Jun Jin Lin v Kong Man Chan
2019 NY Slip Op 31991(U)
June 13, 2019
Supreme Court, Kings County
Docket Number: 509054/2016
Judge: Carl J. Landicino

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 13th day of June, 2019.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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JUN JIN LIN,

Plaintiff,

- against -

KONG MAN CHAN, KONG MEN CHAN and XIAORONG CHAN,

Defendants.

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Index No.: 509054/2016

DECISION AND ORDER

Motions Sequence #5

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	1/2,
Opposing Affidavits (Affirmations).....	3,
Reply Affidavits (Affirmations).....	4,

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This is an action to recover damages for personal injuries allegedly sustained by the Plaintiff Jun Jin Lin (hereinafter "the Plaintiff") on June 25, 2014. The Plaintiff alleges that he was injured while he was working at a property owned by Defendants Kong Man Chan (aka Kong Men Chan) and Xiaoron Chan (hereinafter "the Defendants"), located at 8855 15th Avenue, N.Y. (hereinafter "the Property" or "Premises"). At the time of the alleged incident the Plaintiff was apparently employed by non-party Dong and Tang, Inc. The Plaintiff was at the Property as a part of his employment on the day of the subject incident. The Plaintiff alleges in his Verified Bill of Particulars that he "sustained a fall from a height while performing his job duties at the subject premises when he was caused to fall off of a ladder."

Defendants now move (motion sequence #5) for an order pursuant to CPLR 3212, granting summary judgment in their favor and dismissing all causes of action against them. The Defendants contend that the Plaintiff's Labor Law §§ 240(1) and 241(6) claims should be dismissed given that the Defendants are entitled to a"homeowner's exemption", because the home is a single family residence and the Defendants did not control the Plaintiff's work. As to the Plaintiff's Labor Law §200 and common law negligence claims, the Defendants contend that these claims should be dismissed as the Defendants did not control or have a supervisory role over the Plaintiff's work. The Plaintiff opposes the motion and argues that it should be denied. The Plaintiff contends that there are issues of fact as to whether the Subject Premises qualifies for the homeowners exemption and whether the Defendants were directing the Plaintiff's work at the time of the alleged incident.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the

opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Homeowners Exemption

"An owner of a one- or two-family dwelling is exempt from liability under Labor Law §§ 240(1) and 241(6) unless he or she directed or controlled the work being performed." *Ferrero v. Best Modular Homes, Inc.*, 33 A.D.3d 847, 849, 823 N.Y.S.2d 477, 479 [2nd Dept, 2006]; *Ortega v. Puccia*, 57 A.D.3d 54, 59, 866 N.Y.S.2d 323, 328 [2nd Dept, 2008]. "A building's classification as a 'multiple dwelling' does not automatically cause the homeowner to lose the protection of the exemption." *Hossain v. Kurzynowski*, 92 A.D.3d 722, 723–24, 939 N.Y.S.2d 89, 91 [2nd Dept, 2012]. "To receive the protection of the homeowners' exemption, the defendant has the burden, *inter alia*, of showing that 'the work was conducted at a dwelling that is a residence for only one or two families.'" *Rossi v. Flying Horse Farm, Inc.*, 131 A.D.3d 1033, 1035, 16 N.Y.S.3d 316, 318 [2nd Dept, 2015], *quoting Chowdhury v. Rodriguez*, 57 A.D.3d 121, 867 N.Y.S.2d 123 [2nd Dept, 2008].

Turning to the merits of the application by the Defendants, the Court finds that they have met their *prima facie* burden. In support of their application for dismissal of the Plaintiff's Labor Law §§240(1) and 241(6) claims, the Defendants rely on the deposition testimony of the Plaintiff and the deposition testimony of Defendant, Kong Men Chan. In his deposition Defendant, Kong Men Chan states (Defendants' Motion, Exhibit D, Pages 8-9) that he owns the property with his wife, Defendant Xiaorong Chan, and that the Subject Premises are "a two story, one family house." What is more, during the deposition of Defendant Kong Men Chan, he was asked whether he had told any of the workers at the Subject Premises how to do their work and he answered "[n]o." The deposition testimony of Defendant Kong Men Chan "demonstrates that the

dwelling functions exclusively as a private home for the defendants, who are a married couple." *Rashid v. Hartke*, 171 A.D.3d 1226, 98 N.Y.S.3d 609, 611 [2nd Dept, 2019]. As a result, the Defendants satisfy their *prima facie* burden on whether it qualifies for the "homeowners exemption" in as much as it is a one family home not used for commercial purposes and the testimony of Defendant Kong Men Chan contends that neither he nor Defendant Xiaorong Chan, his spouse, were directing or controlling the work being performed at the Premises. *See Sandals v. Shemtov*, 138 A.D.3d 720, 721, 29 N.Y.S.3d 448, 449 [2nd Dept, 2016]; *Kosinski v. Brendan Moran Custom Carpentry*, Inc., 138 A.D.3d 935, 937, 30 N.Y.S.3d 237, 239 [2nd Dept, 2016].

However, the Court finds that the Plaintiff has raised a material issue of fact as to whether the Subject Premises were a one family residential dwelling at the time of the accident, sufficient to overcome the homeowner's exemption from liability. In opposition to the application by the Defendants the Plaintiff presents evidence (Affirmation in Opposition, Exhibit B) that the Subject Premises were at one time a three unit building with a commercial use. What is more, the Plaintiff points out that the deposition testimony of Defendant Kong Men Chan is unclear as to the number of units in use at the Subject Premises at the time of the alleged incident. As a result, "the record does not 'unequivocally [demonstrate] that the sole purpose of the construction work was to convert a multiple dwelling' into a one-family or two-family home, in which case the defendant would be afforded the 'homeowner exemption' provided for in the Labor Law." *Ru Fa Zheng v. Cohen*, 52 A.D.3d 801, 802, 861 N.Y.S.2d 717, 718 [2nd Dept, 2008], *quoting Stejskal v. Simons*, 3 N.Y.3d 628, 629, 816 N.E.2d 186 [2004]. Accordingly, the Defendants application for dismissal of the Plaintiff's Labor Law §§240(1) and 241(6) claims is denied.

Labor Law § 200

Liability under Labor Law § 200, for injuries arising from the manner in which work is performed, must be premised upon one having the authority to exercise supervision and control over the work. *See Lombardi v Stout,* 80 NY2d 290, 295 [1992]; *Hernandez v Pappco Holding*

Co., 136 AD3d 981, 982 [2nd Dept, 2016]; *Torres v City of New York*, 127 AD3d 1163, 1165 [2nd Dept, 2015]; *Gallello v MARJ Distribs. Inc.*, 50 AD3d 734, 735 [2nd Dept, 2008]. "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed." *Torres v Perry St. Dev. Corp.*, 104 AD3d 672, 676 [2nd Dept, 2013] quoting *Ortega v Puccia*, 57 AD3d 54, 62 [2nd Dept, 2008]. "[T]he 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 is insufficient to impose liability under Labor Law § 200 or for common-law negligence." *Banscher v Actus Lend Lease, LLC,* 132 AD3d 707, 709 [2nd Dept, 2015], quoting *Gasques v State of New York*, 59 AD3d 666, 668 [2009], *affd.* 15 NY3d 869 [2010].

Turning to the merits of the Defendants application in relation to the Plaintiff's Labor Law §200 claim and common law negligence claims, the Court finds that the Defendants' have provided sufficient evidence to meet their *prima facie* burden in relation to the dismissal of Plaintiff's claim. The Defendants argue that they cannot be held liable for the Plaintiff's injuries pursuant to Labor Law §200 given that they contend that they did not supervise or control the work of the Plaintiff and did not provide the Plaintiff with the equipment that he used. In support of this position, the Defendants rely on the deposition testimony of both the Plaintiff and Defendant Kong Men Chan. As stated above, when the Plaintiff's claim involves the method of the work, then a defendant's *prima facie* burden will relate to "whether they had the authority to supervise and control the work." *Chowdhury v. Rodriguez*, 57 A.D.3d 121, 129, 867 N.Y.S.2d 123, 129–30 [2nd Dept, 2008]. When asked whether he was present at the time of the accident, Defendant, Kong Men Chan (Defendants' Motion, Exhibit D, Pages 11) answered "[n]o." When Defendant, Kong Men Chan was asked whether he provided any tools or equipment such as ladder to the construction company, Defendant, Kong Men Chan (Defendants' Motion, Exhibit D, Pages 16) answered "[n]o." He indicated that he was not present when the work was

conducted and did not supervise or control the work performed by the Plaintiff's employer. The Defendants also point to the deposition of the Plaintiff, who when asked whether the owner of the house supervised or directed his work stated (Defendants' Motion, Exhibit C, Page 42) "I never see [sic] the house owner." In the instant proceeding, the Court finds that the evidence provided by the Defendants show that they did not supervise or control the work at the Subject Premises and as a result they have met their *prima facie* burden. *See Small v. Gutleber*, 299 A.D.2d 536, 537, 751 N.Y.S.2d 49, 50 [2nd Dept, 2002].

In opposition, the Plaintiff has failed to raise a material issue of fact as to whether the Defendants supervised or controlled the work at the Premises in order to hold it liable under Labor Law §200. A review of the Plaintiff's deposition shows that he was unsure who provided the ladder that he utilized. When asked who provided the ladders he testified that "[w]ell could be the homeowner because I work there." When he was then asked whether the ladder might have been provided by his employer he stated "[t]hat I really don't know." This testimony is insufficient to create an issue of fact. As a result, the Defendants' application in relation to Labor Law §200 and common law negligence is granted.

Based upon the foregoing, it is hereby Ordered that:

Defendants' motion (motion sequence #5) is granted solely as to the Plaintiff's Law §200 claim and common law negligence claims, which are dismissed.

This constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.