

Cipriano v Structuretech N.Y., Inc.
2020 NY Slip Op 31363(U)
May 14, 2020
Supreme Court, New York County
Docket Number: 150933/2019
Judge: W. Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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JOAO CIPRIANO,

Plaintiff,

- v -

STRUCTURETECH NEW YORK, INC., 70TH STREET LLC.

Defendant.

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INDEX NO. 150933/2019
MOTION DATE 09/04/2019
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37 were read on this motion to/for JUDGMENT - SUMMARY.

This action arises from an alleged work-related accident that occurred on July 24, 2018. NY 70th Street LLC ("Defendant") is the owner of 19 East 70th Street (the "Premises"). Defendant hired non-party Sweeney & Conroy, Inc., as its general contractor to perform construction on the Premises; namely, to convert the Premises from an art gallery to a residential home. Plaintiff was an employee of Sweeney & Conroy when, on July 24, 2018 he was allegedly hit by a portion of a scaffold and suffered injuries. (NYSCEF Doc Nos. 1 at ¶ 35; 30 at ¶ 5.)

Plaintiff commenced this action and set forth the following claims against Defendant: 1. common law negligence; 2. violation of Labor Law § 200; 3. violation of Labor Law § 240 [1]; 4. violation of Labor Law § 241 [6]; and 5. violations of Rule 23 of the Industrial Code.

Defendant now seeks summary judgment dismissal of the Verified Complaint. The motion has been submitted unopposed.

DISCUSSION

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." (Dallas-

Stephenson v Waisman, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) “Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citation omitted].) Upon proffer of evidence establishing a prima facie showing of entitlement by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.’” (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NYS2d 557, 562 [1980].)

Labor Law §§ 240 [1] and 241 [6]

Labor Law § 240 [1] provides that all contractors and owners “except owners of one and two-family dwellings who contract for but do not direct or control the work” shall furnish and operate scaffolding, ladders, and other devices to give proper protection to persons so employed. Similarly, Labor Law § 241 [6] provides that all contractors and owners “except owners of one and two-family dwellings who contract for but do not direct or control the work” shall provide reasonable and adequate protection to persons employed in doing construction, excavation, or demolition work. However, to demonstrate a violation of Labor Law § 241 [6] and withstand a motion for summary judgment, the plaintiff must show that “that defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety.” (*Meighn v Suggs*, 2019 WL 5086294, *5 [Sup Ct, NY County 2019, No. 157183/16].)

To make a prima facie showing of entitlement to the homeowner’s exemption, a defendant must demonstrate that the premises is either a one or two-family dwelling and that the defendant

did not direct or control the plaintiff's work. (*Farias v Simon*, 122 AD3d 466, 467 [1st Dept 2014].)

Here, Defendant submits a verified affidavit from John Hannan, the sole manager of NY 70th Street LLC. Mr. Hannan's affidavit and supporting documentation establishes that the premises was converted to a single-family dwelling (NYSCEF Doc No. 37 at 48.) Additionally, the affidavit demonstrates that Defendant did not exercise supervisory control over the Plaintiff's work and did not provide any tools or equipment. (*Id.* at 44-46; *see also Hewitt v NY 70th Street LLC*, 2018 WL 2247550 [Sup Ct, NY County 2018, No. 0020953/17].)

Although Plaintiff asserted a violation of the Industrial Code as a separate fifth cause of action (NYSCEF Doc Nos. 1 at ¶ 54; 30 at ¶ 15), Plaintiff fails to allege specific violations of the Code in any filing before the court. Accordingly, these alleged violations are deemed abandoned. (*Meighn*, 2019 WL 5086294, at *12.) Moreover, Defendant has made a prima facie showing of entitlement to the homeowner exemption. Plaintiff has failed to oppose the motion or raise an issue of material fact. Accordingly, Plaintiff's claims 3, 4, and 5 are summarily dismissed.

Labor Law § 200 and common law negligence

“Labor Law § 200 codifies the common law duty of owners and general contractors to provide workers with a reasonably safe place to work.” (*Mitchell v 608 Co., LLC*, 2020 WL 2219961, *7 [Sup Ct, NY County, No. 159494/14], citing *Comes v New York State Elec. And Gas Corp.*, 82 NY2d 876 [1993].) If the injury is alleged to have been caused by “the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work.” (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012].)

Here, Plaintiff's alleged injury occurred when "a portion of a scaffold being hoisted/lowered, became loose and fell, striking plaintiff on the head." (NYSCEF Doc No. 30 at ¶ 5.) Defendant argues that Plaintiff's Labor Law § 200 and common law negligence claims should be dismissed because Defendant did not exercise supervisory control over Plaintiff's work. (NYSCEF Doc No. 36 at 12-14.) This argument is supported by the verified affidavit of John Hannan.

Because Plaintiff has not filed an opposition and offers no evidence to raise an issue of material fact, the motion is granted and Plaintiff's claims 1 and 2 are summarily dismissed. Accordingly, it is hereby

ORDERED that the motion of defendant New York 70th Street LLC, Motion Sequence Number 002, to dismiss the complaint and for summary judgement herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further


ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the remaining parties are directed to appear for a preliminary conference on September 15, 2020, at 9:30 AM in Room 307 of 80 Centre Street, New York, New York 10013, unless otherwise directed to participate in a remote preliminary conference due to the current health crisis.

Any requested relief not expressly addressed by the court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

<u>5/14/20</u> DATE		 W. FRANC PERRY, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE