Martinez v 305 West 52 Condominium
2016 NY Slip Op 30331(U)
February 18, 2016
Supreme Court, Queens County
Docket Number: 12167/11
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HON. HOWARD G. LANE** **IA Part 6**
Justice

SUA SPONTE ORDER

JOSE MARTINEZ and MARIA MARTINEZ,
Plaintiffs,

-against-

THE 305 WEST 52 CONDOMINIUM, et al.,
Defendants.

Index Number 12167/11

Motion Dates July 15, 2015 and August 3, 2015

Motion Seq. Nos. 8 and 7

Motion Cal. Nos. 105 and 66

NORMAN D. SCHWARTZ,
Third-Party Plaintiff,

-against-

CARDINAL SALES INC.,
Third-Party Defendant.

THE 305 WEST 52 CONDOMINIUM and ALEXANDER WOLF & COMPANY, INC.,
Second Third-Party Plaintiffs,

-against-

CARDINAL SALES INC.,
Second Third-Party Defendant.

The Court sua sponte recalls its decision/order dated November 25, 2015 and hereby issues the following decision/order in its place:

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Upon the foregoing papers, it is ordered that the motion with calendar no. 105 on the motion calendar for July 15, 2015 and the motion with calendar no. 66 on the motion calendar for August 3, 2015 are determined together as follows:

Plaintiff Jose Martinez (plaintiff)[1] commenced this action, alleging violations of Labor Law §§ 200, 240(1), and 241(6) and common-law negligence. He alleges that he suffered personal injuries on February 25, 2011, during the course of his employment as a construction/demolition worker by third-party defendant Cardinal Sales, Inc. (Cardinal Sales), a general contractor hired by defendant Norman D. Schwartz to perform renovation work in the kitchen of a condominium apartment at 305 West 52nd Street, Apt. 2E, New York, New York. Plaintiff also alleges that on the date of the accident, he was plastering the kitchen ceiling, while using an A-frame stepladder. It is alleged that he fell from the ladder due to its defective condition, and a wet condition on the kitchen floor.

Following joinder of issue,[2] the Condominium defendants moved for summary judgment dismissing the complaint insofar as asserted against them. Thereafter, defendant/third-party plaintiff, Norman D. Schwartz, the admitted owner of the condominium unit, and Cardinal separately cross-moved for summary judgment dismissing the complaint insofar as asserted against Norman D. Schwartz. Plaintiff cross-moved for a continuance and further discovery pursuant to CPLR 3212(f). By order dated June 24, 2013 and entered on June 28, 2013, those branches of the Condominium defendants' motion, and Schwartz's and Cardinal's cross motions, which were for

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[1] It appears that plaintiff Jose Martinez filed a supplemental summons and amended complaint in which Maria Martinez is named an additional plaintiff and a derivative claim is asserted by Maria Martinez for damages for the alleged loss of companionship and services. It is unclear, however, whether such supplemental summons and amended complaint were served with leave of court or pursuant to a stipulation (*see* CPLR 1003, 3025[b]).

[2] The action against defendants Arron Ziegelman and William K. Langfan was discontinued pursuant to a stipulation dated February 16, 2011.

summary judgment dismissing the causes of action alleging a violation of Labor Law § 200 and common-law negligence based on a theory that plaintiff was using a defective ladder were granted. In addition, that branch of plaintiff's cross motion which was to direct the Condominium defendants, Schwartz, and Cardinal to appear for depositions was granted. The court otherwise denied the Condominium defendants' motion, and Schwartz's and Cardinal's respective cross motions. The court determined, among other things, that defendant Norman D. Schwartz failed to demonstrate that he was entitled to the application of the homeowner's exemption found in Labor Law §§ 240(1) and 241(6). The court held that defendant Norman D. Schwartz failed to make a prima facie showing that the apartment was a one-family dwelling used as his residence prior to the renovation and that he was renovating the apartment with the intent to continue to use it as his one-family dwelling. The court also determined that defendant Norman D. Schwartz did not make a prima facie showing that he did not create, or have actual or constructive notice of, any leak causing water to appear on the kitchen floor in the apartment and contributing to the proximate causation of plaintiff's injuries. The court further determined the Condominium defendants failed to make a prima facie showing that they did not create, or have actual or constructive notice of, any leak causing water to appear on the apartment's kitchen floor and contributing to the happening of the accident.

