SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

DCM PART 6

FRANCISCO CHAVEZ,

HON. PHILIP G. MINARDO

Plaintiff(s),

DECISION AND ORDER

-against-

Index No.: 101417/2010

ANNA M. RAMOS and NOLY RAMOS,

Motion No. 101417/2010

Defendant(s).

The following papers numbered 1 to 3 were fully submitted on the 15th day of March, 2012.

	Papers Numbered
Defendants' Notice of Motion, dated November 2, 2011, with Supporting Papers and Exhibits	1
Plaintiff's Affirmation in Opposition, dated February 15, 2012, with Supporting Papers and Exhibits	2
Defenants' Reply Affirmation, dated February 27, 2012	3

Plaintiff FRANCISCO CHAVEZ ("CHAVEZ") commenced this personal injury action in order to recover for damages that he allegedly sustained as a result of his falling from a ladder while installing gutters on the exterior of a one-family residence owned by defendants ANNA M. RAMOS and NOLY RAMOS (collectively "RAMOS"). At the time of the accident, CHAVEZ was an employee of non-party JERRY SMITH CONSTRUCTION.

CHAVEZ has asserted claims against RAMOS for common law negligence and violations

of Labor Law §§200, 240(1), and 241(6). RAMOS moves for summary judgment, pursuant to CPLR 3212, to dismiss all of the causes of action asserted by CHAVEZ.

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 demonstrate the absence of any material issues of fact" *(Alvarez v. Prospect Hosp.,* 68 NY2d 320, 324 [1986]). Once the movant has satisfied this burden, "the burden shifts to the [opponent] to lay bare his or her proof and demonstrate the existence of a triable issue of fact"(*Chance v. Felder,* 33 AD3d 645, 645-646 [2006]).

COMMON LAW NEGLIGENCE AND LABOR LAW §200

In order to prevail on his common law negligence claim, CHAVEZ is required to establish that RAMOS either directed the work or that RAMOS created or had actual or constructive notice of an alleged defective or dangerous condition (*Arama v. Fruchter,* 39 AD3d 678 [2007]). In addition, CHAVEZ must demonstrate that RAMOS failed to maintain a safe construction site in order to impose liability on RAMOS for a claim based on Labor Law §200 (*Hart v. Commack Hotel, LLC,* 85 AD3d 1117 [2011]).

However, CHAVEZ concedes "that facts supporting an inference of actual or constructive notice, which would be required to maintain a common law negligence claim and/or a Labor Law Section 200 claim have not been demonstrated through the discovery process" (Plaintiff's Affirmation in Opposition, dated February 15, 2012, ¶ 22). Therefore, the claims of CHAVEZ based on common law negligence and Labor Law §200 are dismissed.

LABOR LAW §§240(1) and 241(6)

"Labor Law 240(1) impose liability upon owners and contractors who violate the statute by failing to provide or erect necessary safety devices for the protection of workers exposed to elevation-related hazards, where such failure is a proximate cause of the accident" (*Henry v. Eleventh Avenue, L.P., 87 AD3d 523, 524,* quoting *Balzer v. City of New York,* 61 AD3d 796, 797 [2009]). The statue "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" (*Rocovich v. Consolidated Edison Co.,* 78 NY2d 509). However, in order to "establish a prima facie violation of Labor Law §240(1), a plaintiff must demonstrate that the defendants violated the statute and the violation was the proximate cause of his or her injuries" (*Henry, supra., citations omitted).*

Labor Law §241(6) requires contractors, owners, and agents "to provide reasonable and adequate protection and safety for workers and to comply with the specific rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ramos v. Patchogue-Medford School District,* 73 AD3d 1010 [2010] quoting *Ross v. Curtis-Palmer Hydro-Electric Co.,* 81 NY2d 494, 501-502). "To establish liability under Labor Law §241(6), a plaintiff must demonstrate that the defendant's violation of a specific rule or regulation was a proximate cause of the accident" (*Ramos, supra.,* quoting *Seaman v. Bellmore Fire Dist.,* 59 AD3d 515, 516 [2009]).

However, Labor Law §§240(1) and 241(6) exempt owners of one and two-family dwellings who contract for but do not direct or control the work (*Holifield v Seraphim, LLC,* 92 AD3d 841 [2012]. It is undisputed that the subject premises is a one-family home and that RAMOS did not

direct or control the work. In addition, all equipment, including the ladder, were provided to CHAVEZ by his employer.

CHAVEZ maintains that RAMOS is not entitled to the exemption because the premises were used for commercial purposes. Specifically, CHAVEZ contends that the premises were utilized by RAMOS as a commercial auto repair facility. CHAVEZ bases his contention on the fact that he observed various automobiles, engines and other car parts in the rear backyard of the premises in various stages of disrepair. In addition, CHAVEZ cites a New York City Department of Buildings complaint brought by a neighbor against RAMOS for operating an automobile repair facility. The complaint was determined to be unfounded.

It is clear that RAMOS is entitled to the homeowner's exemption to liability under LABOR LAW §2401(1) and §241(6) in this matter. CHAVEZ maintains that the motion for summary judgment should be denied because there remains a question of fact of whether a portion of the premises was use for commercial purposes. However, the mere use of a portion of the premises for commercial use does not automatically disqualify RAMOS from the exemption (*Umanzor v. Charles Hofer Painting & Wallpapering, Inc.,* 48 AD3d 552 [2008]). It is unquestioned that the work was being performed on the gutters of the residence and not in the backyard where the alleged auto repairs were being conducted. The commercial activity, if any, was merely "incidental" to the primary use of the residence (*Umanzor, supra.,* 553*).*

Accordingly, it is

ORDERED the motion for summary judgment by defendants ANNA M. RAMOS and NOLY

RAMOS, pursuant to CPLR 3212, dismissing the complaint of FRANCISCO CHAVEZ is granted, and it is further

ORDERED that the Clerk enter judgment accordingly.

This shall constitute the decision and order of the Court.

Dated: May 8, 2012

E N T E R,

_____
HON. PHILIP G. MINARDO