

Ortiz v JGBY Huntlaw, LLC

2014 NY Slip Op 30373(U)

February 7, 2014

Supreme Court, New York County

Docket Number: 152159/13

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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WILSON and ENEDELIA ORTIZ,

Plaintiffs,

Index No. 152159/13

-against-

DECISION/ORDER

IGBY HUNTSLAW, LLC and A.E. GREYSON & CO.,
INC.,

Defendants.
-----X

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affidavits Annexed	<u>2</u>
Reply Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiffs Wilson and Enedelia Ortiz commenced the instant action against defendants Igby Huntlaw, LLC (“Igby”) and A.E. Greyson & Co., Inc. (“Greyson”) to recover for injuries allegedly sustained by Mr. Ortiz when he was working on a construction project in Unit 2 of the building located at 15 Mercer Street, New York, New York (hereinafter the “premises” or the “apartment”) on November 12, 2012. Defendant Igby now moves for an Order pursuant to CPLR § 3212 for summary judgment dismissing plaintiffs’ complaint and any and all cross-claims asserted against it. For the reasons set forth below, Igby’s motion is granted.

The relevant facts are as follows. Igby is the owner of the apartment, a residential condominium unit, which was allegedly purchased as the primary residence for the two owners of Igby, Timothy Haynes and Kevin Roberts. In early 2012, Igby retained Greyson and Mark

Uriu, LLC (“Mark”) to perform certain construction work at the premises. Mr. Ortiz, an employee of Mark, alleges that on or about November 12, 2012, he sustained injuries when he fell from a ladder he was standing on while performing painting work in the apartment. Plaintiffs then brought the instant action against defendants alleging common-law negligence and violations of Labor Law §§ 200, 240 and 241(6). Igby now moves for an Order pursuant to CPLR § 3212 for summary judgment dismissing plaintiffs’ complaint and any and all cross-claims asserted against it.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Wayburn v. Madison Land Ltd. Partnership*, 282 A.D.2d 301 (1st Dept 2001). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Id.*

That portion of Igby’s motion for summary judgment seeking to dismiss plaintiffs’ complaint is granted. As an initial matter, Igby has established its *prima facie* right to summary judgment dismissing plaintiffs’ causes of action alleging violations of Labor Law §§ 240 and 241(6). “Both Labor Law § 240(1) and § 241 impose nondelegable duties upon contractors, owners and their agents to comply with certain safety practices for the protection of workers engaged in various construction-related activities.” *Lieberth v. Walden*, 223 A.D.2d 978, 979 (3d Dept 1996). However, “[i]t is well-settled that an owner of a one- or two-family dwelling is

subject to liability under Labor Law § 240(1) and § 241(6) only if he or she directed or controlled the work being performed.” *Saverino v. Reiter*, 1 A.D.3d 427 (2d Dept 2003); *see also* Labor Law §§ 240(1) and 241(6). “The exception was enacted to protect those people who, lacking business sophistication, would not know or anticipate the need to obtain insurance to cover them against the absolute liability.” *Umanzor v. Charles Hofer Painting & Wallpapering, Inc.*, 48 A.D.3d 552 (2d Dept 2008), citing *Milan v. Goldman*, 254 A.D.2d 263 (2d Dept 1998). “The phrase direct or control is construed strictly and refers to the situation where the owner supervises the method and manner of the work.” *Saverino*, 1 A.D.3d at 427, citing *Kolakowski v. Feeney*, 204 A.D.2d 693 (2d Dept 1994). “[I]t requires a significant degree of participation in the work by the owner before he or she will be deemed to have crossed the line from being a legitimately concerned homeowner to a de facto supervisor.” *Lieberth*, 223 A.D.2d at 979. “Offering suggestions, lending tools, demonstrating areas that need to be painted, or selecting the paint to be used, is insufficient to cast a homeowner in liability.” *Pesa v. Ginsberg*, 186 A.D.2d 521 (1st Dept 1992).

In the instant action, Igby has established its prima facie right to summary judgment dismissing plaintiffs’ Labor Law §§ 240 and 241(6) claims as it has demonstrated that it is the owner of the apartment, a one-family dwelling, and that it did not direct or control the work being performed by plaintiff. Igby has provided the deed to the apartment, which establishes that Igby is its sole owner and that the apartment is a “single residential condo unit.” Further, Mr. Haynes and Mr. Roberts have affirmed that the apartment was purchased as their primary residence and not for commercial purposes. Additionally, Igby has established that it did not direct or control the work being performed by Mr. Ortiz. Both Mr. Haynes and Mr. Roberts have

affirmed that they “never told [plaintiff] or any of the workers what to do or how to their jobs,” “never supervised [plaintiff] or any of the other workers in their jobs” and they “never directed or controlled [plaintiff] or any of the other workers at [their] home.” Further, Mr. Haynes and Mr. Roberts have affirmed that they “did not purchase or provide any of the painting materials used for the renovation of [their] home” and that they did not “purchase or provide any of the tools used to renovate [their] home...including ladders.” In response, plaintiffs have failed to raise an issue of fact sufficient to defeat Igby’s motion for summary judgment. Therefore, as Igby has demonstrated that it is the owner of the apartment, a single family dwelling, and that it did not direct or control the work performed by Mr. Ortiz, it is entitled to summary judgment dismissing plaintiffs’ Labor Law §§ 240 and 241(6) causes of action.

Additionally, Igby has established its prima facie right to summary judgment dismissing plaintiffs’ causes of action for common-law negligence and violation of Labor Law § 200.

“Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work.” *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877 (1993). “An implicit precondition to this duty ‘is that the party charged with that responsibility have the authority to control the activity bringing about the injury.’” *Id.*, citing *Russin v. Picciano & Son*, 54 N.Y.2d 311, 317 (1981). “[W]here such a claim arises out of alleged defects or dangers arising from a subcontractor’s methods or materials, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation.” *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 504 (1993). “This rule is an outgrowth of the basic common-law principle that ‘an owner or general contractor [sh]ould not

be held responsible for the negligent acts of others over whom [the owner or general contractor] had no direction or control.” *Id.*, citing *Allen v. Cloutier Constr. Corp.*, 44 N.Y.2d 290, 299 (1978). “General supervisory authority is insufficient to constitute supervisory control.” *Hughes v. Tishman Constr. Corp.*, 40 A.D.3d 305, 306 (1st Dept 2007).

In the instant action, Igby has established its prima facie right to summary judgment dismissing plaintiffs’ claims for common-law negligence and violation of Labor Law § 200 as it has shown that it did not supervise, direct or control plaintiff’s activities. It is undisputed that Mr. Ortiz’s accident involved the manner in which he performed his work and the equipment with which he was provided, namely, a ladder. Mr. Haynes and Mr. Roberts have affirmed that they did not supervise, direct or control the injury-producing work and that they did not provide any materials, tools or equipment for the work. In response, plaintiff has failed to raise an issue of fact sufficient to defeat Igby’s motion for summary judgment. Therefore, Igby is entitled to summary judgment dismissing plaintiffs’ causes of action for common-law negligence and violation of Labor Law § 200.

Plaintiffs’ assertion that Igby’s motion should be denied as premature on the ground that discovery is outstanding is without merit. “A determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence.” *Ruttore & Sons Constr. Co. v. Petrocelli Constr.*, 257 A.D.2d 614 (2d Dept 1999). Here, plaintiffs fail to demonstrate that any discovery will lead to relevant evidence.

Finally, that portion of Igby’s motion for summary judgment seeking to dismiss the cross-claim for contribution and indemnification asserted against it by Greyson is granted without

opposition.

Accordingly, Igby's motion for an Order pursuant to CPLR § 3212 for summary judgment dismissing plaintiffs' complaint and any and all cross-claims asserted against it is granted. This constitutes the decision and order of the court.

Dated: 2/7/14

Enter: PK

J.S.C.

CYNTHIA S. KERN
J.S.C.