Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IA Part 15
Justice

ANDREW VATIER
Plaintiff,

-against-

CELLHUT.COM INC., VERIZON WIRELESS, ZOOM WIRELESS OF GREEN ALE, INC., AWNY, a/k/a AWNY, INC., MATTEW KAPHAN, and BAWA BHASIN,
Defendants.

Index Number 2223 2010

Motion Date June 5, 2012

Motion Cal. Numbers 25 & 31

Motion Seq. Nos. 1 & 2

The following papers numbered 1 to 19 read on this motion by defendants Cellhut.com Inc., AWNY, Inc., and Bawa Bhasin for summary judgment dismissing the complaint and all cross-claims; and a motion by plaintiff Andrew Vatier for partial summary judgment on the issue of liability and for an inquest on the issue of damages.

	Papers Numbered
Notice of Motion - Affidavit in Support - Exhibits	1 - 4
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Upon the foregoing papers it is ordered that the motions are determined as follows:

This is an action to recover for personal injuries plaintiff allegedly sustained on April 7, 2009, due to violations of Labor Law §§ 200, 240 (1), 241 (6) and common-law negligence. Plaintiff has alleged that he fell from a ladder while he was working at premises located at 43 Glen Cove Road, in the County of Nassau, State of New York. At the time of the incident, defendant Mathew Kaphan ("Kaphan") owned the premises. Defendant Bawa Bhasin ("Bhasin") was the President of defendant Cellhut.com Inc., ("Cellhut") which was a wholesaler of cellular telephones and accessories. Bhasin was also the President of defendant Zoom Wireless of Greenvale, Inc. ("Zoom Wireless"), which allegedly changed its name to defendant AWNY, a/k/a AWNY, Inc. ("AWNY"), in 2008. In 2005, Bhasin signed a lease agreement on behalf of Zoom Wireless to operate a Verizon Wireless franchise at the premises. That agreement was amended in 2008 to reflect that the premises was leased by Zoom Wireless, also known as AWNY, Inc. After a fire destroyed the premises on January 7, 2009, Kaphan allegedly hired plaintiff to perform restorative construction work at the premises.

By stipulation dated April 7, 2011, the third-party action was discontinued. By stipulation dated March 15, 2012, the complaint and all cross-claims and counter-claims against defendant Verizon Wireless were also discontinued. While plaintiff has alleged that the action was also discontinued against Zoom Wireless, no proof of a stipulation of discontinuance as to this defendant has been included in his papers, nor has such a stipulation been filed with the Clerk of court. Furthermore, in a stipulation dated March 19, 2012, plaintiff attempted to discontinue the action against defendants AWNY, Cellhut and Bhasin. However, that stipulation was not signed by the attorneys for all parties in the action and, thus, is ineffective (CPLR 3217 [a][2]; *see Barker v Barker*, 295 AD2d 151 [2002]; *Siegel, Practice Commentaries, McKinney's Cons Laws of NY*, Book 7B, CPLR C3217:9), and plaintiff does not now move to discontinue the action as to the defendants (CPLR 3217[b]). Therefore, the claims against the defendants remain.

In support of the branch of their motion for summary judgment dismissing the complaint, defendants argue that they were not owners, contractors or agents of the owner or contractor and that they were out-of-possession tenants who did not hire plaintiff, direct, control or supervise plaintiff's work. Defendants must "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). "Labor Law §§ 200, 240, and 241 apply to owners, general contractors, or their agents" (*Guclu v 900 Eighth Ave. Condominium, LLC*, 81 AD3d 592, 593 [2011] [internal quotation omitted]; Labor Law §§ 200, 240, 241).

"[T]he term 'owner' is not limited to the titleholder of the property where the accident occurred and encompasses a person 'who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit'" (*Scaparo v Village of Ilion*, 13 NY3d 864, 866 [2009], quoting *Copertino v Ward*, 100 AD2d 565, 566 [1984]). A lessee that does not contract or otherwise have authority to supervise or control construction work being performed, is not an owner or agent under the Labor Law (*see Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320 [2009]). "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has the ability to control the activity which brought about the injury" (*Guclu v 900 Eighth Ave. Condominium, LLC*, 81 AD3d at 593 [internal quotation omitted]; *see Rodriguez v JMB Architecture, LLC*, 82 AD3d 949, 951 [2011]).

Defendants rely upon, *inter alia*, plaintiff's deposition testimony, the testimony of Bhasin and Kaphan, a copy of the 2005 lease agreement, and a copy of the 2008 amendment to that agreement. It is undisputed that plaintiff was retained and paid only by Kaphan to perform construction work at the premises. It is also undisputed that defendants did not hire, pay, direct or supervise any of the work which led to plaintiff's injury, and that they had no involvement in the construction at the premises. Therefore, based upon the evidence submitted, defendants have made a *prima facie* showing that they were neither owners, contractors, nor agents of the owner or contractor, and thus, that they are not subject to the Labor Law (Labor Law §§ 240, 241; *see Holifield v Seraphim, LLC*, 92 AD3d 841, 842 [2012]; *Dos Santos v STV Engrs., Inc.*, 8 AD3d 223 [2004], *lv denied* 4 NY3d 702 [2004]). The foregoing evidence has further demonstrated, *prima facie*, that defendants did not supervise or control the work giving rise to plaintiff's injury for purposes of plaintiff's Labor Law § 200 and common-law negligence claims (*see Bright v Orange & Rockland Utils.*, 284 AD2d 359, 360 [2001]). Therefore, defendants have satisfied their initial burden on this branch of their motion. In opposition, raises no triable of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Tomecek v Westchester Additions & Renovations, Inc.*, 97 AD3d 737 [2012]; *Holifield v Seraphim, LLC*, 92 AD3d at 843). Thus, the complaint is dismissed against the movants.

Defendants have also moved for summary judgment dismissing any and all cross-claims. Kaphan has alleged cross-claims against them for common-law and contractual indemnification. "Summary judgment on a claim for common-law indemnification 'is appropriate only where there are no issues of material fact concerning the precise degree of fault attributable to each party involved' " (*Coque v Wildflower Estates Developers, Inc.*, 31 AD3d 484, 489 [2006], quoting *La Lima v Epstein*, 143 AD2d 886, 888 [1988]). In light of the above determination dismissing plaintiff's Labor Law and common-law negligence claims against them, defendants have demonstrated their entitlement to the dismissal of Kaphan's cross claim for common-law indemnification (*see Mid-Valley Oil Co., Inc. v*

Hughes Network Sys., Inc., 54 AD3d 394, 395-396 [2008], *lv dismissed and denied* 12 NY3d 881 [2009]).

Turning to the branch of defendants' motion to dismiss Kaphan's cross claim for contractual indemnification against them, "[t]he right to contractual indemnification depends upon the specific language of the contract" (*Sherry v Wal-Mart Stores E., L.P.*, 67 AD3d 992, 994 [2009] [internal quotes and citation omitted]). The court will first address the cross claim for contractual indemnification against Cellhut.com Inc. Defendants' undisputed evidence has demonstrated that Cellhut.com Inc., did not operate a business at the subject premises and was not a party to the lease agreement between the parties. In opposition, no triable issues of fact have been raised (*see Mid-Valley Oil Co., Inc. v Hughes Network Sys., Inc.*, 54 AD3d at 395-396). Therefore, defendants have demonstrated that they are entitled to the dismissal of Kaphan's contractual indemnification claim against Cellhut.com Inc.

AWNY, Inc., was a party to the lease agreement by way of the 2008 amendment, and Bhasin signed the lease agreement and its 2008 amendment on behalf of Zoom Wireless, also known as, AWNY, Inc., with his personal guarantee. However, in their motion, defendants have failed to adequately address Kaphan's cross claim for contractual indemnification against AWNY, Inc., and Bhasin. While defendants have argued that AWNY, Inc., and Bhasin are not liable pursuant to the terms of the lease agreement, they have impermissibly raised this argument for the first time in their reply papers and it cannot be considered on the instant motion (*see Djoganopoulos v Polkes*, 67 AD3d 726, 727 [2009]; *Matter of Allstate Ins. Co. v Dawkins*, 52 AD3d 826, 826-827 [2008]). Thus, defendants have failed to demonstrate their *prima facie* entitlement to summary judgment on this branch of their motion.

Plaintiff now moves for partial summary judgment on the issue of liability. However, by plaintiff's own admission, this motion is untimely. Although a motion for summary judgment is untimely if it is made more than 120 days after the filing of the note of issue, a trial court may consider it for "good cause shown" (CPLR 3212[a]; *see Armentano v Broadway Mall Props., Inc.*, 48 AD3d 493, 494 [2008]). Good cause is "a satisfactory explanation for the untimeliness" (*Brill v City of New York*, 2 NY3d 648, 652 [2004]). However, plaintiff's proffered excuse that he was hoping to settle the action, is not sufficient good cause. Nor is his excuse that his untimely motion is made on his motion on nearly identical grounds as defendants' timely motion for summary judgment (*see Podlaski v Long Is. Paneling Ctr. of Centereach, Inc.*, 58 AD3d 825, 827 [2009]; *Grande v Peteroy*, 39 AD3d 590, 591-592 [2007]). Moreover, plaintiff failed to serve his motion on all parties in the action.

Accordingly, defendants' motion for summary judgment is granted only to the extent that the complaint and Kaphan's cross-claim for common-law indemnification are dismissed

against them and Kaphan's cross-claim for contractual, indemnification is dismissed only against Cellhut.com, Inc. That portion of defendants' motion which seeks dismissal of Kaplan's cross-claim for contractual indemnification against AWNY, Inc. and Bhasin is denied. Plaintiff's motion is denied in its entirety.

Dated: September 7, 2012

J.S.C.

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