Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 22**
Justice

SOO KYU KIM,

Plaintiff,

-against-

43-42 162 ST. REALTY LLC, et al.,

Defendants.

Index No. 6557/07

Motion
Date October 14, 2008

Motion
Cal. No. 11

Motion
Sequence No. 3

PAPERS
NUMBERED

Order to Show Cause-Affidavits-Exhibits.... 1-4
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Upon the foregoing papers it is ordered that this motion is determined as follows:

I. That branch of plaintiff's Order to Show Cause for an order: pursuant to CPLR 3212, granting partial summary judgment in favor of plaintiff on the issue of liability, as against defendant 43-42 162 St. Realty, LLC, and setting the matter down for an assessment of damages against said defendant is denied.

Plaintiff, Soo Kyu Kim, commenced this action to recover monetary damages for serious injuries sustained on February 2, 2007, when, while working at a construction site located at 43-42 162nd Street, Flushing, Queens, New York, he was in the process of moving a deck plate into place for installation onto the I-Beams, he was caused to fall from an I-Beam approximately 12-feet onto the concrete foundation floor. Plaintiff brought suit against defendants, 43-42 162 St. Realty LLC, REBAR Enterprise Inc, Peter Plumbing Assoc., Inc., and Joseph Interior, Inc. d/b/a A-JU, Group A-JU and AJU Architecture. Plaintiff asserts liability pursuant to Labor Law §§ 200, 240(1), and 241(6). Plaintiff moves for partial summary judgment on the issue of liability, as against defendant 43-42 162 St. Realty, LLC., the owner of the property.

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]).

Plaintiff moves for summary judgment against 43-42 162 St. Realty LLC, as to liability for his Labor Law § 240(1) cause of action, maintaining that 43-42 162 St. Realty LLC violated said section which imposes absolute liability on building owners and their general contractors and agents for any breach of the statutory duty that proximately causes a plaintiff's injury and in situations in which a worker is exposed to the risk of falling from an elevated work site.

Plaintiff satisfied his *prima facie* burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*see, Alvarez, supra*). Labor Law § 240(1) imposes a nondelegable duty upon owners and contractors to provide safe work places, and breach of that duty may result in liability notwithstanding the absence of actual supervision or control over the work (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). "Labor Law 240(1) evinces a clear legislative intent to provide exceptional protection for workers against the special hazards that arise when the work site is either itself elevated or is positioned below the level where materials or loads are hoisted or secured." (*Orner v. Port Authority*, 293 AD2d 517 [2d Dept 2002]). The statute will be applicable wherever there is a significant risk posed by the elevation at which material or loads must be positioned or secured (*Salinas v. Barney Skansa Construction Co.*, 2 AD3d 619 [2d Dept 2003]). Plaintiff alleges that 43-42 162 St. Realty LLC was the owner of the property, pursuant to its Answer and that "at the time of the occurrence there were no scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes and/or other safety devices in place to prevent the plaintiff from falling off the beam or falling one story down to the building's concrete floor of the foundation. In addition, the gaps between the beams had not been 'planked over'". In support of his

motion, plaintiff submits, *inter alia*, the pleadings, an affidavit of plaintiff himself, and sworn photographs of the property, taken on April 16, 2008 and June 4, 2008. Plaintiff's affidavit states, in relevant part, that: he was working as an employee at the location of 43-42 162nd Street, Flushing, New York; that "[t]here was no safety netting or scaffolding set up under the I-Beams. [He] was not provided with any safety equipment for work of this kind, which would have protected [him] in the event [he] fell from the I-Beam; that he fell off the I-Beam about four meters to the floor of the foundation and landed on his left ankle; and that as a result of the accident, he fractured his left ankle". Such evidence demonstrates a *prima facie* case that there are no triable issues of fact.

