I.P. v Bonilla

2020 NY Slip Op 33181(U)

September 24, 2020

Supreme Court, Kings County

Docket Number: 518539/2017

Judge: Richard Velasquez

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At an IAS Term, Part 66 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 24th day of September, 2020

PRESENT:
HON. RICHARD VELASQUEZ
Justice.
---X
I.P., infant by his father
JOSE MUGUEL PEREZ HERNANDEZ,

Plaintiff,

-against-

Index No.: 518539/2017
Decision and Order

RAUL BONILLA,

Defendants,
---X

The following *papers NYSCEF* Doc #'s 35 to 58 read on this motion:

Papers	*NYSCEF DOC NO.'s*
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed	35-44
Opposing Affidavits (Affirmations)	47-48
Reply Affidavits	51-58

After having heard Oral Argument on JULY 29, 2020 and upon review of the foregoing submissions herein the court finds as follows:

Defendant moves this court pursuant to CPLR 3212 for an Order granting summary judgment dismissing plaintiff's complaint, in favor of defendants on all causes of action, including Labor Law 240(1), 241(6) and 200 and common law negligence. Plaintiff opposes the same. (MS#3).

BACKGROUND/FACTS

The following action arises from an incident where plaintiff allegedly sustained personal injuries on August 11, 2017.

It is alleged by plaintiff on date of the accident plaintiff was working for a company called the Bentzys Corporation. Plaintiff testified only that "Bentzys Corporation" is in Brooklyn, and does not recall the address. Plaintiff applied for roofing assistant job at "Bentzys Corporation"[1]. Plaintiff testified he only remembers his boss as "The Columbian" he does not recall his name. Plaintiff also testified he was paid by "Bentzys Corporation". Plaintiff alleges he had been working at 44 Stanhope Street Brooklyn NY for approximately 5 days before the incident occurred. Plaintiff alleges that the accident occurred on Friday August 11, 2017 at approximately 11:00 am. Plaintiff alleges the accident did not occur at 44 Stanhope Street, but that the accident occurred next door to 44 Stanhope Street. There was a separate building, which plaintiff described as a one story garage, located next door to 44 Stanhope Street. The garage was not physically connected to the five (5) story building known as 44 Stanhope Street. Plaintiff testified he does not know who owned the garage and the garage was not a part of the construction project for the five (5) story building at 44 Stanhope Street.

It is alleged by the plaintiff, on the date of the accident "The Columbian"[2] directed plaintiff to perform work at the garage next door to 44 Stanhope Street. It is further alleged that Plaintiff was told by "The Columbian" that there was a pin-drop hole in the roof of the garage that plaintiff had to cover. It is further alleged by the plaintiff a man

[1] "Bentys Corporation" is not a named party to this action, no person employed or owner of said corporation has been deposed or disclosed as a witness, an said alleged corporation address has not been disclosed as a witness to the incident in question.
[2] "The Columbian" is an alleged unidentified employee of the alleged "Bentys Corporation", is not a named party, was not deposed or disclosed as a witness to the incident in question.

named "Bentzys"[3], who was employed by the company plaintiff worked for as a foreman, told the "Columbian" to go over and fix the garage roof. Plaintiff alleged he had to put a ladder up in order to climb up to the top of the garage, and that the "Columbian" provided plaintiff with the ladder. Plaintiff further testified and alleges that the ladder was found by the side of a building by the "The Columbian". Plaintiff also alleges he saw "the man"[4] (who the plaintiff cannot identify) across the street allegedly lend "The Columbian" the ladder and that the ladder came from a place next door on the opposite side of the street. Plaintiff was able to get onto the roof without incident and made some measurements. Plaintiff claims that he saw a hole on the roof. Plaintiff cut a piece of roofing to place on the roof. Plaintiff alleges, as plaintiff went up the ladder, he felt a twisting and as he attempted to climb over the ladder go back onto the roof, he felt the ladder move. Plaintiff fell to the left with the ladder.

It is undisputed that the owner of the "garage" where the incident took place is defendant Raul Bonilla. Said garage is allegedly located at 275 Evergreen Avenue, Brooklyn, NY. It is undisputed 275 Evergreen is a one story 5 car garage with separate openings with the entrances to the garages located on Stanhope Street. Defendant Raul Bonilla testified he did not authorize any construction work at the premises where the alleged incident took place; he was not aware of any issues with the garage roof; and the garage roof was replaced in 2014 three years earlier. Defendant further testified there is no construction contract for work on the building located at 275 Evergreen. Defendant further contends he has never heard of the "Bentzys Corporation", has never

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[3] "Bentzys" is an alleged unidentified employee of the alleged "Bentys Corporation" was not deposed, is not a named party, and has not been disclosed as a witness by the plaintiff, and is alleged that he is the foreman for the alleged construction job.

[4] All allegations that the unidentified man across the street was defendants son are mere speculation as plaintiff testified he does not know defendant or his son.

met the plaintiff, and never requested anyone to do any repairs on his property. Defendant further testified he did not give anyone permission or authority to contract for any construction work on the property located at 275 Evergreen Avenue, Brooklyn NY.

ARGUMENTS

Defendant contends summary judgment should be granted because there is no nexus between the plaintiff and the defendant so as to impose liability pursuant to NY Labor Law. Defendant contends Labor Law 200 and common law negligence cause of action should be dismissed because the Defendant did not direct or control and or supervise the means and methods of the work being performed by the plaintiff, defendant never contracted with the company that plaintiff works, for any construction projects. Defendant contends plaintiff was not engaged in construction, excavation and/or demolition work at the time of the incident and the Labor Law 240 and 241 cause of action must be dismissed.

Plaintiff in opposition contends the defendant has not met their prima facie burden. Plaintiff opposition papers contend defendants son is an agent of defendant and defendants son Anthony Bonilla gave plaintiff the ladder[5] and directed him to repair the roof of the garage which creates the requisite nexus to impose liability. Plaintiff's opposition also contends that defendant directed plaintiffs work and provided plaintiff with a defective unsafe ladder and should be liable pursuant to Labor Law 200.

ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to

[5] The court notes the plaintiff did not testify that anyone other than the "Columbian" gave him the ladder and directed him to do the work.

demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trial of the action. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.

A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party". *CPLR* 3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." *Id*. The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. The moving party must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. (*Zuckerman v. City of New York*, 49 NY2nd 557 [1990]) Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v. Algaze*, 84 NY2d 1019 [1995]). Summary judgment must not be granted unless it is clear that by no rational process can the jury find in favor of the non-moving party. *O'Neill v. Port Authority of New York and New Jersey*, 111 A.D.2d 616, 489 N.Y.S.2d 585 (2nd Dept. 1985).

Labor Law § 200 & Common Law Negligence

"Labor Law 200(1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work" (*Ortega v. Puccia*, 57 AD3d 54, 60, 866 NYS2d 323). "[W]hen a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work" (*id.* at 61, 866 NYS2d 323). *Goodwin v. Dix Hills Jewish Center,* 144 AD3d 744, 41 NYS3d 104, 2016 NY Slip Op. 07293. "As a threshold matter, there is no difference between asserting a claim based upon the common-law principles of negligence or one which alleges that the defendant violated section 200 of the Labor Law Section 200 is nothing more than a codification of the common-law duty of an owner or general contractor to provide a safe place to work." *Rizzuto v. L.A. Wenger Contr. Co.*, 91 NY2d 343, 352, 670 NYS2d 816, 821, 693 NE2d 1068, 1073 (1998); *Rusin v. Jackson Hgts. Shopping Ctr.,* 27 NY2d 103, 313 NYS2d 715, 261 NE2d 635 (1970). In other words, a claim arising pursuant to the provision is "tantamount to a common-law negligence claim in a workplace context." *Mendoza v. Highpoint Assoc.*, IX, LLC, 83 AD3d 1, 9, 919 NYS2d 129, 135 (1st Dept.2011); *Quoting Lopez v. Dagan*, 98 AD3d 436, 440–41, 949 NYS2d 671, 675 (2012). "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" (*Ortega v. Puccia*, 57 AD3d at 62, 866 NYS2d 323).

As a preliminary matter the court notes there is nothing in this record that establishes there was a construction project in progress at the premises where the alleged incident occurred. Specifically, there is no contract for any construction work

between the plaintiffs employer and the defendant owner of the property. The only testimony before this court is that there was a construction project for roof replacement being performed at the unconnected/detached property next door to the property in which the incident took place. There is no testimony that the owner of the property contracted for any work to be performed at the property where the incident occurred. There is no testimony by the plaintiffs employer that they were hired to perform work at defendants property. There is no testimony that the defendant did hire or engage plaintiff and or plaintiffs employer for any work at the premise in question.

As to the Labor Law 200 and Common Law negligence claim, in the present case, there is not a scintilla of evidence establishing the defendant had the authority to supervise or control the performance of the work. In fact, the only testimony before the court is that people other than the defendant supervised and controlled the work. Any testimony regarding who gave "Bentys" the ladder is purely speculative as the plaintiff was not present when "Bentys" was allegedly speaking with a man across the street. Additionally, this court will not consider the alleged affidavit of "Jario Lopez" signed by a "Jarron David Lopez Aguilar". It is well settled, "where a party defends a failure to comply with a notice to produce witness information ...., failure to provide the information in his [or her] possession would preclude him from later offering proof regarding that information" (*Corriel v Volkswagen of Am.*, 127 AD2d 729, 731 [1987]). In the present case, the plaintiff offers no explanation for failing to disclose the address of this alleged witness until after the filing of the note of issue. Accordingly, the affidavit was improperly submitted, and will not be considered. *See Kontos v. Koakos Syllogos ""Ippocrates," Inc.*, 11 AD3d 661, 783 NYS2d 653 (2 Dep't 2004). Additionally, there is

no testimony or evidence before this court that the defendant had actual or constructive notice of the allegedly dangerous condition which caused the accident, (*see, Miller v. Perillo,* 71 AD2d 389, 422 NYS2d 424; *Monroe v. City of New York,* 67 AD2d 89, 414 NYS2d 718). As such, the plaintiff's labor law 200 and common law negligence claims must be dismissed.

<u>Labor Law § 240(1)</u>

"Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person." (*Runner v. New York Stock Exchange,* 13 NY3d 599, 604 [2009] [quoting *Ross v. Curtis–Palmer Hydro–Elec. Co.,* 81 NY2d 494, 501 (1993)]). In determining the applicability of the statute, the "relevant inquiry" is "whether the harm flows directly from the application of the force of gravity to the object." (*See Runner v. New York Stock Exchange,* 13 NY3d at 604.) "The single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." (*Id.*) "The purpose of the strict liability statute is to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction work site elevation differentials, and, accordingly, that there will be no liability under the statute unless the injury producing accident is attributable to the latter sort of risk." (*See Runner v. New York Stock Exchange,* 13 NY3d at 603; *see also Davis v. Wyeth Pharmaceuticals, Inc.,* 86 AD3d 907, 909 [3d Dept 2011].)

To meet their burden on a motion for summary judgment on a Labor Law § 240(1) claim, defendants must establish, prima facie, "that the plaintiff's work did not

constitute erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure within the meaning of Labor Law § 240(1)" (*Kearney v. Dynegy, Inc.*, 151 AD3d 1037, 57 NYS3d 520 [2 Dept., 2017]; *see also Tserpelis v. Tamares Real Estate Holdings, Inc.*, 147 AD3d 1001, 47 NYS3d 131 [2 Dept 2017]). "While the reach of [Labor Law] section 240(1) is not limited to work performed on actual construction sites, the task in which an injured employee was engaged must have been performed during 'the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure' " (*Quituizaca v. Tucchiarone,* 115 AD3d 924, 982 NYS2d 524 [2 Dept., 2014], *quoting Martinez v. City of New York*, 93 NY2d 322, 690 NYS2d 524 [1999]; see also Holler v. City of New York, 38 AD3d 606, 832 NYS2d 86 [2 Dept 2007]).

In the present case, the record and evidence presented establishes that defendant did not contract for any work to be done at his premises. There is nothing in the record or evidence to establish there was a construction project at the premises where the plaintiffs accident occurred. Contrary to the plaintiff's contentions, there is nothing in the record to establish that defendants son was an agent of the defendant for purposes of liability under Labor Law § 240(1). Defendant established that he did not contract for nor was he aware of the work the plaintiff was performing on the garage. "Bentys Corporation" was the contractor for the construction of and the replacement of the roof at 44 Stanhope, a construction project separate from the alleged project to repair the pin hole work on the defendants garage. Defendant BONILLA did not supervise or control the plaintiff's work, provided no equipment to the plaintiff, and was not present at the site on the date of the accident, did not contract for

plaintiff to perform any work and did not authorize any individual to contract for such repair work (*see Huerta v. Three Star Constr. Co., Inc.,* 56 AD3d 613, 868 NYS2d 679; *Aversano v. JWH Contr., LLC,* 37 AD3d at 746, 831 NYS2d 222; *Morris v. Pepe,* 283 AD2d 558, 725 NYS2d 71; *Feltt v. Owens,* 247 AD2d 689, 690–691, 668 NYS2d 757). Even if the court were to consider the affidavit of "Jario Lopez" submitted in opposition by the plaintiff, which it is not, an affidavit by a non-party that is an alleged co-worker that was not deposed nor his complete address exchanged after demands, alleging a guy across the street gave them a ladder and that he heard that guy say to someone else i.e. "Bentys"(the foreman) he was defendants son, without more, is insufficient to raise a triable issue of fact as to whether defendants son was an agent of the defendant and contracted for the alleged work. (*see Huerta v. Three Star Constr. Co., Inc.,* 56 AD3d 613, 868 NYS2d 679; *Aversano v. JWH Contr., LLC,* 37 AD3d at 746, 831 NYS2d 222; *Feltt v. Owens,* 247 AD2d at 690–691, 668 NYS2d 757); *quoting Kilmetis v. Creative Pool & Spa, Inc.*, 74 AD3d 1289, 1290–91, 904 NYS2d 495, 497 (2010). As such, there is no circumstance in which a jury could rationally find based on this record that defendants son was an agent of defendant, and defendant authorized said agent to contract on his behalf for the alleged work of patching the alleged pin hole in the roof of the garage. As such, plaintiffs Labor Law 240(1) cause of action must be dismissed.

