Lema v Carucci
2013 NY Slip Op 32373(U)
October 3, 2013
Sup Ct, Suffolk County
Docket Number: 003023/2008
Judge: Paul J. Baisley
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SHORT FORM ORDER

INDEX NO. 003023/2008

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr.

DAVID LEMA,

Plaintiff,

-against-

JOHN A. CARUCCI, JR., as Executrix of the Estate of JOHN A. CARUCCI, LIBERTY IMPROVEMENTS, INC. and KEVIN MOLEY, individually and d/b/a LIBERTY HOME IMPROVEMENTS,

Defendants.

ORIG. RETURN DATE: February 23, 2012
FINAL RETURN DATE: July 11, 2013
MOT. SEQ. #: # 007 MG

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Upon the following papers numbered 1 to 18 read on this motion to renew : Notice of Motion/Order to Show Cause and supporting papers 1-10 ; Notice of Cross Motion and supporting papers___; Answering Affidavits and supporting papers 11-16 ; Replying Affidavits and supporting papers 17-18 ; Other ___; (~~and after hearing counsel in support of and opposed to the motion~~) it is,

ORDERED that the renewed motion by defendant John Carucci Jr. for summary judgment dismissing the complaint against him is granted.

Plaintiff David Lema commenced this action against John Carucci to recover damages for personal injuries he allegedly sustained on June 24, 2007 while working on the renovation of a premises known as 19 Bay Shore Avenue, Bay Shore, New York. John Carucci, the owner of the residence, allegedly hired defendant Liberty Home Improvements, Inc. ("Liberty"), to install a new roof on the premises. Liberty then hired plaintiff's employer, nonparty Manuel Contracting, to perform the roofing installation services. The accident allegedly occurred when plaintiff, who was

in the process of installing the new roof, slipped on a hose and fell to the ground. The complaint asserted causes of action against John Carucci based on common law negligence and violations of Labor Law sections 200, 240 and 241(6). By order dated September 28, 2009, this court granted the branch of a motion by John Carucci for summary judgment dismissing the Labor Law §200 and common law claims against him. However, finding that little or no discovery had been conducted and that a triable issue existed as to whether the premises constituted a one or two-family house, the court denied, without prejudice, the branch of the motion for dismissal of the claims under Labor §240 (1) and §241(6).

On or about October 10, 2009, plaintiff commenced another action containing similar claims against Liberty and its principal, Kevin Moley, under index number 09-9651. Subsequently, plaintiff moved to consolidate the actions and for entry of a judgment of default against Liberty which failed to answer or otherwise appear. By order dated May 8, 2010, the Court (Whelan, J.) granted plaintiff's motion to the extent that the separate actions were consolidated under index number 08-3023 and a new caption was assigned. The Court further granted the branch of the motion for entry of a default judgment against Liberty and directed that an inquest on damages be scheduled following the resolution of plaintiff's claims against the remaining defendants. In February 2011 Justice Whelan granted a motion by plaintiff for an order substituting John Carucci, Jr., the executor of the estate of John Carucci, as a defendant in the action and amended the caption accordingly. Subsequently, plaintiff filed the note of issue on September 23, 2011.

John Carucci, Jr. (hereinafter "Carucci") now moves to renew the branch of the prior motion for summary judgment dismissing plaintiff's claims under Labor Law §§240(1) and 241(6), arguing that his father is exempted from liability under the Labor Law's homeowner's exemption, since the subject dwelling was used solely for residential purposes, and he did not direct or control the work performed there at the time of the accident. In opposition to the motion, plaintiff asserts that a triable issue exists as to whether the premises was being used for commercial purposes at the time of the accident since the adduced evidence reveals that the decedent did not live by himself and permitted motor vehicles and spare parts related to a family owned auto-repair business to be stored there.

In support of the motion, defendant submitted a copy of an affidavit by decedent John Carucci, sworn to in November 2008, which states, among other things, that he was the owner of the premises in question, that he resided in the home by himself, and that he was 78 years old at the time of the alleged accident. The affidavit further states that he hired Liberty to install a new roof at his residence, that he exercised no control over its work during the project, and that he was unaware of plaintiff's accident or the presence of his employer, who had been hired as a subcontractor, at the premises.

At his examination before trial, John Carucci, Jr. testified that the subject property is improved with a single-family home located at the front of the premises and another smaller cottage, known as 19A Bay Shore Avenue, located at the back of the premises. Carucci testified that at the

time of the accident his father, who was 78 years old, lived in the house located at the front of the property with a caretaker known to him by the name Winifred. He testified that Winifred's companion also lived with her on the upper floor of the home, and that he was unaware of whether his father paid Winifred for her services, or whether they engaged in an arrangement whereby Winifred bartered her services to his father in lieu of paying rent. Carucci further testified that while he was aware that tenants lived in the cottage at the back, he had no knowledge of his father leasing any portion of the house located at the front of the premises to Winifred or anyone else. According to Carucci, in addition to cars owned by the people living at the premises, cars belonging to customers of a motor vehicle repair business owned by himself and his brother were stored at his father's home overnight when the shop became overcrowded. He further testified that he and his brother did not pay his father to store customers' vehicles at the premises overnight, and that at no time did either of them conduct any business relating to the motor repair shop from his father's home.

At his examination before trial, plaintiff testified that he was working for Manuel Construction at the time of the accident, that his work was exclusively controlled by his supervisors at the worksite, and that he did not meet the deceased defendant until after his accident occurred when the defendant appeared and asked him if he was injured. Plaintiff further testified that all the equipment he used on the day of the accident belonged to his employer.

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 demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986] ; *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp., supra*; *Winegrad v New York Univ. Med. Center, supra*). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Alvarez v Prospect Hosp., supra*; *Zuckerman v City of New York, supra*).

The homeowner's exemption to liability under Labor Law §§240 and 241(6) is available to "owners of one and two-family dwellings who contract for but do not direct or control the work" performed on their premises (*see Castellanos v United Cerebral Palsy Assn. of Greater Suffolk, Inc.*, 77 AD3d 879, 909 NYS2d 757 [2d Dept 2010]; *Boccio v Bozik*, 41 AD3d 754, 839 NYS2d 525 [2d Dept 2007]). The phrase "direct or control" refers to the situation where the owner supervises the method and manner of the work (*see Walsh v Kresge*, 69 AD3d 612, 893 NYS2d 137 [2d Dept 2010]; *Boccio v Bozik, supra*). While the exemption is not available to an owner who uses a dwelling solely for commercial purposes (*see Van Amerogen v Donnini*, 78 NY2d 880, 573 NYS2d 443 [1991]), use of a portion of a homeowners' premises for commercial purposes-as

here, where part of a two-family dwelling was rented-does not automatically cause the homeowner to lose the protection of the exemption under this statute (*see Ramirez v Begum*, 35 AD3d 578, 829 NYS2d 117 [2d Dept 2006], *lv denied* 8 NY3d 809, 834 NYS2d 90 [2007]; *Small v Gutleber*, 299 AD2d 536, 751 NYS2d 49 [2d Dept 2002], *lv denied* 2 NY3d 702, 778 NYS2d 461 [2004]). Rather, the applicability of the exemption depends on the site and purpose of the work conducted at the time of the accident (*see Khela v Neiger*, 85 NY2d 333, 624 NYS2d 566 [1995]; *Lenda v Breeze Concrete Corp.*, 73 AD3d 987, 903 NYS2d 417 [2d Dept 2010]). If the work contracted for relates to the residential nature of the premises, even though the commercial use of the premises will benefit therefrom, the exemption applies (*see Bartoo v Buell*, 87 NY2d 362, 639 NYS2d 778 [1996]; *Muniz v Church of Our Lady of Mt. Carmel*, 238 AD2d 101, 655 NYS2d 38 [1st Dept 1997]).

Here, Carucci established, prima facie, his entitlement to summary judgment dismissing plaintiff's claims under Labor Law §§240 and 241(6) by demonstrating the subject dwelling was a two-family home used primarily for residential purposes, and that plaintiff's supervisors were in sole control of his work at the time of the accident (*see Bartoo v Buell, supra*; *Khela v Neiger*, 85 NY2d 333, 624 NYS2d 566 [1995]; *Castellanos v United Cerebral Palsy Assn. of Greater Suffolk, Inc.*, 77 AD3d 879, 909 NYS2d 757 [2d Dept 2010]; *Umanzor v Charles Hofer Painting & Wallpapering, Inc.*, 48 AD3d 552, 852 NYS2d 205 [2d Dept 2008]; *Ramirez v Begum*, 35 AD3d 578, 829 NYS2d 117 [2d Dept 2006]). Plaintiff's own deposition testimony indicates that he fell from the roof of the residence occupied by the decedent, that his work was exclusively controlled by his employer, and that such work – the installation of a new roof – was related to the residential use of the property. Although evidence was adduced that motor vehicles were stored at the property in connection with a family owned auto-repair business, the homeowner's exemption still applies, since such commercial use was incidental to the residential purpose of the home (*see Umanzor v Charles Hofer Painting & Wallpapering, Inc., supra*; *Putnam v Karaco Indus. Corp.*, 253 AD2d 457, 676 NYS2d 651 [2d Dept 1998]; *cf. Krukowski v Steffensen*, 194 AD2d 179, 605 NYS2d 773 [2d Dept 1993]). Furthermore, Carucci's deposition testimony shows, among other things, that the people living with his elderly father on the upper floor of the home at the time of the accident were his caretakers, and that he was unaware of him engaging in any type of landlord/tenant relationship with them.

In opposition, plaintiff failed to raise any triable issues warranting denial of the motion (*see Jimenez v Pacheco*, 73 AD3d 1129, 900 NYS2d 903 [2d Dept 2010]; *Morocho v Marino Enters. Contr. Corp.*, 65 AD3d 675, 885 NYS2d 99 [2d Dept 2009]; *Ramirez v Begum, supra*). As noted above, neither the incidental use of the premises for overnight storage of motor vehicles in connection with the family owned repair shop nor the rental of the cottage at the rear of the property precludes the applicability of the homeowner's exemption under the circumstances of this case (*see Ramirez v Begum, supra*; *Small v Gutleber, supra*). Moreover, plaintiff's unsubstantiated assertion that the dwelling was being used for a commercial purpose because the caretakers living with Carucci's elderly father at the time of the accident may have bartered their services to him in lieu of

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rent does not vitiate the residential use of the home (*see Morocho v Marino Enters. Contr. Corp.*, *supra*; *Ramirez v Begum*, *supra*; *Rivera v Revzin*, 163 AD2d 896, 897, 559 NYS2d 74 [4th Dept 1990]), and is insufficient to defeat defendant's prima facie showing since it is based upon mere speculation (*see Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*). Accordingly, Carucci's motion for summary judgment dismissing the complaint against him is granted. The action is severed and shall continue against the remaining defendants

Dated: 10/3/13

HON. PAUL J. BAISLEY, JR.
HON. PAUL J. BAISLEY, JR., J.S.C.