Portillo v 755 Park LLC
2016 NY Slip Op 30325(U)
February 25, 2016
Supreme Court, New York County
Docket Number: 160706/2013
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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SESAR PORTILLO,

Plaintiff,

Index No. 160706/2013

-against-

DECISION/ORDER

755 PARK LLC, 755 PARK AVENUE CONDOMINIUM OWNERS CORP., BROWN HARRIS STEVENS RESIDENTIAL MANAGEMENT LLC and INTER CONSTRUCTION CORP.,

Defendants,

---x

BROWN HARRIS STEVENS RESIDENTIAL MANAGEMENT LLC,

Third-Party Plaintiff,

-against-

GOLD'S PLUMBING CO.,

Third-Party Defendant.

---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
Notice of Cross-Motion and Affidavits Annexed.......................	2
Replying Affidavits..	3
Exhibits..	4

Plaintiff commenced the instant action to recover for injuries he allegedly sustained while performing construction work at the residential premises located at 755 Park Avenue, New York, New York (hereinafter the " premises" or the "work site"). Plaintiff now moves for an Order

pursuant to CPLR § 3212 granting him summary judgment on his Labor Law § 240(1) cause of action against defendant Brown Harris Stevens Residential Management LLC ("Brown Harris Stevens"). Brown Harris Stevens cross-moves for an Order pursuant to CPLR § 3212 for summary judgment dismissing the complaint as against it. Brown Harris Stevens separately moves for an Order pursuant to CPLR § 3215 for a default judgment against third-party defendant Gold's Plumbing Co ("Gold's Plumbing"). The motions are consolidated for disposition and resolved as set forth below.

The relevant facts are as follows. The agreement between defendants 755 Park Avenue Corp., the owner of the premises, and Brown Harris Stevens, the managing agent, for Brown Harris Stevens to manage the property (the "Management Agreement") requires Brown Harris Stevens to "[c]ause repairs and alterations…to be made, including, but not limited to, plumbing …subject only to the limitations contained in this agreement or in any lease or other agreement with any stockholder or tenant. Ordinary repairs or alterations involving an expenditure of over $1,000.00…for any one item shall be made only with the prior approval of the Principal…" In or around March 2013, Greenwich Energy Solutions presented a proposal to Brown Harris Stevens to serve as the contractor for the conversion of the boiler plant at the premises to burn natural gas. The proposal was signed by Lester Mance, Jr., as Assistant Treasurer of "755 Park Ave." Thereafter, 755 Park Ave. Corp. hired Gold's Plumbing as the subcontractor to install the new natural gas lines.

On or about June 3, 2013, plaintiff, an employee of Gold's Plumbing, was working at the work site in the basement and was instructed by his coworker, also an employee of Gold's Plumbing, to stand on a six-foot-high scaffold to drill a hole in the wall. Plaintiff testified that

the drill became lodged in the wall, and when he attempted to remove the drill, a loose piece of concrete was displaced and caused the wooden platform of the scaffold to break. He further testified that he fell six feet to the ground, thereby fracturing his leg. According to plaintiff, no safety equipment was provided by any party. In addition, no employees of the premises' owner or Brown Harris Stevens were present at the work site to supervise or provide instructions regarding the work.

The court first considers plaintiff's motion and Brown Harris Stevens' cross-motion for summary judgment on plaintiff's Labor Law § 240(1) claim. 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.*

Pursuant to Labor Law § 240(1),

> All contractors and owners and their agents . . . who contract for but do not control the work, 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.

A party is an "agent" pursuant to Labor Law § 240(1) when it has the authority to supervise and control the work. *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 293 (2003);

Voultepsis v. Gumley-Haft-Klierer, Inc., 60 A.D.3d 524, 525 (1st Dept 2009) (denying summary judgment for both sides on the ground that there was an issue of fact as to whether a property's managing agent had the authority to supervise and control a special project). The agent need not actually exercise supervision or control over the work to be held liable. *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 500 (1993).

In the present case, both plaintiff's motion and Brown Harris Stevens' cross-motion for summary judgment are denied on the ground that there is a disputed issue of fact as to whether Brown Harris Stevens was an agent pursuant to Labor Law § 240(1). It is unclear from reviewing the Management Agreement whether Brown Harris Stevens had the authority to supervise and control the work in question. The Management Agreement did authorize Brown Harris Stevens to "cause repairs and alterations" to be made to the premises, including to the property's plumbing, although Brown Harris Stevens was required to obtain the owner's approval for non-emergency repairs costing over $1,000.00. However, it is unclear whether the authority to cause repairs and alterations to be made to the premises included the authority to supervise and control the work of the contractors and subcontractors hired to perform the repairs and alterations. Moreover, the affidavit submitted on behalf of Brown Harris Stevens by Lester Mance, Jr., Account Executive of Brown Harris Stevens and Assistant Treasurer of 755 Park Avenue Corp., does not address whether Brown Harris Stevens had the authority to supervise and control the work, as Mr. Mance merely testified that neither he nor anyone on behalf of Brown Harris Stevens "direct[ed], supervise[d] or control[led] the plaintiff's work activities in any way" or had anything to do with Gold Plumbing's "means, methods, techniques, sequences or procedures on the project."

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Plaintiff further contends that its motion for summary judgment should be granted on the ground that Brown Harris Stevens is liable as an "owner" pursuant to Labor Law § 240(1). The Court of Appeals has held that a party who does not hold title to the property may be an "owner" pursuant to Labor Law § 240(1) where it "has an interest in the property and...fulfilled the role of owner by contracting to have work performed for [its] benefit." *Scaparo v. Village of Ilion*, 13 N.Y.3d 864, 866 (2009).

Although plaintiff contends that Brown Harris Stevens is an "owner" pursuant to Labor Law § 240(1), he has failed to make a *prima facie* showing that Brown Harris Stevens has an interest in the property and contracted to have the work performed for its benefit. Although Brown Harris Stevens was involved in negotiations for the work, as shown by the submission of Greenwich Energy Solutions' proposal to Brown Harris Stevens, the contracts with Greenwich Energy Solutions and Gold's Plumbing were signed by 755 Park Avenue Corp. Further, plaintiff has cited no case law holding that a managing agent has an interest in the property it manages.

The court now turns to the portion of Brown Harris Stevens' cross-motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim on the ground that Brown Harris Stevens was not an agent pursuant to Labor Law § 241(6), which requires that,

> All contractors and owners and their agents...when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct

or control the work, shall comply therewith.

The meaning of the term "agent" pursuant to Labor Law § 241(6) is the same as the meaning of the term pursuant to Labor Law § 240(1). *Serpe v. Eyris Productions, Inc.*, 243 A.D.2d 375, 379-80 (1st Dept 1997). As there is an issue of fact as to whether Brown Harris Stevens had the authority to supervise and control the work, the court cannot determine whether Brown Harris Stevens is an "agent" pursuant to Labor Law § 241(6). Therefore, the portion of Brown Harris Stevens' cross-motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim is denied.

The court now turns to the portion of Brown Harris Stevens' cross-motion for summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims. "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).

In the present case, Brown Harris Stevens is entitled to summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims. Brown Harris Stevens made a *prima facie* showing that it did not supervise, direct or control the injury-producing work through the affidavit and deposition testimony of Lester Mance, Jr., that no one on behalf of Brown Stevens supervised, directed or controlled the work, provided any equipment, instructed the contractors or subcontractors on how to perform their work or was even present at the work site. In response, plaintiff has failed to produce any evidence that Brown Harris Stevens actually supervised, directed or controlled the work. Therefore, Brown Harris Stevens is entitled to summary judgment dismissing those claims.

Brown Harris Stevens' motion for an Order granting it a default judgment against Gold's Plumbing on its claims for common law indemnification and contribution, contractual indemnification and breach of contract based on the failure to obtain insurance is denied without prejudice on the ground that Brown Harris Stevens has failed to file proof by affidavit made by the party of the facts constituting the claim or a verified complaint as required by CPLR § 3215(f).

Accordingly, plaintiff's motion for summary judgment on his Labor Law §240(1) claim against Brown Harris Stevens is denied. The portion of Brown Harris Stevens' cross-motion for summary judgment dismissing that claim and defendant's Labor Law §241(6) claim is denied as well. The portion of Brown Harris Stevens' cross-motion for summary judgment dismissing plaintiff's Labor Law §200 claim and common-law negligence claim as against it is granted. Brown Harris Stevens' separate motion for a default judgment against third-party defendant

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Gold's Plumbing is denied. This constitutes the decision and order of this court.

Dated: 2/25/16

Enter: ______________ J.S.C.

CYNTHIA S. KERN
J.S.C.