

Urquiza v Park & 76th St. Inc.
2018 NY Slip Op 30992(U)
May 22, 2018
Supreme Court, New York County
Docket Number: 158295/13
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
JusticePART 13

ANTONIO URQUIZA a/k/a ANTONIO PELAGIO
URQUIZA CARDENAS by MARTHA PARADA ARDAYA
and STIVENS A. SANQUINO, as Co-Administrators of the
Estate of ANTONIO PELAGIO URQUIZA a/k/a
ANTONIO PELAGIO URQUIZA CARDENAS, Deceased,

INDEX NO. 158295/13
MOTION DATE 04-25-18
MOT. SEQ. NO. 024
MOTION CAL. NO. _____

Plaintiffs,

-against-

PARK AND 76TH ST. INC., MARY L. CARPENTER &
EDMUND M. CARPENTER, NORDIC CUSTOM BUILDERS
INC., MITCHELL STUDIO, LLC, GUMLEY-HAFT LLC,
CUMMINS PAINTING SPECIALISTS INC., ARTHUR C.
KLEM, INC., ALKLEM PLUMBING, INC., AA
SERVICES LLC, GT CARPENTRY, LLC, CONNECTICUT
THERMOFOAM LLC a/k/a CONNECTICUT THERMOFOAM
LIMITED LIABILITY COMPANY, ERIN CUSTOM
INTERIORS, INC., W.M. SANFARDINO ELECTRIC LTD.,
and PLASTER WORKS INC.,

Defendants.

and five other related third-party actions.

The following papers, numbered 1 to 12 were read on this Motion pursuant to CPLR §3212 for summary judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3</u>
Answering Affidavits — Exhibits _____ cross motion _____	<u>4, 5 - 6, 7, 8 - 9</u>
Replying Affidavits _____	<u>10 - 11, 12</u>

Cross-Motion: Yes ☒ No

Upon a reading of the foregoing cited papers, it is Ordered that Mary L. Carpenter and Edmund M. Carpenter's motion pursuant to CPLR §3212 for summary judgment dismissing the complaint, any and all cross-claims asserted against them, and on their claims for common law indemnification asserted against Nordic Custom Builder's Inc. and in their second third-party action against Stephen Gamble Inc., is granted only as to dismissing the Labor Law §200 cause of action and those cross-claims not asserted by Park and 76th St. Inc. and Gumley-Haft LLC. The remainder of the relief sought in this motion is denied.

Martha Parada Ardaya and Stivens A. Sanquino, as Co-Administrators of the Estate of Antonio Urquiza a/k/a Antonio Pelagio Urquiza Cardenas, deceased (hereinafter referred to as "plaintiffs") commenced this wrongful death and Labor Law §200, §240[1] and §241[6] action to recover damages as a result of the personal injuries and death of Antonio Pelagio Urquiza Cardenas (hereinafter referred to individually as "decedent") on May 24, 2012, during a duplex renovation project, when he suddenly fell from a third floor window as he was staining an exterior wooden window jamb, in a cooperative apartment located at 840 Park Avenue, Apartment 3/4A, New York, New York (hereinafter referred to as the "premises").

Plaintiffs allege that decedent was performing work in the course of his employment with Stephen Gamble, Inc., as directed by defendant Nordic Custom Builder's Inc. through its site supervisor, Declan O'Meara and his company Euro Wood Trim Inc.. It is further alleged that Declan O'Meara acting on behalf of all of the defendants, directed the decedent to stain the exterior wooden window jambs while

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

standing on a piece of plywood - wrapped in construction paper-to protect a bronze grill on the radiator box, during a rainstorm. Plaintiffs claim that no adequate safety devices were provided by any of the defendants, all of whom retained supervision and control over the work site, instead the defendants relied on the inadequate and improper protection of a decorative rail outside the window to prevent the decedent from falling.

The premises are located in a building owned by Park and 76th Street, Inc., Gumley-Haft, LLC was the property manager. Mary L. Carpenter and Edmund M. Carpenter (hereinafter referred to jointly as "Carpenters") are the tenants, owning the shares of stock for the two apartments that make up the premises. Mitchell Studio, LLC (hereinafter referred to individually as "Mitchell") is the architecture firm retained by the Carpenters to design the interior renovation. Nordic Custom Builder's, Inc. (hereinafter referred to individually as "Nordic") was retained as the general contractor for the renovation project. Nordic hired Grace Ryan Magnus Millwork, LLC (hereinafter referred to individually as "GRMM") as a subcontractor to perform millwork and woodwork. GRMM subcontracted interior wood staining work to Stephen Gamble Inc., plaintiff's employer. Nordic also hired as a subcontractor, Euro Wood Trim, Inc., a company solely owned by Declan O'Meara, to act as a site supervisor.

The Carpenters seek an Order pursuant to CPLR §3212 for summary judgment dismissing the complaint and any and all cross-claims asserted against them, for summary judgment on their cross-claim against Nordic Custom Design for common law indemnification, and on their Second Third-Party claims asserted against Stephen Gamble Inc., for common law indemnification.

The Carpenters argue that they are immune from liability pursuant to the homeowner's exemptions found in Labor Law §240 [1] and §241[6], as owners of a one family dwelling that did not control or direct the work.

The residents of a one family dwelling, including a condominium or cooperative apartment, are entitled to the exemption set forth in Labor Law §240 (1) and §241[6], when they do not control the injury producing work (See Valencia v. Calero, 5 A.D. 3d 254, 773 N.Y.S. 2d 295 [1st Dept., 2004], Brown v. Christopher St. Owners Corp. 211 A.D. 2d 441, 620 N.Y.S. 2d 374 [1st Dept., 1995] and Cannon v. Putnam 76 N.Y. 2d 644, 564 N.E. 2d 626, 563 N.Y.S. 2d 16[1990]).

Plaintiffs' correctly argue that the Carpenters did not raise the homeowner's exemptions found in Labor Law §240 [1] and §241[6] as an affirmative defense in their answer, and that summary judgment should be denied as to the causes of action asserted in the complaint. Plaintiffs do not bear the burden of disproving a defense that has never been raised, and the Court may not sua sponte take judicial notice of a defense that was not raised (De Oleo v. Charis Christian Ministries, Inc., 94 A.D. 3d 541, 942 N.Y.S. 2d 340 [1st Dept., 2012] and Horst v. Brown, 72 A.D. 3d 434, 900 N.Y.S. 2d 13 [1st Dept. 2010]). The argument made by the Carpenters that there is no surprise or prejudice because the homeowner's exemption is common knowledge, is unsupported and unavailing.

Labor Law § 200 imposes a common law duty on an owner or contractor and applies to two categories of claims: (1) Those arising from the manner of performance of the work which includes the equipment used, and (2) those arising from a dangerous condition on the premises (Cappabianca v. Skanska USA Bldg. Inc., 99 A.D. 3d 139, 950 N.Y.S. 2d 35 [1st Dept., 2012]).

A precondition to liability under Labor Law § 200 claims arising from the manner of performance of the work is that the party charged must have authority or exercise direct supervisory control over the activity that resulted in the injury. Mere directions as to the time and quality of the work, picking out the type and color of paint, indicating areas that need painting, and purchasing painting supplies, does not demonstrate control or direction of the method and manner of the work, and is not enough to

establish liability (*Valencia v. Calero*, 5 A.D. 3d 254, *supra* at pgs. 254-255, and *Pareja v. Davis*, 138 A.D. 3d 615, 30 N.Y.S. 3d 78 [1st Dept., 2016]).

The Carpenters have made a prima facie showing that they are not liable under Labor Law §200. Mary Carpenter testified at her deposition that she was not on the premises on the date of the accident, never met the Stephen Gamble Inc. employees, including the decedent, and that she never had discussions with her architect or with anyone else from either Nordic or Declan O'Meara and Euro Wood Trim Inc. about the work performed by Stephen Gamble Inc. employees (Mot. Exh. V, pgs. 10-13, 21-22, 49, 55-56). Plaintiffs have not raised an issue of fact to deny summary judgment under the Labor Law §200 cause of action, or established that the Carpenters exercised authority, or controlled the manner in which the work was performed. Choosing the stain used or being present on the premises at meetings to discuss the progress of work, does not amount to directing and supervising the work.

Labor Law §200 also applies to an existing dangerous defect on the premises requiring that the defendant have either actual or constructive notice of the unsafe condition that caused the accident, with sufficient time prior to the accident to discover and remedy it (*Lopez v. Dagan*, 98 A.D. 3d 436, 949 N.Y.S.2d 671 [1st Dept. 2012] and *Mendoza v. Highpoint Assoc., IX, LLC*, 83 A.D. 3d 1, 919 N.Y.S. 2d 129 [1st Dept., 2011]).

Plaintiffs did not argue that the Carpenters had either actual or constructive notice of any existing dangerous defect on the premises, warranting summary judgment on the Labor Law §200 cause of action.

The Carpenters made no arguments and have not met their prima facie burden for dismissing the cross-claims asserted by Park and 76th St. Inc., and Gumley-Haft LLC for indemnification under the proprietary lease, therefore summary judgment is denied as to that cross-claim. The Carpenters are entitled to unopposed summary judgment dismissing all other cross-claims asserted against them.

The Carpenters seek common law indemnification on their cross-claim against Nordic and on the second third-party claims asserted against Stephen Gamble Inc..

A party seeking common law indemnification is required to prove that it is not liable for negligence other than statutorily, and that the proposed indemnitor's negligence is the cause of the accident or that it exclusively exercised supervision and control over the plaintiff's work (*McCarthy v. Turner Construction, Inc.*, 17 N.Y. 3d 369, 953 N.E. 2d 794, 929 N.Y.S. 2d 556 [2011]). A party can only be liable under common-law indemnification when it exercises "*actual* supervision of the injury producing work." Mere authority to supervise the work and implement safety procedures is not enough (See *Naughton v. City of New York*, 94 A.D. 3d 1, 940 N.Y.S. 3d 21 [1st Dept., 2012] citing to *McCarthy v. Turner Construction, Inc.*, 17 N.Y. 3d 369, *supra* at pgs. 376 and 378, and *Ortiz-Cruz v. Evers*, 150 A.D. 3d 622, 56 N.Y.S. 3d 71 [1st Dept., 2017])

David Gamble was deposed and testified on behalf of Stephen Gamble Inc. that the employees on the premises consisted of three brothers: (1) The decedent, (2) Marcelo Urquiza, (3) Jesus Urquiza, and Carlo Maldonado (Mot. Exh. P, pg. 24). He further testified that the decedent's foreman, his brother Marcelo Urquiza (translated through Carlo Maldonado), was told not to have Stephen Gamble Inc. employees perform the exterior work that the site supervisor Declan O'Meara wanted them to complete, but the employees did it anyway (Mot. Exh. P, pgs. 58-60 and 62). There is other deposition testimony from Carlo Maldonado that Mr. Gamble did not call the employees back to tell them whether or not to complete the exterior jamb work that Declan O'Meara wanted done (Mot. Exh. R pgs. 45-48 and 79-80). Marcelo Urquiza testified at his deposition that David Gamble (translated through Carlo Maldonado) told his employees to do the exterior work if that is what Declan O'Meara told them to do (Mot. Exh. T pgs. 23-24). Declan O'Meara testified at his deposition that David Gamble suggested that the exterior jambs needed to be stained and that he did not request that work (Mot. Exh. M, pg. 91).

Nordic also had a representative at the premises on the day of the accident (Mot. Exh. M, pg. 26).

Issues of fact and credibility issues remain on the negligence claims against both Nordic and Stephen Gamble Inc. and whether supervision and control over the work on the exterior jamb was exercised exclusively by Stephen Gamble Inc.. In light of the conflicting testimony as to the decedent being directed and supervised by Declan O'Meara as site supervisor and potential agent of Nordic, there are issues of fact to be resolved by a jury at trial.

Accordingly, it is ORDERED that Mary L. Carpenter and Edmund M. Carpenter's motion pursuant to CPLR §3212 for summary judgment dismissing the complaint, any and all cross-claims asserted against them, and on their claims for common law indemnification asserted against Nordic Custom Builder's Inc., and their second third-party action against Stephen Gamble Inc., is granted only as to dismissing the Labor Law §200 cause of action and those cross-claims not asserted by Park and 76th St. Inc., and Gumley-Haft LLC, and it is further,

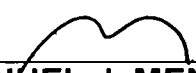
ORDERED that the cause of action pursuant to Labor Law §200 asserted in the complaint against Mary L. Carpenter and Edmund M. Carpenter is severed and dismissed, and it is further,

ORDERED that all cross-claims asserted against Mary L. Carpenter and Edmund M. Carpenter except those asserted by Park and 76th St. Inc., and Gumley-Haft LLC, are severed and dismissed, and it is further,

ORDERED that the remainder of the relief sought in this motion is denied, and it is further,

ORDERED that the Clerk of the Court shall enter judgment accordingly.

ENTER:



MANUEL J. MENDEZ,
J.S.C.

Dated: May 22, 2018

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE