Perez v Refinery NYC Mgmt LLC
2018 NY Slip Op 32545(U)
October 5, 2018
Supreme Court, New York County
Docket Number: 161390/2014
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON **PART** IAS MOTION 42EFM

Justice

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JESUS PEREZ,

Plaintiff,

- v -

REFINERY NYC MGMT LLC, RSVP 38TH STREET VENTURE, LP, RSVP 38TH STREET MANAGEMENT, INC., HIGHGATE HOTELS, L.P., PINKY VAID, and JACOB AINI

Defendant.

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INDEX NO. 161390/2014

MOTION DATE 04/04/2018

MOTION SEQ. NO. 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 73, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this personal injury action where the plaintiff claims to have been injured in a fall from a ladder at the Refinery Hotel in Manhattan, premises allegedly owned, controlled and/or managed by the defendants, defendant Highgate Hotels L.P. (Highgate) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint as against it. Highgate's previous motion for the same relief was denied without prejudice by decision and order dated July 7, 2016. The instant motion is granted.

The plaintiff commenced this action against the defendants following his injury, asserting that they violated Labor Law § 240(1) by failing to supply him with safety devices necessary to provide proper protection to workers from fall-related injuries, and that they violated Labor Law § 241(6) by failing to comply with unspecified provisions of the Industrial Code. The plaintiff also asserts a common law negligence claim against the defendants. Highgate asserts that because it served as a mere marketing and revenue management consultant to the defendant RSVP 38th Street Venture, LP, and was not the owner or operator of the building wherein the plaintiff was working, it cannot be held liable for his injuries. Highgate further argues that the plaintiff is not covered by the Labor Law because the work he was performing at the time of his accident was routine maintenance and not a protected activity under the Labor Law.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980).

Labor Law § 240(1) provides that "[a]ll contractors and owners and their agents . . . shall furnish or erect, or cause to be furnished or erected . . . 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 [construction workers employed on the premises]." The duty created by Labor Law § 240(1) is nondelegable, and an owner or contractor who breaches that duty may be held liable for damages "regardless of whether it has actually exercised supervision or control over the work." Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494, 500 (1993); see Cahill v Triborough Bridge and Tunnel Authority, 4 NY3d 35 (2004). Similarly, Labor Law § 241(6) imposes a nondelegable duty upon all contractors and owners and their agents "to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed." Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 348 (1998) (citation and internal quotation marks omitted); see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 (1993).

"Liability under the Labor Law as an owner . . . turns in every case on sometimes fine distinctions relating to ownership of the premises and control of the injury-producing work." Guryev v Tomchinsky, 20 NY3d 194, 201 (2012). Ownership of the premises, standing alone, is not enough to impose liability under the Labor Law where the property owner did not contract for the work resulting in the plaintiff's injuries; "ownership is a necessary condition, although not a sufficient one, for a non-contracting party's liability" under the Labor Law. Id.; see Naupari v Murray, 163 AD3d 401 (1st Dept. 2018); Barksdale v BP Elevator Co., 16 AD3d 558 (1st Dept. 2018); Alvarez v Hudson Valley Realty Corp., 107 AD3d 748 (2nd Dept. 2013).

In support of its motion, Highgate submits its contract with defendant RSVP 38th Street Venture, LP, whereby it agreed to provide consulting services on marketing and revenue. Highgate also submits the deposition testimony of two representatives of RSVP 38th Street Venture, LP, Refinery NYC Mgmt LLC, and RSVP 38th Street Venture, LP (the RSVP entities). The RSVP entities' representatives testified that Highgate's role is solely to consult on revenue, that no employee of Highgate ever came to the Refinery Hotel other than for a room or building showing, that the contract for labor was solely between the plaintiff's employer and one of the RSVP entities, that requests by laborers such as the plaintiff were always made to RSVP entity employees, and that equipment used by the laborers was stored by an RSVP entity. The deposition testimony of Highgate's witness, Jeff Toscano, indicated that Highgate performs revenue management consulting for RSVP 38th Street Venture, LP, to the extent that Highgate makes recommendations regarding the branding or marketing of the Refinery Hotel and provides consultation regarding the pricing of guest rooms. Toscano stated that Highgate has no ownership interest in the Refinery Hotel, nor does it have any management agreement with any of the RSVP entities.

Highgate's submissions establish, prima facie, that Highgate was not an "owner" of the Refinery Hotel, nor did it have either the authority to contract with the plaintiff's employer to perform the work or the right to control the work. In his response, the plaintiff submits portions of Highgate's website, clips from internet press releases indicating the Refinery Hotel is in

Highgate's portfolio, and other material taken from internet searches identifying the Refinery Hotel as a "Highgate Hotel." None of these materials actually states that Highgate owned or managed the Refinery Hotel. As to the plaintiff's submission of an uncertified document, apparently for employees, wherein it is indicated that the Refinery Hotel's "Owner" is "Partnership between Highgate Holdings and Private Owners," the plaintiff provides no explanation of the relationship between "Highgate Holdings" and "Highgate Hotels, L.P.," the actual defendant in this case, and no explanation of where the document came from.

The plaintiff also offers his own deposition testimony, in which he states that he reported to individuals he believed to be employees of Highgate, and admits that he found the aforementioned document in an online search with nonparty Felix Burgos, while researching the connection between Highgate and the Refinery Hotel, after becoming aware that Highgate disclaimed liability in this case. Finally, the plaintiff offers an affidavit of Felix Burgos, a former laborer at the Refinery Hotel whose employment was terminated. Burgos testified that his supervisors were Highgate employees and that they could fire laborers at any time. The depositions of the defendants confirm that the two employees mentioned by both Burgos and the plaintiff were in fact employed by Refinery NYC Mgmt LLC at the time of the accident. Neither the plaintiff nor Burgos provide any basis for their assumptions. Moreover, the consulting agreement explicitly states that all hotel employees are "Employees of Manager or contractor of Owner or Manager and not employees of Consultant," that the consultant shall not make any decisions or recommendations regarding laborers, and that the consultant has no right to supervise hotel employees.

As to the plaintiff's claim that Highgate was a partner at the Refinery Hotel, none of plaintiff's submissions controvert the plain language of the agreement between Highgate and RSVP 38th Street Venture LP, which explicitly states that "Nothing contained in this agreement shall constitute, or be construed to constitute, or create a partnership, joint venture, agency arrangement, management agreement or lease between owner and consultant with respect to the hotel." Moreover, the plaintiff's argument that because Highgate receives a fee equal to a percentage of the hotel's revenue for its services, there is prima facie evidence of a partnership, fails because there is no indication that Highgate and any of the RSVP entities ever agreed to share losses.

Since Highgate has established that it was not an owner of the Refinery Hotel and did not perform or supervise any work at the incident location, the plaintiff's Labor Law §§ 240(1) and 241(6) claims must be dismissed as against Highgate. In addition, since Highgate established that it did not own, occupy, or control the premises, and that it did not have the authority to supervise or control the manner in which the work was performed, Highgate is entitled to summary judgment dismissing the plaintiff's common law negligence claims. See Alvarez v Hudson Valley Realty Corp., supra. The court does not reach Highgate's claims regarding whether the plaintiff's activity was covered under the Labor Law.

Accordingly, it is

ORDERED that the motion of the defendant Highgate Hotels, L.P., for summary judgment dismissing the complaint as against it is granted, and the complaint is dismissed as against Highgate Hotels, L.P., in its entirety; and it is further,

ORDERED that the clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

10/5/2018
DATE

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED		GRANTED IN PART	☐ OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	☐ REFERENCE