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

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

ANTONIO URQUIZA a/k/a ANTONIO PELAGIO URQUIZA CARDENAS by MARTHA PARADA ARDAYA and STIVENS A. SANQUINO, as Co-Administrators of the Estate of ANTONIO PELAGIO URQUIZA a/k/a ANTONIO PELAGIO URQUIZA CARDENAS, 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 THEROFOAM LIMITED LIABILITY COMPANY, ERIN CUSTOM INTERIORS, INC., W.M. SANFARDINO ELECTRIC LTD., and PLASTER WORKS INC.,

Defendants.

and five other related third-party actions.

INDEX NO. 158295/13
MOTION DATE 04-25-18
MOT. SEQ. NO. 023
MOTION CAL. NO.

The following papers, numbered 1 to 15 were read on this Motion pursuant to CPLR §3212 for summary judgment and cross-motion pursuant to CPLR §3212 for summary judgment and CPLR 3211[a][7] to dismiss:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits _____cross motion	4, 5-7,8 -9, 10-11, 12-13
Replying Affidavits	14-15

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiffs' motion pursuant to CPLR §3212 for summary judgment on liability on the causes of action based on Labor Law §240[1], §241[6] and §200 and setting this matter down for a trial on damages, is granted as to the Labor Law §240[1] causes of action. The remainder of the relief sought in plaintiffs' motion, is denied. Defendant Mitchell Studio, LLC's cross-motion pursuant to CPLR §3212 for summary judgment and pursuant to CPLR §3211[a][7] to dismiss the causes of action asserted against it in the complaint for failure to state a claim, is granted.

Martha Parada Ardaya and Stivens A. Sanquio, as Co-Administrators of the Estate of Antonio Urquiza a/k/a Antonio Pelagio Urquiza Cardenas, deceased (hereinafter referred to as "plaintiffs") commenced this wrongful death and Labor Law §200,§ 240[1] and §241[6] action to recover damages as a result of the personal injuries and death of Antonio Pelagio Urquiza Cardenas (hereinafter referred to individually as "decedent") on May 24, 2012 during a duplex renovation project, when he suddenly fell from a third floor window - as he was staining an exterior wooden window jamb - in a cooperative apartment located at 840 Park Avenue, Apartment 3/4A, New York, New York (hereinafter referred to as the "premises").

The premises are located in a building owned by Park and 76th Street, Inc., Gumley-Haft, LLC was the property manager. Mary L. Carpenter and Edmund M. Carpenter (hereinafter referred to jointly as "Carpenters") are the tenants, owning the shares of stock for the two apartments that make up the premises. Mitchell

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

Studio, LLC (hereinafter referred to individually as "Mitchell") is the architecture firm retained by the Carpenters to design the interior renovation.

Nordic Custom Builder's, Inc. (hereinafter referred to individually as "Nordic") was retained as the general contractor for the renovation project. Nordic hired Grace Ryan Magnus Millwork, LLC (hereinafter referred to individually as "GRMM") as a subcontractor to perform millwork and woodwork. GRMM subcontracted interior wood staining work to Stephen Gamble Inc., plaintiff's employer. Nordic also hired as a subcontractor, Euro Wood Trim, Inc. a company solely owned by Declan O'Meara, to act as a site supervisor.

Plaintiffs allege that decedent was performing work in the course of his employment with Stephen Gamble, Inc., as directed by defendant Nordic through its subcontracted site supervisor, Declan O'Meara and his company Euro Wood Trim Inc.. It is further alleged that Declan O'Meara, acting on behalf of the defendants, directed the decedent to stain the exterior wooden window jambs during a rainstorm, while he was standing on a piece of plywood wrapped in construction paper to protect a bronze grill on the radiator box. Plaintiffs claim that no adequate safety devices were provided by any of the defendants that instead they relied on the inadequate protection of a decorative rail outside the window to prevent the decedent from falling.

Plaintiffs seek an Order pursuant to CPLR §3212 granting summary judgment on liability for the causes of action asserting Labor Law §240[1], §241[6] and §200 claims, setting this matter down for a trial on damages.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, 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 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to produce contrary evidence in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645, 569 N.Y.S. 2d 337 [1999]).

In support of summary judgment plaintiffs rely on deposition testimony, a worker's compensation board hearing transcript, photographs, a climatological report, the alteration agreement, and their experts' affidavits. Plaintiffs argue that all of the defendants are liable pursuant to Labor Law §240[1], §241[6] and §200. They have made a prima facie case that defendants have no conflicting proof and are liable under Labor Law §240[1] for the non-delegable duty of an owner and contractor resulting from the failure to provide the decedent with adequate safety devices in the form of safety harnesses or belts and anchors, with proper barricades to prevent the decedent from falling out of the window.

Liability arises under Labor Law §240[1], upon proof that, "plaintiff's injuries result from an elevation related risk and the inadequacy of safety devices" (Nicometi v. Vineyards of Fredonia, LLC, 25 N.Y. 3d 90, 30 N.E. 3d 154, 7 N.Y.S. 3d 263 [2015]). There is no liability pursuant to Labor Law §240[1], if a proper safety device was "readily available" and the worker's "normal and logical response" would be to get it (Noor v. City of New York, 130 A.D. 3d 536, 15 N.Y.S. 3d 13 [1st Dept., 2015] citing to Rice v. West 37th Group, LLC, 78 A.D. 3d 492, 913 N.Y.S. 3d 492, 913 N.Y.S. 2d 13 [1st Dept., 2010]). The burden is on the defendants to provide evidence establishing that a ladder or scaffold was a suitable safety device, readily available, plaintiff was instructed to use it, and acted either as a recalitrant worker or was the sole proximate cause of the accident (Gutierrez v. 451 Lexington Realty LLC, 156 A.D. 3d 418, 66 N.Y.S. 3d 463 [1st Dept., 2017]).

David Gamble testified on behalf of Stephen Gamble Inc. that the employees on the premises consisted of three brothers: (1) The decedent, (2) Marcelo Urquiza, (3) Jesus Urquiza, and Carlo Maldonado (Mot. Exh. E pg. 24). He testified that the

employees brought step ladders and a baker's scaffold solely for interior work at the premises (Mot. Exh. E, pgs. 32-33). David Gamble further testified that exterior work would have required a harness on site, a temporary barricade in front of the window such as two by fours, and possibly a spotter for the guy who has to work in an open window. He further testified that interior work requiring harnesses had been performed at a different worksite and that Marcelo Urquiza was familiar with that equipment (Mot. Exh. E, pgs. 86-89).

Carlo Maldonado testified at his deposition that the Stephen Gamble Inc. employees did not complain to their employer or anyone else about using the wood covered with paper before the accident, or seek other equipment, and that he saw the decedent standing on the wood provided by Declan O'Meara two days before the accident (Mot. Exh. F, pgs. 71-73, 102-105). He testified that Stephen Gamble, Inc. employees brought two step ladders to the premises, one was six feet tall, the other shorter, he could not remember if they brought a baker's scaffold (Mot. Exh. F, pgs. 34-35). Mr. Maldonado testified that the Stephen Gamble Inc. employees decided to use the radiator grate for convenience because it was difficult to place the ladder in the space (Mot. Exh. F, pg. 107).

Declan O'Meara the site supervisor testified at his deposition that he was unaware whether Stephen Gamble Inc. employees were provided with an anchor, safety belts or harnesses to prevent them from falling and that he watched their progress and directed the employees as to the schedule for completion of the work (Nordic in Opp., Exh. E pgs. 21-23). Declan O'Meara further testified that he told the Stephen Gample Inc. employees to cover the grate with paper (Nordic in Opp. Exh. E, pgs 39-40, 50). Eamonn Ryan testified on behalf of Nordic that Stephen Gamble Inc. contracted only to perform interior work, and that he would not have had the employees stand on the radiator cover, it was not intended to have a person stand on it and he wouldn't stand on it (Mot. Exh. L pgs. 55-56, 132-133). Mr. Ryan testified that alternatively he would have called Stephen Gamble Inc. and ask for the safety equipment that was needed (Mot. Exh. L pgs. 141-142).

The defendants have not raised any issues of fact as to the lack of a safety device in the form of a harness or safety belt with an anchor to prevent the decedent from falling out of the window while he worked on the exterior jamb. Deposition testimony establishes that the work involved a height related risk that required at least a harness or saftey belt to provide adequate protection. Defendants arguments that the work was outside of the scope of the contract and the decedent was the sole proximate cause of his injuries, are unavailing. Their reliance on conflicting testimony as to responsibility for supervision of the work and the use of safety devices does not defeat summary judgment to the plaintiffs under Labor Law §240[1].

There remain issues of fact warranting denial of summary judgment to plaintiffs on their Labor Law §241[6] claims. Plaintiffs rely on Industrial Code sections: §23-1.4 [b][45] (scaffolds), §23-5.1[j] (safety railings) and §23-1.7 [d] (slipping hazards) in support of the Labor Law §241[6] claims.

Labor Law §241[6], establishes a nondelegable duty of owners and contractors to provide "reasonable and adequate protection and safety" for construction workers (Padilla v. Frances Schervier Housing Development Fund Corporation, 303 A.D. 2d 194, 758 N.Y.S. 2d 3 [1st Dept., 2003]). To establish liability the plaintiff is required to specifically plead and prove violations of the Industrial Code regulations, which are the proximate cause of the injuries. The Industrial Code section cited must be a "positive command" (Buckley v. Columbia Grammar and Preparatory, 44 A.D. 3d 263,841 N.Y.S. 2d 249 [1st Dept., 2007]). Comparative negligence applies to Labor Law §241[6] claims (Dwyer v. Central Park Studios, Inc., 98 A.D. 3d 882, 951 N.Y.S. 2d 16 [1st Dept., 2012]).

Industrial Code §23-1.4 is titled "Definitions." Under the subsection §23-1.4 [b] [45] titled "Scaffold" is defined as: "A temporary elevated working platform and its supporting structure including all components." There is no "positive command" under

this section of the industrial code. Plaintiffs have not established that either the radiator cover or the plywood covered in paper constituted a "scaffold." It is not enough to apply that label (Johnson v. Small Mall, LLC, 79 A.D. 3d 1240, 912 N.Y.S. 2d 735 [3rd Dept. 2010]).

Industrial Code §23-5.1[j] is not directly addressed in the report of plaintiffs' expert Scott Silberman, P.E. (Mot. Exh. X). Industrial Code §23-5.1[j] titled "Safety railings" applies to guardrails required for scaffolds with an elevation of not more than seven feet. Plaintiffs have not established that the radiator cover or the plywood covered in paper constituted a "scaffold" such that Industrial Code §23-5.1[j] applies, warranting denial of summary judgment to plaintiffs under this section (See Varona v. Brooks Shopping Centers LLC, 151 A.D. 3d 459, 56 N.Y.S. 3d 87 [1st Dept., 2017]).

Industrial code §23-1.7 [d] titled "Slipping hazards" states: "Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded, or covered to provide safe footing." There remain issues of fact as to whether there was water on either the radiator cover or plywood covered in paper due to the heavy rain, and whether the decedent slipped. The non-party witness Heriberto Serra, testified at his deposition that he only heard the decedent scream and saw his hand attempting to hold on to the window. Mr. Serra did not see what caused the decedent to fall (Mot. Exh. O, pgs.15-16, 42 56- 57)(Vazquez v. Takara Condominium, 145 A.D. 3d 627, 44 N.Y.S. 3d 386 [1st Dept. 2016]). There remains an issue of fact as to whether the plywood and the paper constitute a "foreign substance," further warranting denial of summary judgment to plaintiffs under Industrial code §23-1.7 [d] (See Lopez v. Edge 11211, LLC 150 A.D. 3d 1214, 56 N.Y.S. 3d 187 [2nd Dept. 2017] citing to Johnson v. 923 Fifth Ave. Condominium, 102 A.D.3d 592, 959 N.Y.S. 2d 146 [1st Dept., 2013] and Rajkumar v. Budd Contr. Corp., 77 A.D.3d 595, 909 N.Y.S. 2d 453 [1st Dept., 2010]).

Plaintiffs have not established that they are entitled to summary judgment under Labor Law §200. Their motion seeks summary judgment but a prima facie showing was not made for all of the defendants and there remain issues of fact warranting denial of summary judgment on the Labor Law §200 cause of action.

Labor Law § 200 imposes a common law duty on an owner or contractor and applies to two categories of claims: (1) those arising from the manner of performance of the work which includes the equipment used and (2) those arising from a dangerous condition on the premises (Cappabianca v. Skanska USA Bldg. Inc., 99 A.D. 3d 139, 950 N.Y.S. 2d 35 [1st Dept., 2012]).

A precondition to liability under Labor Law § 200 claims arising from the manner of performance of the work is that the party charged must have authority or exercise direct supervisory control over the activity that resulted in the injury. Mere directions as to the time and quality of the work is not enough to establish liability (Mutadir v. 80-90 Maiden Lane Del LLC , 110 A.D. 3d 641, 974 N.Y.S. 2d 364 [1st Dept., 2013], O'Sullivan v. IDI Const. Co., Inc., 28 A.D. 3d 225, 813 N.Y.S. 2d 373 [1st Dept. 2006] aff'd 7 N.Y. 3d 805, 855 N.E. 2d 1159, 822 N.Y.S. 2d 745 [2006] and In re 91st Street Crane Collapse Litigation, 133 A.D. 3d 478, 20 N.Y.S. 3d 24 [1st Dept. 2015]).

Plaintiffs have not established that the Carpenters, Mitchell, Park and 76th Street, Inc., and Gumley-Haft, LLC, exercised authority or controlled the manner in which the work was performed, or that their presence consisted of more than mere directions as to the time and quality of the work.

Summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y. S. 2d 18, 215 N.E. 2d 341 [1966] and Ansah v. A.W.I. Sec. & Investigation, Inc., 129 A.D. 3d 538, 12 N.Y.S. 3d 35

[1st Dept., 2015]). "It is not the function of the Court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material issues of fact (or point to the lack thereof) (Vega v. Restani Const. Corp., 18 N.Y. 3d 499, 965 N.E. 2d 240, 942 N.Y.S. 2d 13 [2012]). Conflicting testimony raises credibility issues, that cannot be resolved on papers and is a basis to deny summary judgment (Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y. 3d 35, 823 N.E. 2d 439, 790 N.Y.S. 2d 74 [2004], Campos v. 68 East 86th Street Owners Corp., 117 A.D. 3d 593, 988 N.Y.S. 2d 1 [1st Dept., 2014] and Lopez v. Bovis Lend Lease LMB, Inc., 26 A.D. 3d 192, 807 N.Y.S. 2d 873 [1st Dept., 2006]).

There is conflicting testimony creating issues of fact as to the extent that Stephen Gamble Inc., Nordic and Euro Wood Trim through Declan O'Meara were present on the premises and controlled the manner of work performed, warranting denial of summary judgment to plaintiff on the Labor Law §200 cause of action. GRMM was granted summary judgment and is not a party to this action, therefore plaintiff cannot obtain summary judgment against that entity.

Labor Law §200 also applies to an existing dangerous defect on the premises requiring that the defendant have either actual or constructive notice of the unsafe condition that caused the accident with sufficient time prior to the accident to discover and remedy it (Lopez v. Dagan, 98 A.D. 3d 436, 949 N.Y.S.2d 671 [1st Dept. 2012] and Mendoza v. Highpoint Assoc., IX, LLC, 83 A.D. 3d 1, 919 N.Y.S. 2d 129 [1st Dept., 2011]).

Plaintiffs did not make arguments or a prima facie showing that the Carpenters, Mitchell, Park and 76th Street, Inc., and Gumley-Haft, LLC had either actual or constructive notice of any existing dangerous defect on the premises, further warranting denial of summary judgment on the Labor Law §200 causes of action.

Plaintiffs failed to establish a prima facie basis to obtain summary judgment on their claims for punitive damages. Their reliance on Matter of 91st Street Crane Collapse Litigation, 154 A.D. 3d 139, 62 N.Y.S. 2d 11 [1st Dept., 2011], is misplaced. Matter of 91st Street Crane Collapse Litigation, 154 A.D. 3d 139, supra, affirmed a jury verdict and finding at trial that punitive damages were warranted on a failed weld of equipment designed by an untrained employee of the defendant that resulted in the plaintiffs' deaths. The Court found punitive damages were warranted based on the defendant's knowledge of the incompetence of the entity that performed the weld, and the defendant's self-certification of the weld as fit - prior to its failure - in an attempt to save money. Plaintiffs' arguments that the defendants in this action failed to use equipment in an attempt to save money does not have sufficient evidentiary support.

Mitchell Studio, LLC's opposes plaintiffs' motion and cross-moves for an Order pursuant to CPLR §3212 for summary judgment and pursuant to CPLR §3211[a][7] to dismiss the causes of action asserted against it in the complaint for failure to state a claim. Mitchell has made a prima facie showing that it is entitled to summary judgment.

