

Ortiz v IGBY Huntlaw LLC

2016 NY Slip Op 30924(U)

May 19, 2016

Supreme Court, New York County

Docket Number: 152159/13

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

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

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WILSON ORTIZ and ENEDELIA ORTIZ,

Plaintiffs,

-against-

Index No. 152159/13

DECISION/ORDER

IGBY HUNTLAW LLC and A.E. GREYSON & CO., INC.,

Defendants.

-----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.....	<u>1</u>
Affidavits in Opposition.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiffs Wilson and Enedelia Ortiz commenced the instant action seeking to recover for injuries allegedly sustained by plaintiff Wilson Ortiz (“Mr. Ortiz”) in the course of his employment. Defendant A.E. Greyson & Co., Inc. (“Greyson”) now moves for an Order pursuant to CPLR § 3212 for summary judgment dismissing plaintiffs’ complaint. For the reasons set forth below, Greyson’s motion is denied.

The relevant facts are as follows. This action arises out of a November 12, 2012 accident at a construction site at which plaintiff, Mr. Ortiz, a painter employed by non-party Uriu, LLC (“Uriu”), allegedly fell from a ladder while painting at the residential premises located at 15 Mercer Street, Unit 2, New York, New York (hereinafter referred to as the “subject premises” or the

“Project”). The subject premises was owned by defendant IGBY Huntlaw, LLC (“IGBY”), which was previously granted summary judgment by this court based primarily on the one- and two-family owner exemption under New York’s Labor Law (the “Labor Law”). IGBY, as owner, contracted with defendant Greyson, as general contractor, to perform certain work involving the renovation of the subject premises. Separate and apart from its agreement with Greyson, IGBY contracted with Uriu, plaintiff’s employer, to perform certain specialty paint work at the subject premises.

On the day of his accident, plaintiff was painting color samples on the walls of the subject premises. He was using an approximately 10-foot metal A-frame ladder provided by Uriu. The ladder was resting on top of a piece of plywood which was placed over plastic on the floor to protect the marble underneath. While plaintiff was up on the ladder painting, plaintiff alleges that the ladder moved causing him to fall and sustain injuries.

Thereafter, plaintiffs commenced the instant action alleging violations of Labor Law §§ 200, 240(1), 241(6) as well as claims for common law negligence and loss of consortium. Defendant Greyson now moves for summary judgment dismissing plaintiffs’ complaint.

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.*

A general contractor that has not contracted for the work performed by the injured plaintiff is entitled to summary judgment dismissing claims brought pursuant to Labor Law §§ 200, 240(1) and 241(6) where it “had no authority to supervise or control the activity that caused the plaintiff’s injury.” *Balthazar v. Full Circle Constr. Co.*, 268 A.D.2d 96, 98 (1st Dept 2000). Indeed, “[i]t is a defense that the plaintiff’s work at the time of the accident was outside the scope of the general contractor’s contract.” *Id.* See also *Filchuk v. Lehrer McGovern Bovis Constr.*, 232 A.D.2d 329, 329-330 (1st Dept 1996)(“The IAS Court properly granted defendant’s motion for summary judgment dismissing plaintiff’s Labor Law § 240 (1), § 241 (6) and § 200 causes of action, since defendant did not have the contractual or other actual authority to control or supervise the activity bringing about plaintiff’s injury and was not an agent of plaintiff’s employer.”) With regard to sections 240(1) and 241(6), “[t]he rule has its genesis in the concept that Labor Law liability under [such sections] is premised on an owner’s or general contractor’s right to control the work, irrespective of whether such control is exercised, and that if the work leading to the accident is outside the scope of what is contracted for, there is no right of control on the part of the contractor and thus no liability under those statutes.” *Butt v. Bovis Lend Lease LMB, Inc.*, 47 A.D.3d 338, 341 (1st Dept 2007).

In the instant action, Greyson has established its *prima facie* right to summary judgment dismissing plaintiffs’ Labor Law §§ 200, 240(1), 241(6) and common law negligence claims as it has demonstrated that plaintiff’s work was outside the scope of Greyson’s contract with IGBY and that Greyson did not have the contractual or other actual authority to, nor did it, supervise, direct or control plaintiff’s activities on the Project. It is undisputed that there is no contract between Greyson and Uriu and that Uriu was hired by IGBY, the owner, for painting services pursuant to a

separate contract entirely. It is also undisputed that pursuant to the contract between IGBY and Greyson, painting, including specialty painting, was explicitly excluded from the services to be provided by Greyson. Mario Reyes, Supervisor for Uriu, testified that any direction of Uriu employees would come from him and not from any other contractor. Additionally, James Parisi, Supervisor for Greyson, testified that neither he nor any Greyson employee was responsible or had authority to supervise, direct or control the work performed by Uriu's employees, including plaintiff. Further, Joseph Kusnick, President of Greyson, has affirmed that Greyson had no authority, under its contract with IGBY or otherwise, to supervise, direct or control the work performed by Uriu and its employees. Thus, as Greyson had no contractual or other actual authority to, and did not, supervise, direct or control the work performed by Mr. Ortiz, Greyson has established its right to summary judgment dismissing plaintiffs' complaint.

However, in response, plaintiffs have raised an issue of fact sufficient to defeat defendant Greyson's motion for summary judgment dismissing plaintiffs' complaint. Plaintiffs provide the affidavit of Mr. Ortiz who affirms that his accident was caused by the slippery plastic and plywood placed over it and that Mr. Parisi, Greyson's Supervisor, supervised, directed and controlled his and his coworkers work on the Project. Specifically, Mr. Ortiz affirms that: Mr. Parisi "direct[ed] us on a daily basis where to work and he would tell us what sheetrock walls to even out with joint compound and cover the tape over the gaps between sheets of sheetrock with compound, as well"; Mr. Parisi "would tell us the location where we should work...where we could work and where we could not work"; Mr. Parisi "ordered Johnny, Allen and me to protect the marble flooring and cover it with plastic sheeting...[and] also directed us to put plywood down on top of the plastic...[because] Jimmy was very strict about protecting the marble floor"; and Mr. Parisi

provided plaintiff and his coworkers with the plywood used under the ladder.

Greyson's assertion that the court should disregard the affidavit submitted by Mr. Ortiz because it is contradicted by his deposition testimony and his affidavit submitted in opposition to IGBY's prior motion for summary judgment is without merit. Specifically, Greyson points to the portions of Mr. Ortiz's affidavit in which he states that his accident was caused by the slippery plastic and plywood laid over it, that Mr. Parisi ordered plaintiff to put down the plastic and plywood and that Mr. Parisi provided plaintiff with the plywood. Greyson asserts that at his deposition and in his prior affidavit, Mr. Ortiz did not know exactly how his accident occurred and never mentioned specifically that Mr. Parisi directed him to put down the plastic and plywood. When he was asked at his deposition whether he had any conversations with Mr. Parisi, Mr. Ortiz responded "Yes" and clarified that they "only spoke about work." However, the court finds that the affidavit submitted in opposition to the instant motion does not contradict plaintiff's prior testimony or prior affidavit but rather expands upon the questions asked at plaintiff's deposition and the information provided in his prior affidavit. Indeed, plaintiff testified at his deposition that he knew Mr. Parisi as being an employee of Greyson and that he was "in charge." Further, in plaintiff's prior affidavit, which consists of a mere five sentences, plaintiff affirmed that while he was working at the subject premises, he was "caused to fall from an unsecured ladder" and that as a result, he suffered injuries. Nothing in the instant affidavit contradicts either the affidavit submitted in opposition to IGBY's motion or plaintiff's testimony provided at his deposition.

Finally, to the extent plaintiffs request, in opposition to defendant Greyson's motion, that the court search the record and grant plaintiffs summary judgment on their complaint, such request is denied as this court has already found that there are issues of fact as to whether Greyson directed,

