

**Ke Shi Chen v Sumaida & Khurana, LLC**

2019 NY Slip Op 32581(U)

July 8, 2019

Supreme Court, Queens County

Docket Number: 717090/17

Judge: Richard G. Latin

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable RICHARD G. LATIN

IA PART 40

Justice

-----X  
KE SHI CHEN,

Plaintiff,

-against-

SUMAIDA + KHURANA, LLC, et al.

Defendants.  
-----X

Index No.: 717090/17  
Motion Date: 6/6/19  
Motion Cal. No.: 6 & 52  
Motion Seq. No.: 3 & 2

The following numbered papers read on these motions by plaintiff and defendants, Sumaida & Khurana, 609 W 56<sup>th</sup> Street Development, LLC, 611 W 56<sup>th</sup> Street Property LLC, 823 11<sup>th</sup> Avenue, LLC, and Foundations Group I, Inc., to renew and reargue.

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Upon the foregoing cited papers, it is ordered that these motions by plaintiff and defendants, Sumaida & Khurana, LLC, 609 W 56<sup>th</sup> Street Development, LLC, 611 W 56<sup>th</sup> Street Property LLC, 823 11<sup>th</sup> Avenue, LLC, and Foundations Group I, Inc. (Moving-Defendants), for leave to reargue and leave to reargue and renew, respectively, their opposition to New York Insulation, Inc.'s (NYI) motion for summary judgment, are determined as follows:

Plaintiff, Ke Shi Chen, commenced the instant action to recover for work-related injuries he allegedly sustained in an accident on November 29, 2017, while working on the roof at a construction project (Construction Project) located at 609 West 56<sup>th</sup> Street, 611 West 56<sup>th</sup> Street and 823 11<sup>th</sup> Avenue, in the County, City and State of New York (subject Premises). The Construction Project involved two buildings.

Plaintiff claims that the alleged accident was caused by defendants' negligence in allowing him to work on said roof without scaffolds, nets, ropes or other devices, resulting in Plaintiff falling and being catapulted to the ground. Further, Plaintiff alleges that the dangerous and defective condition was an unguarded and unsecured piece of wood/plywood covering a hole/open skylight.

The following facts are undisputed: that at the time and date of the accident (i) Plaintiff was employed by non-party Breaking Solutions; (ii) defendant 611 W 56<sup>th</sup> Street Property, LLC (Defendant-Owner) owned the subject Premises; and (iii) defendant 609 W 56<sup>th</sup> Street Development, LLC was the construction manager of the Construction Project and an owner of the subject Premises (Construction Manager).

Subsequently, NYI moved for summary judgment on the issue of liability dismissing Plaintiff's complaint as against it, arguing that at the time of the accident, NYI was not a contractor or statutory agent for purposes of Labor Law liability. NYI also sought all counterclaims and crossclaims asserted against it dismissed. This Court granted NYI's motion for summary judgment in an order dated December 20, 2018 and entered January 2, 2019. Moving-Defendants and Plaintiff now move to reargue their opposition to NYI's summary judgment motion contending that, inter alia, the Court overlooked and/or misapprehended their arguments, and to vacate the prior relevant order. Plaintiff also moves to renew its opposition to NYI's summary judgment motion.

Moving-Defendants' and Plaintiff's Motions to Reargue:

The determination to grant leave to reargue a motion or opposition to a motion is vested within the sound discretion of the trial court (*see Williams v. Abiomed, Inc.*, 2019 WL 2518440, 1 [2d Dept 2019]; *Castillo v. Motor Vehicle Accident Indemnification Corporation*, 161 AD3d 937, 938 [2d Dept 2018]; *JPMorgan Chase Bank, National Association v. Novis*, 157 AD3d 776, 778 [2d Dept 2018]; *Robinson v. Viani*, 140 AD3d 845, 847 [2d Dept 2016]). It is not designed to be used as a vehicle to raise new issues that were not previously advanced or allow successive opportunities for an unsuccessful party to reargue issues that were previously decided (*id.*). CPLR 2221(d) requires the movant to demonstrate that the court misapprehended or overlooked the relevant facts, misapplied law or for some other reason mistakenly arrived at its earlier decision (*id.*; *Castillo*, 161 AD3d at 939). Here, the Court finds that it did overlook Moving-Defendants' and Plaintiff's arguments, i.e., premature, in opposition to NYI's summary judgment motion (*id.*).

CPLR 3212(f) provides, in relevant part, that a party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position exist but cannot be stated (*see Vukel v. Joan DiGirolomo Irrevocable Trust*, 172 AD3d 951 [2d Dept 2019]; *Cusumano v. AM & G Waterproofing, LLC*, 160 AD3d 922, 924 [2d Dept 2018]; *Lettieri v. Cushing*, 80 AD3d 574, 576 [2d Dept 2011]). "A party contending that a summary judgment motion is premature must demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" (*Cusumano*, 160 AD3d at 924, quoting *Antonyshyn v. Tishman Constr. Corp.*, 153 AD3d 1308, 1310 [2d Dept 2017]).

*Summary Judgment Motion by Defendant NYI; Labor Law §§ 240(1) and 241(6):*

"The [Labor Law] statute imposes upon owners, contractors and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work" (*Barreto v. Metropolitan Transp. Authority*, 25 NY3d 426, 433 [2015]). "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” (*Cabrera v. Arrow Steel Window Corp.*, 163 AD3d 758, 759 [2d Dept 2018], quoting *Linkowski v. City of New York*, 33 AD3d 971, 974-75 [2d Dept 2006]). “To impose such liability, the defendant must have the authority to control the activity bringing about the injury so as to enable to avoid or correct the unsafe condition” (*id.*).

Pursuant to “Labor Law §240(1), owners and general contractors, and their agents, have a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work site” (*Rapalo v. MJRB Kings Highway Realty, LLC*, 163 AD3d 1023, 1023 [2d Dept 2018]).

Labor Law §241(6) “imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers” (*Comes v. New York State Elec. and Gas Corp.*, 82 NY2d 876, 878 [1993]), “even in the absence of control or supervision of the worksite” (*Rizzuto v. Wenger Constr. Co.*, 91 NY2d 343, 348 [1998]).

Generally, a separate prime contractor is not liable under Labor Law §§ 240 or 241 for injuries sustained by employees of other contractors with whom they are not in privity of contract (*see Giovanniello v. E.W. Howell, Co., LLC*, 104 AD3d 812, 813 [2d Dept 2013]). However, where authority to supervise and control a plaintiff’s work has been delegated to such contractor, then it may be liable under Labor Law §§ 240 and/or 241 (*id.*).

Here, NYI, one of the contractors on the Construction Project, established its prima facie entitlement to judgment as a matter of law dismissing Plaintiff’s Labor Law §§ 240 and 241 causes of action as against it and any crossclaims arising from such asserted against NYI, by demonstrating that it was not in privity of contract with Plaintiff’s employer, Breaking Solutions, and that it had not been delegated the authority to supervise and control Plaintiff’s work (*id.*). In opposition, Plaintiff and Moving-Defendants fail to raise a triable issue of fact (*id.*).

*Summary Judgment Motion by Defendant NYI; Common-Law Negligence and Labor Law §200:*

The common-law duty of an owner or general contractor to provide workers with a safe place to work is codified in Labor Law § 200(1) (*see Turgeon v. Vassar College*, 172 AD3d 1134, 1135-36 [2d Dept 2019]). “Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed” (*id.* at 1136, quoting *Ortega v. Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

Where, as here, the plaintiff alleges, inter alia, that a dangerous condition existed on the premises where the construction work was being performed, an owner or general contractor moving for summary judgment dismissing claims under common-law

negligence and Labor Law § 200 must establish that it neither created the dangerous condition nor had actual or constructive notice of its existence (*see Costa v. Sterling Equipment, Inc.*, 123 AD3d 649, 650 [2d Dept 2014]).

The Court finds that NYI is in possession of relevant facts as to the work its employees performed on the roof where Plaintiff's accident occurred and failed to demonstrate that such work was entirely distinct and unrelated to the skylight opening in which Plaintiff allegedly fell (*see Haidhaqi v. Metropolitan Transp. Authority*, 153 AD3d 1328, 1329 [2d Dept 2017]). Thus, Plaintiff and Moving-Defendants should have been afforded the opportunity to obtain discovery from these parties prior to the granting of summary judgment (*see Vukel*, 172 AD3d at 951).

Plaintiff's Motion to Renew:

Similarly, a motion for leave to renew is addressed to the sound discretion of the trial court (*see NYCTL 1998-1 Trust v. Rodriguez*, 154 AD3d 865, 866 [2d Dept 2017]). A motion for leave to renew "shall be based upon new facts not offered on the prior motion [ . . . ] or shall demonstrate that there has been a change in the law that would change the prior determination; and [ . . . ] shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][2], [3]).

Here, Plaintiff fails to state what new facts are now being submitted that would change the prior outcome or provide any justification why such information was not provided with its initial motion (*see CPLR 3221[e][2]; Raghavendra v. Stober*, 171 AD3d 814, 817 [2d Dept 2019]).

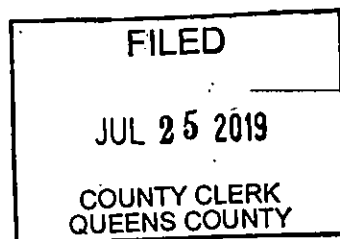
Accordingly, Plaintiff's motion to renew is denied; and it is further

**ORDERED** that the motions by Moving-Defendants and Plaintiff for leave to reargue, are granted only to the extent that upon reargument, this Court's order, dated December 20, 2018 and entered January 2, 2019, is modified so that the branches of NYI's summary judgment motion, relating to causes of action, counterclaims, and crossclaims arising from common-law negligence and Labor Law § 200, are denied without prejudice to renewal upon completion of discovery on the issues of whether NYI created the dangerous condition and whether NYI had actual or constructive notice of its existence; and it is further

**ORDERED** that within thirty (30) days of the date of entry of this order, a copy of this order with notice of entry shall be served upon all parties to this action.

This constitutes the decision and order of the Court.

Dated: July 8, 2019



  
RICHARD G. LATIN, J.S.C.