SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. George J. Silver PART 10
Justice

RODRIGUEZ, CARLOS DANIEL

- v -

50 W. 15th STREET, LLC and 15th ST CONSTRUCTION LLC, ALCHEMY PROPERTIES, INC., ALCHEMY ADMINISTRATIVE, LLC, ALCHEMY 15-21 LLC and ALCHEMY CONSTRUCTION, LLC

INDEX NO. 111186-2008
MOTION DATE
MOTION SEQ. NO. 006

The following papers, numbered 1 to 6, were read on this motion for

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits ---------- No(s). 1, 2

Answering Affirmation(s) — Affidavit(s) — Exhibits ---------- No(s). 3, 4

Replying Affirmation — Affidavit(s) — Exhibits ---------- No(s). 5,6

Upon the foregoing papers, it is ordered that the motion is

In this action to recover for personal injuries allegedly sustained during an accident on a construction site, Defendants Alchemy Properties, Inc., Alchemy Administrative, LLC, Alchemy 15-21 LLC, and Alchemy Construction, LLC ("Alchemy Defendants") move pursuant to CPLR §3212 for an order granting summary judgment in favor of the Alchemy Defendants. Plaintiff Carlos Daniel Rodriguez ("Plaintiff") opposes this motion.

According to Plaintiff's complaint, on March 22, 2008 he was employed by third-party Defendant New York Hoist, LLC ("Hoist"). Plaintiff alleges that he was working as a hoist mechanic at a jobsite located at 50 West 15th Street, New York, New York ("the property")on the date of the accident, when he allegedly fell from the hoist to the ground and sustained an injury.

Alchemy Defendants' Motion for Summary Judgement

In support of their motion, the Alchemy Defendants argue specific reasons as to why each individual entity should be dismissed from this action. Alchemy Properties argues the claim against it must be dismissed where its only relationship to the property was as a sales agent for the post-construction apartments. Alchemy Properties further argues they have no involvement with the construction of the building, they were not owners of the property, and they were not negligent in regards to Plaintiff's accident. Thus, it argues that it cannot be considered an owner or general contractor under the New York State Labor Law and is therefore free from liability. Additionally, Alchemy 15-21 LLC argues the claim against it must be dismissed where there is no contract between itself and the owner or contractor for work at the project, nor did Alchemy 15-21 LLC control, direct, or supervise any of the work at the jobsite. Alchemy Construction LLC also argues the claim against it must be dismissed where it entered into an AIA Agreement with the general contractor, 15th Construction, LLC ("General Contractor"), which states it has no ownership interest in the property nor is it the General Contractor of

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: ☐ GRANTED ☐ DENIED ■ GRANTED IN PART ☐ OTHER
3. Check as appropriate: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

the project. Alchemy Construction further argues it was not involved in Plaintiff's accident, even remotely, where it was only a subcontractor with no supervisory role in the project. Lastly, Alchemy Administrative argues the claim against it must be dismissed where it entered into an AIA agreement with the general contractor as well, stating that Alchemy Administrative was to undertake the role of project management and site supervisor, with its role being similar to a construction manager who oversees the day-to-day activities of the project, not a general contractor or owner of the project/site. Additionally, Alchemy Administrative argues it had no supervisory role in the Plaintiff's activities

Further, the Alchemy Defendants argue that Plaintiff himself was the sole proximate cause of the accident and nothing in his testimony suggests any negligence on the part of the Alchemy Defendants. Plaintiff testified that instead of using the ladder or a co-worker's assistance to get off of the hoist, he chose to jump from it, which caused his injuries. Additionally, Plaintiff's cause of action alleging negligence and violations of Labor Law §200 should be dismissed where none of the Alchemy Defendants had notice of any defective or dangerous conditions in existence. Where none of the Alchemy Defendants owned or supplied the hoist in question, these Defendants can only be held liable under common law negligence (and under Labor Law §200) if they had the authority to supervise or control the injury-causing work, which they argue they did not. Additionally, the Alchemy Defendants argue that Plaintiff's cause of action under Labor Law §240(1) must also be dismissed. Although the accident happened on an elevator hoist (an elevation-related hazard most likely covered under the statute), the fall was not proximately caused by the hoist, but rather by Plaintiff's own actions of improperly jumping from the hoist, thus removing Plaintiff's accident from the protections of Labor Law §240(1). Lastly, the Alchemy Defendants argue that Plaintiff's cause of action under Labor Law §241(6) must be dismissed, where these Defendants did not create any of the alleged conditions which resulted in the alleged Industrial Code violations. The Alchemy Defendants argue there is no evidence to support the theory that they caused or created any of the slipping or tripping hazards, nor did Plaintiff even testify that such a hazardous condition caused his fall (where he testified that he chose to jump from the hoist without assistance, which caused his fall).

Plaintiff's Opposition

Plaintiff argues that none of the Alchemy Defendants are entitled to summary judgment. Plaintiff avers that the Owner, 50 W. 15th Street, LLC ("Owner") is intertwined with each of the prime contractors and that the Alchemy entities are corporate alter-egos of the Owner. Further, Plaintiff argues that each of the Alchemy Defendants had the power and authority to control the operation of the hoist and were the functional equivalent of the general contractor on site. Plaintiff argues that the original contract between New York Hoist LLC (third-party Defendant) and the Owner mandated that the Owner operate the hoist and provide a constant presence at the jobsite throughout the project and Mark Erdman ("Erdman"), superintendent for Alchemy Construction, directed the employees to operate the hoist. Plaintiff argues the totality of the evidence with the interlocking corporate contracts and the contractual reservation of control and operation of the hoist to the owner, Alchemy was the functional equivalent of a general contractor and as such, the conflicting role of the Alchemy Defendants creates issues of fact for the jury to determine.

Further, Plaintiff argues that its claims under Labor Law §200 should not be dismissed, where the record is clear that the hoist was kept in an unsafe and unreliable condition and the owner/construction manager/general contractor had actual notice of the condition. Plaintiff testified that the workers were scared to use the hoist, and the problems were conveyed to Erdman. Plaintiff argues the hoist was in ill-repair and continuously breaking down and four days prior to the accident, lawyers for the Owner wrote to New York Hoist complaining of the condition of the hoist. Liability under Labor Law §200 can be established even in the absence of supervisory control if Defendant knew of the existence of the dangerous condition, which the Alchemy Defendants clearly did. Further, even if Plaintiff contributed to his injuries, Defendants are still not entitled to summary judgment, where there may very well be more than one proximate cause of a workplace accident. Additionally, Plaintiff argues that the Owner,

specifically Joel Breitkopf, is intertwined with each and all of the prime contracts, where Joel Breitkopf: 1)signed the contract between the Owner and the General Contractor on behalf of the General Contractor; 2) signed the contract between the General Contractor and Alchemy Administrative, on behalf of Alchemy Administrative, and; 3) signed the contract between New York Hoist and the Owner, on behalf of the Owner. Such intermingling of the entities raises questions of fact as to who had the power and authority to control the operation of the hoist.

Plaintiff further argues that its claims under Labor Law §240(1) should not be dismissed, where the hoist was defective and in ill-repair, compelling Plaintiff to jump from the hoist car, sustaining injuries, to which Defendants have failed to raise any issues of fact. Further, Courts have held that an entity is a "contractor" within the meaning of the statute of it has the right to exercise control over the work. Plaintiff argues that the Alchemy Defendants had the contractual authority, were involved in the work, and had a superintendent present on site responsible for coordinating the project, all of which are significant factors in determining whether a contractor had the authority under Labor Law §240(1). In addition, Plaintiff argues that its claims under Labor Law §241(6) should not be dismissed, where it properly plead violations of Industrial Code §23-7.1 and §23-7.2. Lastly, the law firm who now represents the Alchemy Defendants previously represented 50 W. 15th Street, LLC and 15th St Construction LLC before the Alchemy Defendants were brought into the case and moved for summary judgment on substantially the same facts of the motion. This Court decided that Plaintiff was not the sole proximate cause of his injuries and denied the motion for summary judgment as it applied to Labor Law §240(1) and §200.

Analysis

Labor Law §200 codifies the general duty of landowners and general contractors to protect the health and safety of employees and exists "to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places." (Labor Law § 200) In order to "impose liability under section 200 for subcontractors, 'it is necessary to show authority and control over plaintiff's 'work'" (*Bell v. Bengomo Realty, Inc.*, 36 A.D.3d 479, 481, 829 N.Y.S.2d 42, 45 (2007)). Labor Law §240(1), known as the "scaffold law," states in relevant part that, "All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed." (*Howell v. Bethune W. Associates, LLC*, 33 Misc. 3d 1215(A), 941 N.Y.S.2d 538 (Sup. Ct. 2011)). "While owners and general contractors are generally absolutely liable for statutory violations under Labor Law safety statutes, other parties such as subcontractors may be liable under those statutes only if they are acting as the 'agents' of the owner or general contractor by virtue of the fact that they had been given the authority to supervise and control the work being performed at time of the injury; determinative factor on issue of control is not whether subcontractor furnishes equipment but whether it has control of work being done and the authority to insist that proper safety practices be followed." (*Serpe v. Eyris Productions, Inc.* (1 Dept. 1997) 243 A.D.2d 375, 663 N.Y.S.2d 542).[1]

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[1]Plaintiff's claims under Labor Law §241(6) have been dismissed, in as much as Plaintiff is still only pleading specific violations of sections 23-7.1 and 23-7.2. In its decision on Motion Sequence 005, this Court held, "Section 23-7.1 [b] is too general to provide a predicate basis for a Labor Law § 241[6] claim and section 23-7.2[g] does not apply to the facts of this case. Therefore, without a predicate basis for his Labor Law § 241[6] claim, defendants' motion for summary judgment must be granted for that reason as well. Plaintiffs Labor Law § 241[6] claim is severed and dismissed." While Motion Sequence 005 was only made on behalf of 50 W. 15th Street LLC and 15th Street Construction, LLC, this Court found that the violations plead were inapplicable to the facts of the case, which have not changed with the addition of the new moving Defendants

Alchemy Properties

Alchemy Properties, Inc. ("Alchemy Properties") makes its prima facie case that it should not be held liable under Labor Law §200. Alchemy Properties submitted an affidavit from Kenneth Horn, sole shareholder and owner of Alchemy Properties, stating it had no involvement in the construction of the building located on the Property and is only involved to the extent that it is a sales agent for the Owner on post-construction apartments. However, Plaintiff raises issues of fact as to Alchemy Properties liability where it attaches Daily Field Logs (Exhibit E to the Opposition) which list Alchemy Properties as Project Superintendent on various logs, as well as provides proof that Alchemy Properties supplied laborers on various days for the Project. This Daily Field Log conflicts with Kenneth Horn's affidavit, raising issues of fact as to Alchemy Properties role in the Project and its authority to control the work on the Project in general, including the work of Plaintiff specifically. The Daily Field Logs list NY Hoist under the Equipment Operating Section, thus creating additional issues of fact as to the supervisory role of Alchemy Properties over NY Hoist. While Defendants allege that the Daily Field Logs were actually compiled by Alchemy Administrative, not Alchemy Properties and allege in Reply that the label on the logs is a computation error, there are additional issues of fact raised by Plaintiff. Rocine Auringer, employee of New York Hoist, testified at his deposition that some of the general contractors employees were trained in operating the hoist, and he identified Alchemy Properties as the contractor responsible for operating the hoist, thus raising issues of fact as to whether Alchemy Properties had control over Plaintiff's work and over New York Hoist in general.

Alchemy Properties has made its prima facie case that it should not be held liable under Labor Law §240(1) as well. Again, Alchemy Properties stated it had no involvement in the construction of the building and it had no control over Plaintiff's work. Plaintiff raised questions of fact (as indicated in the above paragraph) as to the supervisory role of Alchemy Properties, and the extent it had the authority to supervise Plaintiff's work. Under Labor Law §240(1), "When the work giving rise to these [nondelegable] duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under section 240." (*Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 46 [1st Dept 2005]) There remain questions of fact as to Alchemy Properties' authority to supervise and control the work, based upon the Daily Work Logs and the testimony from Rocine Auringer.

Alchemy Administrative, LLC

Alchemy Administrative, LLC makes its prima facie case that it should not be held liable under Labor Law §200, where it provided that it is neither an Owner or a General Contractor, nor does it control or supervise Plaintiff's work through its Affidavit submitted by Joel Breitkopf, a member of Alchemy Administrative. Breitkopf argues the contract he executed on behalf of Alchemy Administrative was only to provide labor for the project, having no connection with the operation of the hoist. However, Defendants also contend that Erdman, the site superintendent, is actually employed by Alchemy Administrative. Defendants also contend that the Daily Field Logs were compiled by Alchemy Administrative. Thus, Plaintiff raised issues of fact as to Erdman's role on site, and more specifically, his role in instructing his laborers to operate the elevator. Plaintiff testified that he and other employees complained of the hoist problems to Erdman, and Erdman directed himself and other employees to operate the hoist. In doing so, Plaintiff raises additional issues of fact as to notice of the defect/dangerous condition of the hoist.

While Alchemy Administrative, LLC makes its prima facie case that it should not be held liable under Labor Law §240(1), for the same reasons as stated above, Plaintiff raises issues of fact as to why Alchemy Administrative should be held liable as an agent of the general contractor/owner. There is testimony from both Auringer and Plaintiff alleging Erdman's supervision of Plaintiff's work and over the hoist in general.

Alchemy 15-21 LLC

Alchemy 15-21 LLC makes its prima facie case that it should not be held liable under Labor Law §200, where it provided evidence that there is no contract between it and the owner/contractor for work at the project through its Affidavit from Joel Breitkopf, a member of Alchemy 15-21 LLC. Breitkopf states in his Affidavit that Alchemy 15-21 LLC is not at all involved in the construction of the building. Further, Alchemy 15-21 LLC argues it did not control, direct, or supervise any of the work at the jobsite. Plaintiff offers no specific evidence in support of a claim against Alchemy 15-21 LLC and fails to raise any triable issues of fact specific to Alchemy 15-21 LLC. Plaintiff's allegations that "Mark," the super, is employed by Alchemy Administrative, Alchemy Properties/Alchemy Construction, and Alchemy 15-21 LLC, is purely speculative and such an assertion is not in itself enough to defeat Alchemy 15-21 LLC's motion for summary judgment, especially where Defendants, in Reply, admit that Mark Erdman is employed by Alchemy Administrative, LLC. "Speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact *(Castore v Tutto Bene Rest. Inc.*, 77 AD3d 599 [1st Dept 2010]).

Additionally, Alchemy 15-21 LLC makes its prima facie case that it should be free from liability under Labor Law §240(1), where there is no evidence that it is either the Owner, General Contractor, subcontractor, or agent of the Owner/general contractor. Plaintiff fails to raise issues of fact as to its involvement, if any, with the project or the Plaintiff's work.

Alchemy Construction

Alchemy Construction, LLC makes its prima facie case that it should not be held liable under Labor Law §200, where it also provided that it is neither an Owner or a General Contractor, nor does it control or supervise Plaintiff's work through its Affidavit submitted by Joel Breitkopf, a member of Alchemy Construction, LLC. Breitkopf argues the contract he executed on behalf of Alchemy Construction was only to provide labor for the project, having no connection with the operation of the hoist. Plaintiff raises issues of fact with the deposition testimony of Tengan Koroma, an employee of Alchemy Construction, who stated that he worked on the elevator the day of the incident before the New York Hoist operator arrived and was instructed by Erdman to operate the elevator on that day. Further, Plaintiff raises additional issues of fact as to Alchemy Construction's notice of the defect/dangerous condition of the hoist, where a letter was written to Auringer on March 18, 2008, copying Breitkopf, explaining the dangerous condition in which the hoist was being maintained. Plaintiff raises questions of fact that Breitkopf, as a member of Alchemy Construction, knew of the defective condition of the hoist prior to the accident.

While Alchemy Construction, LLC makes its prima facie case that it should not be held liable under Labor Law §240(1), Plaintiff raises issues of fact as to whether Alchemy Construction was acting as the 'agents' of the owner/general contractor by virtue of the fact that they had been given the authority to supervise and control the work being performed at time of the injury. Under Labor Laws §240(1), "When the work giving rise to these [nondelegable duties] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under section 240." (*Morales, supra*) Based on Koroma's testimony, there are issues of fact outstanding as to Alchemy Construction's authority and control over the hoist and whether it provided proper safety regulations. In *Uluturk v. the City of New York*, a "subcontractor that controlled ventilation duct work at construction project was liable for injuries sustained when employee of roofing subcontractor fell through uncovered and unguarded ventilation duct, absent evidence of employee's comparative negligence." (*Uluturk v. The City of New York*, 298 A.D.2d 233) *Uluturk* is factually similar to the instant case, where Alchemy Construction debatably controlled the elevator/hoist at the construction site, and Plaintiff was injured in a hoist accident. Questions of fact remain regarding Alchemy Construction's

control over the hoist, and whether it is shared, and to what extent, with New York Hoist. Accordingly, it is hereby

ORDERED that Alchemy Properties, LLC's motion for summary judgment is denied; and it is further

ORDERED that Alchemy Administrative, LLC's motion for summary judgment is denied; and it is further

ORDERED that Alchemy Construction's motion for summary judgment is denied; and it is further

ORDERED that Alchemy 15-21 LLC's motion for summary judgment is granted; and it is further

ORDERED that counsel for parties are to appear at a conference on June 10, 2014 at 9:30 AM in Room 422, 60 Centre Street, New York, New York 10007; and it is further

ORDERED that the movant shall serve a copy of this order, with Notice of Entry, upon all parties, as well as upon the Clerk of the Trial Support Office (60 Centre Street, Room 158) within thirty (30) days of entry

FILED

APR 11 2014

COUNTY CLERK'S OFFICE
NEW YORK

George J. Silver J.S.C.

GEORGE J. SILVER

Dated: APR 11 2014
New York County