

**Alphonso v J.R. Props. of N.Y., L.L.C.**

2011 NY Slip Op 33260(U)

November 30, 2011

Supreme Court, Queens County

Docket Number: 9874/09

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE  
Justice

IAS PART 6

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AKIN ALPHONSO and SHAVONE JOSEPH,  
  
Plaintiffs,  
  
-against-  
  
J.R. PROPERTIES OF NEW YORK, L.L.C.,  
et al.,  
  
Defendants.  
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Index No. 9874/09  
  
Motion  
Date August 2, 2011  
  
Motion  
Cal. Nos. 1 and 2  
  
Motion  
Sequence No. 2 and 3

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Upon the foregoing papers it is ordered that defendants', Cross Bay Medical Services, P.C. ("Cross Bay") and Dr. Jayesh Kripalani s/h/a Dr. Jayesh Kripalani a.k.a. Jaury Kripalani ("Dr. Kripalani")'s motion for an order pursuant to CPLR 221 granting leave to reargue the decision and order of this Court entered on October 13, 2010, which decision denied defendants Cross Bay and Dr. Kripalani's cross motion for summary judgment and upon reargument, for an order pursuant to CPLR 3212 dismissing the plaintiffs', Akin Alphonso and Shavone Joseph's Complaint and any and all cross claims pursuant to CPLR 3211(a) (7) as against them; defendant, J.R. Properties of New York, LLC's ("J.R. Properties") motion for an order pursuant to CPLR 3212 dismissing the plaintiffs', Akin Alphonso and Shavone Joseph's Complaint and any

and all cross claims pursuant to CPLR 3211(a)(7) as against it; defendant Dr. Susan G. Love's cross motion for summary judgment pursuant to CPLR 3212 dismissing the plaintiffs' Complaint as against her; and plaintiffs' cross motion for summary judgment on liability as to all defendants are hereby consolidated solely for purposes of disposition of the instant motions and cross motions and are hereby decided as follows:

At the outset, the Court grants reargument of its decision and order dated October 13, 2010 and upon reargument finds:

Plaintiff, Akin Alphonso, maintains that on February 2, 2009, he was lawfully and diligently working as a fence installer in the course and scope of his employment with Trinchese Iron Works at 159-05 92<sup>nd</sup> Street Howard Beach, County of Queens, State of New York on a commercial construction site. Plaintiff further maintains that on said date he was caused to be injured when he attempted to remove the fence from the delivery truck and the fence started shaking, causing plaintiff, Akin Alphonso to sustain severe and disabling personal injuries as a result of defendants' negligence. Plaintiff, Shavone Joseph, is Akin Alphonso's wife and sues derivatively for loss of services, consortium and support of her husband. Plaintiff commenced this action to recover for serious injuries, alleging liability against all defendants pursuant to Labor Law §§ 200, 240(1), and 241(6) and under common-law negligence theories. Defendants, Cross Bay Medical Services, PC and Dr. Jayesh Kripalani s/h/a Dr. Jayesh Kripalani a/k/a Jaury Kripalani move for an order pursuant to CPLR 3212 granting summary judgment to said defendants and dismissing the complaint and all cross claims as against them, defendant, J.R. Properties of New York, LLC's moves for an order pursuant to CPLR 3212 dismissing the plaintiffs', Akin Alphonso and Shavone Joseph's Complaint and any and all cross claims pursuant to CPLR 3211(a)(7) as against it; defendant Dr. Susan G. Love cross-moves for summary judgment pursuant to CPLR 3212 dismissing the plaintiffs' Complaint as against her; and plaintiff cross-moves for summary judgment on liability as against all defendants.

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not

issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; Pizzi by Pizzi v. Bradlee' s Div. of Stop & Shop, Inc., 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (Gervasio v. DiNapoli, 134 AD2d 235 [2d Dept 1987]).

It is well-settled that liability for negligence will attach pursuant to common law or under Labor Law § 200 if the plaintiff's injuries were sustained as a result of a dangerous condition at the work site and only if the owner, contractor or agent exercised supervision and control over the work performed at the site or had actual or constructive notice of the alleged dangerous condition (see, Pirotta v. EklecCo., 292 AD2d 362 [2002]; Kobeszko v. Lyden Realty Investors, 289 AD2d 535 [2001]; Giambalvo v. Chemical Bank, 260 AD2d 432 [1999]). Labor Law § 200 codifies the common law duty of owners and general contractors to provide construction site workers with a safe working environment (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]). In order for a defendant to be liable under this section, "the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition" (Damiani v. Federated Department Stores, Inc., 23 AD3d 329 [2d Dept 2005][internal citations omitted]). Liability is dependent upon the amount of control or supervision exercised over the plaintiff's work. (*Id.*).

