[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. George J. Silver PART 10
Justice

CHINLOY, PATRICK

- v -

LINCOLN METRO CENTER PARTNERS, LP, GOTHAM ORGANIZATION, INC., GOTHAM CONSTRUCTION COMPANY, LLC, 1965 RETAIL, LLC, MILLENNIUM PARTNERS, LINCOLN WEST COMMERCIAL HOLDING CO. LLC, & LINCOLN WEST COMMERCIAL CO., LLC

INDEX NO. 112742-2008

MOTION DATE

MOTION SEQ. NO. 006

The following papers, numbered 1 to 7, were read on this motion for

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits	No(s). 1, 2
Notice of Cross-Motion— Affirmation — Affidavit(s) —Exhibits	No(s). 3
Answering Affirmation(s) — Affidavit(s) — Exhibits	No(s). 4, 5
Replying Affirmation — Affidavit(s) — Exhibits	No(s). 6,7

Upon the foregoing papers, it is ordered that the motion is

In an action to recover for personal injuries allegedly sustained during an accident on a construction site, Plaintiff Patrick Chinloy ("Plaintiff") moves for an order granting summary judgment against Defendants Lincoln West Commercial Holding Co. LLC ("Holding"), 1965 Retail LLC ("Retail"), and Gotham Construction Company, LLC ("Gotham") on the issue of liability under Labor Law Section §240(1). Defendants Lincoln Metro Center Partners, LP, ("Metro") Gotham Organization, Inc., ("Organization") Gotham, Retail, Millennium Partners, ("Millennium"), Holding, and Lincoln West Commercial Co, LLC("Commercial") (collectively "Defendants") cross-move pursuant to CPLR §3212 for an order dismissing Plaintiff's complaint against Retail, Metro, Organization, Millennium, and Commercial and oppose Plaintiff's motion for summary judgment under Labor Law §240(1). Defendants Holding, Retail, and Gotham cross-move for an order dismissing Plaintiff's claim under Labor Law §200.

"A party moving for summary judgment must make a *prima facie* showing of entitlement to a judgement as a matter of law, providing sufficient evidence to demonstrate the absence of any material issue of fact." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81, 760 NYS2d 397, 790 NE2d 772 [2003]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Id.*)

Plaintiff's Motion for Summary Judgment

Plaintiff moves pursuant to Labor Law §240(1), which states, in relevant part, "All contractors

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

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: ☐ GRANTED ☐ DENIED GRANTED IN PART ☐ OTHER
3. Check as appropriate: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

and owners and their agents...who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed." (N.Y. Lab. Law §240 (McKinney)). Plaintiff testified at his deposition that he was employed by Third-party Defendant SJH Construction on the date of the accident and was working on a project located at 1965 Broadway, New York, New York. Plaintiff worked at the project for seven days, reporting to an SJH foreman for his daily tasks which mainly consisted of framing. On the date of the accident, Plaintiff testified that he was performing drywall and beading work. Plaintiff was not wearing a safety harness on the day of the accident or on any other day that he was working at 1965 Broadway. While working on drywall and beading and in the process of nailing on the top level of the scaffold, Plaintiff testified that he felt a plank move beneath his feet and he fell from the top level of the scaffold (approximately 30 feet from the ground). Based on his testimony, Plaintiff argues that he has a valid claim under Labor Law §240(1), where he was working on a construction site, standing on an unsecured scaffold 30 feet high and where he was not provided with any safety harness or other safety equipment. Plaintiff argues this is the type of case to which Labor Law §240(1) applies.

Further, Plaintiff contends that Holding, Gotham, and Retail are each liable as owners/contractors under the meaning of Labor Law §240(1). Based on Defendants admissions through a Notice to Admit, Holding is the fee owner of 1965 Broadway. As such, Holding should be held liable as an owner under Labor Law §240(1). Additionally, in the same Notice to Admit, Defendants admit that Retail is the lessee and tenant of retail space within 1965 Broadway. Plaintiff argues that as a lessee, Retail is liable under Labor Law §240(1) where Retail was essentially an owner in possession and therefore liable for any injuries which occur as a result of the collapsed scaffold. Further, Retail identifies itself as "Owner" under its contract with Gotham. Additionally, according to Bobby Chen's testimony (Gotham's project manager), Retail organized the bids for subcontractors and ultimately determined which contractors were hired. As Retail had the power to hire and fire subcontractors, Plaintiff argues it can liable as Owner under Labor Law §240(1). Further, Plaintiff argues that Gotham is liable as construction manager, where William Inhoff, Gotham's assistant superintendent, testified that Gotham was hired as Retail's agent to perform the construction at 1965 Broadway. Imhoff further testified that Gotham created and implemented a safety plan for this project, and as such, had authority and control over the project.

In opposition, Defendants argue that there are questions of fact as to how the accident happened. William Imhoff did not witness the accident but testified that he spoke to a worker from Thyssen Krupp escalator (another sub-contractor on the project) who told Imhoff that he saw Plaintiff attempt to go from the step-ladder to the scaffolding which caused Plaintiff to fall. This varies from Plaintiff's version of how the accident happened and as such, Plaintiff's motion for summary judgment on Labor Law §240(1) must be denied. Further, Defendants argue that Retail should not be found liable under Labor Law §240(1), where the agreement between Gotham and Retail provides that Gotham will at all times act as construction manager and will have sole and exclusive responsibility for the health and safety of all of its employees on site. Further, as a lessee/tenant, Defendants argue Retail does not have authority or control over the site which would be necessary in finding it liable under Labor Law §240(1).

In reply, Plaintiff argues that Defendants fail to provide admissible evidence as to the "second" version of the accident which it alludes to in its opposition. No evidence from anyone with personal knowledge of the accident has been offered to contradict Plaintiff's version of the accident. Defendants have failed to establish that the Plaintiff had adequate safety devices available to him and as such, Plaintiff is entitled to summary judgment on Labor Law §240(1).

Plaintiff makes his prima facie case for entitlement to summary judgment on Labor Law 240(1) where, "a plaintiff merely has to demonstrate that he or she was injured when an elevation-related safety device failed to perform its function to support and secure him from injury." (*Ortega v. City of New York*, 95 A.D.3d 125, 128, 940 N.Y.S.2d 636, 639 (2012)) Plaintiff sustained an injury when he fell from

a 30-ft scaffold after it failed to support him properly during his beading work. Further, Plaintiff made its prima facie case against Holding, where it proved by way of Defendants' admission that it was the owner in fact of 1965 Broadway. As to Gotham's liablity, Plaintiff made its prima facie case where Defendants admitted that Gotham had sole responsibility as construction manager over the health and safety of all of its employees. Lastly, Plaintiff made its prima facie case where he proved Retail was an owner by providing the agreement between Retail and Gotham. "It is by now well established that the duty imposed by Labor Law §240(1) is nondelegable and that an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work." (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 500, 618 N.E.2d 82, 85 (1993)). Thus, where Retail lists itself as Owner in its contract with Gotham, its duty is to Plaintiff is nondelegable. Plaintiff further proved that even as a lessee/tenant, Retail will be found liable under Labor Law §240(1) where it hired the general contractor and where it had the authority to control the work site. *(Novell v. Carney Elec. Const. Corp.*, 123 Misc. 2d 1089, 1092, 476 N.Y.S.2d 241, 245 (Sup. Ct. 1984); *Stolze v. Hampton Bays Shell Station*, 2002, 193 Misc.2d 212, 748 N.Y.S.2d 445; *Guzman v. L.M.P. Relaty Corp* (1 Dept 1999) 262 A.D.2d 99, 691 N.Y.S.2d 483)). Thus, as a lessee/tenant and as an the party responsible for hiring Gotham, Plaintiff makes its prima facie case as to Retail's liability under the meaning of Labor Law §240(1).

