Arnold v Empire 326 Grand LLC
2020 NY Slip Op 34929(U)
October 8, 2020
Supreme Court, Bronx County
Docket Number: Index No. 22431/2017
Judge: Lucindo Suarez
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Mtn. Seq. # 2

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Index No.: 22431/2017

KAREEM ARNOLD,

Plaintiff,

- against -

DECISION and ORDER

EMPIRE 326 GRAND LLC, EMPIRE 326 GRAND MANAGER, LLC and 326 GRAND REALTY, INC.,

Defendants.

PRESENT: Hon. Lucindo Suarez

The issue in Defendant 326 Grand Realty, Inc.'s ("326 Grand Realty") summary judgment motion is whether it is a proper Defendant under the Labor Law statutes. If answered in the affirmative, the second issue in 326 Grand Realty's motion is whether it established its entitlement to a dismissal of Plaintiff's Labor Law §§241(6), and 200 claims.[1] Lastly, the tertiary issue is whether 326 Grand Realty is entitled to common-law indemnification from Defendants Empire 326 Grand LLC and Empire 326 Grand Manager (collectively "Empire 326").

This court finds that 326 Grand Realty is a proper Defendant under the Labor Law. This court also finds that there are triable issues of fact that preclude summary judgment on 326 Grand Realty's application for a dismissal of Plaintiff's Labor Law §241(6) claim. In addition, this court finds that 326 Grand Realty's request to dismiss Plaintiff's Labor Law §200 claim and its request for common-law indemnity against Empire 326 are denied.

[1] This court grants 326 Grand Realty's application to dismiss Plaintiff's Labor Law §240(1) claim as neither Plaintiff nor Defendants Empire 326 Grand LLC and Empire 326 Grand Manager, LLC opposed same.

In January 2016, 326 Grand Realty entered into a contract of sale with Empire 326 for the sale of the subject construction site. The contract of sale contained a clause that allowed Empire 326 to have access to the subject construction site for the purposes of making improvements and modifications.

Empire 326, by virtue of said clause, contracted with Plaintiff's employer, Infinity Management Corp., ("Infinity") to perform the improvements and modifications. Infinity in turn, hired Plaintiff to perform drywall and taping. In February 2017, the same day the closing was scheduled between 326 Grand Realty and Empire 326, but a couple hours prior to its completion, Plaintiff testified that while walking on the seventh floor of the construction site, he was caused to slip and fall on water resulting in injuries.

I. Proper Labor Law Defendant

326 Grand Realty seeks a dismissal of Plaintiff's Labor Law §§241(6) and 200 claims as it alleges that it is not a proper Defendant under the Labor Law. Labor Law §§240 and 241 imposes a nondelegable duty upon an owner, general contractor or their agents to conform to the requirement of those Labor Law provisions. *See Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 429 N.E.2d 805, 445 N.Y.S.2d 127 (1981). Moreover, "[i]t is well settled that, to recover under Labor Law §§200, 240, and 241 as a member of the special class for whose protection these provisions were adopted, a plaintiff must establish two criteria: (1) that he was permitted or suffered to perform work on a structure; and (2) that he was hired by the owner, the general contractor or an agent of the owner or general contractor." *Ahmed v. Momart Discount Store, Ltd.*, 31 A.D.3d 307, 821 N.Y.S.2d 150 (1st Dep't 2006); *see also Whelen v. Warwick Val. Civic & Social Club*, 47 N.Y.2d 970, 393 N.E.2d 1032, 419 N.Y.S.2d 959 (1979).

In addition, the Court of Appeals has held that ownership of the premises where the accident

occurred standing alone is not enough to impose liability under the Labor Law where the property owner did not contract for the work resulting in the plaintiff's injuries; that is, ownership is a necessary condition, but not a sufficient one. *See Scaparo v. Vil. of Ilion*, 13 N.Y.3d 864, 921 N.E.2d 590, 893 N.Y.S.2d 823 (2009). Rather, the Court of Appeals has insisted on "some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest." *Id.*

Here, 326 Grand Realty argues that it is not an "owner" for purposes of the Labor Law as it claims that Empire 326 were the *de facto* owners of the subject construction site at the time of loss. 326 Grand Realty contends that eight (8) months prior to Plaintiff's accident, Empire 326 contracted with Infinity to perform improvements and modifications to the subject construction site. 326 Grand Realty further posits that it was not a party to nor did it negotiate any of the terms of the work contracted between Empire 326 and Infinity. 326 Realty also argues that Infinity's President, Matthew Potash, also confirmed that its contract was only with Empire 326.

326 Grand Realty further argues that Empire 326 exercised complete control and authority over the subject construction site including access thereto. Moreover, 326 Grand Realty contends that none of its employees were at the subject construction site on the day of loss, which it argues supports its position that it fully relinquished control of the subject construction site to Empire 326. Lastly, 326 Grand Realty argues that there is no nexus between it and Plaintiff's injury-producing work as there was no lease agreement, grant of an easement or other property interest showing same.

In opposition, both Plaintiff and Empire 326 proffer similar arguments alleging that it was undisputed that 326 Grand Realty was the title owner of the subject construction site at the time of loss, thus, it should be strictly liable to Plaintiff under the Labor Law statutes. Moreover,

Plaintiff contends that it was uncontested that he was permitted to perform work at the subject construction site. Lastly, Empire 326 argues that although 326 Grand Realty did not contract for the work, it granted Empire 326 and by extension, its contractor, Infinity, the right to perform the work on the subject construction site.

Initially, this court rejects Plaintiff and Empire 326's contentions that strict liability should be imposed upon 326 Grand Realty under the Labor Law solely by virtue that it was the title owner of the subject construction site at the time of loss. *See Abbatiello v. Lancaster Studio Assoc.*, 3 N.Y.3d 46, 814 N.E.2d 784, 781 N.Y.S.2d 477 (2004). Furthermore, this court finds that 326 Grand Realty established its *prima facie* burden that it did not hire Plaintiff and neither Plaintiff or Empire 326, raised any triable issues of fact to contest same.

However, this court finds that 326 Grand Realty failed to establish its *prima facie* burden that there was no nexus between 326 Grand Realty and Plaintiff's injury-producing work. It was undisputed that at the time of loss, 326 Grand Realty was the title owner over the subject construction site as it conceded same in its response to Plaintiff's notice to admit.

Furthermore, this court finds that the facts at bar are similar enough to the Court of Appeals case *Sanatass*, wherein it held that by an owner leasing a premises to a tenant who, in turn, hires a contractor to perform alterations at the premises creates a sufficient nexus between the owner and Plaintiff's injuries, notwithstanding, the tenant's failure to obtain written permission before performing any alterations to the property. *See Sanatass v. Consol. Inv. Co., Inc.*, 10 N.Y.3d 333, 887 N.E.2d 1125, 858 N.Y.S.2d 67 (2008).

Likewise, here although the parties did not have a lease agreement like in *Sanatass* the contract of sale bestowed upon Empire 326 the contractual right to make the alterations to the subject construction site prior to the closing, thereby, providing a sufficient nexus between 326

Grand Realty and Plaintiff's injury-producing work to hold 326 Grand Realty strictly liable under the Labor Law statutes. *See Custer v. Jordan*, 107 A.D.3d 1555, 968 N.Y.S.2d 754 (4th Dep't 2013); *see also Gonzalez v. 1225 Ogden Deli Grocery Corp.*, 158 A.D.3d 582, 71 N.Y.S.3d 473 (1st Dep't 2018); *see also Mutadir v. 80-90 Maiden Lane Del LLC*, 110 A.D.3d 641, 974 N.Y.S.2d 364 (1st Dep't 2013). Therefore, this court finds that 326 Grand Realty is a proper Labor Law Defendant.

II. Labor Law §241(6)

326 Grand Realty seeks to dismiss Plaintiff's Labor Law §241(6) claim. Labor Law §241(6), imposes a nondelegable duty of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety" to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. *Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 693 N.E.2d 1068, 670 N.Y.S.2d 816 (1998). The standard of liability under Labor Law §241(6), requires that a plaintiff allege that an owner or general contractor breached a specific rule or regulation containing a positive command. *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993). In addition, Labor Law §241(6), requires that a plaintiff establish that a violation of a safety regulation was the proximate cause of the accident. *See Gonzalez v. Stern's Dept. Stores*, 211 A.D.2d 414, 622 N.Y.S.2d 2 (1st Dep't 1995).

326 Grand Realty relies upon the testimony of Infinity's President, Matthew Potash. Mr. Potash testified that on the day of loss it was Plaintiff's first day on the construction site and that he was hired to clean up around the construction site, take spackle off the floor, and remove garbage. Therefore, 326 Grand Realty argues that since Plaintiff was not engaged in construction, excavation or demolition work, his claim under Labor Law §241(6) should be

dismissed.

Empire 326 contends that the testimony of FDNY EMT Oriol Frantz, the Emergency Department Physician, Dr. Jeffrey Mayer, and the medical reports they generated reflect that Plaintiff reported he was injured while pressing his arm against a wall while performing painting work, and he denied being injured as a result of falling. Therefore, Empire 326 argues there are triable issues of fact that preclude summary judgment on Plaintiff's Labor Law §241(6) claim.

Plaintiff counters by requesting this court search the record to grant him summary judgment on his Labor Law §241(6) claim premised upon 12 NYCRR §§23-1.7(d) and 23-1.7(e)(1)(2) based on his testimony that he slipped and fell on water.[2]

This court finds that 326 Grand Realty's argument that Plaintiff's activities on the day of loss were not covered under Labor Law §241(6) is without merit. Although it is in dispute that Plaintiff's task consisted of cleaning up around the construction site, taking spackle off the floor, and removing garbage, said activities nonetheless are covered under Labor Law §241(6) as Plaintiff's accident occurred in the overall context of the construction work being completed at the construction site. *See Nagel v. D & R Realty Corp.*, 99 N.Y.2d 98, 782 N.E.2d 558, 752 N.Y.S.2d 581 (2002).

However, this court finds that Plaintiff's deposition testimony as to the events that led to his injuries are contradicted by the statements, he provided shortly after his accident to both FDNY EMT Oriol Frantz and Dr. Jeffrey Mayer. Therefore, this court finds that there are triable issues of fact regarding Plaintiff's Labor Law §241(6) claim, which precludes summary judgment.

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[2] Plaintiff abandoned all other predicates, and the claims are dismissed to that extent. *Burgos v. Premier Props. Inc.*, 145 A.D.3d 506, 42 N.Y.S.3d 161 (1st Dep't 2016); *see also 87 Chambers, LLC v. 77 Reade, LLC*, 122 A.D.3d 540, 998 N.Y.S.2d 15 (1st Dep't 2014).

III. Labor Law §200

326 Grand Realty seeks the dismissal of Plaintiff's Labor Law §200 claim. Labor Law §200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work. *Licata v. AB Green Gansevoort, LLC,* 158 A.D.3d 487, 71 N.Y.S.3d 31 (1st Dep't 2018). Where an existing defect or dangerous condition causes injury, liability under Labor Law §200 attaches if the owner or general contractor created the condition or had actual or constructive notice of it. *Id.* In addition, under Labor Law §200, liability for a dangerous condition may arise from the methods employed by a subcontractor, over which the owner or general contractor exercises supervision and/or control. *Makarius v. Port Auth. of NY & New Jersey,* 76 A.D.3d 805, 907 N.Y.S.2d 658 (1st Dep't 2010).

Here, 326 Grand Realty argues that it did not direct, supervise or control Plaintiff's injury-producing work as same was confirmed by Plaintiff's testimony wherein he testified that he only received instruction from his foreman. Moreover, 326 Grand Realty contends that it did not have notice or constructive notice of the alleged dangerous condition that caused Plaintiff's accident as it had no employees present at the construction site on the day of loss.

In opposition, Plaintiff argues that 326 Grand Realty had supervisory control over Plaintiff's injury-producing work because it had the right to insist all workers follow proper safety practices. Moreover, Plaintiff contends that 326 Grand Realty failed to offer some evidence as to when the area was last inspected relative to the incident in order to sustain its burden of showing lack of actual or constructive notice.

In reply, 326 Grand Realty argues that Plaintiff's constructive notice argument must fail as Plaintiff's testimony establishes that the water, he purportedly slipped on was a transient condition and did not exist for a sufficient period of time to constitute constructive notice.

This court finds that even assuming, *arguendo*, that 326 Grand Realty had the right to insist that all workers follow proper safety practices, that does not amount to the "supervision and control" required to impose liability under Labor Law §200. *Griffin v. Clinton Green S., LLC*, 98 A.D.3d 41, 948 N.Y.S.2d 8 (1st Dep't 2012).

Further this court finds that 326 Grand Realty established its *prima facie* burden that it did not have actual notice as it was uncontradicted that it had no employees on the construction site on the day of loss nor was there any allegations that Plaintiff placed 326 Grand Realty on notice of the accumulation of water. *See Gomez v. J.C. Penny Corp., Inc.*, 113 A.D.3d 571, 979 N.Y.S.2d 323 (1st Dep't 2014). In opposition, Plaintiff failed to raise any triable issues of fact with regard to 326 Realty's actual notice.

However, this court finds that 326 Grand Realty did not establish its *prima facie* burden regarding its constructive notice. It did not demonstrate by admissible evidence its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before Plaintiff fell. *See Schiavone v. Seaman Arms, LLC*, 178 A.D.3d 529, 114 N.Y.S.3d 332 (1st Dep't 2019); *see also Ross v. Betty G. Reader Revocable Trust*, 86 A.D.3d 419, 927 N.Y.S.2d 49 (1st Dep't 2011). Therefore, this court finds that 326 Grand Realty is not entitled to a dismissal of Plaintiff's Labor Law §200 claim.[3]

Accordingly, it is

ORDERED, that 326 Grand Realty's motion for summary judgment is granted in part; and it is further

ORDERED, that Plaintiff's Labor Law §240(1) claim is dismissed, without opposition;

[3] 326 Grand Realty's request for common-law indemnity from Empire 326 is denied as premature as there are issues concerning its negligence. *See Sledz v. 333 E. 68 St. Corp.*, 254 A.D.2d 196, 679 N.Y.S.2d 119 (1st Dep't 1998).

and it further

ORDERED, that 326 Grand Realty's application to dismiss Plaintiff's Labor Law §241(6) claim is denied; and it is further

ORDERED, that 326 Grand Realty's application to dismiss Plaintiff's Labor Law §200 claim is denied; and it is further

ORDERED, that 326 Grand Realty's application seeking common-law indemnity from Empire 326 is denied; and it is further

ORDERED, that the Clerk of Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: October 8, 2020

Lucindo Suarez, J.S.C.

LUCINDO SUAREZ, J.S.C.