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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

YADVINDER SINGH,
Plaintiff,

- against -

NOAH SMITH, et ano.,
Defendants.

Index
No. 10841 2004

Motion
Date May 8, 2012

Motion
Cal. No. 20

NOAH SMITH, et ano.,
Third-Party Plaintiffs,

-against-

ISLAND BUILDING CONSTRUCTION CORP., et ano.,
Third-Party Defendants.

Motion
Seq. No. 5

The following papers numbered 1 to 10 read on this motion by defendants for an order granting them summary judgment dismissing the complaint.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-4
Answering Affirmation - Exhibits.....	5-8
Reply Affirmation.....	9-10

Plaintiff commenced this action to recover damages for serious personal injuries alleged to have been sustained by him after he fell from a ladder situated on top of the roof of defendants' single-family home. Defendants hired third-party defendants (of which plaintiff was an employee) to perform brick pointing work on their chimney. The accident is alleged to have occurred when plaintiff was doing grinding work using a five- to six-foot

A-frame wooden ladder. The ladder was tied to the chimney on which he was working and, while he was holding the grinder, he lost his balance and fell from the roof onto the ground. Plaintiff brought the instant suit, alleging violations of Labor Law §§ 200, 240, 241, and common-law negligence.

On their motion, defendants aver, inter alia, that they neither directed, supervised, nor controlled the work and, further, that they are not liable for the occurrence based upon the homeowners' exception. It is well-settled that, under Labor Law §§ 240 and 241, owners of one- and two-family dwellings who contract for but do not direct or control work performed on their property are exempt from liability imposed by those statutes (*see Hossain v Kurzynowski*, 92 AD3d 722 [2012]; *Szczepanski v Dandrea Const. Corp.*, 90 AD3d 642 [2011]; *Rodriguez v Gany*, 82 AD3d 863 [2011]). The terms "direct or control" are to be construed strictly, and refer to owners who supervise the manner and method of the work being performed (*see Walsh v Kresge*, 69 AD3d 612 [2010]; *Pascarell v Klubenspies*, 56 AD3d 742 [2008]). As a preliminary matter, there is no dispute here that the premises is a single-family dwelling.

In support of their motion, defendants rely upon, *inter alia*, their respective deposition testimonies.[1] Defendant Noah Smith (Smith) testified to the following, in relevant part: that he came to hire third-party defendants Island Building Construction Corp. (Island Building) and its owner Ashraf since Smith, as a real estate developer in the business of renovating commercial properties, had a business relationship with Island Building for approximately eight years; that he hired third-party defendants to do brick pointing work on his 30-foot chimney; that he noticed two to three aluminum extension ladders on the roof of the van owned by Island Building; that when the workers arrived, he and Ashraf discussed in the backyard general arrangements as to what work was to be done that day; that, during this conversation, Ashraf asked him whether he had any additional ladders for Island Building's use, at which point he showed Ashraf a wooden 24-foot extension ladder kept in his garage; that his ladder was not used – as far as he knows – because Ashraf did not want it; that, prior to leaving for work that morning, he observed some work being done, which included grinding of the joints near the top of the chimney; that he also saw plaintiff on an extension

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1. It is noted that the deposition transcripts of plaintiff and third-party defendant Mohamed Ashraf (Ashraf) were not considered in determining whether defendants have met their prima facie burden establishing their entitlement to judgment as a matter of law. Those respective transcripts are neither signed by the party deponents, nor did defendants demonstrate that the transcripts were submitted to said deponents and that deponents failed to return a signed copy within 60 days thereafter in accordance with CPLR 3116 (a) (*see Moffett v Gerardi*, 75 AD3d 496 [2010]; *Marmer v IF USA Exp., Inc.*, 73 AD3d 868 [2010]).

ladder on top of a lower, flat roof, on which the ladder was situated to reach the roof; that the ladder was leaning on the roof; that he did not notice whether the ladder was secured; that he did not see the use of scaffolds, safety lines, or hoists; that he was not present when plaintiff fell, as he was on the Long Island Railroad heading into work; and that he received a phone call from his wife advising him that plaintiff had fallen off the roof onto their driveway. Further, with respect to the nature of the work, Smith testified that he denied ever giving instructions to Ashraf as to how to do the work, and that, though he was concerned as to how the workers were going to be able to do an effective job on the chimney without a scaffold and just with the use of a ladder, he had "confidence in Ashraf as a mason," and has always "let the professionals take care of their own job."

