

Posa v David Zwirner, Inc.

2011 NY Slip Op 30779(U)

March 31, 2011

Sup Ct, NY County

Docket Number: 114560/08

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Saliann Scarpulla
Justice

PART 19

Joseph J. Posaj
Plaintiff

INDEX NO. 114560/2008

David Zwirner Inc., et al.
Defendants

MOTION DATE _____

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion ~~to~~ for renewal

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is determined in accordance with the accompanying decision/order.

FILED

APR 04 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/31/11

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

Check one: FINAL DISPOSITION - NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
JOSEPH J. POSA,

Plaintiff,

-against-

Index No.: 114560/08

Submission Date: 1/26/11

DAVID ZWIRNER, INC., DAVID ZWIRNER, BIG
SHOT ELECTRIC CORP. AND E. FITZGERALD
ELECTRIC CO.,

DECISION AND ORDER

Defendants.

-----X
For Plaintiff:
Lewis Scaria & Cote, LLC
11 Martine Avenue, 10th Floor
White Plains, NY 10606

For Defendants:
Cohen, Kuhn & Associates
Two Park Avenue, 6th Floor
New York, NY 10016

Papers considered in review of this motion to renew:

- Notice of Motion 1
- Aff in Support 2
- Aff in Opp 3
- Reply 4

FILED

APR 04 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, plaintiff Joseph J. Posa (“Posa”) moves to renew defendant David Zwirner, Inc.’s (“DZI”) motion to dismiss the complaint insofar as asserted against it, which was granted by this Court (Lehner, J.) in an order dated September 17, 2009.

Posa commenced this action seeking to recover damages for the injuries he sustained on September 16, 2008 when he fell from a ladder while performing work at a

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construction project located at 232/234 East 13th Street (“the subject premises”).¹ The construction project was undertaken to combine 232 and 234 East 13th Street into one residence for David and Monica Zwirner (“the Zwirners”). Posa was employed by the general contractor for the project, Eurostruct, Inc. Posa asserted negligence and Labor Law §§200, 240(1) and 241(6) causes of action.

DZI then moved to dismiss the complaint insofar as asserted against it, arguing that DZI is David Zwirner’s (“Zwirner”) an art gallery with its principal place of business at 525 West 19th Street and has no connection to the subject premises or the subject construction project. In support of the motion, DZI submitted Zwirner’s affidavit, in which he averred that DZI did not own the subject premises, never contracted with any businesses to do work at the subject premises, did not own any equipment at the subject premises and did not control, supervise or coordinate any work or labor at the subject premises. In opposition, Posa argued that no evidence has been presented to support DZI’s contention that no one from the company controlled, managed or supervised the work at the subject premises, that DZI was not the general contractor at the subject premises, or that it was not an agent of Zwirner.

In an order dated September 17, 2009, the Court (Lehner, J.) granted DZI’s motion to dismiss.

¹ Pursuant to a deed for the subject premises, the premises was owned by David Zwirner and Monica Zwirner as tenants in the entirety.

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Posa now moves to renew, explaining that following dismissal of the claims asserted against DZI, Melanie Adams (“Adams”) was produced for a deposition. He argues that Adams’ testimony serves as sufficient evidence to reinstate a claim against DZI because it could be found liable under Labor Law §240(1) and §241(6) as an agent of Zwirner. Specifically, Posa maintains that according to the testimony, Adams was employed by DZI and was working at the subject premises during the course of the construction project on behalf of Zwirner.

Adams testified that she was employed by DZI as a personal assistant for the Zwirners. Her duties included managing their house staff, working with the Zwirners’ business personal assistants, and coordinating and scheduling their personal and business lives. She explained that she deals with Zwirner’s personal scheduling, which is intertwined with the gallery, but does not work at the gallery. She worked out of an office located at the subject premises. She spent her days partially at her office and also shopping, doing errands and also doing her work at a nearby park or coffee shop. She attended the first construction meeting between the general contractor Eurostruct, architects, and the Zwirners. Her purpose at that meeting was to take notes and help Monica Zwirner make shopping lists for such things as shower curtains, shower rods, and garbage cans.

During the course of the construction project, she attended weekly meetings and walkthroughs with the architect, contractor and construction manager, and the Zwirners if

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they were not away. Her purpose at the meetings and walkthroughs was to just sit in and listen. If there were any decisions that needed to be brought to the Zwirners' attention, she would relay the information to them. She was not aware of DZI making any payments with regard to the project. She locked up 234 every night after the workers left and she ensured that the Eurostruct construction manager locked up the 232 side. She was copied on emails containing weekly construction meeting minutes to ensure that the Zwirners would receive those minutes.

In opposition, DZI argues that Adams' testimony provides no basis for renewal because it did not demonstrate that she or DZI exercised any supervision or control over the work site.

Discussion

Pursuant to CPLR §2221(e), a motion to renew shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination. A motion to renew shall also contain reasonable justification for the failure to present such facts on the prior motion. Renewal is not available when it is predicated on legal theories not advanced in the prior motion. *See Venuti v. Novelli*, 179 A.D.2d 477 (1st Dept. 1992).

Adams' testimony does not constitute new facts that would change the prior determination. Labor Law 240(1) and 241(6) only impose liability on contractors, owners or their agents. DZI is clearly not a contractor or an owner. An agency relationship for the

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purposes of the Labor Law arises only when work is delegated to a third party who obtains the authority to supervise and control the job. Where responsibility for the activity surrounding an injury was not delegated to the third party, there is no agency liability under the statute. *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d 280, 293 (2003); *Holze v Yonkers Racing Corp.*, 2009 NY Slip Op 32047U (Sup. Ct. N.Y. Co., September 10, 2009).

Here, Adams testified that she was employed by DZI as a personal assistant for the Zwirners and explained all of her duties encompassed by the job. However, her testimony did not indicate that she had the authority to direct, supervise, or control the construction work at the subject premises, such that DZI would qualify as an agent of David Zwirner pursuant to the Labor Law.

In accordance with the foregoing, it is

ORDERED that the plaintiff Joseph J. Posa's motion to renew defendant David Zwirner, Inc.'s motion to dismiss the complaint insofar as asserted against it, which was granted by this Court (Lehner, J.) in an order dated September 17, 2009 is denied.

This constitutes the decision and order of the court.

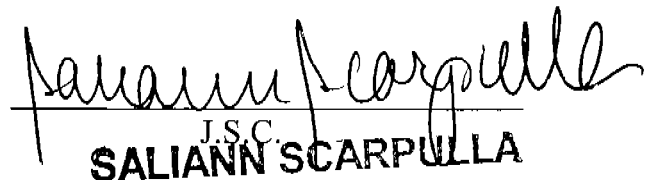
Dated: New York, New York
March 31, 2011

FILED

APR 04 2011

NEW YORK
COUNTY CLERK'S OFFICE

ENTER:


J.S.C.
SALIANN SCARPULLA