Zamboli v Pedersen
2013 NY Slip Op 31994(U)
August 22, 2013
Sup Ct, Suffolk County
Docket Number: 11-28478
Judge: Jerry Garguilo
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SHORT FORM ORDER

INDEX No. 11-28478
CAL. No. 13-00170OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 3-12-13 (#001)
MOTION DATE 4-17-13 (#002)
ADJ. DATE 5-15-13
Mot. Seq. # 001 - MD
002 - MG

LOUIS ZAMBOLI and LISA ZAMBOLI, Plaintiffs, - against - CONNIEANN PEDERSEN, DREAM LAND BUILDERS, INC., AND SHIRLEY PLUMBERS, INC., Defendants.	PALERMO, PALERMO & TUOHY, P.C. Attorney for Plaintiffs 1300 Veterans Highway, Suite 320 Hauppauge, New York 11788 DEVITT, SPELLMAN, BARRETT, LLP Attorney for Defendants Pedersen & Dreamland 50 Route 111, Suite 314 Smithtown, New York 11787 BAXTER SMITH & SHAPIRO, P.C. Attorney for Defendant Shirley Plumbers 99 North Broadway Hicksville, New York 11801

Upon the following papers numbered 1 to 59 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21; Notice of Cross Motion and supporting papers 22 - 38; Answering Affidavits and supporting papers 39 - 45; 46 - 47; 48 - 51; 52 - 53; Replying Affidavits and supporting papers 54 - 55; 56 - 59; Other Plaintiff's Memorandum of Law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiffs Louis Zamboli and Lisa Zamboli for summary judgment in their favor on the issue of liability on their Labor Law §240(1) claim is denied; and it is

ORDERED that the cross motion by defendant Shirley Plumbers, Inc. for summary judgment dismissing the complaint against it is granted.

Plaintiff Louis Zamboli commenced this action to recover damages for personal injuries allegedly sustained on June 13, 2011, while he was performing excavation services on a premises located at 595 Sleepy Hollow Drive, Shirley, New York. Plaintiff allegedly was injured when his right

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hand and arm were struck by a limb he was attempting to cut from a tree situated in the backyard of the subject premises. At the time of the accident, the premises was owned by defendants Connieann Pedersen and Dream Land Builders, Inc. ("Dream Land"), which purchased the property for the purposes of renovation and resale. Plaintiff allegedly was hired as a subcontractor by John Pedersen, one of the principals of Dream Land, to remove shrubs, excavate land, and build the foundation for an extension of the premises. John Pedersen also is the owner of defendant Shirley Plumbers, Inc. ("Shirley Plumbers"), which allegedly served as the general contractor for the renovation project. By way of his complaint, plaintiff alleges causes of action against defendants for common law negligence, premises liability, and violations of Labor Law §§ 200, 240 (1), and 241(6). The complaint also asserts a claim by plaintiff's wife, Lisa Zamboli, for loss of consortium and reimbursement of medical expenses. The defendants joined issue and asserted affirmative defenses and cross claims against each other for contribution and indemnification.

Plaintiffs now move for summary judgment on their Labor Law §240 claim, arguing that defendants, who purchased the Sleepy Hollow Property solely for commercial purposes, failed to provide him with any safety devices designed to protect him from the falling tree limb. The motion is opposed by Shirley Plumbers, which cross-moves for summary judgment dismissing the complaint and cross claims against it on the grounds it was neither the owner nor general contractor for the renovation project, and did not possess the authority to control or supervise plaintiff's work. Plaintiff opposes the cross motion on the basis triable issues exists as to whether Shirley Plumbers and Dream Land acted as one entity with respect to all the work he performed at the worksite, and, if so, whether they possessed supervisory authority over his work at the time of the accident.