Architects and engineers are exempt from liability under Labor Law §240[1] and §241[6], as long as they do not directly control or supervise the work performed. Architects and engineers can be deemed "agents" of the owner when there is contractual retention of control and supervision over the work performed, or direct authority for the performance of the work or safety measures (Walker v. Metro-North Commuter R.R., 11 A.D. 3d 339, 783 N.Y.S. 2d 362 [1st Dept., 2004], Carter v. Vollmer Associates, 196 A.D. 2d 754, 602 N.Y.S. 2d 48 [1st Dept., 1993], and Lopez v. Dagan, 98 A.D. 3d 436, supra at pg. 437).

Mitchell entered into contracts: (1) with the Carpenters to provide architectural services, (2) for engineering services to be provided by CES Engineering, LLC; and (3) for consulting services to be provided by Meltzer/Costa/Paknia Architecture and Engineering LLP (Cross-Mot. Exhs. D, E, F). Mitchell provides proof that none of the agreements retain control or supervision of the contractors or subcontractors, over the

work performed and there was no special relationshiop requiring Mitchell to provide protection to the decedent against the risk of harm. The contract with the Carpenters under "Phase V - Construction Administration" only permits periodic visits by Mitchell to determine if there are "defects or deficiencies" in the work performed by the contractors (Mot. Exh. D). Plaintiff's expert did not make allegations against Mitchell concerning the means and methods of decedent's work (Mot. Exh. X). In addition, Sam Mitchell testified at his deposition on behalf of Mitchell that the work was completed on March 23, 2012 well in advance of the accident date and there was no further return to the premises (Cross-Mot. Exh. C, pg. 22). Mr. Mitchell claims that there was no contractual provision or actual supervision or interaction with the trades doing the finish on woodwork (Cross-Mot. Exh.C, pgs. 25 and 29).

Plaintiffs failed to raise an issue of fact in opposition to the cross-motion. Deposition testimony that Mitchell attended job meetings discussing the progress of the work and the contract with the Carpenters is insufficient to deny summary judgment (Nordic Opp. to Mot., Exh.N, pgs. 15 and 25, Cross-Mot. Exh. D). Plaintiffs failed to raise an issue of fact on the Labor Law §200 cause of action, there was no proof provided that Mitchell failed to exercise the duty of care required of an architect or that Mitchell owed a duty of care to the decedent. Mitchell is entitled to summary judgment dismissing the claims asserted in the complaint. there is no need to address the additional relief sought in the cross-motion pursuant to CPLR §3211[a][7].

Accordingly, it is ORDERED that plaintiffs' motion pursuant to CPLR §3212 for summary judgment on liability for the causes of action based on Labor Law §240[1], §241[6] and §200 and setting this matter down for a trial on damages, is granted to the extemt of granting plaintiff summary judgment on liability on the Labor Law §240[1] cause of action, and it is further,

ORDERED that the remainder of the relief sought in plaintiffs' motion is denied, and it is further,

ORDERED that defendant Mitchell Studio, LLC's cross-motion pursuant to CPLR §3212 for summary judgment dismissing the complaint and pursuant to CPLR §3211[a][7] dismissing the causes of action asserted against it in the complaint for failure to state a claim, is granted, and it is further,

ORDERED that all causes of action asserted in the complaint against Mitchell Studio, LLC are severed and dismissed, and it is further,

ORDERED that the caption of this action is amended to read as follows:

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

Plaintiffs,

-against-

PARK AND 76TH ST. INC., MARY L. CARPENTER & EDMUND M. CARPENTER, NORDIC CUSTOM BUILDERS INC., 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 THEROFOAM LIMITED LIABILITY COMPANY, ERIN CUSTOM INTERIORS, INC., W.M. SANFARDINO ELECTRIC LTD., and PLASTER WORKS INC.,

Defendants.

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and five other related third-party actions.

and it is further,

ORDERED that the Defendant Mitchell Studio, LLC shall serve a copy of this Order with Notice of Entry on the remaining parties, the General Clerk's Office (Room 119), and upon the Clerk of the County (Room 141-B), within twenty (20) days of entry of this order, and said clerks are directed to amend the caption as directed in this Order, and it is further,

ORDERED that the Clerk of the Court shall enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ, J.S.C.

Dated: May 22, 2018

MANUEL J. MENDEZ J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE