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| <b>Ardizzone v Summit Glory LLC</b>  |
| 2018 NY Slip Op 32880(U)   |
| November 1, 2018   |
| Supreme Court, New York County   |
| Docket Number: 157243/2017   |
| Judge: Kathryn E. Freed  |
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

|  |                              |                        |                     |
|--|------------------------------|------------------------|---------------------|
| <b>PRESENT:</b>                          | <u>HON. KATHRYN E. FREED</u> | <b>PART</b>            | <b>IAS MOTION 2</b> |
|  | <i>Justice</i>               |                        |                     |
| -----X                                   |                              | <b>INDEX NO.</b>       | <u>157243/2017</u>  |
| ANGELO ARDIZZONE and MARYBETH ARDIZZONE, |                              | <b>MOTION SEQ. NO.</b> | <u>001</u>          |
| Plaintiffs,                              |                              |                        |                     |

- v -

SUMMIT GLORY LLC, FOSUN INTERNATIONAL LIMITED,  
 HUNTER ROBERTS CONSTRUCTION GROUP, LLC, AMERICON  
 CONSTRUCTION INC., MILROSE CONSULTANTS, INC.,  
 GENSLER ARCHITECTURE DESIGN & PLANNING P.C.,  
 INTERIOR ARCHITECTS INC., INTERIOR ARCHITECTS P.C.,  
 SHMERYKOWSKY CONSULTING ENGINEERS, SYSKA  
 HENNESSY GROUP, INC., DNA CONTROLLED INSPECTION  
 LTD.,

**DECISION AND ORDER**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 39, 40, 41, 42, 43, 44, 45, 46, 47, 54, 72, 74, 89, 92, 93, 94, 98, 121, 122, 123, 124, 125, 126, 127, 128, 148

were read on this motion to/for DISMISSAL

Upon the foregoing documents, it is ordered that the motion is **granted**.

In this personal injury action, defendant Hunter Roberts Construction Group, LLC (“Hunter Roberts”) moves, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint of plaintiffs Angelo Ardizzone and Marybeth Ardizzone (collectively “the Ardizzones”). Hunter Roberts also moves to have this motion treated as one for summary judgment upon the documents submitted on the motion pursuant to CPLR 3211(c). After oral argument, and after a review of the parties’ papers and the relevant statutes and case law, the motion is **granted**.

**FACTUAL AND PROCEDURAL BACKGROUND:**

The complaint in this action alleges that, on June 9, 2016, plaintiff Angelo Ardizzone sustained injuries when he fell off a ladder at a construction site located at 28 Liberty Street in

Manhattan (“the premises”) due to debris, construction materials, and other hazards. (Doc. 43 at 18–19.) At the time, he was an employee of Allran Electric of New York, LLC (“Allran”), which is a non-party to this action. (*Id.* at 18.)

Plaintiffs thereafter commenced this action alleging violations of New York’s Labor Law §§ 200, 240(1), and 241(6) against the following defendants: Hunter Roberts; Summit Glory, LLC (“Summit Glory”); Fosun International Limited d/b/a Fosun Property Holdings; Americon Construction Inc. (“Americon”); Milrose Consultants, Inc.; Gensler Architecture Design & Planning P.C.; Interior Architects Inc.; Interior Architects, P.C.; Shmerykowky Consulting Engineers; Syska Hennessy Group, Inc.; and DNA Controlled Inspection Ltd. (collectively “Defendants”). The complaint alleged that Defendants retained Allran to perform construction work at the premises (*id.* at 11, 13–14, 17, 23, 27–30, 36–37) and that Angelo Ardizzone was injured as a result of their negligence (*id.* at 19, 31, 44, 56, 69, 81, 94, 106, 119, 131, 144).

Defendant Hunter Roberts has filed a pre-answer motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7). Hunter Roberts argues that it is not a proper Labor Law defendant in this action because it was not an owner, agent, or contractor hired to perform work at the site when plaintiff Angelo Ardizzone was injured. (Doc. 41 at 4.) In the alternative, Hunter Roberts contends that, even if it can be considered a Labor Law defendant, plaintiffs’ Labor Law causes of action must fail because Hunter Roberts owed no duty of care to Angelo Ardizzone, since Hunter Roberts did not supervise or control his work and since it did not have any notice of the alleged defective conditions which led to the accident. (*Id.* at 7–9.) Moreover, Hunter Roberts argues that it did not have a contractual relationship with Angelo Ardizzone’s employer, Allran, and that it was not in contractual privity with plaintiff. (*Id.* at 9–10.)

In further support, Hunter Roberts submits a copy of the contract pursuant to which it was retained to perform work at the construction site (Doc. 44), as well as the affidavit of Paul Anderson (“Anderson”), its executive vice president (Doc. 45). The contract purports to show that Summit Glory—the owner of the construction project—and Hunter Roberts executed the same on July 13, 2016, over a month subsequent to plaintiff’s accident. (Doc. 44 at 2.) In his affidavit, Anderson states that, while Hunter Roberts did construction work at the site, the work it performed did not happen until after the execution of the contract between it and Summit Glory. (Doc. 45.)

In opposition, plaintiffs argue that Hunter Roberts’ summary judgment motion should be denied because no discovery has been conducted. Regarding Anderson’s affidavit, plaintiffs contend that, although Anderson testified that Hunter Roberts did not have a contract with Allran until a month after Angelo Ardizzone’s accident, the affidavit does not state whether Hunter Roberts had any pre-contract involvement with the project. (Doc. 72 at 7.) To bolster this assertion, plaintiffs point to several exhibits annexed to the contract that are dated in March, May, and June of 2016. (*Id.* at 7–8.) Thus, plaintiffs argue, Anderson’s affidavit fails to absolve Hunter Roberts of liability because there is an issue of fact as to Hunter Roberts’s involvement in the project prior to its contract with Summit Glory. (*Id.*) Similarly, defendant Summit Glory opposes Hunter Roberts’s summary judgment motion on the ground that it is premature. (Doc. 89.)

With respect to Hunter Roberts’s dismissal motion, plaintiffs assert that Anderson’s affidavit may not be considered as documentary evidence that would establish a defense warranting dismissal pursuant to CPLR 3211(a)(1) (Doc. 72 at 2–3), and that dismissal is

likewise not warranted pursuant to CPLR 3211(a)(7) because the complaint properly states a claim for personal injury (*id.* at 3–5).

Defendant Americon opposes Hunter Roberts’s motion on substantially the same arguments expressed by plaintiffs. (Doc. 121.)

In reply, Hunter Roberts argues that the exhibits which are dated before July of 2016 are not binding contacts between it and Summit Glory. (Doc. 92 at 2–3.) Instead, those exhibits are evidence of prior negotiations between Hunter Roberts and Summit Glory. (*Id.* at 7–8.)

Therefore, Hunter Roberts maintains, the opposition’s focus on the exhibits is misplaced because the contract that was actually executed between the parties unambiguously shows that Hunter Roberts was not at the site and did not perform any construction work there until after Angelo Ardizzone’s injury. (*Id.*) Moreover, Hunter Roberts asserts that it also did not have a contract with Allran, plaintiff’s employer. (*Id.* at 9–10.) Thus, Hunter Roberts has reiterated its position that it owed no duty to plaintiff and that it cannot be held liable for plaintiff’s injuries under New York’s Labor Law.

#### **LEGAL CONCLUSIONS:**

On a CPLR 3211 motion to dismiss a complaint, “the pleading is to be afforded a liberal construction.” (*Leon v Martinez*, 84 NY2d 83, 87 [1994].) However, CPLR 3211(a)(1) provides for dismissal based on documentary evidence. Should the reviewing court find that the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law, dismissal will be granted. (*See 150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]; *see also Leon*, 84 NY2d at 88.) If the “allegations are contradicted by

documentary evidence, they are not presumed to be true or granted every favorable inference . . . .” (*Sterling Fifth Assocs. v Carpentille Corp., Inc.*, 9 AD3d 261, 261–62 [1st Dept 2004].)

Plaintiffs in this action allege violations of Labor Law §§ 200, 240(1), and 241(6). (Doc. 43 at 146–47.) Liability under the Labor Law for accidents that occur on construction sites is limited to owners and general contractors or their statutory agents. (*See* Labor Law §§ 240, 241.) The term “owner” encompasses “a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit.” (*Scaparo v Vil. of Ilion*, 13 NY3d 864, 866 [2009].) Courts have said that a “contractor” is a party charged with the responsibility and authority to control the activity that resulted in the plaintiff’s injury. (*See Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316–17 [1981].) And, in regard to the term “agents,” our Court of Appeals has held the following: “When the work giving rise to these duties [to conform with the Labor Law’s requirements] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory ‘agent’ of the owner or general contractor.” (*Id.* at 318 (reiterating that “[o]nly upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an ‘agent’ . . . .”).)

Here, Hunter Roberts has submitted a copy of the contract it executed for performing construction work at the premises. (Doc. 44.) As a preliminary matter, this Court notes that the first page of the agreement designates Summit Glory as the “owner” of the construction project. (*Id.* at 2.) More important, however, is the fact that the contract was executed by Summit Glory and Hunter Roberts on July 13, 2016 (*id.*), which was over one month after the date of plaintiff’s accident on June 9, 2016 (Doc. 43 at 18–19). None of the parties opposing Hunter Roberts’s motion has questioned the authenticity of the agreement between Hunter Roberts and Summit

Glory, and no parties have come forward with any evidence suggesting that Hunter Roberts had a contract with plaintiff's employer, Allran, or that its scope of work included any work performed by defendant Americon or its subcontractors, including Allran. Therefore, even if Hunter Roberts became a general contractor or a statutory agent under the Labor Law, it is evident from the terms of the contract that it became so only after plaintiff's accident.

Plaintiffs' and co-defendants Summit Glory and Americon's arguments to the contrary are not persuasive. They argue that Anderson's affidavit cannot be considered because "[a]ffidavits are not documentary evidence within the meaning of CPLR 3211(a)(1)." (Doc. 72 at 3.) However, even if factual affidavits do not constitute documentary evidence (*see Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014]), this Court determines that the contract between Hunter Roberts and Summit Glory conclusively establishes that Hunter Roberts was not present and was not performing work at the construction site on the date of plaintiff's accident. (*See DaSilva v Haks Engrs., Architects & Land Surveyors, P.C.*, 125 AD3d 480, 481–82 [1st Dept 2015] (plaintiff's Labor Law claims failed where contract did not give defendant authority or supervisory control over individual contractors).) Thus, this Court need not consider Anderson's affidavit to conclude that Hunter Roberts is not a proper Labor Law defendant pursuant to the relevant construction contract.

Plaintiffs, Summit Glory, and Americon further argue that the contract does not establish a defense to plaintiff's Labor Law claims because the exhibits annexed to the contract are dated prior to July of 2016. In particular, plaintiffs refer to Exhibit A, which is dated March 28, 2016 (Doc. 44 at 29); Exhibit I, which is dated June 9, 2016 (*id.* at 140); Exhibit J, which is dated May 10, 2016 and June 6, 2016 (*id.* at 142); and Exhibit L, which is dated March 10, 2016 (*id.* at 179).

The documents which plaintiffs, Summit Glory, and Americon rely on are inapposite. Exhibits A and L are clearly labeled as drafts. (*Id.* at 29, 179.) Exhibit I is an endorsement issued to Hunter Roberts by Indian Harbor Insurance Company for the construction project. (*Id.* at 139.) Exhibit J seems to be a schedule for Hunter Roberts for the construction project. (*Id.* at 142.) None of them, however, purport to be an actual contract executed between the construction owner, Summit Glory, and Hunter Roberts. Thus, plaintiffs, Summit Glory, and Americon have failed to provide proof of their claims that Hunter Roberts was involved in the construction project at the time of plaintiff's injury and, in any event, those claims are contradicted by the terms of the contract. (*See DaSilva*, 125 AD3d at 482 (defendant was not a Labor Law entity where plaintiff failed to show that defendant actually supervised the work that led to his injury).)

Given the foregoing, it is not necessary for this Court to consider the parties' CPLR 3211(a)(7) and 3211(c) arguments, which would treat the present motion as one for summary judgment.<sup>1</sup>

In accordance with the foregoing, it is hereby:

**ORDERED** that defendant Hunter Roberts Construction Group, LLC's motion to dismiss the complaint of plaintiffs Angelo Ardizzone and Marybeth Ardizzone is granted; and it is further

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<sup>1</sup> Even if this Court were to consider the parties' summary judgment arguments, it is clear that Hunter Roberts would be entitled to judgment as a matter of law. Hunter Roberts' submission of its contract with Summit Glory establishes its prima facie case that it did not have any role in the construction project when plaintiff was injured. The opposition merely contends that summary judgment is premature because discovery has not been completed. But a "grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence." (*Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [1st Dept 2000].) Therefore, plaintiffs, Summit Glory, and Americon's mere hope that some evidence giving rise to an issue of fact might turn up in discovery would be insufficient to defeat Hunter Roberts's entitlement to judgment as a matter of law. (*See Cooper v 6 W. 20th St. Tenants Corp.*, 258 AD2d 362, 362 [1st Dept 1999].)


**ORDERED** that the action is severed and continued against the remaining defendants; and it is further

**ORDERED** that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

**ORDERED** that counsel for the moving party shall serve a copy of this order with notice of entry upon all parties, upon the Clerk of the Court (60 Centre Street, Room 141B), and upon the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein

**ORDERED** that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

**ORDERED** that this constitutes the decision and order of the court.

|                          |  |                            |                                     |                       |
|--------------------------|--|----------------------------|-------------------------------------|-----------------------|
| <u>11/1/2018</u><br>DATE | <br>KATHRYN E. FREED, J.S.C. |                            |                                     |                       |
| CHECK ONE:               | <input type="checkbox"/>   | CASE DISPOSED              | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION |
|                          | <input checked="" type="checkbox"/>  | GRANTED                    | <input type="checkbox"/>            | DENIED                |
| APPLICATION:             | <input type="checkbox"/>   | SETTLE ORDER               | <input type="checkbox"/>            | GRANTED IN PART       |
| CHECK IF APPROPRIATE:    | <input type="checkbox"/>   | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/>            | FIDUCIARY APPOINTMENT |
|                          |  |                            | <input type="checkbox"/>            | OTHER                 |
|                          |  |                            | <input type="checkbox"/>            | REFERENCE             |