No. 159

Avraham Affri,
Appellant,
v.
Yaakov Basch et al.,
Respondents.

Brian J. Isaac, for appellant.
Paul E. Svensson, for respondents.

PIGOTT, J.:

The issue before us is whether defendants exercised sufficient direction and control over plaintiff's work to overcome the one or two-family dwelling exception found in Labor Law §§ 240 and 241. We hold that they did not and therefore affirm the order of the Appellate Division.

Defendants hired plaintiff, a neighbor who had previously done small jobs for them, to perform renovations to an apartment within their home. The work included, as relevant to this appeal, the installation of appliances. Plaintiff fell from a ladder while installing a vent on the roof and suffered injuries that required several surgeries.

Plaintiff brought this action against defendants, alleging violations of Labor Law §§ 200, 240 (1) and 241 (6) and common law negligence. Following discovery, defendants moved for summary judgment dismissing the complaint asserting, among other things, that as owners of a two-family dwelling they were exempt from the duties imposed under the Labor Law. Plaintiff opposed the motion and, in turn, cross-moved for summary judgment maintaining that because defendants directed and controlled his work, the one or two-family dwelling exception did not apply. Supreme Court denied both motions finding questions of fact as to all causes of action.

The Appellate Division reversed, holding that defendants made a prima facie showing of their entitlement to summary judgment under the homeowner's exemption of Labor Law § 240 (1) and § 241 (45 AD3d 615, 616). It further found that plaintiff failed to raise a triable issue of fact in opposition, concluding that plaintiff "demonstrated only that the defendants made aesthetic decisions and exercised general supervision with respect to the project, neither of which deprives them of the

benefit of the statutory exemption" (id.).

As it pertained to the § 200 claim and common law negligence, the Appellate Division found that plaintiff failed to raise a triable issue of fact as to whether defendants exercised supervisory control over the work (id.). Therefore, it found that Supreme Court should have also dismissed those causes of action (id.).

We granted plaintiff leave to appeal and now affirm.

Labor Law § 240 provides in pertinent part as follows:

> All contractors and owners and their agents, *except owners of one and two-family dwellings who contract for but do not direct or control the work*, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor . . . devices which shall be so constructed, placed and operated as to five proper protection to a person so employed (emphasis added).

A similar homeowner's exemption is found in Labor Law § 241.

The exemption was enacted so that "the law would be fairer and more nearly reflect the practical realities governing the relationship between homeowners and the individuals they hire to perform construction work on their homes" (Cannon v Putnam, 76 NY2d 644, 649 [1990] [citations omitted]). We have previously stated that whether a defendant's conduct amounts to direction and control depends upon the degree of supervision exercised over "the method and manner in which the work is performed" (Duda v

Rouse Constr. Corp, 32 NY2d 405, 409 [1973]).

Here, defendants' participation was limited to discussion of the results the homeowner wished to see, not the method or manner in which the work was then to be performed. Defendants' direction to plaintiff to place a vent through the roof was simply an aesthetic decision. Defendants did nothing more than what any ordinary homeowner would do in deciding how they wanted the home to look upon completion. Further, defendants did not provide the plaintiff with any equipment or work materials, nor were they even present at the time plaintiff undertook the venting work. Rather, both the method and the manner of plaintiff's work were left to his judgment and experience.

Plaintiff's affidavit indicating that he expressed reluctance to go on the roof because of concern for his safety is insufficient to raise an issue of fact. Although plaintiff claims that he did not want to go up on the roof to run the vent because he was working alone, he proceeded to do so--not at the specific direction of defendants but of his own volition to complete the work.

For the same reasons, defendants were entitled to summary judgment dismissing the causes of action pursuant to Labor Law § 200 and for common law negligence because defendants exercised no supervisory control over the activity bringing about the injury (see Lombardi v Stout, 80 NY2d 290, 295 [1992]).

Consequently, the order of the Appellate Division should be affirmed, with costs.

Affri v Basch, et al.

No. 159

LIPPMAN, Chief Judge (dissenting):

The majority conflates the end result of the work with the manner and method of its performance and it is the supervision over the latter that is the touchstone in this case. Labor Law § 240 (1) was enacted to protect workers from the hazards involved in elevation-related work. It imposes absolute liability upon owners and general contractors who fail to furnish proper protective devices, but provides an exception for "owners of one and two-family dwellings who contract for but do not direct or control the work" (Labor Law § 240 [1]). We have noted, however, that the homeowner's exemption "is an exception to the clear legislative intent to protect [] workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner[,] and as such, may properly be extended only so far as the language of the exception fairly warrants[. Therefore,] doubts should be resolved in favor of the general provision rather than the exception" (Van Amerogen v Donnini, 78 NY2d 880, 882 [1991] [quotation marks and citations omitted]).

The question presented here is whether plaintiff raised

an issue of fact as to whether defendants directed and controlled his work, sufficient to defeat defendants' summary judgment dismissal motion. Case law from this Court provides little guidance for determining the limits of the homeowner's exemption. However, we have observed that "for one person to be 'directed' by another, there must be supervision of the manner and method of the work to be performed" (Duda v Rouse Constr. Corp., 32 NY2d 405, 409 [1973]). At the other end of the spectrum, the Appellate Division has held that general supervision that is "no more extensive than would be expected of the typical homeowner who hired a contractor to renovate his or her home" (Orellana v Dutcher Ave. Bldrs., Inc., 58 AD3d 612, 614 [2d Dept 2009], lv dismissed 12 NY3d 804 [2009]) or decisions involving merely aesthetic choices will not suffice to establish direction and control.

Under the circumstances presented here, I would find that plaintiff has at the very least raised an issue of fact as to whether defendants were directing and controlling his work. Defendants' conduct could be found to be more extensive than expected of the typical homeowners renovating their home inasmuch as their activity involved changing the fundamental or structural nature of the work. For example, plaintiff asserts that when he told Mr. Basch that in order to move a sink to Basch's preferred location he would need to cut a beam that supported the house, defendant instructed him to cut the beam. Basch told plaintiff

to place the washer-dryer vent through the roof, rather than through the window, after plaintiff expressed reservations about the safety of that procedure -- a significant alteration changing the fundamental nature of the work. That Basch may have been able to induce plaintiff to perform the work on the roof, even though plaintiff was afraid for his safety, would also support a finding that Basch directed or controlled plaintiff's work.

The majority states that plaintiff's affidavit "is insufficient to raise an issue of fact" (majority op at 4). It is not clear why that is so or what more should be required from plaintiff at this stage. Affri was the sole witness to the accident and his affidavit is largely consistent with the testimony he gave at his examination before trial.

The homeowner's exemption does not provide blanket immunity for all homeowners -- only for those who do not direct or control the nature of the work. This is not a situation where it can be said as a matter of law that the homeowner left the method and manner of performance to the worker's expertise such that the homeowner cannot be held responsible. If a homeowner directs the manner and means of the work, it is immaterial that the end result was an aesthetic change. Here, there is a genuine question of fact whether defendants crossed the line from general supervision to exercising direction and control over plaintiff's work.

Therefore, I would reverse and reinstate plaintiff's

Labor Law § 240 (1) claim. For the same reasons, I would reinstate plaintiff's claims under Labor Law §§ 241 (6) and 200 and his claim based on common law negligence.

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Order affirmed, with costs. Opinion by Judge Pigott. Judges Graffeo, Read and Smith concur. Chief Judge Lippman dissents and votes to reverse in an opinion in which Judges Ciparick and Jones concur.

Decided November 24, 2009