

Urquiza v Park & 76th St Inc.
2016 NY Slip Op 32423(U)
December 12, 2016
Supreme Court, New York County
Docket Number: 158295/2013
Judge: Manuel J. Mendez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

ANTONIO URQUIZA aka ANTONIO PELAGIO
URQUIZA CARDENAS by MARTHA PARADA ARDAYA
and STIVINS A. SANGUINO, as Co-Administrators of the
Estate of ANTONIO URQUIZA aka ANTONIO PELAGIO
URQUIZA CARDENAS,

INDEX NO. 158295/2013
MOTION DATE 11/02/2016
MOTION SEQ. NO. 017
MOTION CAL. NO.

Plaintiffs,

-against-

PARK AND 76TH ST INC., MARY L. CARPENTER &
EDMUND L. CARPENTER, NORDIC CUSTOM BUILDERS INC.,
MITCHELL STUDIO, LLC, CONSULTING ENGINEERING
SERVICES INCORPORATED, MELTZER/COSTA & ASSOCIATES,
ARCHITECTURE & ENGINEERING, LLP, GUMLEY-HAFT LLC,
AND HERIBERTO SARRANO d/b/a CPS COMPANY
(exact names being unknown), GRACE, RYAN and MAGNUS
MILLWORK, LLC., CUMMINS PAINTING SPECIALISTS INC.,
ARTHUR C. KLEM, INC., ALKLEM PLUMBING INC.,
AA SERVICES, LLC, B & H RESTORATION, INC., STANLEY
SCHOEN, INC., ROSE DEMOLITION & CARTING, INC., GT
CARPENTRY, LLC, CONNECTICUT THERMOFOAM LLC
a/k/a CONNECTICUT THERMOFOAM LIMITED LIABILITY
COMPANY, ERIN CUSTOM INTERIORS INC., W.M.
SANFARDINO ELECTRIC LTD, ALL-BORO FLOOR SERVICE,
INC., POLAR MECHANICAL CORP., GRANITE TOPS, INC.,
GRANITE TOPS HOLDINGS, INC., PLASTER WORKS INC.,
PROGRESSIVE MARBLE & GRANITE LLC,

Defendants.

The following papers, numbered 1 to 13 were read on this motion for summary judgment, and cross-motion to compel discovery and for sanctions.

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: X Yes [] No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Cummins Painting Specialists Inc.'s, (herein "Movant") motion for summary judgment dismissing all claims and cross-claims asserted against it, is granted, and Plaintiff's cross-motion to compel discovery and for sanctions is denied.

This action was commenced by the Plaintiffs for the wrongful death and conscious pain and suffering of the Plaintiff-Decedent Antonio Urquiza (herein "the Decedent"), when the Decedent fell from a third floor window while performing wood-staining work in the course of his employment, at 840 Park Avenue, Apartment 3/4A, New York, New York (herein "the Apartment"). The Complaint and Bill of Particulars assert claims for negligence, and violations of Labor Law §§200, 240(1), & 241(6), and allege, in relevant part, that the Defendants were negligent in utilizing an unstable board covered with slippery paper on a window ledge (herein "the condition") where Decedent stood while working in the library causing him to fall, and for failure to provide the proper safety devices. (Mot. Exhs. A & D). Issue was joined and the Defendants cross-claimed against each other for indemnification and/or contribution.

Movant now moves for summary judgment to dismiss the Complaint and all Cross-Claims against it.

Movant contends that it was hired as a subcontractor by the General Contractor, Defendant Nordic Custom Builders Inc. (herein "Defendant Nordic"), solely to paint the interior of the Apartment, that it was not the owner of the building, and was not the general contractor for the construction work at the Apartment. That Movant did not employ or owe a duty of care to the Decedent, and that it did not direct or supervise Decedent's work. Movant also contends that there is no evidence that any work performed by Movant contributed in anyway to the accident, and that it was not performing any work in the library where Decedent was working when he fell.

Movant further contends that pursuant to its contract and an invoice with Nordic, Movant was not hired to perform the staining wood work that the Decedent and his employer were hired to do. (Mot. Exhs F & G). That on the day of the accident only one of Movant's employees was on site, that this employee was working in the living room, and that no employees of Movant were in the library at the time of the accident.

Plaintiffs oppose the motion arguing that Movant has failed to submit any admissible evidence as to exactly what its employee, Heriberto Serrano (herein "Serrano"), was doing at the time of the accident, that Movant has failed to establish whether or not the Decedent's employer, Stephen Gamble, Inc., was a subcontractor of Movant, that Movant was to produce Serrano for a deposition as a witness with knowledge, but that Movant moved for summary judgment before Serrano could be produced.

Plaintiffs argue that the Affidavit of Owen Cummins, the corporate-principal of Movant, fails to provide prima facie evidence because his account of the circumstances was not based on personal knowledge. That Movant does not provide any evidence that its employees were not working in the library and/or supervising, directing, controlling or involved with the work Decedent was performing at Nordic's

request. That Serrano needs to be deposed because, according to his statement to Police (Aff. In Opp. Exh. B), he has personal knowledge of the circumstances surrounding the accident, would have knowledge of the work done by Movant's employees in the library, and would have knowledge of whether or not Movant had any direction, control, or supervision over Decedent's work. Additionally, Plaintiffs argue that the testimony of David C. Gamble, given at Decedent's Worker's Compensation Hearing, raises an issue of fact as to who controlled the work being done in the library. Plaintiffs contend that without the necessary discovery, such as a deposition of Serrano, this motion should be denied as premature.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. (Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp., 77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

Labor Law § 200 "codifies the common law duty of an owner or employer to provide employees with a safe place to work" (Jock v. Fien, 80 NY2d 965, 590 NYS2d 878, 605 NE2d 365 [1992]). Labor Law §200 requires "that the party to be charged with that obligation have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (Rizzuto v. L.A. Wenger Contr. Co., 91 N.Y.2d 343, 352, 693 N.E.2d 1068, 670 N.Y.S.2d 816 [1998] citing to, Russin v. Louis N. Picciano & Son, 54 N.Y.2d 311, 317, 429 N.E.2d 805, 445 N.Y.S.2d 127 [1981]). "Where a plaintiff's injuries arise not from the manner in which the work was performed, but from a dangerous condition on the premises, a defendant may be liable under Labor Law § 200 if it either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition" (Garcia v. Market Associates, 23 A.D.3d 661, 998 N.Y.S.2d 193, 197 [2nd Dept, 2014]).

Movant is entitled to summary judgment on this claim as it was not the Owner of the premises, and was not Decedent's employer. Movant was only hired as a sub-contractor to provide painting services. The contract is only between Nordic and Movant (Mot. Exh. F), and the invoice from Movant to Nordic details the scope of the work to be painting services for the entire Apartment, including the library, except for staining to be done by others. (Mot. Exh. G). Plaintiffs provide no proof that Movant hired Decedent's employer as a sub-contractor, or that Movant had the authority to control or supervise the manner in which the Decedent performed his work. (See Mot. Exh. G).

Labor Law §240(1) imposes strict liability on “owners, contractors, and their agents” when they fail to provide adequate safety equipment and that failure causes a worker’s injury in a gravity-related accident (*Fabrizi v. 1095 Ave. Of the Ams., L.L.C.*, 22 N.Y.3d 658, 664-665, 8 N.E.3d 791, 985 N.Y.S.2d 416 [2014]).

Labor Law § 241(6) “requires owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with specific safety rules and regulations promulgated by the Commissioner of the Department of Labor” (*Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 501-502, 601 N.Y.S.2d 49, 618 N.E.2d 82 [1993]). This duty is nondelegable and “to the extent that plaintiff has asserted a viable claim under Labor Law § 241(6), he need not show that defendants exercised supervision or control over his worksite in order to establish his right of recovery” (*Id.* at 502). “§ 241(6) imposes a nondelegable duty upon an owner or general contractor to respond in damages for injuries sustained due to another party’s negligence in failing to conduct their construction, demolition or excavation operations so as to provide for the reasonable and adequate protection of the persons employed therein” (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 N.Y.2d 343, at 350, 670 N.Y.S.2d 816, 693 N.E.2d 1068 [1998]).

For the same reasons stated above, Movant is entitled to summary judgment on the negligence, and §§240(1) and 241(6) claims. The Worker’s Compensation Hearing does not raise an issue of fact. David C. Gamble is Gamble’s site manager who managed the interior wood staining work at the Apartment, and he testified that Gamble was contacted by Nordic to perform this work, and that the invoices indicating the scope of the work were sent from Gamble to Nordic. (*Aff. In Opp. Exh. D* at 9-10). That the Gamble foreman who was on the site daily was Decedent’s brother Marcelo Urquiza, and that the site supervisor was Declan O’Meara from Nordic. (*Id.* at 11 & 14). Mr. Gamble also testified that his workers were paid by Gamble, and that they never became employees of anyone else. (*Id.* at 22).

Plaintiffs fail to rebut Movant’s entitlement to summary judgment. Plaintiffs attach only their attorney’s affidavit, and no affidavit of an individual with personal knowledge, which is insufficient to raise an issue of fact. “The attorney’s affidavit in opposition which discloses no evidentiary facts but deals only in speculation and surmise is insufficient to defeat a motion for summary judgment.” (*Forray v. New York Hosp.*, 101 a.D.2d 740, 475 N.Y.S.2d 57 (1st Dept. 1984)).

Therefore, Movant cannot be found liable under §§200, 240(1), or 241(6), and no proof has been offered to rebut Movant’s contentions that its employees did not create the condition. Plaintiff’s argument that there is an issue of fact because Movant’s contract with Nordic included painting work inside the library, is nothing more than speculative.

Plaintiffs also cross-move for an Order compelling Movant to produce Serrano for a deposition, and for a hearing for sanctions against Movant. Plaintiffs contend

that sanctions should be imposed because Movant made this motion for summary judgment to thwart Serrano’s scheduled deposition. Plaintiffs also argue that the Owens Affidavit contains false and fabricated statements when it states that none of Movant’s employees were in the area where Decedent was working when he fell, but that Serrano stated to the Police that he was sanding the doorway of the library.

Plaintiff fails to show that Movant’s conduct is frivolous as defined by 22 N.Y.C.R.R. 130-1.1(c).

Accordingly, it is hereby ORDERED that Defendant Cummins Painting Specialists Inc.’s motion for summary judgment dismissing the Complaint and all cross-claims against it, is granted, and it is further,

ORDERED, that the Complaint and all cross-claims against Defendant Cummins Painting Specialists Inc., are severed and dismissed, and it is further,

ORDERED, that the action shall continue as to the remaining defendants, and it is further,

ORDERED, that the caption in this action is amended and shall read as follows:

MARTHA PARADA ARDAYA and STIVENS A. SANGUINO,
as Co-Administrator of the Estate of ANTONIO PELAGIO
URQUIZA CARDENAS a/k/a ANTONIO URQUIZA, Deceased,
Plaintiffs,

-against-

PARK and 76TH ST., INC., MARY L. CARPENTER &
EDMUND M. CARPENTER, NORDIC CUSTOM BUILDERS, INC.,
MITCHELL STUDIO, LLC, GUMLEY-HAFT LLC, CUMMINS PAINTING
SPECIALISTS, INC., ARTHUR C. KLEM, INC., ALKLEM PLUMBING, INC.,
AA SERVICES, LLC, GT CARPENTRY LLC, CONNECTICUT
THERMOFOAM LLC, a/k/a CONNECTICUT THERMOFOAM LIMITED
LIABILITY COMPANY, ERIN CUSTOM INTERIORS, INC.,
W.M. SANFARDINO ELECTRIC LTD, AND PLASTER WORKS, INC.,
Defendants.

PARK and 76TH ST. INC., and GUMLEY-HAFT, LLC,
Third-Party Plaintiffs,

-against-

STEPHEN GAMBLE, INC.,
Third-Party Defendant.

MARY L. CARPENTER and EDMUND M. CARPENTER,
Second Third-Party Plaintiffs,

-against-

STEPHEN GAMBLE, INC.,

Third-Party Defendant/Second
Third-Party Defendant.

NORDIC CUSTOM BUILDERS, INC.,

Third Third-Party Plaintiff,

-against-
STEPHEN GAMBLE, INC.,

Third-Party Defendant/Second
Third-Party Defendant/Third
Third-Party Defendant.

MITCHELL STUDIO, LLC,

Fourth Third-Party Plaintiff,

-against-
STEPHEN GAMBLE, INC.,

Third-Party Defendant/Second
Third-Party Defendant/Third
Third-Party Defendant/Fourth
Third-Party Defendant.

and it is further,

ORDERED, that Plaintiffs' cross-motion for sanctions and to compel Defendant Cummins to produce Heriberto Serrano for a deposition, is denied, and it is further,

ORDERED, that within 20 days from the date of entry of this Order the moving party shall serve a copy of this Order with Notice of Entry on all parties appearing, and it is further,

ORDERED, that within 20 days from the date of entry of this Order a copy of this Order with Notice of Entry shall be served on the New York County Clerk's Office pursuant to e-filing protocol, and a separate copy of this Order with Notice of Entry shall be served pursuant to e-filing protocol on the Trial Support Clerk in the General Clerk's Office at genclerk-ords-non-mot@nycourts.gov, who shall amend their records and enter judgment accordingly.

ENTER:

Dated: December 12, 2016

MANUEL J. MENDEZ
J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE