

Munez v Malachite Group, Ltd.
2020 NY Slip Op 33636(U)
November 2, 2020
Supreme Court, Suffolk County
Docket Number: 35393/2010
Judge: Joseph Farneti
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SHORT FORM ORDER

INDEX No. 35393/2010CAL. No. 201901153OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice of the Supreme Court

MOTION DATE 11/18/19 (005)
MOTION DATE 3/5/20 (006)
ADJ. DATE 7/30/20
Mot. Seq. # 005 MotD
006 MotD

-----X
DINA A. MENDOZA MUNEZ, as
Administratrix of the Estate of JULIO PEREZ-
LEON, Deceased, and DINA PEREZ-LEON,

Plaintiff,

- against -

MALACHITE GROUP, LTD.,
MANOUCHEHR MALEKAN, MICHAEL
SILBERBERG, SOUTHVIEW REALTY
CORP, and MALACHITE GROUP OF
TEXAS, INC.,

Defendants.

DELL & DEAN, PLLC
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Garden City, New York 11530

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-----X
MALACHITE GROUP, LTD.,
MANOUCHEHR MALEKAN, MICHAEL
SILBERBERG, SOUTHVIEW REALTY
CORP, and MALACHITE GROUP OF
TEXAS, INC.,

Third-Party Plaintiffs,

- against -

TODD RUTT CONSTRUCTION, LLC.,

Third-Party Defendants.

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Upon the following papers read on these e-filed motions for summary judgment : Notice of Motions/ Order to Show Cause and supporting papers by defendants/third-party plaintiff, dated October 15, 2019 ; Notice of Cross Motion and supporting papers by plaintiff, dated February 26, 2020 ; Answering Affidavits and supporting papers by defendants/third-party plaintiffs, dated July 15, 2020 ; Replying Affidavits and supporting papers by plaintiff, dated July 23, 2020 ; Other ____; it is

ORDERED that the motion by defendants/third-party plaintiffs for summary judgment dismissing the complaint against them is granted to the extent determined herein, and is otherwise denied; and it is further

ORDERED that the cross motion by plaintiff seeking, *inter alia*, summary judgment in her favor on the issue of liability with respect to the Labor Law § 240 (1) claim is determined as follows.

This wrongful death action arises from a construction-related accident which occurred on October 20, 2008, while the decedent, Julio Perez-Leon, was working on a construction project to repair and restore the storm damaged roof of a commercial building located at 13815 South Post Oak Road, Houston, Texas. The accident allegedly occurred when the floor of the roof on which decedent was standing gave in while he was removing debris, and caused him to fall approximately 12 feet to the floor below. The decedent allegedly sustained permanent injuries to his lumbar spine and lower extremities as a result of the accident, and was forced to undergo spinal fusion surgery at the Memorial Hermann Southwest Hospital in Texas on October 22, 2008. At the time of the accident, the decedent was employed by Pacific Coast Stucco & Painting, which was situated in Long Island, New York. Third-party defendant Todd Ruth Construction, LLC ("TRC"), the prime contractor for the project, hired Pacific Coast to perform the roof repairs. Defendant/third-party plaintiff Malachite Group, Ltd., which includes the Malachite Group of Texas, was the strip mall's property manager. The strip mall was owned by defendant/third-party plaintiff Southview Realty Corp. and defendant/third-party plaintiff Manouchehr Malekan, a New York resident, owned both the Malachite Group and Southview Realty. Defendant/third-party plaintiff Michael Silberberg was the lessor of the building on which decedent was working at the time of the accident. By way of the complaint, the decedent alleged causes of action against defendants based on common law negligence and violations of Labor Law §§ 240 (1), 241 (6), and 200. Defendants/third-party plaintiffs joined issue asserting affirmative defenses, including a defense that the decedent's complaint against them is barred by the Texas Civil Practice & Remedies Code. They also impleaded TRC, alleging third-party contribution, indemnification, and breach of contract claims against it.

Following his November 6, 2008 hospital discharge, the decedent, who allegedly continued to suffer from severe chronic pain and immobility, returned to his home in New York. It is alleged that although the decedent received medical treatment, including the use of various pain medications, he continued to decline until he reportedly passed away in January 2015, as a result of blunt force trauma and liver failure. By Order dated October 12, 2017, this Court denied a motion by defendants/third-party plaintiffs seeking, *inter alia*, dismissal of the complaint against them based on the alleged failure to timely substitute the decedent's wife, the administratrix of his estate, as plaintiff in the action. Conversely, the Court granted the cross motion by decedent's wife seeking such substitution. Defendants/third-party plaintiffs now move for summary judgment dismissing the complaint against them

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on the grounds the action is controlled by the Texas Civil Practice and Remedies Code since the accident occurred in Texas, and that dismissal under the code is warranted because they neither controlled the decedent's work nor possessed actual knowledge of the dangerous condition that caused his accident.

Plaintiff opposes the motion and cross-moves for summary judgment in her favor on the issue of liability with respect to the decedent's Labor Law § 240 (1) claim. Plaintiff argues, *inter alia*, that triable issues exist as to whether the work at the subject construction site was done pursuant to a written agreement between the Malachite Group and the decedent's employer and, if so, whether the agreement contains a choice of law clause which mandates that any litigation relating to worker accidents be governed by New York's laws. Plaintiff further argues that Labor Law § 240 (1) should be applied to the conduct of the Malachite Group under the circumstances of this case, as there is no conflict between the Labor Law and the applicable laws of Texas with regard to an agent's liability for injuries occurring at a construction site. Alternatively, plaintiff avers that even if the Court finds that Texas law is applicable to the decedent's accident, it should nonetheless deny the motion to dismiss the complaint because provisions contained in the construction agreement between the Malachite Group and the decedent's employer referenced in the third-party complaint may have provided the Malachite Group the requisite control to establish its liability under Texas' rules. Plaintiff also seeks, pursuant CPLR 3025, leave to amend the complaint to add a wrongful death cause of action. Plaintiff contends that should the Court grant her leave to add a wrongful death claim, it must also find that New York law applies under the circumstances of this case because it was the place where the last injurious event occurred making the Malachite Group liable for the decedent's death.

The Malachite Group opposes plaintiff's cross motion on the basis it was untimely, since it was made on February 26, 2020, approximately 133 days after the filing of the note of issue. The Malachite Group further asserts that plaintiff's motion to amend the pleadings to include a wrongful death action should be denied, as the statute of limitations to bring such a claim expired on October 12, 2019, approximately 4 months prior to the instant application for such relief. The Malachite Group contends that the "relation back doctrine," which may permit the untimely assertion of the wrongful death claim in a medical malpractice action, is inapplicable to the instant personal injury claim, and that the pleadings – devoid of facts linking the decedent's death from cirrhosis caused by excessive use of pain killers – did not give notice of the transactions and occurrences on which the proposed wrongful death cause of action is based.

At the outset, the Court notes that it will consider plaintiff's untimely cross motion, as it was made on grounds nearly identical to those included in the timely motion – namely, the applicability of the provisions of the New York Labor Law – and involves issues already before the Court (*see Reutzel v Hunter Yes, Inc.*, 135 AD3d 1123, 25 NYS3d 370 [3d Dept 2016]; *McCallister v 200 Park, L.P.*, 92 AD3d 927, 939 NYS2d 538 [2d Dept 2012]; *Whitehead v City of New York*, 79 AD3d 858, 913 NYS2d 697 [2d Dept 2010]). Further, the branch of plaintiff's motion seeking leave to amend the pleading to include a new wrongful death cause of action is granted. Such leave "shall be freely given" (CPLR 3025 [b]), unless the proposed amendment is palpably insufficient, devoid of merit, or would otherwise prejudice or surprise the opposing party (*see Lariviere v New York City Tr. Auth.*, 82 AD3d 1165, 920 NYS2d 231 [2d Dept 2011]; *Gitlin v Chirinkin*, 60 AD3d 901, 875 NYS2d 585 [2d Dept 2009]). Although a proposed amendment to add a new cause of action may be regarded as patently devoid of

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merit where the statute of limitations for the newly proposed action has expired (*see Grant v Brooklyn Ctr. for Rehabilitation & Residential Health Care, LLC*, 153 AD3d 798, 60 NYS3d 352 [2d Dept 2017]), such an amendment may be allowed, even where the claim would be otherwise time-barred, if the new cause of action relates back to the facts, circumstances and proof underlying the original complaint (*see Caffaro v Trayna*, 35 NY2d 245, 249, 360 NYS2d 847 [1974]; *DeLuca v PSCH, Inc.*, 170 AD3d 800, 93 NYS3d 898 [2d Dept 2019] [amendment to add wrongful death action permitted, although time barred, where the original complaint was interposed prior to decedent's death and gave notice of transactions and occurrences on which wrongful death cause of action in the amended complaint was based]). Thus, leave to amend the complaint by adding a wrongful death action should be permitted, as the underlying complaint gives notice of transactions and occurrences, namely the accident and the permanent chronic injuries that resulted, on which the wrongful death cause of action is based.

As for the applicability of the Labor Law to the decedent's accident in Texas, when a choice of law issue is raised, New York employs an interest analysis to determine which of the competing jurisdictions has a greater interest. This is determined by an evaluation of facts relating to the purpose of a particular law. Two separate inquiries are applied to ascertain the greater interest: (1) what are the significant contacts and in which jurisdiction they are located; and (2) whether the purpose of the law is the regulation of conduct or the allocation of the loss (*Padula v Lilarn Properties Corp.*, 84 NY2d 519, 521, 620 NYS2d 310 [1994]). If the conflicting rules relate to the standards of conduct to be observed, then the law of the jurisdiction where the accident occurred should be applied, since the interests of that State clearly predominates. However, "when the jurisdictions' conflicting rules relate to allocating losses ... considerations of the State's admonitory interest and party reliance are less important. ... [and] analysis . . . favors the jurisdiction of common domicile" (*Padula v Lilarn Properties Corp.*, 84 NY2d 519, 521, 620 NYS2d 310; *see also DaSilva v C & E Ventures, Inc.*, 83 AD3d 551, 922 NYS2d 32 [1st Dept 2011]). Thus, where, as in this case, the conflicting laws – New York Labor Law and Texas Civil Practice and Remedies Code 95.003 and 95.002 – are conduct regulating, the law of the jurisdiction where the tort occurred will be applied (*see Osborn v 56 Leonard LLC*, 138 AD3d 624, 28 NYS3d 875 [1st Dept 2016]; *DaSilva v C & E Ventures, Inc.*, 83 AD3d 551, 922 NYS2d 32; *Huston v Hayden Bldg. Maintenance Corp.*, 205 AD2d 68, 70, 617 NYS2d 335 [2d Dept 2004]; *Florio v Fisher Dev., Inc.*, 309 AD2d 694, 765 NYS2d 879 [1st Dept 2003]; *Castrillon v ERM-Northeast, Inc.*, 242 AD2d 654, 664 NYS2d 944 [2d Dept 1997]).

Chapter 95, Section 95.003 of the Texas Civil Practice and Remedies Code ("the Texas Code"), entitled "Liability for Acts of Independent Contractors," provides as follows:

A property owner is not liable for personal injury, death, or property damage to a contractor, subcontractor, or an employee of a contractor or subcontractor who constructs, repairs, renovates, or modifies an improvement to real property, including personal injury, death, or property damage arising from the failure to provide a safe workplace unless: (1) he property owner exercises or retains some control over the manner in which the work is performed, other than the right to order the work to start or stop or to inspect progress or receive reports; and (2) the property owner had actual knowledge of the danger or condition resulting in the personal injury, death, or property damage and failed to adequately warn.

Section 95.002 of the Texas Code, entitled Applicability, explains

This chapter applies only to a claim: (1) against a property owner, contractor or subcontractor for personal injury, death or property damages to an owner, a contractor, or a subcontractor or an employee of a contractor or subcontractor; and (2) that arises from the condition or use of an improvement to real property where the contractor or subcontractor constructs, repairs, renovates or modifies the improvement.

Chapter 95 of the Texas Civil Practice and Remedies Code applies to all claims against a property owner that arises from the condition or use of an improvement to real property where the contractor or subcontractor constructs, repairs, renovates, or modifies the improvement (*see Ineos USA, LLC v Elmgren*, 505 SW3d 555 [Tex 2016]). The term “owner” has been strictly construed to mean a person or entity that owns real property primarily for used for commercial or business purposes. Thus, it has been held that the term “owner” excludes employees or agents, including property managers and landlords, who do not own the property at issue (*see Ineos USA, LLC v Elmgren*, 505 SW3d 555).

The type of control contemplated by Chapter 95 of the Texas Code refers to a property owner’s right to control the means, methods, or details of the manner in which the work is performed (*see Fifth Club, Inc. v Ramirez*, 196 SW3d 788 [Tex 2006]). An owner’s control may be proven in two ways: either by way of a contract giving the owner the right to control the means and methods of a contractor’s work, or the owner’s actual exercise of control over the details of the work (*see Dow Chem. Co. v Bright*, 89 SW3d 602 [Tex 2002]). Determining whether a contract gives a right of control is generally a question of law for the court, and such a determination rests upon whether the contract gave the owner the right to control the means, manner, and details of the work out of which the injury arose. If the right of control over work details has a contractual basis, the circumstance that no actual control was exercised will not absolve the general contractor of liability. It is the right of control, and not the actual exercise of control, which gives rise to a duty to see that an independent contractor performs work in a safe manner. Nevertheless, an owner’s general right to control work site safety or the progress of the work is not enough to establish liability under the statute (*see Dow Chem. Co. v Bright*, 89 SW3d 602 [Tex 2002]). Furthermore, liability against an owner will not be established unless the plaintiff proves that the owner “had actual knowledge that the dangerous condition existed at the time of the accident, as opposed to constructive knowledge, which can be established by facts or inferences that a dangerous condition could develop over time” (*Ineos USA, LLC v Elmgren*, 505 SW3d 555, 561-568).

Here, defendants/third-party defendants established that Southview Realty Corp and Manouchehr Malekan, as owners of the subject strip mall, were entitled to dismissal of the complaint against them pursuant to Chapter 95 of the Texas Code by submitting evidence that neither defendant exercised control over the details of the decedent’s work, nor possessed actual knowledge of the particular dangerous condition which caused his accident (*see Phillips v The Dow Chemical Co.*, 186 SW3d 121 [Tex App-Houston 2005]; *Dyall v Simpson Pasadena Paper Co.*, 152 SW3d 688 [Texas App-Houston 2004]; *Dow Chem. Co. v Bright*, 89 SW3d 602; *Elliott-Williams Co., Inc. v Diaz*, 9 SW3d 801 [Tex 1999]). Significantly, it is undisputed that the decedent’s employer was hired by TRC as an independent contractor for the repair project, and that Malekan was not present at the work site at the time of the

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accident. Although Malekan testified that he inspected the work site at the beginning and end of the repair project, he explained that he did not exercise actual or contractual control over the details of the decedent's work. Malekan further testified that he and TRC only had an oral agreement, and that he did not retain any right to direct the manner and details of the work performed by its subcontractors. As for knowledge of the danger which caused the decedent's accident, Malekan testified that while he had general knowledge that some areas of the decking of the roof were damaged by a recent hurricane, or were rotted, he had no knowledge of the particular danger where the roof collapsed.

Plaintiff failed to raise significant triable issues in opposition warranting denial of the motion (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Notably, plaintiff's unsubstantiated assertion that Malekan may have simply refused to disclose his written agreement with TRC, and that such agreement may have granted Malekan control over the details of the decedent's work, is insufficient to defeat the defendants' *prima facie* showing (see *Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595). Even if such control could be proven, plaintiff fails to address whether Malekan possessed actual knowledge of the particular danger which caused the decedent's accident. Therefore the branch of the motion seeking summary judgment dismissing the complaint against Manouchehr Malekan and Southview Realty is granted.

The branch of defendants/third-party plaintiffs' motion seeking summary judgment dismissing the complaint as against Malachite Group, Ltd, Malachite Group of Texas, and Michel Silberberg is denied. As determined above, Chapter 95 of the Texas Code does not apply to an owners' property managers or employees and, as such they failed to demonstrate their entitlement to summary judgment on this basis (see *Ineos USA, LLC v Elmgren*, 505 SW3d 555). Furthermore, defendants/third-party plaintiffs failed to proffer any other defense, statutory or otherwise, in support of this branch of their motion.

Finally, having determined that the Labor Law does not apply under the circumstances of this case, the branch of plaintiff's motion seeking summary judgment in her favor pursuant to Section 240 (1) of the statute is denied.

Dated: November 2, 2020


 Hon. Joseph Farneti
 Acting Justice Supreme Court

____ FINAL DISPOSITION X NON-FINAL DISPOSITION