Both defendant 43-42 162 St. Realty LLC and defendant Joseph Interior, Inc. contend in their affirmations in opposition that the instant motion is premature since discovery is still at a nascent stage. Both defendants assert that they have not been afforded a reasonable opportunity to conduct discovery. They assert that: none of the defendants have been deposed, that the plaintiff has not been deposed as to any issues other than the liability; plaintiff has failed to respond to defendant 43-42 162 St. Realty LLC's discovery demands; and that defendants have not had the opportunity to thoroughly question and examine all witnesses, including the plaintiff's co-workers and employer. Defendants contend that due to the premature discovery stage, facts may exist that would demonstrate that the statutory duty had never been breached and that the plaintiff's own actions were the sole proximate cause of his accident. As it is undisputed that the parties have not completed discovery, and that discovery remains outstanding, plaintiff's motion for partial summary judgment against defendant 43-42 162 St. Realty, LLC on liability is denied without prejudice as it is premature (*see*, CPLR 3212(f); *Groves v. Lands End Housing Co.*, Inc., 80 NY2d 978 [NY 1992]; *Ramos v. DEGU Deutsche Gesellschaft Fuer Immobilienfonds MBH*, 2007 NY Slip Op 1714 [2d Dept 2007]; *Yadgarov v. Dekel*, 2 AD3d 631 [2d Dept 2003]; *George v. New York City Transit Authority*, 306 AD2d 160 [1st Dept 2003]).

II. That branch of plaintiff's Order to Show Cause for an Order of Attachment upon the property known as 43-42 162nd Street, Flushing, County of Queens, City and State of New York during the pendency of this Order to Show Cause, on the grounds that the defendant 43-42 162 St. Realty LLC, with intent to frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, is attempting to dispose of the above-mentioned property is hereby denied.

Pursuant to CPLR 6201(3), an order of attachment can be granted "where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when: . . .the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts . . ."

"Our courts have repeatedly emphasized that attachment is a 'harsh' and 'extraordinary' remedy which must be construed 'strictly in favor of those against whom it may be employed.' Thus, attachment should not be lightly granted as it 'runs counter to the fundamental common-law concept that before depriving a party of his property, opportunity for hearing should be offered.'" (*Interpetrol Bermuda Ltd. v. Trinidad and Tobago Oil Co. Ltd.*, 513 NYS2d 598 [Sup Ct, NY County 1987][internal citations omitted]).

"Under New York law, therefore, a party is entitled to an order of attachment pursuant to CPLR 6201(3) upon demonstrating that: (1) it has stated a claim for a money judgment; (2) it has a probability of success on the merits; (3) the defendant with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts; and (4) the amount demanded from the defendant is greater than the amount of all counterclaims known to the party seeking attachment." (*JSC Foreign Economic Association Technostroyexport v. International Development and Trade Services, Inc.*, 396 F Supp 2d 482 [SD NY 2004][internal quotation marks and internal citations omitted]).

In support of his motion for an order of attachment, the plaintiff indicates that the defendant has failed to provide the parties to the action with information as to its insurance coverage or any other paperwork regrading the construction that was being performed on the property at the time of the accident; that no representatives of any insurance company have contacted the plaintiff's attorney on behalf of the defendant; that no one associated with the attorneys for defendant has informed the plaintiff's attorney that the defendant did not have liability insurance at the time of the accident; that upon information and belief the defendant was uninsured on the date of the occurrence for the type of loss suffered by the plaintiff; that under the circumstances, it is reasonable to believe that defendant is a

shell corporation whose only asset is a deed to the property from which it got its name; that on April 16, 2008 and June 4, 2008, a paralegal from plaintiff's attorney's office observed a "FOR SALE" sign hung on the property, which property was still under construction and which was vacant; that defendant, by its Answer admitted that co-defendant Joseph Interior, Inc. was the general contractor and/or construction manager on the site, but denied having any knowledge or information sufficient to form a belief as to whether they hired Joseph Interior, Inc. Additionally, plaintiff, in his reply papers, presents evidence from the defendant's president, Houng Chu Yi's examination before trial transcript which examination before trial was taken subsequent to the submission of the original moving papers, and which testimony indicates that the defendant was not insured for the property; that the corporation's only bank account had a balance of "almost near zero"; that the corporation doesn't have any real property under the corporation name, nor does it have any other leases, other businesses, motor vehicles, stocks, bonds, or any employees. As such, plaintiff believes that defendant is trying to render itself judgment proof and with an intent to defraud the plaintiff and/or frustrate the enforcement of a judgment, which will inevitably rendered against it and in plaintiff's favor, is trying to dispose of the property that appears to be its sole asset.

Plaintiff has failed to demonstrate that he is entitled to an order of attachment. Regarding motions for attachment, the burden is on the moving party to establish the third element of fraudulent intent via submission of evidentiary facts, as opposed to conclusory allegations that merely arouse suspicions of fraudulent intent (*JSC Foreign Economic Association Technostryoexport, supra*). "[I]t must appear that such fraudulent intent really existed in the defendant's mind." (*Id.* at 487). In the instant case, defendant has failed to assert sufficient evidentiary facts which would be indicative of a fraudulent intent. As such, the Court need not reach a determination as to whether the other three requirements for an order of attachment have been met.

Accordingly, that branch of plaintiff's motion for an order of attachment is denied.

III. That branch of plaintiff's motion for a Preliminary Injunction enjoining and restraining the defendant 43-42 162 St. Realty LLC, its agents, representatives and/or employees from selling, assigning, disposing of or otherwise encumbering the property known as 43-42 162nd Street, Flushing, New York during

the pendency of this Order to Show Cause is hereby denied.

"The law is well settled that to prevail on an application for preliminary injunctive relief, the moving party must demonstrate `"(1) a likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of the preliminary injunction; and (3) that a balancing of equities favors [the movant's] position"'(*Barone v. Frie,* 99 AD2d 129, 132, [2d Dept 1984] *quoting from Gambar Enterprises v. Kelly Servs.,* 69 AD2d 297, 306, 418 [2d Dept 1979); *Aetna Ins. Co. v. Capasso,* 75 NY2d 860, 552 [1990]; and *W.T. Grant Co. v. Srogi,* 52 NY2d 496, 517, [1981]; *see also, Merscorp, Inc. v. Romaine,* 295 AD2d 431, 562 [2d Dept 2002]; and *Neos v. Lacey,* 291 AD2d 434, [2d Dept 2002]). The existence of factual disputes will not preclude the granting of temporary injunctive relief in order to maintain the *status quo (U.S. Reinsurance Corp. v. Humphreys,* 205 AD2d 187, 192, 618 [1st Dept 1994]); *see also,* CPLR 6312[c]; and *Albany Medical College v. Lobel,* 296 AD2d 701,702 [3d Dept 2002]). The determination as to whether to issue a preliminary injunction is a matter left to the sound discretion of the Court (*see, Doe v. Axelrod,* 73 NY2d 748, 750 [1988]). Preliminary injunctive relief is a drastic remedy which will not be granted `unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant (*First Nat. Bank of Downsville v. Highland Hardwoods,* 98 AD2d 924, 926, 471 NYS2d 360; *accord, 607 Buegler v. Walsh,* 111 AD2d 206, *Orange County v. Lockey,* 111 AD2d 896, 897 [1985]; *William M. Blake Agency, Inc. v. Leon,* 283 AD2d 423, 424 [2d Dept 2001]; and *Peterson v. Corbin,* 275 AD2d 35, 36 [2d Dept 2000]). The court stated in *Tucker v. Toia,* 54 AD2d 322, 325-326, however, "it is not for this court to determine finally the merits of an action upon a motion for preliminary injunction; rather, the purpose of the interlocutory relief is to preserve the status quo until a decision is reached on the merits (*Hoppman v. Riverview Equities Corp.,* 16 AD2d 631; *Weisner v. 791 Park Ave. Corp.,* 7 AD2d 75, 78-79; *Peekskill Coal & Fuel Oil Co. v. Martin,* 279 App Div 669, 670; *Swarts v. Board of Educ.,* 42 Misc 2d (761,) 764, *supra; cf. Walker Mem. Baptist Church v. Saunders,* 285 NY 462, 474)." "When the facts are sharply disputed, a preliminary injunction will not be granted." (*Skaggs-Walsh, Inc. v. Chmiel,* 224 AD2d 680 [2d Dept 1996]).

The plaintiff has failed to demonstrate that she will suffer an irreparable injury if the preliminary injunction is not granted. The plaintiff failed to demonstrate facts constituting an immediate injury which cannot be adequately compensated by

monetary damages. As such, the Court need not reach a determination as to whether the other factors for a preliminary injunction have been met.

IV. That branch of plaintiff's motion which seeks pursuant to CPLR 5222, 5229, and 6301, upon granting of this Order to Show Cause which seeks the granting of partial summary judgment in favor of plaintiff, extending the Preliminary Injunction and/or issuing a Restraining Notice should the relief requested in section (b) and/or (c) herein be denied, enjoining and restraining the defendant 43-42 162 St. Realty, LLC, its agents, representative and/or employees from selling, assigning, disposing of, or otherwise encumbering the property until such time that an assessment as to damages against said defendant is held is hereby rendered moot as this Court has denied that branch of the Order to Show Cause which seeks the granting of partial summary judgment on the issue of liability in favor of plaintiff.

This constitutes the decision and order of the Court.

Dated: January 20, 2009

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Howard G. Lane, J.S.C.