At his examination before trial, plaintiff testified that the accident occurred approximately two months after he was finished building the foundation for the extension of the premises, when, at John Pedersen's request, he returned to grade the land located at the back of the property. Plaintiff testified that he had to remove a tree, growing approximately 15 feet from the back of the building, before he could grade the land in question. He testified that Mr. Pedersen asked him to climb into the bucket of an excavator located at the back of the premises and use a chainsaw to cut away some of the limbs located near the top of the tree. He testified that Mr. Pedersen lifted him approximately 25 feet high while he was standing in the bucket of the excavator, and that he was cutting a limb on the tree when it broke and hit the excavator. Plaintiff testified that the weight of the falling limb caused the excavator to tilt forward, and that a part of the limb landed on his hand and arm when he grabbed a piston connecting the bucket in which he was standing to the excavator. He further testified that he managed to pull his hand and shoulder from beneath the tree limb, and that he instinctively jumped from the bucket to the ground. Plaintiff testified he was aware that Mr. Pedersen had ownership interests in both Shirley Plumbers and Dream Land, and that on at least one previous occasion Mr. Pedersen paid him with a check issued by Shirley Plumbers for demolition work he performed during a previous project they worked on together. He further testified that he only performed work on behalf of Dream Land while working at the subject premises, that he only received payment for the earlier excavation and landscaping activities he performed during the project, and that such payment was made by a check issued to him by Dream Land.

At her examination before trial, Connieann Pedersen testified that the purchase of the subject

premises was a joint venture between herself and Dream Land. She testified that she was working as a receptionist for Shirley Plumbers at the time of the alleged accident, and that she was aware that Shirley Plumbers only performed heating and plumbing services on the interior of the subject premises during the renovation project. Mrs. Pedersen testified that she did not know whether Shirley Plumbers was performing any work on the premises on the day of the accident, and, if so, whether it hired plaintiff as a subcontractor to perform any of its work.

At his examination before trial, John Pedersen testified that at the time of the accident Shirley Plumbers only had two other employees, Connieann Pedersen and James Cottone. He testified that he had a 50 % ownership interest in Dream Land and that he was the sole owner of Shirley Plumbers. Mr. Pedersen testified that both companies would hire subcontractors to perform construction and plumbing related activities, and that plaintiff was hired by Dream Land as a subcontractor for the renovation project. He further testified that plaintiff did not perform any work on behalf of Shirley Plumbers during the project. Mr. Pedersen testified that plaintiff completed the foundation for the extension of the premises approximately 30 days before the alleged accident, and that the construction of the extension, including the framing, the installation of the siding and the roof, was complete. He also testified that plaintiff had volunteered to perform the grading of the backyard and the tree removal free of cost following a dispute between the men regarding plaintiff's willingness to perform the work. Mr. Pedersen testified that it was plaintiff who suggested that he be lifted in the bucket of the excavator to cut down limbs located near the top of the tree, and that plaintiff assured him that it was unnecessary to hire a professional to remove the tree. Mr. Pedersen testified that neither the grading of the land nor the removal of the tree at the back of the premises were performed on behalf of Shirley Plumbers, and that such tasks were in no way related to any of its work during the project. He further testified that Shirley Plumbers did not perform any work at the premises on the day of the alleged accident, that it did not own any of the equipment used by plaintiff during the attempted tree removal, and that its work on the premises was limited to renovation of the interior plumbing and heating.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Center***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). The burden will then shift to the nonmoving party to demonstrate that there are material issues of fact; however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]).

Section 240(1) of the Labor Law is liberally construed to accomplish the purpose for which it was formed, that is to "protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owner and general contractor or their agent instead of on workers, who are scarcely in a position to protect themselves from accident" (***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 513, 577 NYS2d 219 [1991], *quoting* ***Koenig v Patrick Constr. Corp.***, 298 NY 313, 319, 83 NE 2d 133 [1948]). A party is deemed to be an agent of an owner or general contractor under the Labor Law when the party has supervisory control and authority over the work being done and can avoid or correct the unsafe condition (***Linkowski v City of New York***, 33 AD3d 971, 974-975, 824

NYS2d 109 [2d Dept 2006]; *see* ***Rodriguez v JMB Architecture, LLC***, 82 AD3d 949, 951, 919 NYS2d 40 [2d Dept 2011]). It is not the defendant's title that is determinative, but the degree of control or supervision it exercised (*see* ***Rodriguez v JMB Architecture, LLC***, *supra* at 951; ***Linkowski v City of New York***, *supra* at 975). Indeed, to hold a subcontractor liable as a statutory agent for violations of Labor Law §§ 240 (1) or 241 (6), there must be a showing that the party "had the authority to supervise and control the work giving rise to these duties" (***Kehoe v Segal***, 272 AD2d 583, 584, 709 NYS2d 817 [2d Dept 2000]; *see* ***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]).

Labor Law § 240 (1) requires owners and contractors to provide workers with appropriate safety devices to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 501, 601 NYS2d 49 [1993]). While not every object that falls on a worker gives rise to the extraordinary protections of Labor Law § 240 (1) (*see* ***Narducci v Manhasset Bay Assoc.***, 96 NY2d 259, 267, 727 NYS2d 37 [2001]), a plaintiff who is injured by such an object may recover where he or she shows that at the time the object fell it was "being hoisted or secured" (***Narducci v Manhasset Bay Assoc.***, *supra* at 268) or "required securing for the purposes of the undertaking" (***Novak v Del Savio***, 64 AD3d 636, 638, 883 NYS2d 558 [2d Dept 2009]; *see* ***Quattrocchi v F.J. Sciame Constr. Corp.***, 11 NY3d 757, 758, 866 NYS2d 592 [2008]). Moreover, "the statute does not require that a worker, to come within the protection of the section, be performing work at the location of the building or structure at the time of his injuries; it is sufficient that the work he is performing be work that is necessary and incidental to or an integral part of the erection, etc., of the building or structure" (***Mosher v St. Joseph's Villa***, 184 AD2d 1000, 1004, 584 NYS2d 678 [4th Dept 1992]; *see* ***Lombardi v Stout***, 80 NY2d 290, 590 NYS2d 55 [1992]). Thus, a plaintiff will be afforded protection under the Labor Law where the tree removal project constituted site preparation, which was incidental and necessary to the erection of a building or structure (*see* ***Lombardi v Stout***, *supra*; ***Martinez v City of New York***, 93 NY2d 322, 690 NYS2d 524 [1999]; ***Mosher v St. Joseph's Villa***, *supra*; *cf* ***Enos v Werlatone, Inc.***,68 AD3d 713, 890 NYS2d 109 [2d Dept 2009]).

Here, Shirley Plumbers established its prima facie entitlement to summary judgment dismissing the Labor Law §§240 (1) and 241(6) claims against it by demonstrating that it neither owned the subject premises nor served as the general contractor or agent for the owners, such that it possessed the supervisory authority over plaintiff's work enabling it to avoid or correct the unsafe condition that caused his alleged injuries (*see* ***Chang Zhang Zou v 122 Dev., LLC***, 103 AD3d 519, 959 NYS2d 666 [1st Dept 2013]; ***Ortiz v I.B.K. Enters., Inc.***, 85 AD3d 1139, 927 NYS2d 114 [2d Dept 2011]; ***Grochowski v Ben Rubins, LLC***, 81 AD3d 589, 916 NYS2d 171 [2d Dept 2011]; ***Morris v C & F Bldrs., Inc.***, 87 AD3d 792, 928 NYS2d 154 [2d Dept 2011]; ***Zervos v City of New York***, 8 AD3d 477, 779 NYS2d 106 [2d Dept 2004]). Significantly, it is undisputed that Shirley Plumbers was not the owner of the subject premises, that it only performed interior heating and plumbing work, and that it did not perform any work at the premises on the day of the alleged accident. Further, Shirley Plumbers submitted evidence that Dream Land served as the general contractor for the project and exercised supervisory control of the work performed on the exterior of the building, and that plaintiff was using Dream Land's equipment at the time of the alleged accident. Indeed, plaintiff's own testimony indicates that he worked exclusively for Dream Land during the renovation project, and that he received payment for such services by a check issued to him by Dream Land. Shirley Plumbers also established, prima

facie, its entitlement to summary judgment dismissing plaintiffs' claim under Labor Law §200, as its submissions demonstrate that plaintiff's injuries arose from the manner in which the work was performed, and that Shirley Plumbers did not possess supervisory authority or control over such work (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 670 NYS2d 816 [1998]; ***Grochowski v Ben Rubins, LLC***, 81 AD3d 589, 916 NYS2d 171 [2d Dept 2011]; ***Ramos v Patchogue-Medford School Dist.***, 73 AD3d 1010, 906 NYS2d 45 [2d Dept 2010]; ***Kehoe v Segal***, 272 AD2d 583, 709 NYS2d 817 [2d Dept 2000]).

In opposition to Shirley Plumbers' prima facie showing, plaintiff failed to demonstrate the existence of any material issues of fact warranting denial of the motion (*see* ***Zuckerman v City of New York***, *supra*; ***Perez v Grace Episcopal Church***, *supra*). Plaintiff's assertion that Shirley Plumbers and Dream Land acted as the same entity during the project because they were both owned by John Pedersen is speculatory and unsubstantiated, and, therefore, is insufficient to raise a material issue of fact (*see* ***Zuckerman v City of New York***, *supra*). Moreover, plaintiff's opposing affidavit, in which he states that at the time of the accident he believed that Mr. Pedersen directed and controlled his work as the owner of Shirley Plumbers, contradicts his earlier deposition testimony that he only performed work on behalf of Dream Land while at the worksite, and presents a feigned issue of fact (*see* ***Garcia-Rosales v Bais Rochel Resort***, 100 AD3d 687, 954 NYS2d 148 [2d Dept 2013]; ***Steinsvaag v City of New York***, 96 AD3d 932, 947 NYS2d 536 [2d Dept 2012]). Accordingly, the cross motion by Shirley Plumbers for summary judgment dismissing the complaint and cross claims against it is granted. The action is severed and shall continue against the remaining defendants.

In light of the foregoing determination, the branch of plaintiffs' motion for summary judgment on the issue of liability as against defendant Shirley Plumbers is denied, as moot. Furthermore, based on the adduced evidence, plaintiffs failed to meet their prima facie burden on the branch of the motion seeking summary judgment on the issue of liability as against Dream Land. Specifically, plaintiffs failed to eliminate significant triable issues as to whether plaintiff volunteered to perform the work in which he was engaged at the time of the accident (*see* ***Stringer v Musacchia***, 11 NY3d 212, 869 NYS2d 362 [2008]; ***Torres v Perry St. Dev. Corp.***, 104 AD3d 672, 960 NYS2d 450 [2d Dept 2013]; ***Lipsker v 650 Crown Equities, LLC***, 81 AD3d 789, 917 NYS2d 249 [2d Dept 2011]; ***Curatolo v Postiglione***, 2 AD3d 480, 767 NYS2d 894 [2d Dept 2003]), and whether the attempted tree removal, which took place more than 30 days after the construction of the extension was completed, fell within the ambit of work covered by the Labor Law (*see* ***Beehner v Eckerd Corp.***, 3 NY3d 751, 788 NYS2d 637 [2004]; ***Crossett v Wing Farm, Inc.***, 79 AD3d 1334, 912 NYS2d 751 [2d Dept 2010]; ***Enos v Werlatone, Inc.***, *supra*; ***Rivera v Santos***, 35 AD3d 700, 827 NYS2d 222 [2d Dept 2006]). Accordingly, plaintiffs' motion seeking summary judgment in their favor on the issue of defendants' liability under Labor Law §240(1) is denied.

Dated: 8/22/13

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION