Casique v Barkin
2013 NY Slip Op 31745(U)
June 21, 2013
Supreme Court, Queens County
Docket Number: 24764/11
Judge: Timothy J. Dufficy
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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JOSE J. CASIQUE,

Plaintiff,

Index No.: 24764/11
Mot. Date: 4/24/13

-against-

Mot. Cal. No. 25
Mot. Seq. 1

DOUGLAS E. BARKIN AND BEATRICE BARKIN AND L.K. CONTRACTING CORP.,

Defendants.

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The following papers numbered 1 to 13 read on this motion by defendants **DOUGLAS E. BARKIN AND BEATRICE BARKIN** ("Barkin") for an order granting summary judgment their favor, dismissing the complaint as against them, and granting them contractual and common-law indemnity as against co-defendant L.K. CONTRACTING CORP.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits	1-4
Affirmation in Opposition-Exhibits	5-7
Affirmation in Opposition-Exhibits	8-10
Reply Affirmation	11-13

Upon the foregoing papers, it is ordered that the motion is granted.

The Barkin defendants move for summary judgment in this action in which the plaintiff is seeking damages for personal injuries based upon violations of Labor Law §§240(1), 241(6) and 200 .

At the time of the accident, May 2, 2011, the plaintiff was doing electrical work at a single-family residence, owned by the BARKIN defendants, when he fell from a ladder.

The Barkin defendants claim that they are exempt from liability under the one or two-family exemption to liability under Labor Law §§240(1) and 241(6), and that they never directed or supervised the work, created the alleged danger or defect nor had actual or constructive notice of the dangerous or defective condition for purposes of liability pursuant to Labor Law §200. This Court agrees.

"'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 issues of fact from the case'" (Santiago v Filstein, 35 AD3d 184, 185-186 [1st Dept 2006], quoting Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; DeRosa v City of New York, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]; Grossman v Amalgamated Housing Corporation, 298 AD2d 224, 226 [1st Dept 2002]).

Labor Law § 240 (1), also known as the Scaffold Law (Ryan v Morse Diesel, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

> All contractors and owners and their agents … in the erection, demolition, repairing, altering, painting … shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists … and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold … or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (John v Baharestani, 281 AD2d 114, 118 [1st Dept 2001], quoting Ross v

Curtis-Palmer Hydro-Electric Company, 81 NY2d 494, 501 [1993]). In order to prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries (Blake v Neighborhood Housing Services of New York City, 1 NY3d 280, 287 [2003]; Felker v Corning Inc, 90 NY2d 219, 224-225 [1997]; Torres v Monroe College, 12 AD3d 261, 262 [1st Dept 2004]).

Labor Law § 240(1) imposes a non-delegable duty upon owners and general contractors to provide safety devices to protect workers from elevation-related risks (see Ross v Curtis-Palmer Hydro-Elec. Co.., 81 NY2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49; Barr v 157 5 Ave., LLC, 60 AD3d 796, 875 N.Y.S.2d 228). "To impose liability pursuant to Labor Law § 240(1), there must be a violation of the statute and that violation must be a proximate cause of the plaintiff's injuries" (Tama v Gargiulo Bros., Inc., 61 AD3d 958, 960 [2d Dept. 2009]; see Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 287 [2003]). "Where there is no statutory violation, or where the plaintiff is the sole proximate cause of his or her own injuries, there can be no recovery under Labor Law § 240(1)" (Treu v Cappelletti, 71 AD3d 994, 997 [2d Dept. 2010]).

Labor Law § 240 (1) and § 241 (6) contain identical language exempting from the statutes "owners of one and two-family dwellings who contract for but do not direct or control the work" (compare Labor Law § 240 [1] with § 241 [6]).

In 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 (see Labor Law § 240 [1]; § 241; see generally Mandelos v Karavasidis, 86 NY2d 767, 768-769, 655 NE2d 174, 631 NYS2d 133 [1995]; Moran v Janowski, 276 AD2d 605, 606, [2d Dept. 2000]). Here, there was no admissible evidence that the premises were utilized as anything other than a one-family home, thus establishing this requirement.

The second requirement of the homeowners' exemption is that the defendants "not direct or control the work" (Labor Law § 240 [1]; § 241[6]). The expressed and unambiguous language of both statutes focuses upon whether the defendants supervised the methods and manner of the work (see Gittins v Barbaria Constr. Corp., 74 AD3d 744

[2d Dept. 2010]; Ortega v Puccia, 57 AD3d 54 [2d Dept. 2008]; Chowdhury v. Rodriguez, 57 A.D.3d 121, 126-127 [2d Dept. 2008]; Boccio v Bozik, 41 AD3d 754, 755 [2d Dept. 2007]; Arama v Fruchter, 39 AD3d 678, 679 [2d Dept. 2007]; Ferrero v Best Modular Homes, Inc., 33 AD3d 847, 849 [2d Dept. 2006]; Siconolfi v Crisci, 11 AD3d 600, 601 [2d Dept. 2004]; Miller v Shah, 3 AD3d 521, 522 [2d Dept. 2004]). Here, the evidence in the record failed to establish that the defendants supervised the methods and manner of the project, or that a triable issue of fact exists in this regard. The mere fact that a contract provision or provisions gave the Barkin defendants the right to use alternative means to perform the job should the contractor become derelict in his duties, does not demonstrate that they actually directed, supervised or controlled the work. Moreover, the Second Department has repeatedly held that typical homeowner interest in the ongoing progress of the work and does not constitute the kind of direction or control necessary to overcome the homeowner's exemption from liability (see Chowdhury v. Rodriguez, supra at 126-127; Tomcek v Westchester Additions & Renovations, Inc., 97 AD3d 737 [2d Dept. 2012]; Affri v Basch, 45 AD3d 615, 616, [2d Dept. 2007]; Arama v Fruchter, 39 AD3d 678, 679 [2d Dept. 2007]).

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 (see Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 352 [1998]; Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]; Lombardi v Stout, 80 NY2d 290, 294 [1992]; Allen v Cloutier Constr. Corp., 44 NY2d 290, 299 [1978]; Ferrero v Best Modular Homes, Inc., 33 AD3d 847, 850 [2d Dept. 2006]; Brown v Brause Plaza, LLC, 19 AD3d 626, 628 [2d Dept. 2005]; Everitt v Nozkowski, 285 AD2d 442, 443 [2d Dept. 2001]; Giambalvo v Chemical Bank, 260 AD2d 432, 433 [2d Dept. 1999]). Liability under the statute is therefore governed by common-law negligence principles.

Labor Law § 200 has two disjunctive standards for determining a property owner's liability. The first is the authority to supervise the work when a plaintiff's injury arises out of defects or dangers in the methods or materials of the work (see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 505 [1993]; Lombardi v Stout, 80 NY2d at 295; Ortega v Puccia, supra; McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts., 41 AD3d 796, 798, [2d Dept. 2007]; Rosenberg v Eternal Mems., 291

AD2d 391, 392 [2d Dept. 2002]). The common-law duty of the owner to provide a safe place to work, as codified by Labor Law § 200 (1), has been extended to include the tools and appliances without which the work cannot be performed and completed. Thus, when a defendant property owner lends allegedly dangerous or defective equipment to a worker that causes injury during its use, the defendant moving for summary judgment must establish that it neither created the alleged danger or defect in the instrumentality nor had actual or constructive notice of the dangerous or defective condition (see Chowdhury v. Rodriguez, supra at 129-130). In this matter, there is no evidence that the Barkin defendants supervised the methods or materials of the work, or provided the plaintiff with any equipment.

The second standard is applicable to worker injuries arising out of the condition of the premises rather than the methods or manner of the work. When a premises condition is at issue, a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice (see Chowdhury v. Rodriguez, supra at 121, 127-129; Ortega v Puccia, supra; Azad v 270 5th Realty Corp., 46 AD3d 728, 730 [2d Dept. 2007]; Keating v Nanuet Bd. of Educ., 40 AD3d 706, 708 [2d Dept. 2007]; Kerins v Vassar Coll., 15 AD3d 623, 626, [2d Dept. 2005]; Kobeszko v Lyden Realty Invs., 289 AD2d 535, 536 [2d Dept. 2001]).

Here, the defendants demonstrated their entitlement to the homeowner's exemption by offering proof that they did not supervise, direct, or control the work being performed at their single-family home, but merely displayed typical homeowner interest in the ongoing construction process (see Chowdhury v Rodriguez, 57 AD3d at 127-128; Cardace v Fanuzzi, 2 AD3d 557, 768 NYS2d 381 [2003]; Garcia v Petrakis, 306 AD2d 315, 760 NYS2d 551 [2003]; Kolakowski v Feeney, 204 AD2d 693, 612 NYS2d 243 [1994]). In opposition, the plaintiff failed to raise a triable issue of fact regarding the defendant's direction and control over the work being performed which led to his injuries (see Alvarez v Prospect Hosp., 68 NY2d 320, 501 NE2d 572, 508 NYS2d 923 [1986]).

Again, the fact that two contract provisions in the standard contracting agreement signed by the parties contained remedies for nonperformance by the contractor did not, by any stretch of the imagination, demonstrate that the Barkin defendants supervised,

directed or controlled the work (see Tomecek v Westchester Additions & Renovations, Inc., 97 AD3d 737, 738-739 [2d Dept. 2012]).

The Barkin defendants also demonstrated prima facie entitlement to judgment as a matter of law on the issue of liability pursuant to Labor Law § 240(1) by submitting evidence that they did not create the allegedly dangerous condition and had no notice of any defective condition or defect in the ladder. The Barkin defendants therefore established, prima facie, their entitlement to judgment as a matter of law dismissing the causes of action under Labor Law §200 and common-law negligence which were based on a dangerous or defective condition (see Parnell v Mareddy, 69 AD3d 915 [2d Dept. 2010]; Chowdhury v Rodriguez, supra at 128-129 ; Ortega v Puccia, supra at 61)

In opposition, the plaintiff failed to raise a triable issue of fact as to whether the Barkin defendants had actual or constructive notice of the allegedly defective condition.

Accordingly, based upon the foregoing, the Barkin defendants' motion for summary judgment is granted in all respects, and the plaintiff's complaint is dismissed. In light of the foregoing order of dismissal, that branch of their motion seeking contractual and common-law indemnification from the Defendant-contractor L.K. Contracting Corp. is denied as academic.

This constitutes the opinion, decision and order of the Court.

Dated: June 21, 2013

TIMOTHY J. DUFFICY, J.S.C.