Mendez v MKAP, LLC (DE)
2019 NY Slip Op 33221(U)
October 17, 2019
Supreme Court, Kings County
Docket Number: 501362/2017
Judge: Larry D. Martin

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
Part 41

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AMBROTIO MANUEL MENDEZ,

Plaintiff,

-against-

MKAP, LLC (DE),

Defendant.

Index no. 501362/2017
DECISION/ORDER
ms #5

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MKAP, LLC (DE),

Third-Party Plaintiff,

-against-

SWEENEY & CONROY, INC.,

Third-Party Defendant.

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Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion for summary judgment.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed	**1**
Answering Affidavits	**2-3**
Replying Affidavits	**4-5**
Sur-Reply Affidavits	

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Plaintiff Ambrotio Manuel Mendez, commenced this action against Defendant MKAP, LLC ("MKAP") for personal injuries incurred on May 24, 2014, when Plaintiff fell and sustained injuries due to an alleged tripping hazard while employed on a construction site at 165 East 70th Street in Manhattan, New York ("subject premises").

MKAP now moves for an Order granting MKAP's summary judgment and dismissing Plaintiff's Complaint. MKAP also moves for an order granting contractual indemnity and

additional insured status on the third-party claim against Third-Party Defendant Sweeney & Conroy, Inc ("Sweeney"). Plaintiff and Sweeney oppose the motions for their respective claims.

FACTUAL BACKGROUND

MKAP is the owner of the subject premises. MKAP was formed by Christy Mack and her husband John Mack as a limited liability corporation for the purpose of purchasing the subject premises in August of 2009. The purchase was followed by a six-year project of designing, demolishing, and constructing the Mack's townhouse, a single-family residence. Christy Mack testified that she and her husband bought the property with the intention of renovating it and moving in. The Macks have resided in the subject premises since October 2015. MKAP hired Chris Pollack, Ltd. as its "owner's representative" to act as MKAP's agent during the project.

Plaintiff was employed by Sweeney & Conroy to work on the project at the subject premises. Sweeney was employed by MKAP as the general contractor for the project. On May 27, 2014, Plaintiff was working in the second floor of the subject premises moving a plaster mold on his shoulder that weighed 70-80 lbs. Plaintiff alleges that as he moved the mold through the second-floor hallway, he slipped on a piece of paper. The paper covered the entire hallway and was used to protect the finished wooden floor. Plaintiff testified that on top of the finished wood was the paper and Masonite used to protect the wooden floor. The Masonite was taped down. The paper and Masonite were placed on the floor by Sweeney workers approximately a week prior to the accident.

Plaintiff alleges he slipped on an approximately one square foot piece of paper that was on top of the Masonite. Plaintiff did not see the piece of paper prior to his fall. He testified that after slipping on his left foot and falling forward, he looked down at his foot and saw the paper by his foot. Plaintiff said his foot made the paper crunched/crumbled up when he slipped. Plaintiff alleges he sustained injuries from the fall.

ANALYSIS

Summary Judgment Standard

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the

absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *see also Zapata v Buitriago*, 107 AD3d 977 [2013]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hospital*, 68 NY2d at 324; *see also*, *Smalls v AJI Industries, Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, supra, 49 N.Y.2d 557 [1980]).

Labor Law §§ 240(1) & 241(6)

MKAP argues that Plaintiff's claims pursuant to Labor Law §§ 240(1) and 241(6) must be dismissed based upon MKAP's status as owner of a one-or two-family dwelling. MKAP argues that its status as an LLC does not deprive them of the homeowners' exemption.

Labor Law §§ 240(1) and 241(6) exempts "'owners of one and two-family dwellings who contract for but do not direct or control the work' from the absolute liability imposed by these statutory provisions" (*Bartoo v Buell*, 87 NY2d 362, 367 [1996]; *see also Ortega v Puccia*, 57 AD3d 54, 58 [2d Dept 2008]). "This exemption is intended to protect residential homeowners lacking in sophistication or business acumen from their failure to recognize the necessity of insuring against the strict liability imposed by the statute" (*Ortega*, 57 AD3d at 58).

"[O]ne and two-family homeowners, however, are exempt from liability under the statutes as long as they do not direct or control the work contracted for" (*Edgar v Montechiari*, 271 AD2d 396, 397 [2d Dept 2000]). "The phrase 'direct or control' is construed strictly and refers to the situation where the owner supervises the method and manner of the work" (*Arama v Fruchter*, 39 AD3d 678, 679 [2d Dept 2007]). A homeowner's instructions to the aesthetic appearance or inspection of the work as it progresses does not constitute the requisite direction or control necessary for the imposition of liability (*Arama*, 39 AD3d at 679; *see also Garcia v Petrakis*, 306 AD2d 315, 316 [2d Dept 2003]; *Shchleglyuk v Esther Feldman Trust*, 54 Misc.).

"The fact that title to an otherwise qualifying one- or two-family dwelling is held by a corporation rather than an individual homeowner does not, in and of itself, preclude application of

the exemption" (*Assevero v Hamilton & Church Props., LLC*, 131 AD3d 553, 556 [2d Dept 2015]; *see also, Baez v Cow Bay Constr.*, 3030 AD2d 528 [2d Dept 2003];). In *Assevero*, the Second Department analyzed the applicability homeowners' exception for personal injuries incurred in a building owned by a limited liability company. While summary judgment was ultimately denied, the Second Department's reasoning did not reject the applicability of the homeowners' exception due to the owners of the status as a limited liability company. Thus, MKAP's status as a limited liability company does not prevent it from availing itself to the homeowners' exception.

MKAP has made a prima facie showing of entitlement to summary judgment on its Labor Law §§ 240(1) and 241(6) causes of action. There is no evidence that at the time of the accident MKAP instructed the plaintiff on how to perform his work nor that it directed Sweeney & Conroy on placing the protective paper or provided the protective paper plaintiff alleges to have slipped on. Christy Mack and Pollack's involvement in the project was no more extensive than that of an ordinary homeowner and its agent who were not supervising, directing, or controlling the manner or method of the work and merely had general supervisory authority over the project and displayed typical homeowner interest in the ongoing construction process (*Ortega*, 57 AD3d at 59; *see also Rodriguez v Mendlovits*, 153 AD3d 556 [2d Dept 2017]; *Tomecek v Westchester Additions & Renovations, Inc.*, 97 AD3d 737 [2d Dept 2012]; *Slettene v Ginsburg*, 257 AD2d 656 [2d Dept 1999]).

In opposition, the Plaintiff argues that MKAP's role and duties on the worksite, including its ability to suspend work, was the actions of a general contractor/construction manager on the worksite and therefore MKAP had a non-delegable duty to provide a safe worksite under the Labor Law. Plaintiff points to Christy Mack's and Pollack's involvement in visiting the site, attending worksite meetings, and taking photographs at the worksite. However, none of this conduct rises to the level of directing or controlling the work to remove the protection provided by the homeowner's exception. Plaintiff failed to raise any issues of triable facts.

The motion to dismiss Labor Law §§ 240(1) and 241(6) is granted and the claims are hereby dismissed.

Labor Law § 200/Common-Law Negligence

MKAP contends that Labor Law 200 and common-law negligence claims must be dismissed because MKAP did not supervise, direct or control the Plaintiff's work.

Labor Law § 200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2000]). Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the plaintiff's work, or who have actual or constructive notice of the unsafe condition that caused the underlying accident (*Bradley* v *Morgan Stanley & Co., Inc.*, 21 AD3d 866, 868 [2005]; *Aranda v Park East Constr.*, 4 AD3d 315 [2004]; *Akins v Baker*, 247 AD2d 562, 563 [1998]).

"Where a plaintiff's injuries do not stem from the manner of performing the work, and instead from a dangerous condition on the premises, an owner may be liable in common-law negligence and under Labor Law § 200 if it controlled the work site and either created the dangerous condition or had actual or constructive notice of the dangerous condition that caused the accident" (*Azad v 270 5th Realty Corp.*, 46 AD3d 728, 730 [2d Dept 2007]). MKAP established prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 200 and common-law negligence claims by, inter alia, demonstrating that neither Mack nor Pollack exercised supervisory control over plaintiff's work and had no actual or constructive notice of any dangerous condition.

Here, Plaintiff's deposition testimony established that neither Mack nor Pollack supervised or controlled plaintiff's work and that Plaintiff was supervised and instructed solely by his employer, Sweeney & Conroy. Further, Plaintiff's contention that Defendant Mack had constructive notice or actual notice of the defective condition because she visited the site more than twice a week, attended site meetings, and had noticed the covering on the floor of the hallways in the second floor is not sufficient to show actual or constructive notice of a dangerous condition. The paper was used to protect the floor. As stated above, there is no evidence that MKAP supervised, controlled, or directed the plaintiff's work giving rise to the subject accident. MKAP's involvement in the project, directly and through its representative, merely amounts to general supervision of the project as expected by an owner but does not rise to the level of supervision,

direction or control envision needed for liability under Labor Law § 200 or common-law negligence.

Accordingly, MKAP's motion seeking summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence causes of action are granted and said claims is hereby dismissed.

Indemnification

Given the decision above for the Labor Law §§ 200, 240(1) and 241(6) causes of action, MKAP's motion for summary judgment for indemnification is moot.

CONCLUSION

Defendant MKAP's motion for summary judgment is granted for claims under Labor Law §§ 240(1), 241(6), 200 and common-law negligence. Plaintiff's summons and complaint for claims against MKAP are hereby dismissed. MKAP's motion for summary judgment for indemnification as against Sweeney is denied as moot.

Dated: 10/17/19

HON. LARRY D. MARTIN
J.S.C.

KINGS COUNTY CLERK
FILED
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HON. LARRY D. MARTIN
Justice of the Supreme Court