

Mondone v Lane

2011 NY Slip Op 32301(U)

August 16, 2011

Supreme Court, Nassau County

Docket Number: 7497/09

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X

JOSEPH J. MONDONE, JR.,

Plaintiff,

-against-

**MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 11
Index No.: 7497/09
Motion Seq. No.: 01, 02 & 03**

CHRISTOPHER P. LANE, JENNIFER A. LANE, TRUE
BUILDING CORP., and KEVIN BEVILACQUA,

Defendants.

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Papers Read on this Motion:

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In motion sequence number one, defendants Christopher P. Lane and Jennifer A. Lane (hereinafter collectively referred to as "Lane") move for an order pursuant to CPLR §3212 granting them summary judgment dismissing the plaintiff's complaint and all cross-claims against them.

In motion sequence number two, the plaintiffs move for an order pursuant to CPLR §3212 granting him summary judgment on the issue of liability and setting this matter down for an immediate assessment of damages as to True Building Corp. and to defendants Lane.

In motion sequence number three defendant Kevin Bevilacqua cross-moves for an order pursuant to CPLR §3211(a)(7) dismissing the complaint on the grounds that it fails to state a cause of

action for piercing the corporate veil.

On February 24, 2009, plaintiff allegedly was injured while performing electrical work at the Lane residence at 60 Stevens Street in Oceanside, New York. At the time of the accident, plaintiff was in the process of descending a staircase from the first floor into the basement when the stairs collapsed. The staircase had been temporarily installed by True Building employees the day before the accident.

Defendants Christopher and Jennifer Lane are the owners of a single family home located at 60 Stevens Street, Oceanside, New York. On August 7, 2008, Lane and True Frame Corp. executed a home remodeling agreement. True Frame Corp. is now known as True Building Corp. and Kevin Bevilacqua is a 50% shareholder with his wife. True Building was hired to perform excavation, foundation, framing, roofing and siding work which included the removal of an existing staircase from the first floor to the basement and the installation of a new staircase in the same location. Lane also hired plaintiff's company Mondone Electric, to perform the electrical work for the project. Christopher Lane performed the plumbing work at the subject premises.

Lane's Contentions

Defendants Lane move for summary judgment on the grounds that (1) defendants neither created nor had notice of the alleged defective condition involving the staircase; and (2) defendants neither directed nor controlled any of the work involving the installation of the staircase.

In support thereof, Lane relies upon his deposition testimony, the deposition testimony of Kevin Bevilacqua and the deposition testimony of plaintiff.

Defendants contend that they satisfied their burden as the testimony demonstrates that they did not install the staircase involved in the plaintiff's accident; and defendants did not have actual notice that the stairs had not been properly installed and were in danger of collapsing. In this respect, the

testimony reflects that the staircase had been installed by True Building employees the day before the plaintiff's accident; and neither Christopher Lane nor Jennifer Lane walked on the stairs after they were installed. Further, neither of the Lanes had received any complaints from anyone as to the condition of the stairs before they collapsed and neither Lane had any knowledge as to how the stairs were installed. Further, none of the workers who used the stairs after they were installed made any complaints to anyone about the condition of the stairs.

As to the issue of constructive notice, defendants Lane note in order for notice to be deemed constructive, the alleged defect must have been visible and apparent and it must have existed for a sufficient period of time prior to the accident to permit the defendant to discover and remedy it. *See, Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *see also, Giulini v Union Free School District No. 1*, 70 AD3d 632 [2d Dept 2010]; *Hartley v Waldbaum, Inc.*, 69 AD3d 902 [2d Dept 2010]; *Denker v Century 21 Dept. Stores, LLC*, 55 AD3d 527 [2d Dept 2008]; *Ferington v Dudkowski*, 49 AD3d 1267 [4th Dept 2008]; *Viera v Riverbay Corp.*, 44 AD3d 577 [1st Dept 2007].

With respect to plaintiff's claim based upon § 200 of the Labor Law, it is well established that in order to impose liability upon the property owner, not only must it be shown by the plaintiff that the owner exercised supervisory direction and control over the operation that brought about the injury, but it must also be shown that the property owner had actual or constructive notice of the alleged unsafe condition that caused the accident. *Maldonado v Metropolitan Life Insurance Company*, 289 AD2d 176 [1st Dept. 2001]; *Nevins v Essex Owners Corp.*, 276 AD2d 315 [1st Dept. 2000]; *Pisciotta v St. John's Hospital*, 268 AD2d 465 [2d Dept 2000]; *Dilena v The Irving Reisman Irrevocable Trust*, 263 AD2d 375 [1st Dept 1999].

Furthermore, no liability will attach to an owner under the common-law or § 200 of the Labor

Law where the defective or dangerous condition arises from a contractor or subcontractor's methods or negligent acts occurring as a detail of the work, and the owner does not exercise any supervisory direction or control over the operation. *Comes v New York State Electric & Gas Corp.*, 82 NY2d 876 [1993]; *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494 [1993]; *Lombardi v Stout*, 80 NY2d 290 [1992]; *Richichi v Construction Management Technologies*, 244 AD2d 540 [2d Dept 1997]. Here, defendants Lane assert that the alleged defective and/or dangerous condition relating to the stairs arose from True Building's methods and/or negligent acts occurring as a detail of their installation of the stairs, and that defendants did not exercise any supervisory direction or control over True Building's installation of the stairs.

Turning to plaintiff's claims based upon §§ 240(1) and 241(6) of the Labor Law, defendants Lane argue that they cannot be held liable under these provisions since, with the exception of the plumbing work performed by Christopher Lane, which had no connection whatsoever to the plaintiff's accident, there is no evidence to demonstrate that the Lane defendants directed or controlled any other aspect of the work that was performed as part of the renovation project. More importantly, there is absolutely no evidence to indicate that the defendants directed or controlled any of the work involving the installation of the staircase.

In this regard, Labor Law §§ 240(1) and 241(6) exempt from liability owners of one and two-family dwellings who contract for but do not direct or control the work. *See, Bartoo v Buell*, 87 NY2d 362 [1996]; *Khela v Neiger*, 85 NY2d 333 [1995]. In order to vitiate the exception, the owner must exercise direction and control over the particular aspect of the work from which the injury arose. *See, Cannon v Putnam*, 76 NY2d 644 [1990]; *see also, Van Alstine v Padula*, 228 AD2d 909 [1st Dept 1996].

The phrase “direct or control” must be strictly construed and applies only where the owner “supervises the method and manner of the work,” can order changes in the specifications, reviews the progress and details of the job with the general contractor, and/or provides the equipment necessary to perform the work. *Miller v Shah*, 3 AD3d 521 [2d Dept 2004]; *Garcia v Petrakis*, 306 AD2d 315 [2d Dept 2003]; *Duarte v East Hills Construction Corp.*, 274 AD2d 493 [2d Dept 2000]; *Valentin v Thirty-Four Square Corp.*, 227 AD2d 467 [2d Dept 1996]; *Kolakowski v Feeney*, 204 AD2d 693 [2d Dept 1994].

Involvement by the owner with minor details such as matters pertaining to decorating, is not enough to establish control. *See, McGuinness v Contemporary Interiors*, 205 AD2d 739 [2d Dept 1994]; *Kelly v Bruno & Son, Inc.*, 190 AD2d 777 [2d Dept 1993]; *Devodier v Haas*, 173 AD2d 437 [2d Dept 1991].

Overall, the Lanes maintain that they did not exercise supervisory direction and control over that particular aspect of True Building’s work involving the installation of the staircase which ultimately resulted in the plaintiff’s accident, nor did they supervise the “method or manner” of True Building’s work. Absent the requisite supervision, direction and/or control, the defendants cannot be held liable for the plaintiff’s accident. Additionally, Lane submits that they did not have any notice that the stairs had not been properly installed.

Plaintiff’s Contentions

In support of his motion, plaintiff asserts that he is entitled to summary judgment against the Bevilacqua /True Building defendants pursuant to Labor Law §§ 200 and 240(1). Plaintiff argues that these defendants have acknowledged that they did not adequately install the staircase; and they “violated Section 240(1) because the basement staircase collapse caused Mr. Mondone to fall

approximately eight feet to the concrete floor.” (¶ 10 of Mark Bernstein’s Affirmation). Notably, True Building has not submitted any opposition to plaintiff’s motion as against it.

As to the Lane defendants, plaintiff similarly asserts that he is entitled to judgment as a matter of law under Labor Law § 240(1) because “the basement staircase collapse caused Mr. Mondone to fall approximately eight feet to the floor.”

In his supplemental affidavit in opposition, plaintiff’s counsel Mr. Bernstein annexes a copy of the non-party witness’ transcript of Joseph Moseley taken on May 16, 2011 in the case entitled *Essex Insurance Company v Mondone, et al.* Mr. Moseley allegedly warned defendant Lane of the fact that the staircase was only temporarily installed and that more work was necessary to make the installation permanent. Based upon this testimony, plaintiff argues that the Lanes had actual knowledge of the dangerous condition upon their premises.

Specifically, plaintiff notes that the Lane defendants were intimately involved with the construction ongoing at their own home; Christopher Lane visited the construction site (his own home) three or four times a week to observe the work being performed; and there is proof that the Lane defendants, as property owners, were warned before the accident by Joseph Moseley of True Building Corp. that the staircase was a hazard because it was only partially installed.

In response, the Lanes assert that the only evidence submitted in opposition to defendants’ motion is the unsworn or unverified statement and deposition transcript from Joseph Moseley (the person who installed the subject stairs); an e-mail with an unattached unsworn investigative report; and the issue of notice is feigned as defendants did not exercise any supervisory discretion or control over the installation of the subject stairs.

Defendants assert that plaintiff should be precluded from relying upon Mr. Moseley’s unsworn

deposition transcript because it does not constitute evidentiary proof in admissible form. *See, Marmer v IF USA Exp., Inc.*, 73 AD 3d 868, 899 [2d Dept 2010]; *Pina v Flik Intern Corp.*, 25 AD3d 772 [2d Dept 2006]; *see also*, CPLR §3116(a). Further, even if this court were inclined to consider Mr. Moseley's unsworn statement and deposition testimony, Mr. Moseley stated in his statement that "I thought the installation would hold."

Labor Law § 200

"Labor Law § 200 is a codification of common-law duty imposed upon an owner or general contractor to maintain a safe construction site" (*Hart v Commack Hotel, LLC*, 85 AD3d 1117 [2d Dept 2011]; *McKee v Great Atl. & Pac. Tea Co.*, 73 AD3d 872, 873 [2d Dept 2010]). Where, as here, "a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law §200 unless it is shown that the part to be charged had the authority to supervise or control the performance of the work" (*Id.* at 874; *see Herrel v West*, 82 AD3d 933 [2d Dept 2011]). Here, the owners did not have the authority to supervise or control the renovation work performed by True Building (*see Lombardi v Stout*, 80 NY2d 290, 294-295[1992]; *McKee v Great Atl. & Pac. Tea Co.*, *supra*; *Chowdhury v Rodriguez*, 57 AD3d 121[2nd Dept. 2008]).

Contrary to plaintiff's contentions, plaintiff failed to raise an issue of fact demonstrating that the Lanes violated Labor Law §200. Similarly, plaintiff has not sufficiently established that defendant had actual or constructive notice of the defective staircase. *Dougherty v O'Conner*, 85 AD3d 1090 [2d Dept 2011]; *cf. Chowdhury v Rodriguez, supra*.

"Labor Law 240(1) imposes a nondelegable duty upon owners and general contractors to provide safety devices to protect workers from elevation-related risks" (*Jara v New York Racing*

Association, Inc., 85 AD3d 1121 [2d Dept 2011]; *Poracki v St. Mary's R.C. Church*, 82 AD3d 1192, 1194 [2d Dept 2011]). “To recover under Labor Law 240(1), plaintiff must demonstrate a violation of the statute and that such violation proximately caused his or her injuries” (*Poracki v St. Mary's R.C. Church, supra*; see *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]). “[T]he single decisive question [in determining whether Labor Law 240(1) is applicable] is whether plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential” (*Runner v New York Stock Exch. Inc.*, 13 NY3d 599, 605 [2009]; see *La Veglia v St. Francis Hosp.*, 78 AD3d 1123, 1127 [2d Dept 2010]).

The Lanes have made a *prima facie* showing of their entitlement to judgment as a matter of law dismissing the causes of action alleging violations of Labor Law §§240(1) and 241(6) insofar as asserted against them by demonstrating that the subject work was performed at a one-family dwelling and that they did not direct or control the work (*Dougherty v O’Conner, supra*; see *Castellanos v United Cerebral Palsy Ass’n of Greater Suffolk, Inc.*, 77 AD3d 879, 880 [2d Dept 2010]). In opposition, plaintiff failed to raise a triable issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

“With respect to a claim pursuant to Labor Law §241(6), the plaintiff must allege a violation of a specific and applicable provision of the Industrial Code” (*D’Elia v City of New York*, 81 AD3d 682, 684 [2d Dept 2011]; see *Ross v Curtis-Palmer Hydro-Elec. Co., supra*). “A failure to identify the Industrial Code provision in the complaint or bill of particulars is not fatal to such a claim” (*Jara v New York Racing Association, Inc., supra*; *D’Elia v City of New York, supra*; see *Galarraga v City of New*

York, 54 AD3d 308, 310 [2d Dept 2008]; *Dowd v City of New York*, 40 AD3d 908, 911 [2d Dept 2007]).

Plaintiff's cause of action alleging a violation of Labor Law §241(6) should be dismissed. While plaintiff identified a violation of specific provisions of the New York State Industrial Code in his pleadings, he failed to identify same in the underlying motion and cross-motion papers. *See Owen v Commercial Sites*, 284 AD2d 315 [2d Dept 2001].

Bevilacqua's Cross-Motion

Defendant Kevin Bevilacqua moves to dismiss the complaint pursuant to CPLR §3211(a)(7) on the grounds that the complaint fails to state a cause of action against him. Bevilacqua asserts that there is not one allegation nor a shred of evidence to pierce the corporate veil and hold the individual defendant liable for plaintiff's injuries. Further, there are no allegations, either in the complaint or in the bill of particulars that Bevilacqua was negligent in any capacity other than as an officer of True Building Corp.

In opposition, plaintiff contends that he is not seeking to hold Bevilacqua vicariously responsible for the actions of the corporate employee or his co-employee. Rather, Bevilacqua was a negligent actor directly responsible for causing the accident. In other words, defendant Bevilacqua's status as an owner of the corporation does not shield him from liability where, as here, he was actively at fault in causing the accident.

"On a motion to dismiss the complaint pursuant to CPLR §3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Peery v United Capital Corp.*, 84

AD3d 120 [2d Dept 2011]; *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008]; see *Leon v Martinez*, 84 NY2d 83 [1999]). A motion to dismiss pursuant to CPLR §3211(a)(7) will fail if “taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law” (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]).

“ ‘A party seeking to pierce the corporate veil must establish that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit fraud or wrong against the plaintiff which resulted in the plaintiff’s injury.’ ” (*Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141, 145 [2d Dept 2009], quoting *Millennium Constr., LLC v Loupolover*, 44 AD3d 1016, 1016 [2d Dept 2002]; see *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). The party seeking to pierce the corporate veil must establish that the controlling corporation or individuals “abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene” (*Matter of Morris v New York State Dept. of Taxation, & Fin.*, *supra*; see *Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, *supra*).

Accepting all facts alleged in the complaint to be true and affording plaintiff the benefit of every possible inference, the complaint fails to state a viable cause of action against Bevilacqua. The complaint and bill of particulars are devoid of any allegations that defendant Bevilacqua, in his own capacity as opposed to that of an officer/employee of defendant True Building Corp., had any role in the case or, more importantly, that Bevilacqua used the corporation as a mere device to further his personal goals rather than those of the corporate business.

In view of the foregoing, it is hereby

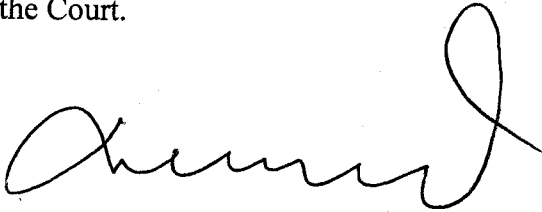
ORDERED, that the motion by defendants Lane for summary judgment dismissing the complaint is **granted** and plaintiff's motion for summary judgment is **granted** as to True Building and **denied** as to defendants Lane. The cross-motion by Kevin Bevilacqua to dismiss the complaint as against him is **granted**.

The action is hereby severed and continued against defendant True Building Corp. It is hereby **ORDERED**, that the remaining parties are directed to appear in DCM on August 24, 2011 for a trial on damages.

This constitutes the Decision and Order of the Court.

DATED: August 16, 2011
Mineola, N.Y. 11501

ENTER:



HON. MICHELE M. WOODARD
J.S.C.

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ENTERED
AUG 23 2011
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