

Frias v Kwan
2022 NY Slip Op 35123(U)
July 11, 2022
Supreme Court, Queens County
Docket Number: Index No. 706133/17
Judge: Timothy J. Dufficy
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

-----X
GILBERTO FRIAS,

Plaintiff,

Index No.: 706133/17

Motion Date: 2/1/22

Mot. Seq. Nos.: 10,11, and 12

CHUCK KWAN, ANGELA CHEW, FULL
SCALE CONTRACTING INC., RICHARD
NEU ELECTRICAL CONTRACTOR'S, INC.,
RICHARD NEU, INDIVIDUALLY, AND
R.J. WELLBROCK, INC.,

Defendants.

FILED & RECORDED

7/14/2022

8:52 AM

COUNTY CLERK
QUEENS COUNTY-----X
R.J. WELLBROCK, INC.,

Third-Party Plaintiff,

-against-

MOISES PINEDA,

Third-Party Defendant.

-----X
The following papers were read on these motions: the motion by defendants Chuck Kwan and Angela Chew, pursuant to CPLR 3212, granting summary judgment in their favor, dismissing plaintiff's common-law negligence and Labor Law §§ 200, 240, and 241 claims and any cross claims asserted against them (Motion Sequence No. 10); the separate motion by defendants Richard Neu Electrical Contractors, Inc. and Richard Neu, individually, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against them (Motion Sequence No.11); and the separate motion by defendant Full Scale Contracting, Inc., pursuant to CPLR 3212, for partial summary judgment dismissing the Labor Law § 241(6) claim against it (Motion Sequence No.12).PAPERS
NUMBEREDMotion Sequence No. 10

Notice of Motion - Affidavits - Exhibits.....

EF 209-230

Answering Affidavits - Exhibits.....

EF 261-274

EF 276-289¹

Reply Affidavit

EF 321

¹The documents filed via NYSCEF numbered 276-289 are duplicates of documents numbered 261-274.

Motion Sequence No. 11

Notice of Motion - Affidavits - Exhibits.....	EF 232-235
Answering Affidavits - Exhibits.....	EF 291-294
Reply Affidavit - Exhibits.....	EF 323-326

Motion Sequence No. 12

Notice of Motion - Affidavits - Exhibits.....	EF 238-255
Answering Affidavits - Exhibits.....	EF 296-319
Reply Affidavit - Exhibits.....	EF 328-329

As an initial matter, the motions, designated as Motion Sequence Nos. 10, 11 and 12, are consolidated for purposes of disposition and are determined as follows:

Defendants Chuck Kwan and Angela Chew move for an order, pursuant to CPLR 3212, granting summary judgment in their favor, dismissing plaintiff's common-law negligence and Labor Law §§ 200, 240, and 241 claims and any cross claims asserted against them (Motion Sequence No. 10). The branch of the motion for summary judgment dismissing the plaintiff's Labor Law § 241(6) claim against Chuck Kwan is granted. Those branches dismissing the plaintiff's Labor Law § 241(6) claim against Angela Chew, as is predicated on sections 23-1.5; 23-1.7(b); 23-1.22(a)-(c); 23-1.30; 23-2.1(a)(2); 23-2.1(b); 23-3.2; 23-3.3(b); 23-3.3(c)-(l); 23-4.1; 4.2(a)-(l) of the Industrial Code and on Occupational Safety and Health Act standards, respectively, are granted. Those branches dismissing the plaintiff's Labor Law § 241(6) claim against Angela Chew, as is predicated on sections 23-1.7(d), 23-1.7(e)(1) and (2), and 23-2.1(a)(1) are denied. The branches of the summary judgment motion seeking dismissal of plaintiff's Labor Law §§200 and 240 claims are denied.

Defendants Richard Neu Electrical Contractors, Inc. and Richard Neu, individually, move for an order, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against them (Motion Sequence No.11). That branch of the motion seeking summary judgment dismissing the plaintiff's Labor Law § 241(6) claim them is granted. The branch of the motion seeking dismissal of plaintiff's Labor Law § 200 and common law negligence claim is denied.

Defendant Full Scale Contracting, Inc., moves for an order, pursuant to CPLR 3212, for partial summary judgment dismissing the Labor Law § 241(6) claim against.

That branch of the motion seeking partial summary judgment is granted, the remaining branches are all denied. (Motion Sequence No.12).

On April 17, 2017, the plaintiff was allegedly injured, while working on the renovation of a two-family dwelling, located at 69-39 Nansen Street, Queens, New York (the premises) owned by the defendants Chuck Kwan (Kwan) and Angela Chew (Chew). Plaintiff alleges he was an employee of third-party defendant Moises Pineda (Pineda). The owners hired Richard Neu Electrical Contractors, Inc. (Neu Electrical) to do electrical work, Full Scale Contracting, Inc. (Full Scale) to, among other things, build the shell of a rear extension to the premises, and R.J. Wellbrock to do plumbing work.² Plaintiff contends that while carrying wood from the basement of the premises through a rear door to the backyard, he stepped on a cinder block being used as a step. He alleges that: there were multiple electrical cords running over the block; the ground on which the block was placed was uneven; the block moved when stepped on; and, consequently, his foot became tangled in the cords causing him to fall and incur injuries.

In May, 2017, the plaintiff commenced the instant action asserting causes of action against all the defendants alleging common-law negligence and violations of Labor Law §§ 200 and 241(6). Kwan and Chew move together for summary judgment (Motion Sequence No. 10); Neu Electrical and Richard Neu, individually, move together for summary judgment (Motion Sequence No. 11); and Full Scale moves for partial summary judgment dismissing the plaintiff's Labor Law § 241(6) claim against it (Motion Sequence No. 12).

Motion by Defendants Kwan and Chew (Motion Sequence No. 10)

Defendants Kwan and Chew move for an order, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against them. They argue that are entitled to summary judgment and a dismissal of the plaintiff's cause of action that alleges a violation of Labor Law § 200 and common-law negligence. They maintain that: they did not supervise or control the performance of the work; they did not

²The plaintiff's complaint and all claims of co-defendants and third party complaints were dismissed against R.J. Wellbrock in a decision and order of this court dated October 18, 2021.

create the dangerous condition that caused the plaintiff's accident; and they did not have actual or constructive notice of the alleged dangerous condition.

Labor Law § 200 is a codification of the common-law duty of owners, contractors, and their agents to provide workers with a safe place to work (*see Mondungo v Bovis Lend Lease Interiors, Inc.*, 184 AD3d 820 [2d Dept 2020]; *Moscatti v Consolidated Edison Co. Of N.Y., Inc.*, 168 AD3d 717 [2d Dept 2019]). “Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed” (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). Where a premises condition is at issue, “[f]or liability to be imposed on the property owner, there must be evidence showing the property owner either created a dangerous or defective condition, or had actual or constructive notice of it without remedying it within a reasonable time” (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 51 [2d Dept 2011]). Where the manner of the work is at issue, recovery against the owner cannot be had “unless it is shown that the party to be charged had the authority to supervise or control the performance of the work” (*Kauffman v Turner Constr. Co.*, 195 AD3d 1003, 1006 [2d Dept 2021], quoting *Ortega*, 57 AD3d at 61). Where a plaintiff alleges defects in both the premises and the manner in which the work was performed, the property owner moving for summary judgment must address the proof applicable to both liability standards (*see Venter v Cherkasky*, 200 AD3d 932 [2d Dept 2021]; *Moscatti*, 168 AD3d at 710).

Although the plaintiff alleges defects in both the premises and the manner in which the work was performed, the complaint and verified bill of particulars sounds almost entirely in premises liability in alleging that the premises were in dangerous condition (*see Rodriguez v HY 38 Owner, LLC*, 192 AD3d 839 [2d Dept 2021]). Kwan and Chew's argument that a cinder block is not inherently dangerous, citing *Gibbons v Lido & Point Lookout Fire Dist.*, (293 Ad2d 647 [2d Dept 2002]), is misplaced. The use of a cinder block as a step has been found to be a dangerous condition (*see Washington v City of New York*, 190 AD3d 1009 [2d Dept 2021]). Moreover, the plaintiff testified at his deposition that the block was placed on ground that was “broken up,” and that it moved when stepped on.

Moreover, Kwan and Chew's evidentiary submissions fail to eliminate triable issues of fact whether they had actual or constructive notice of the alleged dangerous condition of the block being used as a step (*see Berman-Rey v Gomez*, 153 AD3d 653 [2d Dept 2017]). Plaintiff testified that the block was in the aforementioned position for at least a week before the accident occurred and that the conditions were the same when the owner visited the home. Chew testified that: she and Kwan usually visited the home together; she visited approximately four to five times; she did not see a cinder block near the exit coming outside; and, she did not see electrical cords at the rear door in the backyard. Insofar as questions of fact and credibility are evident, Kwan and Chew fail to meet their burden with regard to those branches of the motion seeking to dismiss plaintiff's common-law negligence and Labor Law § 200 claims against them.

Kwan and Chew next argue that they are entitled to the protection of the homeowner's exemption set forth in Labor Law § 241(6) which, in relevant part, exempts from liability "owners of one and two-family dwellings who contract for but do not direct or control the work" (Labor Law § 241[6]; *see Batzin v Ferrone*, 140 AD3d 1102, 1103 [2d Dept 2016]). Where, as here, a "one- or two- family property serves both residential and commercial purposes, '[a] determination as to whether the exemption applies in a particular case turns on the nature of the site and the purpose of the work being performed, and must be based on the owner's intentions at the time of the injury'" (*Batzin*, 140 AD3d at 1103, quoting *Caiazzo v Mark Joseph Contr., Inc.*, 119 AD3d 718, 721 [2d Dept 2014]).

Here, it is undisputed that the property is a two-family residential dwelling owned jointly by Kwan and Chew. Kwan makes a *prima facie* showing that he intended to reside on the first floor of the premises after the renovations were completed (*see Marquez v Mascioscia*, 165 AD3d 912 [2d Dept 2018]). Moreover, in his opposition papers, the plaintiff does not allege that Kwan controlled the work (*id.*). As such, Kwan demonstrates the applicability of the exemption as it applies to him (*id.*; *see Ramirez v Begum*, 35 AD3d 578 [2d Dept 2006]). Thus, that branch of the motion for summary judgment dismissing the plaintiff's Labor Law § 241(6) claim against Chuck Kwan is granted.

However, Chew fails to establish her *prima facie* entitlement to judgment as a matter of law on the applicability of the homeowner's exemption. She testified that when

she and Kwan purchased the property, her intent was to reside on the second floor with her family. However, at some point, she decided not to move into the premises. In 2018, the second floor was listed as a rental apartment. Chew does not set forth any evidence of when her intent changed and, therefore, a question of fact exists as to what her intent was at the time of the plaintiff's accident (*see Batzin*, 140 AD3d at 1104; *Gonzalez v Abreu*, 162 AD3d 748 [2d Dept 2018]).

Turning to an analysis of Labor Law § 241(6) to the extent that it may apply to Chew, owners and contractors have a nondelegable duty to provide reasonable and adequate protection and safety to construction workers (*see Aragona v State of New York*, 147 AD3d 808 [2d Dept 2017]; *Hricus v Aurora Constr., Inc.*, 63 AD3d 1004 [2d Dept 2009]). “To prevail on a cause of action under Labor Law § 241(6), a plaintiff must establish a violation of a specific safety regulation promulgated by the Commissioner of the Department of Labor” (*Robles v Taconic Mgt. Co., LLC*, 173 AD3d 1089, 1091 [2d Dept 2019]).

Here, the plaintiff's bill of particulars predicates his Labor Law § 241(6) claim on alleged violations of sections 23-1.5, 23-1.7(b), 23-1.7(d), 23-1.7(e)(1), 23-1.7(e)(2), 23-1.22(a)-(c), 23-1.30, 23-2.1, 23-3.2, 23-3.3(b); 23-3.3(c)-(l), 23-4.1, and 23-4.2(a)-(l) of the Industrial Code, as well as violations of the Occupational Safety and Health Act (OSHA). However, in opposition, the plaintiff relies solely upon alleged violations of sections 23-1.7(d) (slipping hazards), 23-1.7(e)(1) and (2) (tripping hazards), and 23-2.1(a)(1) (storage of material). As such, he has abandoned claims as to the other alleged violations (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474 [1st Dept 2012]).

With respect to sections 23-1.7(d) and 23-1.7(e)(1) and (2), material issues of fact exist as to whether the cinder block placed on uneven ground, being used as a step, and being covered by electrical cords posed a slipping and/or tripping hazard within the meaning of sections 23-1.7(d) and 23-1.7(e), respectively (*see Mott v Tromel Constr. Corp.*, 79 AD3d 829 [2d Dept 2010]). Also, issues of fact exist as to whether the cinder block being used as a step placed outside the rear door of the premises was a “passageway” within the meaning of section 23-1.7(e)(1), (*see Lois v Flintlock Constr. Servs., LLC*, 137 AD3d 446 [2d Dept 2016]; *McCullough v One Bryant Park*, 132 AD3d 491 [1st Dept 2015]), and whether the cinder block in the aforementioned position with electrical cords running over it was integral to and “consistent with the work being

performed” within the meaning of section 23-1.7(e)(2) (*see Mott*, 79 AD3d at 831). Furthermore, Chew fails to specifically address section 23-2.1(a)(1) in her moving papers, which sets forth, in pertinent part that “[a]ll building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.” As such, issues of fact remain as to the applicability of sections 23-1.7(d), 23-1.7(e)(1) and (2), and 23-2.1(a)(1).

Thus, based upon the foregoing, the branches of the motion dismissing the plaintiff’s Labor Law § 241(6) claim against Angela Chew, as is predicated on sections 23-1.5; 23-1.7(b); 23-1.22(a)-(c); 23-1.30; 23-2.1(a)(2); 23-2.1(b); 23-3.2; 23-3.3(b); 23-3.3(c)-(l); 23-4.1; 4.2(a)-(l) of the Industrial Code and on Occupational Safety and Health Act standards, respectively, are granted.

Those branches of the motion dismissing the plaintiff’s Labor Law § 241(6) claim against Angela Chew, as is predicated on sections 23-1.7(d), 23-1.7(e)(1) and (2), and 23-2.1(a)(1) of the Industrial Code and on Occupational Safety and Health Act standards, respectively, are denied.

Motion by defendants Neu Electrical and Richard Neu, individually
(Motion Seq. No. 11

Defendants Neu Electrical and Richard Neu, individually (collectively, the Neu defendants) move for summary judgment, pursuant to CPLR 3212, dismissing the complaint and all cross claims against them. In support of their motion, the Neu defendants rely on, among other things, the plaintiff’s deposition testimony, the deposition testimony of Chad Anshelewitz (Anshelewitz), project manager at Neu Electrical at the time of the plaintiff’s accident, and a copy of the payment schedule between Neu Electrical and the owners.

With regard to the plaintiff’s Labor Law § 200 and common-law negligence claim, “[w]here a claim is based on an alleged dangerous condition on the premises, an owner or contractor is liable where it created the dangerous condition or had actual or constructive notice of its existence” (*Gargan v Palatella Saros Bldrs. Group, Inc.*, 162 AD3d 988, 989 [2d Dept 2018], quoting *Niewojt v Nikko Constr. Corp.*, 139 AD3d 1024, 1025 [2d Dept 2016]). Here, the Neu defendants were hired by the owners of the

premises as the prime contractor for electrical work. They argue, among other things, that they did not supervise, direct, or control the plaintiff's work, and that they did not create or have actual or constructive notice of the allegedly dangerous condition causing the plaintiff's accident. They contend that they were "off site" for months prior to the date of the accident because they completed their work on the premises by the time the final payment was made in December, 2016. Further, they maintain that they did not work on the exterior of the home, and that they did not use corded tools.

However, the plaintiff testified that an electrician was present at the premises at the time of the accident using an electrical cord that ran over the cinder block. Chew testified that the only contractors she and Kwan hired were Full Scale, Neu Electrical, and R.J. Wellbrock, that Neu Electrical did the electrical work, and that she was not aware of any other electricians that were working on the premises.

Moreover, the payment schedule submitted by the Neu defendants does not establish that they were not at the premises after the owners made their final payment on December 20, 2016. Anshelewitz testified that he did not recall when Neu Electrical completed its work, however, "judging by the payment schedule, it had to be in late November or early December." Chew testified that her mother passed away, in March, 2017, and that she could not recall whether work at the premises was completed before she died. Chew also testified that work at the premises had to stop due to a Department of Buildings violation, that at the time the work was stopped it was "barely complete," and that the work continued in "maybe early 2017" or "possibly around November 2016." Anshelewitz also testified that he could not say with certainty that Neu Electrical did not use extension cords at the premises. As such, the Neu defendants fail to eliminate triable issues of fact including, but not limited to, when they completed work at the premises, whether they were "off site" or present at the time of the plaintiff's accident, and whether they created or had actual or constructive notice of the alleged dangerous condition (*see Pacheco v Smith*, 128 AD3d 926 [2d Dept 2015]).

With respect to the Neu defendants' argument that the plaintiff was the sole proximate cause of his injuries, the record presents, as best, triable issues of fact as to whether the plaintiff could have moved the electrical cords. Moreover, the Neu defendants do not make a claim that the plaintiff was a recalcitrant worker (*see Garcia v Emerick Gross Real Estate, L.P.*, 196 AD3d 676 [2d Dept 2021]). To the extent that the

Neu defendants argue the dangerous or defective condition was “open and obvious,” that argument “merely presents an issue of fact concerning the plaintiff’s comparative fault” (*Baumann v Town of Islip*, 120 AD3d 603, 605 [2d Dept 2014]).

Plaintiff does not oppose the branch of the Neu defendants’ motion seeking dismissal of the Labor Law § 241(6) claim. As such, the plaintiff’s Labor Law § 241(6) claim is dismissed as against the Neu defendants.

Motion by Defendant Full Scale Contracting, Inc., (Motion Sequence No.12).

Defendant Full Scale moves for partial summary judgment, pursuant to CPLR 3212, dismissing the plaintiff’s Labor Law § 241(6) claim against it. Full Scale does not move for dismissal of the plaintiff’s claims against it based upon Labor Law § 200 and common-law negligence.

Labor Law § 241(6) applies to “owners, contractors, and their agents” (*see Fucci v Douglas S. Plotke, Jr., Inc.*, 124 AD3d 835, 836 [2d Dept 2015]). “A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where the plaintiff is injured” (*Delahaye v Saint Anns School*, 40 AD3d 679, 683 [2d Dept 2007], quoting *Linkowski v City of New York*, 33 AD3d 971, 974-975 [2d Dept 2006]). To impose such liability, the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition (*see Myles v Claxton*, 115 AD3d 654 [2d Dept 2014]; *Damiani v Federated Dept. Stores, Inc.*, 23 AD3d 329 [2d Dept 2005]).

Here, Full Scale establishes its *prima facie* entitlement to dismissal of the Labor Law § 241(6) claim against it by demonstrating that it lacked the authority to supervise or control the plaintiff’s work. Plaintiff testified at his deposition that: he was employed by Pineda; Pineda told him verbally what work to do at the premises; and, no one besides Pineda gave him instructions while he was working. Furthermore, Anthony Conte, principal at Full Scale, testified, at his deposition, that there was no general contractor for the renovation at the premises and that Full Scale did not hire any subcontractors. Therefore, Full Scale has demonstrated that it did not have the ability to control the activity which brought about the plaintiff’s injury and cannot be held liable under Labor

Law § 241(6) (*see Gonzalez v Magestic Fine Custom Home*, 115 AD3d 796 [2d Dept 2014]; *Rodriguez v JMB Architecture, LLC*, 82 AD3d 949 [2d Dept 2011]). Thus, the plaintiff's Labor Law § 241(6) claim against Full Scale cannot stand and must be dismissed.

Accordingly, it is hereby

ORDERED that the motion by defendants Chuck Kwan and Angela Chew for an order, pursuant to CPLR 3212, granting summary judgment in their favor, dismissing plaintiff's common-law negligence and Labor Law §§ 200, 240, and 241 claims and any cross claims asserted against them (Motion Sequence No. 10) is granted in part and denied in part; in that: it is

ORDERED the branch of the motion for summary judgment dismissing the plaintiff's Labor Law § 241(6) claim against defendant Chuck Kwan is granted; and it is further

ORDERED that those branches of the motion dismissing the plaintiff's Labor Law § 241(6) claim against Angela Chew, as is predicated on sections 23-1.5; 23-1.7(b); 23-1.22(a)-(c); 23-1.30; 23-2.1(a)(2); 23-2.1(b); 23-3.2; 23-3.3(b); 23-3.3(c)-(l); 23-4.1; 4.2(a)-(l) of the Industrial Code and on Occupational Safety and Health Act standards, respectively, are granted; and it is further

ORDERED that those branches of the motion dismissing the plaintiff's Labor Law § 241(6) claim against Angela Chew, as is predicated on sections 23-1.7(d), 23-1.7(e)(1) and (2), and 23-2.1(a)(1) are denied; and it is further

ORDERED that the branches of the summary judgment motion seeking dismissal of plaintiff's Labor Law §§200 and 240 claims are denied; and it is further

ORDERED that the motion by defendants Richard Neu Electrical Contractors, Inc. and Richard Neu, individually, seeking an order, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against them (Motion Sequence No.11) is granted only to the extent that the branch of the motion seeking summary judgment dismissing the plaintiff's Labor Law § 241(6) claim is granted; and it is further

ORDERED that the branch of the motion seeking to dismiss the plaintiff's Labor Law § 200 and common-law negligence claim is denied; and it is further

ORDERED that the motion by defendant Full Scale Contracting, Inc. for an order, pursuant to CPLR 3212, for partial summary judgment dismissing plaintiff's Labor Law § 241(6) claim against Full Scale is granted; and it is further

ORDERED that the remaining branches of defendant Full Scale Contracting, Inc.'s motion are denied; and it is further

ORDERED that any applications not specifically discussed above, as to the motions, designated as Motions Sequence Nos. 10, 11 and 12 are denied.

The foregoing constitutes the decision, order and judgment of this Court.

Dated: July 11, 2022

**FILED & RECORDED
7/14/2022
8:52 AM
COUNTY CLERK
QUEENS COUNTY**



TIMOTHY J. DUFFICY, J.S.C.


Clerk