

<b>Diaz v KZ Eng'g P.C.</b>
2019 NY Slip Op 31424(U)
April 12, 2019
Supreme Court, Kings County
Docket Number: 516453/18
Judge: Carolyn E. Wade
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At Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the 24<sup>th</sup> day of April 2019

2019 MAY -7 AM 8:45  
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**PRESENT:**  
**HON. CAROLYN E. WADE,**

Justice

-----X  
EDISON DIAZ,

Plaintiff,

Index No. 516453/18

-against-

**DECISION and ORDER**

**SEQ. 1**

KZ ENGINEERING P.C., COLGATE ENTERPRISE CORP.,  
MILESTONE CONSTRUCTION CORP. and EAST  
19 DEVELOPERS LLC,

Defendants.  
-----X

**Recitation, as required by CPLR §2219(a), of the papers considered in the review of Defendant's Motion:**

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	<u>1</u> _____
Cross-Motion and Affidavits/Affirmations.....	_____
Answering Affidavits/Affirmations.....	<u>2</u> _____
Reply Affidavits/Affirmations.....	<u>3</u> _____
Memorandum of Law.....	_____

Upon the foregoing cited papers, and after oral argument, defendant COLGATE ENTERPRISE CORP.'s Motion to Dismiss pursuant to CPLR 3211(a)(1) and (a)(7) is decided as follows:

The underlying action was commenced by plaintiff EDISON DIAZ ("Plaintiff"), who alleges that he was seriously injured on April 18, 2018, after falling from a scaffold/ladder while performing work at premises located at 25 East 19<sup>th</sup> Street, Brooklyn, NY ("Subject Premises"). Plaintiff alleges that defendants KZ ENGINEERING P.C., COLGATE ENTERPRISE CORP. ("Colgate"), MILESTONE CONSTRUCTION CORP. and EAST 19 DEVELOPERS, LLC. violated Labor Law §§ 200, 240(1), and 241(6). Plaintiff's pleadings generally allege that each Defendant was the owner, managing agent, and general contractor of the project.

In support of the instant motion, Colgate submits an affidavit from Peter O'Farrell ("O'Farrell"), its President. O'Farrell states that Colgate is a well-known scaffolding contractor, who installs scaffolding throughout New York City. O'Farrell notes that pursuant to a subcontract agreement, Colgate was hired as a subcontractor for defendant Milestone Construction Corp., the general contractor of the project (Exhibit "A" of Colgate's motion). O'Farrell cites a section of paragraph 4 of the subcontract, which reads as follows:

Scaffold company [Colgate Enterprise] is not an agent of the owner, general contractor [Milestone] or Customer.

O'Farrell asserts that Colgate subsequently entered into a sub-subcontract with defendant Divino Installations Corp. ("Divino"), who it hired as an independent contractor to perform the work on its behalf. O'Farrell points out that paragraph 6 of the contract, in pertinent part, reads

as follows:

The Sub-Contractor will not be an employee of Colgate and will function in all aspects as an independent sub-contractor [...] Colgate will not control, supervise or direct the job site activities of the Sub-Contractor (Exhibit "B" of Colgate's motion).

In opposition, Plaintiff argues that Colgate, "by virtue of being hired by the general contractor, [is] an agent of the same and properly a Labor Law defendant." Moreover, he argues that the affidavit of O'Farrell, Colgate's President, was not premised upon his personal knowledge.

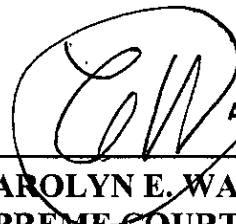
Colgate, in rebuttal, contends that there is no dispute that the terms of the Colgate/Milestone contract clearly provides that it is not an owner, general contractor or an agent of same. Moreover, it maintains that Colgate subcontracted all of its responsibilities under the Milestone/Colgate contract to Divino; and that it had no authority to direct, supervise or control its work. Thus, Colgate avers that there is no basis for Plaintiff's Labor Law and negligence claims against it.

In the instant case, an examination of the documentary evidence discloses that pursuant to a subcontract, Milestone, as the general contractor entered into an agreement with Colgate to perform the scaffolding work on the project. Paragraph 4 of the subcontract clearly provides that Colgate was not an agent of the owner, general contractor or customer. Moreover, Colgate entered into a sub-subcontract with Divino to cover "all work orders for various projects during the terms of [the] agreement [1/1/2018-12/31/2022]" (Exhibit "B" of Colgate's motion, first

paragraph). Paragraph 6 provides that Divino was an independent contractor, which was neither controlled, supervised or directed by Colgate. Consequently, this Court determines that the duly executed contracts absolve Colgate from liability.

Accordingly, based upon the above, Colgate's Motion to Dismiss is GRANTED. The Complaint is hereby dismissed against it.

This constitutes the Decision/Order of the court.



HON. CAROLYN E. WADE  
ACTING SUPREME COURT JUSTICE

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