117 A.D.3d 538
Supreme Court, Appellate Division,
First Department, New York.

Walter PANTOVIC, Plaintiff–Appellant,
v.
YL REALTY, INC., Defendant,
Sprint Communications Company
L.P., Defendant–Respondent.
Sprint Communications Company
L.P., Third–Party Plaintiff,
v.
Penmark Realty Corporation, Third–
Party Defendant–Respondent.

May 15, 2014.

Synopsis

Background: Building's superintendent brought action against tenant after he was injured in fall from ladder while feeding a portable air conditioning exhaust tube into a pre-existing duct hole. The Supreme Court, New York County, Paul Wooten, J., granted tenant's motion for summary judgment, and plaintiff appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] work being performed by building's superintendent when he fell did not qualify as an "alteration" under the scaffold law, and

[2] tenant was not liable under statute requiring machinery and equipment to be kept in a safe condition.

Affirmed.

Attorneys and Law Firms

***68** Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for appellant.

Haworth Coleman & Gerstman, LLC, New York (Scott Haworth of counsel), for Sprint Communications Company L.P., respondent.

Mauro Lilling Naparty LLP, Woodbury (Anthony F. DeStefano, David A. Beatty and Matthew W. Naparty of counsel), for Penmark Realty Corporation, respondent.

MAZZARELLI, J.P., ANDRIAS, DeGRASSE, MANZANET–DANIELS, FEINMAN, JJ.

Opinion

Order, Supreme Court, New York County (Paul Wooten, J.), entered August 2, 2012, which, to the extent appealed from as limited by the briefs, granted the motion of defendant Sprint Communications Company L.P. (Sprint) for summary judgment on plaintiff's claims pursuant to Labor Law §§ 240(1) and 200, sua sponte dismissed plaintiff's common law claims and claims pursuant to OSHA against Sprint, and sua sponte dismissed plaintiff's complaint against YL Realty, Inc., unanimously affirmed, without costs.

[1] **[2]** Plaintiff's Labor Law § 240(1) claim was properly dismissed. Plaintiff, a superintendent, was injured when he fell off a ladder while feeding a portable AC exhaust tube into a pre-existing duct hole. The work being performed by plaintiff does not qualify as an "alteration" pursuant to the statute (*see* Labor Law § 240[1]; *see e.g. Amendola v. Rheedlen 125th St., LLC,* 105 A.D.3d 426, 963 N.Y.S.2d 30 [1st Dept.2013]). In any event, liability against defendant Sprint, a lessee of space at the building where plaintiff was employed, cannot be predicated on Labor Law § 240(1), since it did not contract for the work or have any right to control it (*see Ferluckaj v. Goldman Sachs & Co.,* 12 N.Y.3d 316, 880 N.Y.S.2d 879, 908 N.E.2d 869 [1st Dept.2009]).

***69** **[3]** Plaintiff's claim pursuant to Labor Law § 200 was also properly dismissed since the alleged defect, excessive heat from Sprint's equipment, merely furnished the need for a personal air conditioning unit, it did not cause plaintiff's accident (*see Escalet v. New York City Hous. Auth.,* 56 A.D.3d 257, 867 N.Y.S.2d 62 [1st Dept.2008]).

[4] The motion court properly dismissed plaintiff's common law cause of action against Sprint since it implicated the same issues as his Labor Law § 200 claim (*see Hunter v. R.J.L. Dev., LLC,* 44 A.D.3d 822, 825, 845 N.Y.S.2d 352 [2d Dept.2007]). Plaintiff's OSHA claims were also properly dismissed since OSHA provides no private right of action (*see Donovan v. Occupational Safety & Health Review Commn.,* 713 F.2d 918, 926 [2d Cir.1983]; *see also Khan v. Bangla Motor & Body Shop, Inc.,* 27 A.D.3d 526, 528–529, 813 N.Y.S.2d 126 [2d Dept.2006], *lv. dismissed* 7 N.Y.3d 864,

824 N.Y.S.2d 608, 857 N.E.2d 1139 [2006]; *Gain v. Eastern Reinforcing Serv.*, 193 A.D.2d 255, 258, 603 N.Y.S.2d 189 [3d Dept.1993]).

[5] Although the court erred in sua sponte dismissing plaintiff's complaint against YL Realty, since issue had not yet been joined as to that defendant (CPLR 3212[a]; *see Pilatich v. Town of New Baltimore*, 100 A.D.3d 1248, 1249, 954 N.Y.S.2d 663 [3d Dept.2012]), upon a search of the record, we dismiss the complaint against YL Realty pursuant to CPLR 3215(c) on the ground that it has been abandoned.

Parallel Citations

117 A.D.3d 538, 986 N.Y.S.2d 67, 2014 N.Y. Slip Op. 03589

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