

Guo Fu Zhuo v 111 St. Dev. LLC

2022 NY Slip Op 32446(U)

January 5, 2022

Supreme Court, Queens County

Docket Number: Index No. 709909/2018

Judge: Ulysses B. Leverett

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS:

-----X
GUO FU ZHUO

Plaintiff,

-against-

Index No.: 709909//2018

Motion Seq. No. 5, 6, 7

111 STREET DEVELOPMENT LLC and COS
CONSTRUCTION INC.,,

Defendants.

Decision and Order

-----X
111 STREET DEVELOPMENT LLC,

Third Party Plaintiff

-against-

ACER CONSTRUCTION INC and TU KANG YANG

Third Party Defendants.

-----X
Present: **HONORABLE ULYSSES B. LEVERET:**

Papers Numbered

Notice of Motion/Third Party Plaintiff-Affirmation-Exhibits (seq 5).....	EF-92-103
Affidavit of Service (seq 5).....	EF-104
Notice of Motion/defendant Cos Construction-Affirmation-Exhibits- Memoranda (seq 6).....	EF-105-130 EF-150-151
Reply Affirmation/Exhibits (seq 6).....	EF-172-173
Notice of Motion/defendant/Third Party Plaintiff-Affirmation-Exhibits statement of Facts (seq 7).....	EF-131-149
Notice of Cross Motion/ Plaintiff-Affirmation in Opposition to defendant	
Notice of Motion/Third-Party-Plaintiff-Statement of Facts-Exhibits (seq 7)	EF-152-164
Affirmation in Opposition/Defendant Cos Construction- Response to Statement of Facts.....	EF-167-169
Third-Party-Plaintiff Opposition to Plaintiff's Cross Motion and in support of defendant Third-Party Plaintiff Motion.....	EF-170

(Motion Seq 5)

Upon the foregoing papers, the decision and order on these motions are as follows:
Defendant/Third Party Plaintiff, 111 Street Development LLC (111 LLC) brings this motion
(sequence 5) pursuant to CPLR § 3215, directing entry of a default judgment against third party
defendants Acer Construction Inc. and Tu Kang Yang for relief sought in the Third Party
Complaint and deferring evidence of damages until trial.

It is ORDERED that the motion by 111 LLC to enter a default judgment against defendants Acer Construction Inc. and Tu Kang Yang is granted without opposition as to liability only, as defendants failed to appear, submit an answer, or move with respect to the Complaint. 111 LLC demonstrated proof of facts of its claim by submitting a verified Third Party Complaint and Affirmation in Support of its motion. See CPLR § 3215 (f) and *Gephardt v. J&R Celiaca Contracting Co. Inc.*, 181 AD2d 719 (2d Dept 1992). Additionally, defendants failed to respond to 111 LLC's instant motion. 111 LLC may proceed to a hearing on damages at the time of trial and is directed to attach a copy of this order upon filing the note of issue and certificate of readiness.

(Motion Seq 6)

Defendant Cos Construction Inc. (Cos Inc.) brings this motion (sequence 6) pursuant to CPLR § 3212 for summary judgment dismissing plaintiff's causes of action predicated on violations of New York State Labor Law §§ 200, 240, and 241 (6) and dismissing the cross claims of defendant 111 Street Development, LLC.

Plaintiff Guo Fu Zhou (Zhou) commenced this action for a personal injury that allegedly occurred on September 18, 2017 at a construction site located at 49-08/49-10 111th Street, Corona, New York during his employment with third party defendants Acer Construction Inc. and Tu Kang Yang (Acer and Yang) when a portion of a retaining wall fell. On or about September 1, 2017, defendant 111 LLC, the owner of the subject premises, entered into contract with third party defendants Acer and Yang as the general contractor to build two new four and one half story buildings at the premises in exchange for monies to be paid by 111 LLC. On or about July 22, 2017, Cos Inc. at the request of Tu Kang Yang, submitted work permit applications to New York City Department of Buildings (DOB) to renew existing work permits previously obtained by Morris Miller, prior to Miller's death. The construction permits were obtained by Cos Inc as the General Contractor on the project. Yang requested Cos Inc. to renew the permits since Acer and Yang were not registered contractors with DOB. There were no oral or written contracts between 111 LLC and Cos Inc.

Plaintiff Zhou's accident occurred on his first day of work at the premises on September 18, 2017. The structures that previously occupied the premises were demolished by Acer and Yang. A concrete retaining wall from the prior structure remained in the foundation hole after demolition. A trench had been dug approximately one foot away from the pre-existing retaining wall. The trench was being prepared for subsequent pouring of the concrete foundation. A portion of the pre-existing retaining wall collapsed while plaintiff was standing in the trench leveling out dirt. Plaintiff received instruction for his work from his supervisor, Tu Kang Yang.

Defendant Cos Inc. argues that it was not a contractor or agent within the meaning of the Labor Law and therefore not subject to liability imposed by §§ 200, 240 and 241(6) as it never performed work at the subject work site, never provided personnel, tools, equipment, supervision, direction or control nor did it have any contractual obligations to do so. Cos Inc owner Jincheng Wu acknowledged obtaining work permits as the general contractor but asserts it was never hired to perform any duties of a general contractor. Cos Inc. asserts that the duties and

responsibilities for the construction project at the subject work site was with Yang and Acer pursuant to a written contract with 111 LLC and not upon Cos Inc based upon the acquisition of a work permit. See *Huerth v Three Star Constr Co.* 56 AD 3d 613 (2d Dept NY 2008) and *Donnell v Apple Food Serv. of N.Y. LLC*, 2018 N.Y. Slip Op 316343 (NY Sup Ct 2018).

Labor Law § 200 and common law negligence imposes a common law duty of an owner or general contractor agent to provide construction site workers a safe place to work. To prevail on a claim for liability under Labor Law § 200, the plaintiff must show that the owner or the general contractor has the requisite authority to supervise or control the work or has actual or constructive notice of the unsafe condition which caused the injury. *Ortega v Puccia*, 57 A 3d 54 (2d Sept 2008). An entity is a contractor if it has the power to enforce safety standards and choose responsible subcontractors. *Milanese v Kellerman*, 41 AD 3d 1058 (3rd Dept 2007) and *Williams v Dover Home Improvement, Inc.*, 276 AD 2d 626 (2nd Dept 2000).

Labor Law § 240 (1) imposes a nondelegable duty on all contractors and owners and their agents in the construction, demolition or repair 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 to protect construction workers from falls or falling objects.

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.

In a motion for summary judgment, a party is entitled to summary judgment when it is clear that there are no material issues in dispute requiring trial. The 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. If the movant makes a prima facie showing of entitlement to summary judgment, the burden shifts to the opposing party to demonstrate by admissible evidence that there is a factual issue requiring trial. See *Zuckerman v City of New York*, 49 NY 2d 557 (1980).

Defendant Cos Inc made a prima facie showing that it did not serve as general contractor within the meaning of the Labor Law as Cos Inc was not contracted as the general contractor for the project, never worked at the project, did not undertake any task in connection with demolition, excavation or construction at the subject site nor had notice of the alleged compromised integrity of the retaining wall.

Plaintiff nor defendant 111 LLC has submitted any opposition to refute Cos Inc’s arguments that it was not the general contractor; did not control the injury producing activity, did not owe duty of care to the parties in this action; was not negligent; did not have notice of any dangerous condition arising from the means and methods employed by Acer and Yang at the project. Plaintiff and defendant 111 LLC failed to raise a triable issue of fact by its assertion that

Cos Inc was listed as the contractor on the work permit, as Cos Inc. was not contracted or performed any work as a general contractor at the site.

Accordingly, the Court finds that Defendant Cos Inc has tendered sufficient evidence to establish that it was not a contractor within the meaning of Labor Law, and is entitled to summary judgment dismissing plaintiff's cause of action against Cos Inc. predicated on violations of Labor Law § § 200, 240, and 241(6).

(Motion Seq 7)

Defendant Third Party Plaintiff 111 Street Development LLC (111 LLC) brings motion (seq 7) pursuant to CPLR § 3212 for summary judgment in favor of defendant 111 LLC on all causes of action asserted by plaintiff in its amended complaint and on all cross -claims asserted by defendant Cos Construction Inc (Cos Inc). Plaintiff alleges causes of action against 111 LLC under Labor Law § § 200, 240, and 241(6). Defendant 111 LLC asserts that plaintiff's claim for alleged personal injuries arose while plaintiff was performing construction work at its premises located at 49-08 and 49-10 111th Street, Corona, New York on September 18, 2017. At the time of the accident, plaintiff was an employee of Third-Party defendants Acer Construction Inc. and Tu Kang Yang (Acer and Yang). On or about September 1, 2017, defendant 111 LLC entered into a contract with Acer and Yang to build two new four and a half story buildings at the premises. Cos Construction Inc. obtained construction permits identifying itself as General Contractor on the project. Acer and Yang demolished the structure that occupied the subject premises at the time of 111 LLC's purchase. The grounds were being prepared to lay the foundation at the time of the September 18, 2017 accident. Plaintiff was preparing a trench that had been dug for subsequent pouring of the concrete foundation. The pre-existing concrete retaining wall that remained after the demolition and excavation of the premises was one foot away from the newly prepared trench. The retaining wall collapsed and fell on plaintiff as he was leveling dirt in the trench.

Defendant Cos Inc., in its answer to plaintiff's complaint, asserted cross claims against 111 LLC for apportionment, common law indemnification and contractual indemnification. Defendant 111 LLC filed an action against Acer and Yang for contractual indemnification. With respect to defendant Cos Inc. action for contractual indemnification from 111 LLC., there has been no contract offered by either party which provides for any such indemnification between 111 LLC and Cos Inc. Additionally, as to common law indemnification or contribution, any liability assessed against 111 LLC will be direct rather than vicarious as this Court under motion sequence 6 above has determined that Cos Inc. is not a contractor within the meaning of Labor Law § § 200, 240, and 241(6) and is not liable for plaintiff's injuries. See also *Torres v 63 Perry Realty LLC*, 123 AD 3d 911 (2d Dept 2014) and CPLR § 1401.

Accordingly, defendant 111 LLC's summary judgment motion to dismiss all cross-claims asserted in Cos Construction Inc's answer is granted.

Defendant 111 LLC's summary judgment motion to dismiss causes of action in plaintiff's amended complaint is granted in part.

Defendant 111 LLC argues that it is not liable for plaintiff's injuries under Labor Law §200 because as a passive owner, it did not control the method and manner of the work and had no authority to supervise and control the work. Defendant 111 LLC also argues that the alleged dangerous condition of the compromised structural integrity of the retaining wall was the result of the construction work performed at the site by defendants Acer and Yang. See *Mitchell v Caton on the Park*, 167 AD 3d 865 (2d Dept 2018) and *O'Sullivan v IDI Construction Co. Inc.*, 7 NY 3d 805 (2006).

Plaintiff has failed to raise a triable issue of fact that the method and manner of work as well as the authority to supervise and control the work was defendant owner 111 LLC rather than the general contractors Acer and Yang. Accordingly, defendant 111 LLC's motion for summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claim is granted.

Defendant 111 LLC's summary judgment motion to dismiss plaintiff's causes of action pursuant to New York Labor Law § § 240 and 241(6) is denied.

Labor Law § 241(1) imposes absolute liability on property owners and contractors where a construction site worker sustains an injury as a result of a failure to provide proper protection against an elevation related hazard. See *Wilinski v 334 E. 92nd Housing Dev. Fund Corp.*, 18 NY 3d 1 (2011).

Labor Law § 241(6) imposes vicarious liability on the owner for the negligent failure of contractors, subcontractors, their agents and employees to perform the statutory duty and provide that "all areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places". See *Nagel v D & R Realty Corp.*, 99 NY 2d 98 (2002). Labor Law § 241(6) liability may be imposed on an out of possession/passive owner who exercised no control or supervision of work, where safety measures were unreasonable or inadequate under the circumstances. The owner and general contractor's statutory duties are nondelegable in actions brought for violations of industrial Code provisions. See *Sergio v Banjoto*, NV 168 AD 2d 235 (1st Dept 1990).

Here, plaintiff Zhou moves to amend the Bill of Particulars to allege violations of Industrial Code § 12 NYCRR 23-3.3 (b)(3) & (c) and upon amendment for an order granting summary judgment on the Labor Law § 241 (6) cause of action.

12 NYCRR 23-3.3 (c) provides:

"During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any persons resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means."

12 NYCRR 23-3.3 (b)(3) provides:

“Walls, chimneys and other parts of any building or other structure shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration”.

Plaintiff in support of his motion for summary judgment argues that defendant 111 LLC’s contractor Acer and Kang were hired to demolish the existing structure/house on the subject premises, excavate the foundation and construct a condominium on the property. Plaintiff alleges the excavated foundation that was 10 to 12 feet deep, exposed the pre-existing 8 foot high, 1 foot thick and 20 foot long wall which was weakened during demolition and subsequently collapse during the additional digging in the trench adjacent to the wall.

The Court grants plaintiff Zhou’s motion to amend the pleadings to identify the applicable Industrial Code provision since the amendment involves new factual allegations, legal theories of liability or prejudice. See CLR § 3025 (b) and *D’elia v City of New York*, 81 AD 3d 682 (2011).

Plaintiff claims that nothing was done to guard, secure, shore or brace the wall prior to the collapse and that there is no evidence that any inspection was made of the wall. Additionally, plaintiff claims that defendant 111 LLC’s failure to provide any protective device to brace, post or shore the compromised structural integrity of the retaining wall was a violation of Labor Law § 240 (1) and the cause of the falling/collapsing wall. See *Ortega v Everest Realty LLC*, 84 AD 3d 542 (2011). Defendant argues that the stationary pre-existing wall is not a falling object that requires securing related to elevation differential. See *Misseritti v Mark IV Construction Co.*, 86 NY 2d 487 (1995).

Here, while the retained walls have not been shown to be the object of the demolition when they fell, the issue under Labor Law § 240 (1) is whether defendants failed to provide the worker with adequate protection from reasonably preventable gravity-related accidents. See *Wilinski v 334 E. 92nd supra*.

The Court finds that triable issues of fact exists as to whether the wall retained after demolition of structure upon it and excavations beside it and allegedly uninspected was structurally compromised to the extent that protective devices were necessary under Labor Law §§ 240 (1) and 241(6) to prevent the retained wall collapse and plaintiff’s subsequent injury.

Accordingly, defendant 111 LLC’s motion for summary judgment dismissing plaintiff’s complaint pursuant to Labor Law §§ 240 (1) and 241(6) is denied and plaintiff’s motion for summary judgment for liability pursuant to §§ 240 (1) and 241(6) after amendment of the bill of particulars is denied.

This is the decision and order of this Court.

Dated: January 5, 2022


Ulysses B. Leverett, JSC

