

<b>Ardizzone v Summit Glory LLC</b>
2020 NY Slip Op 31070(U)
April 27, 2020
Supreme Court, New York County
Docket Number: 157243/2017
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

*Justice*

-----X

ANGELO ARDIZZONE, MARYBETH ARDIZZONE,

Plaintiff,

- v -

SUMMIT GLORY LLC, FOSUN INTERNATIONAL LIMITED,  
AMERICON CONSTRUCTION INC., MILROSE  
CONSULTANTS, INC., GENSLER ARCHITECTURE  
DESIGN & PLANNING P.C., INTERIOR ARCHITECTS  
INC., INTERIOR ARCHITECTS P.C., SHMERYKOWSKY  
CONSULTING ENGINEERS, SYSKA HENNESSY GROUP,  
INC., DNA CONTROLLED INSPECTION LTD., TITAN  
INDUSTRIAL SERVICES CORP., EASTERN DESIGN TILE  
& MARBLE, INC., KABACK ENTERPRISES, INC., MASPETH  
WELDING, INC., RIVCO CONSTRUCTION, LLC

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 194, 195, 196, 197, 201, 202, 203, 204, 205, 212, 213

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 198, 199, 200, 206, 207, 208, 209, 210, 211, 214, 216, 217, 218

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is

Motion sequence numbers 006 and 007 are hereby consolidated for disposition.

In motion sequence 006, defendant Milrose Consultants, Inc. (Milrose) moves,  
pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint.

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157243/2017 ARDIZZONE, ANGELO vs. SUMMIT GLORY LLC  
Motion No. 006 007

In motion sequence 007, defendant DNA Controlled Inspection, Ltd. (DNA) moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and all cross claims against it.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff Angelo Ardizzone alleges that he was injured on June 9, 2016 when, while in the employ of nonparty Allran Electric, he fell from a ladder at a construction site on the 30th floor of a building located at 28 Liberty Street, New York, New York. Marybeth Ardizzone, plaintiff's wife, alleges a claim for loss of consortium as a result of plaintiff's injuries.

In his complaint filed August 11, 2017, plaintiff alleged common law negligence and violations of New York's Labor Law §§ 200, 240 (1), and 241 (6) as against defendants Hunter Roberts; Summit Glory, LLC; Fosun International Limited d/b/a Fosun Property Holdings (Fosun); Americon Construction Inc. (Americon); Milrose; Gensler Architecture Design & Planning P.C.; Interior Architects Inc.; Interior Architects, P.C.; Shmerykowsky Consulting Engineers (Shmerykowsky); Syska Hennessy Group, Inc.; and DNA. By order entered January 16, 2020, this case was consolidated with the matter of *Angelo Ardizzone and Marybeth Ardizzone v Titan Industrial Services Corp., Eastern Design Tile & Marble, Inc., Kaback Enterprises, Inc., Maspeth Welding, Inc., and Rivco Construction, LLC.*, which had been pending in this Court under Index Number 153299/19. Doc. 238.

### **ARGUMENTS**

**Motion Sequence 006**

Milrose contends that its motion for summary judgment must be granted because Labor Law §§ 200, 240 (1) and 241 (6) are not applicable herein. Milrose argues that, pursuant to a written contract dated September 2, 2015, nonparty Jones Lang LaSalle (JLL) hired it to complete New York City Department of Buildings (DOB) permit applications associated with the construction project at the subject premises. Pursuant to the contract, maintains Milrose, its sole role at the construction project was as a consultant to file permits with the DOB. Milrose contends that the total contract sum of \$11,497.50 reflects that it performed no construction-related work. Milrose argues that it is not a property owner, contractor, or statutory agent; that it had no supervisory role at the premises; that it did not direct, control, or coordinate any work at the premises; and that it did not hire any contractors at the premises.

In support of its motion, Milrose submits an affidavit from Michael Neal (Neal) dated February 12, 2019. Neal is a Certified Public Accountant and is Milrose's Chief Financial Officer. He states that Milrose did not perform any work or labor in relation to the premises at 28 Liberty Street other than completing permit applications for JLL.

Neal states that Milrose was neither the general contractor nor construction manager at the premises and did not enter into written agreements with any of the contractors or entities other than the agreement with JLL. According to Neal, Milrose never directed, supervised, managed, or controlled any work at the premises; had no presence at the job site in June of 2016; never performed any work related to ladders or debris; did not provide any ladders or other construction equipment or materials, and had no responsibility to provide ladders or debris removal at the premises before or after June 9, 2016.

In opposition to Milrose's motion, Shmerykowsky argues that discovery is vital and has just commenced. Shmerykowsky asserts that an affidavit is not equivalent to a deposition and that Neal's affidavit is self-serving. Shmerykowsky contends that it should be given the opportunity to explore Milrose's alleged relation to, and control over, the subject premises at the time of plaintiff's accident, including the scope and time frame of the permit work and whether any inspections or visits were part of the job. It further argues that the documents attached to the motion are not in admissible form and should not be considered by the court.

Plaintiffs also oppose Milrose's motion, asserting that there have been no depositions and that little discovery has been exchanged. They maintain that, while Milrose contends that voluminous documentary discovery has been exchanged, responses to discovery demands have not been provided.

### **Motion Sequence 007**

DNA contends that its motion for summary judgment must be granted because it cannot be found liable pursuant to Labor Law §§ 200, 240 (1) or 241 (6). DNA argues that it was not the owner of the subject premises, the general contractor, or an agent. DNA maintains that it did not direct, control, or supervise plaintiff's work, nor did it owe a duty to plaintiff. DNA contends that it did not create a dangerous condition and lacked actual or constructive notice of any hazardous condition which allegedly caused plaintiff's accident.

DNA submits an affidavit from Patricia Nucatola (Nucatola) dated May 8, 2019. Nucatola, the president and owner of DNA, represents that DNA performs inspections to confirm that construction work performed by contractors meets the requirements of the New York City Building Code. Nucatola states that, on December 1, 2016, DNA was retained by Fosun to

perform inspection services on the 30<sup>th</sup> floor of 28 Liberty Street, New York, New York.

DNA's inspections were limited to visualizing the itemized list of fire and other control-related systems set forth in the contract. She insists that that DNA not retained to inspect, and that it did not perform, any electrical systems contractors' work or any other tasks outside the scope of the contract.

Nucatola states that, based on her investigation on June 9, 2016, the date of plaintiff's accident, DNA had no personnel on-site at the premises before 2:00 p.m. or after 4:00 p.m. DNA's inspector, Ibrahim Bhuyan (Bhuyan) arrived at the premises on June 9, 2016 at 2:00 p.m. to perform visual inspections of the mechanical system, sprayed fire-resistant materials, sprinkler systems and standpipe systems. Nucatola states that the only equipment used by Bhuyan was a laptop or handheld tablet. Bhuyan reported his findings to Mr. Forgione, whom she believed was employed by Americon.

Nucatola states that, prior to and including June 9, 2016, DNA did not own, lease, supervise, control, operate, maintain or manage the premises. She also maintains that DNA was not retained to act as general contractor or construction manager for construction, renovation, and/or alteration of the premises; that it did not perform construction work, supervise, or supply construction labor at the premises; that it did not employ or supervise plaintiff; that it had no control over plaintiff's work; and that it had no control over the construction project at the premises.

Summit Glory and Shmerykowsky oppose DNA's motion for summary judgment and argue that it is premature. Shmerykowsky argues that there has been no opportunity to question DNA with respect to plaintiff's alleged accident. Shmerykowsky maintains that it is entitled to know the particulars of the conduct which the parties were engaged in prior to the time of the

accident. Shmerykowsky argues that, while DNA submits an affidavit from Nucatola, the affidavit is insufficient to resolve all questions of fact with respect to the subject accident. Shmerykowsky argues that documents attached to DNA's underlying motion are not in admissible form and not authenticated.

Shmerykowsky contends that, although DNA admits that it actively performed inspections on the 30<sup>th</sup> floor of the premises on the date of plaintiff's accident, it is unknown whether DNA performed similar inspections prior to June 9, 2016. It also contends that is unclear whether DNA's employees observed any debris or dangerous conditions around the location of plaintiff's accident, and whether anyone reported any safety issues or concerns to Fosun or to Americon's site supervisor. Shmerykowsky argues that discovery and depositions of DNA are crucial before a motion for summary judgment can be decided.

Plaintiffs oppose DNA's motion and contend that DNA admitted that it was its responsibility to perform safety inspections and that it performed a safety inspection on the date of the accident on the same floor as the accident. Plaintiffs contend that, although DNA attempts to argue that its safety inspections were only to visually confirm requirements of the New York City Building Code, depositions and documentary discovery are required to evaluate DNA's claims.

### **LEGAL CONCLUSIONS**

"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 NY2d 851, 853 (1985). Furthermore, when moving for summary judgment, the defendant must establish that the

cause of action has no merit. *See Friedman v BHL Realty Corp.*, 83 AD3d 510, 510 (1st Dept 2011).

The Appellate Division, First Department, has held that when discovery is incomplete, an order granting summary judgment may be premature. *See Ali v Effron*, 106 AD3d 560, 560 (1st Dept 2013) (holding “[p]laintiff’s cross motion for partial summary judgment was properly denied as premature in light of the incomplete state of discovery, including the lack of any depositions”); *Wilson v Yemen Realty Corp.*, 74 AD3d 544, 545 (1st Dept 2010) (“in light of the incomplete state of discovery, including the fact that no party had yet been deposed, the summary judgment motion was premature”); *McGlynn v Palace Co.*, 262 AD2d 116, 117 (1st Dept 1999) (holding “ this is not a situation where defendants can be charged with a failure to diligently seek discovery, since plaintiffs’ motion was made almost immediately after entry of the court’s preliminary conference order, and the motion for summary judgment brought into force a stay of discovery proceedings . . . Under the circumstances presented here, it was error to grant summary judgment prior to affording defendants an opportunity to depose plaintiff.”).

Here, the formal discovery process, under this Court’s supervision, has yet to commence. A preliminary conference has been scheduled for April 28, 2020. Plaintiff has yet to be deposed. Thus, plaintiff still has not had the opportunity to testify regarding the circumstances of his accident including which defendants, if any, were supervising or instructing his work. Further, defendants have not been deposed to establish what work, if any, was being conducted at the site prior to, and at the time of plaintiff’s accident.

In support of their respective motions, both Milrose and DNA submit affidavits. Although Milrose provides an affidavit from Neal, who works as a Chief Financial Officer for Milrose, plaintiffs and defendants have not had the opportunity depose Neal and ask questions

about Milrose's work on the project. Additionally, although Nucatola submits an affidavit regarding DNA's visual inspections at the subject premises, the other parties to this action have not yet had the opportunity to question her.

Since discovery is still in its nascent stage, and because plaintiffs and defendants should have a reasonable opportunity to conduct discovery prior to the determination of these motions for summary judgment, this Court holds that the motions of Milrose and DNA are premature. Thus, the motions are denied without prejudice to renew the same upon the completion of discovery.

Therefore, in light of the foregoing, it is hereby:

ORDERED that defendant Milrose Consultants, Inc.'s motion (motion sequence 006) for summary judgment is denied without prejudice to renew the same upon the completion of discovery; and it is further

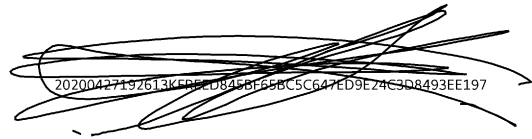
ORDERED that DNA Controlled Inspection, Ltd.'s motion (motion sequence 007) for summary judgment is denied without prejudice to renew the same upon the completion of discovery; and it is further

ORDERED that the parties are to appear for a preliminary conference on July 21, 2020 at 80 Centre Street, room 280 at 2:15 p.m. unless otherwise ordered by the Court; and it is further

ORDERED that this constitutes the decision and order of the court.

4/27/2020

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE