Mowla v Baozhu Wu
2019 NY Slip Op 34930(U)
September 23, 2019
Supreme Court, Kings County
Docket Number: Index No. 502414/2018
Judge: Carl J. Landicino

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 23rd day of September, 2019.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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MD RAFIQUIL MOWLA,
Plaintiff,

- against -

BAOZHU WU,
Defendant.

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Index No.: 502414/2018

DECISION AND ORDER

Motion Sequence #1

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	1/2,
Opposing Affidavits (Affirmations).....	3
Reply Affidavits (Affirmations).....	4

Upon a review of the foregoing papers, and after oral argument, the Court finds as follows:

This is an action to recover damages for personal injuries allegedly sustained by the Plaintiff, MD RAFIQUIL MOWLA (hereinafter "the Plaintiff"), on August 20, 2017, while he was working at a property purportedly owned by Defendant Baozhu Wu (hereinafter "the Defendant"). The property was located at 63 Wendover Road, Forest Hills, NY (hereinafter "the Property"). In his complaint, the Plaintiff alleges that he was engaged in construction work on the roof of the property when his hand came into contact with a loose brick column and he fell from the roof. The Plaintiff alleges in his Verified Bill of Particulars that the Defendant was negligent "in failing to provide the Plaintiff with a safe place to work; in failing to warn Plaintiff of the existence of a dangerous condition; in causing and permitting several bricks on the roof of said premises to be rotted; in causing and permitting plaintiff to fall from a ladder as a result of his hand coming into contact with a column of rotted loose bricks on the roof of the subject premises..." and other related acts of negligence. (See Defendant's Motion, Exhibit C, Paragraph 5).

The Defendant now moves (motion sequence #5) for an order pursuant to CPLR 3212, granting summary judgment in his favor and dismissing all causes of action against him. The Defendant contends that the Plaintiff's Labor Law § 240(1) claim should be dismissed given that the Defendant is entitled to a"homeowner's exemption", because the home is a single family residence and the Defendant did not control the Plaintiff's work. As to the Plaintiff's Labor Law §200 and common law negligence claims, the Defendant contends that these claims should be dismissed as the Defendant did not control or have a supervisory role over the Plaintiff's work and also that the Defendant did not create, nor have actual or constructive notice of the defect at issue.

In opposition to the Defendant's motion, the Plaintiff argues that the motion should be denied as the Defendant did not meet his *prima facie* burden. First, the Plaintiff contends that the Defendant is not entitled to a homeowners' exemption under Labor Law §200. Second, the Plaintiff argues that the Defendant improperly moves for summary judgment on the Plaintiff's Labor Law §200 and common law negligence claims. Plaintiff contends that although the Defendant does address the "means and method" theory of liability, he has failed to adequately address the "defective premises" theory of liability, in support of his motion. Specifically, the Plaintiff contends that for the Defendant to establish his *prima facie* burden, as it relates to a defective premises theory of liability in relation to Labor Law §200 and common law negligence, the Defendant would have to show that he lacked actual and/or constructive notice of the alleged defect or hazard.

As an initial matter, the Plaintiff does not otherwise oppose the Defendant's motion as it relates to the dismissal of the Plaintiff's Labor Law §240(1) claim. Accordingly, the remainder of this Decision and Order will relate to the Plaintiffs' Labor Law §200 and common law negligence claims. The Defendant's motion is granted as it relates to Plaintiff's Labor Law §240(1) claim and that claim is dismissed. *See Allan v. DHL Exp. (USA), Inc.*, 99 A.D.3d 828, 832, 952 N.Y.S.2d 275, 280 [2nd Dept, 2012].

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Labor Law § 200

Labor Law §200 "is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe construction site." *Rizzuto v. L.A. Wenger Contracting Co.*, 91 N.Y.2d 343, 352, 693 N.E.2d 1068, 1073 [1998]. " 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." *Ortega v. Puccia*, 57 A.D.3d 54, 61, 866 N.Y.S.2d 323, 329 [2nd Dept, 2008]. "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 may be held liable in common-law negligence and under Labor Law § 200 if it 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 5th Realty Corp.*, 46 A.D.3d 728, 730, 848 N.Y.S.2d 688, 690–91 [2nd Dept, 2007]. What is more, "[u]nlike Labor Law §§ 240 and 241, § 200 does not contain any single- and two-family homeowners' exemption." *Ortega v. Puccia*, 57 A.D.3d 54, 61, 866 N.Y.S.2d 323, 329 [2nd Dept, 2008].

Turning to the merits of the Defendant's motion in relation to the Plaintiffs' Labor Law §200 claim, the Court finds that the Defendant, as the owner of the building at issue, has not provided sufficient evidence to establish his *prima facie* burden in relation to the dismissal of Plaintiffs' claim. The Defendant argues that he cannot be held liable for the Plaintiff's injuries pursuant to Labor Law §200, given that he did not supervise or control the work of the Plaintiff and also because he did not have actual or constructive notice of the alleged defect at issue. However, the Defendant fails to sufficiently address Plaintiffs' claim in relation to an alleged dangerous condition. "Where, as here, a plaintiff contends that an accident occurred because a dangerous condition existed on the premises where the work was being undertaken, an owner moving for summary judgment dismissing causes of action alleging common-law negligence and a violation of Labor Law §200 must make 'a prima facie showing that it neither created the dangerous condition nor had actual or constructive notice of [it].'" *Doto v. Astoria Energy II, LLC*, 129 A.D.3d 660, 663, 11 N.Y.S.3d 201, 205 [2nd Dept, 2015], *quoting Costa v. Sterling Equip., Inc.*, 123 A.D.3d 649, 997 N.Y.S.2d 704 [2nd Dept, 2014].

In the instant proceeding, the Defendant argues that he did not have supervisory authority over the Plaintiff but he does not present any evidence that he did not have actual or constructive

notice of the condition at issue. Moreover, although the Defendant raises in his Attorney Affirmation in Support that the Plaintiff was hired to repair the bricks at issue and as a result had knowledge of the condition at issue prior to the alleged incident, there is no clear indication, either in the form of the Defendant's deposition testimony or a contract between the parties,[1] that would support this position. Further, the Defendant does not indicate that he conducted any inspection in relation to loose bricks. In fact, the Defendant states that he had no knowledge of the alleged loose bricks prior to the accident. (See Defendant's Motion, Exhibit I, Pages 42-47). Notwithstanding this, the Defendant contends that the repair of loose bricks was a part of the Plaintiff's scope of work. Therefore, the Defendant's motion is denied. *See Rodriguez v. BCRE 230 Riverdale, LLC*, 91 A.D.3d 933, 935, 938 N.Y.S.2d 146, 149 [2nd Dept, 2012].

Based upon the foregoing, it is hereby Ordered that:

Defendant's motion (motion sequence #1) is granted solely to the extent that the Plaintiff's cause of action based upon Labor Law §240(1) is dismissed. The Plaintiff's remaining claims shall continue.

The foregoing constitutes the Decision and Order of the Court.

Enter:

Carl J. Landicino
Justice Supreme Court

[1] Although referenced in deposition testimony, no contract was provided.