

Barahona v Deutsch

2013 NY Slip Op 30275(U)

January 29, 2013

Supreme Court, New York County

Docket Number: 113737/08

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: How Jour A. M. dbw
Justice

PART 11

Index Number : 113737/2008
BARAHONA, MARCO
vs.
DEUTSCH, DONALD
SEQUENCE NUMBER : 003
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the annexed Memorandum Decision + Order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

FEB 06 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 29, 2013

[Signature], J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
MARCO BARAHONA and MERCEDES VASQUEZ,

Index No. 113737/08

Plaintiff,

-against-

DONALD DEUTSCH and CLARK CONSTRUCTION
CORPORATION,

Defendants.

-----X
CLARK CONSTRUCTION CORPORATION,

Third-Party Plaintiff,

-against-

A& R EQUIPMENT, LLC,

Third-party Defendant.

-----X
JOAN A. MADDEN, J.

FILED

FEB 06 2013

NEW YORK
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In this action arising out of an accident at a construction site, defendant Donald Deutsch (“Deutsch”) moves for summary judgment dismissing the complaint against him. Plaintiffs and defendant Clark Construction Corporation (“Clark”) oppose the motion, which is granted for the reasons below.

Background

Plaintiff Marco Barahona (“Barahona”) was injured on September 11, 2008, when he fell from the first floor into the basement of a six-story building located at 6 East 78th Street, New York, NY (“the premises”) while removing marble flooring. Deutsch, who owns the premises, entered into an agreement with Clark to perform construction work, which involved the gut renovations of the premises. Clark hired third-party defendant A&R Equipment, LLC (“A&R”)

to perform demolition work at the premises. In this action, plaintiffs seek to recover damages based on alleged violations of Labor Law §§ 240(1), 241(6) and 200.

Deutsch now moves for summary judgment dismissing the complaint against him based on the exemption from liability under Labor Law §§ 240 and 241(6) for one and two-family home owners. Deutsch argues that the exemption applies here based on the record which shows that the premises is a six story residence where he lives with his children and staff. He also asserts that the evidence shows that he did not control the work at issue such that he would be disqualified from the exemption. As for the Labor Law § 200 and negligence claims, Deutsch asserts that these claims must also be dismissed as there is no evidence that he controlled or supervised Barahona's work or had notice of any allegedly dangerous condition prior to the accident or that he created such dangerous condition.

In opposition, plaintiffs assert that the motion is premature as a representative of Clark has not been deposed and the Clark deposition would provide evidence concerning whether Deutsch directed or controlled the work. Plaintiffs also argue that Deutsch has not established that there is no commercial purpose for the work as required to apply the exemption from liability for one and two-family owners and, in support of this position, plaintiffs point to evidence that a four person office was built at the premises.

Clark opposes the motion as premature based on outstanding discovery, including a notice of discovery and inspection served by Clark on Deutsch seeking, *inter alia*, information regarding the staff and employees working at the premises, and tax returns reflecting write-offs and deductions taken by Deutsch.

In reply, Deutsch notes that since the time that he moved for summary judgment, the

deposition of Clark's representative was taken, and such testimony confirms that Deutsch did not control or supervise the work. Deutsch also maintains that the discovery sought by Clark in its notice of discovery and inspection is not relevant to the issues raised on the motion. He also argues that since the record establishes that premises is used primarily for residential purposes, the existence of a home office does not render the one and two-family home owner exemption inapplicable.

The Court of Appeals has noted that the exemption from the strict liability of Labor Law §§ 240 (1) and 241 (6) for one and two-family homeowners, who do not direct or control the work, represents a legislative effort to fairly 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). While the exclusion does not apply to one and two-family homes which are used for exclusively commercial purposes (Van Amerogen v Donnini, 78 NY2d 880, 882-883 [1991]), "[i]t is well settled that the existence of both residential and commercial usages of a particular property does not result in the automatic loss to the dwelling owner of the exemption provided under the Labor Law." Johnson v. Fox, 268 AD2d 782, 784 (3d Dept 2000). Instead, "[i]f the main purpose of the construction project is directly related to the owner's residential use of the property, the owner will receive the benefit of the exemption, even though the work may also incidentally benefit the commercial section of the structure." Id. Furthermore, "the key circumstance in applying the exemption is not an owner's residential status but the residential nature of the site and purpose of the work." Castro v Mamaes, 51 AD3d 522, 523 (1st Dept 2008)(internal quotation marks and citations omitted).

Under this standard, the court finds that Deutsch is entitled to summary judgment

dismissing the Labor Law § 240(1) and 241(6) claims based on the one and two-family home owner exemption. First, contrary to the opposing parties' position, the existence of a four-person office at the premises does not raise a triable issue of fact as to whether the exemption applies as the record shows that the premises was a six-story residence with an one-room office, and that majority work being performed related to the residential use of the premises. See Bartoo v. Buell, 87 NY2d 362, 368 (1996)(writing that "a residence that houses a business may nevertheless retain its character as a home" such that the exemption applies); Telfer v. Gunnison Lakeshore Orchards, Inc., 245 AD2d 620 (3d Dept 1997), lv denied, 92 NY2d 803(1998)(holding that corporate owner was entitled to exemption when it demonstrated that it used the property for primarily residential purposes); DeSabato v. 674 Carroll Street, Corp., 55 AD3d 656, 658 (2d Dept 2008)(holding that exemption applies to property even though defendant had a home office there); Miller v. Trudeau, 270 AD2d 683 (3d Dept 2000)(holding that the presence of a professional office on the premises was insufficient to deny defendant the benefit of the exemption where the record demonstrated the residential use of the premises and the residential nature of the work performed).

Furthermore, even assuming *arguendo* that Deutsch made business deductions to cover the cost of the renovation, this fact would not alter the primarily residential nature of the premises or the applicability of the one and two-family home exemption. See Johnson v. Fox, 268 AD2d 782 (rejecting plaintiff's argument that the one and two-family dwelling exemption did not apply since the dwelling houses the real estate business of defendants and that defendants took certain business deductions for the cost of repairs).

The record also establishes that Deutsch exercised no supervisory control over the work

being performed by Barahona such that would deprive him of the exemption. See Yurkovich v Kvarner Woodworking, Inc., 289 AD2d 183, 184 (1st Dept 2001)(holding that “close supervisory involvement in the work at issue” is necessary to disqualify the homeowner from the exemption).

Accordingly, the one and two-family homeowner exemption applies to bar plaintiffs’ claims against Deutsch under Labor Law §§ 240(1) and 241(6).

In addition, Deutsch is entitled to summary judgment dismissing the negligence and Labor Law § 200 claims against him as there is no evidence that Deutsch controlled or supervised the work of Barahona or had notice of any dangerous condition or created such condition.

Finally, the additional discovery sought by Clark is insufficient to warrant the denial of the motion in the absence of showing that such discovery would raise a triable issue of fact. Steinberg v. Schnapp, 73 AD3d 171, 177 (1st Dept 2010)(noting that “[a] grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence”).

Conclusion

In view of the above, it is

ORDERED that the motion for summary judgment by defendant Donald Deutsch is granted, and the Clerk is directed to enter judgment accordingly in favor of Donald Deutsch; and it is further

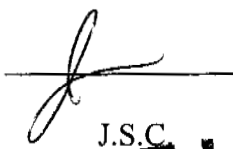
ORDERED that the caption is amended to reflect the dismissal of the claims against Donald Deutsch; and it is further

ORDERED that the action against the remaining defendant; and it is further

ORDERED that counsel for defendant Donald Deutsch shall serve a copy of this order with notice of entry upon the County Clerk (room 141B) and the Clerk of the Trial Support Office (room 158), who are directed to mark the court records to reflect the change in caption herein; and it is further

ORDERED that the remaining parties shall proceed to mediation.

DATED: January 29 2013



J.S.C.

FILED

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