Smith's wife, defendant Beth Stephens (Stephens), also testified in this matter. Stephens stated, in relevant part: that she was home when Island Building arrived; that no one asked her to use a ladder that day and was unsure as to whether anyone had asked her husband for one; that she was not present when plaintiff fell as she went to get coffee; that, when she returned, she saw plaintiff on the ground in her driveway, with a metal extension ladder lying across the top of her own van which was parked in the driveway; and that she spoke with plaintiff's coworker, who told her that plaintiff had fallen off the ladder and was not wearing a safety harness.

Based on the above, defendants demonstrated, prima facie, that they are entitled to the homeowners' exception (*see generally Dougherty v O'Connor*, 85 AD3d 1090 [2011]; *Paez v Shah*, 78 AD3d 673 [2010]; *Parnell v Mareddy*, 69 AD3d 915 [2010]). Defendants' participation in the discussions with Island Building involved what was to be done that day, rather than how it was to be done, as evidenced by Smith's statements that he relied on the judgment and expertise of Island Building, amounting to "nothing more than what any ordinary homeowner would do in deciding how they wanted the home to look upon completion" (*Affri v Basch*, 13 NY3d 592 [2009]; *see Orellana v Dutcher Ave. Bldrs., Inc.*, 58 AD3d 612 [2009]; *Jumawan v Schnitt*, 35 AD3d 382 [2006]). Further, the defendant homeowners both testified that neither of them were even present when the accident occurred. Finally, defendants also successfully argue that, even if they did loan a wooden ladder to plaintiff or to third-party defendants, same does not amount to supervision or control over the work (*see Chowdhury v Rodriguez*, 57 AD3d 121 [2008]; *Reyes v Silfies*, 168 AD2d 979 [1990]).

In opposition to the motion, plaintiff relies upon his deposition transcript, which was originally submitted by defendants, but not considered – as inadmissible – on the motion. However, despite same, since plaintiff relied upon it, it is considered to be adopted by him

as accurate and, as such, the court may consider it in support of his opposition[2] (*Rodriguez v Ryder Truck, Inc.*, 91 AD3d 935 [2012]; *see Ashif v Won Ok Lee*, 57 AD3d 700 [2008]). That having been said, the facts submitted by plaintiff are in stark contrast to those which were testified to by defendants. Plaintiff testified to the following, in pertinent part: that Ashraf gave him instructions about the job that was to be done at defendants' home, which was to do pointing work on the chimney; that Smith and Ashraf were speaking English but that he did not understand, and that, while Smith did not speak to him directly, Smith was using hand gestures to tell him what needed to be done; that he first did grinding work on his 30-foot extension ladder on three sides of the chimney; that, thereafter, Ashraf instructed him that they were going to leave since they did not have the proper equipment to finish the fourth side of the chimney; that Smith told them that he had a small wooden ladder located in the garage which would allow them to finish the job, and gave that ladder to the workers to use for that purpose; that Smith and Ashraf tied the ladder in order to hoist it up to the lower roof; that Ashraf and his coworker then pulled it up; that Ashraf tied the small ladder to the chimney; that plaintiff checked to see if it was tied properly and correctly positioned; that, just before the accident, he noticed that Smith was on the ground watching along with Ashraf and his coworker; and that, while using the grinder, he lost his balance and fell. Plaintiff further testified that the ladder did not have rubber feet nor stops at the bottom, and that he thinks that "maybe the step came out of the ladder" or slipped out of the rope which was tied to the chimney.

While plaintiff did not raise a triable issue of fact with respect to Stephens,[3] there is, at the very least, an issue of fact as to whether Smith exercised the requisite direction or control over the work, thereby making the homeowners' exception inapplicable herein (*see Szczepanski v Dandrea Constr. Corp.*, 90 AD3d 642 [2011]; *Rodriguez*, 82 AD3d at 864-865). Plaintiff's testimony indicates that Smith may have directed plaintiff and his employer to complete the work despite not having the requisite tools to do so. Specifically, plaintiff had stopped working after doing work on the third side of the chimney, and was told by his boss to gather his tools in preparation to leave. However, it was at that time, according to

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2. It is noted that, though plaintiff, too, relies upon the deposition transcript of Ashraf, he did not submit a copy of the transcript in admissible form in opposition and, as such, Ashraf's testimony was not considered by the court. It is further noted that plaintiff's affidavit in opposition was also not considered as inadmissible, since it was not accompanied by an affidavit of translation (CPLR 2101 [b]; *see Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47 [2011]).

3. While the issue was not raised by the parties, the court notes that Stephen's "liability under the Labor Law must be determined based on her status and actions, not those of her husband" (*Mandelos v Karavasidis*, 213 AD2d 518 [1995]).

plaintiff, that Smith intervened and instructed Ashraf as to the means and methods in which he was to finish the pointing work on the fourth side of the chimney, to wit: by telling them that the remainder of the work could be done by the use of a smaller wooden ladder provided by him, which was what he believed to be the right tool for the job, and assisting them in tying the ladder in order for it to be hoisted onto the roof (*cf. Jumawan v Schnitt*, 35 AD3d 382 [2006] [exemption applied since there was no evidence that the homeowner instructed the plaintiff or any workers as to how to perform their work or provided or suggested that any particular tools be used]).

It is noted that the homeowners' exception "was enacted to protect those who, lacking business sophistication, would not know or anticipate the need to obtain insurance to cover them against absolute liability" (*Rothman v Shaljian*, 278 AD2d 297 [2000]; *see Rodriguez*, 82 AD3d at 864; *Acosta v Hadjigavriel*, 18 AD3d 406 [2005]). As Smith himself testified, he is a real estate developer, having been involved in the renovation of commercial buildings for approximately seven years, and having a business relationship in with Island Building for eight years (Island Building having been retained on several prior jobs for Smith). This also raises a triable issue of fact as to whether to impose liability under Labor Law §§ 240 and 241 (*see Boccio v Bozik*, 41 AD3d 754 [2007]; *Acosta*, 18 AD3d at 407 ["there is a triable issue of fact as to whether the defendant, who owned a construction business which employed the plaintiff before the accident (on an unrelated job), exercised the requisite degree of direction and control over the painting of his home to impose liability under Labor Law § 240 (1) and § 241 (6)"]).

When all these factors are examined together – the policy behind the homeowners' exception, the nature of the relationship between Smith and third-party defendants, Smith's sophistication and expertise in the field, the facts as described by plaintiff – there exists an issue of fact as to whether the exception applies here. As a result, Smith is not entitled to judgment as a matter of law on this issue.

Moreover, Smith's motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims must be denied for the same reason[4] (*see e.g. Szczepanski*, 90 AD3d at 644; *Reilly-Geiger v Dougherty*, 85 AD3d 1000 [2011]).

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4. Since Stephens met her prima facie burden with respect to the homeowners' exception to the extent that there is no evidence she directed or controlled the work, and since plaintiff did not raise a triable issue of fact with respect to same, Stephens has conclusively established her entitlement to dismissal of the Labor Law § 200 and common-law negligence claims as well.

Accordingly, the motion for an order granting defendants summary judgment dismissing the complaint is granted only to the extent that the complaint is dismissed against defendant Beth Stephens. The motion is otherwise denied.

Dated: May 14, 2012

J.S.C.