

Matute v Lebovits
2022 NY Slip Op 35181(U)
December 15, 2022
Supreme Court, Queens County
Docket Number: Index No. 707759/2017
Judge: Mojgan C. Lancman
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. MOJGAN C. LANCMAN

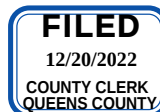
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JAVIER FRANCISCO ASMAL MATUTE,

IAS Part 20

Plaintiff,

Index No.: 707759/2017

-against-



Motion Seq. No.: 5

MOSHE LBOVITS, MICSA REALTY &
MANAGEMENT INC. and DAS REALTY &
MANAGEMENT INC.,

Motion Date: 8.24.2022

Motion Cal. No.: 1

Defendants.
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The e-filed papers bearing NYSCEF document numbers 104-121 were read on the motion made by the defendants Micsa Realty & Management Inc. ("Micsa") and Das Realty & Management Inc. ("Das") (collectively, the "Defendants") for summary judgment dismissing all claims against them.

The Plaintiff commenced this action seeking to recover damages for personal injuries allegedly sustained in a work-related accident (the "Accident"). Presently before the Court is the Defendants' motion for an Order granting summary judgment and dismissing all claims against them. For the following reasons, the motion is granted.

I. Factual Background

The Accident occurred on June 11, 2015 at 726 Myrtle Avenue, Williamsburg, New York (the "Premises"). At that time, the Plaintiff was employed by Kitchen Expo, a non-party. His duties consisted of delivering kitchen cabinets.

On the date of the Accident, the Plaintiff was to deliver cabinets, a sink and a faucet to the apartment (the "Apartment") located on the second floor of the Premises. The ground floor of the Premises consisted of a commercial establishment.

The floor in the Apartment consisted of a plywood subfloor. On June 11, 2015, the Plaintiff made either one or two trips to the Apartment before the Accident took place. During the pre-accident trip(s), he placed the deliveries in the living room, approximately six feet from the door to the Apartment. There was no construction work being performed in the Apartment during said deliveries.

The Accident took place on the Plaintiff's last delivery, which would have been either the second or third on that day. The Plaintiff explained that he walked into the Apartment carrying a cabinet, took approximately six steps, and then fell.

The Plaintiff fell into a hole that was four feet wide, five feet long and four feet deep. The bottom of the hole consisted of "beams, another floor." The Plaintiff was standing on the subject beams immediately after the Accident. After the Accident, he observed that a piece of plywood had been removed from the subfloor. The Plaintiff does not know who did so. The record also does not disclose who removed same.

Micsa purchased the Property on February 5, 2013. In June 2015, the kitchen of the Apartment was being renovated due to wear and tear. Kitchen Expo, the Plaintiff's employer, was hired by Micsa and/or its principal, Benjamin Malik ("Malik"), to deliver and install kitchen cabinets and fixtures.

Malik did not control or direct the Plaintiff's work. He also did not control any of Kitchen Expo's other work. Das did not have an ownership interest in the Premises on the date of the Accident.

II. Discussion

The Defendants contend that they are entitled to the summary disposition because: (1) the "homeowner's exception" to the Labor Law is applicable; (2) Labor Law § 240 [1] does not apply (3) the Industrial Code provisions underpinning the Labor Law Section § 241 [6] claims are not sufficiently specific; and (4) there is the absence of notice with respect to Labor Law Section §200 and negligence claims.

Das also moves for summary judgment on the grounds that it did not own, manage or control the Premises at the time of the Accident. Because the Plaintiff does not raise any triable issue of fact in opposition with respect to any of these facts, the motion is granted as to Das on these grounds.

The Court shall now consider each of the remaining grounds for summary judgment presented by the Defendants.

In considering the exemption from liability for owners of a mixed residential and commercial use one- or two-family dwellings "... the applicable test is whether the work performed directly relates to the residential use of the building, even if the work also serves a commercial purpose" (*Gonzalez v Romero*, 178 AD3d 1401, 1402 [4th Dept 2019] [internal quotation marks and citations omitted]). Micsa contends that it is entitled to the benefit of the exemption because the Apartment was being renovated for the benefit of Malik's daughter, Malka Josefwtz, who did not pay rent to either Micsa or Malik. In opposition, the Plaintiff fails to raise a triable issue of fact. The Court notes that it is unnecessary for the owner of a premises to reside there to invoke the exemption (*see Ramsden v Geary*, 195 AD3d 1488 [2d Dept 2021]; *Castro v Mamaes*, 51 AD3d 522 [1st Dept 2008]).

The Labor Law § 240 [1] is dismissed because this statutory provision does not apply to holes that do not permit or allow the worker to completely fall through (*see Vitale v Astoria Energy II, LLC*, 138 AD3d 981[2d Dept 2016]). There is no factual dispute that the Plaintiff did not fall completely through the hole. He simply fell several feet and landed, standing up, on “beams, [of] another floor.”

The Plaintiff opposes the branch of the motion to dismiss his Labor Law § 241 [6] claims only as to Industrial Code §§ 23-1.7 [b] and 23-1.32. His other Labor Law § 241 [6] claims predicated on other Industrial Code violations are thus dismissed.

Industrial Code §§ 23-1.7 [b] is applicable if written notice of a dangerous condition is first given by the commissioner. There is nothing in the record to demonstrate that written notice of the allegedly dangerous condition was given by the commissioner to the Defendants. Industrial Code § 23-1.32 is also inapplicable because, as explained above, the Plaintiff did not fall completely through the hole. Because these Industrial Code violations are inapplicable, the Labor Law § 241 [6] claim is dismissed.

Lastly, the Plaintiff’s Labor Law § 200 and common law negligence claims are dismissed.

Labor Law § 200 is a codification of the common law duty placed upon owners and contractors to provide employees with a safe place to work (*see Kim v Herbert Constr. Co.*, 275 AD2d 709 [2nd Dept 2000]).

“Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises condition at a work site, and those involving the manner in which the work is performed” (*Ortega v Puccia*, 57 AD3d 54 [2nd Dept 2008]). “These two categories should be viewed in the disjunctive” (*see id.*).

“Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner [or general contractor] either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident” (*see id.*).

Here, there is no evidence that the Defendants created the allegedly defective condition. There is also no evidence that they had actual notice thereof. The Defendants did not have constructive notice of the missing piece of plywood because the Plaintiff admitted at his deposition that the Accident took place after he made his first or second delivery to the Apartment, and that the allegedly dangerous condition did not exist during the said prior deliveries.

“[W]hen the manner of work is at issue, no liability will attach to the owner [or general contractor] solely because [he or she] may have had notice of the allegedly unsafe manner in which work was performed. Rather, when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work ... mere general supervisory authority at a worksite for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to

impose liability under Labor Law § 200. A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed” (*see id.* at 57 AD2d 61).

With respect to control, the determinative factor is not whether a defendant furnishes equipment but whether it has control of the work being done and the authority to insist that proper safety practices be followed (*see Eldoh v Astoria Generating Co., L.P.*, 81 AD3d 871, 875, 917 N.Y.S.2d 289 [2nd Dept 2011]).

Here, the evidence shows that the Defendants did not supervise or control the Plaintiff’s work. Malik’s affidavit reveals: (1) that he did not tell the Plaintiff how to perform his job; (2) that on the date of the Accident, he did not supervise or control any work that was occurring in the Apartment; and (3) that he was not at the Apartment or Premises when the Accident occurred.

III. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that the Defendants’ summary judgment motion is granted; and it is further,

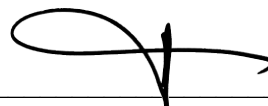
ORDERED, that all claims against the Defendants are dismissed; and it is further,

ORDERED, that the Defendants shall serve a copy of this Order with Notice of Entry upon the Plaintiff by January 31, 2023.

This cause was discontinued as to the first-named defendant Moshe Lebovits, pursuant to a stipulation of discontinuance that was filed on June 17, 2021 (*see* NYSCEF doc. no.: 101). In light of same, and the dismissal of this cause as to the remaining defendants pursuant to this Order, the Clerk of the Court is respectfully directed: (1) to mark this cause disposed; and (2) to close all appearances.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
December 15, 2022



MOJGAN C. LANCMAN, J.S.C.

