SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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JORGE RAGGHIANTI,

Index No.: 104286/07

Plaintiff,

-against-

ROBERT MANOCHERIAN, TARCON GENERAL CONTRACTING CO., INC., SANTORO BUILDING & DESIGN, INC. and RICHARD ELMENDORF,

Defendants.

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ROBERT MANOCHERIAN,

Third-Party Index No.: 591049/08

Third-Party Plaintiff,

-against-

GALICIA CONTRACTING & RESTORATION CORP.,

Third-Party Defendant.

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Edmead, J.:

This is an action to recover damages sustained by a worker when he fell from a scaffold while performing construction work on a single family home located at 784 Pinesbridge Road, Yorktown, New York (the home) on November 6, 2005.

Defendant Tarcon General Contracting Co., Inc. (Tarcon) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's Jorge Ragghianti's complaint, as well as any and all related cross claims against it.

BACKGROUND

Defendant and third-party plaintiff Robert Manocherian (Manocherian) was the owner of the single-family home under construction (the project) at the time that the accident took place.

Manocherian hired defendant Richard Elmendorf (Elmendorf) to serve as construction manager for the project. Manocherian hired defendant Santoro Building & Design, Inc. (Santoro) to serve as the general contractor during the foundation construction phase of the project. Plaintiff was employed by third-party defendant Galicia Contracting & Restoration Corporation (Galicia), the subcontractor hired by Manocherian to waterproof the home's concrete foundation. After the project was well underway, Manocherian hired defendant Tarcon to provide general interior and finishing services for the project.

On the date of the accident, plaintiff, who was not wearing a harness or any other safety equipment, was working on a scaffold when one of the scaffold's floor boards broke, causing him to fall approximately six to eight feet to the ground and become injured. Although the pipes that comprised the scaffold were provided by his employer, the floor boards, which were placed on the scaffold by his employer, were provided by the construction site. After the fall, plaintiff inspected the subject board and noticed that it had cracked as a result of a large knot in the wood.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980];

DeRosa v City of New York, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224, 226 [1st Dept 2002]).

PLAINTIFF'S LABOR LAW §§ 240 (1) AND 241 (6) CLAIMS AGAINST DEFENDANT TARCON

Initially, Tarcon argues that, as the project entailed the construction of a single-family residence, it is entitled to summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims as against it based upon the homeowner exemption contained in those provisions. Explicitly contained in both of these provisions is language which exempts from liability "owners of one and two-family dwellings who contract for but do not direct or control the work" (*see Affri v Basch*, 13 NY3d 592, 596 [2009]; *Garcia v Martin*, 285 AD2d 391, 391 [1st Dept 2001]; *Edgar v Montechiari*, 271 AD2d 396, 397 [2d Dept 2000]).

However, in this case, Tarcon is not a homeowner, but a contractor hired by the homeowner, and thus, the homeowner exemption to Labor Law §§ 240 (1) and 241 (6) does not apply. "The exemption was enacted so that 'the law would be fairer and more nearly reflect the practical realities governing the relationship between homeowners and the individuals they hire to perform construction work on their homes'" (*Affri v Basch*, 13 NY3d at 596, quoting *Cannon v Putnam*, 76 NY2d 644, 649 [1990]). As such, "[t]he exception was enacted to protect those who, lacking business sophistication, would not know or anticipate the need to obtain insurance to cover them against absolute liability" (*Acosta v Hadjigavriel*, 18 AD3d 406, 406 [2d Dept 2005]). As a result, Tarcon, as a general contractor, is not the sort of entity that the homeowner

exemption intends to protect.

In any event, as defendant Tarcon asserts, in the absence of sufficient evidence that Tarcon had the authority to supervise and control the work of the other contractors, including plaintiff's employer, Galicia, at the time of the accident, so as to be considered a general contractor or an agent of the owner, Tarcon cannot be held liable under Labor Law §§ 240 and 241 (6) (*Lane v Karian*, 210 AD2d 549, 550 [3d Dept 1994] [no Labor Law §§ 240 (1) and 241 (6) liability where alleged general contractor hired to perform certain interior and exterior carpentry and finishing work did not hire the other contractors and had no authority to supervise the work of the other contractors, including plaintiff's employer's workers]; *compare Szpakowski v Shelby Realty, LLC*, 48 AD3d 268, 268 [1st Dept 2008] [evidence that defendant was authorized to direct workers during construction project and that he negotiated and hired subcontractors and oversaw construction progress was sufficient to hold it liable as a general contractor under Labor Law § 240 (1)]).

A review of evidence in the record indicates that, at the time of the accident in November of 2005, Elmendorf, as a direct employee of Manocherian, and Santoro, were in charge of the work going on at the site. In fact, Tarcon did not begin work at the site until two months after the accident. To this effect, Elmendorf testified that Manocherian retained him as the project manager for the project, and that he was personally responsible for

> general construction oversight of the job. Making sure that things are done properly. Making sure that the contractors are working in, you know, timely fashion. Making sure there is no slacking on the job, general work

(Defendant's Notice of Motion, Exhibit H, Elmendorf Deposition, at 54). Elmendorf also testified that he was responsible for general safety at the site. In addition, it was one of his job

duties to supervise and inspect Galicia's waterproofing work, as well as the work of all of the other subcontractors at the site. Further, other than four or so day laborers, he could not remember any other subcontractors working at the site during the three months that Galicia was on duty at the site.

Elmendorf maintained that he was not put on Tarcon's payroll as a construction manager until approximately January of 2006, and that, prior to this time, he worked directly for Manocherian. Specifically, Elmendorf stated that he "was placed on Tarcon's payroll but was never hired. Robert [Mancherian] was the only one I worked for" (Tarcon's Notice of Motion, Exhibit H, Elmendorf Deposition, at 94). Elmendorf also described Tarcon's business as mostly dealing with general interior construction, and he noted that he never saw Tarcon's owner, Mike Cullen (Cullen), at the construction site prior to the time of plaintiff's accident.

Manocherian testified that he hired Elmendorf at the beginning of the project, pursuant to a verbal contract, to perform many functions. During the foundation phase of the project, Manocherian hired Santoro to serve as the general contractor responsible for ensuring that the foundation waterproofing work was done properly. According to Manocherian, the only people/entities involved in the early stages of the project were Elmendorf, Galicia and Santoro.

Manocherian testified that, in 2006, he hired Tarcon to perform interior finishing work on the project. Prior to that time, although Tarcon was involved in some consulting work for him, Tarcon played no role in the foundation phase of the project. Manocherian also explained that, at around the time that the actual construction of the house was underway, he hired Santoro and Tarcon and switched Elmendorf over to Tarcon's payroll, as he "needed to have somebody who was going to be held responsible," and he "needed to have [experienced] people handling the

construction of his house" (Tarcon's Notice of Motion, Exhibit I, Manocherian Deposition, at 60, 143).

Cullen testified that Tarcon was never a general manager for the project, and that Manocherian hired Tarcon to perform "[f]inishing, carpentry, interior work" on the project (Tarcon's Notice of Motion, Exhibit J, Cullen Deposition, at 37). Cullen asserted that Tarcon did not have any employees present at the site before the date of the accident, although Tarcon did assist Manocherian by retaining a day-labor contractor and four to five laborers for the project, because Cullen and Manocherian were "very good friends" (*id.* at 142). In addition, as Tarcon paid the day laborers, and then Manocherian reimbursed Tarcon for that pay, Tarcon did not make any profit for its assistance in supplying the laborers. Cullen also noted that he never went to the site to check on the work performed by the laborers or made sure that the laborers were practicing safe work habits.

Moreover, Cullen asserted that, prior to placing Elmendorf on Tarcon's payroll in January of 2006, Tarcon had no involvement at the site. Cullen explained that he hired Elmendorf, who had been in charge of the site up to that time, "because of friendship to get him on medical insurance with my company" (Tarcon's Notice of Motion, Exhibit J, Cullen Deposition, at 76).

In his opposition to defendant Tarcon's motion, plaintiff now puts forth an affidavit by Elmendorf, dated June 11, 2010, in which, for the first time, he maintains that, in approximately 2002 to 2003, Manocherian hired Tarcon as one of the general contractors to supervise and coordinate the project. Specifically, in his affidavit, Elmendorf stated:

> Based on my work at the site and my frequent meeting with ROBERT MANOCHERIAN, I am aware that on and before November 6, 2005, Mr. MANOCHERIAN relied on TARCON as one of the general contractors to

> generally supervise and coordinate the project. Mike Cullen of TARCON, when he was at the job site, had authority to stop the work or even shut down the job site entirely, if he witnessed unsafe work practices

(Plaintiff's Affirmation in Opposition, Exhibit A, Elmendorf Affidavit dated June 11, 2010, at 2).

In addition, Elmendorf states that Tarcon supplied three to seven construction laborers, who were present at the site on a daily basis, to assist all other trades in performing their work. Elmendorf also asserts that, although he gave these laborers their daily assignments, Tarcon maintained the ultimate authority to direct and supervise their work.

However, "'[a] party's affidavit that contradicts [his or] her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment'" (*Pippo v City of New York*, 43 AD3d 303, 304 [1st Dept 2007], quoting *Harty v Lenci*, 294 AD2d 296, 298 [1st Dept 2002]; *Garcia-Martinez v City of New York*, 68 AD3d 428, 429 [1st Dept 2009]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 383 [1st Dept 2007]).

Thus, as the evidence in this case establishes that Tarcon was not an owner, general contractor or agent of the owner at the time the accident, it is not liable for plaintiff's injuries under Labor Law §§ 240 (1) and 241 (6) (*Lane v Karian*, 210 AD2d at 550 [no Labor Law §§ 240 (1) or 241 (6) liability where there was no evidence in the record to support plaintiff's claim that defendant was the general contractor on the project]).

PLAINTIFF'S COMMON-LAW NEGLIGENCE AND LABOR LAW § 200 CLAIMS

Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work' [citation omitted]" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]; *see also Russin v Louis N.*

Picciano & Son, 54 NY2d 311, 317 [1981]). Labor Law § 200 (1) states, in pertinent part, as follows:

> "1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints*, 41 AD3d 796, 797-798 [2d Dept 2007]).

It is well-settled that in order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Rizzuto v L.A. Wenger Contracting Company*, 91 NY2d 343, 352 [1998]; *Comes v New York State Electric & Gas Corporation*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where plaintiff's injury was caused by lifting a beam and there was no evidence that defendant exercised supervisory control or had any input into how the beam was to be moved]; *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). "'A defendant has the authority to supervise or control the work for the purposes of Labor Law § 200 when the defendant bears responsibility for the manner in which the work is performed'" (*Orellana v Dutcher Avenue Builders, Inc.*, 58 AD3d 612, 614 [2d Dept 2009], quoting *Ortega v Puccia*, 57 AD3d at 62; *Cambizaca v New York City Transit*

Authority, 57 AD3d 701, 702 [2d Dept 2008]).

Here, defendant Tarcon has established, as a matter of law, that it did not control or supervise the injury-producing work, nor did it have notice of the alleged defective condition. At most, Tarcon may have had general supervisory authority over the laborers whom it had hired and who were working at the site on the day of the accident. However, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Construction Corporation*, 40 AD3d 305, 311 [1st Dept 2007]; *Burkoski v Structure Tone, Inc.*, 40 AD3d at 381 [no Labor Law § 200 liability where defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]; *Natale v City of New York*, 33 AD3d 772, 773 [2d Dept 2006]).

Moreover, a review of evidence reveals that plaintiff's employer provided the scaffold at issue in this case. "'[T]he duty to provide a safe place to work is not breached when the injury arises out of a defect in the subcontractor's own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work'" (*Cambizaca v New York City Transit Authority*, 57 AD3d at 701-702, quoting *Persichilli v Triborough Bridge & Tunnel Authority*, 16 NY2d 136, 145 [1965]).

Thus, defendant Tarcon is entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims as against it (*Affri v Basch*, 13 NY3d at 595 [plaintiff failed to raise triable issue of fact as to whether defendants exercised supervisory control over the work]; *Gallello v MARJ Distributors, Inc.*, 50 AD3d 734, 736 [2d Dept 2008];

Mitchell v New York University, 12 AD3d 200, 200 [1st Dept 2004]; *Tolino v Speyer*, 289 AD2d 4, 5 [1st Dept 2001] [general contractor's general supervisory responsibility did not amount to supervision and control necessary for common-law negligence and Labor Law § 200 liability]).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion of defendant Tarcon General Contracting Co., Inc. to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that counsel for defendant Tarcon shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel; and it is further

ORDERED that the action is severed and continued against the remaining defendants.

DATED: September 17, 2010

ENTER:

Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD