

Riveros v Custom Design Homes

2013 NY Slip Op 33683(U)

March 12, 2013

Supreme Court, Queens County

Docket Number: 11754/06

Judge: Darrell L. Gavrin

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**
Justice

IA PART 27

JUAN RIVEROS,

Index No. 11754/06

Plaintiff,

Motion

Date October 25, 2013

- against-

Motion

Cal. No. 85

CUSTOM DESIGN HOMES, ROOSKA HOME
IMPROVEMENT CORP., ATLANTIC PLUMBING
& HEATING, INC., TOP GUN ELECTRIC, INC.,
CUSTOM DESIGNER HOMES OF LONG ISLAND,
INC., TONY'S STAIRS & RAILING, INC., MIKE
GARCIA SIDING, MIKE GARCIA ENTERPRISES,
INC., GARCIA SIDING, CHARLES GARCIA
ROOFING & SIDING, D&A EXCAVATING, LTD.,
BNB PLUMBING, BNB PLUMBING CORP., AA
DRYWALL, C. SCOTT, C. SCOTT & SONS, INC.,
and MOON BAY DEVELOPMENT CORP.,

Motion

Seq. No. 13

Defendants.

ROOSKA HOME IMPROVEMENTS CORP.,

Third-Party Plaintiff,

- against -

BAYVIEW CUSTOM FRAMING, INC.,

Third-Party Defendant.

The following papers numbered 1 to 13 read on this motion by defendant, AA Drywall, for an order granting summary judgment, dismissing the complaint and all cross claims, and awarding costs assessed against plaintiff pursuant to CPLR 8101, 8106 and 8303-a.

	Papers <u>Numbered</u>
Notice of Motion - Affirmation - Exhibits.....	1-5
Affirmation in Opposition - Exhibits.....	6-8
Reply Affirmation.....	9-10
Reply Affirmation-Exhibits.....	11-13

Plaintiff alleges that he sustained serious injuries on June 26, 2003, during the course of his employment at a construction site of a residential home, located at 6 Kate Court, Southampton, New York, when he stepped onto the stairs leading to the basement and fell through the first stair onto the landing, and then onto the basement floor. Plaintiff was employed by Drywall Unlimited as a sheet rock installer. Plaintiff commenced four separate actions for negligence and violations of Labor Law §§ 200, 240 and 241(6), which were consolidated pursuant to a so-ordered stipulation dated September 30, 2009, under Index No. 11754/2006.

Prior to the consolidation of the four actions, AA Drywall served an answer to the action commenced under Index No. 14134/2006, and interposed 12 affirmative defenses and two cross claims against various defendants, including BNB Plumbing Corp. (BNB Plumbing). BNB Plumbing served an answer to the action commenced under Index No. 14134/2006, and interposed nine affirmative defenses, and a cross claim against various defendants.

AA Drywall and BNB Plumbing discontinued their cross claims against each other pursuant to a stipulation dated September 18, 2012, and filed with the court on January 23, 2013. Plaintiff, pursuant to a stipulation dated January 11, 2013, and filed with the court on February 6, 2013, discontinued the action against Rooska Home Improvements Corp.

Plaintiff was deposed on November 17, 2009, and stated that he was employed by Unlimited Drywall, and that he was working at the job site, a private home that was under construction located at 6 Kate Court, East Quogue, New York, for approximately six days prior to the accident. He stated that he and his co-workers were installing sheet rock on the first floor; that some wires were stuck and he was instructed to go to the basement to pull them; and that when he stepped on the first step of a wooden staircase, he fell through the wood, that his right side touched the landing, and that he fell down to the basement. He stated that he did not remember seeing anyone from AA Drywall on this job site (T. 116); that it had to be the carpenter who installed the steps that went to the basement and that he did not know the name of the carpentry company (T. 129); that the name AA Drywall sounded familiar, but that he did not know exactly where he heard about this entity; that he did not remember seeing any advertisements, vans, or uniforms that may have contained the name AA Drywall at this job site (T. 136); that only he and his co-workers were installing sheet rock or drywall at this job site (T.137); that he never met with any employee of AA Drywall at this location (T. 138); and that he never spoke with any representative of AA Drywall while he was at this location (T.139). He also stated that there was no sheet rock or drywall located at or near the basement stairs (T. 140).

Anthony Alessi, the sole founder, principal and shareholder of AA Drywall Corp., was deposed on January 10, 2012. Mr. Alessi, stated at his deposition and in an affidavit submitted in support of the within motion, that AA Drywall never performed any work at 6 Kate Court; was never present at said premises; and had no involvement with any work performed at that location. Mr. Alessi stated that AA Drywall was only engaged in the installation of sheet rock and spackling, and that it did not install any steps, including interior steps. He further stated that AA Drywall had worked as a subcontractor pursuant to oral agreements with Custom Design Homes, on various construction sites in Quogue and Southampton, but he had no independent knowledge or familiarity with 6 Kate Court, as AA Drywall did not perform any work at 6 Kate Court.

The proponent of a summary judgment motion “must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of its position (*Zuckerman v City of New York*, 49 NY2d 557, *supra*).

The evidence presented sufficiently establishes that AA Drywall did not perform any work at the subject premises and neither controlled nor supervised plaintiff’s work. There is no evidence whatsoever that AA Drywall was ever solicited to perform any work at the subject premises, or that it was engaged as a contractor or subcontractor, or actually performed any work at the subject premises, including the construction of the staircase. Plaintiff has not presented any evidence to the contrary. Since there is no evidence that AA Drywall ever worked at the job site, plaintiff cannot establish liability for common law negligence or for violations of Labor Law §§ 200 240, and 241(6) (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494 [1993]; *Lopes v Interstate Concrete*, 293 AD2d 579 [2d Dept 2002]; *Kelarakos v Massapequa Water District*, 38 AD3d 717 [2d Dept 2007]).

Plaintiff, in opposition, asserts that summary judgment should be denied, as not all the parties have been disposed, including defendant BNB Plumbing. However, it is noted that this court, in an order dated December 19, 2012, granted BNB Plumbing’s motion for summary judgment dismissing plaintiff’s complaint; denied as moot its request to dismiss AA Drywall’s cross claims; dismissed all other cross claims against BNB Plumbing, and denied its request for attorney’s fees and sanctions. This court determined that plaintiff’s counsel, despite multiple orders directing a deposition, chartered his own course with respect to BNB Plumbing, as he failed to depose its sole shareholder and officer, Brian Blatt, when he was available for a deposition in August 2011 and in January 2012, or any time thereafter.

Plaintiff’s contention that summary judgment should be denied, pending further discovery relating to the foregoing factual contentions, does not furnish a reason for delaying the disposition

of AA Drywall's motion (CPLR 3215 [f]; *Connecticut Indem. Co. v Travelers Ins. Co.*, 300 AD2d 530 [2d Dept 2002]; *Petitpain v Curti*, 269 AD2d 376 [2d Dept 2000]). Mere speculation that further discovery will reveal facts that support plaintiff's claims cannot be permitted to delay or postpone summary judgment (*Hampton Living, Inc. v Carlton on the Park, Ltd.*, 286 AD2d 664 [2d Dept 2001]; *Romeo v City of New York*, 261 AD2d 379 [2d Dept 1999]).

Accordingly, AA Drywall's motion for an order granting summary judgment dismissing plaintiff's complaint is granted; the request for sanctions and costs is denied.

Dated: March 12, 2013

DARRELL L. GAVRIN, J.S.C.