

Chavarria v Bruce Nagel & Partners Architects, P.C.
2022 NY Slip Op 35220(U)
October 12, 2022
Supreme Court, Suffolk County
Docket Number: Index No. 617091-2020
Judge: David T. Reilly
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**SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 30 SUFFOLK COUNTY**

PRESENT:
HON. DAVID T. REILLY, JSC

INDEX NO.: 617091-2020

JOSE CHAVARRIA,

Plaintiff,

-against-

**BRUCE NAGEL & PARTNERS ARCHITECTS, P.C.,
DAVID L. WASSERMAN and ELLEN F.
WASSERMAN,**

Defendants.

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MOTION DATE:	<u>04/20/22</u>
SUBMITTED:	<u>04/20/22</u>
MOTION SEQ. NO.:	<u>1, 2, 3</u>
MOTION:	001 <u>MD</u>
	002 <u>MG</u>
	003 <u>MG</u>

Upon the reading and filing of the following papers in this matter: NYSCEF Doc. Nos. 20 - 32; 34 - 57; 59 - 68 and 71 - 85 (and after hearing counsel in support and in opposition to the motion) it is,

ORDERED that Mot. Seq. 001, 002 and 003 are hereby consolidated for purposes of this determination; and it is

ORDERED that defendant Bruce Nagel & Partners Architects, P.C.'s motion for summary judgment dismissing the plaintiff's complaint and in its favor on the cross-claims asserted against defendants David L. Wasserman and Ellen F. Wasserman is denied; and it is

ORDERED that defendants David L. Wasserman and Ellen F. Wassermans' cross-motion for summary judgment dismissing the cross-claims asserted by Bruce Nagel & Partners Architects, P.C. is granted; and it is

ORDERED that defendants David L. Wasserman and Ellen F. Wassermans' motion for summary judgment dismissing plaintiff's complaint as against them is granted.

Plaintiff commenced this action with the filing of a summons and complaint on November 7, 2020 seeking money damages for personal injuries based on causes of action sounding in common law negligence, Labor Law §§ 200, 240, 241, 241-a and Rule 23 of the Industrial Code. Plaintiff asserts that he was employed by KDMAX Construction, Inc. (KDMAX) at a residential construction site located at 81 Dune Road, East Quogue, New York. Plaintiff states that the property was owned by David L. Wasserman and Ellen F. Wasserman (the Wasserman defendants) and his employer, a general contractor, was performing construction/renovation work at the subject premises on January 6, 2020 when he was caused to fall from a mechanical lift platform and suffer serious injuries. Specifically, plaintiff alleges that he was on a scissor-lift which had a platform attached to it and was standing on the platform which had been raised approximately twenty feet to reach the second floor of the structure. Plaintiff was allegedly attempting to deliver a piece of drywall from the platform to another laborer when a gust of wind took hold of the drywall and knocked plaintiff to the ground. Plaintiff maintains that Bruce Nagel & Partners Architects, P.C. (Nagel & Partners) was hired by the Wasserman defendants to act as construction manager for the project.

Nagel & Partners and the Wasserman defendants have each moved for summary judgment dismissing the plaintiff's complaint and for summary judgment in their respective favor on the cross-claims asserted by Nagel & Partners against the Wasserman defendants. The cross-claims sound in indemnification, contribution, breach of contract and negligence. In support of its motion Nagel & Partners has submitted, among other things, a copy of the pleadings, the construction/renovation agreement between it and the Wasserman defendants, the affidavit of Bruce Nagel, the company's president, and a statement of material facts. The Wasserman defendants have submitted, among other things, their own affidavits, a copy of the pleadings and a statement of material facts. Plaintiff has filed opposition and has submitted, among other things, his own affidavit.

The agreement and addendum to the agreement between the defendants were signed by the parties in March 2018 and August 26, 2019, respectively. Section 2(E) of the agreement, entitled Construction Administration Phase, states that Nagel & Partners "will not have control over or charge of and will not be responsible for construction means, methods, techniques, sequences, or procedures or for safety precautions in connection with the construction since [the Wasserman defendants] agree that these are solely the Contractor's responsibilities" (*see* NYSCEF Doc. No. 60). In addition, the agreement states that the Wasserman defendants were to require KDMAX to include Nagel & Partners on its General Liability policy with a minimum limit of \$1,000,000 per person and \$3,000,000 per occurrence. The August 26, 2019 addendum terminated any further construction administration work by Nagel & Partners.

Initially, the proponent of a summary judgment motion must make a prima facie showing of

entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Labor Law §200 is a codification of the common-law duty of owners and general contractors to provide workers with a reasonably safe place to work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 609 NYS2d 168 [1993]; *Banscher v Actus Lend Lease, LLC*, 132 AD3d 707, 17 NYS3d 774 [2d Dept 2015]). To be held liable under Labor Law §200 and for common-law negligence for injuries arising from the means and methods used to perform the work, an owner or general contractor must have authority to exercise supervision and control over the work (*Paolchin v Mall Props., Inc.*, 155 AD3d 900, 64 NYS3d 310 [2d Dept 2017]; *Banscher v Actus Lend Lease, LLC*, *supra*). Where a plaintiff's injuries stem from a dangerous condition on the premises, a defendant may be held liable if it either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition (*Paolchin v Mall Props., Inc.*, *supra*; *Banscher v Actus Lend Lease, LLC*, *supra*).

Labor Law §240(1) imposes absolute liability upon owners and contractors who fail to provide or erect safety devices necessary to give proper protection to workers exposed to elevation-related hazards such as falling from a height (*see Saint v Syracuse Supply Co.*, 25 NY3d 117, 8 NYS3d 229 [2015]; *Misseritti v Mark IV Constr. Co., Inc.*, 86 NY2d 487, 634 NYS2d 35 [1995]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, *supra*; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 577 NYS2d 219 [1991]). The hazards intended to be mitigated by Labor Law §240(1) "are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*Rocovich v Consolidated Edison Co.*, *supra*, at 514; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, *supra*). Specifically, Labor Law §240(1) requires that safety devices, including scaffolds, hoists, stays, ropes or ladders be so "constructed, placed and operated as to give proper protection to a worker" (*Klein v City of New York*, 89 NY2d 833, 834, 652 NYS2d 723 [1996]).

To prevail on a claim pursuant to Labor Law § 240(1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*see Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880 [1985]; *Yao Zong Wu v Zhen Jia Yang*, 161 AD3d 813, 75 NYS3d 254 [2d Dept 2018]; *Allan v DHL Express (USA), Inc.*, 99 AD3d 828, 952 NYS2d 275 [2d Dept 2012]; *Sprague v Peckham Materials Corp.*, 240 AD2d 392, 658 NYS2d 97 [2d Dept 1997]). The question of whether the safety device at issue provided protection within the meaning of Labor Law §240(1) is ordinarily a question of fact for the jury (*see Garhartt v Niagara Mohawk*

Power Corp., 192 AD2d 1027, 596 NYS2d 946 [3d Dept 1993]; *Plass v Solotoff*, 283 AD2d 474, 724 NYS2d 887 [2d Dept 2001]).

Excluded from the strict liability provisions of Labor Law §§240 and 241 are owners of one and two-family dwellings who contract for but do not direct or control the work (Labor Law §240(1); Labor Law §241; *Cannon v Putman*, *supra*; *Abdou v Rampaul*, 147 AD3d 885, 47 NYS3d 430 [2d Dept 2017]; *Assevero v Hamilton & Church Props., LLC*, 131 AD3d 553, 15 NYS3d 390 [2015]).

