

Lopez v God's Love We Deliver, Inc.

2016 NY Slip Op 30654(U)

March 4, 2016

Supreme Court, Queens County

Docket Number: 708846/14

Judge: Valerie Brathwaite Nelson

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Short Form Order

FILED
MAR - 8 2016
COUNTY CLERK
QUEENS COUNTY

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE VALERIE BRATHWAITE NELSON IA PART 7
Justice

JOSE LOPEZ, x Index Number: 708846/14

Plaintiff, Motion Date: 10/28/15
Motion Seq No: 1

-against-

Motion Date: 11/25/15
Motion Seq No: 2

GOD'S LOVE WE DELIVER, INC., ET AL.,

Defendants. x

The following papers numbered 1 to 16 read on this motion by the defendant JRM Construction Management, LLC, for an order granting summary judgment, pursuant to CPLR 3212, dismissing the plaintiff's complaint against it; and on motion by the defendant God's Love We Deliver, for an order granting summary judgment, pursuant to CPLR 3212, dismissing the plaintiff's complaint and all cross-claims against it.

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Upon the foregoing papers it is ordered that these motions are consolidated for the purpose of disposition and are determined as follows:

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff, Jose Lopez, while working on a construction project at the premises located at 176 Avenue of the Americas, New York, New York, on June 17, 2013. In the amended verified complaint, plaintiff alleges, *inter alia*, that defendants

God's Love We Deliver and JRM Construction Management, LLC, owned, leased, operated, maintained, controlled, managed, repaired, constructed and/or had possession of the premises located at 166 Avenue of the Americas, New York, New York at the time of the accident. Plaintiff alleges further, *inter alia*, that defendants were liable for common law negligence and for violating various sections of the New York State Labor Law, including a violation of Labor Law § 240(1), which imposes a nondelegable duty upon owners, contractors and their agents to provide proper protection to workers exposed to elevation-related hazards while engaged in the construction, alteration or repair of a building or structure (see, Misseritti v Mark IV Constr. Co., 86 NY2d 487, 490-491 [1995]; Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500-501 [1993]). The law was designed to place the responsibility for a worker's safety squarely upon the owner and contractor rather than on the worker (see Felker v Corning, Inc., 90 NY2d 219 [1997]).

Defendants God's Love We Deliver and JRM Construction Management, LLC move herein for summary judgment dismissing the plaintiff's complaint against them. In support of their motions, the moving defendants submit, *inter alia*, photographs of the location showing an active construction site at 176 Avenue of the Americas and revealing that Triton Construction Company, LLC was the general contractor for that site, a contract between the moving defendants God's Love We Deliver and JRM Construction Management dated September 30, 2013, and an affidavit from Joseph P. Romano, President of defendant JRM, wherein he states that defendant JRM entered into the contract to perform construction services with co-defendant God's Love We Deliver, Inc., for their property located at 166 Avenue of the Americas, on September 30, 2013, months after the date of the accident. Mr. Romano asserts that JRM did not retain the plaintiff, nor his employer, Disano Construction Company. Mr. Romano attests that prior to September 30, 2013, JRM did not perform any work, supply any tools or equipment, including the ladder and scaffold alleged to have been involved in plaintiff's accident, to the location of either 166 or 176 Avenue of the Americas, and never supplied, owned or had any involvement with the ladder and scaffold alleged to have been involved therein. In addition, defendant God's Love We Deliver submits, *inter alia*, an affirmation of counsel stating that he provided plaintiff's counsel with a Department of Finance Tax Map search and ACRIS database search revealing that the premises located at 176 Avenue of the Americas is a separate tax block owned by QT Soho Realty, LLC, a December 2012 permit application made to the Department of Buildings by Navi Structural Engineering, LLC with respect to 176 Avenue of the Americas, and an April 2013 approved permit showing that work was to begin on May 3, 2013. In addition, defendant God's Love We Deliver submits an affidavit from Candy

Bonder, its Chief of Staff. In her affidavit, Ms. Bonder attests that defendant God's Love We Deliver does not own, occupy, or control 176 Avenue of the Americas, never contracted with nor hired the plaintiff or his employer, Disano Construction Company, and never hired or contracted with co-defendants QT Soho Realty, LLC of Triton Construction Company, LLC.

A court may grant summary judgment where there is no genuine issue of material fact and the moving party is therefore entitled to judgment as a matter of law (Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). The burden on the party moving for summary judgment is to demonstrate the absence of any material issue of fact (Ayote v Gervasio, 81 NY2d 1062 [1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of opposing papers (Alvarez v Prospect Hosp., *supra*). However, once this initial burden has been met, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form to create material issues of fact requiring a trial (*Id.*); Zuckerman v. City of New York, 49 NY2d 557[1980]). Here, the moving defendants' evidence of their lack of involvement at plaintiff's worksite at the time of the accident is sufficient to make a *prima facie* showing of their entitlement to judgment as a matter of law.

The burden now shifts to the opponents of the motion to produce evidentiary proof in admissible form sufficient to raise a triable issue of fact (Zuckerman v City of New York, 49 NY2d 557, *supra*). In opposition to the motion, plaintiff submits, *inter alia*, a copy of a work permit data form from the Department of Buildings issued on May 2, 2013 to plaintiff's employer, Disano Construction Company, with respect to 176 Avenue of the Americas, photographs of the location showing an active construction site at 176 Avenue of the Americas and revealing that Triton Construction Company, LLC was the general contractor for that site, a deed for the premises located at 166 Avenue of the Americas showing defendant God's Love We Deliver as the owner of said premises, and various permits issued to defendant JRM for work at the premises located at 166 Avenue of the Americas, the earliest of which is dated December 7, 2013. Plaintiff argues, *inter alia*, that it is premature to grant the within motion to dismiss the complaint as the within motion was made prior to plaintiff's having had an opportunity to complete discovery, including the depositions of the moving defendants, who shared a common wall with the premises located at 176 Avenue of the Americas, where plaintiff was allegedly working when the accident occurred.

Before a party can defeat a motion for summary judgment

claiming ignorance of the facts due to the lack of discovery, he must show that he has made reasonable efforts to discover these facts and that the facts sought would give rise to a triable issue (see Gillinder v. Hemmes, 298 AD2d 493 [2002]). In order to justify denying the motion pursuant to CPLR 3212[f], a party is required to demonstrate that additional discovery would yield facts indicating that the movant was at fault (see Szczotka v. Adler, 291 AD2d 444 [2002]). Here, plaintiff failed to show that additional discovery would demonstrate the moving defendants' culpability in the happening of this accident which occurred at a time and place in which said defendants had no control or involvement (see Alvarez v Hudson Val. Realty Corp., 107 A.D.3d 748 [2d Dept 2013]; Billman v. CLF Mgmt., 19 A.D.3d 346 [2d Dept 2005]).

Accordingly, defendants' motions for summary judgment are granted, and the complaint and cross-claims asserted against them are dismissed, pursuant to CPLR 3212.

Dated: 3/4/16

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VALERIE BRATHWAITE NELSON, J.S.C.

FILED
MAR - 8 2016
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