

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DUANE A. HART IA Part 18
Justice

	x	Index	
ZENON WOJTOWICZ		Number <u>820</u>	2003
- against -		Motion	
		Date <u>June 4,</u>	2003
NEW YORK & HARLEM RAILROAD COMPANY, et al.		Motion	
	x	Cal. Number <u>32</u>	

The following papers numbered 1 to 10 read on this motion by defendant New York and Harlem Railroad Company ("Harlem Railroad") to dismiss the complaint and cross claims asserted against it pursuant to CPLR 3211(a)(1) based upon a deed.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1 - 4
Answering Affidavits - Exhibits	5 - 8
Defendant Harlem Railroad's Memoranda of Law.....	9- 10

Upon the foregoing papers it is ordered that the motion is denied.

This is an action for personal injuries allegedly sustained by plaintiff on January 2, 2001 when he fell from a ramp while working on a construction site at 270 Park Avenue in Manhattan (the "building"). Plaintiff commenced this action against defendants for violations of Labor Law § 240(1), § 241(6) and § 200, and for common-law negligence. In his complaint, plaintiff alleges that Harlem Railroad owned, managed, operated, controlled and supervised the building.

In support of its motion, Harlem Railroad argues that it has no interest in, access to, or control of the building. Rather, Harlem Railroad asserts that it owns the land beneath the building which is leased to non-party American Premier Underwriters, f/k/a Penn Central Corporation. Harlem Railroad states that on September 9, 1976, it sold all of its interest in the building (i.e., the property from the ground level up) to nonparty Union

Carbide Corporation. Therefore, Harlem Railroad maintains that it is not an owner of the building, and therefore, cannot be held liable under the Labor Law or for contribution.

In opposition, plaintiff argues that Harlem Railroad admits to being a fee owner, and, therefore may be held liable for violations under the Labor Law. Defendant J.P. Morgan Chase & Co. has not submitted any opposition to the motion.

The statutory duty imposed by sections 240(1), 241(6) and 200 of the Labor Law places ultimate responsibility for safety practices upon owners of the work site and general contractors (see, Gordon v Eastern Ry. Supply, 82 NY2d 555; Russin v Picciano & Son, 54 NY2d 311; Kowalska v Board of Educ. of the City of N.Y., 260 AD2d 546; Sabato v New York Life Ins. Co., 259 AD2d 535; Coleman v City of N.Y., 230 AD2d 762, affd 91 NY2d 821). The term owner is not specifically defined in the Labor Law. However, the Court of Appeals has instructed that any party who is "technically an 'owner'" must be considered an owner under the Labor Law statute even if the owner had no control over the work and the work is being performed for the benefit of others (Coleman v City of N.Y., supra; see, Copertino v Ward, 100 AD2d 565).

In support of its motion, Harlem Railroad relies on Perez v Paramount Communications, Inc. (247 AD2d 264, affd on other grounds 92 NY2d 749) a First Department case wherein the Appellate Division found that defendant Paramount "was not an 'owner' for purposes of Labor Law liability, since its apparent interest in the underlying land did not give it a proprietary interest in the building where the accident occurred and it neither contracted for the work nor had any control over its performance" (id., at 264). However, in the Second Department, it has been held that liability under the Labor Law "may lie against the owner of land on which a building is located, even though the owner leased the land to another and did not own the building itself" (Mejia v Moriello, 286 AD2d 667, 668; see, Cannino v Locust Valley Fire Dist., 241 AD2d 534). Consequently, under the controlling law in the Second Department, plaintiff's Labor Law claims against Harlem River are sufficient to survive a motion to dismiss.

Dated:

J.S.C.