Here, the Wasserman defendants have met the criteria for qualification under the homeowner's exemption; consequently, they cannot be held liable for plaintiff's injuries under Labor Law §240 or §241 (*see Abdou v Rampaul*, *supra*; *Sandals v Shemtov*, 138 AD3d 720, 29 NYS3d 448 [2d Dept 2016]). The Wasserman defendants have each submitted affidavits wherein they maintain that the subject premises was their second home used primarily for family vacations and that they only visited the property a few times during the construction/renovation period to observe the progress of the work. The Wasserman defendants have also established that they did not have the authority to control or supervise the means and methods of the plaintiff's work, nor did they have actual or constructive notice of any dangerous conditions at the work site on the date of the accident to support the imposition of liability under the Labor Law or common-law negligence (*see Sandals v Shemtov*, *supra*; *Banscher v Actus Lend Lease, LLC*, *supra*; *Wejs v Heinbockel*, 142 AD3d 990, 37 NYS3d 569 [2d Dept 2016]). Therefore, the plaintiff's complaint is dismissed as to the Wasserman defendants.

With respect to that branch of the motion by Nagel & Partners seeking summary judgment on the cross-claims against the Wasserman defendants and the motion by the Wasserman defendants' for dismissal of the cross-claims, it is clear that any liability which may have been attributable to the Wasserman defendants would have terminated when the addendum to the contract between the parties was executed on August 26, 2019. That addendum effectively cancelled any further construction administration duties by Nagel & Partners on behalf of the Wasserman defendants. Therefore, inasmuch as the plaintiff's accident occurred on January 6, 2020, any insurance in place for the benefit of Nagel & Partners for an accident related injury such as plaintiff's would have terminated prior to the accident.

Further, because the injury was allegedly suffered due to the lack of proper safety equipment and not a fault in the design plans or the like, it does not appear that the Wasserman defendants had a duty to Nagel & Partners at the time of the accident. Finally, it is worth noting that construction/renovation work began at the subject premises in and around 2018 and at no time prior to the plaintiff's accident does it appear that Nagel & Partners complained that they were not included in a General Liability insurance policy, nor did Nagel & Partners request a copy of the Certificate of Insurance. Accordingly, the Wasserman defendants motion to dismiss the cross-claims is granted and, by logical extension, that branch of Nagel & Partner's motion for summary judgment on the cross-claims is denied.

Finally, turning to that branch of Nagel & Partner's motion for summary judgment dismissing the plaintiff's complaint, there appears to be conflicting accounts of Nagel & Partners' involvement

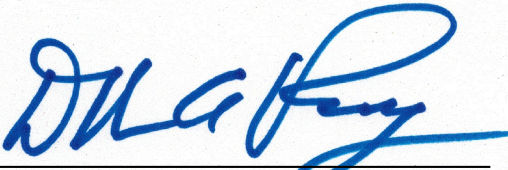
with the building/renovation process prior to and until the date of the accident. Bruce Nagel's affidavit avers that Nagel & Partners did not exercise any supervisory control over the project as they did not have the authority to direct or control the method or manner of the injury-producing work, did not have actual or constructive notice of any alleged defects at the property and was not present at the work site on the day of plaintiff's accident (*see* NYSCEF Doc. No. 23). To the contrary, plaintiff states that Nagel & Partners, specifically Bruce Nagel was often at the job site and witnessed him instructing the KDMAX employees how to work more efficiently and safely, how to construct the premises according to his plans and how the work could be completed more rapidly (*see* NYSCEF Doc. No. 67).

Although the plaintiff's affidavit is somewhat vague as to the circumstances of Nagel & Partners' alleged involvement in the construction administration phase in terms of time periods, the Court is charged with determining whether issues of fact exist while viewing any evidence in a light most favorable to the nonmoving party. The Court is not responsible for resolving issues of fact or determining matters of credibility (*see Chimbo v Bolivar*, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; *Pearson v Dix McBride, LLC*, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; *Kolivas v Kirchoff*, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see Chimbo v Bolivar, supra*; *Benetatos v Comerford*, 78 AD3d 730, 911 NYS2d 155 [2d Dept 2010]). Here, the Court is presented with such conflicting accounts that may only be resolved by further discovery. Accordingly, summary judgment is not appropriate and the branch of Nagel & Partners' motion to dismiss the complaint is denied.

This constitutes the decision and Order of the Court.

Dated: October 12, 2022
Riverhead, New York




 DAVID T. REILLY
 JUSTICE OF THE SUPREME COURT

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION