Stiegman v Barden & Robeson Corp.
2016 NY Slip Op 33006(U)
December 13, 2016
Supreme Court, Niagara
Docket Number: E147557/2012
Judge: Frank Caruso
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STATE OF NEW YORK
SUPREME COURT : COUNTY OF NIAGARA

GARY STIEGMAN,
Plaintiff,

vs.

THE BARDEN & ROBESON CORPORATION, Individually and doing business as BARDEN HOMES, L.J. KLEIN DEVELOPMENT, SCOTT GRIBBEN, DEBRA GRIBBEN, B&H CARPENTRY, BRIAN MCDONALD and JOSEPH MCDONALD, Individually and D/B/A J&D ENTERPRISES, and JEFFREY M. BROWN,
Defendant.

Decision & Order
Index No. E147557/2012

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Caruso, J.

This decision and order results from a motion by plaintiff for summary judgment on their Labor Law §240(1) claim against The Barden & Robeson Corporation (Barden) and B&H Carpentry (B&H). Additionally, defendant B&H cross moves for summary judgment dismissing all claims against them, Barden cross moves for summary judgment dismissing all claims against them but has withdrawn their request for common law indemnification as against B&H, and Brian McDonald and Joseph McDonald individually and d/b/a J&D Enterprises (J&D) cross move for summary judgment dismissing all claims against them. Defendant L.J. Klein Development (L.J. Klein) also moves for summary judgment seeking dismissal of all claims against it and defendants Debra Gribben and Scott Gribben move for summary judgment seeking dismissal of all claims brought against them as well as a penalty for spoliation against Barden and indemnification as against B&H as well as Barden.

This case arises from the construction of a single family home which was undertaken by the Gribbens. They approached Barden Homes to inquire about purchasing a home from their company and were directed to L.J. Klein and specifically Donny Kleinschmidt. The specifications of the home were decided upon and construction began with the Gribbens dealing with Todd Arnold of Barden Homes who represented himself to be managing the project. A set of basement stairs were installed in the initial stages of the project and the plaintiff, who was hired to do electrical work for the home, utilized these stairs to get to the electrical box. One of the times he went down the stairs, they gave way causing him to fall and injure himself.

The plaintiff claims that the stairs in question were temporary stairs which were installed by B&H with the assistance of Todd Arnold. It is further alleged that the Gibbens dealt primarily with Todd Arnold throughout the construction process and they relied on him to determine what contractors to use and to oversee the project. It is claimed that the actions of Todd Arnold put him

in a position of being a supervisory authority on the project making Barden Homes liable under the Labor Law.

It is further asserted by the plaintiff that the instillation of the stairs was delegated to B&H so they are responsible under Labor Law §240(1). It is not necessary for the plaintiff to prove why the stairs collapsed, just that B&H, with the assistance of Barden's Todd Arnold, installed the stairs which were the equivalent of a safety device, which failed.

Defendant Barden Homes takes the position that neither them, nor Todd Arnold were ever engaged as general contractor for the construction of the Gribben home. Neither selected or recommended subcontractors or material suppliers for the project and in fact, most were already engaged prior to Mr. Arnold being brought on. Mr. Arnold was not responsible for supervising work being done and had no authority to reprimand a subcontractor for safety issues. In fact, Barden points to L.J. Klein as taking the role as general contractor in this instance as he engaged many of the subcontractors involved.

It is also alleged that the stairway in question was not a temporary staircase, but rather a permanent fixture which takes it out of the realm of §241. These stairs were part of the original plans which were in place and it is not uncommon for these stairs to be the only stairs installed in a particular home. It was only after construction began that the Gribbens decided to finish the stairwell and install different stairs. The initial plans even indicated that the knock-down stairs were to be installed and that the homeowners may purchase finished stairs later. Thus the stairs that fell down where intended to be permanent which they were first installed.

Defendant B&H points out that the accident happened months after they had installed the stairway and alleges that someone removed the supports they had installed. Additionally, they note that they were not a general contractor or construction manager for the worksite so they cannot be held liable under the Labor Law. They did not coordinate, supervise, or exercise any kind of control of the project or its workers. It is indicated that Todd Arnold did have this role on the project and

should bear the duty of responsibility. Further, since it did not supervise or control the plaintiff's work, it cannot be held liable under a common law duty of care under §200. Also, since there is no evidence presented showing any kind of defect in their work, common law negligence does not apply either.

Defendants Gribbens point out that they had absolutely no involvement in the condition which led to the plaintiff's injuries. They did not fabricate or install the stairs which fell nor is there anything to indicate that there was any defect for them to notice and be responsible to remedy. Further, they are not responsible for the negligence of a contractor they hired to perform work as they had no supervisory role in the construction of the house as this was performed by Mr. Arnold. Also, since they did not direct or control the work being done, they are exempted from any Labor Law liability.

Defendant L.J. Klein argues that they did not hire any of the contractors on the job nor did it have any authority to supervise the job site. It was never expected that they would be on the job site and their involvement dealt only with selling the Gribbens a style of home. Therefore, it cannot be said that they are a contractor for the purposes of the Labor Law. Also since there was no control or supervision there was no duty owed to the plaintiff under a negligence standard.

The Court has considered the following: Notice of Motion by Samuel J. Capizzi, Esq. dated November 14, 2014; Attorney's Affidavit of Samuel J. Capizzi, Esq. sworn to November 14, 2014 with exhibits attached thereto; Memorandum of Law submitted by Samuel J. Capizzi, Esq. dated November 14, 2015; Notice of Cross Motion by Janet F. Neumann, Esq. incorrectly dated February 16, 2014; Attorney Affirmation of Janet F. Neumann, Esq. dated February 9, 2015 with exhibits attached thereto; Memorandum of Law submitted by Janet F. Neumann, Esq. dated February 10, 2015; Notice of Cross Motion by Mark C. Rodgers, Esq. dated February 18, 2015; Affidavit of Mark C. Rodgers, Esq. sworn to February 18, 2015 with exhibits attached thereto; Affidavit of Donald Kleinschmidt, sworn to February 11, 2015 with exhibits attached thereto; Notice of Motion by

Jonathan H. Bard, Esq. dated February 18, 2015; Attorney Declaration by Jonathan H. Bard, Esq. dated February 18, 2015; Memorandum of Law in Support submitted by Jonathan H. Bard, Esq. dated February 18, 2015; Attorney Affirmation of Jonathan H. Bard, Esq. dated February 18, 2015 with exhibits attached thereto; Attorney Affirmation of Janet F. Neumann, Esq. (oppose Gribbens) dated February 27, 2015; Attorney Affirmation of Janet F. Neumann, Esq. (oppose L.J. Klein) dated February 27, 2015; Notice of Motion by Joseph G. Goergen, Esq. dated March 3, 2015; Affirmation in Support by Joseph G. Goergen, Esq. dated March 3, 2015 with exhibits attached thereto; Notice of Cross Motion by Thomas W. Bender, Esq. dated March 5, 2015; Attorney's Affidavit by Thomas W. Bender, Esq. sworn to March 5, 2015; Memorandum of Law submitted by Thomas W. Bender, Esq. undated; Attorney Affirmation of Janet F. Neumann, Esq. dated March 11, 2015; Attorney's Affidavit of Thomas W. Bender, Esq. (oppose B&H) sworn to March 19, 2015; Attorney's Affidavit of Thomas W. Bender, Esq. (oppose J&D) sworn to March 19, 2015; Attorney's Affidavit of Thomas W. Bender, Esq. (oppose L.J. Klein) sworn to March 19, 2015; Attorney's Affidavit of Thomas W. Bender, Esq. (oppose Gribbens) sworn to March 19, 2015 with exhibit attached thereto; Affidavit of Todd J. Arnold sworn to March 19, 2015 with exhibits attached thereto; Attorney's Affidavit of Samuel J. Capizzi, Esq. sworn to March 19, 2015; Attorney Affirmation of James H. Cosgriff, III, Esq. dated March 20, 2015; Attorney's Affidavit of Samuel J. Capizzi sworn to March 23, 2015 with exhibit attached thereto; and Attorney Affirmation of James H. Congriff, III, Esq. dated March 24, 2015;

The first question which must be answered here is whether or not the staircase which collapsed were considered to be temporary or permanent. It has been repeatedly held that a permanent stairway is not considered "the functional equivalent of a ladder or other 'device' as contemplated by section 240(1)" (see *Williams v City of Albany*, 245 A.D.2d 916 [3rd Dept.] quoting *Cliquennoi v. Michaels Group*, 178 A.D.2d 839). Therefore, as it is not to be treated as a safety device and its collapse would not fall under the provisions of the Labor Law. *Id.*

In *Sponholz v. Benderson Property Development, Inc.*, 266 A.D.2d 815 (4th Dept. 1999), the Fourth Department examined a stairway in a house which was being renovated. It was found that the stairway was to eventually be removed but that did not render it temporary as it was not a "tool or device employed **solely** to provide access to an elevated worksite," Id. at 433, (emphasis added). The Court in *Williams v. City of Albany*, 245 A.D.2d 916 (3rd Dept. 1997] also noted that not even imminent demolition "warrants treating it as a 'temporary' structure used **only** to afford workers access to a worksite," (emphasis added). In examining the case-law it is clear that for a staircase to fall under Labor Law §240(1), it must be the type erected solely, or at least primarily, for the workers to reach a worksite and not be part of the construction itself.

In this case, despite being referred to as "temporary", the staircase in question was part of what the homeowners selected as part of the initial construction. (See Arnold affidavit exhibits A and B). While there was a possibility the "knock-down" stairs may have been replaced later, this was not the intent when they were first erected. The plans for building the house, which were used during their installation, called for the stairs which were in place at the time of the accident. While it is true that the plans changed and the stairs were to be removed later, this does not change the facts that it was not erected **solely** to provide workers access to their worksites. As in Williams supra, the stairway's imminent demolition does not warrant treating the stairs in question as temporary. As such, this case cannot survive under Labor Law §240(1).

With respect to the claims made under Labor Law §241(6), this portion of law both reiterates the general common-law standard of care and then sets forth a mechanism where the Labor Commissioner may establish more specific rules. (See *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 503 [Ct. App. 1993]). Such common law duty requires an actual hand through control or supervision in the work which resulted in injury. As §241 applies to all contractors, owners and their agents, focusing on the common-law portion of subsection 6 and simply pointing to a general term such as "adequate," "effective," or "proper" found in a regulation would circumvent the

control requirement. *Id.* at 504. Therefore, the case law requires that claims made under §241(6) require violations of regulations which set forth "specific standard(s) of conduct and not simply a recitation of common-law safety principles." *St. Louis v. Town of N. Elba*, 16 N.Y.3d 411, 414 (Ct. App. 2011).

The plaintiff alleges violations of three different sections of the industrial code, 12 N.Y.C.R.R. §§23-1.7(b)(1), 23-1.11 and 23-2.7(b). With respect to §23-1.7(b)(1), this section requires hazardous openings to be guarded by a substantial cover. However, a stairwell is not considered a hazardous opening for the purposes of this section. (See *Smith v. McClier Corp.*, 38 A.D.3d 322 [1st Dept. 2007]; *Rookwood v. Hyde Park Owners Corp.*, 48 A.D.3d 779 [2nd Dept. 2008]). Therefore, this claim must be dismissed.

With respect to §23-2.7(b) this requires the specifications to which a temporary stairway must be constructed. As the Court has already found that this stairway does not qualify as a temporary stairway under the Labor Law, this section does not apply to this case. Similarly, §23-1.11 also does not apply as it pertains to the construction of a temporary structure. Therefore, these claims must also be dismissed.

