SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART: 5

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Fernandez, Rosendo

Index No. 26242/2020E

-against-

Hon. Alison Y. Tuitt

Justice Supreme Court

The Eastgate Group

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The following papers numbered 1 to 3 Read on this motion, (Seq. No. 001) for Summary Judgment, noticed on 6/3/21.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). 1
Answering Affidavit and Exhibits	No(s). 2
Replying Affidavit and Exhibits	No(s). 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision

Motion is Respectfully Referred to Justice:
Dated:

Dated: 8/20/21

Hon. A. Y. Tuitt, J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

NEW YORK SUPREME COURT---------COUNTY OF BRONX

PART IA - 5

ROSENDO FERNANDEZ,

Plaintiff,

-against-

THE EASTGATE GROUP INC., EASTGATE MANAGEMENT LLC, EASTGATE MANAGEMENT SERVICE CORP., CHAIM LEBOWITZ, and CASTLTON ENVIRONMENTAL CONTRACTORS, LLC,

Defendants.

INDEX NUMBER: 26242/2020E

Present:
HON. ALISON Y. TUITT
Justice

EASTGATE MANAGEMENT SERVICE CORP. and CHAIM LEBOWITZ,

Third-Party Plaintiffs,

-against-

SECURITY SHIELD USA INC.,

Third-Party Defendant.

The following papers numbered 1 to 3,

Read on this Defendant/Third Party Plaintiff Chaim Lebowitz's Motion for Summary Judgment

On Calendar of 7/8/2021

Notice of Motion-Exhibits, Affirmation 1

Affirmation in Opposition 2

Reply Affirmation 3

Upon the foregoing papers, defendant/third-party plaintiff Chaim Lebowitz's ("Lebowitz") motion for summary judgment is denied for the reasons set forth herein.

This is an action for personal injuries sustained by plaintiff arising out of an accident on February 26, 2020 in which plaintiff alleges he fell and suffered injuries. Plaintiff was employed by Security Shield USA Inc. ("Security Shield") and worked at a property located at 37 Milval Lane, Hamlet of Highland Mills, County of Orange, New York which was owned by defendant/third-party plaintiff Lebowitz. Security Shield was retained to perform work at the subject location by defendant Eastgate Management Service Corp. by contract dated January 20, 2020.

Defendant/third-party plaintiff Lebowitz submits an affidavit stating that the subject premises is a single-family home owned by Lebowitz for the benefit of the Lebowitz family; specifically, for Lebowitz, his wife, and their children. He further states that the subject premises serves no commercial purpose, there is no business located there, and no part of the premises has ever been rented, leased or loaned to any person or entity. Lebowitz contends that he did not direct or control the means and methods of the construction work performed by Eastgate Management Service Corp. and its subcontractors at the Lebowitz home. He states that he never received any complaints regarding the construction. Furthermore, Lebowitz claims that he and his family were out of the country during the time that the construction work was being performed at the subject premises.

Defendant Lebowitz moves for summary judgment, seeking dismissal of plaintiff's causes of action pursuant to Labor Law §§240(1) and 241(6) on the grounds that he was not plaintiff's employer, did not direct or control plaintiff's work and he was not otherwise negligent. Additionally, Lebowitz argues that he is exempt from vicarious liability under the Labor Law, as an owner of a one or two-family dwelling, who contracted for but did not control the work being performed on the subject premises.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary

judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

An owner of a premises has a non-delegable duty under the Labor Law to provide a safe work environment to workers. However, an implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition. Russin v. Louis N. Picciano & Son, 54 N.Y.2d 311 (1981) citing Reynolds v Brady & Co., 329 N.Y.S.2d 624 (2d Dept. 1972). Specifically, Labor Law §240(1) provides in pertinent part that: "[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect... for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"At issue here is the Labor Law §§240 and 241 homeowner exemption to the strict liability rule it imposes on owners, contractors and their agents to protect workers from building construction, demolition and repair-related dangers. The exemption covers 'owners of one and two-family dwellings who contract for but do not direct or control the [contractor's] work. An owner who uses such a property solely for commercial purposes is not, however, entitled to the statutory exemption.'" Thompson v. Geniesse, 880 N.Y.S.2d 19 (1st Dept. 2009) quoting Van Amerogen v. Donnini, 78 N.Y.2d 880 (1991). See also, Farias v. Simon, 997 N.Y.S.2d 28 (1st Dept. 2014). The question of whether an owner has sufficiently directed the work so as to lose the benefits of the single family homeowner exception depends on the degree to which the owner controls the

particulars of the work. Ennis v. Hayes, 544 N.Y.S.2d 99 (4th Dept. 1989)("Whether an owner's conduct amounts to directing or controlling the work depends upon the degree of supervision exercised over the method and manner in which the work is performed."); Chura v. Baruzzi, 596 N.Y.S.2d 592)(3rd Dept. 1993)("In analyzing whether a homeowner's actions with respect to a particular construction or renovation project amount to direction and control thereof within the meaning of Labor Law §240(1), the relevant inquiry is the degree to which he or she supervised or directed the method and manner of the work."); Rimoldi v. Schanzer, 537 N.Y.S.2d 839 (2d Dept. 1989)("the phrase 'direct and control' contemplates the situation in which the owner supervised the method and manner of the work, can order changes in the specifications, reviews the progress and details of the job with the general contractor and/or provides the equipment necessary to perform the work."). As such, courts find a question of fact as to whether the homeowner is entitled to the exemption where "the homeowner's involvement went beyond the mere expression of dissatisfaction and demands for timely completion of the work." Garcia, *supra*. See also, Chura, *supra* ("Here, there can be no argument that defendant's actions went well beyond those of an interested homeowner who simply presented his ideas and suggestions, made observations and inquiries, and inspected the work.").

In the instant matter, the motion for summary judgment is denied as premature. There has been no discovery in this action. A preliminary conference order has not been entered. No depositions of any party have been conducted to date. Moreover, defendants The Eastgate Group and Eastgate Management LLC have not yet appeared in this action. The Third-Party Defendant just entered an appearance in this action on June 1, 2021. Additionally, defendants Lebowitz and Eastgate Management Services Corp. have not responded to plaintiff's discovery demands. Furthermore, defendant Lebowitz does not explain the contradiction between the contract for the project at issue that lists his address as 89 Wallabout Street, Brooklyn, New York, and his claims that the location of Plaintiff's injury was "used exclusively as a residence" and that it serves "no commercial purpose."

Accordingly, defendant/third-party plaintiff Lebowitz's motion for summary judgment is denied.

This constitutes the decision and Order of this Court.

Dated: 8/20/21

A. Y. Tuitt

Hon. Alison Y. Tuitt