Labor Law § 240 (1) requires owners, contractors, and their agents to provide workers with appropriate safety devices to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]; see, Rocovich v. Consolidated Edison Co., 78 NY2d 509, 514 [1991]; Gasques v. State of New York, 59 AD3d 666 [2009]; Rau v. Bagels N Brunch, Inc., 57 AD3d 866 [2008]). The duty to provide scaffolding, ladders, and similar safety devices is non-delegable, as the purpose of the section is to protect workers by placing the ultimate responsibility on the owners and contractors (see, Gordon v. Eastern Ry. Supply, Inc., 82 NY2d 555, 559 [1993]; Ortega v. Puccia, 57 AD3d 54 [2008]; Riccio v. NHT Owners, LLC, 51 AD3d 897 [2008]). In order to prevail on a cause of action pursuant to Labor Law § 240 (1), the plaintiff must establish that the statute was violated and that said violation was the proximate cause of his or her injuries (see, Chlebowski v. Esber, 58 AD3d 662 [2009]; Rakowicz v. Fashion Inst. of Tech., 56 AD3d 747 [2008]; Rudnik v. Brogor Realty Corp., 45 AD3d 828 [2007]).

Labor Law § 241(6) imposes a non-delegable duty upon owners and contractors to provide necessary equipment to maintain a safe working environment, provided there is a specific statutory violation causing plaintiff's injury (see, Toefer v. Long Island R.R., 4 NY3d 399 [NY 2005]; Bland v. Manocherian, 66 NY2d 452 [1985]; Kollmer v. Slater Electric, Inc., 122 AD2d 117 [2d Dept 1986]). The Court of Appeals has held that the standard of liability under this section requires that the regulation alleged to have been breached be a "specific positive command" rather than a "reiteration of common law standards which would merely incorporate into the State Industrial Code a general duty of care" (Rizzuto v. LA Wenger Contracting, 91 NY2d 343 [NY 1998]). In order to support a Labor Law § 241(6) cause of action, such a regulation cannot merely establish only "general safety standards", but rather must establish "concrete specifications" (see, Mancini v. Pedra Construction, 293 AD2d 453 [2d Dept 2002]; Williams v. Whitehaven Memorial Park, 227 AD2d 923 [4<sup>th</sup> Dept 1996]).

### **1. Defendant Dr. Susan G. Love**

Defendant, Dr. Susan G. Love's cross motion for summary judgment pursuant to CPLR 3212 dismissing the plaintiffs' complaint as against her is granted and plaintiffs' Complaint as against Dr. Love pursuant to Labor Law §§ 200, 240(1), and 241(6) and common-law negligence theories is dismissed.

Defendant, Dr. Susan G. Love established a prima facie case that the plaintiffs' claims under Labor Law § 200 and common-law negligence must be dismissed as against her. Defendant Love submitted her own affidavit which establishes that: she is a tenant of the building located at 159-05 92<sup>nd</sup> Street, Howard Beach, New York, she has no ownership interest in the building, she did not operate, manage, control, repair or inspect the subject premises, she did not direct, control, or supervise anybody during the course of the fence installation, she did not enter into any agreement with the plaintiff's employer and has no obligations to the plaintiff, and she did not supply any tools nor regulate hours of the fence contractor or his employees. Accordingly, Dr. Susan G. Love established that she was not an owner or general contractor, and as such, she has no liability to plaintiff under Labor Law § 200. Additionally, Dr. Love established that she owed no duty to plaintiff under common-law negligence theories, as she was merely a tenant of the subject premises. To establish a prima facie case of negligence, a plaintiff must establish the existence of a duty, a breach of the duty, and that said breach was the proximate cause of their injuries (see, Gordon v. Muchnick, 180 AD2d 715 [2d Dept 1992]).

However, absent a duty of care, there is no breach and no liability (Id.; see also, Marasco v. C.D.R. Electronics Security & Surveillance Systems Co., et.al., 1 AD3d 578 [2d Dept 2003]). Accordingly, Dr. Susan G. Love established that she owed no duty to plaintiffs, and as such, she has no liability to plaintiffs under common-law negligence theories.

Defendant, Dr. Susan G. Love established a prima facie case that the claims under Labor Law § 240(1) must be dismissed as against her. As discussed above, the affidavit of Dr. Susan G. Love establishes that she was not an owner or contractor, and as such, has no liability to plaintiff under this section.

Defendant, Dr. Susan G. Love established a prima facie case that the claim under Labor Law § 241(6) must be dismissed as against her. As discussed above, the affidavit of Dr. Susan G. Love establishes that she was not an owner or contractor, and as such, has no liability to plaintiff under this section.

Plaintiffs have failed to present any evidentiary, non-conclusory proof sufficient to establish the existence of material issues of fact regarding any of the Labor Law or common-law negligence claims for defendant, Dr. Susan G. Love (see, Giuffrida v. Citibank Corp., 100 NY2d 72 [2003]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). As such, the plaintiffs' Complaint is dismissed as against defendant, Dr. Susan G. Love.

