

**Chinloy v Lincoln Metro Ctr. Partners, LP**

2011 NY Slip Op 31044(U)

April 25, 2011

Supreme Court, New York County

Docket Number: 112742/2008

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE  
HON. JUDITH J. GISCHE

PART 10

Index Number : 112742/2008

CHINLOY, PATRICK

vs  
LINCOLN METRO CENTER

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 004

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**FILED**

APR 25 2011

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

NEW YORK  
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.

*and status conf  
scheduled 6/2/11 @ 9:30 am*

APR 21 2011  
APR 21 2011

Dated: \_\_\_\_\_

*[Signature]*  
HON. JUDITH J. GISCHE 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: IAS PART 10**

-----X  
Patrick Chinloy,

Plaintiff (s),

**-against-**

Lincoln Metro Center Partners, LP,  
Gotham Organization, Inc., and  
Gotham Construction, LLC,

Defendant (s).

-----X  
Lincoln Metro Center Partners, L.P.,  
Gotham Organization, Inc. and  
Gotham Construction, LLC,

3<sup>rd</sup> Party Plaintiffs,

**-against-**

SJH Construction, Inc.,

3<sup>rd</sup> Party Defendants.

-----X

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
<u>Motion Seq No. 3</u>	
Lincoln/Gotham n/m (strike NOI and consolidation) w/DP affirm, exhs	1
Pltf's x/m (partial 3212) w/PG affirm, exhs	2
Lincoln/Gotham opp w/DP affirm, exhs	3
Pltf's further support x/m and in reply w/PG affirm, exhs	4
Stip re NOI and Consolidation so-ordered 1/13/11	5
 <u>Motion Seq No. 4</u>	
Lincoln/Gotham n/m (3212) against plaintiff and SJH w/DP affirm, exhs	6
SJH opp w/RTB affirm, exhs	7
Pltf's opp w/PG affirm, exhs	8
Lincoln/Gotham reply to plaintiff opp w/DP affirm	9

**DECISION/ ORDER**  
Index No.: 112742/08  
Seq. No.: 003, 004

**PRESENT:**  
Hon. Judith J. Gische  
J.S.C.

Third Party  
Index No.:  
590804/09

Lincoln/Gotham reply to SJH's opp w/DP affirm, exhs . . . . . 10  
 DP affirm for adjournment . . . . . 11  
 Stip re Lincoln/Gotham's w/d of motion against SJH dated 1/13/11 . . 12  
 Orders dated 1/13/11 (2) and 3/25/11 . . . . . 13

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*Upon the foregoing papers, the decision and order of the court is as follows:*

**GISCHE J.:**

This is an action in which Patrick Chinloy alleges he sustained personal injuries causally related to defendants' violation of the Labor Laws applicable to construction sites (Labor Law §§ 240 [1], 241 [6], 200). Issue was joined by defendants in the main action who have now commenced a third party action. Issue was also joined in the third party action.

At oral argument, the motion by defendants Lincoln Metro Center Partners, L.P. ("Lincoln Metro"), Gotham Organization, Inc. and Gotham Construction Company, LLC ("the Gotham defendants") for an order striking the note of issue was resolved by the parties agreeing that Chinloy would vacate his note of issue. This is memorialized in the parties' so ordered stipulation dated January 13, 2011. The defendants' motion for an order consolidating this action (at times "action no. 1") with the action bearing the caption Patrick Chinloy v. 1965 Retail LLC, Millennium Partners and Gotham Construction Company, LLC, Index No. 105626/10 (at times "action no. 2") was also resolved by all sides agreeing that the two actions would be consolidated for all purposes, presumably also for joint trial. These agreements are memorialized in another so-ordered stipulation, also dated January 13, 2011.

Remaining for the court to decide is plaintiff 's ("Chinloy") motion for partial summary judgment on his Labor Law § 240 [1] claim against all the defendants,

including those newly brought into this action by consolidation. The Lincoln/Gotham defendants brought a motion for summary judgment, dismissing all of Chinloy's claims against them. A separate branch of their motion, for conditional summary judgment against 3<sup>rd</sup> party defendant SJH Construction, Inc. ("SJH") for indemnification, was withdrawn in one of the January 13, 2011 so-ordered stipulations.

The motions for summary judgment were made timely after the (now vacated) note of issue was filed. Therefore, these motions may be decided on their merits (Brill v. City of New York, 2 NY3d 648 [2004]).

### **Arguments**

On February 12, 2008, while working on the 1<sup>st</sup> floor of the premises located at 1965 Broadway, New York, New York ("premises"), owned by 1965 Retail LLC ("1965 Retail"), a defendant in action number 2, Chinloy, an employee of 3<sup>rd</sup> party defendant SJH Construction, Inc. ("SJH"), fell 30 feet from a scaffold. Chinloy alleges he suffered injuries to his left hand (nerve laceration, chip fracture), his right knee (a tear, etc), his back (vertebral compression fracture) and hip (strain). Defendant Gotham Construction Company, LLC ("Gotham Construction") was the construction manager for the project. To establish this contract, plaintiff has proved a "letter of intent for construction management services" dated June 21, 2007 ("LOI") from 1965 Retail to Mr. Giammarella of Gotham Construction. According to the LOI, the LOI is in effect until such time as a mutually acceptable construction management agreement is signed. Pursuant to the LOI, Gotham Construction is the owner's agent and "owner" is identified as 1965 Retail is printed on stationary bearing the words "1965 Retail LLC c/o Millennium Partners." The LOI also states the "sole and only beneficiaries of this LOI

are the parties hereto." The only signatories to the LOI are 1965 Retail and Gotham Construction.

Gotham Construction entered into a trade subcontract with SJH as of September 11, 2007 ("trade contract"), pursuant to which SJH agreed to perform "the Work." The work included such things as "preparation, delivery, installation etc., of materials, scaffolding, tools, equipment and all transportation cartage, loading and hoisting . . ." also "temporary light and heat" and "protection of work and labor from winter conditions, safety requirements [etc.]..."

Plaintiff was deposed by the defendants in action #1, not the newly added defendants (i.e. 1965 Realty or Millennium). At his deposition Chinloy testified that he had been performing drywall and beading in the lobby of the premises using a scaffold. He described as being made of pipes with cross braces. He did not set up the scaffold; it was already present when he arrived. According to Chinloy, there were four planks on the scaffold, none of which were tied down or secured. As Chinloy was nailing part of the bead to the side of the wall, he felt a plank move. When it shifted, he fell to the ground several feet below. Chinloy was not wearing a safety harness when the accident happened.

Plaintiff contends that "all" the defendants, including 1965 Retail and Millennium Partners, who were newly consolidated into this action, are strictly liable for his accident because the scaffold he was asked to work on did not have safety railings, he was not provided with other protective devices, such as a safety harness or safety line and the scaffold was unsafe because the planks were unsecured. In seeking this relief, plaintiff specifically identifies 1965 Retail as the owner of the premises and Gotham

Construction as the “general contractor.”

In opposition to plaintiff’s motion, defendants Lincoln Metro Center Partners, Gotham Organization, Inc. and Gotham Construction argue that plaintiff’s motion is premature because 1965 Retail and Millennium were just recently brought into this case, they have not had any discovery and there are eyewitnesses to the accident who have not yet been deposed. More importantly, 1965 Realty denies it is the “owner” of the premises, although in its answer it admits it is the lessee thereof. Defendants Lincoln Metro and the Gotham also deny that Millennium is an owner and argue that Gotham Construction is a construction manager, not a general contractor, as plaintiff professes them to be. Thus, the defendants in action #1 contend the motion is premature (CPLR 3212 [f]), but even if it is not premature, Chinloy has not established who the owner of the premises is or proved that Gotham Construction, the construction project manager, had the ability to control the activity which brought about the injury alleged.

Other reasons proffered by defendants for why plaintiff’s motion should be denied is that plaintiff may have been the sole proximate cause of his accident by choosing to access the ladder in a dangerous manner and he may have refused to use a harness to safely do his job.

In support of their own motion for summary judgment dismissing plaintiff’s complaint, Lincoln Metro and the Gotham defendants deny they owned the subject premises on February 12, 2008, the day plaintiff claims he was injured. They seek an order striking plaintiff’s notice to admit on the basis that it was served before the two actions were consolidated, yet has both captions on it and, furthermore, it asks the

defendants to admit fundamental issues in the case, such as did the defendants "operate" the site or "control" it. In opposition, plaintiff contends that the matters in the notice are now deemed admitted because defendants failed to promptly respond. Plaintiff also argues that the LOI "proves" Millennium is the owner's agent and/or contractor for the project, if not actually the owner, and that as the lessee of the premises, 1965 Retail is in the position of an "owner" for purposes of the Labor Law.

### Discussion

Since Lincoln Metro and the Gotham defendants on the one hand and plaintiff on the other each have motions for summary judgment each side bears the initial burden of making a *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 [1985]). If this burden is met, then it shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

The motions presently before the court were brought before actions no. 1 and no. 2 were consolidated. Yet, plaintiff seeks summary judgment in action no. 1 against the defendants in both actions. This procedural snafu is reason enough to deny plaintiff's motion. Compounding matters is that the newly added defendants 1965 Realty and Millennium, have not had any discovery. Oddly, this argument is not raised by 1965 Realty or Millennium but by Lincoln Metro and the Gotham defendants. The defendants in action no. 1 also contend that they were not the owners of the subject premises on the day of plaintiff's accident. Although 1965 Realty has not appeared in

connection with any of these motions, 1965 Realty has, in its answer, also denied ownership of the premises on the day of Chinloy's accident. Arguments by plaintiff that as the lessee of the premises, 1965 Realty is the "owner" for purposes of statutory liability, is offered without any legal authority but, more importantly, raised in a procedurally defective motion.

The motion by Lincoln Metro and the Gotham defendants is also defective. In the notice, the moving defendants seek summary judgment in favor of themselves "and Millennium Partners in Action #2," although the attorneys identify themselves as only representing Lincoln Metro and the Gotham defendants. There is no proof of service on the defendants in action no. 2. In any event, the sole proof that Lincoln Metro and the Gotham defendants offer that they do not own the premises is a self-serving affidavit by their property manager ("Cvijic") who states neither "Lincoln Metro Center Partners, L.P. nor Gotham Organization, LLC, nor 1965 Retail LLC, nor Millennium Partners were the fee owners of the Premises on the date of plaintiff's accident." This statement is simply based on Cvijic's familiarity with the ownership interests at the premises. These bare allegations do not support defendants' motion.

Given the status of this case, which has now been consolidated with action no. 2, neither movant prevails on its motion for summary judgment because plaintiff's motion was brought prematurely, before there has been discovery in the newly consolidated action by added defendants. Likewise, the motion by defendants Lincoln Metro and the Gotham defendants fails because they have not disproved themselves as the owners. To the extent that any party seeks to place ownership responsibility on 1965 Retail, that motion is premature as well and defendants Lincoln Metro and the Gotham defendants

did not serve their motion on 1965 Retail. Consequently, each motion for summary judgment is denied.

Although the stipulation allowing for the consolidation of actions no. 1 and 2 does not expressly state whether the consolidation is only for discovery purposes or for all purposes, including trial, the court presumes that it is for joint trial as well since the motion that the stipulation resolved was for that relief.

Therefore, Lincoln Metro and the Gotham defendants shall serve a copy of this order with notice of entry on the County Clerk (Room 141 B), who shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation. Defendants shall also serve a copy of this order with notice of entry on the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the consolidation.

The Clerk is also directed to vacate the note of issue previously filed by Chinloy, as stipulated by the parties.

This case should no longer appear in the Mediation part since the Note of Issue has been vacated. Consequently, the court directs that all sides appear for a compliance conference on **June 2, 2011 at 9:30 a.m.** in Part 10, at 60 Centre Street, Room 232.

Any relief requested that has not been expressly addressed is hereby denied.

This constitutes the decision and order of the court.


Dated: New York, New York  
April 2, 2011

**FILED**

**APR 25 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

So Ordered;

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC