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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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RICARDO FLORES,

Plaintiff(s),

Index No. 12635/09

Motion Submitted: 11/10/11
Motion Sequence: 003

-against-

SLEEPY HOLLOW ESTATES AND SLEEPY HOLLOW ESTATES, LLC,

Defendant(s).

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The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Motion by defendants, Sleepy Hollow Estates and Sleepy Hollow Estates, LLC seeking summary judgment pursuant to CPLR §3212 for an Order of this Court dismissing the complaint of plaintiff, Ricardo Flores, is granted.

This motion arises out of an underlying personal injury action, filed in this Court in June 2009, wherein the plaintiff alleged violations under Labor Law §§240 and 241. Plaintiff fell from a ladder while performing construction work on the improved real property owned by defendants. Plaintiff is alleging that the statutory residential exemption does not apply as the real property is in actuality, the site of plaintiff's business entity.

In September, 2008, Leonardo Cordero and Virginia Stanco entered into a work agreement which provided that his company was to "repair and paint[ing]" the "Stanco

[r]esidence", and the contract was executed by Cordero and Virginia Stanco, as owner of the subject premises.[1] Such work included the repair of shingles, siding, and painting the house, including the windows and window trimming. According to the defendants, the premises is and was at the time of the underlying action, a private one-family residence and the home of multi generations of the Russo family. The real property included a main house and a renovated cottage. The work was to be performed on the main house.

The property has been in the family and owned by Virginia and Francis Stanco since November 2, 1983. In 1987, Ruth Russo and her three children, formed the partnership, Sleepy Hollow Estates[2]. The partnership's essential purpose was for the management of its real estate holdings and was part of an estate plan. Shortly after the formation of the partnership, the Stanco's transferred their fee interest in the subject real property to the defendant partnership.

Plaintiff argues that the defendants have set up a "sophisticated real estate partnership" and the construction work was performed for the purposes of improvement on one of the partnership's assets; granting that the statutory exemption would contravene the public policy purposes of the statutory exemption in Labor Law §§240 and 241; and the premises is situated within the Town of Oyster Bay, whose Building Code defines one-family dwellings as a dwelling used solely for residential purposes, and that house one family unit.

Ruth Russo, the family matriarch, lived at the premises with her husband, Andrew Russo, her daughter, Virginia Russo Stanco, and son-in-law, Francis Stanco, as well as Ruth's granddaughter and her husband. The family members do not pay rent. No rental income is derived from the property in question. Plaintiff contends that there are in fact three families residing in the home and thus it cannot be a single family home eligible for the exemption.

Plaintiff, as an employee of Leonardo Cordero, performed the painting work on the subject premises. On August 26 2008, plaintiff, during the course of performing these duties, sustained injuries after falling from an extension ladder. Plaintiff contends that the defendants directed and controlled the work and supplied the allegedly defective ladder,

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[1]It is noted that the defendants submitted a deed into evidence indicating that the defendant partnership actually owned the subject premises.

[2]One of Ruth Russo's son's was deceased at the time of this accident. He and his family resided in the cottage, which is now occupied by his sons. No rent is paid in connection with the cottage, which, in any event, was not the subject of this home improvement project.

which caused his fall. Plaintiff submits into evidence the following: an affidavit of Mario Gonzales, fellow employee of Cordero Corp.; lease agreement between defendant, Sleepy Hollow Estates and Petroleum Tankers, LTD; and the work agreement between the Codero Brothers and Sleepy Hollow Estates.

Defendants argue that the exemption under the Labor Law provisions is applicable, as the business entity is "nothing more than a legal vehicle of convenience" for the Russo family, and the business acts performed on the premises are merely incidental. They deny providing the allegedly defective ladder and that they controlled the work. Defendant submits the following: copies of the pleadings; transcripts of the depositions of plaintiff, and Ruth Russo on behalf of Sleepy Hollow Estates; and affidavits of Ruth Russo and extended family member, James Stanco.

A Court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is; therefore, entitled to summary judgment as a matter of law (***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (***Miller v. Journal-News***, 211 A.D.2d 626, 620 N.Y.S.2d 500 [2nd Dept., 1995]).

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of material issue of fact (***Ayotte v. Gervasio***, 81 N.Y.2d 1062, 619 N.E.2d 400, 601 N.Y.S.2d 463 [1993]). Once the initial burden has been met by movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form, sufficient to create material issues of fact requiring a trial.

Generally, Labor Law §240 provides in relevant part;

> ". . . all contractors and owners and their agents, *except owners of one and two-family dwellings who contract for but do not direct or control the work*, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed . . . ."

Labor Law § 241 sets forth specific safety requirements for contractors and owners and their

agents regarding such work, with the same exceptions.

