

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 10

Justice

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LAL CHAND, RITU RAJ, AND No. 29478/02
SEMA RANI,

Plaintiffs, Motion
Date December 14, 2004
-against-

THE CITY OF NEW YORK, Motion
NEIGHBORHOOD RESTORE HOUSING Cal. No. 10
DEVELOPMENT FUND CORPORATION,
HILLY REALTY CORP., 7A
MANAGEMENT CO., DILORENZO
PROPERTIES AND "XYZ CORP."
1-10 NAMES BEING FICTITIOUS
INDICATING UNKNOWN ENTITIES,

Defendants.

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Plaintiffs commenced this action seeking to recover damages for personal injuries allegedly sustained by plaintiff Lal Chand on October 9, 2002 when he fell from a scaffolding erected around the building located at 644 Riverside Drive, New York, New York.

Defendant The City of New York (City) moves for an order pursuant to CPLR 3211(a)(7) dismissing the complaint and all cross-claims as against it and/or an order granting summary judgment pursuant to CPLR 3212.

Defendants Hilly Realty Corp. (Hilly) and DiLorenzo Properties (DiLorenzo) cross-move for an order pursuant to

CPLR 3212 granting summary judgment dismissing the complaint and cross-claims as against them.

Contentions of the Parties

Defendant City argues that it did not own or control either the subject premises or the subject scaffolding. An employee of The New York City Law Department, Sophia Pontoppidan, conducted a title search for the subject location as of October 9, 2002. The results of the title search showed that defendant Hilly is the true owner of the premises. Defendant Hilly acquired the premises in 1986 and has remained the owner thereof since that time. As defendant City did not own the property on the date of the accident, it cannot be held liable for the alleged injuries. Defendant had no control over the premises and could not have caused or created the alleged dangerous condition. Defendant City did not enter into an agreement and contract with co-defendants with respect to certain work conducted at the premises.

In addition, defendant City contends that Debra A. Thomas, Director of Article 7A Programs at The City of New York's Department of Housing Preservation and Development (HPD), conducted an investigation. It was revealed that as of October 9, 2002 the premises were in receivership and were being managed by a 7A administrator, Rafael Lara. The 7A administrator was responsible for the management of the premises including the hiring of the contractors to perform labor thereat. Although HPD has oversight responsibilities of the 7A administrator it cannot be held liable for plaintiff's alleged injuries based on RPAPL §778(7). Such section provides that defendant City shall not be liable for injuries to persons by reason of conditions of the premises or acts or omissions of an administrator except when the City has been appointed the administrator. The investigation of Ms. Thomas shows that defendant City did not serve as the direct 7A administrator of the subject premises, nor did it act as general contractor or perform any labor with respect to the premises.

The attorney for defendants Hilly and DiLorenzo argues that they were merely owners "in deed" only as a 7A administrator had been appointed to manage the premises.

Said defendants did not exercise any control over the premises or the method and manner of the work performed and did not exhibit any traits common to an owner of a building pursuant to the applicable Labor Law. They were specifically ordered by the Housing Court nearly twelve years ago not to interfere in the operation and maintenance of the building. The Housing Court also ordered defendant City through its own agency, HPD, and its self appointed 7A administrator to take over all control over the building and any repairs in a judgment and order (judgment/order) dated December 22, 1992 (Rodriguez, J.). Defendants Hilly and DiLorenzo argue that an owner who does not exercise any degree of direction or control over work required cannot be held liable under the Labor Law. Here, defendant City, HPD and the 7A administrator exercised complete control of the subject premises.

Defendants Hilly and DiLorenzo also argue that they do not fit the criteria for the definition of an owner for purposes of the Labor Law as they had no right to insist that proper safety practices be followed or the right to control the work. These defendants were specifically ordered by the Housing Court not to interfere in the management, operation and control of the premises. They had no responsibility for the safety of the premises as defendant City did. These defendants were effectively divested of their ownership interest in the property by the Housing Court judgment/order. Finally, these defendants were in no position to have actual or constructive notice of any alleged defect or labor law violation.

Defendants Hilly and DiLorenzo oppose the motion by defendant City on the ground that the December 22, 1992 judgment/order granted HPD authority to take over all aspects of control and ownership of the premises through its own appointed 7A administrator, Rafael Lara. It had the sole authority to perform numerous acts including borrowing money for and ordering all necessary materials, labor and services for any necessary repairs. In addition, defendants Hilly and DiLorenzo were specifically enjoined and restrained from interfering in any way with the 7A administrator's management, operation and control of the premises including collecting rent in any way. Defendant City has exercised complete de facto control over the

building for more than twelve years. The accident occurred while presumably defendant City was making repairs to the building that it was specifically authorized and ordered to do.

Defendant City opposes the cross-motion by defendants Hilly and DiLorenzo on the ground that they have not put forth any evidence in support of their arguments that they did not exercise any control of the premises or the manner of work and did not exhibit traits common to an owner. Their attorney's affirmation is not sufficient evidence as a basis for a request for summary judgment. Pursuant to a so-ordered stipulation dated July 15, 2004, defendants Hilly and DiLorenzo were to produce a witness for deposition on August 16, 2004. Failure to comply would result in their being precluded from testifying at the time of trial. Said defendants are precluded at trial because they failed to produce such witness. They should not, therefore, be cross-moving for summary judgment. Contrary to co-defendants argument, the judgment/order did not give HPD or defendant City authority to take over all control of the building and any repairs thereto. Further, the Housing Court Judge, not HPD, appointed the 7A administrator in question. Defendants Hilly and DiLorenzo have not offered any evidence to show that they did not have permission or authorization from the 7A administrator to repair, maintain, control or in any way have input over their own property. Co-defendants merely submit the judgment/order in support of their cross-motion. There is no evidence to support their allegation that defendant City was responsible for the safety procedures in place. The judgment/order did not divest the co-defendants of their ownership interest. It merely required them to obtain permission of the 7A administrator before engaging in activities with respect to the premises. Defendants Hilly and DiLorenzo have not submitted any evidence to show that they did not have actual or constructive notice of the dangerous condition or that they did not actually control the work being performed.

Plaintiffs oppose the motion and cross-motion on the grounds that summary judgment should be denied as premature because necessary discovery has not yet been completed and the movants have failed to meet the burden of proof. No discovery has yet been received from Rafael Lara, the 7A

administrator. He possesses information which is material and relevant to this case, specifically, who negotiated, hired, contracted with and paid the plaintiff's employer to perform the construction work of the premises. Plaintiffs do not possess any of that information. Defendant City through HPD was to oversee and supervise the 7A administrator's activities as required by the judgment/order. Copies of certain financial documents with respect to the premises suggest that defendant City maintained the responsibility to oversee and supervise the operation of the premises. Having exercised some control over the property, defendant City is an owner within the meaning of Labor Law §240(1). As to defendants Hilly and DiLorenzo, the judgment/order did not preclude them from entering the premises and contracting with subcontractors or overseeing the construction. The judgment/order is silent as to any restrictions or limitations on the record owners. Such defendants failed to submit admissible evidence as they only produced their attorney's affirmation.

Decision of the Court

The motion by defendant City is granted and the complaint and all cross-claims are hereby dismissed as against defendant The City of New York. The cross-motion by defendants Hilly and DiLorenzo is denied.

With respect to defendant City, RPAPL §778(7) provides that:

No city or county specified in section seven hundred sixty-nine of this article shall be liable to any party, including such administrator or the owner, for injury to persons or property by reason of conditions of the premises or the acts or omissions of such administrator, except that when the City of New York is appointed administrator, liability shall be determined in accordance with subdivision six of this section.

As defendant City is a city specified in RPAPL §769, it must be afforded the protection of RPAPL §778(7). It is clear that defendant City was not appointed the 7A administrator with respect to the subject premises as the

judgment/order appointed Rafael Lara as the 7A administrator. Defendant City cannot, therefor, be held liable for personal injury caused by conditions of the premises. Defendant City also submits sufficient evidence in admissible form to show that it did not undertake any control of the premises or the construction work. The opposition to defendant City's motion is insufficient to raise a material triable issue of fact to warrant denial of the motion.

Defendants Hilly and DiLorenzo have failed to sustain their initial burden on their cross-motion for summary judgment.

It is well settled that: "The 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 eliminate any material issues of fact from the case (see, Zuckerman v City of New York, 49 NY2d 557, 562, 427 NYS2d 595, 404, NE2d 718; Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404, 165 NYS2d 498, 144 NE2d 387). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Matter of Redemption Church of Christ v Williams, 84 AD2d 648, 649, 444 NYS2d 305; Greenberg v Manlon Realty, 43 AD2d 968, 969, 352 NYS2d 494)." (Winegrad v New York University Medical Center, 64 NY2d 851 at 853).

Here, defendants Hilly and DiLorenzo have not submitted sufficient evidence in admissible form so as to entitle them to judgment as a matter of law. They rely upon their attorney's affirmation and the judgment/order. Their attorney's affirmation is without probative value as to whether defendants Hilly and DiLorenzo exercised any control over the premises or the construction work. While their counsel relies upon the judgment/order to support his assertions of lack of ownership, control, and lack of actual or constructive notice of any alleged defect or Labor Law violation, such reliance is misplaced. It is undisputed that defendants Hilly and DiLorenzo are the fee owners of the subject premises. While the 7A administrator is placed in the position of the owner for some purposes, he "does not, however, fully stand in the shoes of the owner." Lawrence v Martin, 131 Misc2d 256 at 258. The

judgment/order did not deprive defendants Hilly and DiLorenzo of their ownership rights to the premises. They were not, in fact, enjoined or restrained from interfering in the operation and maintenance of the building. Rather, paragraph 14 of the judgment/order stated that:

"The owner, managing agent or any person acting under authority from the owner, managing agent, or any other persons who do not have authorization from the administrator, are hereby enjoined and restrained from interfering in any way with the Administrator's management, operation and control of the subject premises, or causing any physical or structural (sic) damage to the premises or making any attempt to collect rents from the tenants of the subject premises, or accepting rents from the tenants of the subject premises, or harassing the tenants or the Administrator in any way."

As noted in Martin v Lawrence at 258-259:

"The order of appointment prevents the owner from interfering with the administrator's carrying out his duties but imposes no other restrictions. It does not prevent an owner from making repairs to the building so long as the owner does not interfere with the administrator's operation of the building."

Accordingly, the motion by defendant City is granted and the complaint and all cross-claims are dismissed as against defendant The City of New York. The cross-motion by defendants Hilly and DiLorenzo is denied.

Dated: February 22, 2005

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HON. DAVID ELLIOT