Turning to Labor Law §200 and common law negligence it is noted that §200 is a "codification of the common-law duty of a landowner to provide workers with a reasonably safe place to work," Lombardi v Stout, 80 N.Y.2d 290, 294 (1992). However, "[i]t is well settled law that where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under section 200 of the Labor Law." Id. at 295. Here, the Gribbens were the landowners where their house was being build, but they did not exercise any supervisory control. This was acknowledged by the plaintiff in his papers. Therefore, the Gribbens cannot be held liable under §200 or a negligence standard.

Regarding B&H, they were no present on the worksite when the accident took place so it cannot be said that they had authority or control over the plaintiff or where he was working. An "implicit precondition" of the duty imposed by §200 "'is that the party charged with that responsibility have the authority to control the activity bringing about the injury.'" *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876 (1993) quoting *Russin v. Picciano & Son*, 54 N.Y.2d 311. As this was not the case with B&H, a §200 claim cannot survive. However, as B&H themselves point out, a subcontractor can be held liable if the work they performed created the condition which caused the plaintiff's injuries. (See *Poracki v. St. Mary's R.C. Church*, 82 A.D.3d 1192 [2nd Dept. 2011]). The Court does not agree with their contention that summary judgment should be granted to them on the issue. The stairway clearly fell and it is equally clear that the plaintiff himself did not cause them to fall. Therefore, it is best left up to a jury to determine who should bear the responsibility of being liable for the accident, if anyone.

J&D simply delivered the stairs which were to be installed later as an upgrade from the knockdown stairs originally selected. These were delivered to the worksite but there is nothing to indicate any involvement with the stairs which fell. Therefore, any claims against them should be dismissed and this is not opposed by the plaintiff.

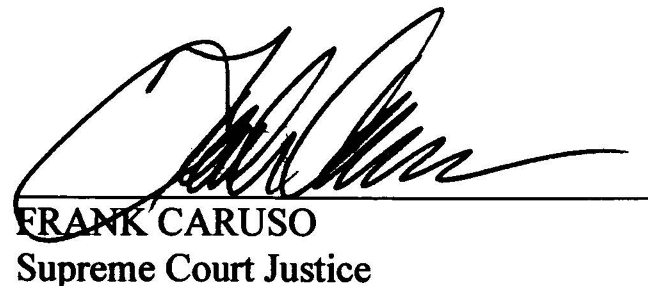
With respect to Barden and L.J. Klein, much is being made about the role each of them played in the construction of the house. It is alleged that for purposes of the Labor Law, each of them acted in such a manner as to be called a general contractor. Mr. Arnold worked for Barden and described himself as a project manager. His duties included making sure the work was done according to the specifications agreed upon, stopping the work if it wasn't being done right, overseeing subcontractors work, making sure the project was progressing and informing the homeowners of the progress. He also indicated that he could stop work if conditions were not safe. Additionally, he personally helped install the stairway which collapsed. The evidence clearly demonstrates that Mr. Arnold controlled all aspects of the worksite. Therefore, the Court finds that

Barden, through Mr. Arnold, was a contractor which can be held liable, but will leave to a jury to determine to what level.

L.J. Klein's motion to dismiss the claims against them is not opposed by the plaintiff in this case. Further, the evidence would seem to demonstrate that they were nothing more than salesmen and had no authority over the worksite which would give rise to liability. Therefore, the case against them is also dismissed.

Therefore, the plaintiff's motion is denied in its entirety, B&H's cross motion is granted in part with respect to all claims except for common law negligence, Barden's cross motion is granted in part with respect to all claims except for Labor Law §200 and common law negligence, J&D's cross motion is granted in its entirety, L.J. Klein's cross motion is granted in its entirety, and the Gribben's motion for summary judgment is granted with respect to dismissal of all claims against them making the rest of their motion moot.

This decision shall constitute the Order of the Court.



FRANK CARUSO
Supreme Court Justice

Dated: December 13, 2016
Niagara Falls, New York

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BY:
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