Labor Law 241(6)

Next, the court shall address the Labor Law 241(6) claims. Notably, The Court of Appeals has "consistently held that ownership of the premises where the accident occurred—standing alone—is not enough to impose liability under Labor Law § 241 (6)

where the property owner did not contract for the work resulting in the plaintiff's injuries; that is, ownership is a necessary condition, but not a sufficient one. Rather, the Court of Appeals has "insisted on "some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest" (*Abbatiello*, 3 NY3d at 51; *see also Scaparo v Village of Ilion*, 13 NY3d 864, 866 [2009] ["In cases imposing liability on a property owner who did not contract for the work performed on the property, this Court has required 'some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest' " (*Quoting, Abbatiello v. Lancaster Studio Assocs.*, 3 NY3d at 51; 814 N.E.2d 784 (2 Dep't 2004); quoting *Morton v. State*, 15 NY3d 50, 56, 930 NE2d 271 (2010).

In the present case, no such nexus exists. The injured plaintiff was on the owner's premises not by reason of any action of the owner." *Quoting, Abbatiello v. Lancaster Studio Assocs.,* 3 N.Y.3d 46, 51, 814 N.E.2d 784 (2 Dep't 2004). Direction and control for purposes of liability under Labor Law §§ 240 and 241(6) will only be found in situations where the homeowner supervises the method and manner of work, can order changes in the specifications, reviews the progress and details of the job with the general contractor, and/or provides the equipment necessary to perform the work (*see, Rimoldi v. Schanzer,* 147 AD2d 541, 537 NYS2d 839). Plaintiff has failed to show facts to demonstrate that the defendant "exercised any direction or control" over the alleged work. On the contrary, the facts adduced at the depositions reveal that the equipment used in the project was supplied by an unknown/unidentified person across the street[6], that the foreman of the project plaintiff was hired to work for, gave "the

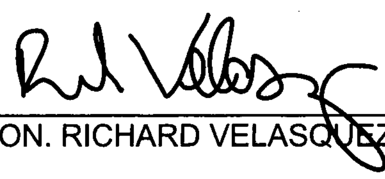
[6] All allegations that the unidentified man across the street was defendants son are mere speculation as plaintiff testified he does not know defendant or his son.

Columbian" the ladder who in turn gave it to the plaintiff and directed him to do work on a detached building next door to the construction site where he was working. *See Devodier v. Haas*, 173 AD2d 437, 438, 570 NYS2d 63, 64 (1991). As previously discussed, this court notes the plaintiff has also failed to establish that defendants son was an agent of the defendant. "Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under [Labor Law §§ 240 and 241(6)]" (*Russin v. Louis N. Picciano & Son,* 54 NY2d 311, 318, 445 NYS2d 127, 429 NE2d 805 [1981]; *see Walls v. Turner Constr. Co.,* 4 NY3d 861, 863–864, 798 NYS2d 351, 831 NE2d 408 [2005]; *Fisher v. Hart,* 27 AD3d 998, 999, 812 NYS2d 668 [2006]). There is no contract or testimony by anyone with direct knowledge of who the alleged man across the street actually is, what the alleged man across the street said to "Bentys" (the alleged foreman of the construction site at 44 Stanhope), nor is there any proof the defendant exercised any level of control over the construction for which he did not contract (*see Becker v. Tallamy, Van Kuren, Gertis & Assoc.,* 221 AD2d 1014, 1014, 634 NYS2d 282 [1995]; *cf. Hall v. Miller & Assoc.,* 167 AD2d 688, 690–691, 563 NYS2d 270 [1990]); (*see also, Narducci v. Manhasset Bay Assoc.,* 96 NY2d 259, 269, 727 NYS2d 37, 750 NE2d 1085 [2001]); quoting, *Baker v. Town of Niskayuna*, 69 AD3d 1016, 1018–19, 891 NYS2d 749, 752 (2 Dep't 2010). The only testimony before this court is that the defendant did not authorize his son, or anyone for that matter, to manage or contract for any work on his property known as the garage located at 275 Evergreen. As such, plaintiffs' labor law 241(6) causes of action must be dismissed as there is no nexus between the plaintiff and the defendant.

Accordingly, Defendants request pursuant to CPLR 3212 for an Order granting summary judgment dismissing Labor Law 240(1), 241(6) and Labor Law 200 and common law negligence causes of action is hereby granted, for the reasons stated above. (MS#3).

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
September 24, 2020



HON. RICHARD VELASQUEZ

SO ORDERED

Hon. Richard Velasquez

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