

Basnuh v Green Dot Marketplace Corp.
2019 NY Slip Op 32555(U)
August 19, 2019
Supreme Court, Kings County
Docket Number: 513935/16
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.:513935/16
Motion Date: 12-10-18
Mot. Cal. No.: 6

-----x
NAMIK ANIL BASNUH and GINA ALICE BASNUH,

Plaintiff,

-against-

DECISION/ORDER

GREEN DOT MARKETPLACE CORP. and AMS-
MYRTLE, LLC,

Defendants.

-----x

The following papers numbered 1 to 3 were read on the motion:

Papers:	Numbered:
Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits/.....	1
Answering Affirmations/Affidavits/Exhibits.....	2
Reply Affirmations/Affidavits/Exhibits.....	3
Other.....	

Upon the foregoing papers, the motion is decided as follows:

In this action to recover damages for personal injuries, the defendant, GREEN DOT MARKETPLACE CORP. (Green Dot), moves pursuant to CPLR 3212 for an order granting summary judgment dismissing plaintiffs' causes of action based on Labor Law §§ 240(1), 241(6), 200 and common law on various against all defendants.¹

¹Counsel for Green Dot claim that his firm will be taking over the defense of defendant, AMS-MYRTLE, LLC.

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Background:

The plaintiff, NAMIK ANIL BASNUH, commenced the action claiming that on July 30, 2015, he was injured while installing a fan on the ceiling of a shed located outside a grocery store located 59-29 Myrtle Avenue, Ridgewood, New York. Green Dot owned and operated the grocery store and defendant, AMS-MYRTLE, LLC, owned the building. The shed housed the compressors for the refrigeration units used inside the store and fans which were used to keep the compressors cool.

The Accident:

At his deposition, plaintiff testified that prior to the accident, Birol Turkoglu, the manager of the grocery store, asked him to hang the fan on the ceiling. After receiving these instruction, he and Kluan, an employee of the store, went into the shed and decided where to hang the fan. Khuan brought an A- frame ladder into the shed as well as the other equipment that was going to be used to hang the fan.

Once plaintiff and Khuan determined where to hang the fan, plaintiff maintains that he opened the ladder in the middle of the shed, climbed up to about the fifth rung of the ladder, at which time Khuan handed the fan up to him. Plaintiff then attempted to attach the fan to the ceiling with "metal holders." While he was doing this, he claims that fan became unstable in his hands and that the ladder began to sway. For these reasons, he then let go of the fan and began to fall off the ladder. As he was falling, he reached out with his right arm, grabbed onto one of the compressors and felt an electrical shock which caused him to faint. He ultimately fell to the ground and sustained injury.

Turkoglu testified at his deposition that he never instructed plaintiff to do any work

in the shed and that the plaintiff took it upon himself to do the work. He maintains that he was in the basement at the time of the accident and first learned of the accident from Khuan. Khuan told him that he witnessed the accident and that plaintiff fell from an apple bin, not a ladder. He maintains that Khuan told him that plaintiff took it upon himself to climb onto the apple bin in order to replace a fan inside the shed and that plaintiff slipped on the apple bin and grabbed onto an electrical cable to prevent himself from fall. When plaintiff touched the cable, he got an electric shock.

Plaintiff's Employment Status:

Plaintiff claims that he was not employed by Green Dot at the time of the accident and maintained that he worked for a Greenbay, a company that owned and operated another grocery in Astoria, New York. Hassan Celik hired him to work for Greenbay in 2012. Celik is also a principle of Green Dot. In the Spring of 2015, he claims that Celik assigned him to help out at the Green Dot store in Ridgewood, where he started to work two to three days a week. He maintained, however, that he never stopped working at the Astoria store. Although he worked some days at the Green Dot store, he was never paid by Green Dot. His entire salary was always paid by Greenbay.

Analysis:

The Labor Law § 240(1) Claim:

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642). To prevail on a cause of action under Labor

Law § 240(1), a plaintiff must establish, among other things, that he or she was injured during the “erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure” (see *Ferrigno v. Jaghab, Jaghab & Jaghab, P.C.*, 152 A.D.3d 650, 59 N.Y.S.3d 115; *Moreira v. Ponzo*, 131 A.D.3d 1025, 16 N.Y.S.3d 813; *Enos v. Werlatone, Inc.*, 68 A.D.3d 713, 890 N.Y.S.2d 109). In *Joblon v. Solow*, 91 N.Y.2d 457, 695 N.E.2d 237, the Court of Appeals held that “altering” within the meaning of Labor Law § 240(1) “requires making a *significant* physical change to the configuration or composition of the building or structure” (91 N.Y.2d at 465, 695 N.E.2d at 241). The physical change does not need to be permanent in order to qualify as an alteration under the statute (see *id.* at 127–128, 8 N.Y.S.3d 229, 30 N.E.3d 872; *Mananghaya v. Bronx–Lebanon Hosp. Ctr.*, 165 A.D.3d 117, 124, 83 N.Y.S.3d 444; *Destefano v. City of New York*, 39 A.D.3d 581, 582, 835 N.Y.S.2d 275).

Here, defendant failed to eliminate all triable issue of fact as to whether the plaintiff was engaged in “altering” at the time of accident (see *Hall v. Smithtown Cent. Sch. Dist.*, 82 A.D.3d 703, 704, 917 N.Y.S.2d 690, 691 [holding that defendant’s motion for summary judgment dismissing plaintiff’s Labor Law § 240(1) was properly denied where he was injured when he fell from a ladder while installing ceiling fixtures]; see also, *Buckley v. Radovich*, 211 A.D.2d 652, 621 N.Y.S.2d 638, 639 [holding that Labor Law § 240(1) applied where a worker was fell from a ladder while installing a 3 feet by 5 feet “For Sale” sign on a building which was be attached to the brick facade of the building with masonry nails]).

While Green Dot contends that plaintiff’s work, at best, entailed “routine maintenance”, which does not come within the purview of Labor Law § 240(1) (see

Ferrigno v. Jaghab, Jaghab & Jaghab, P.C., 152 AD3d at 653; *see Esposito v. New York City Indus. Dev. Agency*, 1 NY3d 526, 528, 770 N.Y.S.2d 682, 802 N.E.2d 1080; *Joblon v. Solow*, 91 N.Y.2d 457, 465, 672 N.Y.S.2d 286, 695 N.E.2d 237; *Smith v. Shell Oil Co.*, 85 N.Y.2d 1000, 1002, 630 N.Y.S.2d 962, 654 N.E.2d 1210), courts have generally held that “routine maintenance” involves “replacing components that require replacement in the course of normal wear and tear” (*Esposito v. New York City Indus. Dev. Agency*, 1 N.Y.3d at 528, 770 N.Y.S.2d 682, 802 N.E.2d 1080; *see Mammone v. T.G. Nickel & Assoc., LLC*, 144 A.D.3d 761, 41 N.Y.S.3d 97). Green Dot did not demonstrated as a matter of law that plaintiff was engaged in such work at the time of the accident.

Further, Green Dot did not demonstrate, as a matter of law, that the plaintiff was a “special employee” of Green Dot at the time of the accident. “A special employee is described as one who is transferred for a limited time of whatever duration to the service of another” (*Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553, 557, 578 N.Y.S.2d 106, 585 N.E.2d 355). The factors to be considered in determining whether a special employment relationship exists include the right to control the employee's work, the method of payment, the furnishing of equipment, the right to discharge the employee, and the relative nature of the work (*see Alvarez v. Cunningham Assoc., L.P.*, 21 A.D.3d 517, 518, 800 N.Y.S.2d 730). “The key to the determination is ‘who controls and directs the manner, details and ultimate result of the employee's work’ ” (*id.* at 518, 800 N.Y.S.2d 730, quoting *Thompson v. Grumman Aerospace Corp.*, *supra* at 558, 578 N.Y.S.2d 106, 585 N.E.2d 355). Here, plaintiff was hired by Greenbay, paid by Greenbay and there is no evidence that Geen Dot had the right to discharge him. For these reasons, Green Dot did not

demonstrate as a matter of law that the plaintiff was its special employee.

Green Dot Green Dot's status as a lessee does not require dismissal of plaintiff's Labor Law claims. Although Labor Law §§ 240(1) and 241(6) apply to owners, contractors, and their agents (*see* Labor Law §§ 240 [1]; 241[6]; *Guclu v. 900 Eighth Ave. Condominium, LLC*, 81 A.D.3d 592, 593, 916 N.Y.S.2d 147), the term owner "may also apply to a lessee, where the lessee has the right or authority to control the work site (*Zaher v. Shopwell, Inc.*, 18 A.D.3d 339, 339–340, 795 N.Y.S.2d 223; *see Bart v. Universal Pictures*, 277 A.D.2d 4, 715 N.Y.S.2d 240). The key question is whether the Green Dot had the right to insist that proper safety practices were followed (*see Grilikhes v. International Tile & Stone Show Expos*, 90 A.D.3d 480, 934 N.Y.S.2d 384; *Bart v. Universal Pictures*, 277 A.D.2d 4, 715 N.Y.S.2d 240; *Copertino v. Ward*, 100 A.D.2d 565, 473 N.Y.S.2d 494). Here, Green Dot failed to establish, *prima facie*, that it did not have the right to insist that proper safety practices were followed (*see Zaher v. Shopwell, Inc.*, 18 A.D.3d 339, 795 N.Y.S.2d 223).

While Green Dot correctly asserts that Labor Law §§ 240, 241 and 200 do not protect workers acting as volunteers (*Hill v. Country Club Acres, Inc.*, 134 A.D.3d 1267, 1267–68, 20 N.Y.S.3d 755, 756; *McNulty v. Exec. Kitchens, Ltd.*, 294 A.D.2d 411, 412, 742 N.Y.S.2d 354, 356), plaintiff testified that he was directed to install the fan by Turkoglu. Accordingly Green Dot did not established as a matter of law that plaintiff was acting as a volunteer at the time of the accident.

The Labor Law § 241(6) Claim:

With respect to plaintiff Labor Law § 241(6) claim, the threshold question is

whether the plaintiff was engaged in a type of work which falls within the scope of Labor Law § 241(6), specifically, whether the injury occurred in an area “in which construction, excavation or demolition work is being performed” (Labor Law § 241[6]). The Appellate Division in this Department has generally held that the scope of Labor Law § 241(6) is governed by 12 NYCRR 23-1.4(b)(13), which defines construction work expansively as “[a]ll work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures” (*see, Vernieri v. Empire Realty Co.*, 219 A.D.2d 593, 595, 631 N.Y.S.2d 378, 380; *Moreira v. Ponzo*, 131 A.D.3d 1025, 1027, 16 N.Y.S.3d 813, 815; *Perez v. 286 Scholes St. Corp.*, 134 A.D.3d 1085, 1086, 22 N.Y.S.3d 545, 547). As indicated above, since plaintiff was arguably engaged in the alteration of a building, Green Dot failed to establish, *prima facie*, that Labor Law § 241(6) is inapplicable .

The Labor Law § 200 and Common Law Claims:

With regard to plaintiffs’ claims under Labor Law § 200 and common law negligence, Green Dot established, *prima facie*, that defendant AMS -Myrtle, LLC, did not have the authority to control or supervise the means and methods of the plaintiff’s work, or have actual or constructive notice of the dangerous conditions alleged, to support the imposition of liability under common-law negligence or Labor Law § 200 (*see Rashid v. Hartke*, 171 A.D.3d 1226, 1227–28, 98 N.Y.S.3d 609, 611; *DiMaggio v. Cataletto*, 117 A.D.3d 984, 985, 986 N.Y.S.2d 536). Plaintiff failed to raise a triable issue of fact as to these issues. The record, however, does not eliminate all triable issue of fact as to whether Green Dot lacked the authority to control or supervise the means and methods of plaintiff’s

work, or whether it had actual or constructive notice of the dangerous conditions alleged.

Green Dot's motion for summary judgment dismissing plaintiffs' claim under Labor Law § 200 and common law negligence is therefore granted only with respect to defendant AMS.

The Court has considered Green Dot's remaining arguments in support of the motion and find them unavailing.

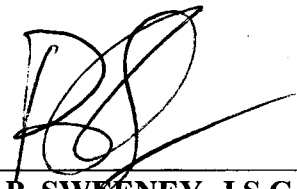
Conclusion:

Accordingly, it is hereby

ORDERED that Green Dot's motion is **GRANTED** solely to the extent that plaintiffs' claims under Labor Law § 200 and common law negligence are **DISMISSED** as against defendant, AMS-MYRTLE, LLC and is in all other respects **DENIED**.

This constitutes the decision and order of the Court.

Dated: August 19, 2019



PETER P. SWEENEY, J.S.C.

HON. PETER P. SWEENEY, J.S.C.

KINGS COUNTY CLERK
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