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

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FRANCISCO RODRIGUEZ AND MARIE ESPINOSA RODRIGUEZ,

Plaintiff, Index No.156290/2012

-against-

225 EAST 43RD STREET REALTY CORP AND THE FRENCH JAPANESE EDUCATIONAL INSTITUTE OF NEW YORK,, INC D/B/A LYCEUM KENNEDY INTERNATIONAL SCHOOL,

Defendants.

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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
Cross-Motion and Affidavits Annexed.....	2,3
Answering Affidavits to Cross-Motion.....	4
Replying Affidavits.....	5,6, 7

Plaintiff Francisco Rodriguez commenced this action to recover for injuries he allegedly sustained while performing work at a construction site. He has brought the present motion for partial summary judgment on the issue of liability based on his claims brought pursuant to Labor Law §§ 240 and 241(6). Defendant 225 East 43rd Street Realty Corp. ("Realty") has brought a cross-motion for summary judgment on its cross-claim against defendant The French Japanese Educational Institute of New York ("Lyceum") for indemnification and to dismiss plaintiff's lost wages claim. Defendant Lyceum has also brought a cross-motion for summary judgment dismissing plaintiff's complaint and the cross-claim asserted against it by Realty. As will be explained more fully below, the plaintiff's motion and Realty's cross-motion are denied and

Lyceum's cross-motion is granted.

The relevant facts are as follows. Plaintiff commenced this action to recover monetary damages for personal injuries he suffered at the conclusion of a construction project on June 7, 2012 at 225 East 43rd Street, New York, New York (the "Building). He claims that he was injured while dismantling a pipe scaffold on the rooftop of 230 East 44th Street, which was the building adjacent to the Building owned by defendant Realty. At the time of the accident, he was an employee of A-1 Mabetex Construction Corp. ("A-1"). Plaintiff alleges that he was injured when the wooden plank on the pipe scaffolding he was dismantling broke, causing him to fall to the rooftop 15 to 18 feet below.

Hisashi Hariya testified on behalf of both defendants, as follows. He testified that both defendants, the owner of the Building and the school which leased a portion of the Building, were owned by the same person, Myung Sonoda. Realty owned the Building and leased a portion of the Building to Lyceum, which operated a school. Lyceum pays rent to Realty pursuant to the Lease and each defendant maintains its own financial records and each is insured by a different insurance company. Although Mr. Hariya is an employee of Lyceum, he also performs work for Realty including working on the bills for Realty. In 2012, Realty undertook a construction project to extend the second floor lunchroom on the northern side of the Building, by adding 800 square feet to the second floor of the Building. Pursuant to its contract with Realty, A-1 performed the exterior work associated with the second floor extension, which required it to install scaffolding on the roof of the adjacent building. Mr. Hariya unambiguously testified that, although he was the person who negotiated the contract, it was Realty rather than the school which entered into the contract with A-1 to extend the second floor. Although the

contract itself states that it is between the construction company and Anything Construction LLC, Hariya testified that the contract was between the construction company and Realty. Mr. Hariya negotiated the contract on behalf of Realty and required A-1 to obtain coverage naming Realty as an insured. He also testified that Ms. Sonoda signed the contract with A-1 in her capacity as owner of Realty. Moreover, all of the invoices from the construction company are made out to Realty, not to Lyceum. Mr. Hariya did testify that some of the money for the construction came out of the school's bank account and some of the money came out of Realty's bank account but that the money which came out of the school's bank account was repaid to the school by Realty. He also testified that nobody from the school had anything to do with the actual construction. He testified that the only time he spoke to the construction workers was to tell them to be quiet because school was going on.

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, Lyceum 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). The courts have held that there is no liability against a lessee of the premises pursuant to Labor Law sections 240 and 241 where the lessee establishes that it did not hire the contractor to do the renovation work that plaintiff was performing at the time of the accident, did not otherwise have control over the work site or have any authority over safety measures at the work site or supply the safety devices used at the work site. *See Pest v. Beeper Connection Paging*, 302 A.D.2d 249 (1st Dept 2003); *Bart v. Universal Pictures*, 277 A.D.2d 4, 5 (1st Dept 2000); *Guzman v. L.M.P. Realty Corp.*, 262 A.D.2d 99 (1st Dept 1999).

In the present case, Lyceum, as a lessee in the Building, has met its *prima facie* burden that is has no liability pursuant to Labor Law sections 240 or 241 by demonstrating that it did not hire the contractor A-1 to perform the work at the Building, that it did not have control over the work site or have any authority over safety measures at the work site or supply the safety devices used at the work site. Mr. Hariya's testimony, which was not contradicted, established that it was Realty rather than Lyceum which entered into the contract with A-1 for the performance of the construction work, none of the contract documents and change orders refer to or make any mention of Lyceum and the invoices for the work are addressed to Realty rather than to Lyceum. Moreover, it was Realty rather than Lyceum which paid A-1 for the work. Mr. Hariya further testified, again uncontradicted, that Lyceum did not exert any control over A-1's work or supervise A-1's work or supply any equipment to A-1. Rather, according to the testimony of Plaintiff and Ventura, his fellow employee, it was either Mr. Dumani or plaintiff himself who supervised the work.

In response, plaintiff and Realty have failed to raise an issue of fact sufficient to defeat Lyceum's motion for summary judgment dismissing the complaint against it. Although plaintiff points to evidence that Mr. Hariya, who was an employee of Lyceum, was involved in the negotiation of the contract with A-1, Mr. Hariya testified that he was involved in negotiating the contract for Realty rather than for Lyceum. Other than the mere fact that Mr. Hariya was involved in negotiating the contract with A-1, plaintiff has failed to present any evidence that it was Lyceum rather than Realty who entered into the contract for the construction work with A-1 or exercised any supervision or control over the work performed by A-1 or plaintiff. Similarly, there is no evidentiary support for defendant Realty's position that Lyceum was acting as an agent for the owner with respect to the construction project. To the contrary, Mr. Hariya unambiguously testified that all of his actions with respect to the construction project were done on behalf of Realty rather than Lyceum and no other evidence has been offered to the contrary by any other witness, including Ms. Sonoda who would be able to provide contrary evidence if it existed. Moreover, the mere fact that the school ultimately paid the owner of the Building for the work performed after it was completed does not establish that Lyceum had the authority to control or supervise the manner in which the work was performed.

This court also finds that defendant Lyceum is entitled to summary judgment dismissing Realty's cross-claim against it for contractual indemnification and that Realty's motion for summary judgment on its contractual indemnification claim against Lyceum should be denied. Realty argues that it is entitled to contractual indemnification pursuant to the lease agreement between the parties. The relevant portion of the lease provides that the tenant shall indemnify the owner for any damages "to which the owner may be subject to or suffer by reason of anything

whatsoever arising from or out of the occupancy by or under the this lease...." This court finds that the accident at issue, the worker's fall from a scaffold on the adjoining roof, does not arise from or out of Lyceum's occupancy by or under the lease. Lyceum uses and occupies the leased premises for the purposes of operating a school. The construction work being performed by A-1 pursuant to its contract with the owner of the Building on the roof of the adjoining building does not arise out of the tenant's occupancy of the premises for the purposes of running an educational institution. The result might be different if it was Lyceum which had entered into the Agreement with A-1 to perform the work but this court has already found that it was Realty rather than Lyceum which entered into the contract with A-1 to perform the work which allegedly resulted in the injuries. Notably, Realty has not submitted any affidavit from Ms. Sonoda, the owner of the Building and the School, which contradicts the testimony of Mr. Hariya that it was the Building which hired the contractor and that the school had no involvement in the construction process. Under these circumstances, the court finds that based on the unambiguous language in the lease, the accident did not arise out of the tenant's occupancy of the premises. The court does note that the construction work did ultimately benefit the school but that is not enough by itself to establish that the work arose out of the tenant's occupancy.

This court also finds that plaintiff is not entitled to partial summary judgment against Realty on its Labor Law section 240 and 241 claims as there is a bona fide issue as to plaintiff's credibility. Even where a plaintiff establishes a prima facie claim for liability pursuant to Labor Law sections 240 or 241, summary judgement may be denied where the defendant raises a bona fide credibility issue with respect to plaintiff's testimony. *See Weber v. Baccarat, Inc.*, 70 A.D. 3d 487 (1st Dept 2010). In the present case, defendants have raised a bona fide credibility issue

with respect to plaintiff's version of how the accident occurred. Plaintiff has given three materially different accounts as to the manner in which he suffered the injuries that he claims were caused at the construction site. Although he claims in this lawsuit that his injuries were caused by the fall from the scaffold, he made prior claims that his injuries were caused by a fall down a flight of stairs in his home and that the accident occurred at the Carlton Hotel at 88 Madison Avenue. At his deposition and in an affidavit attached to his motion for partial summary judgment, plaintiff stated that his injuries occurred when a scaffold plank broke underneath him causing him to fall. However, at the hospital where he went to be treated for his injuries, he stated that he fell down a flight of stairs at his home, allegedly to avoid questions about his employment status. At his deposition, he claimed that he lied to the hospital about how his injuries occurred. When he went to consult a worker's compensation attorney with Mr. Dumani after the accident, he let Mr. Dumani tell the attorney in his presence that the accident happened at the Carlton Hotel and did not correct him. Plaintiff then signed a C-3 Employee Claim form in which he attested that his accident occurred at the Carlton Hotel. He later testified at his deposition that he signed this form knowing it to be false because he wanted to cure himself. Based on the three different versions plaintiff has put forth as to what caused his injuries, there is a bona fide issue as to the credibility of his testimony in this case as to how the accident occurred.

The final issue which the court must address is the motion by Realty for summary judgment dismissing plaintiff's claim for lost wages. The court finds that defendant Realty is not entitled to summary judgment dismissing the lost wages claim as the issue of whether plaintiff can establish this claim is a question of fact for the jury. Defendant correctly points out

that under the law, an award for past and future wages cannot be based solely on plaintiff's testimony regarding his prior employment, unsubstantiated by any tax returns or W-2 forms, where the current employment is only for a short period. *Delvalle v. White Castle System,* 277 A.D.2d 13 (1st Dept 2000). However, in the present case, one of the owners of A-1 testified that plaintiff had worked for the company for almost five years or more until the day after the accident. Moreover, there is testimony and documentary evidence that instead of being paid directly as a W-2 employee, plaintiff was paid for his work by having the defendants issue checks to his company, Selena Corp. Based on this evidence, the issue of plaintiff's claim for lost wages should be resolved by the trier of fact rather than on a dispositive motion.

Based on the foregoing, plaintiff's summary judgment motion is denied in its entirety, Realty's cross-motion for summary judgment is denied in its entirety and Lyceum's cross-motion to dismiss the complaint and cross-claim against it is granted. This constitutes the decision and order of the court.

Dated: 7/9/14

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.