

Min Zhang v Park Ave. & 35th St. Corp.

2021 NY Slip Op 34169(U)

October 8, 2021

Supreme Court, Queens County

Docket Number: Index No. 707403/2018

Judge: Ulysses B. Leverett

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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MIN ZHANG,

Plaintiffs,

Index No.: 707403//2018

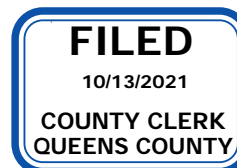
Motion Seq. No. 006

-against-

Decision and Order

PARK AVENUE & 35TH STREET CORP., THE
SEVEN PARK AVENUE CORP., MARTIN PERETZ
and JOHN B. LOVETT & ASSOCIATES

Defendants.
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Present: **HONORABLE ULYSSES B. LEVERET:**

Papers Numbered

Notice of Motion-Affirmation-Exhibits.....	EF-131-153
Notice of Cross Motion-Affirmation-Exhibits.....	EF-154-167
Affirmation In Opposition/Cross Motion-Exhibits.....	EF-171-172
Reply Affirmation/Cross Motion.....	EF-174
Reply Affirmation/Motion.....	EF-176

Upon the foregoing papers, the decision and order on the defendants' motion and plaintiff's cross motion is as follows:

Defendants, The Seven Park Avenue Corporation, John B. Lovett & Associates and defendant Third Party plaintiff, Martin Peretz (Peretz) bring this motion (seq 6) pursuant to Civil Practice Law and Rules (CPLR) § 3212 for an order granting summary judgment dismissing plaintiff Min Zhang's complaint and for such other relief this Court deems just and proper

Plaintiff Zhang commenced this labor law action to recover for alleged personal injuries sustained on February 25, 2016. Plaintiff claims he sustained injuries when he fell from a Baker scaffold during the course of his employment as a painter at a renovation project on the cooperative apartment of defendant/third party plaintiff (Peretz). Peretz' apartment is part of the Seven Park cooperative building located at 7 Park Avenue, Apartment 21A, New York, New York (the Apartment). Peretz hired the general contractor of the project, third party defendant, D.L. Compton Ltd. (DL Compton). Plaintiff Zhang was an employee of DL Compton.

Plaintiff Zhang claims that the accident occurred while he was standing on a Baker scaffold which was no more than 5 feet high. Plaintiff's co-worker pushed the scaffold while plaintiff was on top of it, causing plaintiff to fall to the floor. Plaintiff claims that the defendants violated Labor Law sections §§ 200, 240(1) and 241(6) and that they were negligent.

Defendant movant in its motion for summary judgment to dismiss the complaint argues that these claims should be dismissed as a matter of law. It is established that a proponent of a

motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact. See *Alvarez v Prospect Hospital*, 68 NY 2d 320 (1986). Once the movant has made such a showing, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish the existence of material issues of fact requiring a trial. See *Zuckerman v City of New York*, 49 NY 2d 557 (1980).

Labor Law § 200 and common law negligence imposes a common law duty of an owner or general contractor to provide workers a safe place to work. To prevail on Labor Law § 200 and negligence claims of defects and dangers of materials and equipment provided, the plaintiff must show that defendants had the authority to supervise or control the performance of the work. See *Ortega v Puccia*, 57 AD 3d 54 (2008).

Labor Law § 241(6) provides that owners and contractors and their agents shall be liable for failing to comply with enumerated rules promulgated by the commissioner of the Department of Labor.

Labor Law § 240 (1) imposes a nondelegable duty on all contractors and owners and their agents in the repairing of a building or structure who do not furnish or cause to be furnished inter alia hoists, stays, ladder, pulley, braces, ropes and other devices which give proper protection to a person so employed.

Defendants argue that defendant John B. Lovett & Associates, Ltd (Lovett Ltd) was not the managing agent for defendant The Seven Park Avenue Corporation (Seven Park), but rather The Lovett Company, LLC (TLC) was the exclusive managing company and agent of Seven Park at the time of plaintiff's accident. Defendant Lovett through its partner and vice president, Ellen Kornfeld provided testimony and documentary evidence that Lovett is not the managing agent of Seven Park and accordingly had no duty to control, manage, or supervise the subject project. The Lovett TLC is not a party to this action and plaintiff seeks by cross motion to amend the complaint to add TLC. Here plaintiff has not provided evidence to establish a triable issue of fact of defendant Lovett, Ltd's involvement as an agent of the owner or contractors to impose liability under Labor Law §§ 200, 240(1) or 241 (6) or common law negligence. Accordingly, defendants' summary judgment motion to dismiss plaintiff's complaint against defendant John B. Lovett & Associates, Ltd (Lovett Assoc) is granted.

Defendants move to dismiss plaintiff's Labor Law §§ 240(1) and 241(6) causes of action against defendant Peretz based upon the homeowner's exemption of one and two family dwelling under Labor Law §§ 240 and 241. The exemption from the nondelegable duty imposed by Labor Law §§ 240 (1)and 241 (6) are for owners of one and two family dwellings who contract for but do not control the work. Defendants also seek dismissal of plaintiff's Labor Law § 200 cause of action against Peretz, as he did not directly control or supervise plaintiff's work. The homeowner's exemption has been extended to cooperative shareholders and proprietary lessees of apartments where the accident occurs. See *DeSabato v 674 Carroll St. Corp.* 55 AD 3d 656 (2d Dept 2008).

Plaintiff argues that there is no evidence that Peretz intended to move in the apartment

rather than renting it and that Peretz was arguably supervising or controlling the work during his visits to the apartment during renovation. However, defendant has established through credible undisputed evidence that Peretz moved into his single family co-op after the renovations were completed. Additionally, plaintiff's supervisor from DL Compton, Ching Wong, DL Compton's principal Lafayette Compton and defendant Peretz testified that Peretz did not supervise, control or direct the performance, means or method of plaintiff's work. Plaintiff has not established a triable issue of fact of Peretz' exemption. Accordingly, defendants' motion to dismiss plaintiff's Labor Law § § 200, 240(1) and 241(6) causes of action against Peretz is granted.

Defendants have moved to dismiss plaintiff's Labor Law § § 200, 240(1) and 241(6) action against the defendant Seven Park. Defendant Seven Park Avenue Corporation is the owner of the subject cooperative apartment building at 7 Park Ave. NY. Labor Law § 200 imposes a common law duty on an owner to maintain a safe construction site. The duty is conditioned upon the owner having authority or direct supervisory control over the activity that resulted in the injury. Here, the deposition testimony of Ellen Kornfeld and others raises an issue of fact as to whether the owners retained supervisory control based upon inspection of the project to ensure the contractors conformed with the Alteration Agreement. Accordingly, defendants' motion to dismiss Labor Law § 200 cause of action against defendant Seven Park is denied. Defendants' motion to dismiss Labor Law § 240 (1) cause of action as to Seven Parks and plaintiff's cross motion for summary judgment for Labor Law § 240(1) liability are denied. The Court finds there are triable issues of fact as to whether plaintiff was a recalcitrant worker as there is conflicting evidence as to what equipment, safety devices, guard railings and instructions were provided to plaintiff by the owner or its agent.

Defendants' arguments as to Labor Law liability of The Lovett Company, LLC (TLC) are premature since TLC is not a party to this action and has moved to amend the Complaint to add TLC.

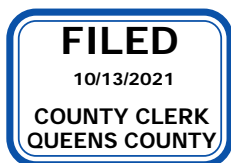
Defendants move to dismiss plaintiff's Labor Law § 241 (6) claims because the Industrial Code relied upon are either not applicable or were not violated is granted in part. The Labor Law § 241 (6) established nondelegable duty to owner and contractors to provide reasonable and adequate protection and safety. The plaintiff is required to specifically plead and prove violations of the Industrial Code which caused the injury. See *Ross v Hydro Electric Company*, 81 NY 2d 494 (1993) claims under Labor Law § 241 (6) are subject to defenses of contributory negligence and comparative negligence. Here, plaintiff alleges that defendants violated 12 NYCRR 23, including the following Industrial Code provisions: Section 23-1.5, Section 23-1.7; Section 23-1.15; Section 23-1.16; Section 23-1.21; Section 23-1.21 (b)(1), 3(i), 3(ii), 3 (iv), 4(i), 4(ii), 4(iv) 4(V) 8, and e (2) and (3); Section 23-1.33 (a) (1) (2) and (3); Section 23-5, Section 23-5, 23-5.1 (c) (2), 23-5.1, 23-5.1 (b), 23-5.1(c), 23-5.1 (e)(1), 23-5.1(t), 23-5.1(I), 23-5(j), 23-5.3(e), 23 - 5.3(11), 23-5.8, 23-5.18, 23-5.18(b), 23-5.18(e), 23-1.7(e)(1), 23-1.7 (e)(2); 23-1.28; 23-2.1(b). However, based upon the uncontroverted testimony of defendants' engineering expert, the defendants have made a prima facie showing that all above provisions are inapplicable or were not violated, except the following. Plaintiff has raised a triable issue of fact as to the applicability of Industrial Code Rule 23-1.15 (safety railings), 23-1.16 (safety belts & harnesses), 23-5.1 (j)(1) (safety railings) and 23.5.18 & (B) manually propelled mobile scaffolds and the special provisions pertaining to the specific type of scaffolds. Defendants' motion to dismiss the Labor Law 241(6) is accordingly granted in part.

Finally, plaintiff's cross motion to amend the complaint to add the Lovett Company (TLC) as a defendant under the relation back doctrine is granted. The Court pursuant to CLPR § 3025 (b) and CPLR § 1003 is authorized to grant leave to amend the complaint. The relation back doctrine allows untimely claims to be asserted against a defendant in an amended filing where it relates to claims previously asserted against a co-defendant if the parties are united in interest. See CPLR § 203 [b] and [e]. There is ample evidence that defendant John B. Lovett & Associates and the Lovett Company LLC (TLC) share business address, members, common principal, Mitchell Unger. Additionally, (TLC) had notice of the present action within the applicable limitation period and suffered no prejudice as (TLC) partner and vice president participated in this lawsuit with defendant John B. Lovett & Associates.

Accordingly, plaintiff's motion to amend the complaint to add the Lovett Company LLC as a defendant is granted and is deemed timely served nunc pro tunc as per the proposed supplemental summons and Verified Amended Complaint attached to the motion. The defendant may serve an answer within 20 days after service of the notice of entry of this decision and order.

This is the decision and order of this Court.

Dated: October 8, 2021



Ulysses B. Leverett
 Ulysses B. Leverett, JSC