Salgado v Rubin
2018 NY Slip Op 32633(U)
October 10, 2018
Supreme Court, Suffolk County
Docket Number: 08516/2015
Judge: William G. Ford

SHORT FORM ORDER **INDEX NO.: 08516/2015**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motion Submit Date: 05/10/18
Mot SCH: 12/07/16
CCH: 10/12/17
Mot Seq 001 MG; CASE DISP

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JOHNNY SALGADO,

Plaintiff,

-against-

KEN RUBIN & CAROL RUBIN,

Defendants.

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PLAINTIFF'S COUNSEL:
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The following papers were considered on defendants'' motion for summary judgment:

1. Notice of Motion & Affirmation in Support dated April 21, 2017 and supporting papers;
2. Affirmation in Opposition dated June 21, 2017 and opposing papers;
3. Reply Affirmation in Further Support dated July 5, 2017; and upon due deliberation and full consideration; it is

ORDERED that defendants' motion for summary judgment pursuant to CPLR 3212 is **granted** as follows; and it is further

ORDERED that plaintiff's complaint is **dismissed** as against defendants; and it is further

ORDERED that counsel for defendants serve a copy of this decision and order with notice of entry on counsel for plaintiff via certified first-class mail forthwith.

BACKGROUND

Plaintiff Johnny Salgado commenced this personal injury action filing a summons and complaint on May 13, 2015 seeking recovery of money damages for sustaining a spinal cord injury resulting in paraplegia for an incident which occurred on January 9, 2011 at defendant's premises. Defendants Ken and Carol Rubin own a summer vacation home located in Bridgehampton, Suffolk County, New York. The Rubins maintain a primary residence in Manhattan, New York. Mr. Rubin practices medicine as a gastroenterologist in New Jersey. Mrs. Rubin maintains their household. The Rubins maintain that they use their vacation home

for purely personal and noncommercial uses and have not rented it out. Further, they both testified at their depositions that the property was acquired as new prospective construction and neither played any role in the planning or construction of the property.

In January 2015, the Rubins received phone calls from their home security company advising that two separate alarms had been triggered at their vacation property. This prompted Mrs. Rubin to reach out to their caretaker who visited their property. On his inspection of the property, the caretaker advised defendants that a water pipe had frozen and ruptured, causing a leak that collapsed a second-floor bedroom ceiling, and resulting wall and floor damage. The Rubins in turn filed a property damage claim with their insurer AIG. Defendants also reached out to a contractor who hired a plumber to repair the ruptured water pipe. In so doing, the plumber discovered that the pipe was located behind the wall of a second-floor bedroom closet. In making his repairs, the plumber opened the wall and discovered an attic space where the pipe was located. Defendants were previously unaware of this attic space and the first time it was accessed was by virtue of the plumber's repairs.

At the time of the incident, plaintiff was employed by Cleancrafters Inc. d/b/a Paul Davis Restoration of Long Island, a water, smoke and fire damage restoration company as a crew leader. From January 9 -11, 2015, he responded to defendants' property to take photographs of water damage, and document repairs and cleaning for correspondence with the property damage insurer. Part of this required plaintiff to access the attic space via plumber created access point. Plaintiff testified at his examination before trial that while in the attic space, he would walk along 2x12 floor beams/joists, with one foot on each beam to document and photograph. At no point did either defendant enter that space while plaintiff was there. Nor did plaintiff testify that he observed either defendant enter the attic in his presence. During the course of the weekend that he worked at defendants' property, plaintiff testified he entered the attic space on at least two separate occasions.

While working at defendants' property, plaintiff claims that he was asked to don and wear blue plastic booties over his footwear. These were items he kept in his work truck that he would wear on occasion at a homeowner's request. Defendants deny making this request of the plaintiff. Plaintiff further stated that Mrs. Rubin requested that plaintiff and his crew carry personal effects such as statues out of the area they worked in, directing that two men carry each as they weighed upwards of 20 lbs. each. Salgado additionally testified that Mrs. Rubin requested that all debris, damaged and wet material be routed through her French doors and out into the yard via wheelbarrow for disposal at the dumpster to avoid dirtying her home. Lastly, plaintiff stated that on at least one occasion while in the attic space Mrs. Rubin requested that he "double insulate" the repaired water pipe to avoid a reoccurrence of freezing. For her part, Mrs. Rubin denies this request.

On Sunday, January 9, 2011, plaintiff had arrived at defendants' home and was awaiting an opportunity to speak to his boss, Mark the company owner who was in the basement with defendants going over details of the project. Plaintiff's understanding was that his employer had been retained to clean up and remediate the water damage, but that Mark and defendants might have been discussing possible expansion of the scope of the project to include reconstruction. While waiting, plaintiff reentered the attic space via access point in the second-floor bedroom closet. On his entry, having taken two or three steps into the room with the purpose of taking additional photographs, plaintiff felt the beam/joist under his right foot give way under his body

weight, causing him to lose his balance and fall in the 16-inch insulated space between the joists through the attic floor/bedroom ceiling onto the ground. Defendants and Mark overhearing a thud, travelled from the basement into the bedroom and observed plaintiff lying on his back. Defendant, a licensed medical doctor then responded to render aid and care and directed plaintiff's coworkers to call an ambulance, speculating that plaintiff suffered a spinal cord injury. Mrs. Rubin called 911. Sometime later an ambulance responded, and plaintiff was airlifted to Stony Brook Hospital. Defendants testified on seeing plaintiff immediately post-incident that they did not observe any plastic booties on his footwear.

SUMMARY OF THE ARGUMENTS

Plaintiff has sued defendants seeking recovery under Labor Law §§ 200, 240 & 241. Defendants joined issue answering the complaint on September 11, 2015. They now move seeking summary judgment dismissing the complaint as against them seeking protection under the single-family homeowner's exception to labor law liability. Principally, defendants make two separate arguments which require discussion: first, that because they were unaware of the attic space comprising plaintiff's accident scene, they lacked any notice, actual or constructive, of the alleged dangerous condition (loose or unsecured attic floor joints/beams); and second, that they lacked control of the means, method or manner of plaintiff's work. Plaintiff opposes defendant's application in its entirety arguing that defendants had notice of the alleged dangerous condition, and further that Mrs. Rubin directed or controlled plaintiff's work by making requests beyond the scope of his ordinary work (double insulating pipe, etc.).

DISCUSSION

A. Summary Judgment

It is well settled that summary judgment is a drastic remedy which should not be granted when there is doubt as to the existence of a triable issue of fact. Where, however, one seeking summary judgment tenders evidentiary proof in admissible form establishing its defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, the burden falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter (*see* ***Zuckerman v. City of New York,*** 49 NY2d 557, 562 [1980]). The evidence presented on a motion for summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*see* ***Goldstein v. Monroe County,*** 77 AD2d 232, 236 [1980]).

The proponent on a motion of summary judgment 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 (***Alvarez v Prospect Hosp.***, 68 NY2d 320 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557 [1980]).

If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see* ***Zuckerman***, *supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (***Pantote Big Alpha Foods, Inc. v Schefman,*** 121 AD2d 295 [1st Dept. 1986]).

The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289AD2d 557 [2d Dept. 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600 [2d Dept. 1991]; ***O'Neill v Fishkill***, 134 AD2d 487 [2d Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see* ***Andre v Pomeroy,*** 35 NY2d 361 [1974]; ***Benincasa v Garrubo,*** 141 AD2d 636 [2d Dept 1988]).

1. **Single-Family Homeowner's Exception to Liability**

Labor Law § 240(1) provides that: "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, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed". Such statute imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury (***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 513, 577 NYS2d 219 [1991]).

The courts have repeatedly held that such duty is non-delegable and that an owner is liable for a violation of the statute even though the job was performed by an independent contractor over which it exercised no supervision or control (***Gordon v Eastern Railway Supply, Inc.,*** 82 NY2d 555, 606 NYS2d 127, 626 NE2d 912 [1993]; ***Rocovich v Consolidated Edison Co.***, *supra* at 513; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 [1993]). The statute, which was designed to place the responsibility for a worker's safety squarely upon the owner and contractor rather than on the worker, is to be liberally construed to achieve its objectives (***Felker v Corning Inc.,*** 90 NY2d 219, 224, 682 NE2d 950, 660 NYS2d 349 [1997], citing ***Zimmer v Chemung County Performing Arts,*** 65 NY2d 513, 520).

It has been held, however, that a worker injured by a fall from an elevated worksite must also generally prove that the absence of or defect in a safety device was the proximate cause of his injuries (***Felker v Corning Inc.,*** *supra* at 90 NY2d 224, citing ***Zimmer v Chemung County Performing Arts,*** *supra* at 65 NY2d 524; ***Duda v Rouse Constr. Corp.,*** 32 NY2d 405, 410). "The mere fact that a plaintiff fell from a ladder does not, in and of itself, establish that proper protection was not provided .... [t]here must be evidence that the 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" (***Karanikolas v. Elias Taverna, LLC.***, 120 AD3d 552, 555, 992 NYS2d 34 [2d Dept. 2014]).

The courts have repeatedly held that such duty is non-delegable and that an owner is liable for a violation of the statute even though the job was performed by an independent contractor over which it exercised no supervision or control (***Gordon v Eastern Railway Supply, Inc.,*** 82 NY2d 555, 606 NYS2d 127, 626 NE2d 912 [1993]; ***Rocovich v Consolidated Edison Co.***, *supra* at 513; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 [1993]).

There is however an exception to the general rule. A homeowner's exemption to liability under Labor Law § 240 and § 241 is available to "owners of one and two-family dwellings who contract for, but do not direct or control the work" (*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]; ***Ferrero v Best Modular Homes. Inc.***, 33 AD3d 847, 823 NYS2d 477 [2d Dept. 2006]; ***Murphy v Sawmill Constr. Corp.***, 17 AD3d 422, 792 NYS2d 616 [2d Dept. 2005]). The exception was enacted to "protect those who, lacking business sophistication, would not know or anticipate the need to obtain insurance to cover them against absolute liability" (***Acosta v Hadjigavriel***, 18 AD3d 406, 406-407, 794 NYS2d 445 [2d Dept. 2005]; *see* ***Szczepanski v Dandrea Constr. Corp.***, 90 AD3d 642, 934 NYS2d 432 [2d Dept. 2011]).

The statute recognizes an exemption to liability under Labor Law § 240(1) available to owners of one-and two-family dwellings who contract for the performance of work on the premises, but who do not direct or control the work (***Nicholas v Phillips***, 151 AD3d 731, 731, 54 NYS3d 675, 676 [2d Dept 2017]). In order to benefit from the homeowner's exemption, one must show that the work was conducted at a dwelling that is a residence for only one or two families, and the defendant did not direct or control the work (***Murillo v. Porteus***, 108 AD3d 753, 754, 970 NYS2d 235, 237 [2d Dept. 2013]; *see also* ***Dasilva v Nussdorf***, 146 AD3d 859, 859, 45 NYS3d 531, 533 [2d Dept 2017][ruling defendants-homeowners entitled to the protection of the homeowner's exemption on submission of evidence demonstrating that plaintiff's work directly related to the residential use of the premises, and further defendants did not direct or control the manner in which the plaintiff performed his work]). The statutory phrase "direct or control" is construed strictly and refers to situations where the owner supervises the method and manner of the work (***Ortega v Puccia***, 57 AD3d 54, 58-59, 866 NYS2d 323, 327 [2d Dept 2008]).

Thus, courts routinely dismiss similar claims finding judgment as a matter of law for a homeowner entitled to freedom from liability under the exemption on the *prima facie* showing that the homeowner lacked control or direction of plaintiff's work (***Morocho v Marino Enterprises Contr. Corp.***, 65 AD3d 675, 675, 885 NYS2d 99, 100 [2d Dept 2009][finding no liability where accident arose from the means and methods of the plaintiff's work, and homeowner exercised no supervision or control over the work under the common law or Labor Law § 200 for failure to provide a reasonably safe place to work]; ***Parise v Green Chimneys Children's Services, Inc.***, 106 AD3d 970, 971, 965 NYS2d 608, 609 [2d Dept 2013][defendants demonstrated its entitlement to the homeowner's exemption of Labor Law §§ 240(1) and 241 by establishing that the subject premises was a single-family dwelling used solely as a residence, the house served no commercial or business use, received no income from the house, and defendants did not direct or control the work being performed]).

Applied here, defendants argue, and plaintiff does not dispute that the premises where plaintiff was injured was a residential property. Defendants further have argued without opposition that they derived no commercial or profit from their summer vacation home. The parties dispute centers on whether Mrs. Rubin's alleged requests to plaintiff exhibit sufficient control or direction to deny defendants' protection under the homeowner's exemption. Defendants deny having supplied plaintiff tools or special directions or instructions on how to photograph or document his work in the attic. They further deny having entered the attic space where he did his work and was injured. Plaintiff for his part states that at least once Mrs. Rubin

asked that he take sufficiently detailed photos for the insurance claims process. However, the Court agrees with defendants that this all taken at face value is not sufficient to warrant imposition of liability against defendants under Labor Law § 240 or 241.

