Casanova v Construction by Design NYC LLC
2015 NY Slip Op 30447(U)
February 19, 2015
Supreme Court, Queens County
Docket Number: 16402/12
Judge: Darrell L. Gavrin
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** Justice | IA PART 27

RICARDO CASANOVA,

Plaintiff,

- against-

CONSTRUCTION BY DESIGN NYC LLC and 317 E. 90 REALTY, LLC,

Defendants.

Index No. 16402/12

Motion Date September 28, 2014

Motion Cal. No. 38 & 39

Motion Seq. No. 6 & 7

The following papers numbered 1 to 7 read on this motion by defendant, 317 E. 90 Realty, LLC, for, *inter alia*, summary judgment dismissing plaintiff's causes of action based on common-law negligence and Labor Law§ 200, and on this motion by defendant, Construction By Design NYC, LLC, for summary judgment dismissing the complaint against it

	Papers Numbered
Notice of Motion - Affirmation - Exhibits............................	1-2
Affirmation in Opposition - Exhibits....................................	3-5
Reply Affirmation..	6
Memoranda of Law	7

Upon the foregoing papers, it is ordered that the branch of the motion by defendant, Construction By Design NYC, LLC, for summary judgment dismissing the plaintiff's complaint pursuant to the exclusivity provisions of the Workers' Compensation Law is granted. The remaining branches of the motion by defendant, Construction By Design NYC, LLC, are denied as moot. The branch of the motion by defendant, 317 E. 90 Realty, LLC, for summary judgment dismissing the plaintiff's cause of action for common-law negligence asserted against it, is granted. The branch of motion by defendant, 317 E. 90 Realty, LLC, for summary judgment dismissing the plaintiff's cause of action based on Labor Law § 200, is granted. The branch of the motion by defendant, 317 E. 90 Realty, LLC, for summary judgment dismissing the cross claims asserted against it is granted. The branch of the motion by defendant, 317 E. 90 Realty, LLC, which is for summary judgment on its cross claim for common-law indemnification, is denied. The branch of the motion by defendant, 317 E. 90 Realty, LLC, for summary judgment on its cross claim for contractual indemnification is conditionally granted in the event that it is found to be liable to the plaintiff pursuant to Labor Law § 241 (6).

[* 2]

I. The Facts and Allegations

A. The Deposition Testimony of Plaintiff Ricardo Casanova

Plaintiff, Casanova, an experienced refinisher of floors, owned a company called Casanova NY Services. Plaintiff's company obtained work from defendant, Construction By Design NYC, LLC (CBD), a business owned by Gino Rodriguez. Rodriguez had insisted that plaintiff organize his own company so that he could be regarded as an independent contractor.

On June 11, 2012, plaintiff, instructed by Rodriguez, began work on a wooden living room floor located at 317 East 90th Street, apartment 1-D, Manhattan, New York. He picked up the materials, tools, and machinery necessary for the job at CBD's warehouse. A CBD employee drove plaintiff, the equipment, and the materials over to the job site in CBD's van. The CBD employee had the keys to the apartment, which had two windows in the living room and one window in the kitchen. Plaintiff spent the day stripping and sanding the wooden living room floor, and before he finished the day's work, Rodriguez came by to give him the keys to the apartment.

The next day plaintiff returned to the apartment and resumed sanding and buffering the floor, which he vacuumed to prepare it for the application of sealant. Plaintiff opened the sealant can, which he had taken from CBD's warehouse, and began to apply the sealant. After about ten to fifteen minutes, by which time he had applied the sealant to more than one-half of the floor, fumes from the sealant ignited. Plaintiff observed flames coming from the kitchen. Plaintiff was burned by the fire.

Plaintiff had not checked the stove to see if it had a pilot light, and, if so, if the pilot light was on, before he began work. Plaintiff knew that oil-based sealants were flammable and water-based sealants were not.

B. The Deposition Testimony of CBD

Eugenio Rodriguez organized CBD in March, 2011 for the purpose of engaging in the business of renovating apartments. Since 1996, he received jobs from S.W. Management, LLC (SWM), the managing agent of defendant, 317 E.90 Realty, LLC, the owner of the building where the plaintiff's injury occurred. CBD would prepare an invoice for the work done in an apartment, and the defendant owner would issue the check to pay CBD. Rodriguez had agreed that CBD would hold harmless SWM and the owners of the properties from all claims arising out of the work his company did at the apartments.

On or about June, 2012, SWM sent CBD an e-mail requesting the latter to get the apartment ready for rental by doing a "vacancy prep and paint," which consisted of plastering, painting, tile work, the installation of shelving in a closet, the replacement of cabinets, electrical outlets, and light fixtures. SWD sent another e-mail requesting CBD to re-finish the

floor.

CBD used two types of finishing compounds that came in different colored containers: an oil-based polyurethane for exterior areas and a water-based polyurethane for interior floors. While doing renovation work, Rodriguez normally checks to see if the gas is on and if the stove has a pilot light or electronic ignition. Rodriguez does not recall checking the gas service for Apartment 1-D. CBD had instructed the plaintiff to check stoves for pilot lights before beginning work.

Before the plaintiff's accident, CBD's supplier had notified the company that oil-based sealants were no longer to be used for interior work, in turn, had cautioned the plaintiff not to use oil-based sealants for interior work. Only the plaintiff had assembled the materials and equipment needed to do the flooring work in the apartment.

Plaintiff received Form 1099, used to report "miscellaneous income" paid to independent contractors, from CBD, not a W-2. CBD did not deduct payroll taxes from the checks issued to plaintiff, but CBD did maintain worker's compensation insurance covering individuals who receive Form 1099. After the accident, plaintiff applied for worker's compensation benefits from CBD. The records show that plaintiff received benefits totaling $11,733.44 from July 13, 2012 to February 22, 2013. One workers' compensation form captioned "Notice to Chair of Carrier's Action on Claim for Benefits" has a box marked next to a line which reads "Claim is not disputed, Payment has Begun." Plaintiff denies depositing or cashing the workers' compensation checks.

C. The Affidavits From and The Deposition of the Defendant-Owner

SWM managed the building located at 317 East 90th Street, Manhattan, New York, and defendant-owner did not have any of its own employees on the premises. SWM's duties with respect to the renovation of Apartment 1-D consisted of largely sending a request to CBD for items of work to be performed. SWM neither controlled nor supervised CBD's work. CBD provided the workers, materials, and equipment necessary for the job. After the completion of the job, CBD sent SWM an itemized invoice for work performed, and SWM approved payment to CBD.

SWM did not direct, control, or supervise the work done by the plaintiff. CBD had exclusive control over the manner in which the plaintiff did his work, the materials and equipment that were used, and matters pertaining to work-site safety. Neither CBD nor the plaintiff ever asked SWM whether the stove in Apartment 1-D had a pilot light.

II. Procedural History

Plaintiff began this action for personal injury by the filing of a summons and complaint on or about August 6, 2012. His complaint asserts causes of action based on common-law

[* 4]

negligence, Labor Law § 200 and § 241 (6).

III. The Motion by CBD

As a general rule, the only remedy available to an employee injured in the course of employment against his employer is recovery under the Workers' Compensation Law. (*See*, Workers' Compensation Law §§ 11, 29 [6]; *Billy v Consolidated Mach. Tool Corp*., 51 NY2d 152 [1980]; *Constantine v Premier Cab Corp*., 295 AD2d 303 [2001].) "[W]hen a defense based on the exclusivity of the statutory remedy is interposed, no suit against an employer may be maintained for an accidental injury that may be fairly described as 'arising out of and in the course of the employment' ***." (*Burlew v American Mut. Ins. Co*., 63 NY2d 412, 416, [1984] quoting Workers' Compensation Law § 10.)

Plaintiff attempts to raise an issue of fact concerning whether he was an employee of CBD or an independent contractor. (*See, e.g., Carrion v Orbit Messenger*, 82 NY2d 742 [1993]; *Christ v Ongori*, 82 AD3d 1031 [2d Dept 2011].) However, plaintiff's acceptance of worker's compensation benefits precludes him from raising that issue, and, indeed, precludes him from maintaining this action against CBD. "[W]here, as here, an employee applies for and accepts workers' compensation benefits, he is deemed to have elected his remedy and thereby forfeits his right to proceed by way of an action for common-law tort ***." (*Babcock v Lamb,* 247 AD2d 903, 904 [4th Dept 1998]; *Cunningham v State of New York*, 60 NY2d 248, 252 [1983] ["By applying for and accepting such benefits, these claimants have forfeited their rights to maintain wrongful death actions against respondent for intentional torts."]; *Thomas v City of New York*, 239 AD2d 180 [1st Dept 1997]; *Riggins v Stong,* 238 AD2d 950 [4th Dept 1997].)

Although plaintiff alleges that he never deposited or cashed the worker's compensation checks, he did not allege that he returned the checks. Moreover, the plaintiff does not deny receiving medical benefits pursuant to worker's compensation.

In any event, the facts underlying the relationship between plaintiff and CBD are undisputed, and, thus, the court may resolve the employee-independent contractor issue as a matter of law. (*See*, *Sikorski v Burroughs Drive Apartments, Inc*., 306 AD2d 844 [4th Dept 2003].) "The label assigned by the parties to the employment relationship between them is not determinative of whether an employer-employee relationship or independent contractor status exists ***." (*Mowry v DiNapoli,* 111 AD3d 1117, 1120 [3rd Dept 2013].) "Control of the method and means by which the work is to be done is the critical factor in determining whether one is an independent contractor or an employee for purposes of tort liability ***." (*Sanabria v Aguero-Borges,* 117 AD3d 1024, 1025 [2d Dept 2014].)

In the case at bar, CBD directed and controlled the manner, details, and ultimate results of plaintiff's work. (*See*, *Thompson v Grumman Aerospace Corp.,* 78 NY2d 553 [1991].) Further, CBD supplied plaintiff with the equipment and materials, that it owned, necessary for the job. (*See*, *Greene v Osterhoudt*, 251 AD2d 786 [3rd Dept 1998].) CBD provided plaintiff

with transportation to the job site. CBD provided the plaintiff with workers' compensation coverage. Plaintiff admitted that he formed his company solely because CBD would not give him work unless he did so. Under all of the circumstances of this case, the court finds, as a matter of law, that the plaintiff was an employee of CBD.

CBD is entitled to summary judgment dismissing the plaintiff's complaint against it.

IV. The Motion by the Defendant-Owner

A. Common-Law Negligence

"To prove a *prima facie* case of negligence, the plaintiff must prove the existence of a duty on the defendant's part to the plaintiff, the breach of the duty, and that the breach of the duty was a proximate cause of an injury to the plaintiff***." (*Gordon v Muchnik*, 180 AD2d 715 [2d Dept 1992].) The common-law imposes a duty upon an owner and a general contractor to provide a worker with a safe place to work. (*See*, *Comes v New York State Electric and Gas Corp*., 82 NY2d 876 [1993]; *Torres v Perry Street Development Corp*., 104 AD3d 672 [2d Dept 2011].) This duty may be violated in two ways: (1) through the defective condition of the premises itself and (2) through a danger arising from the worker's activities where a party has supervisory control. (*See*, *Smith v Nestle Purina Petcare Co.,* 105 AD3d 1384 [4th Dept 2013]; *Clavijo v Universal Baptist Church*, 76 AD3d 990 [2d Dept 2010].) Where a worker sustains an injury because of a defective condition on the premises, a property owner is liable for common-law negligence and a violation of Labor Law § 200 when the owner created the dangerous condition which caused the injury or when the owner failed to remedy the dangerous condition of which he had actual or constructive notice. (*LaGiudice v Sleepy's Inc*., 67 AD3d 969 [2d Dept 2009]; *see*, *Mikelatos v Theofilaktidis*, 105 AD3d 822 [2d Dept 2013].) Unlike injuries arising from the method of work, where the injury arises from a condition of the job site, it is not necessary to prove supervision and control over the worker. (*Urban v No. 5 Times Square Development, LLC,* 62 AD3d 553 [1st Dept 2009]; *Murphy v Columbia University*, 4 AD3d 200 [1st Dept 2004].)

The mere presence of a stove with a pilot light did not constitute a defective condition on the premises. *Fiallos v Vin's Crown Realty Associates* (70 AD3d 630 [2d Dept 2010], rev'g 22 Misc3d 1122[A] [Table], 2008 WL 5622741 [Text]) is dispositive. Plaintiff Fiallos, a contractor's worker who sustained personal injury when a flash fire occurred while he was sanding and applying lacquer to the hardwood floors in an apartment, began a personal injury action against the owner of the building. He alleged that the defendant-owner had failed to ensure proper ventilation of the subject apartment and had failed to ensure that there were no open flames at the work site. The Appellate Division, Second Department, held that the defendant-owner was entitled to summary judgment dismissing the causes of action based on common-law negligence and Labor Law § 200 asserted against it. The defendant-owner, the Appellate Division stated, "satisfied its *prima facie* burden of establishing its entitlement to judgment as a matter of law by demonstrating that the plaintiff was injured, not by a dangerous

condition, but by the methods or materials of his work, and that it did not have the authority to supervise or control the performance of his work ***." (*Fiallos v Vin's Crown Realty Associates,* 70 AD3d 630, 630 [2d Dept 2010].) In opposition, the appellate court found, Fiallos failed to raise a triable issue of fact.

In the case at bar, plaintiff's injury arose from his manner of work he did not use a ventilation fan, he did not check the pilot light, and he used a type of sealant not suitable for indoor use. The defendant-owner did not have a sufficient level of control over plaintiff's activity for liability to arise on the basis of common-law negligence. In cases involving "manner of the work" or "methods and means," defendant/owner or contractor may be found liable only if he has a sufficient level of supervision and control over the plaintiff's work. (*See*, *Allan v DHL Exp. (USA), Inc*. 99 AD3d 828 [2d Dept 2012]; *LaRosa v Internap Network Servs. Corp*., 83 AD3d 905 [2d Dept 2011]; *Ortega v Puccia*, 57 AD3d 54 [2d Dept 2008].) "[T]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence ***." (*Gasques v State of New York,* 59 AD3d 666, 668 [2d Dept 2009], *affd on other grounds,* 15 NY3d 869; *Allan v DHL Exp. (USA), Inc*., *supra*; *Austin v Consolidated Edison, Inc*., 79 AD3d 682 [2d Dept 2010]; *Pilato v 866 U.N. Plaza Associates, LLC*, 77 AD3d 644 [2d Dept 2010].) "General supervisory authority at a worksite for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common-law negligence and under Labor Law § 200 ***." (*Dos Santos v STV Engineers, Inc*., 8 AD3d 223, 224; *see, Alexandre v City of New York*, 300 AD2d 263 [2002].)

The defendant-owner is entitled to summary judgment dismissing the plaintiff's cause of action for common-law negligence asserted against it.

B. 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 Electric and Gas Corp*., 82 NY2d 876, 877 [1993]; *Blessinger v Estee Lauder Companies, Inc*, 271 AD2d 343 [2d Dept 2000].) " Cases involving Labor Law § 200 generally fall into two categories: those where workers were injured as a result of dangerous or defective conditions at a work site and those involving the manner in which the work was performed ***." (*LaGiudice v Sleepy's Inc*., 67 AD3d 969, 972 [2d Dept 2009].)

In the instant case, the courts find that there is no basis of for imposing liability against the defendant-owner pursuant to Labor Law § 200. The pilot light did not amount to a dangerous or defective condition on the premises (*see*, *Fiallos v Vin's Crown Realty Associates* (70 AD3d 630 [2d Dept 2010]), and the defendant-owner did not have a sufficient degree of control over the plaintiff's methods of work. (*See*, *Gasques v State of New York, supra; Allan v DHL Exp. (USA), Inc*., *supra*; *Austin v Consolidated Edison, Inc*., *supra*; *Pilato v 866 U.N.*

Plaza Associates, LLC, *supra*.)

The defendant-owner is entitled to summary judgment dismissing the plaintiff's cause of action based on Labor Law § 200.

C. Labor Law § 241 (6)

The defendant-owner did not move for summary judgment dismissing the cause of action based on Labor Law § 241 (6) which was asserted against both it and CBD.

"Labor Law § 241 (6) imposes a nondelegable duty of reasonable care upon an owner or general contractor to provide reasonable and adequate protection to workers ***." (*Melchor v Singh,* 90 AD3d 866, 870 [2d Dept 2011].) The duty imposed by Labor Law § 241 (6) upon owners and contractors is nondelegable and exists regardless of their control and supervision of the job site. (*See*, *Rizzuto v L.A. Wenger Contracting Co., Inc.,* 91 NY2d 343 [1998]*; Comes v New York State Electric and Gas Corp.,* 82 NY2d 876 [1993]; *Perri v Gilbert Johnson Enterprises, Ltd.*, 14 AD3d 681 [2d Dept 2005]; *Whalen v City of New York*, 270 AD2d 340 [2d Dept 2000].)

Although it appears to have been an oversight, in the absence of a branch of the defendant-owner's motion for summary judgment dismissing the cause of action based on Labor Law § 241 (6), the court will refrain from determining the issues which arise under it. (*See, e.g*, *Pittman v S.P. Lenox Realty, LLC*, 119 AD3d 846 [2d Dept 2014]; *Pittman v S.P. Lenox Realty, LLC*, 91 AD3d 738 [2d Dept 2012].)

D. The Cross Claims Against the Defendant-Owner

The plaintiff's action against CBD is barred by the exclusivity provisions of the Workers' Compensation Law. Since CBD has not been found to be vicariously liable for the plaintiff's injuries, there is no basis for its seeking common law indemnification against the defendant-owner (*see*, *McCarthy v Turner Const., Inc*, 17 NY3d 369 [2011]). Moreover, an allegedly active tortfeasor cannot seek contribution or indemnity from a party which can only be vicariously liable for the tortfeasor's conduct. (*See*, *Ruddock v Boland Rentals, Inc*., 5 AD3d 368 [2d Dept 2004].) The defendant-owner is entitled to dismissal of CBD's cross claims against it.

E. The Defendant-Owner's Cross Claim for Common-Law Indemnification

Third-party claims for indemnification and contribution against employers are prohibited by Worker's Compensation Law § 11 unless a third-party plaintiff can show that the employee sustained a "grave injury" or that a written agreement provides for the right to contribution and indemnification. (*See, Guijarro v V.R.H. Const. Corp*., 290 AD2d 485 [2d Dept 2002]; *Potter v M.A. Bongiovanni Inc*., 271 AD2d 918 [3d Dept 2000].) The term "grave injury" is a

"statutorily defined threshold for catastrophic injuries" (*Kerr v Black Clawson Co*., 241 AD2d 686 [3d Dept 0997]) "and includes only those injuries which are listed in the statute and determined to be permanent***." (*Ibarra v Equipment Control, Inc*., 268 AD2d 13, 17 [2d Dept 2000].) The defendant-owner did not produce evidence showing that the plaintiff sustained a grave injury.

F. The Defendant-Owner's Cross Claim for Contractual Indemnification

CBD entered into a contract with SWM which provided in relevant part: "To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the owner, owner's real estate manager *** from and against claims, damages, losses and expenses, including by not limited to attorney's fees, arising out of resulting from the performance of the work ***."

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances' ***." *(Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973].) "While owners and general contractors owe nondelegable duties under the Labor Law to plaintiffs who are employed at their work sites, these defendants can recover in indemnity, either contractual or common-law, from those considered responsible for the accident ***." (*Kennelty v Darlind Const., Inc*., 260 AD2d 443, 445-446 [2d Dept 1999]; *Lazzaro v* MJM *Industries, Inc*.; 288 AD2d 440 [2d Dept 2001].)

Contrary to the position taken by CBD, the court finds that the agreement unambiguously obligates the contractor to indemnify 317 E. 90 Realty, LLC. The agreement creates an obligation toward both the "owner" and the "owner"s real estate manager," not the latter (SWM) alone.

The defendant-owner established its right to a conditional grant of that branch of its motion which is for summary judgment on its cross claim for contractual indemnification from defendant, CBD, in the event that the defendant-owner is found liable to the plaintiff under Labor Law § 241 (6). (*See, Isnardi v Genovese Drug Stores*, 242 AD2d 672 [2d Dept 1997] ; *Bello v Lefrak*, 236 AD2d 571 [2d Dept 1997]; *Conley v Salt City Energy Venture, L.P.*, 234 AD2d 909 [4th Dept 1996].)

Dated: February 19, 2015

____
DARRELL L. GAVRIN, J.S.C.