

Velayarse Fernandez v El-Kam Realty Co.

2014 NY Slip Op 31203(U)

March 5, 2014

Sup Ct, Bronx County

Docket Number: 300989/11

Judge: Wilma Guzman

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
IAS PART 7**

Index No. 300989/11
Motion Calendar No.11
Motion Date: 11/25/13

JONATAN VELAYARSE FERNANDEZ

Plaintiff(s),

-against-

DECISION/ ORDER

Present:

**Hon. Wilma Guzman
Justice Supreme Court**

EL-KAM REALTY CO., and BUCKINGHAM
TRADING PARTNERS, INC.,

Defendants,

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion to Dismiss:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation in Support, and Exhibit thereto.....	1
Plaintiff's Affirmation in Opposition.....	2
Reply Affidavit.....	3

Upon the foregoing papers and after due deliberation, t the Decision/Order on this motion is as follows:

Defendants move this Court for summary judgment on the grounds that neither defendant has any liability. Plaintiff submitted written opposition.

Plaintiff commenced this action seeking damages for injuries allegedly sustained on January 19, 2011 in a construction site accident on property located at 1752 First Avenue, New York, NY.

It has long been held that summary judgment is a drastic remedy, the procedural equivalent of a trial which should only be granted when the evidence leaves no issue of material fact unresolved (Andre v. Pomeroy, 35 N.Y.2d 361 [1974] Chemical Bank v. West 195th Street Development Corp., 161 A.D.2d 218 [1st Dep't. 1990]) or where an issue is even debatable. Stone v. Goodson, 8 N.Y.2d 8 (1960). In deciding a summary judgment motion, it is not the function of a court to make credibility determinations or findings of fact, but is rather to identify material triable issues of fact or to point to the lack thereof. Vega v. Restani Constr. Corp. 18 N.Y.3d 499 (2012) *citing* Sillman

v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957).

The proponent of a motion for summary judgment has the initial burden of the production of sufficient evidence to demonstrate, as a matter of law, the absence of any material issue of fact. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Once the initial burden has been satisfied, the burden then shifts to the party opposing the motion to produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

Plaintiff testified that he did not have any knowledge of Kurtaji Construction. He testified that he was employed by SC Management. He knows Arben Kurtaj as Benny, the foreman. He testified that he understood Eli Samuels to be Benny's boss. Benny was the person who paid him in cash, however, he received instructions about work from both Benny and Eli. At the subject location, his job responsibilities were to mix the cement, help to straighten out the steel beams and set them in the ceiling. He received his tools from Benny who also performed some of the demolition work. On the date of his accident, he was working with Benny and another worker, Francisco to pick up bricks and put them in plastic bags. He was injured when a garbage container that was filled with the bricks fell on his leg. As he pulled the garbage container, which was filled with the bricks, he noticed that the container was stuck due to a brick stopping the wheel from rolling. As he removed the brick the container fell on his leg. He had observed debris on the floor prior to the cart falling. Plaintiff also testified that the ground was not level. Plaintiff testified that he had received instruction from Benny to remove the cart.

Eli Samuels testified that he is the managing agent for defendant Buckingham Trading which has its principal place of business at 3 West 57th Street. The principal of Buckingham Trading is Cameron Hakim. He was also employed as the managing agent for defendant El-Kam Realty. The principal of El-Kam Realty is Ellen Hakim, Cameron Hakim's wife. In January 2011, he was the managing agent for both companies. El-Kam is the owner of properties, including the property located at 1752 First Avenue. Buckingham the manger and S.C. Management is a holding company for both companies that pays out vendors. Buckingham Trading would sometimes act as the General Contractor and employ subcontractors, who would be hired by Mr. Samuels. Mr. Samuels hired subcontractor, Benny Kurtaj of Kurtaj Construction. Mr. Samuels would visit the construction site

approximately everyday overseeing the construction. If he saw work being done improperly or in an unsafe manner, he would bring it to the attention of the subcontractor. El-Kam provided the materials, such as sand, cement, rebar, steel, plywood, sheetrock, dials, marl. He did not supervise plaintiff's work in addition to hardhats, brooms, masks. Mr. Samuels would tell Benny what to do and Benny would get it done. Buckingham also had workers at the construction site which Mr. Samuels would oversee. Mr. Samuels testified that there could have been uneven flooring at the construction site on January 29, 2011.

At the outset, the defendants motion to dismiss plaintiff's Labor Law 241(6) claims is denied as defendant fails to set forth any argument in support of this application and improperly raises it in reply papers. Defendants motion for summary judgment is granted as it applies to Labor Law 200.

As reiterated by the Appellate Division in Sheehan v. Gong, 2 A.D.3d 166 (1st Dept. 2003).

“Section 200 of the Labor Law, which imposes a general duty to protect the health and safety of workers, is a codification of the common-law duty imposed upon property owners to provide a safe place to work (*see Jurgens v Whiteface Resort*, 293 A.D.2d 924, [2002]). However, a landowner will not be liable under section 200 or under common-law negligence principles for injuries sustained by workers on the property in the absence of evidence that the landowner exercised supervision or control over the work or had notice of the existence of a dangerous condition. (*see e.g. Rosenberg v Eternal Mems.*, 291 A.D.2d 391[2002]).”

Defendants motion to dismiss the plaintiff's claims under Labor Law 200 and common law negligence is hereby granted. Plaintiff has failed to raise a triable issue of fact. Plaintiff testified that he received all his work orders from Benny, who is not an employee of either defendant but a sub-contractor. Furthermore, Mr. Samuel's testimony supports the plaintiff's testimony. Mr. Samuel testified that he although he had the ability to stop work and uphold safety regulations, he did not directly control or supervise plaintiff's work. “The right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications insufficient to impose liability under Labor Law 200 or for common-law negligence.” Allan v. DIIL Exp.(USA) Inc., 99 A.D.3d 828 (2nd Dept. 2013) (internal citations omitted); *See also, Reinoso v. Biodi*, 105 A.D3d 491(1st Dept. 2013).

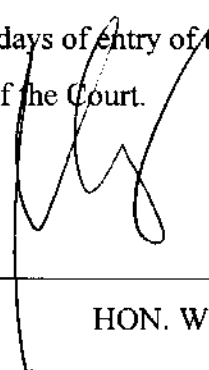
Accordingly, it is

ORDERED that defendants motion for summary judgment is granted to the extent that plaintiffs claims under Labor Law 200 and common law negligence are hereby dismissed. It is further

ORDERED that the Clerk of the Court mark the file accordingly. It is further

ORDERED that defendants serve a copy of this Order with Notice of its Entry upon all plaintiff Fernandez within thirty (30) days of entry of this Order.

This constitutes the decision of the Court.



HON. WILMA GUZMAN, J.S.C.

DATE
3/5/14