Supreme Court of the State of New York
County of Kings

Part LL1

VINCENT TURTURRO,

Plaintiffs,

against

MIP ONE WALL STREET ACQUISITONS LLC C/O MACKLOWE PROPERTIES, TURNER CONSTRUCTION COMPANY, AND J.T. MAGEN & COMPANY INC.,

Defendants.

Index Number 519981/2022
Seq. 003

DECISION/ORDER

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

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	2
Replying Affidavits	3
Exhibits	
Other	

Upon the foregoing papers, defendant Turner's motion for summary judgment (seq. 003) is decided as follows:

Introduction and Procedural Background

This action arises out of injuries that the plaintiff claims he sustained on December 9, 2021 when he tripped over a garbage chute on the 20th floor of a construction project located at One Wall Street, New York, NY. On May 2, 2017, defendant MIP One Wall Street Acquisition LLC c/o Macklowe Properties (MIP) retained defendant J.T. Magen & Company Inc. (JTM) as a general contractor on the project at 1 Wall Street to convert the Premises into residential and retail property (the Project). On or around January 23, 2019, JTM retained plaintiff's employer Jantile, Inc. as the tile/stone installation subcontractor on the Project.

It is uncontested that Turner was hired by LTF Lease Company, LLC (LTF), a commercial tenant of building owner MIP, to oversee construction and development of Life Time Athletic fitness club at 1 Wall Street. LTF only leased the bottom four levels of the building for its commercial purposes. The contract between Turner and LTF outlining the scope

of work Turner was contracted to perform is also attached.

MIP, the building owner, contracted with JTM to convert the upper levels of 1 Wall Street into residential and commercial property. MIP then sub-contracted Jantile, plaintiff's employer, to perform tile and stone installation throughout the renovated floors. Plaintiff alleges that he was injured while performing work on the 20th floor.

Turner contends that it did not perform any work on the 20th floor, where the plaintiff contends that his injury occurred. Turner submits the affidavit of Michael Kenna, its project manager, to support this contention. Mr. Kenna states, based on his contention that he was "fully familiar with the work performed and contracts entered into by Turner," that Turner only performed work at street level and three floors below street level, and did not perform any work on any other part of the premises, including the 20th floor (Kenna Aff. at ¶ 4). Mr. Kenna further states that "based on [his] personal knowledge of the work at the premises, Turner" did not work on the 20th floor, did not have authority by contract or otherwise to work on, direct, or supervise the project occurring on the 20th floor, and did not provide any tools or other equipment for the project on the 20th floor (Kenna Aff. at ¶ 5).

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Labor Law §§ 240 (1) and 241 (6) imposes nondelegable duties on owners, general contractors, and their agents to conform to the requirements of those sections (*see Russin v Louis*

Picciano & Son, 54 NY2d 311 [1981]; *see also Van Blerkom v America Painting, LLC*, 120 AD3d 660 [2d Dept 2014]). "Only upon obtaining the authority to supervise and control [the work giving rise to those duties] does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241" (*Russin*, 54 NY2d at 318).

Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]). Thus, claims for negligence and for violations of Labor Law § 200 are evaluated using the same negligence analysis (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). In cases where a dangerous condition is at issue, liability may attach to a defendant if it either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*id.* at 61). Where the means and methods of the plaintiff's work are at issue, liability attaches where a defendant "had the authority to supervise or control the performance of the work" (*id.*).

Defendant Turner moves for summary judgment on the basis that it 1) is not a proper defendant under Labor Law §§ 240 (1) and 241 (6) and 2) did not create a dangerous condition nor did it have the authority to supervise or control the performance of plaintiff's work. Turner asserts that it, therefore, is not liable to the plaintiff as a matter of law.

While Turner was admittedly a general contractor at the same address where plaintiff's alleged injury occurred, Turner provides evidence indicating that it was retained solely as a general contractor for the Life Time Athletic renovation project. Based on the evidence provided, Turner did not contract with the owner of the building, but rather with the commercial tenant LTF. LTF did not occupy or control the floor where plaintiff's alleged injury occurred, and did not contract with Turner to perform work on those floors. Turner has provided contracts

indicating that its authority did not extend to the floor where plaintiff's injury allegedly occurred, and therefore that it did not have the authority to control, supervise, or direct plaintiff's work. Additionally, there is no evidence that Turner supplied any of the materials for plaintiff's work or any of the materials that allegedly contributed to plaintiff's accident.

Upon its showing that it was not the general contractor of the project involving the plaintiff and was not an agent of the owner or of that general contractor, that it did not have the authority to direct or control the plaintiff's work, and that the work it was contracted to perform was unrelated to and did not impact plaintiff's project, Turner has made out its prima facie entitlement to summary judgment under each of plaintiff's claims (*see Russin*, 54 NY2d at 318).

In opposition, plaintiff argues that Turner's motion is premature as no depositions have been conducted at this time (citing CPLR 3212 [f]). Arguing prematurity requires a party to demonstrate that discovery may reveal essential facts exclusively within the possession of the movant (*Sapienza v Harrison*, 191 AD3d 1028 [2d Dept 2021]). Plaintiff contends that the operations and day-to-day responsibilities of Turner's employees, and especially whether any of them ever entered the 20th floor, are facts unavailable to the plaintiff and would be made clear upon further discovery. Plaintiff further argues that Turner has failed to provide any work logs, daily logs, progress reports, or any other documents reflecting the work performed by Turner at the subject construction site. Turner's co-defendants took no position on the motion.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). Therefore, motions seeking summary judgment before depositions and other relevant discovery are generally disfavored. However, it is also true that "mere hope or speculation" is insufficient to defeat a motion for summary judgment (*Boris L. v AMC Entertainment Holdings, Inc.*, 208 AD3d 859, 860 [2d Dept

2022]). In this action and on the papers currently before the court, plaintiff has not demonstrated that further discovery would be likely to rebut Turner's showing that it is not a proper Labor Law §§ 240 (1) and 241 (6) defendant in this action. Plaintiff also has not demonstrated that further discovery would be likely to show Turner had authority to direct or control the work on the 20th floor or was involved with the garbage chute on that floor when Turner has furnished evidence that its work and authority were entirely limited to the bottom four levels of the building. Therefore, this motion and the arguments before the court represent the unusual case where an early application warrants summary judgment before substantial discovery has been conducted.

Conclusion

Defendant Turner's motion for summary judgment (Seq. 003) is granted as to Turner only; plaintiff's action shall proceed against the remaining defendants.

This constitutes the decision and order of the court.

March 18, 2024
DATE

DEVIN P. COHEN
Justice of the Supreme Court