On this point defendants' argument carries the day. Assuming *arguendo* that Mrs. Rubin watched over plaintiff and his crew and made instructions or directions concerning how to carry statues sculpted by her mother, or how to don and wear booties to avoid dirtying floors, this sort of monitoring does not equate to the kind of supervision, control and direction within meaning of the Labor Law warranting imposition of liability. "A homeowner's involvement [in monitoring the progress of a contractor's work on the home reflects typical homeowner interest in the ongoing progress of the work and does not constitute the kind of direction of control necessary to overcome the homeowner's exemption from liability" (***Chowdhury v Rodriguez***, 57 AD3d 121, 127, 867 NYS2d 123, 129 [2d Dept. 2008]); ***Mondone v Lane***, 106 AD3d 1062, 1064, 966 NYS2d 164, 167 [2d Dept. 2013]; *see also* ***Nai Ren Jiang v Yeh***, 95 AD3d 970, 971, 944 NYS2d 200, 202-03 [2d Dept 2012][declining to impose liability on single-family homeowners where defendant's involvement in the project was "no more extensive than would be expected of the typical homeowner who hired a contractor to renovate his or her home"]; *accord* ***Affri v Basch***, 13 NY3d 592, 596 [2009][no liability imposed where defendants' participation 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, further finding that defendants did nothing more than what any ordinary homeowner would do in deciding how they wanted the home to look upon completion]).

The Court determines that defendants have made a *prima facie* case of entitlement to protection under the homeowner's exemption to liability on this showing. In opposition, plaintiff has failed to raise a triable issue of fact calling into question any of the salient elements of this analysis, namely that the premises was a pure personal vacation/summer home with no commercial purpose, or that Mrs. Rubin by her requests elevated herself from the concerned homeowner into a supervisor or controller of plaintiff's work. Accordingly, that aspect of defendant's motion for summary judgment dismissing the Labor Law §§ 240 & 241 claims against them is **granted** and those claims are as a result **dismissed**.

2. **Notice of the Alleged Dangerous Condition**

Generally speaking, courts recognize that Labor Law § 200 is a codification of the common-law duty of property owners and general contractors to provide workers with a safe place to work. Liability under the statute is therefore governed by common-law negligence principles (***Chowdhury v Rodriguez***, 57 AD3d 121, 127-28, 867 NYS2d 123, 129 [2d Dept 2008]). [W]hen a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work" (***King v Villette***, 155 AD3d 619, 622, 63 NYS3d 500, 504 [2d Dept 2017]). Once again however, recovery is limited to instances where the owner "either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" (***DeFelice v Seakco Const. Co., LLC***, 150 AD3d 677, 678, 54 NYS3d 55, 57 [2d Dept 2017]).

Again, defendants' motion must be successful. Here, defendants emphasize that they

could not have had notice, actual or otherwise, of the alleged dangerous condition plaintiff alleges as the proximate cause of his injuries (the loose or unsecured attic floor beams/joists) where undisputed record evidence indicates that the attic space was not known to the defendants prior to the wall being opened and access being created by their plumber. In opposition, plaintiff fails to raise any triable issues of fact. Missing from the record of his submission is any suggestion that defendants played any hand in the building or planning of their home. Plaintiff by his own testimony acknowledged he had been in the attic space taking photographs on at least one prior occasion without incident, including walking the very same attic floor beams/joists which caused his injury subsequently. Plaintiff attempted to manufacture triable questions of fact with by expert engineer's affidavit, but those efforts must be unsuccessful. Initially this Court notes that plaintiff's purported expert did not visit the accident scene, but rather relied on accident scene photographs to render his opinion. Moreover, plaintiff failed to proffer the proposed expert's *curriculum vitae*. As a result, the affidavit is conclusory, speculative and self-serving and does not heavily factor into this Court's analysis.

Since plaintiff has failed to offer any persuasive contrary argument raising a fact question concerning defendants' lack of notice, he fails to rebut defendants' *prima facie* showing of entitlement to summary judgment on the Labor Law § 200 and ordinary negligence/premises liability claims. Accordingly, defendants' motion for summary judgment dismissing those claims is **granted** and that aspect of the complaint against defendants is therefore **dismissed**.

The foregoing constitutes the decision and order of this Court.

Dated: October 10, 2018
Riverhead, New York

WILLIAM G. FORD, J.S.C.

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**