

Echeverria v Wiz Home Improvements, LLC
2020 NY Slip Op 32801(U)
July 8, 2020
Supreme Court, King County
Docket Number: 517020/2017
Judge: Mark I. Parthnow
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At an IAS Term, Part 43 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 8th day of July, 2020.

PRESENT:

HON. MARK PARTNOW,
Justice

-----X

LUCIO HERNANDEZ ECHEVERRIA,

Plaintiff,

-against-

Index No. 517020/2017

WIZ HOME IMPROVEMENTS, LLC, WERNER
ZLOKLIKOVITS AND CHELSEY KASOW,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc #

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and

Affidavits (Affirmations) Annexed _____

18-32 45-64

Opposing Affidavits (Affirmations) _____

36-44 66-71

Reply Affidavits (Affirmations) _____

73-75 72

Upon the foregoing papers, defendant Chelsey Kasow's (Kasow) motion, sequence 2, for summary judgment pursuant to CPLR 3212, and for dismissal of all claims and cross-claims against him, is denied without prejudice and with leave to renew upon completion of discovery.

Defendants Werner Zloklikovits (Zloklikovits) and Wiz Home Improvements, LLC's (Wiz Home LLC) motion, sequence 3, for summary judgment pursuant to CPLR 3212, and dismissal of all claims and cross-claims against them, is also denied without prejudice with leave to renew upon completion of discovery.

Background and Procedural History

In 2017, Lucio Hernandez Echeverria (Plaintiff), was employed by the construction company, Landmark Restoration, Inc. (Landmark). On July 28, 2017, while working for Landmark, Plaintiff was repairing the façade of Kasow's home located in Brooklyn, New York. While at Kasow's home and while attempting to repair the façade, Plaintiff alleges to have fallen from a ladder.

Following the accident, Plaintiff commenced the instant personal injury action against Wiz Home LLC by filing a summons and complaint on September 1, 2017. Shortly thereafter, Plaintiff filed an amended complaint, verified by counsel, adding Zloklikovits as an additional defendant. On February 6, 2018, Plaintiff filed a summons and complaint in a separate action (index number 502371/2018), naming Kasow as the sole defendant. By order dated May 23, 2018, the Honorable Justice Paul Wooten granted Plaintiff's motion, sequence 1, to consolidate the two actions. Both actions were consolidated under the instant index number. The action seeks to recover damages for personal injuries sustained as a result of the defendants' alleged violations of Labor Law §§ 200, 240, and 241(6), as well as common-law negligence.

After the actions were consolidated, both motions (sequences 2 and 3) were orally argued before the Honorable Justice Johnny Lee Baynes and were marked fully submitted on April 3, 2019. However, upon Justice Baynes' untimely passing, the action was transferred to this Part in July 2020.

Discussion

Kasow's Motion for Summary Judgment

In support of his motion (sequence 2), Kasow contends that: 1) he is exempt from liability under the homeowner's exemption under both Labor Law §§ 240 (1) and 241 (6); 2) he did not violate Labor Law § 200; and 3) he cannot be held liable for common-law negligence. In opposition, Plaintiff maintains that Kasow's motion is premature since discovery is incomplete.

Plaintiff further argues that even if the motion is determined not to be premature, that: 1) Kasow does not qualify for the homeowner's exemption; and 2) that a triable issue of fact exists as to whether Kasow was directing, controlling or supervising Plaintiff's work.

It is undisputed that Kasow purchased the home on or about February 6, 2013 and remains the owner of the subject property to date. According to the deed of the subject property (attached as Exhibit 1 to Kasow's motion), Kasow's home is designated as a two-family dwelling. In his affidavit, Kasow states that he did not perform, direct, control, or supervise any work during the course of the repair and/or construction work at his home. Furthermore, Kasow states that he did not direct, control, or supervise the plaintiff during the course of the repair and/or construction work at his home at any time. In opposition, Plaintiff submits his own affidavit in which he states that Kasow visited the subject property on several occasions. During these alleged visits, Plaintiff claims to have discussed with Kasow the progress of the work, timeliness of the work, and what needed to be done. Additionally, as Plaintiff has yet to depose any of the defendants in this matter, Plaintiff argues that discovery is incomplete and this summary judgment motion is premature.

"Labor Law §§ 240(1) and 241(6) apply to owners, contractors, and their agents" (*Alexandridis v. Van Gogh Contracting Company*, 180 AD3d 969, 973 [2d Dept 2020] *quoting Medina v. R.M. Resources*, 107 AD3d 859, 860 [2d Dept 2013]). "Labor Law §§ 240(1) and 241(6) specifically exempt from liability thereunder 'owners of one and two-family dwellings who contract for but do not direct or control the work'" (*Lazzo v. Ricci*, 178 AD3d 811,812 [2d Dept 2019]). "The phrase direct or control as used in those statutes is construed strictly and refers to the situation where the owner supervised the method and manner of the work" (*Salgado v. Rubin*, 183 AD3d 617 [2d Dept 2020]). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*Vega v. Restani Const. Corp.*, 18 NY3d 499, 503 [2012]; *citing Ortiz v. Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). "Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's

meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action” (*id.*).

However, even if the moving party is able to meet this burden, “a party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment” (*Rutherford v. Brooklyn Navy Yard Development Corp.*, 174 AD3d 932, 933 [2d Dept 2019]). “A party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated” (*id.*). “A party contending that [a] summary judgment motion is premature must demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant” (*id.*).

Here, Kasow proffered evidence that he is the owner of a two-family dwelling and that he did not direct or control any of the work performed by Plaintiff. As such, Kasow has met his initial burden for a judgment as a matter of law. In opposition, however, Plaintiff’s affidavit establishes that Kasow may have visited the property while work was being performed and that Kasow may have controlled and directed the work performed at the property during these visits. The extent to which Kasow may have performed, directed, controlled, or supervised the manner and method of the construction work, is exclusively within Kasow’s knowledge. Plaintiff should be afforded the opportunity to depose Kasow on these issues, as such information is necessary to oppose Kasow’s motion for summary judgment. Therefore, Kasow’s motion, sequence 2, for summary judgment pursuant to CPLR 3212 and dismissal of all claims and cross-claims against him is denied without prejudice and with leave to renew upon completion of discovery.

Wiz Home LLC’s & Zloklikovits’s Motions for Summary Judgment

Wiz Home LLC seeks an order (motion sequence 3) granting it summary judgment on the grounds that it alleges to not have any association with the Plaintiff or the work performed at the subject property. According to the New York State Department of State database printout (attached

as Exhibit L to Wiz Home LLC's motion), Wiz Home LLC is a construction business company that was formed by defendant Zloklikovits on October 20, 1998. In support of its position, Zloklikovits submits an affidavit which states that Wiz Home LLC never contracted to perform any work on Kasow's home. Rather, Zloklikovits avers that the parties to the contract for construction work on Kasow's home are Kasow and Werner Zloklikovits d/b/a Wiz Home Improvement. Zloklikovits contends that Werner Zloklikovits d/b/a Wiz Home Improvement is a separate entity from Wiz Home LLC. Wiz Home LLC proffers several pieces of documentary evidence to support the contention that it was not associated with any aspect of the work performed pursuant to said contract.

First, Wiz Home LLC submits a copy of the contract between Kasow and Wiz Home Improvement. As the contract does not reference "Wiz Home Improvements, LLC", defendant Wiz Home LLC contends that it is not a party to the contract. Second, the deposit check signed by Kasow was made payable to Wiz Home Improvement and not to Wiz Home LLC. Third, the New York City work permit associated with the construction work on Kasow's home was issued to the business, "Werner Zloklikovits."

In opposition, Plaintiff again argues that the motion for summary judgment is premature because discovery is incomplete. Plaintiff has yet to depose any of the defendants and ascertain which entities did in fact contract with Kasow to perform work at the subject property. Plaintiff further argues that Wiz Home LLC held themselves out to be the general contractors for the construction property work on Kasow's home. Plaintiff maintains that he needs additional discovery to determine Wiz Home LLC's actual relationship to Kasow, the Plaintiff, and the work performed at the subject property.

As this information is exclusively within the knowledge and control of Wiz Home LLC and was necessary to oppose the motion for summary judgment, Plaintiff has sufficiently established that this motion is premature because discovery is incomplete. Therefore, Wiz Home

LLC's motion, sequence 3, for summary judgment pursuant to CPLR 3212 and dismissal of all claims and cross-claims against him is denied without prejudice and with leave to renew upon completion of discovery.

Zloklikovits argues that based upon the evidence submitted he cannot be held liable under Labor Law §§ 200, 240(1), and 241(6), as well as common-law negligence. According to his affidavit, Zloklikovits states that he is the sole member of Wiz Home LLC. He contends to have entered into a contract with Kasow to perform construction work on Kasow's home in his individual capacity d/b/a Wiz Home Improvement and not in his capacity as sole member of Wiz Home LLC and on Wiz Home LLC's behalf. Zloklikovits contends that his contract with Kasow consisted of primarily interior framing, plumbing and electrical work. Furthermore, Zloklikovits states that his contract with Kasow specifically excludes work to be done on the façade of the property. As such, he contends that he did not perform, direct, control, or supervise any work performed by Landmark or its employees during the course of his contract with Kasow.

In opposition, Plaintiff avers that he saw and spoke with Zloklikovits on several occasions while at the job site. Plaintiff states that Zloklikovits observed the condition of the ladders and stated that the ladders were unsafe. Plaintiff further contends that Zloklikovits was monitoring the progress and safety of the worksite.

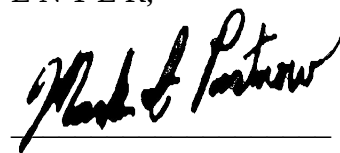
Plaintiff has raised matters which justify the continuation of discovery and has provided sufficient reason why a motion for summary judgment is premature at this time. Further discovery, including depositions, should be conducted. Accordingly, it is

ORDERED that Kasow's motion sequence 2, for summary judgment, and dismissal of all claims and cross-claims against him is denied without prejudice and with leave to renew upon completion of discovery; and it is further

ORDERED that Zloklikovits' and Wiz Home LLC's motion sequence 3, for summary judgment, and dismissal of all claims and cross-claims against them, is denied without prejudice and with leave to renew upon completion of discovery.

This constitutes the decision and order of the court.

E N T E R,

A handwritten signature in black ink, appearing to read "Mark J. Pantano", is written over a horizontal line.

J. S. C.