

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA
Justice

PART 19

Mian, Mohammad Anwar

INDEX NO. 112359/2003

MOTION DATE 1/13/2010

- v -

City of New York et al

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion and cross motion be decided in accordance with accompanying memorandum decision.

This Constitutes Decision and Order of the Court.

FILED

JAN 27 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: January 25, 2010

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X

MOHAMMED ANWAR MIAN,
Plaintiff

Index Number 112359-2003
Submission Date Jan 13, 2010
Mot. Seq. No. 005 & 006

-against-

ORDER AND DECISION

THE CITY OF NEW YORK, MASCON
RESTORATION, LLC, and DELCOR
ASSOCIATES, INC.,

Defendants.

-----X

Appearances: For Plaintiff:
Sanders, Sanders, Block, Woycik,
Viener & Grossman, P.C.
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(516) 741-5252

For Defendant Mascon Restoration:
Ahmuty Demers & McManus
By Mark J. Connelly
200 I.U Willets Road
Albertson, NY 11507
516-294-5433

For Defendant Delcor Associates:
Lewis Scaria & Cote, LLC
By Susan A. Scaria
75 South Broadway, 4th Floor
White Plains, New York 10601
(914) 304-4311

For Defendant New York City:
Corporation Counsel
By Scott Rosenberg
100 Church Street
New York, New York 10007
(212) 788-0540

Papers considered in review of this motion and cross-motions for summary judgment:

Papers

Delcor's Affirm. in Supp. of Mot. to Renew and Reargue.....1
City's Affirm. in Supp. of Mot. to Reargue.....2
Plaintiff's Affirm. in Supp. of Mot. to Reargue.....3
Mascon's Affirm. in Opp. to City's Mot.....4
Mascon's Affirm. in Opp. to Plaint.'s Mot. to Reargue.....5

FILED

JAN 27 2010

**NEW YORK
COUNTY CLERK'S OFFICE**

Delcor's Affirm. in Opp. to City's Mot.....	6
City's Affirm in Opp. to Delcor's Mot. and in Further Supp.....	7
City's Affirm. in Reply and Further Opp.....	8
City's Reply Affirm.....	9

HON SALIANN SCARPULLA, J.:

In motion sequences 005, defendant the City of New York (“the City”) moves pursuant to CPLR 2221 for leave to reargue this Court’s denial of the City’s summary judgment motion by an order dated June 16, 2009. In motion sequence 006, defendant Delcor Associates, Inc. (“Delcor”) makes a combined motion pursuant to CPLR 2221(f) for leave to reargue and leave to renew its summary judgment motion, which the Court denied by its June 16, 2009 order. Plaintiff cross-moves for leave to reargue the denial of its motion for summary judgment against all defendants. On January 13, 2010, the Court held oral argument on the matter. At the oral argument, the Court ruled from the bench and denied plaintiff’s, the City’s, and Delcor’s motions to reargue. However, the Court granted Delcor leave to renew its motion and reserved opinion on Delcor’s renewed summary judgment motion.

Discussion

In its original motion for summary judgment, Delcor maintained that as a construction manager, it could not be held liable under Labor Law § 240(1) and § 241(6), because it did not fall within the required category of owner, general contractor, or an agent of either. Delcor established that Mascon was the general contractor on the project, and the City was the registered owner. Delcor argued that it could not be considered an

“agent,” because there was no evidence of its authority to directly supervise Mian’s work or any aspect of the project that was a proximate cause of plaintiff’s accident.

In general, a construction manager customarily functions as an agent of the owner in an advisory capacity only. Nevertheless, when the particular construction management contract calls for the construction manager to exercise oversight of the work progress, to enforce safety regulations, and to stop the work when unsafe practices occur, the courts have reasoned that the construction manager has the requisite supervision and control of the work so as to render the construction manager liable as a statutory agent under the Labor Law. *See Walls v Turner Constr. Co. et al.*, 4 N.Y.3d 861, 863 (2005); *see also Blake v Neighborhood Housing Services of New York City*, 1 N.Y.3d 280, 293 (2003).

To show lack of supervisory authority, Delcor offered with its original motion the contract it had entered into with the City for construction management services. Delcor, however, failed to submit attachment “A” to the construction management contract, detailing the scope of services to be provided by Delcor to the City. It was therefore impossible for the Court to determine, on Delcor’s original motion, whether Delcor was contractually bound to act as an “agent” for the City in order to enforce safety regulations, to stop work when unsafe practices occurred and to oversee the progress of the work.

In support of its renewed motion, Delcor has supplemented the record with a complete copy of its contract with the City, which includes attachment “A.” Having fully reexamined the record, the Court finds that Delcor did not contractually or affirmatively

assume any control over the general work site, or plaintiff's work performance, in particular. Therefore, Delcor was not an "agent" of either the City or the general contractor Mascon Restoration, LLC within the meaning of Labor Law § 240 and § 241(6). In addition, Delcor may not be held liable under Labor Law § 200, because Delcor lacked sufficient supervision and control over the work that resulted in plaintiff's accident. *See e.g., Eizzuto v L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 352 (1998). Therefore, the Court grants that branch of Delcor's renewed summary judgment motion that seeks dismissal of plaintiff's Labor Law claims.

However, the City may still maintain its claim for indemnification and defense against Delcor pursuant to Article 15.5 of the construction management contract. Article 15.5 states that "Construction Manager shall be solely responsible for all injuries . . . resulting from any act, omission, negligence, fault or default, or error in judgment of Construction Manager or Construction Manager's . . . independent contractors, Primary Contractors or Subcontractors." Here, it was Delcor who contracted with Mascon Restoration, LLC by contract dated January 9, 2002, and who was contractually bound to approve all of the sub-contractors, including non-party A.R. Painting, plaintiff's direct employer. Therefore, plaintiff's accident falls within the purview of Article 15.5.

In accordance with the foregoing, it is

ORDERED that the motion by defendant Delcor Associates, Inc. pursuant to CPLR 2221 for renewal of its summary judgment motion is granted to the extent that the

Court dismisses plaintiff Anwar Mian's claims under Labor Law § 240 , § 241(6), and § 200 as against defendant Delcor Associates, Inc only, and the motion is otherwise denied; and it is further

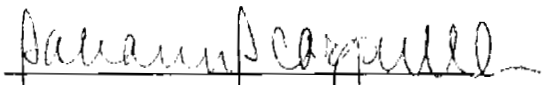
ORDERED that counsel for defendant Delcor Associates, Inc. shall serve a copy of this decision and order upon all parties and upon the Clerk of Court (60 Centre St., Basement), who shall enter judgment in accordance with the foregoing and sever and continue the claims which are not dismissed and upon the Clerk of Trial Support (60 Centre St., Rm. 158) who shall schedule this matter forthwith for jury selection and a trial.

This constitutes the decision and order of the Court.

Dated: New York, New York

January 25 , 2010

ENTER:


Hon. Saliann Scarpulla, J.S.C.

FILED
JAN 27 2010
NEW YORK
COUNTY CLERK'S OFFICE