

Grochowski v Ben Rubins, LLC

2009 NY Slip Op 33283(U)

December 3, 2009

Supreme Court, Queens County

Docket Number: 14168/2007

Judge: Orin R. Kitzes

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

Upon the foregoing papers it is ordered that the motions are determined as follows:

Plaintiff Tomasz Grochowski was employed as a laborer by nonparty K-Pro, Inc., which was hired by Almar Services, Corp. (Almar) to provide plumbing services for the renovation project at the subject premises. The property is a single-family residence with a dental office located in the basement. Ben Rubins, LLC (Ben Rubins) is the owner of the premises, and Mizrahi, D.D.S., P.C. (Mizrahi, D.D.S.) is the lessee of the basement-level dental office. Mr. Mizrahi is the sole officer of both Ben Rubins and Mizrahi, D.D.S. On March 29, 2007, plaintiff Tomasz Grochowski was allegedly injured falling from a ladder while installing sewer pipe couplings in the basement. Plaintiff Tomasz Grochowski, and his wife suing derivatively, commenced this action against defendants under Labor Law §§ 240(1), 241(6), 241-a, and 200 and common-law negligence.

The branches of Mr. Mizrahi and A to Z Steel's separate motions for leave to reargue plaintiffs' prior cross motion for partial summary judgment on the Labor Law §§ 240(1) and 241(6) causes of action are granted. Motions for reargument may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision (CPLR 2221; *see E.W. Howell Co., Inc. v S.A.F. La Sala Corp.*, 36 AD3d 653 [2007]). Mr. Mizrahi and A to Z Steel demonstrated that the court, in granting plaintiffs' partial summary judgment on the Labor Law §§ 240(1) and 241(6) causes of action, misapprehended certain facts concerning the parties against whom plaintiffs sought summary relief in their previous cross motion. Pursuant to CPLR 2215, a cross motion can only be made for relief against a moving party, and A to Z Steel was not one of the original moving parties. Moreover, plaintiffs' original motion papers sought summary judgment only against Ben Rubins and Mizrahi, D.D.S., not Mr. Mizrahi individually. Therefore, upon reargument, the court hereby vacates its prior order dated September 21, 2009 granting plaintiffs partial summary judgment under Labor Law §§ 240(1) and 241(6). Furthermore, based on the foregoing, the court need not address the other branches of A to Z Steel's motion.

The court will next turn to the branch of Mr. Mizrahi's motion for leave to renew his original motion for summary judgment dismissing the complaint and all cross claims asserted against him. A motion for leave to renew must be based upon new facts not offered on a prior motion that would change the prior determination, and set forth a reasonable justification for the failure to present such facts on the earlier motion (CPLR 2221[e]; *see Swedish v Beizer*, 51 AD3d 1008 [2008]). However, the requirement that a motion for leave to renew be based upon newly-discovered facts is a flexible one (*see Matter of Surdo v Levittown Pub. School Dist.*, 41 AD3d 486 [2007]). A court, in its discretion, may grant renewal, in the interest of justice, upon facts which were known to the moving party at the time of the original motion where the movant offers a reasonable excuse for failing to submit

them on the prior motion (*see Lafferty v Eklecco, LLC*, 34 AD3d 754 [2006]). Moreover, it is improvident to deny leave to renew where it may fairly be said that the new matter was not raised because of excusable mistake or inadvertence (*see Mollin v County of Nassau*, 2 AD3d 600 [2003]).

The court denied Mr. Mizrahi's earlier summary judgment motion on the ground that it was untimely pursuant to CPLR 3212(a). However, in support of his motion for leave to renew, Mr. Mizrahi offered new evidence that, in a stipulation dated February 5, 2009, the court directed that the time in which to make a motion for summary judgment was extended to May 13, 2009. Therefore, Mr. Mizrahi's original motion for summary judgment was timely as it was made within the court-ordered deadline (CPLR 3212[a]; *see Brill*, 2 NY3d at 650). In addition, Mr. Mizrahi presented a reasonable excuse for failing to submit the stipulation on his original summary judgment motion since all the parties were aware of it. Mr. Mizrahi is, thus, granted leave to renew his prior motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against him (*see Kenner v T.J. Maxx*, 305 AD2d 547 [2003]).

Upon renewal, the court hereby vacates its prior order dated September 21, 2009 with respect to Mr. Mizrahi's original motion for summary judgment dismissing the complaint and all cross claims asserted against him and the following is substituted in its place and stead:

Mr. Mizrahi established, prima facie, his entitlement to judgment as a matter of law that he is not an "owner" or "contractor" within the meaning of Labor Law §§ 240 and 241. In opposition, plaintiffs failed to raise a triable issue of fact. An entity is deemed a contractor within the meaning of Labor Law §§ 240(1), 241(6), and 241-a if it had the power to enforce safety standards and choose responsible subcontractors (*see Williams v Dover Home Improvement, Inc.*, 276 AD2d 626 [2000]). Therefore, to impose liability, the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition (*see Damiani v Federated Dept. Stores, Inc.*, 23 AD3d 329 [2005]). The relevant inquiry on the issue of control is not who furnished equipment and safety devices but who had control over the work being done and the authority to insist that proper safety practices be followed (*see Everitt v Nozkowski*, 285 AD2d 442, 443 [2001]). Furthermore, a party's status as a contractor is dependent upon whether it had the right to exercise control over the work, not whether it actually exercised that right (*see Williams*, 276 AD2d at 626). In this case, the evidence in the record reveals that Mr. Mizrahi, an orthodontist with no experience in the construction field, did not have the authority to direct or control the method or manner of the sewer pipe installation work being performed by plaintiff Tomasz Grochowski, and he did not provide the ladder from which the injured plaintiff fell (*see e.g. Rodas v Weissberg*, 261 AD2d 465 [1999]). The deposition testimony of Mr. Mizrahi demonstrates that his involvement was merely limited

to activities such as visiting the work site on occasion, hiring general contractors and architects, providing the site plans, and making general decisions regarding the renovations of the property. Moreover, as discussed in this court's prior order dated September 21, 2009, Mr. Mizrahi is not the owner of the subject premises because title to the property is held by Ben Rubins (*see Ryba v Almeida*, 27 AD3d 718 [2006]).

Likewise, Mr. Mizrahi established his prima facie entitlement to judgment as a matter of law on plaintiffs' Labor Law § 200 and common-law negligence claims against him. In opposition, plaintiffs failed to raise a triable issue of fact. Where, as here, a claim arises out of alleged defects or dangers in the methods or manner of the work rather than the condition of the premises, recovery against the owner or contractor cannot be had under the common-law or Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]; *Cambizaca v New York City Tr. Auth.*, 57 AD3d 701 [2008]). As previously discussed, there is no evidence indicating that Mr. Mizrahi instructed the injured plaintiff how to perform the sewer pipe installation work, and he exercised only limited general supervision over the renovations (*see Kajo v E. W. Howell Co., Inc.*, 52 AD3d 659 [2008]; *Natale v City of New York*, 33 AD3d 772 [2006]; *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681 [2005]).

In conclusion, upon renewal, Mr. Mizrahi's original motion for summary judgment dismissing the complaint and all cross claims against him is granted.

The court will not entertain A to Z Steel's untimely motion for summary judgment dismissing plaintiffs' complaint and all cross claims insofar as asserted against it because A to Z Steel has failed to offer a reasonable excuse for the delay in making the motion. In the absence of a court order or rule to the contrary, CPLR 3212(a) requires summary judgment motions to be made no later than 120 days after the filing of the note of issue, except with leave of court on good cause shown (*see Brill v City of New York*, 2 NY3d 648 [2004]). Here, A to Z Steel's summary judgment motion was made more than three months after the expiration of the court-ordered deadline of May 13, 2009. Significant outstanding discovery may, in certain circumstances, constitute good cause for the delay in making a motion for summary judgment (*see Tower Ins. Co. of N.Y. v Razy Assoc.*, 37 AD3d 702 [2007]; *Czernicki v Lawniczak*, 25 AD3d 581 [2006]). However, such circumstances do not exist in this case. In support of its summary judgment motion, A to Z Steel relied upon the deposition testimony of the injured plaintiff and Mr. Mizrahi, whose depositions were completed approximately one year prior to the making of the instant motion. While discovery was not complete until after the deposition of A to Z Steel's president, Zion Daniel, A to Z Steel had access to its own witness' testimony at any time (*see e.g. Espejo v Hiro Real Estate Co.*, 19 AD3d 360 [2005]). As such, all of the discovery

needed to make A to Z Steel's motion was available before the expiration of the court-ordered deadline. Nonetheless, even after receipt of Mr. Daniel's executed deposition transcript, A to Z Steel waited approximately one month before moving for summary judgment, and provided no justification for that delay.

Accordingly, A to Z Steel's motion for summary judgment dismissing the complaint and all cross claims asserted against it is denied. The branch of Mr. Mizrahi's motion for leave to renew his original summary judgment motion is granted and, upon renewal, Mr. Mizrahi's motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against him is granted. In addition, the branches of Mr. Mizrahi and A to Z Steel's motions for leave to reargue plaintiffs' prior cross motion for partial summary judgment are granted and, upon reargument, this court's order dated September 21, 2009 granting plaintiffs partial summary judgment on the Labor Law §§ 240(1) and 241(6) causes of action is vacated. In all other respects, A to Z Steel's motion is denied.

Dated: December 3, 2009

J.S.C.