

Spilker v Corin Court II, LLC
2012 NY Slip Op 33126(U)
December 31, 2012
Supreme Court, Suffolk County
Docket Number: 09-41342
Judge: W. Gerard Asher
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SUPREME COURT - STATE OF NEW YORK
L.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 5-8-12 (#007)
MOTION DATE 6-6-12 (#008)
ADJ. DATE 8-28-12
Mot. Seq. # 007 - MG
008 - MG

PETER SPILKER,

Plaintiff,

- against -

CORIN COURT II, LLC, BALSAR COURT LLC,
MAJESTIC CAPITAL PARTNERS LLC and DF
STONE CONTRACTING, LTD.,

Defendants.

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Attorney for Plaintiff
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Bay Shore, New York 11706

MAJESTIC CAPITAL PARTNERS, LLC
Defendant pro se
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Upon the following papers numbered 1 to 19 read on these motions to strike an answer and for summary judgment ____; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; 12 - 19; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers ____; Other ____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by plaintiff to strike the answer of defendant Majestic Capital Partners, LLC and the motion by defendant DF Stone Contracting, Ltd. for summary judgment are consolidated for the purposes of this determination; and it is further

ORDERED that this motion by plaintiff for an order pursuant to CPLR 3126 striking the answer of defendant Majestic Capital Partners, LLC is granted; and it is further



ORDERED that this motion by defendant DF Stone Contracting, Ltd. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims as against it is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff on October 1, 2008 while installing garage door motors in the garage of premises known as 7 Corin Court, Syosset, New York. By his amended complaint, plaintiff alleges a first cause of action claiming common-law negligence in failing to provide a safe place to work, a second cause of action claiming a violation of Labor Law § 200, a third cause of action claiming a violation of Labor Law § 240, and a third cause of action claiming a violation of Labor Law § 241 (6). Plaintiff also alleges violations of sections of the Industrial Code including 12 NYCRR §§ 23-1.5, 23-1.7, and 23-1.21. In his bill of particulars, plaintiff alleges that defendants were negligent in, among other things, permitting certain construction materials to remain on the garage floor creating a dangerous and defective condition and a trap, failing to provide plaintiff with a flat surface on which to erect a ladder, failing to properly supervise the construction site, and failing to make proper and necessary inspections of the construction site.

The preliminary conference order in this action dated October 12, 2010 directed that the parties were to appear for depositions on January 12, 2011. Plaintiff obtained an order of default dated February 18, 2011 (Asher, J.) against defendants Corin Court II LLC and Balsar Court LLC. Then, by order dated May 24, 2011 (Asher, J.), this court granted the motion of counsel for defendant Majestic Capital Partners, LLC (Majestic) for leave to withdraw as attorney of record and stayed all proceedings until July 12, 2011 to afford defendant Majestic the opportunity to retain new counsel.

Plaintiff now moves to strike the answer of defendant Majestic for willful disobedience of the preliminary conference order. Plaintiff explains that examinations before trial were scheduled on November 16, 2011 on which date plaintiff appeared and was deposed but defendant Majestic failed to appear. Examinations before trial were then scheduled for February 15, 2012 but were re-scheduled to March 23, 2012 at the request of defendant DF Stone Contracting, Ltd. (DF Stone). Defendant DF Stone appeared and was deposed on March 23, 2012 but defendant Majestic failed to appear again. Plaintiff asserts that to date, defendant Majestic has failed to communicate with plaintiff's counsel and that the failure of defendant Majestic to appear for a deposition has not only violated the preliminary conference order but has impaired and prejudiced plaintiff by effectively preventing him from proceeding with his action. In support of his motion, plaintiff's submissions include the supplemental summons and amended complaint, the answers of defendants Majestic and DF Stone, the aforementioned prior orders of this Court, a good faith affidavit, and the affidavit of service of this motion indicating that defendant Majestic was served at Woodbury and Jericho, New York addresses. Defendant Majestic has not submitted any opposition to this motion.

