Pointer v 111 Pheasant Lane LLC
2020 NY Slip Op 35340(U)
December 21, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 22/2020
Judge: Joseph A. Santorelli

ORIGINAL

SHORT FORM ORDER

INDEX No. 22/2020

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 7-1-2020
SUBMIT DATE 10-22-2020
Mot. Seq. # 1 - MD

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LIGIA POINTER, as Administratrix of the Estate of JAVIER HERIBERTO TORRES, and LIGIA POINTER Individually,

Plaintiff,

-against-

111 PHEASANT LANE LLC and GEORGE VICKERS, Jr ENTERPRISES INC. and GEORGE VICKERS Jr.,

Defendants,

GEORGE E. VICKERS JR. ENTERPRISES, INC. Incorrectly sued herein as GEORGE VICKERS, Jr ENTERPRISES INC.,

Third-Party Plaintiff,

-against-

TROY CONSTRUCTION & DESIGN INC.,

Third-Party Defendant,

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111 PHEASANT LANE LLC ,

Second Third-Party Plaintiff,

-against-

TROY CONSTRUCTION & DESIGN INC.,

Second Third-Party Defendant.

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Upon the following papers numbered 1 to 31 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; ~~Notice of Cross Motion and supporting papers ____~~; Answering Affidavits and supporting papers 14 - 24 ; Replying Affidavits and supporting papers 25 - 31 ; ~~Other ___; (and after hearing counsel in support and opposed to the motion)~~ it is,

Defendant 111 Pheasant Lane LLC, hereinafter referred to as "Pheasant", moves for an order granting summary judgment dismissing the plaintiff's complaint and all cross-claims against it arguing that it hired George E. Vickers, Jr. Enterprises Inc., hereinafter referred to as "GEVJE", and Pheasant did not control or supervise the decedent plaintiff's work. Pheasant argues that the decedent plaintiff's claims under Labor Law §§ 240 (1) and 241 (6) are barred by the single-family homeowner exemption. The plaintiff did not file opposition papers to this motion. Third-Party Defendant Troy Construction & Design Inc., hereinafter referred to as "Troy", filed opposition to the application arguing that discovery has not been conducted.

This action was commenced by the plaintiff to recover damages for injuries allegedly sustained by the decedent on July 2, 2019, when during the course of his employment with Troy he fell and suffered fatal injuries at the premises known as 111 Pheasant Lane, Southampton, New York. Plaintiff alleges that the decedent was injured during the course of his employment on property owned by defendant Pheasant wherein GEVJE contracted with the owners of said property to do construction work including renovations and asserts claims against the defendants for violations of the Labor Law and for common law negligence. Defendants Pheasant and GEVJE each filed separate third-party complaints against third-party defendant Troy. Stipulations of discontinuance were filed related to the causes of action in the complaint against George Vickers, Jr., individually, and for the cross-claim filed by GEVJE against Pheasant. Pheasant now moves for summary judgment claiming that it is a single family homeowner who was not present at the job site and did not direct or control the work being performed. It also claims that it did not create or cause the dangerous condition and that the causes of action against it should be dismissed due to the homeowner exemption under the Labor Law. Pheasant states that it is a single purpose limited liability company formed to own the property located at 111 Pheasant Lane, Southampton, New York. Pheasant claims that the sole shareholders and members are Michael Zaoui and Anna Zaoui. Pheasant entered into a contract with GEVJE to perform certain construction at the Zaoui home pursuant to a written contract. GEVJE entered into a contract with Troy dated December 7, 2018 to perform work at the subject home. Troy argues that "[t]he motion by 111 Pheasant must be denied as wholly premature and being made without allowing the parties any reasonable opportunity to engage in discovery, including the deposition that was noticed of 111 Pheasant in March of 2020." Troy further argues

> Pheasant relies entirely upon an affidavit from an individual who purports to be a personal resident of the home, behind a somewhat corporate structure, Michael Zaoui, which is annexed here to as Exhibit "F". No other documents are submitted, such as corporate information, to confirm the statements by this individual. Mr. Zaoui conveniently alleges that the subject property was only used as a single-family residence with no commercial use and that he and his family were out of the country at the time of construction. He also claims he, solely because he was out of the

> country, did not direct or control the work. Id. Mr. Zaoui fails to provide any information whatsoever about the corporate structure of 111Pheasant which is the limited liability company that actually owns the subject house, nor any information about Peacock Limited, yet another company that owns the 111 Pheasant Company. Furthermore, despite Mr. Zaoui's claim that he and his family were "out of the country at the time of construction work", he has failed provide any plane tickets, passports, hotel invoices or further proofs to support these assertions. That absence, even if true, does not prove lack of direction, control, or supervision, and to wit, one's physical presence is not required for such a finding. But, because depositions have not been held, no party has been permitted to inquire as to Mr. Zaoui's role at all. How did he contract for the project? What level of control and supervision was exercised? Did he designate an agent or other individual to do so, if not done by him? What were the conditions of the pergola at the time he left the country and what communications or notice did he have about same? What role does he play in Peacock Limited? What kind of Company is Peacock Limited and how is it organized? All of these questions, and more, would be posed at a deposition and are all not only relevant, but could create questions of fact with respect to plaintiff's labor law claims and negligence claims, as well as Troy's common law negligence, contribution and contractual indemnity claims.

A party moving for summary judgment 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 (***Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP***, 26 NY3d 40, 19 NYS3d 488 [2015]; ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (***Nomura***, *supra*; *see also* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (***Daliendo v Johnson***, 147 AD2d 312, 543 NYS2d 987 [2d Dept 1989]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (***Nomura***, *supra*; *see also* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

The Court in ***Perri v Gilbert Johnson Enters., Ltd.***, 14 AD3d 681, 683 [2nd Dept 2005], held that

> To establish liability for common-law negligence or violation of Labor Law § 200, the plaintiff must establish that the defendant in issue had "authority to control the activity bringing about the injury

> to enable it to avoid or correct an unsafe condition" (***Russin v Picciano & Son***, 54 N.Y.2d 311, 317, 429 N.E.2d 805, 445 N.Y.S.2d 127 [1981]; see ***Rizzuto v Wenger Contr. Co.***, 91 N.Y.2d 343, 352, 693 N.E.2d 1068, 670 N.Y.S.2d 816 [1998]; ***Singleton v Citnalta Constr. Corp.***, 291 A.D.2d 393, 394, 737 N.Y.S.2d 630 [2002]). "General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common-law negligence and under Labor Law § 200" (***Dos Santos v STV Engrs., Inc.***, 8 A.D.3d 223, 224, 778 N.Y.S.2d 48 [2004], lv denied, 4 N.Y.3d 702, 824 N.E.2d 49, 790 N.Y.S.2d 648 [2004]). Further, the authority to review safety at the site is insufficient if there is no evidence that the defendant actually controlled the manner in which the work was performed (see ***Loiacono v Lehrer McGovern Bovis***, 270 A.D.2d 464, 465, 704 N.Y.S.2d 658 [2000]).

In order to find liability for common-law negligence or under Labor Law 200 the owner of the premises must have "supervisory control over the injury-producing activity". (***Balbuena v NY Stock Exch., Inc.***, 49 AD3d 374, 376 [1st Dept 2008]. In ***Perri v Gilbert Johnson Enters., Ltd.***, supra, the evidence "established that Gilbert visited the site '[s]ometimes once or twice a week, sometimes once every two weeks' to talk to customers and review the progress of the work... There is no evidence in the record that the owner supervised the manner in which the work was performed" and therefore summary judgment was granted dismissing the common-law negligence and Labor Law 200 violations.

Labor Law § 200 is a codification of the common-law duty imposed upon an owner, contractor, or their agent, to provide construction site workers with a safe place to work (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Haider v Davis***, 35 AD3d 363, 827 NYS2d 179 [2d Dept 2006]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (***Messina v City of New York***, 46 NYS3d 174, 2017 NY Slip Op 00640 [2017], quoting ***Ortega v Puccia***, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]). When the methods or materials of the work are at issue, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged "had the authority to supervise or control the performance of the work" (*id.*). General supervisory authority at a work site is not enough; rather, a defendant must have had the responsibility for the manner in which the plaintiff's work is performed (*see* ***Messina v City of New York***, *supra*).

Labor Law §§ 240 and 241 apply to "[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith." To establish entitlement to the protection of the homeowner's exemption, a defendant must demonstrate that her house was a single- or two-family residence and that she did not "direct or control" the work being

performed (***Ortega v Puccia***, *supra* at 58). "The statutory phrase 'direct or control' is construed strictly and refers to situations where the owner supervises the method and manner of the work" (*id.* at 59).

The owner or possessor of real property also has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Milewski v Washington Mut., Inc.***, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]). Thus, "[w]here a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" (***Ortega v Puccia***, *supra* at 61; *see* ***Pacheco v Smith***, 128 AD3d 926, 9 NYS3d 377 [2d Dept 2015]; ***Chowdhury v Rodriguez***, 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]).

In ***Colombini v Westchester County Healthcare Corp.***, 24 AD3d 712, 715 [2d Dept 2005], the Court held that

> Summary judgment should be denied as premature where, as here, the party opposing the motion has not had an adequate opportunity to conduct discovery into issues within the knowledge of the moving party (see CPLR 3212 [f]; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 506, 618 NE2d 82, 601 NYS2d 49 [1993]; ***OK Petroleum Distrib. Corp. v Nassau/Suffolk Fuel Oil Corp.***, 17 AD3d 551, 793 NYS2d 152 [2005]; ***Mazzola v Kelly***, 291 AD2d 535, 738 NYS2d 246 [2002]).

Based upon a review of the motion papers the Court concludes that the defendant Pheasant's motion for summary judgment as to the complaint and cross-claims of Troy is premature as the third-party defendant has not had an adequate opportunity to conduct discovery into issues within the knowledge of the moving party as to the corporate structure of Pheasant and Peacock Limited which Troy claims is a corporate owner of Pheasant. Thus the motion for summary judgment must be denied; and it is

ORDERED that a preliminary conference is hereby scheduled to be held on **Thursday, February 11, 2021 at 10:00 a.m.**, in the DCM courtroom 338 of the Hon. Alan D. Oshrin Supreme Court Building, 1 Court Street, Riverhead, New York. Counsel for the respective parties in this action are directed to appear at that time.

The foregoing shall constitute the decision and Order of this Court.

Dated: December 21, 2020

HON. JOSEPH A. SANTORELLI
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**