Napolitano v U.S. Seamless, Inc.
2020 NY Slip Op 34779(U)
June 25, 2020
Supreme Court, Orange County
Docket Number: Index No. EF008231-2018
Judge: Maria S. Vazquez-Doles
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At a term of the IAS Part of the Supreme Court of the State of New York, held in and for the County of Orange, at the Orange County Court House, 285 Main Street, Goshen, New York 10924 on the 25th day of June, 2020.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

THOMAS NAPOLITANO,

Plaintiff,

-against-

U.S. SEAMLESS, INC.; EAST MAIN AND BROAD STREET MINI-MART, INC., OUTDOOR CONCEPTS, INC., and BHAJAN SINGH,

Defendants.

DECISION & ORDER

Index No.: EF008231-2018

Motion Date: March 20, 2020
Motion Seq. #2 #3 #4 #5 #6

VAZQUEZ-DOLES, J.S.C.

The following E-filed papers numbered 1 - 70 were read by the court on the motion of the defendant, US Seamless Inc. (hereinafter "Seamless"), for an order granting it summary judgment dismissing all claims and cross claims against it, on the motion for the defendants East Main and Broad Street Mini-Mart, Inc. (hereinafter "East Main") and Bhajan Singh (hereinafter "Singh") for an order granting them summary judgment dismissing all claims against them, on the motion of defendant Outdoor Concepts, Inc. (hereinafter "Outdoor Concepts") for an order granting it summary judgment dismissing all claims against it, on the motion of the Plaintiff for an order granting him partial summary judgment on the issue of liability on his Labor Law § 240 claims against all defendants, and, on the cross-motion of the Plaintiff for an order granting leave to serve a supplemental bill of particulars and to compel discovery of checks representing payments made in connection with the subject construction project, in this action to recover damages for personal injuries arising from a construction site accident:

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Upon the foregoing papers, the motions are granted to the extent set forth herein.

Plaintiff seeks damages for personal injuries caused by a fall that occurred on June 3, 2016 while he was working for Percy Dixon & Sons, Inc. (hereinafter "Dixon") at 209-213 East Main Street, Middletown, New York (hereinafter "the Premises"). East Main, the owner of the Premises, hired Dixon, US Seamless, and Outdoor Concepts to perform construction work at the Premises in connection with the construction of a gas station/convenience store.

Plaintiff had been working at the Premises for about a month before June 3, 2016. He was employed by Dixon as a laborer. Dixon's workforce consisted of Percy Dixon, a co-worker Greg, and plaintiff. On June 3, 2016, Dixon was not at the site and Greg was in charge of the work. Plaintiff was installing “Z channel” along the edge of the roof of the new building. His

feet were approximately 8 to 9 feet above the ground as he stood on a 12 foot folding "gorilla" ladder that had been provided by Dixon. He was using this ladder because Greg needed the taller ladder for the work he was doing. The Plaintiff was not provided with a lift, scaffold or any means of securing his ladder to the building or the ground, nor was he provided with a safety harness secured to a tail line or lifeline. Plaintiff placed the ladder on the ground and rested it on the facia. After plaintiff placed the ladder, he climbed up and began attaching the Z channel to the facia of the building. As he was doing so, the left leg of the ladder sank into the ground and the ladder slid along the roof causing plaintiff to be thrown from the ladder and onto the ground. He was not sure if he injured his hand on the metal roof as he fell or when he landed on the ground below. The Plaintiff knew defendant Singh as the owner of the Premises and observed him on the premises approximately twice a week. He did not know anything about Seamless or Outdoor Concepts or their connection to the construction work at the job site.

Seamless was named as the contractor on the demolition and building permits issued for the project by the City of Middletown. The permit applications (including Seamless' proof of insurance), were prepared and submitted by East Main's architect. While there was discussion between Seamless' principal and Singh about being the general contractor for this construction project, Seamless only contracted with East Main to do electrical work. Seamless did not appear at the work site until after the date plaintiff fell. The witness who appeared at the examination before trial for Seamless testified that Dixon ended up as the General Contractor for the project.

Outdoor Concepts contracted with East Main to excavate and install concrete in the fuel tank area and for the canopy over the gas pumps. The area excavated included the area where the plaintiff placed his ladder when he fell. However, this excavation work was completed before

the day plaintiff fell. All that remained to be done under Outdoor Concepts contract was the pouring of concrete in the pump area. The witness who testified at examination before trial for Outdoor Concepts testified that he thought Dixon was the General Contractor at this job site and that he never saw Seamless at the Premises.

Singh, the principal of East Main, was present at the work site frequently and testified that Dixon was the general contractor on this project.

Plaintiff brought this action against East Main, Singh, US Seamless, and Outdoor Concepts alleging causes of action for common-law negligence and for violations of Labor Law §§ 200, 240(1), and 241(6). Issue was joined, discovery is complete, a note of issue was filed and all the parties have now moved for summary judgment.

The proponent of a motion for summary judgment must establish that there is no defense to the cause of action or that the cause of action or defense has no merit sufficiently to warrant the court as a matter of law to direct judgment in his or her favor. *Bush v St. Clare's Hospital*, 82 NY2d 738 (1993). "The proponent of a summary judgment motion is required to make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to do so required denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). This standard requires that the proponent of the motion tender evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case. *Zuckerman v New York*, 49 NY2d 557 (1980). Summary judgment is a drastic remedy only granted where this burden is met and then only if the opposition to the motion fails to establish the existence of a material issue of fact requiring a trial. *Vega v Restani Construction.*

Corp., 18 NY3d 499 (2012), *Alvarez v Prospect Hospital*, 68 NY2d 320 (1986). One opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require the trial of a material question of fact on which she rests her claim or must demonstrate an acceptable excuse for her failure to meet the requirement. *Zuckerman v New York*, 49 NY2d 557 (1980).

In deciding a motion for summary judgment, a Court's function is to identify material triable issues of fact, not to make credibility determinations or findings of fact. Issue-finding, rather than issue-determination is required. *Vega v Restani Construction. Corp.*, 18 NY3d 499 (2012). It is not for the court to assess credibility unless it clearly appears that the issues are feigned and not genuine, and any conflict in the testimony or evidence presented merely raises an issue of fact. *Brown v Kass*, 91 AD3d 894 (2nd Dept 2012). Summary judgment is inappropriate where credibility issues are raised. *Zuckerman v New York*, 49 NY2d 557 (1980).

On a motion for summary judgment, the evidence is to be viewed in the light most favorable to the nonmoving party, and the nonmoving party is given the benefit of all reasonable inferences that can be drawn from the evidence. *Negri v Stop & Shop, Inc.*, 65 NY2d 625 (1985). Summary judgment should be granted where only one conclusion may be drawn from the established facts. *Kriz v Schum*, 75 NY2d 25 (1989). If there is any doubt as to the existence of a triable issue, then the motion for summary judgment should be denied. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 (1978). Nevertheless, only the existence of a bona fide triable issue demonstrated by evidentiary facts will defeat a summary judgment. Conclusory or irrelevant allegations will not suffice. *Id.*

Plaintiff contends on this motion that Seamless was a general contractor because

Seamless is named as contractor on the permit applications prepared and submitted by East Main's architect. It is clear from the record on this motion that neither Seamless nor Outdoor Concepts were a general contractor at this construction site. Both were prime contractors as they contracted directly with East Main to do certain work. However, their work did not include the work being performed by plaintiff under the contract East Main had with Dixon. A separate prime contractor will not be held liable under Labor Law §§ 240 or 241 for injuries to employees of other contractors with whom they are not in privity provided the prime contractor has not been delegated authority over the work of the injured worker. *Barrios v City of New York*, 75 AD3d 517 (2nd Dept 2010). Seamless and Outdoor Concepts both established their entitlement to judgment as a matter of law dismissing the plaintiff's Labor Law §§ 240 and 241 causes of action against them by demonstrating that they were not in privity of contract with Dixon and that they were not delegated authority to oversee or control the plaintiff's work. Plaintiff's opposition does not demonstrate the existence of a triable issue of fact on this issue. The fact that Seamless was named as contractor on permits issued for the construction, is insufficient to raise a triable issue of fact. *Huerta v Three Star Construction Co. Inc.*, 56 AD3d 613, *lv denied*, 12 NY3d 702 (2009).

For similar reasons, the plaintiff's Labor Law §200 and common law negligence claims against all defendants must be dismissed. Labor Law § 200 is the codification of the common law duty of owners and contractors to provide workers with a reasonably safe place to work. *Comes v New York State Electric & Gas Corp.*, 82 NY2d 876 (1993). To be liable under these theories of liability, a defendant must have had authority to exercise supervision and control over the work being performed by the injured worker or, have created or had notice of the dangerous

condition that caused the accident. *Rojas v Schwartz*, 74 AD3d 1046 (2nd Dept 2010). Here the record is bereft of proof that any of the defendants had authority to exercise supervision and control over the plaintiff's work or that they created or had notice of any dangerous condition that caused the plaintiff's fall. In opposition, the plaintiff fails to demonstrate the existence of a triable issue of fact as to these claims against any of the defendants.

Plaintiff does not contest the East Main's and Singh's motion insofar as plaintiff's Labor Law § 241(6) cause of action is concerned. Accordingly, plaintiff's Labor Law § 241(6) claim is dismissed as against East Main and Singh.

Plaintiff is entitled to summary judgment against East Main on his Labor Law § 240(1) claim. Under Labor Law § 240 (1), the owner of a building under construction must provide ladders and other devices so constructed, placed and operated as to give proper protection to a person so employed. *O'Brien v Port Authority of New York & New Jersey*, 29 NY3d 27 (2017). The statute imposes a nondelegable duty upon owners making them liable without regard to whether they supervise or control the work. *Cahill v Triborough Bridge & Tunnel Authority*, 4 NY3d 35 (2004). Accordingly, to recover under Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that such violation was a proximate cause of his injury. *Barreto v MTA*, 25 NY3d 426 (2015). A fall from an unsecured ladder while engaging in a work related activity establishes a prima facie showing for summary judgment purposes on a Labor Law § 240 (1) claim. *Beamon v Agar Truck Sales, Inc.*, 24 AD3d 481 (2nd Dept 2005). Where an accident is caused by a violation of Labor Law § 240 (1), the plaintiff's culpable conduct is not a defense. However, where a plaintiff's conduct is the sole proximate cause of the accident, no liability will be imposed under the statute. *Cahill v Triborough Bridge & Tunnel Authority*, 4 NY3d 35

(2004). A plaintiff's negligence is the sole proximate cause of their injuries when the safety devices that plaintiff alleges were absent were readily available at the work site and plaintiff knew he was expected to use them but for no good reason chose not to do so causing an accident. *Gallagher v New York Post*, 14 NY3d 83 (2010). While defendants argue that plaintiff's conduct was the sole proximate cause of his fall, this argument fails because it is not supported by proof that other equipment, ladders or safety devices were readily available for the plaintiff's use at the work site on the date of the accident.

Singh is entitled to summary judgment dismissing the plaintiff's complaint against him. There is no proof submitted on these motions that Singh committed any affirmative tortious acts involving the plaintiff. Singh did not direct or instruct the plaintiff and did not supply equipment to the plaintiff. A corporate officer is not liable for the negligence of the corporation merely because of his official relationship to it. It must be shown that the officer was a participant in the wrongful conduct. *Aguirre v Paul*, 54 AD3d 302 (2nd Dept 2008). No such showing is made here and Singh's summary judgment must be granted. *Sarafolean v Accomplice New York*, 74 AD3d 1310 (2nd Dept 2010) *Bernstein v Starrett City,* 303 AD2d 530 (2nd Dept 2003). Moreover, Plaintiff has failed to establish that the corporate veil should be pierced.

Equity will intervene to "pierce the corporate veil" and impose liability on corporate owners for the obligations of the corporation in order to avoid fraud or injustice. The plaintiff asserts that he is entitled to do so in this case so as to assert a direct claim against Singh, the principal and sole shareholder of East Main. A party seeking to pierce the corporate veil must establish that the owner exercised complete domination of the corporation with respect to the transaction at issue, and that this domination was used to commit a wrong against the party

seeking to pierce the corporate veil which resulted in the injury to that party. *Matter of Agai v Diontech Consulting, Inc.*, 138 AD3d 736 (2nd Dept 2017). Demonstration of the complete domination of the corporation is not enough. There must be a showing of a wrongful or unjust act toward the person seeking to pierce the corporate veil. *Matter of Morris v New York State Department of Taxation and Finance*, 82 NY2d 135 (1993). Here, even if complete domination of the corporate entity by Mr. Singh is assumed, plaintiff fails to demonstrate how that domination was used by Singh against the plaintiff to cause injury to the plaintiff.

Given this lack of proof of any tortious conduct toward the plaintiff by Singh, plaintiff will not be able to pierce East Main's corporate veil. Accordingly, plaintiff's request for copies of checks regarding payments made by Singh in connection with the project must be denied.

Plaintiff's motion to serve a supplemental bill of particulars should be granted as there is no prejudice shown in opposition to the application and the proposed additional claims have merit. *G.K. Alan Assoc., Inc. v Lazzari*, 44 AD3d 95, *affd*, 10 NY3d 941 (2008). The supplemental bill of particulars is deemed served.

Accordingly, it is hereby ORDERED that the summary judgment motions of the defendants, Seamless, Outdoor Concepts, and Singh are granted and all claims against them in this action are hereby dismissed, and it is further

ORDERED that the summary judgment motion of East Main is granted as to plaintiff's claims under Labor law § 241(6), Labor Law § 200, and negligence, the motion is denied as to plaintiff's Labor Law § 240(1) claim, and it is further

ORDERED that the plaintiff's motion for partial summary judgment on the issue of

liability under Labor Law § 240(1) is granted as against East Main and is otherwise denied, and it is further

ORDERED that the plaintiff's cross-motion for leave to serve a supplemental bill of particulars and for discovery from defendant Singh is granted to the extent that leave to serve a supplemental bill of particulars is granted and deemed served, the cross-motion is otherwise denied, and it is further

ORDERED that the plaintiffs claims against defendants Seamless, Outdoor Concepts, and Singh are hereby severed and said defendants may enter judgment dismissing all claims against them in this action without further direction or order of this Court.

The foregoing constitutes the Decision and Order of this Court.

Dated: June 25, 2020
Goshen, New York

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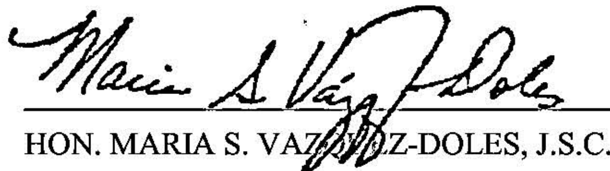

HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

To: Counsel via NYSCEF