

Medrano v Noxxen Realty Corp.
2019 NY Slip Op 33896(U)
February 21, 2019
Supreme Court, Queens County
Docket Number: 702229/2017
Judge: Marguerite A. Grays
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Short Form Order

NEW YORK SUPREME COURT --QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IAS PART 4
Justice

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WALTER MEDRANO,

Index
No.: 702229/2017

Plaintiff(s),

Motion
Date: August 13, 2019

-against-

NOXXEN REALTY CORP., PALMANA REALTY
CORP., GOTHAM STEEL SUPPLY, INC., EAN
HOLDINGS, INC. and ELRAC, INC.

Motion
Cal. No.: 21
Motion
Seq. No.: 4

Defendant(s).

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The following papers numbered EF74-EF100 read on this motion by defendants Noxxen Realty Corp., Palmana Realty Corp., EAN Holdings, Inc. and Elrac, Inc. for an Order pursuant to CPLR §3212(b), dismissing the plaintiff's complaint and directing the entry of summary judgment in favor of said defendants.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	EF 74-85
Answering Affidavits - Exhibits	EF 86-87, 94
Reply Affidavits	EF 100

Upon the foregoing papers, it is ordered that this motion by defendants Noxxen Realty Corp., Palmana Realty Corp., EAN Holdings, Inc. and Elrac, Inc. for an Order pursuant to CPLR §3212(b), dismissing the plaintiff's complaint and directing the entry of summary judgment in favor of said defendants, is granted to the extent set forth below.

This is an action for personal injuries sustained by plaintiff Walter Medrano on or about December 18, 2015, at 2235 Flatbush Avenue, Brooklyn, New York, the site of an Enterprise Rent-A-Car location which was under construction and renovation at the time of the accident. Plaintiff was employed as a laborer by the general contractor on the project, non-Party CRM Construction.

The incident occurred when the plaintiff was allegedly hit in the head by a pipe tool that fell off a flatbed truck causing him to sustain injuries. As a result of his injuries, plaintiff commenced this action.

On the date of the incident, the plaintiff arrived at the Enterprise location with three other employees and instructions to unload steel beams and pipes off of a flatbed truck. The driver of the truck was employed by Gotham Steel Supply, Inc. ("Gotham Steel") and proceeded to loosen and unfasten the chains that held the steel beams in place on the flatbed. While plaintiff was standing on the ground, adjacent to the truck, he was struck in the head by an object he claimed was the pipe used to loosen the chains. Defendants Noxxen Realty Corp. ("Noxxen Realty") and Palmana Realty Corp. ("Palmana Realty") are allegedly the owners of the subject premises. Defendants EAN Holdings, Inc. ("EAN Holdings") and Elrac, Inc. ("Elrac") leased the subject premises from non-party Gaseteria Oil Corp.

Plaintiff commenced this action by the filing of a Summons and Complaint against Noxxen Realty and Gotham Steel on February 16, 2017. Issue was joined by service of defendant Gotham's Verified Answer on May 3, 2017, and defendant Noxxen's Verified Answer on June 15, 2017. On June 29, 2017, the plaintiff filed a Supplemental Summons and Amended Complaint adding Palmana Realty as a defendant. Plaintiff filed a Second Supplemental Summons and Amended Complaint, on July 6, 2017, naming EAN Holdings and Elrac as defendants. On or about September 27, 2017, defendants Noxxen Realty and Palmana Realty served their Verified Answer to the Second Amended Complaint. On October 5, 2017, EAN Holdings and Elrac served their Verified Answer with discovery demands to the Second Amended Verified Complaint. Discovery was conducted and depositions were held. Plaintiff filed his Note of Issue on December 27, 2018.

In addition to the negligence claims, plaintiff alleged that defendants violated New York State Labor Law §§200, 240(1), 240(2), and 241(6).

Deposition Testimony of Walter Medrano:

Plaintiff Walter Medrano testified, upon his examination before trial, as follows:

Plaintiff worked with CRM Construction as a laborer since January 2014. On the date of the incident, plaintiff arrived at the Enterprise location with three other workers and was instructed to unload steel beams and pipes from a flatbed truck. Plaintiff stood approximately two feet back from the cab of the truck and two feet away from the side of the subject truck in the moments before the incident occurred. He was facing the back of the truck. The driver of the truck stood on the flatbed and was loosening the chains that held the steel beams and pipes in place. Plaintiff remembered that before he was struck in the head, he looked up at

the driver and observed him unfastening the chains with a pipe. The plaintiff said the driver lost his grip on the pipe, which fell and hit plaintiff. He testified that the driver of the truck stood on the flatbed part of the truck while unfastening the chains with a pipe.

Deposition Testimony of Edison Moran:

Edison Moran (“Moran”) testified on behalf of Gotham Steel at his deposition as follows:

Moran was employed by Gotham Steel as a driver. On the date of the incident, he arrived at 2235 Flatbush Avenue at around 7:00 or 8:00 a.m. and parked the truck on the street in front of a yard. At some point, he was directed by someone to reverse the truck into the yard and was guided by the plaintiff. Moran testified about a policy that whichever company accepts the delivery of the materials is to remove the materials from the truck. His job was to loosen the chains so the workers could unload the materials. After he parked the truck in the yard, Moran handed an invoice to the plaintiff, who stood next to the driver’s side of the cab. Moran then proceeded to the passenger side of the truck to begin loosening the chains. He uses a pipe with a hook to secure or tighten the chains that secure the materials on the flatbed. He described this pipe as a metal pipe measuring about three feet long that is kept in the cabin of the truck. He explained that the process of tightening and loosening the chains is performed while standing on the ground and usually takes about five to ten minutes to do. While standing on the ground on the passenger side of the truck with the metal pipe in his hand, he lost his grip on the pipe and it flew out of his hand and over the truck. He testified that he did not know why he lost his grip. He stated he never stepped onto the flatbed of the truck prior to the happening of the incident.

Deposition Testimony of Marcos Bartot:

Marcos Bartot (“Bartot”) testified on behalf of Enterprise at his deposition as follows:

Bartot has been employed with Enterprise since July, 2000 as a facility or construction manager. His responsibilities include searching for new real estate and management of construction and maintenance of the facilities. He recalled construction work, specifically, fireproofing work and dunnage repair, being performed at the subject Enterprise location on the date of the incident. According to Bartot, the general contractor on the job was CRM Construction. There were no written agreements or contracts between Enterprise and CRM Construction for any of the construction projects. He explained that Gaseteria Oil Corp. owned many properties and believed Noxxen Realty and Palmana Realty to be real estate divisions of Gaseteria. CRM Construction was tasked to order the supplies for a job and provide the invoice to Enterprise directly. He never heard of Gotham Steel until he received

papers in connection with this lawsuit. He first learned of plaintiff's incident on the date that it occurred upon being contacted by the manager at the subject location. He recalled watching a video of the incident taken from a parking lot camera. He remembered observing a steel truck in the parking lot with two or three CRM Construction employees standing on the side of the truck. The Gotham Steel employee stood on top of the flatbed and was unstrapping the steel when one of the bands flew over and struck the plaintiff in the head. He claimed to have copied the video onto a flash drive but he has been unable to locate it.

Discussion:

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 demonstrate the absence of any material issues of fact" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324). Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (see, *Zuckerman v. City of New York*, 49 NY2d 557, 562; *Alvarez v. Prospect Hosp.*, *supra*). Here, defendants Noxxen Realty Corp., Palmana Realty Corp., Ean Holdings, Inc. have met their burden.

As alleged owners or agents of the subject premises, Noxxen Ralty and Palmana Realty and EAN Holdings and Elrac, as lessees in possession of the premises, were "owners" of the property, and are subject to Labor Law §§ 240 (1), 241 (6), and 200 (see *Alfonso v Pacific Classon Realty, LLC*, 101 AD3d 768 [2012]). The evidence in the record shows that defendant Gotham Steel was neither an owner or a general contractor at the job site. Even if Gotham Steel was an "agent" of the owner or general contractor, there is no evidence that construction work was delegated to Gotham Steel or that it possessed the authority to supervise and control the work. In this case, Gotham Steel was never delegated the work in which plaintiff was engaged at the time of the accident. The evidence demonstrated that Gotham Steel was not responsible for the work that gave rise to the duties referred to in and imposed by Labor Law §§ 240 and 241 (see *Russin v Louis N. Picciano & Son*, 54 NY2d 311).

Even if Gotham Steel was somehow an "agent" of the owner or general contractor under these facts, the injury sustained by plaintiff is not the kind of harm typically associated with elevation-related hazards to be liable under Labor Law § 240 (1). The activity of loosening the chains with a pipe that held the steel beams and pipes in place on a flatbed truck is not an elevation-related risk contemplated by this statute (see *Maldonado v AMMM Props. Co.*, 107 AD3d 954 [2013]; *Moncayo v Curtis Partition Corp.*, 106 AD3d 963 [2013]). The evidence submitted failed to show that plaintiff because of the absence or


1 inadequacy of a safety device of the kind enumerated by the statute (*see Narducci v Manhasset Bay Associates*, 96 NY2d 259 [2001]; *Wilinski v 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1 [2011]; *Romero*, 148 AD3d at 167). The activity of loosening the chains that held the steel beams in place in anticipation of being unloaded from the flatbed truck was not done in connection with any type of “...erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure” to fall within the confines of Labor Law §240 (1). Accordingly, the plaintiff’s Labor Law §240 (1) claims against the defendants Noxxen Realty Corp., Palmana Realty Corp., EAN Holdings, Inc., are dismissed.

Defendants Noxxen Realty, Palmana Realty, EAN Holdings and Elrac also move for summary judgment on their cross-claims for common law indemnification and contribution against defendant Gotham Steel. However, in light of the fact that there has been no determination concerning the degree of fault attributable to each of the parties involved, any decision regarding the claims for common law indemnification and contribution against Gotham Steel by defendants Noxxen Realty, Palmana Realty, EAN Holdings and Elrac is premature at this juncture (*see Sheridan v Albion Cent. School Dist.*, 41 AD3d 1277, 1279 [2007]; *Gil v Manufacturers Hanover Trust Co.*, 39 AD3d 703, 705 [2007]). Accordingly, this branch of the motion by said defendants is denied at this juncture.

Defendants Noxxen Realty, Palmana Realty, EAN Holdings and Elrac also move for the entry of summary judgment in their favor as to plaintiff’s Labor Law §200 claims. This branch of this motion is denied as moot inasmuch as the plaintiff has withdrawn his Labor Law §200 claim in his Affirmation in Opposition (See NYCEF Doc. No. 96).

Dated:

FEB 21 2019


MARGUERITE A. GRAYS
J.S.C.

FILED
JAN 23 2020
COUNTY CLERK
QUEENS COUNTY