It is not an improvident exercise of discretion for a court to strike a party's pleading based upon a willful and contumacious failure to comply with discovery demands or orders (*see Rock City Sound, Inc. v Bashian & Farber, LLP*, 83 AD3d 685, 920 NYS2d 394 [2d Dept 2011]; *cf. Lomax v Rochdale Vil., Inc.*, 76 AD3d 999, 999, 907 NYS2d 690 [2d Dept 2010]; *Moray v City of Yonkers*, 76 AD3d 618, 619, 906 NYS2d 508 [2d Dept 2010]; *Cobenas v Ginsburg Dev. Cos. LLC*, 74 AD3d 1269, 1270, 903 NYS2d 238 [2d Dept 2010]). "Willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply" (*Friedman, Harfenist, Langer & Kraut v Rosenthal*, 79 AD3d 798, 800, 914 NYS2d 196 [2d Dept 2010],

quoting *Savin v Brooklyn Mar. Park Dev. Corp.*, 61 AD3d 954, 954-955, 878 NYS2d 178 [2d Dept 2009]), ““or a failure to comply with court-ordered discovery over an extended period of time”” (*Friedman, Harfenist, Langer & Kraut v Rosenthal*, 79 AD3d at 800, 914 NYS2d 196, quoting *Prappas v Papadatos*, 38 AD3d 871, 872, 833 NYS2d 156 [2d Dept 2007]; see *Russell v B & B Indus.*, 309 AD2d 914, 915, 766 NYS2d 374 [2d Dept 2003]; *Penafiel v Puretz*, 298 AD2d 446, 447, 748 NYS2d 767 [2d Dept 2002])).

Based on the submissions herein, it appears that defendant Majestic has not retained new counsel and thus cannot defend this action (see CPLR 321 [a]). In addition, the record reveals that defendant Majestic has failed over an extended period of time to comply with the Court’s preliminary conference order and has provided no explanation for its non-compliance. Under said circumstances, the Court grants plaintiff’s motion to strike defendant Majestic’s answer (see *Matone v Sycamore Realty Corp.*, 87 AD3d 1113, 930 NYS2d 460 [2d Dept 2011]).

Defendant DF Stone seeks summary judgment dismissing the complaint and all cross claims as against it on the grounds that it was merely a sub-contractor and did not supervise, direct or control plaintiff’s work, did not provide any tools or materials including ladders to plaintiff, and did not provide, own or use any wooden planks located in the garage at the subject premises. The submissions of defendant DF Stone in support of its motion include the supplemental summons and amended complaint, its answer, plaintiff’s original and amended bills of particulars, and the deposition transcripts of plaintiff and Christopher Keegan on behalf of defendant DF Stone. No opposition to the motion has been submitted although the motion was served upon all the parties as evidenced by the affidavit of service.

Plaintiff testified at his deposition on November 15, 2011 that at the time of the accident he was self-employed as a garage door installer and that he was working with defendant Majestic on new residential construction. Plaintiff did not recognize the name of defendant DF Stone. He explained that defendant Majestic called him approximately three weeks prior to the accident to install the motors of the garage doors that he had already installed in the homes under construction at the site. When plaintiff performed a field check on this particular house, the last to have its two garage door motors installed, the garage was clean but when he next arrived to install the motors he noticed that the garage doors were unlocked and that the inside of the garage contained what appeared to be a wood shop with a lot of lumber. He informed Anthony of defendant Majestic, whom he believed to be the foreman, that the garage “was very messy” and that he had a difficult time setting up a ladder so the motor would have to be installed at a later date. Plaintiff stated that Anthony called him approximately two weeks later saying that the garage had been slightly cleaned and asked plaintiff to try to install the motors but plaintiff had the same difficulties during his second attempt. On that second visit, plaintiff observed long timbers in the garage. On his third visit to the premises, on October 1, 2008, plaintiff immediately told Anthony and Don, whom he believed to be one of the owners of defendant Majestic, that a problem remained, the wood was still in the garage but piled differently to allow for a little walking room of approximately two-foot wide aisles. Plaintiff noticed painters working in the hallway vestibule next to the garage. Plaintiff also testified that he learned “from talk ... around the complexes” that the homeowner was constructing his own kitchen and that the wood in the garage belonged to the homeowner. On that third visit to the premises, plaintiff installed the first motor using his own A-frame ladder with rubber feet. While installing the second motor, plaintiff placed either his four-foot or 6-foot A-frame ladder over a one-to-two-foot high pile of lumber and stood on the first rung below the top of

the ladder and as he leaned to the left with his hands full, the ladder became unsteady and fell to the right. Plaintiff fell landing in a sitting position on top of the pile of lumber.

Christopher Keegan testified at his deposition on March 23, 2012 that he is the project manager/operations director for defendant DF Stone, which performs structural and improvement concrete work. He explained that his job duties involved supervising crews and that with respect to the subject project, defendant DF Stone's work included building the foundations of the homes. Mr. Keegan stated that defendant Majestic was the general contractor for this residential construction project and that its principals were named Don Casadenten and Craig. He added that defendant Majestic had a coordinator named Anthony. Mr. Keegan also explained that the involvement of defendant DF Stone in the construction of the homes was limited to the foundations and that once the framing of the homes began, defendant DF Stone and its materials were off of the work site.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d at 324, 508 NYS2d 923, citing to *Zuckerman v City of New York*, 49 NY2d at 562, 427 NYS2d 595).

Labor Law §§ 200, 240, and 241 apply to owners, general contractors, or their "agents" (Labor Law §§ 200 [1], 240 [1], 241). A party is deemed to be an agent of an owner or general contractor under the Labor Law when the party has supervisory control and authority over the work being done and can avoid or correct the unsafe condition (*Linkowski v City of New York*, 33 AD3d 971, 974-975, 824 NYS2d 109 [2d Dept 2006]; *see Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864, 798 NYS2d 351 [2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318, 445 NYS2d 127 [1981]; *Rodriguez v JMB Architecture, LLC*, 82 AD3d 949, 951, 919 NYS2d 40 [2d Dept 2011]; *Damiani v Federated Dept. Stores, Inc.*, 23 AD3d 329, 331-332, 804 NYS2d 103 [2d Dept 2005]). The determinative factor is whether the party had "the right to exercise control over the work, not whether it actually exercised that right" (*Williams v Dover Home Improvement*, 276 AD2d 626, 626, 714 NYS2d 318 [2d Dept 2000]; *see Bakhtadze v Riddle*, 56 AD3d 589, 590, 868 NYS2d 684 [2d Dept 2008]).

To hold a subcontractor or statutory agent of the owner or general contractor absolutely liable under Labor Law §§ 240 or 241, "there must be a showing that the subcontractor had the authority to supervise and control the work giving rise to these duties" (*Kehoe v Segal*, 272 AD2d 583, 584, 709 NYS2d 817 [2d Dept 2000]). "The determinative factor on the issue of control is not whether a subcontractor furnishes equipment but whether it has control of the work being done and the authority to insist that proper safety practices be followed" (*id.* at 584, 709 NYS2d 817; *see Grochowski v Ben Rubins, LLC*, 81 AD3d 589, 916

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NYS2d 171 [2d Dept 2011]; *Temperino v DRA, Inc.*, 75 AD3d 543, 545, 904 NYS2d 767 [2d Dept 2010]; *Everitt v Nozkowski*, 285 AD2d 442, 443, 728 NYS2d 58 [2d Dept 2001]).

Here, the proffered proof demonstrates that defendant DF Stone was not a general contractor or a statutory agent for purposes of liability under Labor Law § 240 (1) and § 241(6) inasmuch as it did not select and coordinate the contractors, schedule and monitor the work, and ensure that safety guidelines were followed (*see Temperino v DRA, Inc.*, 75 AD3d 543, 545, 904 NYS2d 767; *Aversano v JWH Contr., LLC*, 37 AD3d 745, 831 NYS2d 222 [2d Dept 2007]). Plaintiff failed to show the existence of a triable issue of fact. Therefore, defendant DF Stone is entitled to summary judgment dismissing the Labor Law § 240 (1) and § 241(6) claims asserted against it (*see Temperino v DRA, Inc.*, 75 AD3d 543, 545, 904 NYS2d 767).

Defendant DF Stone is also entitled to summary judgment dismissing the Labor Law § 200 and common-law negligence claims asserted against it. Plaintiff's deposition testimony that the lumber materials in the garage belonged to the homeowner who was constructing a kitchen and Mr. Keegan's testimony that defendant DF Stone and its materials would no longer be present on the house site after framing commenced established that defendant DF Stone did not create the alleged dangerous condition (*see id.*). In opposition, plaintiff failed to raise a triable issue of fact (*see id.*).

Accordingly, the motions are granted. The action is severed and continued against the remaining defendants.

Dated: December 31, 2012

W. Gerard Ailner
 J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION