Plioplys v Coburn
2017 NY Slip Op 31222(U)
June 7, 2017
Supreme Court, Suffolk County
Docket Number: 13-8136
Judge: Arthur G. Pitts

SHORT FORM ORDER

INDEX No. 13-8136
CAL. No. 15-01895OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 2-25-16 (002)
MOTION DATE 2-29-16 (003)
MOTION DATE 3-14-16 (004)
ADJ. DATE 11-17-16
Mot. Seq. # 002 - MG
003 - MotD
004 - MG

---X

ALEKSANDRAS PLIOPLYS,

Plaintiff,

- against -

ROBERT COBURN and
JANET HARASIMOWICZ,

Defendants.

---X

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Upon the following papers numbered 1 to 72 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 -14, 15 - 22 ; Notice of Cross Motion and supporting papers 23 - 34 ; Answering Affidavits and supporting papers 35 - 46, 47 - 57, 58 - 60 ; Replying Affidavits and supporting papers 63 - 64, 65 - 69, 70 - 72 ; Other Memorandum of Law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Robert Coburn for summary judgment dismissing the complaint against him is granted; and it is further

ORDERED that the motion by defendant Janek Harasimovich for summary judgment dismissing the complaint against him is granted to the extent indicated herein and is otherwise denied; and it is further

ORDERED that the cross motion by plaintiff for partial summary judgment in his favor on the issue of liability with respect to his Labor Law § 240 (1) claim against defendant Harasimovich is granted.

Plaintiff Alexsandras Plioplys commenced this action to recover damages for personal injuries allegedly sustained on October 27, 2012, when he fell from a ladder while installing storm shutters on a single-family home

located at 345 Hill Street, Southampton, New York. At the time of the accident, the premises was owned by defendant Robert Coburn. Coburn allegedly hired defendant Janek Harasimovich to perform the storm shutter installation in preparation for Hurricane Sandy. Harasimovich then retained plaintiff as a helper. The accident allegedly occurred when plaintiff, who was in the process of hanging the storm shutter on pre-installed hooks, felt the aluminum extension ladder on which he was standing begin to vibrate. Moments later both plaintiff and the ladder fell to the ground. By way of his complaint, plaintiff alleges causes of action against the defendants for common law negligence, and violations of Labor Law §§ 200, 240 (1), and 241(6). Defendants joined issue asserting affirmative defenses and cross claims against each other, and the note of issue was filed October 16, 2015.

Coburn now moves for summary judgment dismissing the complaint and cross claims against him on the grounds plaintiff failed to state viable causes of action under Labor Law §§ 240(1) and 241(6) since he was not engaged in any activity covered by the statute at the time of his accident. Alternatively, Coburn argues that he is exempted, as owner of the subject premises, from plaintiff's Labor Law §§ 240 (1) and 241 (6) claims, as he did not direct or control plaintiff's work on the premises. Coburn argues that plaintiff's common law negligence and Labor Law § 200 claims must be dismissed for similar reasons, as he did not control plaintiff's work, supply him any equipment, or have actual or constructive notice of a dangerous condition on the premises. By way of a separate motion, Harasimovich moves for dismissal of plaintiff's Labor Law claims only, asserting that plaintiff should not be regarded as an "employee" for the purposes of the statute and was not, in any event, engaged in an activity that was covered by the statute at the time of his accident. Harasimovich's motion, however, does not address plaintiff's common law negligence claims against him. Plaintiff opposes Coburn's motion only to the extent that it seeks dismissal of the common law negligence and Labor Law § 200 claims against him, arguing that dismissal of those claims should be denied because triable issues exist as to whether Coburn supplied the defective ladder which caused the accident and, if so, whether his transfer of the ladder to his neighbor, potentially spoliating evidence, precludes summary judgment in Coburn's favor.

Plaintiff opposes Harasimovich's motion on the basis that triable issues exist as to whether he should be regarded as Harasimovich's employee for the purposes of the Labor Law and, if so, whether his installation of storm shutters on the shutters of the premises constituted an alteration, an activity protected under Labor Law § 240 (1). Plaintiff further asserts that Harasimovich, who controlled the means and manner of his work, violated Labor Law §§ 240 (1) and 200, by directing him to work in an unsafe manner and providing him with an unsecured ladder that did not adequately protect him from falling. Plaintiff cross-moves for partial summary judgment on the issue of liability with respect to his Labor Law § 240 (1) claim against Harasimovich on a similar basis, arguing Harasimovich violated the statute by failing to supply him with adequate safety devices, including a secured ladder, designed to protect him from falling.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 574, 774 NYS2d 792 [2d Dept 2004]). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (*see* ***O'Neill v Town of Fishkill***, 134 AD2d 487, 488, 521 NYS2d 272 [2d Dept 1987]). 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 Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues remain which preclude summary judgment (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). However, in opposing a summary

judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Initially, the court notes that plaintiff will be regarded as an "employee" for the purposes of the Labor Law statute where, as in this case, he was previously paid by Harasimovich for work he performed at the same residence earlier in the year, he received nonmonetary compensation in return for the work he was performing at the time of the accident, and Harasimovich controlled the manner and ultimate outcome of such work (*see* ***Stringer v Musacchia***, 11 NY3d 212, 869 NYS2d 362 [2008]; ***Aloise v Saulo***, 51 AD3d 829, 858 NYS2d 355 [2d Dept 2008]; ***Zimmerman v Weig***, 5 AD3d 1084, 773 NYS2d 664 [4th Dept 2004]). Further, inasmuch as Harasimovich retained the ability to control the activity in which plaintiff was engaged at the time of his injury, and acted as Coburn's "eyes and ears" for the purposes of the project, he served as Coburn's statutory agent for the purposes of the Labor Law and, as such, was liable for the breach of the statute (*see* ***Walls v Turner Constr. Co.***, 4 NY3d 861, 798 NYS2d 351 [2005]; ***Van Blerkom v America Painting, LLC***, 120 AD3d 660, 992 NYS2d 52 [2d Dept 2014]; ***Bakhtadze v Riddle***, 56 AD3d 589, 868 NYS2d 684 [2d Dept 2008]). Moreover, the court finds that the work in which plaintiff was engaged at the time of his accident, namely the installation of storm shutters on all three floors of the premises to safeguard it against the effects of a major storm, effectuated a significant physical change to the building, such that it would be considered a covered "alteration" under Labor Law § 240 [1] (*see* ***Belding v Verizon N.Y., Inc.***, 14 NY3d 751, 898 NYS2d 539 [2010]; ***Joblon v Solow***, 91 NY2d 457, 672 NYS2d 286 [1998]; ***Ferrari v Niasher Realty, Inc.***, 175 AD2d 591, 573 NYS2d 794 [4th Dept 1991]; *cf* ***Kesselbach v Liberty Haulage, Inc.***, 182 AD2d 741, 582 NYS2d 739 [2d Dept 1992]). Therefore, plaintiff met the necessary criteria to invoke the protections afforded by Labor Law § 240 (1) (*see* ***Whelen v Warwick Val. Civic & Social Club***, 47 NY2d 970, 971, 419 NYS2d 959 [1979]; ***Stringer v Musacchia***, *supra*).

However, plaintiff's work, though properly regarded as an "alteration" under the circumstances of this case, falls outside of the context of a construction, demolition or excavation project, and is not covered under Labor Law § 241 (6) (*see* ***Esposito v N.Y. City Indus. Dev. Agency***, 1 NY3d 526, 770 NYS2d 682 [2003]; ***Nagel v D & R Realty Corp.***, 99 NY2d 98, 101, 752 NYS2d 581 [2002]). Therefore, the unopposed branches of the motions by Coburn and Harasimovich for summary judgment dismissing plaintiff's Labor Law § 241 (6) claims are granted. To the extent that Harasimovich's summary judgment motion is predicated solely on the contentions that plaintiff was neither an "employee" nor engaged in an activity that was covered by the statute at the time of the accident, the branches of his motion seeking dismissal of plaintiff's common law negligence and Labor Law §§ 240 (1) and 200 claims are denied.

With respect to the branch of Coburn's motion for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim, that section of the statute expressly exempts owners of one and two-family dwellings who contract for but do not direct or control the work. The exemption is intended to protect residential homeowners lacking in sophistication or business acumen from their failure to recognize the necessity of insuring against the strict liability imposed by the statute (***Ortega v Puccia***, 57 AD3d 54, 58-59, 866 NYS2d 323 [2d Dept 2008]; *see* ***Abdou v Rampaul***, 147 AD3d 885, 47 NYS3d 430 [2d Dept 2017]; ***Ramirez v I.G.C. Wall Sys., Inc.***, 140 AD3d 1047, 35 NYS3d 159 [2d Dept 2016]). "[I]n order for a defendant to receive the protection of the homeowners' exemption . . . the defendant must satisfy two prongs required by the statutes. First, the defendant must show that the work was conducted at a dwelling that is a residence for only one or two families . . . The second requirement . . . is that the defendants 'not direct or control the work'" (***Chowdhury v Rodriguez***, 57 AD3d 121, 126, 867 NYS2d 123 [2d Dept 2008], quoting Labor Law § 240 [1]). The phrase "direct or control" refers to the situation where the owner supervises the method and manner of the work (*see* ***Abdou v Rampaul***, *supra*; ***Walsh v Kresge***, 69 AD3d 612, 893 NYS2d 137 [2d Dept 2010]; ***Boccio v Bozik***, 41 AD3d 754, 755, 839 NYS2d 525 [2d Dept 2007]).

Here, Coburn established, prima facie, that he is entitled to the homeowners' exemption against plaintiff's Labor Law § 240 (1) claim, by submitting evidence that he was the owner of the subject single-family residence at the time of the alleged accident, and that he did not control or supervise the method and manner of plaintiff's work at the premises (*see* ***Abdou v Rampaul***, *supra*; ***Ramirez v I.G.C. Wall Sys., Inc.***, *supra*; ***Nai Ren Jiang v Shane Yeh***, 95 AD3d 970, 944 NYS2d 200 [2d Dept 2012]). Plaintiff, who did not oppose this branch of Coburn's motion, failed to raise any triable issue in response (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Therefore, the branch of Coburn's motion seeking summary judgment dismissing plaintiff's Labor Law § 240(1) claim is granted.

Coburn further established his prima facie entitlement to summary judgment dismissing plaintiff's common law negligence and Labor Law § 200 claims against him by submitting evidence that he neither controlled the means or manner of plaintiff's work, nor had notice of any alleged dangerous condition on the premises at the time of the accident (*see* ***Persichilli v Triborough Bridge & Tunnel Auth.***, 16 NY2d 136, 262 NYS2d 476 [1965]; ***Dasilva v Nussdorf***, 146 AD3d 859, 45 NYS3d 531 [2d Dept 2017]; ***Sandals v Shemtov***, 138 AD3d 720, 29 NYS3d 448 [2d Dept 2016]; ***Bennett v Hucke***, 131 AD3d 993, 16 NYS3d 261 [2d Dept 2015]; ***DiMaggio v Cataletto***, 117 AD3d 984, 986 NYS2d 536 [2d Dept 2014]). Section 200 of the Labor Law statute is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]). Where a premises condition is at issue, an owner or contractor may be held liable for a violation of Labor Law § 200 if they either created the dangerous condition or had actual or constructive notice of its existence (*see* ***Kuffour v Whitestone Const. Corp.***, 94 AD3d 706, 941 NYS2d 653 [2d Dept 2012]; ***Azad v 270 Realty Corp.***, 46 AD3d 728, 730, 848 NYS2d 688 [2d Dept 2007]). By contrast, when a claim arises out of alleged dangers in the method of the work or the use of defective equipment, there can be no recovery against the owner unless it is shown that the owner had the authority to control the performance of the work or the provision of the alleged defective equipment (*see* ***Rizzuto v L.A. Wenger Contr. Co., Inc.***, 91 NY2d 343, 352, 670 NYS2d 816; ***Persichilli v Triborough Bridge & Tunnel Auth.***, 16 NY2d 136, 262 NYS2d 476).

As mentioned above, plaintiff testified that Harasimovich exclusively controlled the means and method of his work at the subject premises. Moreover, Coburn submitted deposition testimony by Harasimovich indicating that the aluminum ladder in question belonged to him, that he purchased the ladder for the purpose of continuing to perform handyman jobs at the premises, and that Coburn merely permitted him to store the ladder on the premises for future use there. In addition, to the extent that plaintiff's complaint can be construed to allege that a dangerous condition on the premises caused his accident, the adduced evidence indicates that Coburn neither created nor had constructive notice of any such condition prior to the accident (*see* ***Dasilva v Nussdorf***, 146 AD3d 859, 45 NYS3d 531 [2d Dept 2017]; ***Azad v 270 Realty Corp.***, *supra*; ***Dahar v Holland Ladder & Mfg. Co.***, 79 AD3d 1631, 914 NYS2d 817 [4th Dept 2010]). Furthermore, in light of undisputed testimony by Harasimovich that he owned the subject ladder and assisted plaintiff in setting it up prior to the accident, plaintiff's conclusory assertions that triable issues exist as to the ownership of the ladder, and whether Coburn allegedly spoliated evidence by transferring it to his neighbor, are insufficient to defeat Coburn's prima facie showing (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*). Accordingly, the branch of Coburn's motion for summary judgment dismissing plaintiff's common law negligence and Labor Law § 200 claims against him is granted.

Turning to plaintiff's cross motion for partial summary judgment on the issue of liability with respect to his Labor Law § 240 (1) claim, that section of the statute requires that safety devices, including scaffolds, hoists, stays, ropes or ladders be so "constructed, placed and operated as to give proper protection to a worker" (***Klein v City of New York***, 89 NY2d 833, 834, 652 NYS2d 723 [1996]). To prevail on a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her

injuries (*see* ***Bland v Manocherian***, 66 NY2d 452, 497 NYS2d 880 [1985]; ***Sprague v Peckham Materials Corp.***, 240 AD2d 392, 658 NYS2d 97 [2d Dept 1997]). While "[a] fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240 [1]" (***Xidias v Morris Park Contr. Corp.***, 35 AD3d 850, 851, 828 NYS2d 432 [2d Dept 2006]), liability will be imposed when the evidence shows that the subject ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries (*see* ***Baugh v New York City Sch. Constr. Auth.***, 140 AD3d 1104, 33 NYS3d 472 [2d Dept 2016]; ***Robinson v Bond St. Levy, LLC***, 115 AD3d 928, 983 NYS2d 66 [2d Dept 2014]; ***Melchor v Singh***, 90 AD3d 866, 935 NYS2d 106 [2d Dept 2011]; ***Artoglou v Gene Scappy Realty Corp.***, 57 AD3d 460, 461, 869 NYS2d 172 [2d Dept 2008]).

Here, plaintiff established his prima facie entitlement to summary judgment on the issue of liability by submitting evidence the unsecured ladder failed to fulfill its safety function and was insufficient to prevent him from falling without the use of additional precautionary devices or measures (*see* ***Seferovic v Atlantic Real Estate Holdings, LLC***, 127 AD3d 1058, 7 NYS3d 458 [2d Dept 2015]; ***Grant v City of New York***, 109 AD3d 961, 972 NYS2d 86 [2d Dept 2013]; ***McGill v Qudsi***, 91 AD3d 1241, 937 NYS2d 460 [3d Dept 2012]; ***Ordonez v C.G. Plumbing Supply Corp.***, 83 AD3d 1021, 922 NYS2d 156 [2d Dept 2011]; *cf* ***Costello v Hapco Realty, Inc.***, 305 AD2d 445, 761 NYS2d 79 [2d Dept 2003]). Significantly, plaintiff testified that the ladder inexplicably began vibrating as he was attempting to install the first storm shutter on the third floor on the premises, and that it suddenly fell from beneath him, causing him to fall to the ground. Plaintiff further testified that he warned Harasimovich that the ladder felt unstable and vibrated when he climbed it to install storm shutters on the other floors of the premises. Indeed, plaintiff testified that despite his warnings about the condition of the ladder, Harasimovich neither held the ladder nor provided any additional safety device meant to protect plaintiff from falling.

Harasimovich failed to raise a significant triable issue in opposition warranting denial of plaintiff's motion (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*). As mentioned above, plaintiff is regarded as an "employee" under the circumstances of this case (*see* ***Stringer v Musacchia***, *supra*; ***Aloise v Saulo***, *supra*), and his task of installing storm shutters throughout the premises to safeguard it against the effects of a major storm is deemed a covered altercation under Labor Law § 240 [1] (*see* ***Belding v Verizon N.Y., Inc.***, *supra*; ***Joblon v Solow***, *supra*; ***Ferrari v Niasher Realty, Inc.***, *supra*). The court also rejects Harasimovich's contention that he is not subject to liability because he was no longer a general contractor at the time of the accident, and was merely volunteering to help Coburn, as his retention of control over the project rendered him a statutory agent for the purposes of the Labor Law (*see* ***Walls v Turner Constr. Co.***, *supra*; ***Van Blerkom v America Painting, LLC***, *supra*; ***Bakhtadze v Riddle***, *supra*; *see also* ***Tomyuk v Junefield Assoc.***, 57 AD3d 518, 868 NYS2d 731 [2d Dept 2008]; ***Stevenson v Alfredo***, 277 AD2d 218, 715 NYS2d 444 [2d Dept 2000]). Furthermore, it is noted that "an unsecured ladder, even one in good condition, can give rise to Labor Law § 240 (1) liability if a worker falls from it" (***Fanning v Rockefeller Univ.***, 106 AD3d 484, 964 NYS2d 525 [1st Dept 2013]), and plaintiff's accident is distinguishable from those in cases involving falls from secured ladders where a worker merely loses his balance and falls (*see* ***Spenard v Gregware Gen. Contr.***, 248 AD2d 868, 669 NYS2d 772 [3d Dept 1998]; ***Gange v Tilles Inv. Co.***, 220 AD2d 556, 632 NYS2d 808 [2d Dept 1995]). Accordingly, plaintiff's motion for partial summary judgment in his favor on the issue of liability as against Harasimovich is granted.

Dated: Riverhead, New York
June 7, 2017

ARTHUR G. PITTS, J.S.C.

____ FINAL DISPOSITION _X_ NON-FINAL DISPOSITION