

Posa v David Zwirner, Inc.

2012 NY Slip Op 31043(U)

April 16, 2012

Sup Ct, NY County

Docket Number: 114560/08

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Saliann Scarpulla
Justice

PART 19

Posa

INDEX NO. 114560/08

-v-

MOTION DATE _____

David Zwirner, Inc.

MOTION SEQ. NO. 006

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s) _____

Answering Affidavits — Exhibits _____ No(s) _____

Replying Affidavits _____ No(s) _____

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the accompanying decision paper

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

✓

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Dated: 4/16/12

Saliann Scarpulla, J.S.C.
SALIANN SCARPULLA

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
JOSEPH J. POSA,

Plaintiff,

- against-

Index No.: 114560/08
Submission Date: 12/21/2011

DAVID ZWIRNER, INC., DAVID ZWIRNER,
BIG SHOT ELECTRIC CORP., and
E. FITZGERALD ELECTRIC CO.,

Defendants.

----- X
DAVID ZWIRNER,

Third-Party Plaintiff,

- against-

EUROSTRUCT, INC.,

Third-Party Defendant.

FILED

APR 19 2012

NEW YORK
COUNTY CLERK'S OFFICE

----- X

For Plaintiff:
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For Defendant/Third Party Plaintiff David Zwirner:
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For Defendant Big Shot Electric Corp.:
O'Connor Redd LLP
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White Plains, NY 10601

Papers considered in review of this motion for summary judgment:

- Aff in Support 1
- Aff in Opposition 2
- Notice of Cross-Motion 3
- Aff in Partial Opposition 4
- Aff in Opposition to
Cross-Motion 5

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendant David Zwirner
("Zwirner") moves for summary judgment dismissing the complaint and cross claims

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against him, or, in the alternative, for summary judgment on his third-party claim for contractual indemnification asserted against third-party defendant Eurostruct, Inc. (“Eurostruct”). Defendant Big Shot Electric Corp. (“Big Shot”) cross-moves for summary judgment dismissing the complaint and cross-claims against it.

This action arises from injuries plaintiff Joseph J. Posa (“Posa”) sustained on September 16, 2008. Posa alleges that he fell from a ladder while working on a construction project (the “project”) at 232/234 East 13th Street in Manhattan (the “premises”). Zwirner is the owner of the premises.

At the time of the accident, Posa was employed with third-party defendant Eurostruct, Inc. (“Eurostruct”), the project’s general contractor. Big Shot subcontracted with Eurostruct to perform electrical work on the project, including installing temporary lighting on each floor of the premises.

At his deposition, Posa testified that the accident occurred while he was framing a fireplace on the third floor. Posa had been working on that floor and under similar lighting conditions for two days before the accident. According to Posa, he fell from the fifth rung of a ladder after shooting a nail from a powder actuated gun. As Posa was attempting to catch his balance, his right hand hit a piece of steel that was fastened to the wall. Posa testified that he knew he cut his hand on the steel because he later saw the piece of steel with his blood on it.

Posa further testified that he had checked to make sure the ladder was stable, but because it was so dark in the room he was unable to see debris under the ladder.

However, Posa was not certain whether he placed the ladder on the debris. According to Posa, the lack of lighting contributed to his accident because he could not see the piece of steel that cut his hand and because he was unable to ensure proper footing of the ladder.

Noel Frett ("Frett"), Big Shot's General Foreman on the project, testified that he was not aware of any complaints about the third floor lighting conditions.

Posa commenced this action in October 2008, pleading causes of action under Labor Law §§ 240, 241 and 200, and common law negligence. On September 17, 2009, the Court dismissed the complaint as to DZI, Zwirner's art gallery, ruling that DZI had no connection to the project.

Thereafter, Posa moved to renew opposition to the motion to dismiss, arguing that the deposition testimony of Melanie Adams, Zwirner's personal assistant, indicated that she acted on behalf of DZI at the work site. On March 31, 2011, the Court denied Posa's motion to renew, ruling that Melanie Adams's testimony did not establish that she exercised sufficient supervision or control over the work site to impose Labor Law liability on DZI as an agent of David Zwirner.

Zwirner now moves for summary judgment to dismiss the complaint and cross-claims against him, or, in the alternative, for summary judgment on his third-party claim for contractual indemnification asserted against Eurostruct. Zwirner argues that Posa's

[*5]
Labor Law §§ 240 and 241 causes of action should be dismissed because Zwirner is exempt from liability as the owner of a one-family dwelling. Zwirner further maintains that the Labor Law § 200 and common law negligence claims against him should be dismissed because there is no evidence that he controlled Posa's work site, or that he had notice of the alleged dangerous condition.¹

In its cross-motion, Big Shot argues that it is neither an owner, contractor or agent within the meaning of the Labor Law, thus it may not be held liable under Labor Law §§ 240 and 241(6). Big Shot argues that is not liable under Labor Law § 200 or common law negligence because it neither controlled Posa's work site nor had notice of the alleged dangerous condition. Big Shot further contends that Posa's testimony indicates that there was adequate lighting at the premises despite his allegations to the contrary.

In opposition to Zwirner's motion, Posa argues that there are issues of fact as to Zwirner's control over the work site because Posa testified that Zwirner's personal assistant was directing workers at the premises. In opposition to Big Shot's motion, Posa maintains that there are issues of fact as to whether Big Shot had notice of the alleged defect.²

Discussion

¹Eurostruct opposes that portion of Zwirner's motion in which he seeks summary judgment on his claim for contractual indemnification asserted against Eurostruct.

²Posa does not address Big Shot's argument that it cannot be held liable under Labor Law §§ 240 or 241(6) because it was not the project's owner, contractor or agent.

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Here, there are triable issues of fact precluding summary judgment for Zwirner on the Labor Law §§ 240 and 241 causes of action. Under Labor Law §§ 240 and 241, owners of one or two-family dwellings are liable only if they directed or controlled the project's work. *Affri v. Basch*, 13 N.Y.3d 592, 595 (2009). The parties do not dispute that the premises was a single-family dwelling. Further, Zwirner affirms that he had no contact with Posa during the project or controlled Posa's work site. However, Posa testified that Melanie Adams, Zwirner's personal assistant, directed workers in the removal of debris and location of lighting at the premises, and that he fell because of debris around his ladder and inadequate lighting at the premises. Though this Court previously ruled that Melanie Adams provided no testimony indicating that she had the authority to direct, supervise, or control the construction work at the subject premises, Posa's testimony creates a triable issue of fact precluding summary judgment.

Moreover, Zwirner has failed to make a *prima facie* showing of entitlement to summary judgment on the Labor Law § 200 and common law negligence causes of

action. As this injury arose out of an alleged dangerous condition of the premises, Zwirner is liable under § 200 if he created or had notice of the condition. *See Slikas v Cyclone Realty, LLC*, 78 A.D.3d 144, 147 (2d Dept. 2010). Because Zwirner has failed to present any evidence outside of his attorney's affirmation that he did not have notice of the alleged dangerous condition, his motion to dismiss the § 200 and common law negligence causes of action is also denied. *See Stainless, Inc. v. Employers Fire Ins. Co.*, 69 A.D.2d 27, 31 (1st Dept. 1979).

Further, Zwirner submits no evidence in support of the branch of his motion seeking summary judgment on his third-party claim for contractual indemnification asserted against Eurostruct. He fails to submit the third-party pleadings or the contract upon which the claim for contractual indemnification is based. As such, that branch of his motion is denied.

On its cross-motion, Big Shot is entitled to summary judgment dismissing the Labor Law § 240, 241 and 200 causes of action asserted against it. The Labor Law applies only to owners, contractors or agents. *See Rodriguez v. New York City Hous. Auth.*, 194 A.D.2d 460, 461 (1st Dept. 1993). The parties do not dispute that Zwirner, not Big Shot, was the owner of the premises. Big Shot was a subcontractor on the project, thus was not a "contractor" under the Labor Law. *See Nowak v. Smith & Mahoney, P.C.*, 110 A.D.2d 288, 289-90 (3d Dept. 1985) (To be liable under the Labor Law as a "contractor," an entity must have the duty and power to choose subcontractors and

enforce a project's safety standards.). Further, because Posa testified that no electrician directed his work, Big Shot was not an "agent" under the Labor Law. *See Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 318 (1981) ("When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor.").

However, issues of fact remain as to Big Shot's common law negligence liability. Big Shot was responsible for providing lighting for the project, and Posa testified that inadequate lighting partially caused his fall. In response, Big Shot has not presented any evidence to establish that it was free from negligence. *See Urban v. No. 5 Times Sq. Dev., LLC*, 62 A.D.3d 553, 554 (1st Dept. 2009).³ Accordingly, Big Shot's motion is denied as to the common law negligence cause of action.

In accordance with the foregoing, it is hereby

ORDERED that defendant David Zwirner's motion for summary judgment, or, in the alternative, for summary judgment on his third-party claim for contractual indemnification asserted against third-party defendant Eurostruct, Inc. is denied; and it is further

ORDERED that defendant Big Shot Electric Corp.'s motion for summary

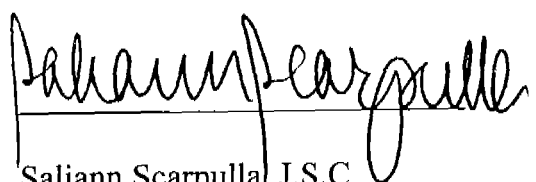
³Big Shot argues that Posa's claims are "illusory" because he previously worked under the same lighting conditions, could see the debris under the ladder when he fell, and could read his plans. This argument, however, goes to credibility and is an issue for a jury to decide at trial. *See Barber v. Roger P. Kennedy Gen. Contrs., Inc.*, 302 A.D.2d 718, 719-20 (3d Dept. 2003).

judgment is granted insofar as the Labor Law §§ 240, 241 and 200 causes of action against it are dismissed, and is otherwise denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
April 16, 2012

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Saliann Scarpulla, J.S.C.

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