

Danyshchuk v Sterwash LLC
2020 NY Slip Op 31127(U)
April 28, 2020
Supreme Court, Kings County
Docket Number: 506463/15
Judge: Kathy J. King
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At an IAS Term, Part 64 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 28th day of April, 2020.

P R E S E N T:

HON. KATHY J. KING,

Justice.

----- X

MYKHAYLO DANYSHCHUK,

Plaintiff,

DECISION/ORDER

Index No. 506463/15

- against -

STERWASH LLC, and XYZ CONTRACTOR CORP., a fictitious name unknown at this time intended to be the GENERAL CONTRACTOR,

Defendants.

----- X

STERWASH, LLC,

Third-Party Plaintiff,

- against -

REMONT INC.,

Third-Party Defendant.

----- X

The following papers number 1 to 4 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1-2
Opposing Affidavits (Affirmations)_____	3
Reply Affidavits (Affirmations)_____	4

Upon the foregoing papers, defendant and third-party plaintiff Sterwash LLC (“Sterwash”) move, for an order, pursuant to CPLR 3212 granting summary judgment and dismissing the complaint of plaintiff Mykhaylo Danyshchuk and awarding conditional

contractual indemnification against third-party defendant Remont Inc. (“Remont”). Plaintiff submits opposition to the motion.

Background

On May 26, 2015 plaintiff commenced the underlying action against Sterwash. Plaintiff claims that Sterwash, as owner of the property located at 482 Sterling Place, Brooklyn, New York (“the subject premises”), hired a general contractor¹ to build, renovate and/or alter structures on the premises, and that the general contractor hired Remont to perform construction work, and that plaintiff was a Remont employee. Thereafter, Sterwash interposed an answer with a general denial, together with claims against Remont, who had been subsequently impleaded into the action. Sterwash claims that Remont failed to have a commercial general liability policy, and asserts causes of action sounding in contribution, indemnity and breach of contract.

Plaintiff’s complaint alleges that he was performing construction work at the subject premises on November 21, 2014, when he fell and was injured. Plaintiff contends that his injuries were proximately caused by violations of Labor Law §§ 240 (1), 241 (6) and 200. With respect to Labor Law §§ 240 (1) and 240 (6), plaintiff claims that Sterwash, as owner, is vicariously liable without regard to fault. As to Labor Law §200, the complaint alleges that Sterwash violated the common-law duty to keep his premises reasonably safe.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his day in court and should only be employed when there is no doubt as to the absence of triable issues of material fact (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). [T]he proponent of a summary judgment

¹ The general contractor is unknown and is not a named party in this action.

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” (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). However, a summary judgment motion will be granted, if upon all the papers and proof submitted, the cause of action or defense is sufficiently established to warrant directing judgment in favor of any party as a matter of law, and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material factual issues (see CPLR 3212 [b]; see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

First, the Court shall consider the unsigned deposition transcripts of plaintiff and Michael Lehman, a principal of Sterwash, as admissible evidence over objection. “[T]he submission of unsigned and some uncertified deposition transcripts constituted mere irregularities and, because no substantial right of any party was prejudiced, [a] court should . . . disregard[] these defects and determine[] the motion . . . for summary judgment on the merits” (*Hartman v Milbel Enters., Inc.* 130 AD3d 978, 980 [2d Dept 2015], citing CPLR 2001).

Based on a review of the moving papers, the Court finds that plaintiff has failed to establish prima facie entitlement to summary judgment as a matter of law. It is well settled that an owner of a one or two family dwelling is exempt from liability under Labor Law §§ 240 (1) and 240 (6) unless he directed or controlled the work being performed. "A determination as to whether the exemption applies in a particular case turns on the nature of the site and the purpose of the work being performed" and "must be based on the owner's intentions at the time of the

injury" (*Caiazzo v Mark Joseph Contracting, Inc.*, 119 AD3d 718, 721 [2014]). "The statutory phrase 'direct or control' is construed strictly and refers to situations where the owner supervises the method and manner of the work" (*Ortega*, 57 AD3d at 59, citing *Boccio v Bozik*, 41 AD3d 754, 755 [2007]).

Here, contrary to the plaintiff's contentions in opposition, the uncontradicted deposition testimony establishes that Michael Lehman, a member of Sterwash, LLC was renovating the premises with the intent to use it as a single-family residential residence. There is no evidence in the record that either Sterwash or Michael Lehman operated a business in the subject premises. While plaintiff claims that a factual issue is raised since the deed, certificate of occupancy and other real estate documents identify the premises as commercial, the Court disagrees. In *Rashid v Hartke*, 171 AD3d 1226 [2d Dept 2019], the Appellate Division held that although "the subject building is classified as a multiple- or three-family dwelling by the New York City Department of Buildings," the exemption did not apply, since "the dwelling functions exclusively as a private home for the defendants" (*id.*). Plaintiff's reliance on documents to show commercial use, including insurance policies, is, thus, unavailing.

Next, the court addresses plaintiff's contentions under Labor Law §200 and common-law negligence. Absent a dangerous premises condition, any liability for "causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the work" (*Aranda v Park E. Constr.*, 4 AD3d 315, 316 [2d Dept 2004], citing *Lombardi v Stout*, 80 NY2d 290, 295 [1992]). Here, plaintiff's accident did not involve any dangerous or defective condition on the premises. Rather, the accident involved removing beams and dropping them from the third floor to the second floor. Additionally, the

record establishes that plaintiff received instructions only from Remont's foremen and, no dangerous or defective condition existed on the premises (*see e.g. Bright v Orange Rockland Utils., Inc.*, 284 AD2d 359, 360 [2d Dept 2001]). Thus, Labor Law §200 or common-law negligence claims against Sterwash do not apply (*see Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 620 [2008]).

As to the issue of indemnification, the Court finds that it is generally premature for a court to award summary judgment before a finding of fault is made (*Fritz v Sports Auth.*, 91 AD3d 712, 713-714 [2d Dept 2012]). While Remont submitted no opposition to the motion, “[a] court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action so that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed. To obtain conditional relief on a claim for contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of . . . statutory [or vicarious] liability” (*Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 616 [2d Dept 2011] [internal citations omitted]). Here, conditional contractual indemnification is warranted since Sterwash has established by proof in admissible form that he is entitled to the homeowner's exemption under the Labor Law.

Based on the foregoing, the motion is granted in its entirety.

This constitutes the decision of the Court.

ENTER,


HON. KATHY J. KING
J. S. C.