Joseph v De-Menil
2008 NY Slip Op 31052(U)
April 9, 2008
Supreme Court, New York County
Docket Number: 0114133/2004
Judge: Shirley W. Kornreich
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SCANNED ON 4/11/2008

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Shirley Werner-Kornreich, Justice

PART 54

Index Number : 114133/2004

JOSEPH, GARREN

vs.

DE-MENIL,FRANCOIS

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

ı this motion to/for ____

PAPERS NUMBERED

xhibits ...

Answering Affidavits — Exhibits ____

Replying Affidavits ____

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
APR 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/9/08

HON. SHIRLEY WERNER KORNREICH, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

GARREN JOSEPH,

Plaintiff,

- against -

FRANCOIS DE-MENIL and SUSAN DE-MENIL,

Defendants.

INDEX NO. 114133/2004

DECISION AND ORDER

FILED
APR 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

KORNREICH, SHIRLEY WERNER, J.:

This is a personal injury action seeking damages for injuries from a construction site accident pursuant to Labor Code §§ 200, 240 and 241(6). Defendants Francois and Susan De-Menil, husband and wife, filed a motion for summary judgment against plaintiff Garren Joseph, seeking dismissal of the Amended Complaint. The De-Menils argue that plaintiff cannot, as a matter of law, establish their liability because undisputed admissible evidence shows the construction occurred in their single family home, they did not direct or control the manner in which the work was performed, and they did not have notice of any dangerous workplace condition. In support the De-Menils submit the pleadings, bills of particulars, deposition transcripts, the construction contract, the deed and assessment roll for the property. Plaintiff opposes the motion with an attorney's affirmation.

I. *Plaintiff's Allegations*

Plaintiff alleges in the Complaint that: the De-Menils owned, operated and supervised a multiple dwelling building; they retained a construction company to perform construction and

renovation at the site; they each served as the general contractor and/or construction manager for work, labor and/or services on the site; they and/or their agents or employees had actual and/or constructive notice of dangerous conditions on the work site; they and/or their agents or employees breached a non-delegable duty to see that the work site, and in particular the ladder that plaintiff fell from, were reasonably safe, thereby constituting the sole cause of plaintiff's injuries; and under these facts they violated Labor Law §§ 200, 240 and 241(6). The De-Menils deny that they supervised or controlled the worksite and that they had notice of any dangerous condition. They pled as affirmative defenses that any dangerous condition was open and obvious and that plaintiff's injuries resulted from acts of persons over whom they had no control.

I. *Summary of Undisputed Facts*

In 1996 the De-Menils, husband and wife, purchased a single-family home located at 37 East 68th Street in New York City. On May 11, 2001, Mr. De-Menil, as the owner of the property, entered into a contract with Alliance Builders Corp. (Alliance) to perform construction and renovation at the De-Menils' residence.[1] Mr. De-Menil also served as the architect on the job. Alliance agreed to furnish construction administration and management services and to be solely responsible for all aspects of the construction, including jobsite safety, with one exception -- where the contract documents have given specific instructions concerning construction means, et al., Alliance has notified the owner that it deems the latter unsafe and, regardless, the owner instructs Alliance to proceed in accordance with the original instructions. Exh. K §§ 3.3.1, 10.2,

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[1]The defendants' surname is spelled interchangeably as "de Menil" and "deMenil" on the contract documents, "de Menil" on the deed to the property and "De-Menil" on the Amended Complaint. To avoid confusion, the court will use the surname that appears on the Amended Complaint, "De-Menil."

Motion. In another section the contract specifically excluded the architect (Mr. De-Menil) from any control over the means or methods of construction or safety precautions and programs "since these are solely the Contractor's [Alliance's] rights and responsibilities," with the one exception noted *supra*. Ibid., § 4.2.2. Plaintiff was employed by Alliance as a laborer and had worked at the De-Menils' residence for three months prior to the accident. On February 28, 2003, plaintiff fell while descending a ladder that belonged to Alliance. He never met the De-Menils and received all direction from the project foreman.

III. *Legal Discussion and Rulings*

A. *Summary Judgment Standard*

To obtain summary judgment, a movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. C.P.L.R. 3212(b). It must do so by tender of evidentiary proof in admissible form. *Zuckerman v. New York*, 49 N.Y.2d 557, 562-563 (1980). Once a movant has met the initial burden, the burden shifts to the party opposing the motion to show facts sufficient to require a trial of any issue of fact. C.P.L.R. 3212 (b); *id.* at 560. *See also GTF Marketing Inc. v. Colonial Aluminum Sales, Inc.*, 66 N.Y.2d 965 (1985) (complaint properly dismissed on summary judgment where affidavit of opposing counsel was insufficient to rebut moving papers showing case has no merit). The adequacy or sufficiency of the opposing party's proof is not an issue until the moving party sustains its burden. *Bray v. Rosas*, 29 A.D.3d 422 (1st Dept. 2006). Moreover, the parties' competing contentions must be viewed "in a light most favorable to the party opposing the motion." *Lakeside Constr. v Depew & Schetter Agency*, 154 A.D.2d 513, 515-515 (2d Dept. 1989).

B. *Labor Law Violations*

Labor Law § 240(1) was enacted to provide absolute liability for construction activities involving a significant risk due to elevation. *Coleman v City of New York*, 91 N.Y.2d 821, 822-823 (1997). Labor Law § 241(6) creates a cause of action against owners and contractors, making them vicariously liable for the negligence of others. *Morris v. Pavarini Constr.*, 9 N.Y.3d 47, 50 (2007). Labor Law § 200(1) codifies landowners' and general contractors' common-law duty to maintain a safe workplace. Recovery against the owner cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation itself. *Allen v. Cloutier Constr. Corp.*, 44 N.Y.2d 290, 297 (1978).

Both Sections 240(1) and 241(6) contain exceptions from liability for owners of one and two-family dwellings who contract for, but do not direct or control, the work. The De-Menils have met their burden to come forward with admissible evidence sufficient to warrant the court as a matter of law in directing judgment in their favor. C.P.L.R. 3212(b). Plaintiff has not presented admissible evidence sufficient to warrant the court as a matter of law in directing judgment in his favor. C.P.L.R. 3212(b). The submission of a hearsay affirmation by counsel alone does not satisfy the requirement that a party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action. *Zuckerman v. New York*, 49 NY2d 557, 562-563 (1980).

The De-Menils have overwhelmingly established their lack of control over the "means and methods" of the work. The undisputed evidence overwhelmingly establishes that *Mrs.* De-Menil had *no* control over any aspect of the construction job. Her connection is limited to her ownership interest in the property and her marriage to Mr. De-Menil. The motion is therefore

granted in favor of Mrs. De-Menil. The undisputed evidence also negates Mr. De-Menil's liability. As an owner of the single-family residence he is exempt from liability because, as the De-Menils' evidence indisputably establishes, he had no responsibility under the contract, either as the owner or the project architect, "for construction means, methods * * * or for safety precautions and programs in connection with the work...." *Davis v Lenox School*, 151 A.D.2d 230, 231 (1st Dept.1989) (denial of summary judgment against plaintiff reversed where contract limited architect's responsibilities to supervision of construction and compliance with plans and specifications). He was not sued in his capacity as the project architect, but even if he had been, he would be afforded the same exemption from liability as the owner because he did not directly supervise or control the injury producing work. *See Walker v. Metro-North Commuter R.R.*, 11 A.D.3d 339, 341 (1st Dept. 2004).

Mr. De-Menil's contractual responsibilities, as owner and architect, were limited to aesthetics, preparing and assuring compliance with plans and specifications. Under the contract Alliance was responsible for the worksite, work means and methods, and safety. Further, it is undisputed that Mr. De-Menil never met plaintiff, did not commit an affirmative act of negligence, had no notice of a dangerous condition, did not choose or purchase workplace equipment, including ladders, and was not even at the worksite on the day of the accident. Under these circumstances, the De-Menils have met their burden and since plaintiff has failed to come forward with admissible evidence showing a disputed issue of material fact, the De-Menils are entitled to judgement against plaintiff on all three alleged Labor Law violations. *See Dennis v. City of New York*, 304 A.D.2d 611 (2d Dept. 2003) (retention of right to generally supervise work and to stop work if safety violation is noted, does not amount to supervision and control

necessary for liability under Labor Law § 200); *see also Lombardi v. Stout*, 80 N.Y.2d 290 (1992) (no liability for negligence where owner not have notice of offending condition); *Ferrero v. Best Modular Homes, Inc.*, 33 A.D.3d 847 (2nd Dept. 2006) (dismissal of § 240 claim proper where defendant not at jobsite on day of accident and did not give instructions to plaintiff re: use of ladder). Accordingly,

IT IS HEREBY ORDERED that the motion for summary judgment by defendants Francois and Susan De-Menil is granted as against plaintiff Garren Joseph and the complaint is dismissed.

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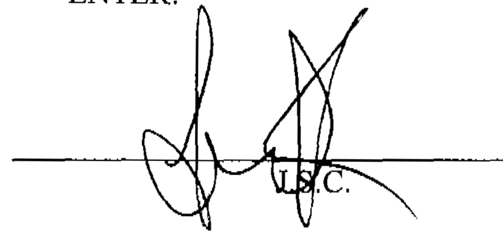

J.S.C.

Date: April 9, 2008
New York, N. Y.

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