SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

----------X

WOJCIECH CHOINSKI,

Index No. 158242/13
Motion Seq: 003

Plaintiff,

-against-

115 WEST 69, LLC, AISYRK CO., INC.

DECISION/ORDER
ARLENE P. BLUTH, JSC

Defendants.

----------X

115 WEST 69, LLC

Third Party Plaintiff,

-against-

TP Index No. 595143/15

MOULIN & ASSOCIATES, INC.

Third Party Defendant.

----------X

The motion by third party defendant, Moulin & Associates, Inc. (Moulin), for summary judgment and to dismiss the third party-complaint is granted. Defendant 115 West 69, LLC's (115 West) cross-motion for summary judgment dismissing plaintiff's complaint is granted. Plaintiff's cross-motion to amend the complaint to add Moulin as a direct defendant is granted.

Background

This action arises out of alleged injuries suffered by plaintiff on July 25, 2013 while he was working at premises owned by defendant 115 West. Plaintiff was a junior mechanic for non-party Citron Brothers Plumbing & Heating (Citron). Citron was hired to assist with the renovation of a townhouse owned by 115 West, which was being renovated from a five story townhouse into a one family home. The sole shareholders of 115 West are Mike and Maria Paskowitz. Moulin signed a contract with the Paskowitzs whereby Moulin agreed to be the project manager for the townhouse's renovation.

Plaintiff claims that from his first day on the job site, he considered Anthony Ferranti[1] of Moulin to be the general contractor for the job site. Plaintiff alleges that he spoke with Mr. Ferranti about when and where work was to be done. Plaintiff further alleges that Mr. Ferranti was on the job site every day and that Mr. Ferranti directed plaintiff's work on many occasions. Moulin claims that Mr. Ferranti served only as the project manager and never directed plaintiff ***how*** to do his job; he merely explained what tasks workers were supposed to accomplish.

Plaintiff was asked to install a sprinkler near the ceiling of a curved staircase on the third floor. Plaintiff claims that Mr. Ferranti directed him to build a platform to facilitate the installation of the sprinkler system. Plaintiff alleges that he was not a carpenter and built his own makeshift platform after Mr. Ferranti refused to ask carpenters to build the platform. Plaintiff claims that he was forced to use a ladder on top of the platform to enable him to connect a sprinkler pipe to a previously uninstalled elbow. Plaintiff allegedly fell off the ladder when one

---

[1]The parties in the instant action rotate between spelling Mr. Ferranti's name as "Ferrante" and "Ferranti." For the purposes of this motion, the Court will assume that it is spelled "Ferranti."

of the pipes broke. Plaintiff insists that he injured his left hand while grabbing a metal stud in an attempt to stop his fall.

115 West's Motion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

115 West moves for summary judgment on the ground that the homeowner's exemption provided under Labor Law 240(1) and 241(6) precludes a finding of liability against 115 West.

Labor Law 241 (6) requires that "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" (Labor Law 241[6]). These requirements do not apply to "owners of one and two-family dwellings who contract for but do not direct or control the work" (*id.*). The homeowner's exemption applies even when corporations hold title to the property, rather than an individual person, when the premises are to be used as a residence for its shareholder (*Baez v Cow Bay Constr.*, 303 AD2d 528, 529, 756 NYS2d 281 [2d Dept 2003] *lv denied* 2 NY3d 701, 778 NYS2d 459 (Table) [2004]; *see Uddin v Three Bros. Constr. Corp.*, 33 AD3d 691, 823 NYS2d 178 [2d Dept 2006] [dismissing a personal injury claim against a church because the homeowner's exemption applied where the church did not exercise supervision and control over the construction of a house for its pastor]).

115 West asserts that because Mr. and Mrs. Paskowitz, through 115 West, are the owners of the premises, the homeowner's exception should apply. 115 West further claims that the deposition testimony of Mr. Paskowitz makes clear that 115 West did not exercise any supervision, direction, or control over the job site. 115 West claims that Mr. Paskowitz delegated supervisory authority over the job site to Mr. Ferranti of Moulin.

115 West also moves for summary judgment dismissing plaintiff's Labor Law claims and common-law negligence claims on the ground that 115 West did not control the methods or manner of the work at the job site.

"It is settled law that where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under section 200 of the Labor Law" (*Lombardi v Stout*, 80 NY2d 290, 295, 590 NYS2d 55 [1992]).

115 West has made a prima facie showing that it is entitled to summary judgment. The burden shifts to the plaintiff to raise a triable factual question.

In opposition, plaintiff claims that Mr. Paskowitz was on the site regularly and should have had notice of the dangerous condition at the worksite.

Plaintiff fails to raise an issue of fact regarding the homeowner's exemption. Plaintiff acknowledges that 115 West, by way of Mrs. and Mr. Paskowitz, entrusted Moulin to oversee the worksite. Mr. Paskowitz testified that Moulin's employee on site, Mr. Ferranti, managed the renovation of the premises. Although Mr. Paskowitz further testified that he visited the site ten times per year, his deposition testimony also indicates that he never exhibited any control or direction over the work. Therefore, because 115 West is the owner of a property being converted to a single or two-family dwelling, it is entitled to the homeowner's exemption for work done on a residential property.

Plaintiff also failed to raise an issue of fact with respect to the Labor Law and common law negligence claims. Both plaintiff's testimony and Mr. Paskowitz's testimony indicate that 115 West exercised no supervisory control over the construction site. As stated above, Mr. Paskowitz hired Moulin to oversee the design and construction of the renovation. Mr. Paskowitz further testified that although he made visits to the job site, he did not make changes or stop the

work. Plaintiff testified that he did not know who the owner of the property was and that he had never met Mr. or Mrs. Paskowitz. The alleged dangerous condition arose while plaintiff was attempting to connect pipes and plaintiff claims that he was performing this work at the request of Mr. Ferranti. Although Moulin disputes this fact, 115 West had no control over the methods and means of the construction at the job site.

Moulin's Motion

Moulin claims that it is entitled to summary judgment against 115 West and to dismissal of the third-party action because 115 West has no liability to the plaintiff and there is no contractual privity between Moulin and 115 West because Moulin's contract is with the Paskowitzs rather than 115 West.

Because the Court granted 115 West's motion dismissing plaintiff's complaint, 115 West has no liability to plaintiff. Therefore, Moulin's motion is granted and the third party complaint is dismissed. Although the parties did not address Moulin's counterclaim against 115 West, the homeowner's exemption would likely prevent Moulin from seeking contribution or indemnity from 115 West if Moulin were found liable. The Court can fully dismiss the third party complaint under the general relief clause contained in both the motions by 115 West and Moulin (*see Planned Consumer Mktg., Inc. v Coats & Clark, Inc.*, 127 AD2d 355, 369, 513 NYS2d 417 [1st Dept 1987]; *Llano v Leading Ins. Servs. Inc.*, 45 Misc.3d 131(A), 3 NYS3d 285 (Table) [App Term, 1st Dept 2014]).

Plaintiff's Motion

Plaintiff cross-moves to amend the complaint to name third-party defendant Moulin as a direct defendant in plaintiff's main action. CPLR 3025(b) provides that "A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties" (CPLR 3025[b]). "Leave shall by freely given upon such terms as may be just including the granting of costs and continuances" (*id.*).

"Leave to amend pleadings under CPLR 3025(b) should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay or if the proposed amendment is palpably improper or insufficient as a matter of law" (*McGhee v Odell*, 96 AD3d 449, 450, 946 NYS2d 134 [1st Dept 2012] [internal quotations and citations omitted]). "A party opposing leave to amend must overcome a heavy presumption of validity in favor of permitted amendment" (*id.* [internal quotations and citation omitted]). "Prejudice requires some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (*Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365, 841 NYS2d 277 [1st Dept 2007]).

Plaintiff argues that Moulin is subject to liability under the Labor Law because Moulin's employee, Mr. Ferranti, supervised and directed the job site where plaintiff worked. Specifically, plaintiff claims that Moulin may be held liable as a general contractor under sections 200, 240(1) and 241(6) of the Labor Law.

In opposition, Moulin claims that plaintiff's accident occurred as a result of plaintiff's own means and methods, which resulted in plaintiff falling from a ladder placed on top of a

platform constructed by plaintiff. Moulin argues that Mr. Ferranti never exercised supervision or control and had no authority over the means and methods under the terms of Moulin's contract with the Paskowitzs. Moulin further claims that plaintiff testified that Mr. Ferranti did not oversee his work and that plaintiff's boss, Mr. Tatko of Citron, supervised plaintiff's work.

Plaintiff's motion for leave to amend the pleading is granted. Plaintiff's supplemental complaint contains allegations against Moulin that are not palpably insufficient. Plaintiff claims that Moulin was the "general contractor for the construction, demolition and/or renovation work performed" (affirmation of plaintiff's counsel in support of plaintiff's cross-motion, exhibit G ¶ 19). Plaintiff also claims that the work performed was under the direction and control of Moulin (*id.* ¶ 20). These allegations, if true, could form the basis for a finding of liability against Moulin under the Labor Law. Moulin is not prejudiced by the delay because Moulin has appeared in the case as a third-party defendant.

Although Moulin's arguments that Mr. Ferranti never exhibited supervision or control over plaintiff's work appear to have some merit, they do not warrant denial of a motion for leave to amend a complaint.

Accordingly, it is hereby

ORDERED that Moulin's motion for summary judgment and to dismiss the third-party complaint is granted; and it is further

ORDERED that 115 West's motion for summary judgment dismissing plaintiff's complaint is granted and all of plaintiff's claims against 115 West are severed and dismissed; and it is further

ORDERED that plaintiff's motion for leave to amend the complaint to add Moulin as a direct defendant is granted.

This is the Decision and Order of the Court.

Dated: May 5, 2016
New York, New York

HON. ARLENE P. BLUTH, JSC