

Viana v All Is. Recycle & Rubbish Removal
2024 NY Slip Op 35546(U)
March 28, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 612067/2018
Judge: Linda Kevins
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SHORT FORM ORDER

INDEX No. 612067/2018
CAL. No. 202300584OTSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY***P R E S E N T :***Hon. LINDA J. KEVINS
Justice of the Supreme CourtMOTION DATE 9/26/23
ADJ. DATE 12/05/23
Mot. Seq. # 014 MG-----X
RUTH VIANA as Administrator of the Estate of
LUIS VIANA,

Plaintiff,

- against -

ALL ISLAND RECYCLE AND RUBBISH
REMOVAL, ALL ISLAND MASONRY
CONCRETE, ALL ISLAND MASONRY
CONCRETE, d/b/a ALL ISLAND MASON
CONTRACTORS, INC., BELLCO
ENTERPRISES, INC., BRINIC
CORPORATION, OAKLAND CONTRACTING
CORP., and PAUL MICHAEL BELLINATO,Defendants.
-----XCELLINO LAW
Attorney for Plaintiff
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Attorney for Defendants Bellco Enterprises, Inc.
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Upon the following papers read on this motion for summary judgment: Notice of Motion/Order to Show Cause and supporting papers by defendant Bellco Enterprises, Inc., dated August 18, 2023; Answering Affidavits and supporting papers by plaintiff, dated November 29, 2023; Replying Affidavits and supporting papers by defendant Bellco Enterprises, Inc., dated December 4, 2023; it is

ORDERED that the motion by defendant Bellco Enterprises, Inc. for summary judgment dismissing the complaint and cross-claims against it is granted; and it is further

ORDERED that upon Entry of this Order, the movant is directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the affidavits of service with the Clerk of the Court.

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Plaintiff Ruth Viana, as the administrator of the estate of Luis Viana (hereinafter the decedent), commenced this action to recover damages for personal injuries and wrongful death allegedly arising out of an accident, which occurred on October 6, 2016, at the premises located at 890 Second Street, in Ronkonkoma, New York. The accident allegedly occurred when the decedent was struck by a payload loader operated by nonparty Michael Heafy. Defendants All Island Recycle and Rubbish Removal, All Island Masonry Concrete, All Island Masonry Concrete, d/b/a All Island Mason Contractors, Inc., Belco Enterprises, Inc., Brinic Corporation, Oakland Contracting Corp., and Paul Michael Bellinato allegedly owned and operated the premises. By its answer, Belco Enterprises, Inc. (hereinafter Belco) admits ownership of the property (*see* CPLR 3018 [a]; *Santiago v County of Suffolk*, 280 AD2d 594, 720 NYS2d 540 [2d Dept 2001]). By order dated February 18, 2020, the court, inter alia, granted both the unopposed motion by All Island Recycle and Rubbish Removal (hereinafter All Island) for an order pursuant to CPLR 3211 (a) (8), and the unopposed cross-motion by Bellinato for, in effect, an order pursuant to CPLR 3211 (a) (8), based on lack of personal jurisdiction over them. By order dated September 17, 2020, the court, in part, denied plaintiff's motion for an order pursuant to CPLR 2211, granting leave to reargue and renew All Island's prior motion. To date, All Island Masonry Concrete, All Island Masonry Concrete, d/b/a All Island Mason Contractors, Inc., and Oakland Contracting Corp. have not answered the complaint or otherwise appeared in this action.

Belco now moves for summary judgment dismissing the complaint and cross claims against it. Belco contends, among other things, that it did not own the payload loader at issue, and that it did not control direct, or supervise the decedent's work.¹ In support of its motion, Belco submits, inter alia, the affidavit and deposition transcript of Bellinato.

At his deposition testimony, Bellinato testified that he was a shareholder in Belco in 2016, and that he did not hold an officer position. He "believe[d]" that he was Brinic's president as well. Subsequent to his deposition, Belco attests in his affidavit that he is Belco's "Chief Executor Officer." During his deposition, Bellinato described the subject premises as a yard used to screen topsoil and mulch, which he reiterates in his affidavit. His deposition testimony and affidavit indicate that, at the time of the incident, Belco owned the subject premises, both All Island and Brinic were tenants thereof, and Belco had no employees. Bellinato testified at his deposition that he thought that All Island owned the payload loader at issue, and that he "guess[ed]" that he was responsible for it in 2016. By his affidavit, Bellinato clarifies that Belco did not own the subject payload loader.

Bellinato also attested to his familiarity with the decedent during his deposition, which he reiterates in his affidavit. Bellinato stated that the decedent was a contractor servicing a screening machine on premises in October 2016. Similarly, plaintiff testified at her deposition that the decedent was self-employed in the business of repairing heavy machinery at the time of the accident.

¹ While Belco addresses Labor Law §§ 200, 240 (1), and 241 (6) at length in its moving papers, plaintiff's only attempt to allege causes of action based on violations of those Labor Law provisions was in the bill of particulars, and plaintiff concedes that she does not assert any Labor Law claims.

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“Where, as here, the plaintiff is a worker whose claim is based upon premises liability, the landowner’s duty is to provide the worker with a safe place to work” (*Rojas v 1000 42nd St., LLC*, 159 AD3d 1024, 1025, 72 NYS3d 568, 569 [2d Dept 2018]; see *Wejs v Heinbockel*, 142 AD3d 990, 37 NYS3d 569 [2d Dept 2016], *lv denied* 28 NY3d 911, 47 NYS3d 227 [2016]). “Liability on common-law negligence . . . ‘generally falls into two broad categories: instances involving the manner in which the work is performed, and instances in which workers are injured as a result of dangerous or defective premises conditions at a work site’ ” (*Nusio v Legend Autorama, Ltd.*, 219 AD3d 842, 843, 196 NYS3d 87, 90 [2d Dept 2023], quoting *Korostynskyy v 416 Kings Hwy.*, 136 AD3d 758, 759, 24 NYS3d 747, 748 [2d Dept 2016]; *Cantalupo v Arco Plumbing & Heating, Inc.*, 194 AD3d 686, 689, 148 NYS3d 224, 228-229 [2d Dept 2021]). “[W]here a claim arises out of alleged dangers or defects in the means and methods of the work, an owner may be held liable for common-law negligence . . . only if he or she ‘had the authority to supervise or control the performance of the work’ ” (*Walsh v Kenny*, 219 AD3d 1555, 1557, 198 NYS3d 90, 93 [2d Dept 2023], quoting *Medina-Arana v Henry St. Prop. Holdings, LLC*, 186 AD3d 1666, 1668, 131 NYS3d 110, 144 [2d Dept 2020]; *Valencia v Glinski*, 219 AD3d 541, 545, 194 NYS3d 111, 115 [2d Dept 2023]). Evidence of mere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common-law negligence (see *Flores v Crescent Beach Club, LLC*, 208 AD3d 560, 173 NYS3d 574 [2d Dept 2022]; *Dos Santos v STV Engrs., Inc.*, 8 AD3d 223, 778 NYS2d 48 [2d Dept 2004], *lv denied* 4 NY3d 702, 790 NYS2d 648 [2004]). A defendant is not obligated to blindly accept a plaintiff’s categorization of an accident as either a method and manner case or a dangerous condition case, or both and may establish, as part of its prima facie showing, that the accident falls into one of the two broad categories of cases under the common law (see *Rodriguez v HY 38 Owner, LLC*, 192 AD3d 839, 143 NYS3d 411 [2d Dept 2021]; *Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 87 NYS3d 189 [2d Dept 2018]).

Bellco established its prima facie entitlement to summary judgment dismissing the complaint and cross claims against it. Bellco demonstrated, inter alia, that the accident was not caused by a dangerous condition on its premises, but rather the method and manner of the work (see *Lopez v Halletts Astoria LLC*, 205 AD3d 573, 169 NYS3d 282 [1st Dept 2022]; *Boody v El Sol Contr. & Constr. Corp.*, 180 AD3d 863, 116 NYS3d 586 [2d Dept 2020]; *Calvert v Duggan & Duggan Gen. Contr.*, 159 AD3d 1490, 73 NYS3d 331 [4th Dept 2018], *lv denied* 31 NY3d 912, 81 NYS3d 371 [2018]; see also *Poole v Ogiejko*, 62 AD3d 977, 880 NYS2d 123 [2d Dept 2009]). The evidence submitted by Bellco indicates, among other things, that the decedent, who was at the premises to repair heavy machinery, was struck by a payload loader operated by Heafy, and that Bellco neither owned the payload loader at issue nor had any employees at the time of the accident. Bellco further demonstrated, prima facie, that it exercised no supervision or control over the injury-producing work (see *Argueta v City of New York*, 223 AD3d 862, 204 NYS3d 547 [2d Dept 2024]; *Mitchell v 148th St. Jamaica Condominium*, 221 AD3d 596, 198 NYS3d 396; *Calvert v Duggan & Duggan Gen. Contr.*, 159 AD3d 1490, 73 NYS3d 331; *Babcock v Orange & Rockland Util., Inc.*, 179 AD3d 882, 114 NYS3d 662 [2d Dept 2020]; *Kandatyan v 400 Fifth Realty, LLC*, 155 AD3d 848, 63 NYS3d 681 [2d Dept 2017]).

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In opposition, plaintiff failed to raise a triable issue of fact. The affirmation of plaintiff's counsel, who lacks personal knowledge of the facts, was insufficient to raise a triable issue of fact, as was the unsworn and unaffirmed counter statement of material facts (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Cano v Mid-Valley Oil Co., Inc.*, 151 AD3d 685, 57 NYS3d 494 [2d Dept 2017]). Bellinato's deposition prior testimony that he was not an officer of Belco, and that he did not know who held officerships therewith was not inconsistent with the statement in his affidavit regarding his position in Belco at the time his affidavit was executed (*see Nusio v Legend Autorama, Ltd.*, 19 AD3d 842, 196 NYS3d 87 [2d Dept 2023]; *Davis v Khalil*, 214 AD3d 947, 186 NYS3d 314 [2d Dept 2023]). "Where an affidavit can be reconciled with prior testimony, it cannot be regarded as merely a self-serving allegation calculated to contradict an admission made in the course of previous testimony" (*Clemente v 205 W. 103 Owners Corp.*, 180 AD3d 516, 517-518, 119 NYS3d 109, 111 [1st Dept 2020], quoting *Kalt v Ritman*, 21 AD3d 321, 323, 800 NYS2d 168, 170 [1st Dept 2005] [internal quotation marks and citations omitted]; *see Boggs v City of New York*, 135 AD3d 583, 22 NYS3d 858 [1st Dept 2016]). Moreover, "New York law disfavors disregard of the corporate form" (*Cortlandt St. Recovery Corp. v Bonderman*, ___ AD3d ___, 2024 NY Slip Op 01250 [1st Dept 2024], quoting *Sutton 58 Assoc. LLC v Pilevsky*, 189 AD3d 726, 729, 137 NYS3d 359, 362 [1st Dept 2020]; *Inner Harbor Phase I L.P. v COR Inner Harbor Co. LLC*, 211 AD3d 1475, 1478, 182 NYS3d 821, 825 [4th Dept 2022]), and plaintiff provides no basis for the court to disregard Belco's corporate form. Therefore, evidence that Brinic, rather than All Island, owned the subject payloaders is immaterial here. The court has reviewed plaintiff's remaining contentions and determined them to be unavailing.

Accordingly, Belco's motion is granted.

Anything not specifically granted herein is hereby denied.

The foregoing constitutes the Decision and **Order** of the Court.

Dated: 3.28.24


 LINDA KEVINS, JSC

____ FINAL DISPOSITION X NON-FINAL DISPOSITION