SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 5
NASSAU COUNTY

GERVER LOPEZ,

Plaintiff(s),

-against-

COLDWELL BANKER MEADOW REALTY INC., #1 REALTY and DEVELOPMENT, INC., LAURA MUSCATELLI, STEVE BOTTA, LEE A. FALBO, CARVALLARO CONTRACTING INC., LAB DESIGN ASSOCIATES, ANIELLO SCIALLI PLUMBING, STASI BROTHERS ASPHALT CORP., CATIZONE ELECTRICAL CONTRACTING, INC., PHOENIX AIR CONDITIONING and HEATING, INC., NATIONAL CONSTRUCTION RENTALS, INC., TESTANI RUBBISH COMPANY,

Defendant(s).

ORIGINAL RETURN DATE:09/11/08
SUBMISSION DATE: 10/22/08
INDEX No.: 13022/07

MOTION SEQUENCE #4,5,6,7

The following papers read on this motion:

Notice of Motion.....	1
Amended Notice of Motion.....	2
Cross-Motion.....	3,4
Answering Papers.....	5,6,7
Reply.....	8,9,10,11

Motions by defendants, Steve Botta ("Botta") [Sequence 004] and Phoenix Air Conditioning and Heating, Inc. ("Phoenix") [Sequence 005], and cross motions by defendants, Catizone Electrical Contracting, Inc. ("Catizone") [Sequence 006] and Aniello Scialli Plumbing ("Scialli") [Sequence 007] for an order pursuant to CPLR 3212, awarding them summary judgment dismissing the complaint of plaintiff, Gerver Lopez, are denied.

This action arises out of an accident that occurred on May 22, 2007, at premises known as 1605 Dale Avenue, East Meadow, New York. At the time of the accident, plaintiff was working on the construction of a new home at the subject premises. The date of the accident was his first day on the job. He was brought to the job site by his uncle, Lauterio Arevelo, who is apparently a subcontractor of the defendant, Carvallaro Contracting, Inc. Plaintiff claims that he was standing on a scaffold and was placing siding on the side of the house when he was caused to fall off the scaffold. He alleges that he fell from a height of approximately 3 stories. Plaintiff sustained severe injuries to his spine which have rendered him a paraplegic.

Plaintiff alleges that each of the defendants, *inter alia*, was negligent in the performance of their work at the subject premises and were also negligent in that the work was performed in a dangerous, careless and improper manner. Plaintiff further alleges that each of the defendants failed to warn him of a dangerous and defective condition and failed to protect him from gravity related dangers. To that extent, plaintiff alleges that he was allowed to fall from a scaffold and that defendants were negligent in failing to provide adequate safety equipment. In general, defendants are alleged to be negligent in the general operation and control and work performed at the site.

Defendants Phoenix, Catizone, and Scialli, claim that since they were not on the site on the day of plaintiff's accident, they owed no duty to plaintiff to maintain the work site in a safe condition or to protect plaintiff from gravity related dangers. These defendants argue that as they were not present or performing any work on the day of the accident, it is axiomatic that they did not and could not have exercised any supervisory control over plaintiff or over his work. Defendants, Phoenix and Catizone, also submit that neither their personnel nor their equipment were on site on the date of plaintiff's accident; and, therefore, they cannot be held responsible for negligently maintaining the work site or for improperly protecting plaintiff from gravity-related injuries. Defendants, Phoenix and Scialli, also assert that as subcontractors and not as owners or general contractors, the statutory causes of action asserted in plaintiff's summons and complaint under Labor Law §§ 200, 241(6) and 240(1) are not applicable to these defendants; thus, the only cause of action available to plaintiff as against these two defendants is common law negligence. In that respect, these defendants maintain that they were not performing any work at the subject premises at the time of plaintiff's accident, and thus there is no evidence that they owed a duty to maintain a safe work place to plaintiff on or prior to plaintiff's accident. They submit that they were not owners, general contractors nor agents of the same and did not have any authority to direct, supervise or control plaintiff or plaintiff's work. Further, defendants submit that as plaintiff fails to specify which sections of the Industrial Code were violated, his claims pursuant to Labor Law §241(6) should be dismissed.

Summary judgment is the procedural equivalent of a trial (*Capelin Assoc. Inc. v. Globe Mfg. Corp.*, 34 NY2d 338 [1974]). It is a drastic remedy that will only be granted when the proponent establishes that there are no triable issues of fact (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Once the party seeking summary judgment has made a prima facie showing of

entitlement to judgment as a matter of law, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or demonstrate an acceptable excuse for its failure to do so (*Alvarez v. Prospect Hosp.*, supra; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient (*Zuckerman v. City of New York*, supra).

In this case, defendants, Catizone, Phoenix and Scialli, have established their prima facie entitlement to judgment as a matter of law. Accordingly, the burden shifts to plaintiff as the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). In opposition, plaintiff maintains that as the depositions of the parties have not yet taken place, and in light of the fact that discovery remains pending, defendants' summary judgment motions should be denied.

The determination of a summary judgment motion may be delayed to allow for further discovery where evidence necessary to oppose the motion is unavailable to the opponent (CPLR 3212 (f)). However, "[a] determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (*Ruttura & Sons Constr. Co. v Petrocelli Constr.*, 257 AD2d 614, 615 [1999]; *Wyllie v District Attorney of County of Kings*, 2 AD3d 714 [2d Dept. 2003]). A party's mere hope that further discovery will reveal the existence of triable issues of fact is insufficient to delay determination on the issue of summary judgment (*Wyllie v District Attorney of County of Kings*, supra; *Weltmann v RWP Group*, 232 AD2d 550 [2d Dept. 1996]). Here, plaintiff has demonstrated an evidentiary basis to suggest that additional disclosure might lead to relevant evidence. The undisputed evidence thus far confirms that the construction site in question was the location of a custom home being built on behalf of defendants, #1 Realty & Development, Laura Muscatelli ("Muscatelli") and Carvallaro, (*see Pl's Opp.* Ex. D). Defendant Carvallaro appears to be the general contractor involved in the construction of this home and also appears to have hired all of the subcontractors, substantially, if not all, of which are named defendants herein. Plaintiff was brought to the work site and employed by his uncle, Lauterio Arevelo, who in turn was a subcontractor of defendant, Carvallaro. Plaintiff avers in his affidavit that he speaks very little English and as a result had very little communication with any of the other people at the work site on the day of his accident. Plaintiff does not and cannot know, without discovery, who was present at the site on the date of the accident and what their roles were. No party, including Carvallaro and Muscatelli, has yet been deposed in this litigation. Thus, plaintiff has no basis to know whether they were working in the area where plaintiff's accident occurred or some day prior and whether any condition they created led to the plaintiff falling from the scaffold.

It is true that speculation, mere conclusions and unsubstantiated allegations or assertions are insufficient to oppose the motion for summary judgment (*Zuckerman v. City of New York*, supra). However, in this case, plaintiff has offered an evidentiary basis to show that further discovery might lead to relevant evidence and that further discovery is necessary to advance an opposition to defendants' prima facie entitlement to summary judgment as a matter of law. Accordingly, this Court herewith denies as premature defendants', Catizone, Phoenix and Scialli's, motions for summary judgment.

Defendant, Botta's motion for summary judgment is also denied. Defendant Botta maintains that plaintiff, based upon an incorrect tree preservation affidavit, has erroneously alleged that Botta is the owner of the premises in question. In his affidavit he states that the tree preservation affidavit form which he was filling out while Muscatelli was simultaneously filling out an identical affidavit ended up with Muscatelli's address being erroneously transposed on the form he executed. He states that he has absolutely no ownership interest, control or other relationship to the premises in question and that he was not a party to any contract concerning the subject premises. Botta also attempts to submit the deed to the subject premises in support of his argument that he does not own the subject premises but rather owns a nearby property. He maintains that this evidence conclusively demonstrates that the property in question is, in fact, owned by co-defendant, Laura Muscatelli. Additionally, Botta maintains that even if there remains an issue of fact as to whether he was the owner of the subject premises, the action should nevertheless be dismissed because the accident occurred at a one- or two-family home and he is therefore subject to the one- or two-family homeowner defense outlined in the Labor Law.

Defendant, Botta, has failed to make a prima facie showing of entitlement to judgment as a matter of law and thus his motion is denied, without regard to the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Based upon the papers presented for this Court's consideration, including the deed, this Court is simply unable to determine the owner(s) of the subject premises. There is no indication on the deed submitted as to the street address of the premises. Thus, this Court is unable to determine who owned the subject premises. Further, defendant has failed to provide any evidence that the subject premises were, in fact, a one- or two-family home such that he would be entitled to the one or two family homeowner defense. For these reasons, defendant Botta's motion for summary judgment is also denied.

This decision constitutes the order of the court.

Dated: 11-13-08

HON THOMAS P. PHELAN

ENTERED

NOV 17 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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