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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

MIGUEL ANGEL TATIS,
Plaintiff,

- against -

KEVIN MCNAMARA, et al.,
Defendants.

Index
No. 22949 2010

Motion
Date June 5, 2012

Motion
Cal. No. 22

Motion
Seq. No. 1

The following papers numbered 1 to 9 read on this motion by defendants for an order granting them summary judgment dismissing plaintiff's complaint.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-4
Answering Affirmation - Exhibits.....	5-7
Reply Affirmation.....	8-9

This is an action to recover damages for personal injuries alleged to have been sustained by plaintiff, on May 31, 2010, after he fell from a six-foot A-frame ladder while painting a balcony attached to the home located at 26-02 24th Street, Astoria, New York. Defendant Joseph Losada and Blanch Losada are trustees of a trust which owns the home, and defendant Blanch McNamara, their daughter, lives there "rent-free" with her husband, defendant Kevin McNamara. Plaintiff alleges violations of Labor Law §§ 200, 240, 241, and common-law negligence.

With respect to the branch of their motion which seeks dismissal of plaintiff's claims sounding in Labor Law §§ 240 and 241, defendants aver that, since the property is a two-

family dwelling and, further, since none of them directed, supervised, nor controlled the work, 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, the court notes that the homeowners' exception applies to a trust as owner (*see generally Holifield v Seraphim, LLC*, 92 AD3d 841 [2012]; *Going v Toomey*, 81 AD3d 688 [2011]).

In support of their motion, defendants proffer a copy of the Certificate of Occupancy for the subject premises, evidencing that same is a residential two-family dwelling. Mrs. McNamara testified at her examination before trial that her parents own the premises (they reside in Florida full-time, visiting New York on occasion) but that she and her husband have lived there continuously since 1960 and 1974, respectively. Mrs. McNamara also stated that an individual rents the upstairs apartment. Mr. McNamara also testified similarly, stating that three individuals reside in the upstairs apartment, who pay rent to Mr. McNamara's father-in-law. Finally, both Joseph and Blanch Losada submit affidavits in which they state that, at the time of the occurrence, they were the trustees and beneficial owners of the two-family home, his wife as owner having deeded the house into a trust for their benefit in 2002.

Defendants further submit that they neither directed nor controlled the work. With respect to the Losada defendants, the two were living in Miami Beach at the time (where they spend most of the year), had no interaction with plaintiff, and plaintiff himself never met them. With respect to the McNamara defendants, they offer their respective deposition transcripts and that of plaintiff. Plaintiff testified, in relevant part: that he met Mrs. McNamara when he was working on the demolition of a balcony on the home in connection with his employment with a company called Complete Maintenance; that Mrs. McNamara hired him to do some side work and paint the balcony of the subject premises; that she was to provide the tools and materials for the job, including the paint, brushes, drop cloths, rollers, and ladder; that Mr. McNamara handed him the subject ladder; that it seemed "normal" but he asked for a "better" one because the one given to him looked deteriorated, old, and was missing a rubber foot on one side; that he used the one given to him since the McNamaras did not have any others; that he opened the ladder and placed it on the concrete, which looked level, and the ladder looked fine after opening it; and that after painting the railing underneath the balcony, he descended the ladder and, once reaching the second step

from the bottom, "the ladder came on to [him]," tipped to the side and fell to the ground, causing plaintiff to fall and sustain injuries.

Mr. McNamara testified, in part: that the household had the subject ladder for at least 20 years; that it was in good condition, with all of its rubber feet in tact and no prior incidents; that he expected plaintiff would bring his own ladder, but gave him the subject ladder when his wife informed him that plaintiff needed one to do the work; that plaintiff made no complaints about the ladder; that he first realized that there was an accident when he heard plaintiff yell out, at which point he looked over the edge of the balcony and saw plaintiff lying on the floor; and that he noticed that, while the paint can tipped over, the ladder was still upright and in the fully open position.

Finally, Mrs. McNamara testified to the following: that she agreed with plaintiff that she would provide the supplies for the paint job, but that there was no discussion regarding who would provide the ladder; that she did not observe plaintiff working; that she asked her husband to give him the ladder they had, with which she never had problems in the past, nor did plaintiff complain about it; that the ladder had all of its rubber feet; and that her first indication that there was an accident is when she heard a noise, at which point she looked over the edge of the balcony along with her husband and saw plaintiff on the floor, with the ladder standing in an open position. The McNamaras both testified that the concrete surface upon which plaintiff positioned the ladder was level, but sloped downwards to drain water away from the house.

Defendants have established their prima facie entitlement to judgment as a matter of law dismissing plaintiff's causes of action which allege violations of sections 240 and 241 of the Labor Law since the testimony reveals that: (1) the work was being performed on a two-family dwelling; and (2) defendants neither directed nor controlled the work (*see Nai Ren Jiang v Yeh*, 95 AD3d 970 [2012]; *Harper v Holland Addison, LLC*, 75 AD3d 495 [2010]; *Gittins v Barbaria Const. Corp.*, 74 AD3d 744 [2010]).

To the extent that plaintiff initially argues in opposition that the premises were not a two-family home since the Losadas did not reside there and they were using the property for commercial purposes based upon Mr. McNamara's testimony that a portion of the home was rented to three tenants, the court finds that same is insufficient to disqualify defendants from the exception.

The purpose of the enactment of the exception was "to protect owners of one- and two-family dwellings who are not in a position to realize, understand, and insure against the responsibilities of absolute liability imposed by Labor Law § 240 (1) and § 241 (6)" *(Lenda v Breeze Concrete Corp.*, 73 AD3d 987 [2010]). In certain cases, the dichotomy is clear: the

exception applies when the property is used solely as a one-or two-family dwelling and the owner does not control the work (*see Castellanos v United Cerebral Palsy Assn. of Greater Suffolk, Inc.*, 77 AD3d 879 [2010]), and the exception does not apply where the property is used by the owner exclusively for commercial purposes (*see Van Amerogen v Donnini*, 78 NY2d 880 [1991]). Further, the existence of both a residential and commercial use of the property does not automatically disqualify the owner of the statutory exception (*see Bartoo v Buell*, 87 NY2d 362 [1996]). In such a circumstance, the case must be analyzed in terms of the site and purpose of the work being performed (*see Khela v Neiger*, 85 NY2d 333 [1995]; *Cannon v Putnam*, 76 NY2d 644 [1990]). If the work is directly related to residential use of the property, the exception applies (*id.*).

Here, the circumstances lie somewhere in the middle of the spectrum. It is clear that the McNamaras were not commercial tenants, as they were members of the Losada family. Simply because the Losadas' daughter and son-in-law resided in the home is insufficient to cause defendants to lose the protection of the exception, since their arrangement (i.e., their living "rent-free") serves no commercial purpose (*see e.g. Morocho v Marino Enters. Contr. Corp.*, 65 AD3d 675 [2009]; *Castro v Mamaes*, 51 AD3d 522 [2008]). Further, the work being performed – painting the balcony which the McNamaras use – was directly related to the residential use of the premises (*see id.*). Finally, the exception applies even though one portion of the unit was rented out (*see Chowdhury v Rodriguez*, 57 AD3d 121 [2008]). Plaintiff does not otherwise show that the premises was not a two-family dwelling.

Plaintiff further contends that the McNamaras directed/controlled plaintiff's work. However, all the facts cited to in support of this notion amounts 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. While they were outside on the balcony – technically in plaintiff's presence – they did not see him working nor did they witness the accident. Finally, even if they did provide materials, 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]).

Turning to plaintiff's Labor Law § 200 claim, this statute is a codification of the common-law duty of owners and their agents to provide workers with a safe place to work (*see Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47 [2011]; *Ramos v. Patchogue-Medford School Dist.*, 73 AD3d 1010 [2010]). Here, defendants have conclusively established that the Losadas are entitled to summary judgment dismissing plaintiff's claims against them, as they were not involved at all in plaintiff's hiring, nor were they present when the accident occurred. With respect to the McNamaras, these defendants argue that they are not liable

since both testified that they never had a problem with the subject ladder in the past and, further, that plaintiff did not complain about the condition of the ladder. Plaintiff, on the other hand, contends that these defendants lent him a defective ladder which was missing rubber feet, was old and deteriorated and, further, that the McNamaras were aware of same since plaintiff specifically requested another ladder.

As here, when the issue presented is allegedly dangerous or defective equipment lent to a worker by defendants which thereby causes injury, the standard of proof on a motion for summary judgment is the prima facie showing that defendants "neither created the alleged danger or defect in the instrumentality nor had actual or constructive notice of the dangerous or defective condition" (*Chowdhury v Rodriguez*, 57 AD3d 121 [2008]). Based upon the conflicting testimony regarding the condition of the subject ladder and whether plaintiff advised the McNamaras of same, the McNamaras did not eliminate issues of fact regarding whether they had notice of the allegedly dangerous condition thereof.

Accordingly, defendants' motion for summary judgment is granted only to the extent that: (1) the complaint against defendants Joseph Losada and Blanch Losada as Trustees of the Joseph Losada and Blanch Losada Revocable Living Trust, Dated the 10th Day of September, 2002, is dismissed; and (2) plaintiff's causes of action sounding in Labor Law §§ 240 and 241 asserted against defendants Kevin McNamara and Blanch McNamara are dismissed; the remaining branches of the motion are denied.

Dated: July 9, 2012

J.S.C.