In reviewing the record setting forth the facts of the instant case, there is no evidence to support that the defendants directed or controlled plaintiff's work. Plaintiff's self-serving affidavit only avers that an individual that may have been Andrew Russo, whose identity could not be confirmed, gave him three ladders to use one from which he fell. This court noted, however, that the owner's involvement consisted of determining what portion of the premises to paint and what type of paint to use, and did not include any supervision of the manner or method of the painter's work nor did the owner direct the painter to use the scaffolding in the performance of his work. Those facts are insufficient to demonstrate direction and control within the meaning of Labor Law § 240(1) (*see* ***Mayen v. Kalter,*** 282 A.D.2d 508, 722 N.Y.S.2d 760 [2d Dept., 2001]). The remaining issues raised by Plaintiff are whether this is a one-family dwelling and whether the actual use of the subject premises was for residential or commercial purposes, or both.

Although it is the defendants' initial prima facie burden, the Court has considered whether plaintiff's reliance upon the Town of Oyster Bay Code to define a single-family dwelling, is proper. It is noted that plaintiff provides only a section of the Code and he does not provide citations. The provision upon which he relies states in relevant part: ". . . a single or one family dwelling is a building designed for and occupied *exclusively* as a home or residence for not more than one (1) family . . . ."

The defendants, in their reply papers, provide the citation and Code provision in full:

> ". . . buildings *for the purpose of this chapter* shall be classified in respect to their occupancies as follows:
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> A.[o]ne-family owner-occupied dwellings: buildings containing not more than one dwelling unit occupied exclusively for residential purposes by the immediate family of the owner-occupant, not having more than one kitchen . . . and no portion of which is used for the accommodation of roomers or boarders.
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> B. One-and two-family dwellings: buildings containing one or two dwelling units, with less than four lodgers with a family in either one of such dwelling units . . . ." (*see* ***Town of Oyster Bay Code §135-17***]).

The authority of a Town to enact zoning legislation is derived from Section 261 of the Town Law. Pursuant to this statute, the Town Board is empowered by Ordinance "to regulate and restrict . . . the density of population, and the location and use of buildings . . . for . . . residence or other purposes." Said power is granted for "the purpose of promoting the health,

safety, morals, or the general welfare of the community." (*See* ***McMinn v. Town of Oyster Bay,*** 111 Misc.2d 1046, 445 N.Y.S.2d 859 Nassau County Sup. Ct. [1981]). Therefore, the above referenced Code was enacted for the narrow purpose of enforcing the municipality's zoning laws. It cannot be expanded for application to the case at bar.

It also is relevant to set forth the essential purpose of the homeowner exemption, which was added to Labor Law § 240(1) and § 241 in 1980. The exemption was intended by the Legislature to shield homeowners from the harsh consequences of strict liability under the provisions of the Labor Law and to reflect the legislative determination that the typical homeowner is no better situated than the hired worker to furnish appropriate safety devices and to procure suitable insurance protection (*see* ***Bartoo v. Buell***, 87 N.Y.2d 362, 367, 662 N.E.2d 1068, 639 N.Y.S.2d 778 (1996), ***Dineen v. Rechichi***, 70 A.D.3d 81, 888 N.Y.S.2d 834 [4th Dept., 2009]). Since the enactment of this amendment, the courts have repeatedly granted an exemption from the liability imposed by the Labor Law upon homeowners who contract for repair work, where it is clear that the property is used solely as a one- or two-family dwelling and where the homeowner does not direct or control the work (*see,* ***Schwartz v. Foley,*** 142 A.D.2d 635, 530 N.Y.S.2d 281 (2d Dept., 1988), ***Rimoldi v. Schanzer,*** 147 A.D.2d 541, 537 N.Y.S.2d 839 [2d Dept., 1989]).

As to the use of the premises, it is well settled that the homeowner exemption from Labor Law liability does not apply where a one-family dwelling is used by its owner exclusively for commercial purposes (*see* ***Van Amerogen v. Donnini,*** 78 N.Y.2d 880, 577 N.E.2d 1035, 573 N.Y.S.2d 443 [1991]). Notwithstanding the foregoing, the Court is aware, based on the plethora of case law, that, generally, an owners' use of a *portion* of their residence for commercial purposes does not automatically cause them to lose the protection of exception from liability of a plaintiff's claim under Labor Law §§ 240 and 241 (*see* ***Umanzor v. Charles Hofer Painting & Wallpapering, Inc.***, 48 A.D.3d 552, 852 N.Y.S.2d 205 [2d Dept., 2008]).

In determining whether or not to apply the dwelling exemption to those situations, that fall somewhere between exclusive residential and exclusive commercial use, the Court of Appeals in ***Van Amerogen v. Donnini, supra***, indicated that a strict construction is to be applied when interpreting Labor Law §§ 240(1) and 241. There, the plaintiff was injured while working on the roof of a one-family house that was being used as rental property. The owners of the house argued that though they did not reside there, the property was being used as a one-family dwelling, and thus were entitled to the statutory exemption. The Court of Appeals, in rejecting that argument, held that the dwelling exemption should not be "expanded to encompass homeowners who use their one- or two-family premises entirely and solely for commercial purposes" (***Van Amerogen v. Donnini, supra,***).

It is uncontroverted that the extended Russo family reside in this single family dwelling. It is further established that the residence was held in the name of a partnership, which was comprised of family members. Lastly, it was conceded that management activities pertaining to rental properties also owned by the partnership, including maintaining copies of business records, receipt of rent collected from other properties and telephone calls with tenants of other properties were made and received at the subject dwelling. No question of fact was raised with regard to the subject property being a rental unit, in fact, the evidence was to the contrary.

On the facts before the court, the use of the residence in the past, up to and including the time of the accident, had been primarily residential with ancillary commercial use. In sum, the defendants seek the application of the dwelling exemption where a homeowner contracts for such work upon a single structure used as both a dwelling and a place of business.

In ***Cannon v. Putnam,*** 76 N.Y.2d 644, 564 N.E.2d 626, 563 N.Y.S.2d 16 (1990), the owner of the subject real property, used for both his business and a dwelling occupied by his family, retained the plaintiff to help install a floodlight to illuminate his front yard and its two artificial ponds. Plaintiff sustained injuries during the installation process. The evidence indicated that the business entity and/or work site was not located in or on the dwelling structure itself; however, the light was to be installed on an outdoor area to which all of the structures on the property had access. The evidence established that the project had been undertaken solely in connection with defendant's residential use of the property. Therefore, the Court of Appeals held that the owner was entitled to invoke the statutory exemption.

Owners of one or two-family dwellings who did not direct or control the work, are entitled to the protection of the homeowner exemption, notwithstanding the presence of some commercial activity on their properties. The Court of Appeals has held that the exemption was applicable to an incident involving work on a barn roof, which housed not only the defendant's personal belongings, but also his neighbor's belongings as well as a separate section of the barn leased by defendant to nine individuals to store their golf carts for an annual fee. In a second case, decided at the same time, a woman who added a bedroom to the first floor of her home, with a sliding glass door leading to the backyard, was entitled to the exemption, notwithstanding the fact that she operated a children's day care center in her home. A residence that houses a business may retain its character as a home.(***Bartoo v. Buell,*** 87 N,Y.2d 362, 662 N.E.2d 1068, 639 N.Y.S.2d 778 [1996]).

Looking at the site and purpose of the work, which consisted of the installation of a door and window in the dining room necessitating the painting of the exterior of the residence, it is clear that the home improvement was not intended to benefit the commercial usage of the property, but rather related to the residential use of the defendants home. The defendants are

therefore qualified for the exemption. (***Khela v. Neiger***, 85 N.Y.2d 333, 648 N.E.2d 1329, 624 N.Y.S.2d 566 (1995); ***Ramirez v. Begum***, 35 A.D. 3d, 578, 829 N.Y.S.2d 117 [2d Dept., 2006]).

Where the single family home was used as a residence, was not an income producing property, the fact that the deed was in the name of the partnership does not exclude application of the exemption, where as here, any commercial benefit was ancillary to the residential purpose of the home. (***Castellanos v. United Cerebral Palsy Assn. Of Greater Suffolk, Inc.,*** 77 A.D.3d 879, 909 N.Y.S.2d 757 (2d Dept., 2010); ***Muniz v. Church of Our Lady of Mt. Carmel***, 238 A.D.2d 101, 655 N.Y.S.2d 38 (1st Dept., 1997), *lv den.* 90 N.Y.2d 804, 683 N.E.2d 1054, 661 N.Y.S.2d 180 [1997]).

With regard to Plaintiff's position that three families live in the home, thus it is not a "single-family" home contemplated by the statute, it is untenable. No evidence was offered to counter Defendants proof that the dwelling is a single-family home. The nature of the use of the premises is controlling, rather than the relationship of the people residing in the home. (*See* ***Muniz v Church of Mt. Carmel, id.***)[the fact that unrelated priests resided in a rectory, did not change the purpose of the rectory to serve as their residence]; ***Castellanos v. United Cerebral Palsy Assn. Of Greater Suffolk, Inc.,supra;*** [six disabled individuals lived together and functioned as a family unit], thus the extended family residing in the subject dwelling did not deprive the owner of the homeowner exemption under Labor Law.

Accordingly, the defendants' motion is granted.

The foregoing constitutes the Order of this Court.

Dated: February 8, 2012
Mineola, N.Y.

Karen V. Murphy
J. S. C.
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