Garnica v Hong BSD LLC
2019 NY Slip Op 31164(U)
March 4, 2019
Supreme Court, Queens County
Docket Number: 710529/2015
Judge: Carmen R. Velasquez

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS Part 38
Justice

JUAN GARNICA, x
Plaintiff,
-against-
HONG BSD LLC and DUNKIN' DONUTS FRANCHISING LLC,
Defendant.
x

Index Number 710529 2015
Motion Date November 26, 2018
Motion Seq. No. 4

The following papers numbered EF42 to EF73 read on this motion by Hong BSD LLC ("Hong"), and Dunkin Donuts Franchising LLC ("Dunkin Donuts"), for summary judgment dismissing the complaint, pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	EF42-EF63
Answering Affidavits - Exhibits	EF71-EF72
Reply Affidavits	EF73

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff in this negligence/labor law action seeks damages for personal injuries sustained on October 21, 2014, when an awning allegedly fell and struck plaintiff as he was attempting to install it. The incident occurred at 40-08 Bell Boulevard, Bayside, New York ("Premises"). Plaintiff commenced this action against defendant Hong BSD LLC, the owner of the premises, and Dunkin Donuts Franchising LLC, on or about October 8, 2015, alleging violations of the Labor Law §§200 and 241[6], and common-law negligence. The record established that Dunkin Donuts had entered into a preliminary franchise agreement with the property owners, allowing the owners to construct and operate a franchised restaurant on the owners' premises. The lease and franchise agreements indicate that Dunkin Donuts had no

proprietary interest in the property, did not control the day to day operations and did not direct or supervise any work at the Premises.

Dunkin Donuts and Hong move to dismiss the complaint on the ground that, inter alia, Dunkin Donuts was neither an owner, a contractor, or an agent of either pursuant to Labor Law §§ 200 and 241 (6). Hong contends that it had no control over the work site and neither created the dangerous condition causing an injury, nor did it have actual or constructive notice of the same. Plaintiff opposes the motion.

Facts

Jeffrey L. Karlin, Assistant Secretary for Dunkin Donuts, submitted an affidavit indicating that Bell QSR LLC ("Bell"), the franchisee, operated from the Premises pursuant to a Franchise Agreement dated July 30, 2004. Pursuant to the Franchise Agreement, the franchisee had the exclusive right and did control the day-to-day activities and construction of the store located at the subject Premises. Bell was the only party who hired, fired and or supervised the work of any individuals in this case. Dunkin Donuts had no involvement in any of these activities. Pursuant to the Franchise Agreement, Bell was an independent contractor. While Dunkin Donuts had the right of entry upon the premises at all times, to inspect construction in progress and to ensure that Dunkin Donuts's requirements are being met, Dunkin Donuts' duties were limited solely to ensuring that Dunkin Donuts' requirements were being met on the Premises.

Plaintiff testified, upon examination before trial, as follows: that on October 21, 2014, he was working at 40-08 Bell Boulevard to install an awning. The subject awning weighed about 200 pounds, and was constructed of orange fabric and metal pipes. Plaintiff's supervisor at the site was Mustafa Arshad. Plaintiff was also working with a co-worker, Miguel Zumba. Other than the awning, the workers brought ladders, drills, hammer drills to make holes in the wall. The ladder and equipment were owned by Sign Media. After installing brackets in the wall, they attempted to install the awning by both ascending separate ladders with each person carrying a side of the awning. When plaintiff was close to the top of his ladder, the legs of the ladder slid and plaintiff fell. Plaintiff stated that the awning fell on his head and hit his right shoulder. Plaintiff commenced the instant action on or about October 8, 2015.

Mustafa Arshad testified, upon examination before trial, in substance as follows: he is the owner of Sign Media. In 2014, Sign Media entered into an agreement to install an awning at the Dunkin Donuts at 40-08 Bell Boulevard, in Bayside, New York. Sign Media fabricated the awning, which was 10 feet wide, 4 feet high with a 3 foot projection. It had metal tubing and orange fabric, and weighed about 250 pounds. Arshad described how the awning is put in place and testified that at no point was plaintiff involved in an accident, and

that he did not observe plaintiff fall from a ladder. Arshad also testified that plaintiff was not employed by the company and was only hired off the street occasionally for some jobs.

Similarly, Miguel Zumba also testified upon examination before trial, that he assisted in the installation of the "180 pound" awning at the Premises and did not observe plaintiff in any accident. Plaintiff did not fall and the awning did not strike plaintiff as the two were lifting it to mount it onto the exterior wall. Plaintiff did complain that his arm was hurting that day as they raised the awning to the proper height.

Mohammed Khaled, General Manager of Operations for Legacy QSR Management ("Legacy"), testified on behalf of Dunkin Donuts, as follows: that he manages the managers of the Dunkin Donuts stores. Bell hired Sign Media International to install the awning and sign for the property. The property is a commercial building on the first floor and upstair residential. The awning installation occurred on October 21, 2014. Usually Sign Media takes about 3 to 4 hours to install the awning, as they have used Sign Media on 3 or 4 occasions. Sign Media provided the labor and materials for the sign installation and was paid by Bell. Khaled was not at the property on the date that the sign was installed and was unaware of any accident which allegedly occurred thereon. No one on behalf of Legacy was present on the property on the date in question. Finally, Khaled testified that Sign Media determined how to install the sign and what tools and equipment to use.

Discussion

Labor Law § 241 (6) imposes a nondelegable duty of reasonable care upon owners, contractors or their agents to "provide reasonable and adequate protection and safety to all persons employed in areas in which construction, excavation, or demolition work is being performed" (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]). "The term 'owner'" under §§ 200 and 241 of the Labor Law is not limited to titleholders. It encompasses a party who has an interest in the property and who fulfilled the role of owner by contracting to have the work performed for his benefit ... an 'owner' is the party who, as a practical matter, has the right to hire or fire subcontractors and to insist that proper safety practices are followed" *(Wendel v Pillsbury Corp.*. 205 AD2d 527, 527-528 [2d Dept 1994], *quoting Bach v Emery Air Frgt. Corp..*,128 AD2d 490 [2d Dept 1987]). Further, "[a] party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured" (*Linkowski v City of New York*, 33 AD3d 971, 974-975 [2006]). To impose such liability, the defendant must have the authority to supervise or control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition (*see Linkowski v City of New York, supra; Damiani v Federated Dept. Stores, Inc.*, 23 AD3d 329 [2d Dept 2005]).

Labor Law § 200, which also applies to owners, contractors or their agents, is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311 [1981]). "Where a plaintiff's injuries stem not from the manner in which the work was being performed, but rather, from a dangerous condition on the premises, an owner [or contractor] may be held liable in common-law negligence and under Labor Law § 200 if [they] had control over the work site and either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" (*Azad v 270 Realty Corp.*, 46 AD3d 728. 730 [2d Dept 2007]; *see Russin v Louis N. Piccado & Son*, *supra*).

Here, Dunkin Donuts established their prima facie entitlement to summary judgment dismissing the complaint by demonstrating that it was not an " owner" as such term is defined in Labor Law 200 and 241 (6), and that it neither possessed supervisory authority over plaintiff's work, nor created or had actual or constructive notice of the alleged dangerous condition (*see Filchuk v Lehrer McCiovem Bovis Constr.*, 232 AD2d 329 [1st Dept 1996]; *Wendel v Pillsbury Corp.. supra; Santos v American Museum of Natural History*, 187 AD2d 420 [2d Dept 1992]; *Pouso v New York*, 177 AD2d 560 [2d Dept 1991]; *compare Rizzo v Hellman Elec. Corp.*, 281 AD2d 258 [1st Dept 2001]). It is uncontroverted on this record that Dunkin Donuts had no proprietary interest in the subject premises, and that it was the proposed franchisee, Bell, not Dunkin Donuts, who had entered into the contract with Sign Media. It has repeatedly been emphasized that an "owner" is "the party who, as a practical matter, has the right to hire or fire subcontractors and to insist that proper safety practices are followed" (*Bach v Emery Air Frgt. Corp., supra*, at 491, *quoting Sweeting v Board of Coop. Educ. Servs., supra*, at 114). Dunkin Donuts had no such rights. While Dunkin Donuts reserved the right pursuant to its franchise agreement to approve plans, submit an approved list of vendors, and supervise the work in progress, it did not retain control over the work itself or the manner in which it was performed. "Neither retention of inspection privileges nor a general power to supervise alone constitute control sufficient to impose liability" (*Shaheen v International Bus. Machs. Corp.*, 157 AD2d 429, 434 [3d Dept 1990]). Even if the contractors failed to perform the work according to Dunkin Donuts' specifications. Dunkin Donuts had no authority to hire or fire, and would be relegated to discontinuing the franchise relationship as its only remedy. In sum, the rights retained by Dunkin Donuts pursuant to its franchise agreement, including the right to have supervisors on the construction site, do not support plaintiffs' assertion that it functioned as an owner or contractor or agent of an owner or contractor. Dunkin Donuts was never hired as a general contractor, nor was there any evidence that Dunkin Donuts performed any of the duties of a general contractor (*Wendel v Pillsbury Corp.*, 205 AD2d 527, 528-29 [2d Dept 1994]; *see Seeber v City of Oswego*, 148 Misc 2d 366, *affd* 176 AD2d 1194). Moreover, Dunkin Donuts

had no authority to direct or control the work, and could not be held to be an agent of either the owners or general contractor (*cf., Russin v Picciano & Son*, 54 NY2d 311). Thus, on this record, it may be concluded as a matter of law that Dunkin Donuts, as a franchisor, was neither an owner, contractor, nor agent of either. Accordingly, the branch of the motion which is for summary judgment as against Dunkin Donuts, is granted.

The branch of the motion which seeks to dismiss the Labor Law 200 cause of action, insofar as asserted against Hong, is granted. Liability on common-law negligence and Labor Law § 200 causes of action "generally falls into two broad categories: instances involving the manner in which the work is performed, and instances in which workers are injured as a result of dangerous or defective premises conditions at a work site" *(Abelleira v City of New York*, 120 AD3d 1163, 1164 [2d Dept 2014]). Where, as alleged here, the plaintiff's accident arose from an allegedly dangerous premises condition, a property owner may be held liable in common-law negligence and under Labor Law § 200 when the owner has control over the work site and either created the dangerous condition causing an injury, or failed to remedy the dangerous or defective condition while having actual or constructive notice of it (*see id.* at 1164). Thus, where a plaintiff's injury arose from a dangerous condition at a work site, a property owner moving for summary judgment dismissing a cause of action alleging common-law negligence has "the initial burden of making a prima facie showing that it neither created the dangerous condition nor had actual or constructive notice of its existence" (*Ventimiglia v Thatch, Ripley & Co. LLC*, 96 AD3d 1043, 1046 [2d Dept 2012]; *see Nicoletti v Iracane*, 122 AD3d 811, 812 [2d Dept 2014]). Here, the sworn deposition testimony of Mohammed Khaled and Mustafa Arshad establish that it was Sign Media that provided materials and controlled the means and methods of plaintiff's work, and that Hong had no control or supervision over plaintiff's work. Plaintiff also testified that his boss, Mustafa, provided all equipment and instructions regarding his work. Hong further established that it had no notice, actual or constructive, of the alleged dangerous condition which caused plaintiff's accident (*see Seepersaud v City of New York*, 38 AD3d 753, 755 [2d Dept 2007]).

The branch of the motion which is to dismiss plaintiff's labor law 241[6] claims as asserted against Hong, is also granted. To sustain a cause of action against an owner and general contractor under Labor Law § 241(6) for failure to provide adequate safety measures, the plaintiff must allege "[that] a concrete specification of the [Industrial] Code has been violated", as opposed to general safety standards (*Rizzuto v Wenger Contr. Co.*, 91 NY2d 343, 350 [1998]; *Boho v City of New York*, 266 AD2d 173, 173-74 [2d Dept 1999]; *see Mitchell v Triborough Bridge & Tunnel Auth.*, 220 AD2d 727 [2d Dept 1995]). Here, of the several provisions cited from 12 NYCRR 23, only subsection 1.7(a), which addresses overhead hazards, is specific enough to satisfy 241[6] (*see Zervos v City of New York*, 8 AD3d 477, 480 [2d Dept 2004]). However, this section is inapplicable to the facts presented

here as there is no evidence to support the section's requirement that the area in which the plaintiff was injured was one where workers are normally exposed to falling objects (*Vatavuk v Genting New York, LLC*, 142 AD3d 989, 990 [2d Dept 2016]; *Portillo v Roby Anne Dev., LLC.*, 32 AD3d 421, 422 [2d Dept 2006]; *Mercado v TPT Brooklyn Assoc.*, LLC, 38 AD3d 732, 733 [2d Dept 2007]; *see Amato v State of New York*, 241 A.D.2d 400, 402 [1st Dept 1997]; *cf. Gonzalez v TJM Constr. Corp*, 87 AD3d 610 [2d Dept 2011]; *Amerson v Melito Constr. Corp.*, 45 AD3d 708 [2d Dept 2007]).

Accordingly, the motion by defendants Dunkin Donuts and Hong to dismiss the complaint is granted.

Dated: ~~February~~ March 4, 2019

CARMEN R. VELASQUEZ, J.S.C.

FILED
MAR 13 2019
COUNTY CLERK
QUEENS COUNTY