

<b>Mishqui v Bemini Constr. Corp.</b>
2013 NY Slip Op 34255(U)
June 24, 2013
Supreme Court, Bronx County
Docket Number: Index No. 21160/12E
Judge: Alexander W. Hunter, Jr.
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 23A**

-----X  
Segundo Daniel Cargua Mishqui,

Index No.: 21160/12E

Plaintiff,

Decision and Order

-against-

Bernini Construction Corp., Pennbus Realities LLC,  
H Eighth Avenue Associates, LLC, S&E Bridge &  
Scaffold, LLC, Rockledge Scaffold Corp., Celta  
Construction Corp., IMDN Holdings LLC and  
Francesco Sireno,

Defendants.

-----X  
**HON. ALEXANDER W. HUNTER, JR.**

Defendant IMDN Holdings LLC’s (“IMDN”) motion for an order pursuant to C.P.L.R. 3211(a)(1), (7), and 3212, dismissing the verified complaint and all cross-claims against said defendant, is granted pursuant to C.P.L.R. 3212.

The cause of action is for personal injuries allegedly sustained by plaintiff while he was performing construction, repairs, and/or alteration work at the premises located at 575 5<sup>th</sup> Avenue, New York, New York (the “subject premises”) on April 20, 2012. Plaintiff alleges violations of Labor Law §§ 200, 240(1), and 241(6) and a claim for common law negligence against all defendants.

Defendant IMDN argues that it cannot be held liable for any of plaintiff’s injuries because it was not the owner of the subject premises on the date of the accident. Consequently, IMDN owed no duty to any party in this action for causes of action stemming from plaintiff’s accident. In support of the instant motion, defendant submits the affidavit of Brian G. Wrynn, the Assistant Manager of IMDN. (Wrynn aff). Mr. Wrynn avers that IMDN did not acquire title to the subject premises until April 30, 2012. (Wrynn aff, ¶ 3). Moreover, prior to April 30, 2012, IMDN asserts that it 1) never leased, operated, controlled, or maintained the subject premises; 2) did not serve as the general contractor for the construction project; 3) did not furnish any labor, equipment, or materials for the construction project; and 4) was not responsible for the safety of the individuals working at the subject premises in connection with the construction project. (Wrynn aff, ¶¶ 5-8). Mr. Wrynn further asserts that plaintiff was never employed by IMDN in any capacity. (Wrynn aff, ¶¶ 9). Defendant IMDN also submits a copy of the deed transferring ownership of the subject premises to IMDN. (Wrynn aff, exhibit A).

First, plaintiff asserts that IMDN waived its right to move for dismissal based on documentary evidence since defendant failed to raise this defense in its answer or a pre-answer motion. Nonetheless, plaintiff contends that the documentary evidence submitted by IMDN does

not conclusively establish a defense to plaintiff's claims. Plaintiff notes that in order to dismiss plaintiff's Labor Law and negligence claims, defendant IMDN must demonstrate that it was not an owner as defined in the Labor Law. Specifically, plaintiff argues that defendant IMDN failed to demonstrate that it was not a contract vendee and therefore, an owner of the subject premises. Plaintiff notes that defendant IMDN failed to submit any evidence to establish that it never contracted with anyone for work to be performed at the subject premises.

Second, since IMDN can be held liable as an owner, plaintiff's verified complaint should not be dismissed for failure to state a cause of action. When viewed in the light most favorable to plaintiff, the verified complaint does state a cause of action against defendant IMDN.

Lastly, plaintiff argues that defendant's motion for summary judgment is premature and should be denied pursuant to C.P.L.R. 3212(f). At this early stage, plaintiff maintains that the following issues still need to be fleshed out during discovery: 1) whether IMDN ever contracted with anyone to provide work at the subject premises; 2) whether IMDN had access to the subject premises on the date of the accident; and 3) whether IMDN had any other interest in the construction project at the subject premises.

In reply, defendant IMDN asserts that plaintiff's opposition papers fail to raise any valid grounds upon which IMDN could be held liable for plaintiff's injuries. Since IMDN established its entitlement to dismissal, it was incumbent on plaintiff to submit evidence in admissible form sufficient to raise a triable issue of fact. Defendant IMDN notes that save for plaintiff, no other party opposes the instant motion. IMDN asserts that codefendants' silence speaks volumes in this instance. Defendant argues that plaintiff's opposition consists solely of an affirmation by counsel replete with speculation. In addition, defendant argues that plaintiff has improperly asserted this new claim against IMDN working as a contract vendee for the first time in his opposition papers.

This court did not receive any papers in opposition to the instant motion from codefendants.

C.P.L.R. 3211(e) provides that a defendant waives a motion pursuant to C.P.L.R. 3211(a)(1), a defense based upon documentary evidence, if the defendant fails to raise that defense in a pre-answer motion or a responsive pleading. Since defendant IMDN failed to raise such a defense in its verified answer, defendant waived its right to bring a motion pursuant to C.P.L.R. 3211(a)(1).

Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue of fact. **Rotuba Extruders v. Ceppos, 46 N.Y.2d 233 (1978); Andre v. Pomeroy, 35 N.Y.2d 361 (1974); C.P.L.R. 3212(b)**. The court's function on a motion for summary judgment is issue finding rather than issue determination. **Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957)**. For summary judgment to be granted, the moving party must establish his or her cause of action or defense by presenting

evidentiary proof in admissible form that would be sufficient to warrant the court in directing judgment in favor of the moving party. **Friends of Animals, Inc. v. Associated Furniture Manuf., Inc.**, 46 N.Y.2d 1065 (1979). Where the moving party fails to make such a showing, the motion must be denied regardless of the sufficiency of the opposition papers. **Winegrad v. New York University Medical Center**, 64 N.Y.2d 851 (1985). Once the movant has made this showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that would require a trial of the action. **Alvarez v. Prospect Hosp.**, 68 N.Y.2d 320 (1986); **Zuckerman v. City of New York**, 49 N.Y.2d 557 (1980). In considering a motion for summary judgment, the evidence must be viewed in the light most favorable to the party opposing the motion. **People v. Grasso**, 50 A.D.3d 535 (1<sup>st</sup> Dept. 2008). However, mere conclusory allegations or defenses are insufficient to preclude summary judgment. **Zuckerman**, 49 N.Y.2d 557.

Labor Law § 200 codifies an owner or general contractor's common law duty to provide a safe place to work for construction site workmen. **Allen v. Cloutier Constr. Corp.**, 44 N.Y.2d 290 (1978). "An implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition." **Russin v. Louis N. Picciano & Son**, 54 N.Y.2d 311, 317 (1981). Labor Law § 241(6) holds owners and general contractors liable for failing to comply with rules promulgated by the Commissioner of Labor. Labor Law § 240(1), otherwise known as the Scaffold Law, "imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury." **Gordon v. Eastern Ry. Supply, Inc.**, 82 N.Y.2d 555, 559 (1993). "[T]he term 'owner' encompasses [a titleholder as well as] a 'person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit.'" **Copertino v. Ward**, 100 A.D.2d 565, 566 (2<sup>nd</sup> Dept. 1984); **Kwang Ho Kim v. D & W Shin Realty Corp.**, 47 A.D.3d 616 (2<sup>nd</sup> Dept. 2008).

This court finds that defendant IMDN has made a prima facie showing of entitlement to summary judgment as a matter of law. It is undisputed that IMDN did not gain title to the subject premises until ten days after plaintiff's accident. IMDN established that it had no connection to the subject premises before April 30, 2012. In opposition, plaintiff failed to raise a triable issue of fact to preclude summary judgment. Plaintiff's new theory of liability, that IMDN was a contract vendee and may have contracted work at the subject premises prior to the acquisition of title, was improperly raised for the first time in opposition to the motion for summary judgment. **See, Harrington v. City of New York**, 6 A.D.3d 662 (2<sup>nd</sup> Dept. 2004); **Slacin v. Aquafredda**, 2 A.D.3d 624 (2<sup>nd</sup> Dept. 2003). Moreover, plaintiff's opposition consisting solely of an attorney's affirmation is not evidence and offers nothing more than hearsay. **Israelson v. Sidney Rubin**, 20 A.D.2d 668 (2<sup>nd</sup> Dept. 1964). Since IMDN was not the owner of the subject premises at the time of plaintiff's accident, IMDN cannot be held liable for any of the claims asserted in this action.

As to the timing of IMDN's motion, plaintiff has failed to offer an evidentiary basis by way of an affidavit to support the contention that "facts essential to justify opposition may exist but cannot be stated..." C.P.L.R. 3212(f). "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the motion." Kimyagarov v. Nixon Taxi Corp., 45 A.D.3d 736, 737 (2<sup>nd</sup> Dept. 2007).

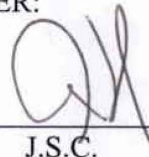
Accordingly, defendant IMDN's motion for summary judgment is granted and the verified complaint and all cross-claims are hereby dismissed as against said defendant.

Movant is directed to serve a copy of this decision and order on all parties by certified mail (return receipt not required) and file proof thereof with the clerk's office.

This constitutes the decision and order of this court.

Dated: June 24, 2013

ENTER:



J.S.C.

**ALEXANDER W. HUNTER JR**