

Nill v Ahmed
2024 NY Slip Op 35646(U)
October 8, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 602134/2020
Judge: Joseph C. Pastorella
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX No. 602134/2020
 CAL. No. 202400149OT

SUPREME COURT - STATE OF NEW YORK
 I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
 Justice of the Supreme Court

MOTION DATE 3/6/24 (003)
 MOTION DATE 5/1/24 (004)
 MOTION DATE 5/1/24 (005)
 ADJ. DATE 6/5/24
 Mot. Seq. # 003 MG
 Mot. Seq. # 004 MG
 Mot. Seq. # 005 MD

-----X
 JEFFREY NILL and BARBARA NILL,
 Plaintiffs,

- against -

ZAHEER AHMED, M.D. and GOLD COAST
 STANDARD, LLC,
 Defendants,

DAVIS & FERBER, LLP
 Attorney for Plaintiffs
 1345 Motor Parkway
 Islandia, New York 11749

RUSKIN MOSCOU FALTISCHEK, P.C.
 Attorney for Defendants/Third-Party Plaintiff
 1425 RXR Plaza
 East Tower, 15th Floor
 Uniondale, New York 11566

-----X
 GOLD COAST STANDARD, LLC,
 Third-Party Plaintiff,

- against -

NILL CONTRACTING INC.,
 Third-Party Defendant.

CONNORS & CONNORS, P.C.
 Attorney for Third-Party Defendant
 766 Castleton Avenue
 Staten Island, New York 10310

-----X
 Upon the following papers read on these motions for summary judgment and to disqualify defendants' counsel: Notice of Motion and supporting papers by defendant Zaheer Ahmed, M.D., dated February 14, 2024; Notice of Motion and supporting papers by third-party defendant Nill Contracting Inc., dated March 27, 2024; Notice of Cross-Motion and supporting papers by plaintiffs, dated April 12, 2024; Answering Affidavits and supporting papers by plaintiff, dated April 12, 2024; Answering

Nill v Ahmed
Index No. 602134/2020
Page 2

Affidavits and supporting papers by defendants, dated May 29, 2024; Replying Affidavits and supporting papers by plaintiff, dated June 4, 2024; Replying Affidavits and supporting papers by defendants, dated June 4, 2024; Other Memoranda of Law; it is

ORDERED that the motion by defendant Zaheer Ahmed, M.D., the motion by third-party defendant Nill Contracting, Inc., and the motion by plaintiff are consolidated for the purpose of this determination; and it is further

ORDERED that the motion (003) by defendant Zaheer Ahmed, M.D., for summary judgment dismissing the claims against him is granted; and it is further

ORDERED that the motion (004) by third-party defendant Nill Contracting Inc. for summary judgment dismissing the third-party claims against it is granted; and it is further

ORDERED that the motion (005) by plaintiffs for an order disqualifying defendants' counsel is denied.

Plaintiff Jeffrey Nill commenced this action to recover damages for personal injuries he allegedly sustained on November 13, 2019, while working on the renovation of a home located at 2 Yens Way, Nissequogue, New York. Plaintiff alleges that his company, Nill Contracting Inc., was hired to perform roofing work at the subject premises, and that while he was working on the outside of the premises, he stepped backwards into a hole and sustained injuries. Defendant Zaheer Ahmed, M.D. ("Ahmed"), is the owner of the subject premises. Defendant Gold Coast Standard, LLC ("Gold Coast") was the general contractor for the renovation of the premises. By his complaint, plaintiff alleges causes of action for negligence and for violations of Labor Law §§ 240 and 241 against defendants. The complaint also contains a derivative cause of action for loss of services, society and consortium on behalf of Barbara Nill.

Ahmed moves for summary judgment dismissing plaintiff's claims against him based on the arguments that he is not subject to liability under the Labor Law, and that he did not create or have actual or constructive notice of the condition which allegedly caused the accident. In support of his motion, Ahmed submits, inter alia, copies of the pleadings, the plaintiff's deposition testimony, his own affidavit, and an affidavit by Richard Hartig of Gold Coast.

The proponent of a summary judgment motion 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 (*see Alvarez v Prospect Hosp.*, 68 NY2d 320; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395). 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.*, 64 NY2d 851). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must offer evidence in admissible form, and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557).

Nill v Ahmed
Index No. 602134/2020
Page 3

Ahmed's motion for summary judgment dismissing the complaint against him is granted. Ahmed has submitted undisputed evidence that the single-family residence in question was being constructed solely for residential use, and that he neither directed nor controlled the work being performed there at the time of the accident (*see Sanders v Sanders-Morrow*, 177 AD3d 920; *Diaz v Trevisani*, 164 AD3d 750; *Kosinski v Brendan Moran Custom Carpentry, Inc.*, 138 AD3d 935). Owners of a one- or two-family dwelling are subject to liability under Labor Law §§ 240 (1) and 241 (6) only if they directed or controlled the work being performed (*see Sanders v Sanders-Morrow*, 177 AD3d 920; *Kosinski v Brendan Moran Custom Carpentry, Inc.*, 138 AD3d 935; *Tomecek v Westchester Additions & Renovations, Inc.*, 97 AD3d 737). "The phrase 'direct or control' as used in those statutes is construed strictly and refers to the situation where the owner supervises the method and manner of the work" (*Torres v Levy*, 32 AD3d 845, 846 [internal citations omitted]; *see also Diaz v Trevisani*, 164 AD3d 750; *Tomecek v Westchester Additions & Renovations, Inc.*, 97 AD3d 737).

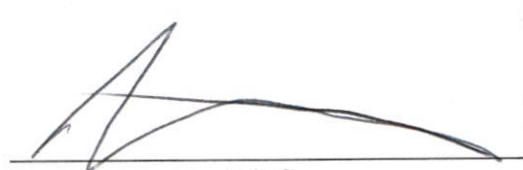
Ahmed has also established prima facie entitlement to summary judgment with respect to plaintiff's claims against him under common-law negligence. The evidence submitted in support of Ahmed's motion demonstrates that he did not create or have actual or constructive notice of the alleged dangerous condition at the premises (*see Mondone v Lane*, 106 AD3d 1062; *Tomecek v Westchester Additions & Renovations, Inc.*, 97 AD3d 737). In this regard, Ahmed states in his affidavit that he was not living at the subject premises while it was being renovated, and that he did not visit the premises with any regularity during that time. Ahmed further states that he did not create the hole into which plaintiff allegedly fell, nor did he have notice of that condition prior to the accident. In opposition to Ahmed's prima facie showing of entitlement to summary judgment, plaintiff failed to raise an issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557). Accordingly, plaintiff's claims against Ahmed are dismissed.

Nill Contracting's unopposed motion for summary judgment dismissing the claims against it in this matter is granted. Gold Coast commenced a third-party action against Nill Contracting, alleging claims for common-law indemnification, contribution and negligent training and supervision. "Absent an express indemnification agreement, or a 'grave injury' as enumerated in Workers' Compensation Law § 11, an employer's liability for an employee's on-the-job injury is ordinarily limited to workers' compensation benefits" (*Fleming v Graham*, 10 NY3d 296, 299; *see also Velazquez-Guadalupe v Ideal Bldrs. & Constr. Servs., Inc.*, 216 AD3d 63). In addition, claims for common-law indemnification and contribution are statutorily barred against an employer in the absence of a grave injury (*see Fleming v Graham*, 10 NY3d 296; *Velazquez-Guadalupe v Ideal Bldrs. & Constr. Servs., Inc.*, 216 AD3d 63; *Ironshore Indem., Inc. v W&W Glass, LLC*, 151 AD3d 511; *Grech v HRC Corp.*, 150 AD3d 829). Here, it is undisputed that Nill Contracting is owned by plaintiff, and that plaintiff was working for Nill Contracting at the time of the accident. As it is further undisputed that plaintiff did not suffer a grave injury as a result of the alleged accident, the third-party claims against Nill Contracting are dismissed (*see Douglas v Roseland Dev. Assoc., LLC*, 225 AD3d 467; *Velazquez-Guadalupe v Ideal Bldrs. & Constr. Servs., Inc.*, 216 AD3d 63; *Masiello v 21 E. 79th St. Corp.*, 126 AD3d 596).

Nill v Ahmed
Index No. 602134/2020
Page 4

Plaintiffs' motion, incorrectly denominated as a cross motion, to disqualify Ruskin Moscou Faltischek, P.C., from representing defendants in this action is denied. The disqualification of an attorney is a matter that rests within the discretion of the trial court (*see Falk v Gallo*, 73 AD3d 685; *Nationscredit Fin. Servs. Corp. v Turcios*, 41 AD3d 802). Generally, a party is entitled to be represented by counsel of his or her own choosing, and that valued right should not be abridged absent a clear showing that disqualification is warranted (*see S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437; *Goldstein v Held*, 52 AD3d 471; *Zutler v Drivershield Corp.*, 15 AD3d 397). Rule 1.7 (a) (1) of the Rules of Professional Conduct (22 NYCRR 1200.0) provides that a lawyer shall not represent a client if a reasonable lawyer would conclude that "the representation will involve the lawyer in representing differing interests." Pursuant to rule 1.7 (b) of the Rules of Professional Conduct (22 NYCRR 1200.0), the potential conflict may be waived if the lawyer reasonably believes that he or she will be able to provide competent and diligent representation to each affected client, the representation is not prohibited by law, the representation does not involve the assertion of a claim by one client against the other in the same litigation, and each affected client gives informed consent, confirmed in writing. Here, plaintiffs have failed to demonstrate that the interests of the defendants are adverse to each other. In addition, in opposition to plaintiffs' motion, defendants' counsel established the necessary criteria for waiver of any potential conflict, including that each defendant provided informed, written consent to their representation by Ruskin Moscou Faltischek, P.C. As plaintiffs failed to submit evidence sufficient to demonstrate that disqualification of Ruskin Moscou Faltischek, P.C., is warranted, their motion is denied (*see Koumantaros v Hephaistos Developing, LLC*, 203 AD3d 907).

Dated: OCTOBER 8, 2024


HON. JOSEPH C. PASTORELLA

 FINAL DISPOSITION X NON-FINAL DISPOSITION