

Galej v Madison

2014 NY Slip Op 31780(U)

July 7, 2014

Supreme Court, New York County

Docket Number: 103503/2011

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____
Justice _____

PART _____

Index Number : 103503/2011
GALEJ, KRZYSZTOF
vs.
PONTE GADEA MADISON
SEQUENCE NUMBER : 006
006

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

is decided in accordance with the annexed decision.

FILED

JUL 11 2014

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 7/7/14

CRK, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
KRZYSZTOF GALEJ,

Plaintiff,

Index No. 103503/2011

-against-

PONTE GADEA MADISON, LLC, DOMAIN
CONSTRUCTION OF NY LLC, M&R SCHOENBACH INC.,
CASSIDY TURLEY and ROYALE CONSTRUCTION, LLC,

Defendants.
-----X

PONTE GADEA MADISON and ROYALE
CONSTRUCTION, LLC

Plaintiff,

Index No. 590145/2013

-against-

FILED

DECISION/ORDER

M&R SCHOENBACH INC. and HAMPTON JUL 11 2014
ELECTRICAL CORPORATION,

NEW YORK
COUNTY CLERK'S OFFICE
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
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	3
Answering Affidavits to Cross-Motion.....	4
Replying Affidavits.....	5
Exhibits.....	6

Plaintiff commenced this action to recover for injuries he allegedly sustained while

performing work at a construction site. Defendant Cassidy Turley (“Turley”) now moves for an order pursuant to CPLR § 3212 granting summary judgment dismissing all claims and cross-claims asserted against it. For the reasons set forth below, Turley’s motion is granted.

The relevant facts are as follows. This is an action to recover monetary damages for personal injuries suffered by the plaintiff as a result of a construction site accident that occurred on November 4, 2010 at 366 Madison Avenue, New York, New York (the “Building”). At the time of the accident, the 10th and 11th floors of the Building were being renovated and plaintiff was there to perform electrical work on behalf of his employer defendant Hampton Electric Corporation (“Hampton”). Specifically, plaintiff alleges that he was pulling electrical cables through metal studs on the 11th floor of the Building when the 6 foot A-frame ladder he was standing on “slipped and [he] started falling.” According to plaintiff, it was at this time, while he was falling, that he was caused to cut his right hand, which resulted in an open fracture of the index finger on his right hand.

At the time of the alleged accident, Turley was acting as the Building’s manager pursuant to a “Management and Leasing Agreement” entered into between defendant Ponte Gadea Madison, LLC (“Ponte Gadea”), the owner of the Building at time of the accident, and Turley’s predecessor Colliers ABR, Inc. sometime in 2006 (the “Contract”). Under the Contract, Turley’s responsibilities as to renovation projects at the Building was as follows:

if it becomes advisable or necessary to make (i) extraordinary repairs, (ii) repairs or alternations required to comply with laws or insurance requirements, (iii) or engage in extensive reconstruction or rehabilitation of any part of the Building (including replacement of Building systems or equipment or fixtures), or (iv) if Agent is called upon to perform any extraordinary services not customarily a part of the usual services performed by a managing agent, then in all instances, but only if requested by Owner, it is agreed by the parties hereto that Agent shall during the term hereof manage and

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coordinate within the Building the making by others of any and all such alteration, reconstruction, compliance alterations, rehabilitation or extraordinary repairs by any and all contractors of Owner and in all instances receive for such coordination an additional fee therefore . . .

According to the testimony of Kevin Hoey, who appeared for a deposition on behalf of Turley, Turley was not compensated to oversee the renovation project herein at issue. However, Mr. Hoey testified that Turley was paid an "administrative fee" in relation to the renovation work for addressing "the administrative issues related to the project." Specifically Mr. Hoey testified that Turley's interaction with the contractors was limited to ensuring that "certain documents were in place such as permits and insurance." Mr. Hoey further testified that Turley was not responsible for the safety of the renovation project or, specifically, for supervising work at a height on the renovation project. However, according to the deposition transcript of Robert Schoenbach, who appeared for deposition on behalf of defendant M&R Schoenbach Inc., the general contractor for the renovation project, Turley had the authority to stop any construction at the Building if it saw something unsafe or incorrect.

On or about March 23, 2011, plaintiff commenced the instant action asserting claims for negligence and violation of Labor Law sections 200, 240(1) and 241(6). Turley now moves for summary judgment dismissing all claims and cross-claims asserted against it on the ground that it was only acting as the Building manager at the time of the accident and as such cannot be held liable for plaintiff's injuries. Plaintiff, in opposition, asserts that Turley may be held liable as it was acting as Ponte Gadea's agent at the time of the accident and controlled the work being performed by plaintiff.

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). 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.” *See Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Id.*

In the present case, Turley has established its *prima facie* right to summary judgment dismissing this action as against it. Both Labor Law sections 240 and 241 impose nondelegable duties upon general contractors, owners and their agents to comply with certain safety practices for the protection of workers engaged in various construction-related activities. *See Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 317-318 (1981). It is well settled that “[o]nly upon obtaining the authority to supervise and control does [a third-party] fall within the class of those having nondelegable liability as an ‘agent’ under sections 240 and 241.” “Thus, unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law.” *Walls v. Turner Constr. Co.*, 4 N.Y.3d 861, 864 (2005). General supervision and coordination of the worksite is insufficient to trigger liability. *See Singh v. Black Diamonds LLC*, 24 A.D.3d 138, 140 (1st Dept 2005). Similarly, Section 200 of the Labor Law is a codification of the common-law duty to provide an employee with a safe place to work. *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877 (1993). Thus, “[a]n 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.*

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(quoting *Russin v. Picciano & Son*, 54 N.Y.2d 311, 317 (1981)).

In the present case, Turley has met its *prima facie* burden by demonstrating that it had no authority, contractual or otherwise, to supervise, direct or control plaintiff's activities that brought about his injuries on the day of the accident. As an initial matter, there is no language in the Contract between Turley and Ponte Gadea delegating any duty to oversee the safety of the construction workers at the Building during the project. Moreover, during his deposition, Kevin Hoey, Vice President of Turley, testified that Turley was in no way, shape or form in charge of supervising work at height at the jobsite. Instead, Mr. Hoey made clear that Turley was to act as the owner's agent with respect to administrative issues related to the renovation project only and Turley's interaction with contractors was limited to ensuring that certain documents were in place such as permits and insurance. Thus, Turley had no agency to control the work of plaintiff as he was performing electrical work at the time of his accident, which clearly falls outside the ambit of "administrative issues."

In response, plaintiff has failed to raise an issue of fact sufficient to defeat Turley's motion for summary judgment. As an initial matter, contrary to plaintiff's assertion, Mr. Schoenbach's deposition testimony that Turley had the authority to stop any construction work at the project is insufficient to trigger liability as this evidences only general supervision and coordination over the Building and not supervisory authority over the specific activity giving rise to plaintiff's injury. Additionally, the terms of the Contract relied upon by plaintiff to support its position that Turley had the requisite control over plaintiff's activities on the day of the accident are insufficient to support such a finding as they only confer a general authority to manage and coordinate construction projects occurring at the Building and not the specific authority to

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manage and oversee electrical work being performed during the construction project. Thus, the evidence submitted by plaintiff in opposition is insufficient to defeat Turley's motion for summary judgment.

Additionally, to the extent that plaintiff contends summary judgment should be denied as Turley's motion is only supported by unsigned deposition transcripts, such contention is without merit. Unlike the Second Department case law cited by plaintiff in support of this position, the First Department has found that an unsigned deposition transcript may be used when it is otherwise certified as accurate. *See Zabari v. City of New York*, 242 A.D.2d 15, 17 (1st Dept 1998). Here, even though the deposition transcripts relied upon by Turley in its moving papers were unsigned they were otherwise certified as accurate by the court reporter. Thus, the court finds that the transcripts are admissible and are sufficient to support Turley's motion for summary judgment.

Based on the foregoing, Turley's motion for summary judgment dismissing all claims and cross-claims asserted against it is granted. This constitutes the decision and order of the court.

Dated: 7/7/14

FILED
Enter:
JUL 11 2014
NEW YORK
COUNTY CLERK'S OFFICE

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J.S.C.