Defendant fails to raise any issues of fact as to how the accident happened, where the only evidence offered, which gives a different version of the accident, is Imhoff's testimony. Imhoff did not directly witness the accident, but can only testify as to how the accident happened as told to him by a third-party. This statement is hearsay and therefore inadmissible.[1] Thus, based on Plaintiff's testimony as to how the accident happened, Plaintiff has a valid claim under Labor Law §240(1). Defendant raises no issues of fact as to the liability of Holding and Gotham, where it concedes that Holding is the owner in fact of the building at 1965 Broadway and that Gotham, pursuant to its agreement with Retail agrees to act as construction manager and to have sole and exclusive responsibility for the health and safety of all of its employees on site. Lastly, Defendant raises no issues of fact as to Retail's liability, where it offers no arguments as to why Retail is listed as "Owner" in its contract with Gotham, nor does it provide any admissible evidence that Retail, as a tenant/lessee, had no authority or control over the job site. The only argument it makes is that contractually, Gotham had control over the safety on site, but where Retail hired and contracted with Gotham as Owner, it cannot escape liability under Labor Law §240(1).

Defendants' Cross-Motion

Defendants cross-move to dismiss Plaintiff's complaints against Retail, Organization, Metro, Millennium, and Commercial. In regards to Retail, Defendants argue that a lessee of a premises will only be deemed an owner if it had the right to insist that proper safety practices were followed. Defendants further argue that nothing in the agreement between Gotham and Retail authorized Retail to supervise the SJH workers and implement safety procedures and as such, Retail should not be deemed an Owner for purposes of Labor Law liability. Further, as to Defendant Organization's liability, Defendant provides a copy of a web page which states there is no such business entity found under the name Gotham Organization, Inc. and therefore the claim against it should be dismissed. Lastly, Defendants provide the Affidavit of David Cvijic, a property manager employed by Millennium, concedes that Holding owned the premises at issue in this case, and Retail leased the space. Cvijic further states that the claims against Metro, Millenium, and Commercial must be dismissed as they are not the owners

---

[1] "Hearsay alone is insufficient to defeat a motion for summary judgment." (*Iurato v City of New York*, 9 AD3d 301 [1st Dept 2004]). "Hearsay is admissible to defeat summary judgment...only where it is not the only evidence offered (Murray v North Country Ins. Co., 277 AD2d 847, 850; Guzman v L.M.P. Realty Corp., 262 AD2d 99). Here, the hearsay testimony was the only evidence offered to present an issue of fact as to how the accident occurred.

under the meaning of the Labor Law statutes. Further, Defendants' cross-move to dismiss Plaintiff's claim under Labor Law §200. Labor Law 200, in relevant part, states, "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section." (N.Y. Lab. Law § 200 (McKinney)). Defendants argue that liability will attach for common-law negligence only where Plaintiff's injuries were sustained as a result of a defective/dangerous condition at a work site and where the owner had control and exercised supervision over the work performed. Defendants argue that none of the Defendants had any supervisory control over the injury producing work and as such, the claim under Labor Law §200 should be dismissed against all Defendants.

Third-Party Defendant SJH opposes Defendants' cross-motion on the grounds that it was untimely. Defendants served their cross-motion on SJH on December 17, 2012, well over the 120- day period from the filing of Note of Issue, which Plaintiff filed on July 30, 2012. Further, Defendants did not provide any good cause shown for the delay and as such, the cross-motion must be denied. Even if Defendants motion is not dismissed for being untimely, SJH argues it should be substantively denied under Labor Law §200, where questions of fact remain as to whether the general contractor took an active role with regard to safety precautions and whether the general contractor complained to SJH about problems with the scaffolding prior to Plaintiff's accident. SJH argues that Imhoff testified that there was a safety program established by Gotham for the project and further testified to his extremely active role in regards to safety at this work site. SJH argues that Gotham, as general contractor, had the responsibility and authority to maintain a safe work environment and should be found liable under Labor Law §200.

Plaintiff also opposes Defendants' cross-motion on both procedural and substantive grounds. Plaintiff argues service on Plaintiff was defective where it was not served until January 4, 2013 and further, the cross-motion was made well beyond the 120 days after the Note of Issue was filed. Substantively, there are questions of fact as to Retail's liability as an owner, where it is admittedly a lessee and where Imhoff testified that Retail ultimately approved all subcontractors. As to Organization, Defendants offer no admissible proof that it is not a proper party to this lawsuit, such as an affidavit from someone with personal knowledge. Further, even though Civjic states that Metro, Millennium, and Commercial do not own the property, Plaintiff alleges liability through operation, maintenance and control of the premises and Defendants fail to object to these allegations. Plaintiff argues that simply stating that these entities do not own the premises does not relieve them from liability.

Defendants made their cross motion more than 120 days after Plaintiff filed his note of issue. A court has "broad discretion in determining whether the moving party has established good cause for delay" and a motion court's decision "will not be overturned unless it was improvident." (Fine v One Bryant Park, LLC, 2011 NY Slip Op 3659 [1st Dept]). "'Good cause' necessary for filing late summary judgment motion requires a showing of good cause for the delay in making the motion, a satisfactory explanation for the untimeliness, rather than simply permitting meritorious, nonprejudicial filings." (Brill v. City of New York, 2 N.Y.3d 648, 814 N.E.2d 431 (2004)). Defendant was required to serve its cross-motion within 120 days of Plaintiff filing his Note of Issue, which he did on July 30, 2012. As such, Defendants had until November 28, 2012 to make their motion to dismiss Plaintiff's Labor Law §200 claim. Defendants made their cross-motion on December 18, 2012. In the cross-motion, Defendants failed to address any reason for why the motion was untimely and as such have not provided any good cause for the late filing. However, Courts have found that, "[a] cross-motion for summary judgment made after the expiration of the statutory 120-day period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief nearly identical to that sought by the cross motion" (*Filannino v Triborough Bridge & Tunnel Auth.*, 34

AD3d 280, 281 [1st Dept 2006]). The Court further states in *Filiannino* that, "defendants' motion was addressed to the causes of action under Labor Law § 200 and § 241(6), while plaintiff's cross motion concerned a different cause of action (i.e., Labor Law § 240) (cf. Osario v. BRF Constr. Corp., 23 A.D.3d 202, 203, 803 N.Y.S.2d 525 [2005]" (id.) The facts here are similar to the *Filannino* case, where Plaintiff's motion for summary judgment addresses a cause of action under Labor Law §240(1) and Defendants' cross motion concerns causes of action under Labor Law §240(1) and Labor Law §200. Thus, the cross motion will only be considered as it applies under Labor Law §240(1).

Defendant fails to make its prima facie case to dismiss Plaintiff's case against Defendant Organization, where it offers no admissible evidence that Organization is not a proper party to this case. It is well-settled that on a motion for summary judgment, the moving party has the initial burden of demonstrating, by admissible evidence, its right to judgment (*see generally, Bendik v Dybowski*, 227 AD2d 228 [1st Dept 1996]). The only evidence offered is the attorney's affirmation which is not based upon personal knowledge and thus has no probative weight (*Johnson v Phillips*, 261 AD2d 269 [1st Dept 1999]). Further, Defendants have failed to show, prima facie, that Defendants Metro, Millenium, and Commercial are not liable under Labor Law §240(1). Defendants only state that Metro, Millennium, and Commercial are not owners, which is only one element in proving that the Defendants are not liable. In order to prevail on dismissing Plaintiff's claims against them, Defendants must show that they are not an owner, general contractor, or agent and as such, had no control over the work site or the injury producing work. (N.Y. Lab. Law §240 (McKinney)) While Plaintiff, in opposition, fails to cite specific allegations as to Metro, Millennium, and Commercial, the initial burden is on Defendant to prove freedom from liability. Defendants fail to make their prima facie case by simply stating that Metro, Millenium, and Commercial are not owners. Further, as discussed above in the analysis of Plaintiff's motion for summary judgment (page 3), Defendants failed to make their prima facie case to dismiss Plaintiff's case against Retail, where simply stating it is a lessee is not sufficient to establish that it is free from liability. Accordingly, it is hereby

ORDERED that Plaintiff's motion for summary judgment on the issue of liability pursuant to Labor Law §240(1) against Holding, Gotham, and Retail is granted; and it is further

ORDERED that Defendants' cross-motion pursuant to Labor Law §240(1) as to Retail, Organization, Metro, Millennium, and Commercial is denied; and it is further

ORDERED that Defendants' cross-motion pursuant to Labor Law §200 is denied as untimely; and it is further

ORDERED that the movant shall serve a copy of this order, with Notice of Entry, upon all parties, within thirty (30) days of entry

FILED

SEP 18 2013

NEW YORK COUNTY CLERK'S OFFICE

George J. Silver J.S.C.

GEORGE J. SILVER

Dated: SEP 12 2013

New York County