## **2. Defendants Cross Bay Medical Services, P.C. and Dr. Kripalani**

Defendant, Cross Bay's motion for summary judgment pursuant to CPLR 3212 dismissing the plaintiffs' complaint as against them is granted and plaintiffs' Complaint as against defendant Cross Bay and Dr. Kripalani pursuant to Labor Law §§ 200, 240(1), and 241(6) and common-law negligence theories is dismissed. In support of this branch of the motion, moving defendants submit, inter alia, the examination before trial transcript testimony of defendant, Dr. Kripalani, himself, wherein he testified inter alia, that: he formed Cross Bay Medical Services, PC as a corporation for his medical practice; and an affidavit of defendant, Dr. Kripalani, himself, wherein he averred that: J.R. Properties of New York, LLC is the owner of the premises located at 159-05 92<sup>nd</sup> Street, Howard Beach, New York, he is the president and sole shareholder of that corporation, he formed Cross Bay as a corporation for his medical practice; and an affidavit of Dr. Kripalani, wherein he averred that: he has been the President of Cross Bay for approximately 3½ years, on the day of plaintiff's accident, no employees, personnel or equipment from Cross Bay

Medical Services, PC or himself were at or near the location where plaintiff's accident occurred, neither Cross Bay, nor Dr. Kripalani individually contracted for any work performed by plaintiff's employer, Trinchese Iron Works, at no time did Dr. Kripalani nor anyone from Cross Bay supervise, direct or in any way control any of the work performed by plaintiff or anyone from Trinchese Iron Works and Construction, and plaintiff Akin Alphonso was not performing any work under his direction at the time of the accident. Accordingly, defendants Cross Bay and Dr. Kripalani established a prima facie case that they were not owners or contractors, and moreover, they did not exercise any direction or control over plaintiff's work, as such, they have no liability to plaintiff under this section. Additionally, defendants Cross Bay and Dr. Kripalani established that they breached no duty to plaintiff under common-law negligence theories, as they did not create or have actual notice of a dangerous condition.

Defendants, Cross Bay and Dr. Kripalani established a facie case that the claim under Labor Law § 240(1) must be dismissed as against them. As demonstrated above, defendants Cross Bay and Dr. Kripalani established a prima facie case that they were not owners or contractors, and moreover, they did not exercise any direction or control over plaintiff's work, as such, they have no liability to plaintiff under this section.

Defendants, Cross Bay and Dr. Kripalani established a prima facie case that the claim under Labor Law § 241 (6) must be dismissed as against them. Labor Law § 241(6) imposes a non-delegable duty upon owners and contractors to provide necessary equipment to maintain a safe working environment, provided there is a specific statutory violation causing plaintiff's injury (see, Toefer v. Long Island R.R., supra; Bland v. Manocherian, supra; Kollmer v. Slater Electric, Inc., supra). As set forth above, defendants Cross Bay and Dr. Kripalani established a prima facie case that they were not owners or contractors, and moreover, they did not exercise any direction or control over plaintiff's work, as such, they have no liability to plaintiff under this section.

In opposition, plaintiffs have failed to present any evidentiary proof sufficient to raise a triable issue of fact that either defendant Cross Bay or Dr. Kripalani were the owner, the general contractor, or the statutory agent of the work site. Plaintiff's argument that Dr. Kripalani acted as a general contractor for the entire fencing project because Dr. Kripalani testified that he hired separate contractors for the fence project and was actively involved in designing the fence is

insufficient to establish that Dr. Kripalani was a general contractor. Plaintiffs also failed to establish that either Cross Bay or Dr. Kripilani supervised, controlled, or directed the method or manner in which plaintiff performed his work. Cross Bay and Dr. Kripalani "[were] not an 'owner' or a general contractor' and the record established that [Cross Bay and Kripalani] did not have sufficient authority to supervise and control the injury-producing work to support the imposition of liability on [them] as a statutory 'agent.'" (Smith v. McClier Corp., 22 AD3d 369 [1<sup>st</sup> Dept 2005][internal citations omitted]. While plaintiff submits an affidavit of plaintiff, Akin Alphonso himself, which affidavit alleges that Dr. Kripalani gave directions to plaintiff's supervisor regarding the staging and timing of the work to plaintiff's supervisor, such does not establish supervisory control of the method and means in which the plaintiff performed his work.

Accordingly, as plaintiffs have failed to present any evidentiary, non-conclusory proof sufficient to establish material issues of fact, summary judgment is warranted, and plaintiffs' complaint pursuant to Labor Law §§ 200, 240(1) 241(6), and common-law negligence must be dismissed as against defendants, Cross Bay and Dr. Kripalani (Kelarakos v. Massapequa Water District, 38 AD3d 717 [2d Dept 2007]).

### **3. Defendant J.R. Properties of New York, LLC**

Defendant, J.R. Properties of New York, LLC ("J.R. Properties") establishes a prima facie case that the plaintiffs' claim under Labor Law § 200 and common-law negligence must be dismissed as against it. It is undisputed that J.R. Properties was the owner of the premises located at 159-05 92<sup>nd</sup> Street Howard Beach, County of Queens, State of New York. Defendant, J.R. Properties established that it did not direct or control the means and methods of plaintiff's work. In support of this branch of the motion, defendant J.R. Properties submits, inter alia, the examination before trial transcript testimony of plaintiff, himself, wherein the only testimony given by plaintiff with respect to the involvement of J.R. Properties with respect to the project was that he believes an individual who identified himself as the owner of the premises and customer who retained Trinchese Iron Works told the workers and plaintiff's supervisor, Andrew Trinchese something to the effect of "hurry up," and plaintiff denies any other conversations between this individual and plaintiff's employer and the workers, and plaintiff received instruction from Andrew Trinchese. Defendant, J.R. Properties establishes a prima facie case that at the work site and J.R. Properties did not exercise supervision and control over the work

performed at the site and J.R. Properties did not have actual or constructive notice of an alleged dangerous condition

Defendant, J.R. Properties of New York, LLC establishes a prima facie case that the plaintiffs' claim under Labor Law § 240(1) must be dismissed as against it. "Labor Law 240(1) evinces a clear legislative intent to provide exceptional protection for workers against the special hazards that arise when the work site is either itself elevated or is positioned below the level where materials or loads are hoisted or secured" (Orner v. Port Authority, 293 AD2d 517 [2d Dept 2002]). The statute will be applicable wherever there is a significant risk posed by the elevation at which material or loads must be positioned or secured (Salinas v. Barney Skansa Construction Co., 2 AD3d 619 [2d Dept 2003]). Defendant, J.R. Properties establishes a prima facie case that plaintiff was not performing any type of height-related work via plaintiff's own examination before trial transcript testimony wherein he testifies that: he was on the flatbed of the truck at the time of the accident and he was injured when fence sections that were also on the flatbed of the truck at the same level that he was at, struck him. In opposition, plaintiff raises a triable issue of fact. Plaintiffs submit, plaintiff's own examination before trial transcript testimony wherein he testified that: 10-11 iron fences, each weighing about 100 pounds were loaded vertically and stored approximately 6 feet off the floor of a flatbed truck, they were stored inadequately in that they only had a small soft wire protecting them from falling, without any strap being used on the day of the accident. The Court finds that there is a triable issue of fact as to whether this accident involved the elevation-related risks necessary to implicate the protections afforded by Labor Law § 240(1).

Defendant, J.R. Properties of New York, LLC establishes a prima facie case that the plaintiffs' claim under Labor Law § 241(6) must be dismissed as against it. Labor Law § 241(6) imposes a non-delegable duty upon owners and contractors to provide necessary equipment to maintain a safe working environment, provided there is a specific statutory violation causing plaintiff's injury (see, Toefer v. Long Island R.R., supra; Bland v. Manocherian, supra; Kollmer v. Slater Electric, Inc., supra). Pursuant to Labor Law § 241(6): "[a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places". In support of this branch of the motion, defendant, J.R. Properties submits, inter alia, the

examination before trial transcript of defendant, Dr. Kripalani, wherein he testified that: the brick pillar installation work was commenced and completed in early December 2008 by another contractor, there was a two-month gap in between the installation of the brick pillars by the other contractor and the beginning of the fence installation by Trinchese Iron Works. It is undisputed that the accident occurred while plaintiff was unloading fence sections which were going to be installed. Defendant, J.R. Properties established a prima facie case that plaintiff was not in an area of "construction, excavation, or demolition work" on the date of his alleged accident as the work plaintiff was performing was not done in a construction context as defined by the Industrial Code and he was not involved in demolition or excavation work (see, Lioce v. Theatre Row Studios, 7 AD3d 493 [2d Dept 2004]; Rajkumar v. Bud Contracting Corp., 77 AD3d 595 [1st Dept 2010]).

Plaintiffs fail to raise any argument in opposition to the argument of J.R. Properties that the work was not being done in a construction, excavation, or demolition context and as such, summary judgment is granted to defendant, J. R. Properties regarding the Labor Law § 241(6) claim.

**Conclusion**

Accordingly, all of plaintiffs' causes of action are dismissed as against all defendants except for plaintiffs' Labor Law § 240(1) cause of action against defendant, J.R. Properties, which cause of action remains intact.

This constitutes the decision and order of the Court.

Dated: November 30, 2011

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**Howard G. Lane, J.S.C.**