

Colorado v Galleria Condominium
2010 NY Slip Op 31082(U)
May 3, 2010
Supreme Court, New York County
Docket Number: 104768/08
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 61

ROBINSON COLORADO,

Plaintiff,

-against-

GALLERIA CONDOMINIUM,

Defendants.

INDEX NO. 104768/08

MOTION DATE March 2, 2010

MOTION SEQ. NO. 004

MOTION CAL. NO. 21

The following papers, numbered 1 to 8 were read on this motion for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-5

6-7

8

Cross-Motion: Yes No

Upon the foregoing papers, defendant's motion for an order pursuant to CPLR § 3212 granting summary judgment in its favor dismissing the complaint is decided in accordance with the accompanying decision and order.

FILED
MAY 05 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/3/10

O. P. Sherwood
O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 61

-----X

ROBINSON COLORADO,

Plaintiff,

-against-

GALLERIA CONDOMINIUM,

Defendant.

-----X

O. PETER SHERWOOD, J.:

DECISION AND
ORDER

Index No.: 104768/2008

This is an action to recover damages for personal injuries based upon alleged violations of Labor Law §§ 200, 240 (1) and 241 (6). Board of Managers of the Galleria Condominium s/h/a Galleria Condominium (“Galleria” or “defendant”) moves for summary judgment dismissing plaintiff’s complaint.

Background

Plaintiff Robinson Colorado (“Colorado” or “plaintiff”) alleges that, on July 31, 2007, he was employed by Alpha Restoration and Painting (“Alpha”) and was working at defendant’s building (“the building”) located at 117 East 57th Street, New York, New York (Affidavit of Robinson Colorado [Pl’s Aff.] ¶ 3). He asserts that for one to two weeks prior to the subject accident he had been working in various apartments in the building, performing plastering, sanding and painting. On July 31, 2007, plaintiff was working in unit 46A (“the apartment”) (Pl’s Aff., ¶ 6, Ex. “B”, Pl’s EBT, at 41).

Plaintiff testified at his deposition that on the day of the accident he was not given a ladder. Has a consequence, he stood on top of a radiator to perform his work. As he did so, plaintiff slipped on dust and plastic sheeting on top of the radiator, which caused him to fall to the floor and sustain injuries (*id.* at 57, 70-71). Plaintiff states that the sanding performed as part of the touch-up work in preparation for painting the windows caused dust to fall (*id.* at 56-57, 78-80). Plaintiff testified further that he was directed by Bryan Lamaj, an employee of Galleria, to the particular work site within the building (*id.* at 47-48). Plaintiff claims that Galleria is liable under Labor Law §§ 240 (1), 241 (6) and 200 for the injuries he sustained as he fell from an unsecured height.

Conversely, Galleria contends that the individual apartments in the building are owned as condominiums by the unit owners; the apartment where the accident occurred was owned by Charles

Feinbloom; and Galleria required the apartment unit owners throughout the building to replace their windows as part of a building-wide comprehensive waterproofing program (Affidavit of Robert J. Apfel [Apfel Aff.] ¶ 4, Ex. "6" Apfel EBT, at 17, 19-20, 25). It further asserts that the individual unit owners, including Feinbloom, selected both the window replacement contractors to do that work (Apfel EBT, at 25-27) and the companies that performed the follow-up cosmetic repairs and painting (*id.* at 28). Specifically, Galleria states that Feinbloom selected Skyline Window to do the window replacement in the apartment and Alpha to do the cosmetic work (*id.* at 27).

Galleria also alleges that the individual unit owners determined what cosmetic work needed to be done in their respective apartments and that it did not direct, supervise or control Alpha's work (Apfel Aff. ¶¶ 6, 8; Affidavit of Bryan Lamaj [Lamaj Aff.], ¶¶ 6-8). Galleria states that it organized the schedule of which apartments needed work (Apfel Aff. Ex. "6" at 20), but that Alpha directed and controlled how plaintiff worked (*id.* at 46-47) and Alpha supplied him with appropriate equipment (*id.*). Consequently, Galleria claims that it is not an owner as defined by the Labor Law and is, accordingly, not responsible for plaintiff's injury.

Additionally, Galleria alleges that, in the course of performing his work of sanding, plaintiff created the dust he slipped on (*id.* at 78-80) and that, since this was integral to the work, Galleria is not liable to plaintiff. Finally, it contends that it is exempt under the one- and two-family dwelling exemption, since the apartment was an owner-occupied one-family residence.

Discussion

1. Labor Law § 200

Labor Law § 200 is a codification of common-law negligence. To be liable under this section, a party must have the authority to control the activity that caused the plaintiff's injury (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]). There is no liability for an owner that exercises no supervisory control over the operation, where the purported defect or dangerous condition arose from the contractor's methods (*Lombardi v Stout*, 80 NY2d 290, 295 [1992]). Plaintiff has alleged that the failure to provide an adequate ladder was the dangerous condition which caused his injuries (Apfel Aff., Ex. "3", Verified Bill of Particulars, item 6). Alpha provided the equipment to plaintiff (*id.*, Ex. "4", Pl's EBT, at 60) and instructed him as to how to perform his job (*id.* at 48-49). Galleria has presented evidence that it was not responsible for controlling the manner in which plaintiff performed the work (Apfel Aff. ¶¶ 6, 8; Lamaj Aff., ¶¶ 6,

8). Plaintiff has failed to rebut defendant's prima facie demonstration of entitlement to judgment on this issue as a matter of law by producing evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact (*see e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Therefore, his claim under Labor Law § 200 is dismissed.

2. One and Two Family Dwelling Exemption

Galleria asserts that it should be exempt from liability under the statutory exemption for "owners of one- and two-family dwellings who contract for but do not direct or control the work" (*see*, Labor Law § 240 [1]; Labor Law § 241). The purpose of this exemption is to protect individuals perceived as lacking in sophistication or business acumen such that they would not recognize the need to insure against a strict liability statute (*Van Amerogen v Donnini*, 78 NY2d 880, 882-883 [1991]).

In this case, Feinbloom, rather than Galleria, is the owner of the apartment. Galleria's relationship to the apartment is commercial, rather than residential. Therefore, the exemption does not apply to it and dismissal on this ground is denied.

3. Owner

Labor Law § 240 (1) provides, in pertinent part, that:

All contractors and owners and their agents ... [in the performance of enumerated activities] shall furnish or erect, or cause to be furnished or erected ... scaffolding, hoists, stays, ladders, slings, ... pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a [worker].

Labor Law § 241(6) provides, in pertinent part, that:

All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith shall comply with the following requirements: ... All areas ... shall ... be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to [workers] ... [in accordance with rules promulgated by the Commissioner of Labor]."

The purpose of these statutes is to protect workers and place the responsibility for safety practices on owners and contractors which are deemed the parties best situated to ensure that appropriate safety practices are followed and proper equipment is provided (*Rizzuto v L.A. Wenger*

Contr. Co., 91 NY2d 343, 348 [1998]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500 [1993]).

However, by their terms, Labor Law §§ 240 (1) and 241 (6) apply to owners of property (*see Aarons v 401 Hotel, L.P.*, 12 AD3d 293, 293-294 [1st Dept 2004]). Galleria was not the owner of the apartment where plaintiff fell. “An undivided interest in the common elements, including the land, does not equate with a proprietary interest in the portion of the building where the accident occurred sufficient to impose liability [under Labor Law §§ 240 (1) and 241 (6)]” (*id.* at 293-294). The individual unit owners of a condominium own their apartments in fee simple absolute (*Pekelnaya v Allyn*, 25 Ad3d 111, 114 [1st Dept 2005]). In contrast, the individual unit owners of a cooperative corporation are proprietary lessees and the cooperative corporation is the owner of the property (*id.* at 121). Here, Feinbloom owned the apartment (Lamaj Aff., ¶ 4), but he is not a named defendant.

A party that is not the fee owner may be held to be “a statutory agent ... [if it has] authority to supervise the injury-producing work” (*Fox v Brozman-Archer Realty Servs.*, 266 AD2d 97, 98 [1st Dept 1999]). Galleria can be held responsible as an agent of the owner if it had the authority to supervise plaintiff’s work.

The right to control the work means the right to insist that proper safety practices be followed (*Berrios v TEG Mgt. Corp.*, 7 AD3d 555, 556 [2nd Dept 2004]). Galleria has presented evidence that it did not control either the means or the method of the cosmetic work in which plaintiff was engaged (Apfel Aff., ¶¶ 6, 8; Lamaj Aff., ¶¶ 6-8). Plaintiff has not controverted this contention. Indeed, he specifically testified at his deposition that instructions concerning his work were provided by Alpha (Apfel Aff. Ex. “4”, Pl’s EBT, at 49). Accordingly, Galleria has established that it was neither an owner nor a statutory agent under Labor Law §§ 240 (1) and 241 (6) and plaintiff has failed to raise a triable issue of fact.

In any event, by sanding the window frames plaintiff created the accident-causing dust condition (*id.* at 78-80). Since the dust arose from the actual performance of the cosmetic work plaintiff was performing and “was an integral part of [that work]” (*Marinaccio v Arlington Cent. School Dist.*, 40 AD3d 714, 715 [2nd Dept 2007] [internal citation omitted], *lv denied* 9 NY3d 809 [2007]), such condition cannot be held to violate Labor Law §§ 240 (1) and 241 (6).

Conclusion

Based upon the foregoing discussion, it is, therefore,

ORDERED that defendant Galleria Condominium's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

DATED: 5/3/10

ENTER,

O.P. Sherwood

O. PETER SHERWOOD

J.S.C.

FILED

MAY 05 2010

NEW YORK
COUNTY CLERK'S OFFICE