

Yousef v Malik

2012 NY Slip Op 31868(U)

July 13, 2012

Sup Ct, Richmond County

Docket Number: 100048/10

Judge: Philip G. Minardo

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X

JACQUES YOUSEF and MOUNA SABAUGH,

Plaintiffs,

-against-

ABBAS G. MALIK and ROBINA MALIK,

Defendants.

-----X

DCM PART 6

Present:

HON. PHILIP G. MINARDO

DECISION and ORDER

Index No. 100048/10

Motion Nos. 999-008
1145-009

The following papers numbered 1 to 4 were fully submitted on the 31st day of May, 2012.

	Papers Numbered
Notice of Motion by Defendants for Summary Judgment, with Supporting Papers and Exhibits (dated March 27, 2012).....	1
Memorandum of Law by Defendants in Support of Motion (dated March 27, 2012).....	2
Cross Motion by Plaintiffs for Summary Judgment with Supporting Papers and Exhibits (dated April 10, 2012).....	3
Reply Memorandum of Law by Defendants (dated May 4, 2012).....	4

Upon the foregoing papers, defendants' motion (No. 999) for summary judgment and dismissal of the complaint is granted; plaintiffs' cross motion (No. 1145) for summary judgment on the issue of liability under Labor Law § 240(1) is denied.

This is an action for personal injuries allegedly sustained by plaintiff Jacques Yousef (hereinafter "plaintiff") on November 11,

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2008, when he allegedly fell from a ladder while installing a skylight in a single family residence under construction on Staten Island. At the time in question, plaintiff was an employee of non-party KES Construction (hereinafter "KES"). Defendant Robina Malik is the sole owner of the residence (see Plaintiff's Exhibit "1"), while defendant Abbas S. Malik is both the spouse of the homeowner and the sole shareholder and owner of KES.

It is well established that Labor Law § 240 (1) expressly exempts from liability the "owners of one family dwellings who do not direct or control the work" (Bartoo v Bull, 87 NY2d 362, 366), an exemption which the Legislature intended to protect residential homeowners lacking in sophistication or sufficient business acumen to recognize the necessity of insuring against the strict liability imposed by the statute (see Bartoo v Bull, 87 NY2d at 367). As the parties seeking to benefit from this exemption, defendants bore the initial burden of establishing their prima facie entitlement to judgment as a matter of law on the basis of the "homeowners' exemption". In order to satisfy this burden, it was incumbent upon defendants to demonstrate not only that the structure in question was a single-family residence, but that they did not "direct or control" the work (Labor Law § 240 [1]; see Arama v Fruchter, 39 AD3d 678, 679, Miller v Shah, 3 AD3d 521, 522). For these

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purposes, the statutory phrase "direct or control" has been construed strictly to refer solely to those situations where the owner supervises the method and manner of the work being performed (see Boccio v Bozik, 41 AD3d 754, 755).

Here, contrary to plaintiffs' contention, defendant Robina Malik made the requisite prima facie showing that she was entitled to the protection of the homeowners' exemption by submitting evidence in the form of uncontroverted deposition testimony which confirmed her ownership status as well as her lack of authority to supervise, control or instruct any worker regarding the method or manner of construction (see Defendant's Exhibit "J" p 23). In opposition, plaintiffs have failed to raise an issue of fact. Moreover, the deposition testimony of plaintiff-employee Jacques Yousef only serves to strengthen this finding, as he denied ever seeing Mrs. Malik at the construction site (see Plaintiffs' Exhibit "I", p 30). Hence, defendant Robina Malik is entitled to the dismissal of the complaint as against her. In addition, since defendants have failed to controvert plaintiffs' contention that the falling ladder constituted prima facie proof of a violation of Labor Law § 240 (1) (see Hernandez v Bethel United Methodist Church of New York, 49 AD3d 251; Montalvo v J. Petrocelli Construction, Inc., 8 AD3d 173), the only question remaining concerns the

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liability of the co-defendant.

With respect to defendant Abbas Malik, it is undisputed that he is the spouse of Robina Malik, and was not named as an owner of the property in either the contract of sale or the relevant deed. Under like circumstances, it has been held that a husband's status as the homeowner's spouse does not entitle him to claim the "homeowners' exemption" (see Fisher v Coghlan, 8 AD3d 974) . To the contrary, based on the uncontroverted deposition testimony, it is clear that in addition to being the owner of KES, this defendant was for all intents and purposes acting as both the general contractor and as the owner's agent in his supervision of this construction project (see e.g. Plaintiffs' Exhibit "2", p 18; Exhibit "3" p 16)¹. In this regard, it is well settled that "[a] general contractor is generally responsible for the coordination and execution of all the work at the work site" (Bagshaw v Network Serv. Mgmt., 4 AD3d 831, 833 quoting Feltt v Owens, 247 AD2d 689, 691). Thus, a person or entity may be considered a general contractor "if it was responsible for coordinating and supervising the entire construction project and was invested with a concomitant

¹Pursuant to case law, defendant homeowner Robina Malik cannot be held vicariously liable for the wrongful acts (e.g., statutory violations) of her co-defendant performed in his capacity as the owner's agent (see Fisher v Coughlin, 8 AD3d at 976; Halstead v Wightman, 246 AD2d 909, 910).

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power to enforce safety standards and to hire responsible contractors" (Kulaszewski v Clinton Disposal Servs., 272 AD2d 855, 856; Outwater v Ballister, 253 AD2d 902, 904). General contractors, like owners and the agents of both, are absolutely liable for violations of section 240(1) of the Labor Law unless subject to the homeowners' exemption (see Decotes v Merritt Meridian Corp., 245 AD2d 864).

In support of summary judgment, defendant Malik Abbas (hereinafter "defendant") contends that, as the owner of KES, the undisputed employer of plaintiff, he is completely insulated from liability based upon the exclusivity provision of Workers' Compensation Law § 29(6). It is undisputed that plaintiff received Workers' Compensation benefits referable to his employment by KES, and that he is now seeking to recover personally from his employer in the latter's alternate status as, e.g., the general contractor (see Defendants' Exhibit "4").

Workers' Compensation qualifies as an exclusive remedy when both plaintiff and defendant were acting within the scope of their employment as co-employees at the time of the injury (see Maines v Cronomer Valley Fire Dept., 50 NY2d 535). More specifically, "to [be entitled to] the protection of the exclusivity provision, [a defendant] must himself have been acting within the scope of his

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employment and not have been engaged in a willful or intentional tort" when plaintiff's injury was sustained (*id.* at 543). Here, this Court determines, as a matter of law, that defendant Abbas Malik was acting within the scope of his employment as owner of KES Construction at the time of plaintiff's accident.

It is uncontroverted that plaintiff at bar was injured while performing work that had been assigned to him by defendant in his capacity as the owner and sole shareholder of KES. Such an act being clearly within the latter's scope of authority as the owner of the construction company, the injured employee is relegated exclusively to the benefits available under the Workers' Compensation Law (see Macchirole v Giamboi, 97 NY2d 147, 150-151; Sojka v Romeo, 293 AD2d 522, 523; Halstead v Wightman, 247 AD2d 909, 910). In this regard, it may be worthy of note that the duties owed by defendant to the plaintiff-employee as the owner and sole shareholder of KES are, for purposes of Section 240(1) of the Labor Law, indistinguishable from those owed as the general contractor and/or owner's agent (Macchirole v Gamboi, 97 NY2d at 91).

Accordingly, it is hereby,

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed; and it is further

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ORDERED that plaintiffs' cross motion for summary judgment is denied; and it is further

ORDERED that the Clerk enter judgment accordingly.

E N T E R,

/s/ Philip G. Minardo
J.S.C.

Dated: July 13, 2012