

Kotyk v BCG Dev., LLC
2018 NY Slip Op 32758(U)
March 26, 2018
Supreme Court, Westchester County
Docket Number: 50981/16
Judge: Lewis J. Lubell
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SCP 4/24/18 @ 9:15

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF WESTCHESTER

-----X

MYKHAYLO KOTYK,

Plaintiff,

-against -

BCG DEVELOPMENT, LLC, BRENTON GREER,
and NY RENOVATE, LLC,

Defendants.

-----X

LUBELL, J.

DECISION & ORDER

Index No. 50981/16

Sequence Nos. 5&6

The following papers were considered in connection with **Motion Sequence #5** by defendants BCG Development, LLC and Brenton Greer for an Order granting defendant Brenton Greer summary judgment dismissing the plaintiff's Labor Law Section 200, 241(6) and common law negligence claim and dismissing all claims against defendant Brenton Greer on the basis that he was not an owner of the property or general contractor within the meaning of the labor law, and as such, cannot be held liable for negligence even if it exists, and **Motion Sequence #6** by plaintiff for an Order pursuant to CPLR 3042(b) and/or 3042(b) granting plaintiff leave to serve a supplemental and/or amended bill of particulars:

PAPERS

NOTICE OF MOTION/AFFIRMATION/EXHIBITS A-K
NOTICE OF CROSS MOTION/AFFIRMATION/EXHIBITS A-D
AFFIRMATION, IN OPPOSITION/EXHIBITS A-N

NYSCEF

71-84
95-101
102-117

Defendant Brenton Greer seeks summary judgment dismissing the plaintiff's Labor Law claims against him individually because he is not the owner of or the general contractor for the property where the plaintiff's alleged injury occurred. Plaintiff argues

that summary judgment is inappropriate because he believes the plaintiff still owned the property even after the transfer.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a Court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. [Giuffrida v. Citibank Corp., et al., 100 N.Y.2d 72 (2003) (citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986))]. The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. [Lacagnino v. Gonzalez, 306 A.D.2d 250 (2d Dept. 2003)]. However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. [Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124 (2000)]. Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. [Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980)].

The law is clear that "a corporation has a separate legal existence from its shareholders even where the corporation is wholly owned by a single individual." [Queens West Development Corp. v. Nixbot Realty Associates, 121 A.D.3d 903, 905 (2d Dept. 2014)]. Here, four days before the alleged accident, the property was transferred from defendant Brenton Greer and his wife to BCG Development, LLC. Indeed, from a review of the plaintiff's EBT testimony and the deed of transfer, it appears that the accident occurred approximately an hour after the deed was recorded by the county clerk. As a result, defendant Brenton Greer was no longer the owner of the property, and even if he was one of two shareholders of the corporate entity owning the property, summary judgment is appropriate because the corporate entity is the proper defendant.

Defendants also seek summary judgment on the Section 241(6) claim because they contend that the plaintiff has not properly alleged the specific Industrial Code regulation violated in his bill of particulars. The plaintiff has filed a motion, which is unopposed, seeking leave to amend the bill of particulars to cure a defect in the Industrial Code section that is alleged to have been violated.

Although a plaintiff asserting a Labor Law §241(6) cause of

action must allege a violation of a specific and concrete provision of the Industrial Code, a failure to identify the Code provision in the complaint or bill of particulars is not fatal to such a claim. When, as here, the plaintiff's allegation of a violation of the Industrial Code involves no new factual allegations, raises no new theories of liability and causes no prejudice to the defendants, plaintiff is allowed to amend the bill of particulars. [See Kelleir v. Supreme Industrial Park, LLC, 293 A.D.2d 513, 514 (2d Dept. 2002).] As a result, defendant's motion for summary judgment on the Industrial Code violation claim is denied and plaintiff's motion for leave to serve a supplemental and/or amended bill of particulars is granted.

Based upon the foregoing, it is hereby

ORDERED, that defendants' motion to dismiss the complaint is granted as against defendant, Brenton Greer, and is otherwise denied; and, it is further

ORDERED, that plaintiff's motion for leave to serve a supplemental and/or amended bill of particulars is granted and is hereby deemed served; and, it is further

ORDERED, that the parties are directed to appear on Tuesday, April 24, 2018, at 9:15 a.m. in the Settlement Conference Part, Courtroom 1600, Westchester County Supreme Court, 111 Dr. Martin Luther King, Jr. Boulevard, White Plains, New York, prepared to conduct a settlement conference.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
March 26th, 2018



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