

**Yumbla v William Paster, Inc.**

2023 NY Slip Op 31883(U)

June 5, 2023

Supreme Court, New York County

Docket Number: Index No. 152007/2020

Judge: Lori S. Sattler

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. LORI S. SATTLER **PART** **02TR**

*Justice*

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MAURICIO E. AVILA YUMBLA,  
  
Plaintiff,

**INDEX NO.** 152007/2020

**MOTION DATE** 12/08/2022

**MOTION SEQ. NO.** 001

- v -

WILLIAM PASTER, INC., 15 EAST 92ND STREET LLC,  
  
Defendant.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for DISMISS.

In this action brought pursuant to Labor Law §§ 240(1), 241(6), and 200, Defendant 15 East 92nd Street LLC (“the LLC”) moves for summary judgment dismissing the complaint as against it pursuant to CPLR 3212. Plaintiff Mauricio E. Avila Yumbla (“Plaintiff”) opposes.

As set forth in the parties’ Statements of Material Facts and the annexed EBT transcripts of Plaintiff and William Paster (“Paster”), whose general contracting company is also a defendant, the action stems from an accident that occurred on November 26, 2019 at a building located at 15 East 92nd Street. Plaintiff, as an employee of Third-Party Defendant A to Z Abatement (“A to Z”), was on an allegedly unsecured six-foot scaffold on the second floor of the home using a chipping gun. According to Plaintiff, the gun hit something hard in the wall, causing the scaffold to fall backward and resulting in injury. Plaintiff commenced this Labor Law action against William Paster, Inc., the general contractor on the project, and the LLC, which owns the home.

According to the LLC, the building it owns at 15 East 92nd Street is a single-family home. It annexes an affidavit of Robert Scott McClellan, who states that he is the LLC’s

principal and lives in the home (NYSCEF Doc. No. 28, ¶¶ 2-3). McClellan has not been deposed in this action. His affidavit states that he created the LLC on May 9, 2019 in advance of the purchase of the home, which occurred on June 25, 2019. The corporate formation documents and property's deed are also annexed, and they confirm McClellan's timeline of the formation and purchase (NYSCEF Doc. Nos. 29, 30). In a Reply Affidavit, McClellan attests that the LLC was formed for the purpose of purchasing the home as a private residence and does not own any other property (NYSCEF Doc. No. 37).

Plaintiff does not concede that the building is a private residence. He notes that the deed does not so specify and takes the position that McClellan's affidavit is self-serving and insufficient to prove summary judgment (NYSCEF Doc. No. 34, ¶¶ 9-10). Plaintiff testified that he did not know what kind of a building it was (NYSCEF Doc. No. 25, Avila Yumbla EBT, at 25). However, Paster testified: "We were called in to work with the owners who just purchased a brownstone and we were getting it ready for them to move in" (NYSCEF Doc. No. 27, Paster EBT, at 17). Paster identified "Mr. and Mrs. McLellan [sic]" as "the owners of the brownstone" (*id.* at 19). He further testified that McClellan and his wife had three children and that "they were going to live" in the home (*id.* at 23).

It is undisputed that McClellan engaged co-Defendant William Paster, Inc. to perform certain renovations. Paster is the owner of the general contracting company, William Paster, Inc. (Paster EBT, 8-10). He testified that McClellan and his wife with the help of an architect directed the scope of the work and made aesthetic choices as the job progressed, but did not tell him how to do his job, or provide any tools or equipment for the job (*id.* at 19-22). Plaintiff testified that he was given instructions as to what to do on the worksite from his boss, William

Ochoa (Avila Yumbla EBT, 28, 44). He did not see the homeowners while he was there (*id.* at 31).

The LLC moves for summary judgment dismissing the complaint. It maintains that it cannot be found liable under Labor Law §§ 240(1) and 241(6) because those statutes explicitly do not apply to owners of single- and two-family homes. As to § 200, it argues there is no issue of fact as to whether McClellan or anyone else on behalf of the LLC supervised the work, as indicated by the testimony of both Plaintiff and co-Defendant's witness.

In opposition, Plaintiff contends the motion is premature as McClellan has not yet been deposed. He points to the LLC's corporate formation documents, which list the LLC as having a different address than the home, and claims that because of this discrepancy there may be an issue of fact as to whether the LLC owns any other property which might not entitle it to the exemptions contained in §§ 240(1) and 241(6). Plaintiff does not address the § 200 claim in his opposition papers.

On a motion for summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). If the movant makes this initial showing, the burden shifts to the opposing party which must then produce evidentiary proof in admissible form to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (*DaSilva v Haks Engrs.*, 125 AD3d 480, 482 [1st Dept 2015], quoting *Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [1st Dept 2000]). Expressions of hope or speculation that discovery might reveal evidence

giving rise to a triable issue of fact is not a basis for denial of summary judgment (*DaSilva*, 125 AD3d, at 482).

Labor Law § 240(1) imposes a duty upon contractors, owners, and their agents to protect workers performing certain construction work from gravity-related hazards on worksites (§ 240[1]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Hill v City of New York*, 140 AD3d 568, 569 [1st Dept 2016]). The statute applies to “[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” (§ 240[1]). Labor Law § 241(6) imposes an additional duty of care on contractors and owners to provide safety protections in accordance with the Industrial Code. Like § 240(1), § 241(6) applies to “[a]ll owners and contractors and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work.”

The LLC presented evidence in the form of the deed for the home and Paster’s EBT showing that the building where the accident occurred is a single-family home. The LLC has further made a showing that it did not direct or control the work, as established by the EBT testimony of Plaintiff and Paster. The LLC therefore succeeds in making a prima facie case for dismissal of the §§ 240(1) and 241(6) claims against it.

In response, Plaintiff fails to meet its burden of raising a material issue of fact. His only argument is that the motion is premature because further discovery might reveal that the LLC owns additional properties that would make it ineligible for the statutes’ exemptions. He bases this speculation on the fact that the LLC’s address on its corporate documents is different than the address of the home. However, it is undisputed that the LLC was created several weeks before the purchase of the home, and therefore the home’s address could not have been used. It is clear from the documents that the address listed is the office address of the attorney who

prepared the documents for filing. Furthermore, McClellan states in the affidavit annexed in reply that the LLC does not own any other property. The contention that more discovery is needed to determine whether an LLC created for the purchase of a specific single-family home might own other properties sufficient to impose Labor Law liability amounts to nothing more than speculation. Accordingly, Plaintiff's §§ 240(1) and 241(6) claims must be dismissed against the LLC.

Labor Law § 200 codifies the common law duty of owners and general contractors to provide a safe workplace to construction site workers (*Comes v NY State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Where a dangerous premises condition or existing defect causes an injury, “liability attaches if the owner or general contractor created the condition . . . .” (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-44 [1st Dept 2012]). “Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work” (*Cappabianca*, 93 AD3d at 144). An owner will not be liable under a method and means theory where they “at most exercised general supervisory powers over plaintiff” (*see Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]).

The LLC has tendered evidence sufficient to show that it did not exercise supervisory control of the injury-producing work, as Plaintiff testified that his work was overseen by his A to Z supervisor, William Ochoa, and William Paster testified that the homeowners did not supervise the manner and means of the work, only gave direction as to its scope. Plaintiff does not address the § 200 claim in his opposition papers, and therefore fails to establish the existence of a triable issue of fact that would defeat summary judgment.

Accordingly, for the reasons set forth herein, it is hereby:

ORDERED that the motion for summary judgment of defendant 15 East 92nd Street LLC is granted, and the complaint is dismissed against it; and it is further

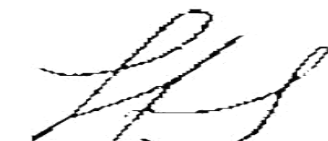
ORDERED that said claims against defendant William Paster, Inc. are severed, and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant 15 East 92nd Street LLC dismissing the claims made against it in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that a Preliminary Conference shall be held on July 18, 2023 at 9:30 am. Counsel may submit a proposed order on consent prior to that date in lieu of appearing.

This constitutes the Decision and Order of the Court.

6/5/2023  
DATE

  
LORI S. SATTLER, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE