

**Martinez v 305 W. 52 Condominium**

2013 NY Slip Op 31466(U)

June 24, 2013

Supreme Court, Queens County

Docket Number: 12167/11

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IA Part 6  
Justice

JOSE MARTINEZ,  
Plaintiff,

Index  
Number 12167/11

-against-

Motion  
Date March 14, 2013

THE 305 WEST 52 CONDOMINIUM, et al.,  
Defendants.

Motion Cal. No. 80

Motion Seq. No. 4

NORMAN SCHWARTZ,  
Third-Party Plaintiff,

-against-

CARDINAL SALES, INC.,  
Third-Party Defendant.

The following papers numbered 1 to 23 read on this motion by defendants The 305 West 52 Condominium (the Condominium) and Alexander Wolf & Company, Inc. (Alexander Wolf) (the Condominium defendants) pursuant to CPLR 3212 for summary judgment dismissing the complaint asserted against them; this cross motion by Norman Schwartz pursuant to CPLR 3212 for summary judgment dismissing the complaint asserted against him; cross motion by third-party defendant Cardinal Sales, Inc. pursuant to CPLR 3212 for summary judgment dismiss the complaint against Norman Schwartz; and cross motion by plaintiff Jose Martinez pursuant to CPLR 3212(f) for a continuance to permit disclosure to be had, and to compel further discovery.

Papers  
Numbered

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Upon the foregoing papers it is ordered that the motion and cross motions are determined as follows:

Plaintiff Jose Martinez alleges that he suffered personal injuries on February 25, 2011, during the course of his employment as a construction/demolition worker by third-party defendant Cardinal Sales, Inc. (Cardinal Sales), a general contractor hired to perform renovation work in the kitchen of a condominium apartment at 305 West 52nd Street, Apt. 2E, New York, New York. Plaintiff was plastering the kitchen ceiling, while using an A-frame stepladder. Plaintiff alleges the ladder was unsteady, lacked rubber feet, and had one leg made out of a two-by-four piece of wood, and because it was too short for him properly to reach portions of the ceiling to perform the work, he had to stand on the top of the ladder. Plaintiff further alleges that there was a puddle two foot in area on the kitchen floor and in an effort to remediate it, he removed the paper on the floor, replaced it and put the ladder on top of the paper. As he used the ladder, the ladder slipped sideways, causing him to hit the wall and fall to the ground.

Plaintiff Jose Martinez<sup>1</sup> commenced this action against the Condominium, the sponsor of the condominium, and Alexander Wolf, the managing agent of the condominium building, and Norman D. Schwartz and Arline Schwartz, asserting causes of action to recover damages for common-law negligence and violations of Labor Law §§ 200, 240(1) and 241(6). He alleges, among other things, that he was not provided an adequate safety device to perform work at an elevated height and there was a dangerous wet condition on the kitchen floor. Defendant Norman Schwartz interposed a third-party complaint against third-party defendant Cardinal Sales for contribution and indemnification.

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<sup>1</sup>

It appears that plaintiff Jose Martinez filed a supplemental summons and amended complaint in which Maria Martinez is named an additional plaintiff and a derivative claim is asserted by Maria Martinez for damages for the alleged loss of companionship and services. It is unclear, however, whether such supplemental summons and amended complaint were served with leave of court or pursuant to a stipulation (*see* CPLR 1003, 3025[b]).

Issue has been joined with respect to the Condominium defendants and defendant Norman Schwartz, and in relation to the third-party action. Plaintiff has discontinued the action against defendants William K. Langfan and Arron Ziegelman. Defendant Arline Schwartz died prior to the date of the accident.

It is well established that to obtain summary judgment, a movant must establish a cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in the movant's favor, and the movant must do so by tender of evidentiary proof in admissible form (*see* CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980], *see also Rebecchi v Whitmore*, 172 AD2d 600, 601 [2d Dept 1991]). 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 [1985]). Furthermore, the court's function on a motion for summary judgment is issue finding, not issue determination (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

#### Labor Law §§ 240(1) and 241(6)

Labor Law § 240 requires contractors and property owners, engaged in, among other things, the construction, demolition, or repair of buildings or structures, to furnish or erect scaffolding, ladders, pulleys, ropes, and other safety devices, which must be constructed, placed, or operated as to give proper protection for workers (*see* Labor Law § 240[1]). The law is intended to protect workers from gravity-related occurrences stemming from the inadequacy or absence of enumerated safety devices (*see Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]). The duties set forth in Labor Law § 240 are nondelegable, and liability is absolute as to the general contractor or owner when its breach of the statute proximately causes injuries (*see Jock v Fien*, 80 NY2d 965, 967–968 [1992]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509 [1991]). “Labor Law § 241(6) holds ‘owners and contractors and their agents’ liable for failing to comply with rules promulgated by the Commissioner of the Department of Labor (Labor Law § 241[6]; *see Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; Industrial Code [12 NYCRR])” (*Allan v DHL Exp. (USA), Inc.*, 99 AD3d 828 [2d Dept 2012]).

Labor Law §§ 240(1) and 241, however, specifically exempt “owners of one and two-family dwellings who contract for but do not direct or control the work.” This exemption is intended to protect residential homeowners lacking in sophistication or business acumen from their failure to recognize the necessity of insuring against the strict liability imposed by the statute (*see Bartoo v Buell*, 87 NY2d 362, 368 [1996]; *see also*

*Cannon v Putnam*, 76 NY2d 644, 649 [1990]; *Mayen v Kalter*, 282 AD2d 508, 509 [2d Dept 2011]). An owner who uses such a property solely for commercial purposes, however, is not entitled to the statutory exemption (see *Van Amerogen v Donnini*, 78 NY2d 880, 882–83 [1991]). In such circumstance, the property is more accurately considered as a commercial enterprise than as one-or two-family dwelling (see *Lombardi v Stout*, 80 NY2d 290 [1992]; *Van Amerogen v Donnini*, 78 NY2d at 883).

To the extent defendant Norman Schwartz and third-party defendant Cardinal Sales seek summary judgment dismissing the causes of action asserted against defendant Norman Schwartz based upon violations of Labor Law §§ 240(1) and 241(6), they rely solely upon Norman Schwartz’s claim that the homeowner’s exemption found in Labor Law §§ 240(1) and 241(6) applies to him. To satisfy the prima facie burden on the basis of the “homeowner’s exemption,” a defendant is required to demonstrate that the housing unit was a single- or two-family residence (see *Chowdhury v Rodriguez*, 57 AD3d 121, 126 [2d Dept 2008]); and the defendant did not “direct or control” the work being performed (Labor Law § 240[1]) (see *Nai Ren Jiang v Yeh*, 95 AD3d 970 [2d Dept 2012]; *Rodriguez v Gany*, 82 AD3d 863 [2d Dept 2011]). Defendant Norman Schwartz and third-party defendant Cardinal Sales have failed to make a prima facie showing that the apartment was a one-family dwelling used as a residence by Norman Schwartz prior to the renovation, and that he was renovating the apartment with the intent to continue to use it as his one-family dwelling (see *Holifield v Seraphim, LLC*, 92 AD3d 841 [2d Dept 2012]; *Sweeney v Sanvidge*, 271 AD2d 733 [3d Dept 2000]; cf. *Thompson v Geniesse*, 62 AD3d 541 [1st Dept 2009]).

Under such circumstances, that branch of the cross motion by defendant Norman Schwartz and that branch of the cross motion by third-party defendant Cardinal Sales for summary judgment dismissing the causes of action asserted against Norman Schwartz based upon violations of Labor Law §§ 240(1) and 241(6) are denied.

Notwithstanding defendant Norman Schwartz’s admissions that he is the owner of the apartment and he retained third-party defendant Cardinal Sales as the general contractor, the Condominium defendants have failed to make a prima facie showing that they are not an owner of the apartment or the general contractor or statutory agent of the owner under the provisions of Labor Law §§ 240(1) and 241(6) and there is no lessor-lessee relationship between the condominium and defendant Norman Schwartz (cf. *Guryev v Tomchinsky*, 20 NY3d 194 [2012]).

Thus, that branch of the motion by the Condominium defendants for summary judgment dismissing the causes of action asserted against them based upon violations of Labor Law §§ 240(1) and 241(6) is denied.

## Labor Law § 200 and Common-law Negligence

To the extent defendant Norman Schwartz and third-party defendant Cardinal Sales seek summary judgment dismissing the causes of action asserted against Norman Schwartz based upon common-law negligence and a violation of Labor Law § 200, they contend Norman Schwartz lacked any notice of a defective or dangerous condition in the kitchen, and did not exercise supervision or control over plaintiff's work. According to defendant Norman Schwartz, the water had been turned off in the apartment prior to plaintiff's injury, and was not turned on again in the kitchen until after the accident. Defendant Norman Schwartz states that he did not hire plaintiff or direct or control his work, and did not supply him with the ladder or other tools. He admits, however, that a different, unidentified, contractor was renovating the bathroom at the same time as the renovation of the kitchen.

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe construction site" (*Rizzuto v L.A. Winger Contr. Co.*, 91 NY2d 343, 352 [1998]). A cause of action sounding in violation of Labor Law § 200 or common-law negligence may arise from dangerous or defective conditions of the premises, or method or manner in which the work is performed (*see Pilate v 866 U.N. Plaza Assoc., LLC*, 77 AD3d 644, 646 [2d Dept 2010]; *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). At times, both theories of liability may be implicated (*see Reyes v Wentworth Mgt. Corp.*, 83 AD3d 47, 50–52 [2d Dept 2011]).

Defendant Norman Schwartz and third-party defendant Cardinal Sales have shown that Norman Schwartz did not exercise supervisory control or had any input as to the manner in which plaintiff plastered the kitchen ceiling and did not supply or own the ladder (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d at 294; *Ortega v Puccia*, 57 AD3d 54). Likewise, the Condominium defendants have shown they did not exercise supervisory control or had any input in relation to the manner in which plaintiff plastered the kitchen ceiling and did not provide or own the ladder. Plaintiff admitted at his examination before trial that his work was supervised by Rocco Fiorello, a co-employee, and no one else. He also admitted that the ladder was owned and supplied to him by third-party defendant Cardinal Sales. Defendant Norman Schwartz and third-party defendant Cardinal Sales therefore have established entitlement as a matter of law to summary judgment dismissing the cause of action asserted against Norman Schwartz for violation of Labor Law § 200 based on a theory that plaintiff was using a dangerous or defective ladder (*see Tomecek v Westchester Additions & Renovations, Inc.*, 97 AD3d 737 [2d Dept 2012]). In addition, the Condominium defendants have established entitlement as a matter of law to summary judgment dismissing the cause of action asserted against them for violation of Labor Law

as a matter of law § 200 based on a theory that plaintiff was using a dangerous or defective ladder (*see id.*).

Defendant Norman Schwartz and third-party defendant Cardinal Sales, however, have failed to make a prima facie showing that Norman Schwartz did not create, or have actual or constructive notice of, any leak causing water to appear on the kitchen floor in the apartment and contributing to the proximate causation of plaintiff's injuries (*see Seaman v A.B. Chance Co.*, 197 AD2d 612 [2d Dept 1993]). Nor has the Condominium defendants made a prima facie showing that they did not create, or have actual or constructive notice of, any leak causing water to appear on the kitchen floor in the apartment and contributing to the happening of the accident.

Furthermore, plaintiff testified that after he removed the wet paper on the kitchen floor, put more paper down, and then water reappeared, wetting the paper, and "[o]ne could not see where the water was coming from." He also testified that he did not know where the water was coming from, but "possibly" it was "from the pipe from the sink." Defendant Norman Schwartz, third-party defendant Cardinal Sales and the Condominium defendants have not been deposed in this action, and defendant Norman Schwartz has failed to respond to plaintiff's notice of discovery and inspection and a demand for a bill of particulars on affirmative defenses. Furthermore, defendant Norman Schwartz, the Condominium defendants and third-party defendant Cardinal Sales were directed, pursuant to the compliance conference order dated June 18, 2012, to appear for depositions to be held on August 13, 14 and 16, 2012, and defendants were directed to provide responses to plaintiff's discovery demands dated March 30, 2012 within 30 days of the order to the extent not previously provided. When filing the certificate of readiness and note of issue on November 8, 2012, in accordance with the June 18, 2012 order, plaintiff noted the case was not ready for trial, that discovery was outstanding and cited among other things, that defendants had failed to comply with discovery orders. In these circumstances, discovery may yield salient information in the possession of defendant Norman Schwartz, and the Condominium defendants and third-party defendant Cardinal Sales which would allow plaintiff to raise issues of fact as to whether defendant Norman Schwartz or the Condominium defendants created, or had actual or constructive notice of, any leak causing a dangerous wet condition on the kitchen floor of the apartment (*see CPLR 3212[f]*).

That branch of the motion by Condominium defendants for summary judgment dismissing the causes of action asserted against them for violation of Labor Law § 200 and common-law negligence is granted only to the extent of granting summary judgment dismissing the claim asserted against them for violation of Labor Law § 200 based upon a theory that plaintiff was using a dangerous or defective ladder. That branch of the cross

motions by defendant Norman Schwartz and third-party defendant Cardinal Sales for summary judgment dismissing the causes of action asserted against defendant Norman Schwartz for violation of Labor Law § 200 and common-law negligence is granted only to the extent of granting summary judgment dismissing the claim asserted against defendant Norman Schwartz for violation of Labor Law § 200 based upon a theory that plaintiff was using a dangerous or defective ladder. The cross motion by plaintiff Jose Martinez is granted to the extent of directing defendant Norman Schwartz to respond to plaintiff's notice of discovery and inspection dated March 20, 2012 within 15 days of the date of this order, and directing defendant Norman Schwartz, the Condominium defendants and third-party defendant Cardinal Sales to appear for examinations before trial, in the following order-- the Condominium, Alexander Wolf, Norman Schwartz and Cardinal Sales-- at the offices of plaintiffs' counsel, commencing on July 15, 2013 at 10:00 A.M., and continuing each day thereafter until completion.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: June 24, 2013

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