By notice of motion dated October 23, 2013, the Condominium defendants moved for leave to renew their motion for summary judgment and upon renewal, for summary judgment dismissing the complaint insofar as asserted against them. Plaintiff cross-moved for a continuance to permit disclosure and to compel further disclosure. By stipulation dated March 24, 2014, the Condominium defendants agreed to produce the building superintendent for a deposition (scheduled to be held on March 25, 2014) and respond to plaintiff's notice of discovery and inspection dated November 7, 2013 within thirty (30) days of the date of the stipulation and plaintiff agreed to withdraw his cross motion. By order dated August 4, 2014, that branch of the motion by the Condominium defendants for leave to renew their prior motion for summary judgment dismissing the claims under Labor Law §§ 240(1) and 241(6), was granted, and upon renewal, the motion for summary judgment dismissing such claims was denied without prejudice to further renewal following completion of the deposition of the building superintendent and the service of a response to plaintiff's notice for discovery and inspection dated November 7, 2013.

By decision and order of the Appellate Division, Second Department, dated May 10, 2015, the Supreme Court order entered on June 28, 2013, was modified, on the law, by adding a provision thereto that the denials of those branches of the motion by the Condominium defendants, which were for summary judgment dismissing the causes of action alleging violations of Labor Law §§ 240 and 241, and the causes of action alleging

a violation of Labor Law § 200 and common-law negligence not based on a theory that plaintiff was using a defective ladder, insofar as asserted against them, and those branches of the separate cross motions of defendant/third-party plaintiff Norman D. Schwarz and third-party defendant Cardinal Sales, Inc., which were for summary judgment dismissing the causes of action alleging violations of Labor Law §§ 240 and 241, and the causes of action alleging a violation of Labor Law § 200 and common-law negligence that are not based on a theory that plaintiff Jose Martinez was using a defective ladder, insofar as asserted against defendant/third-party plaintiff Norman D. Schwartz, are denied without prejudice to renew upon the completion of discovery, and as so modified, the order was affirmed insofar as appealed from (*Martinez v 305 West 52 Condominium*, 128 AD3d 912 [2d Dept 2015]). The Appellate Court determined because no depositions of the Condominium defendants, Schwartz or Cardinal had been conducted, the motion and cross motions for summary judgment to the extent sought, were premature since further discovery might lead to relevant evidence (*id.*).

That branch of the motion by defendant Nelson D. Schwartz for leave to renew is granted. In support of his motion for summary judgment dismissing the complaint insofar as asserted against him, and upon renewal for summary judgment dismissing the complaint and cross claims asserted against him, defendant Norman D. Schwartz submits, among other things, his affidavits dated January 9, 2013 and April 24, 2015, copies of deposition transcripts, the deed for the condominium unit dated April 12, 1991 and the death certificate of Arline Schwartz, indicating she died on August 21, 1995.

The deed reflects that defendant Norman D. Schwartz and Arline Schwartz, his wife, were the titled owners of the condominium unit. Defendant Norman D. Schwartz avers that he is the sole owner of the property, and the apartment was his residence at the time of the accident, but that he was there only on a very sporadic basis during the project. Defendant Norman D. Schwartz testified that he lived in the apartment for 22 years, and has lived with Sandra (Sandy) Katz, his girlfriend at the apartment since April 2011. Defendant Norman D. Schwartz also avers that during the period of the renovation of the kitchen, the bathroom in the apartment was also being renovated by a different contractor, and that all fixtures had been removed. He also testified that during the renovation he lived elsewhere and not at the premises but Ms. Katz was there almost every day to let the workers into the apartment. He further testified that Ms. Katz would return at the end of the day, but no one spent any nights at the apartment. He further testified that he never had a leak in the apartment during his ownership, and he was not aware of any leaking or water problems in the kitchen in the day before the accident, or during the six-month period prior to the renovation. He testified that he was told by the contractor that the contractor had to turn off the water in the kitchen to remove the sink. Defendant Schwartz additionally testified that during the performance of the work, the

unit's bathroom was not available, but a toilet and a slop sink with water was available for the workers' use in the basement. He also testified that he observed white buckets being used for plaster and that "they took water from the basement to make plaster in a metal dish they were using." According to his testimony, at around the time plastering work was performed, he did not see any liquid substance on the floor, and although he observed plaster in a sheetrock bucket, he did not observe water in it. He denied ever seeing the brown paper on the floor wet, or any puddles of water in the kitchen when the workers used the buckets with plaster or spackling. He testified that there was no "piping" in the kitchen floor. According to defendant Schwartz, he did not observe the workers ever transporting water to his apartment and did not receive any complaints during the time of the renovation from any other apartment owner.

Ms. Katz, a non-party witness, testified that she began dating defendant Schwartz in 2010 when she lived in Brooklyn and moved into the apartment with him in 2012. She testified that during the time the work was being performed, no one lived in the apartment, but that she would travel from Brooklyn to open the apartment with a key a little before 9:00 A.M. She testified that the floors had been covered with paper by defendant Cardinal, but she never saw the paper on the floor wet, never saw a puddle of water in the kitchen, and no workers made any complaint to her about water, a leak or puddle of water in the kitchen. She also testified that there was not any leak in the kitchen, and the water was off because "[e]verything was ripped out" and "because they took the sink out."

Plaintiff testified at his deposition that during the period he worked at the apartment, the "lady and gentleman," whom he identified as "the owners," were inside the apartment when he got there in the morning, and then the gentleman would "go" and the lady would go "out for food" and "then we didn't see her until the next day." Plaintiff however admitted that on the date of the accident he only saw the "lady," who said she was going to go to her house in Brooklyn, and for plaintiff to "close the door." He testified that when he arrived at the apartment on the date of the accident, a two foot section of the kitchen floor was wet. He admitted he did not mention the floor being wet to the lady or "the man," or defendant Cardinal, and that he had not observed water or wetness in the kitchen in the days before the accident. He also testified that on the day of the accident, he removed the paper on the floor, in an effort to clean the wetness, and replaced it with "industrial" paper, putting the A-frame stepladder on top of the paper. He further testified that the paper got wet again. Plaintiff admitted he did not know from where the water was coming, and indicated it was "possibly from the pipe," "maybe from the sink," or "possibly from the pipe from the sink." Plaintiff additionally testified that on the day of the accident, he had working from 9:30 A.M. until 11:30 A.M., standing on the top of the ladder, while plastering the kitchen ceiling, when the ladder slipped sideways,

causing him to hit the wall and fall to the ground. He testified he was alone at the time, and the ladder was unsteady, lacked rubber feet and was too short for him properly to reach portions of the ceiling.

Defendant Norman D. Schwartz has made a prima facie showing that he is entitled to the protection of the homeowner exemption contained in Labor Law §§ 240(1) and 241(6). His evidence demonstrates he was the owner of the condominium unit, the unit was used solely as his residence and not to operate a business or generate rental income, and that he did not direct or control the work being performed (*see Garcia v Pond Acquisition Corp.*, 131 AD3d 1102 [2d Dept 2015]; *Parise v Green Chimneys Children's Servs., Inc.*, 106 AD3d 970, 971 [2d Dept 2013]; *Holifield v Seraphim, LLC*, 92 AD3d 841, 842 [2d Dept 2012]). Plaintiff has failed to raise a triable issue of fact with respect to defendant Schwartz's prima facie showing as to the applicability of the exemption (*see Banegas v Farr*, 122 AD3d 783 [2d Dept 2014]). Thus, defendant Norman D. Schwartz is entitled to summary judgment dismissing the causes of action asserted against him alleging violations of Labor Law §§ 240(1) and 241(6). That branch of the motion by defendant Nelson D. Schwartz for summary judgment dismissing the claims asserted insofar as asserted against him based upon violation of Labor Law §§ 240(1) and 241(6) is granted.

With respect to that branch of the motion for summary judgment by defendant Schwartz dismissing the causes of action asserted against him alleging a violation of Labor Law § 200 and common-law negligence based upon a theory of the allegedly dangerous condition of the premises, Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Ross v Curtis–Palmer Hydro–Elec.*, 81 NY2d 494, 501–502 [1993]; *Banscher v Actus Lend Lease, LLC*, 132 AD3d 707 [2d Dept 2015]).[3] Where, as here, a plaintiff contends that an accident occurred because a dangerous condition existed on the premises where the work was being undertaken, an owner moving for summary judgment dismissing causes of action alleging common-law negligence and a violation of Labor Law § 200 must make "a prima facie showing that it neither created the dangerous condition nor had actual or constructive notice of [it]" (*Costa v Sterling Equip., Inc.*, 123 AD3d 649, 650 [2d Dept 2014]; *see Navarro v City of New York*, 75 AD3d 590, 592 [2d Dept 2010]; *Chowdhury v Rodriguez*, 57 AD3d 121, 128, 131–132 [2d Dept 2008]). A defendant has constructive notice of a defect when it is visible and apparent, and has

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[3] Unlike Labor Law §§ 240 and 241, section 200 of the Labor Law does not contain any single- and two-family homeowners' exemption (*see Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

existed for a sufficient length of time before the accident such that it could have been discovered and corrected (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Nicoletti v Iracane*, 122 AD3d 811 [2d Dept 2014]; *Rendon v Broadway Plaza Assoc. Ltd. Partnership*, 109 AD3d 975, 977 [2d Dept 2013]).

By his submissions, defendant Norman D. Schwartz has made a prima facie showing that he neither created the allegedly dangerous wet condition on the kitchen floor which allegedly contributed to plaintiff's fall from the ladder, nor had actual or constructive notice of its existence.

In opposition, plaintiff offers his own affidavit dated June 26, 2015, and points to the deposition transcripts of Rocco Fiorillo, an expediter employed by defendant Cardinal, and Ferdinand Reyes, the superintendent at the condominium as proof that during the renovation, water was not completely turned off in the apartment and was still available there.

In his affidavit, plaintiff states that the woman "who lived there" let him into the apartment on the date of the accident and remained in the apartment for another half hour. He states that the kitchen is a few feet from the apartment entrance "from where I could see the water that caused my fall." He also states the woman "left money on the counter where the water that caused my fall was visible" and "remained in the apartment for another half hour."

Mr. Reyes testified that he had been contacted by someone, prior to the renovation to the apartment starting, regarding the bathroom valve not "holding" when it was shut off. He explained that a valve which does not "hold" allows for water to continue to run from the faucet when opened. He further testified that the building's water line to the apartment's bathroom had been shut off but not the water line to the kitchen, and the valve in the kitchen was replaced during the renovation with a ball joint valve, but had not been previously leaking. Mr. Reyes said "they" wanted to replace the ball joint valve in the kitchen so to allow the unit owner to turn off the sink water in the event of a problem without having to obtain his help.

Mr. Fiorillo testified that under the contract between defendant Norman D. Schwartz and Cardinal, Cardinal was to replace the kitchen by demolishing and removing appliances and cabinetry, performing electrical and patching work, installing flooring, base molding and countertops, plastering, hooking up all kitchen appliances with required plumbing. He also indicated that valves inside an apartment would be changed if required, but that defendant Cardinal was not involved in the renovation of the apartment's bathroom. He testified that "there was running water in the kitchen stopped

by valves" but there were "no water issues whatsoever" on the job. He also testified that it was his "view" that defendant Norman D. Schwartz and Ms. Katz were both living in the apartment during the renovation, but he did not observe "the Schwartz" accessing water or getting water from the kitchen during the job.

Plaintiff's submissions are insufficient to raise a question of fact as to whether defendant Schwartz created, or had actual or constructive notice of the wet floor condition. That water was available in the apartment at points during the renovation, and sink valves were replaced, does not show that there was a leak which resulted in water on the kitchen floor of the apartment on the accident date. Furthermore, the presence of Ms. Katz, or some other unidentified woman, in the apartment on the accident date, does not constitute a basis to conclude that defendant Schwartz had actual or constructive notice of the wet condition, where plaintiff has made no showing that Ms. Katz or the woman was an employee or agent of defendant Schwartz for the purpose of warning of, or remedying, any hazardous condition at the apartment. That the wet condition allegedly existed on the date of the accident at 9:00 A.M., and then recurred following plaintiff's cleaning of it, and remained for a period of 2½ hours, is insufficient, under the circumstances, to raise a triable issue of fact that defendant Schwartz had constructive notice of any alleged recurring wet condition on the kitchen floor (*see Moss v JNK Capital Ltd.*, 211 AD2d 769 [2d Dept 1995]); *see also Decker v Schildt*, 100 AD3d 1339 [3d Dept 2012]; *Koenig v Shostal*, 251 AD2d 202 [1st Dept 1998]; *cf. Greco v Purdy*, 222 AD2d 652 [2d Dept 1995). In addition, mere speculation as to how a condition was created will not suffice to defeat a motion for summary judgment (*see Acheson v Shepard*, 27 AD3d 596 [2d Dept 2006]). That branch of the motion for summary judgment by defendant Schwartz dismissing the causes of action asserted against him alleging a violation of Labor Law § 200 and common-law negligence based upon a theory of the allegedly dangerous condition of the premises is granted.

That branch of the motion by the Condominium defendants for leave to renew their motion for summary judgment dismissing the causes of action asserted against them based upon violations of Labor Law §§ 240(1) and 241(6) is granted, and upon renewal, the motion by the Condominium defendants for summary judgment dismissing the causes of action asserted against them by plaintiff based upon violations of Labor Law §§ 240 (1), 241(6) and common-law negligence is granted. The Condominium defendants have made a prima facie showing that they are not owners of the apartment or the general contractors or statutory owners of the apartment, there is no lessor-lessee relationship between the condominium and defendant Schwartz, and the Condominium defendants neither contracted for nor controlled the construction work in the apartment by virtue of the Apartment Decorating Agreement (*see Guryev v Tomchinsky*, 20 NY3d 194 [2012]). Mr. Ferdinand Reyes testified inter alia, that: only Norman Schwartz had the ability and

authority to let Cardinal's contractors into Unite 2E to conduct their work during the renovation, he did not provide any tools to Cardinal or to any other contractors in general, he had no authority to stop Cardinal or any other contractors from doing work within the subject Unit because the renovation "was a private job," Norman Schwartz was the one who hired a plumber to address issues with a valve in the bathroom, Norman Schwartz hired another plumber to replace a "ball valve" in the kitchen sink for the benefit of future tenants, not because the ball valve was leaking, and he never received any complaints from anyone related to leaks in Unite 2E. Such testimony establishes that the Condominium defendants are not, the owners of Unit 2E, are not acting as an agent of Norman Schwartz, and did not exercise any control over plaintiff's work. Additionally, there is no evidence to support plaintiff's claim that the Condominium defendants created or had notice of the alleged wet condition. Accordingly, the Condominium defendants are not liable pursuant to Labor Law §§200, 240(1) and/or 241(6) or under common law negligence.

That branch of the motion by defendant Norman D. Schwartz for summary judgment dismissing the cross claims asserted against him, the Condominium defendants and defendant Cardinal asserted cross claims against defendant Norman D. Schwartz for contribution and common-law indemnification, and defendant Cardinal asserted an additional cross claim against defendant Norman D. Schwartz for contractual indemnification is granted. Since the causes of action in the complaint asserted against defendant Norman D. Schwartz have been dismissed, the cross claims asserted by the Condominium defendants and defendant Cardinal for contribution and common-law indemnification must be dismissed (*see Yong Ju Kim v Herbert Const. Co., Inc.*, 275 AD2d 709 [2d Dept 2000]; *Dilena v Irving Reisman Irrevocable Trust*, 263 AD2d 375 [1st Dept 1999]). Likewise, the cross claim asserted by defendant Cardinal against defendant Norman D. Schwartz for contractual indemnification also must be dismissed (*see Adamczyk v Hillview Estates Dev. Corp.*, 229 AD2d 940 [4th Dept 1996], *lv to appeal denied* 89 NY2d 801 [1996]; *NJ Lenders Corp. v Cosentino*, 30 Misc 3d 11 [App Term, 1st Dept 2010]). That branch of the motion by defendant Norman D. Schwartz for summary judgment dismissing the cross claims asserted against him is granted.

This constitutes the decision and order of the court.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: February 18, 2016

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Howard G. Lane, J.S.C.

[* 10]