

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D21336
O/kmg

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Argued - November 7, 2008

ROBERT A. SPOLZINO, J.P.
JOSEPH COVELLO
DANIEL D. ANGIOLILLO
CHERYL E. CHAMBERS, JJ.

2007-04962

DECISION & ORDER

Fabian Fajardo, appellant-respondent,
v Stephen Clark, et al., respondents,
Palladino Roofing, Inc., et al., respondents-
appellants.

(Index No. 28375-03)

Keegan & Keegan, Ross & Rosner, LLP, Patchogue, N.Y. (Daniel C. Ross of counsel), for appellant-respondent.

Gold, Stewart, Kravatz, Benes & Stone, LLP, Westbury, N.Y. (Jeffrey B. Gold of counsel), and Dubow, Smith & Marothy, Bronx, N.Y., for respondents-appellants (one brief filed).

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Suffolk County (Doyle, J.), dated April 19, 2007, as denied those branches of his cross motion which were for summary judgment on the issue of liability on the Labor Law §§ 240(1) and 241(6) causes of action insofar as asserted against the defendants Robert Palermo, Palladino Roofing, Inc., and Bruce Palladino, and, in effect, upon searching the record, awarded summary judgment to the defendants Palladino Roofing, Inc., and Bruce Palladino dismissing those causes of action insofar as asserted against them, and the defendants Palladino Roofing, Inc., and Bruce Palladino cross-appeal, as limited by their brief, from so much of the same order as denied that branch of their motion which was for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action and all cross claims insofar as asserted against them on the ground that the action insofar as asserted against them was barred by the exclusivity provisions of the Workers' Compensation Law.

December 9, 2008

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ORDERED that the order is modified, on the law, by deleting the provision thereof which, upon searching the record, awarded summary judgment to the defendants Palladino Roofing, Inc., and Bruce Palladino dismissing the Labor Law §§ 240(1) and 241(6) causes of action insofar as asserted against them; as so modified, the order is affirmed insofar as appealed and cross-appealed from, without costs or disbursements.

The defendant Stephen Clark owned certain property on Fire Island, in Suffolk County. Clark wanted to build a guest house on the property and hired the defendant Robert Palermo in connection with the project.

After the framing of the guest house commenced, Palermo contacted the defendant Bruce Palladino, the owner of the defendant Palladino Roofing, Inc. (hereinafter Palladino Roofing), to construct the roof. The roof needed to be constructed of wood. However, Palladino did not know how to construct a wood roof. Thus, he contacted William Court, the owner of Bill Court Roofing, who had expertise in constructing wood roofs. Court agreed to construct the roof with Palladino.

Palladino and an employee of Palladino Roofing then constructed a scaffold to facilitate the roof's construction. However, the scaffold collapsed when the plaintiff, an employee of Bill Court Roofing, stepped onto it to work on the roof. The plaintiff subsequently commenced this action asserting causes of action to recover damages for violations of Labor Law §§ 200, 240(1), and 241(6), and for common-law negligence.

Following the completion of discovery, Palladino and Palladino Roofing, asserting that Palladino Roofing and Bill Court Roofing were "joint venturers," moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against them on the sole ground that the action insofar as asserted against them was barred by the exclusivity provisions of the Workers' Compensation Law. Contrary to their contention, the Supreme Court properly denied their motion, as they failed to demonstrate their prima facie entitlement to judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). The evidence submitted by Palladino and Palladino Roofing failed to establish, inter alia, that Palladino Roofing and Bill Court Roofing agreed to share in any losses their alleged joint venture might suffer (*cf. Davella v Nielsen*, 208 AD2d 494; *De Vito v Pokoik*, 150 AD2d 331, 331-332).

In addition, the plaintiff cross-moved, inter alia, for summary judgment on the issue of liability on his Labor Law §§ 240(1) and 241(6) causes of action insofar as asserted against Palermo, Palladino, and Palladino Roofing. Contrary to the plaintiff's contention, the Supreme Court properly denied those branches of his motion, as he failed to demonstrate his prima facie entitlement to judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853). The evidence he submitted failed to establish, inter alia, that Palermo, Palladino, or Palladino Roofing was the general contractor on the project (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318; Labor Law § 240[1], § 241[6]). However, since the evidence submitted in opposition to the cross motion did not make it clear that neither Palladino nor Palladino Roofing was the general contractor, it was improper for the Supreme Court to search the record and award them summary judgment dismissing the Labor Law §§ 240(1) and 241(6) causes of action insofar as asserted against them on

that ground (*see* CPLR 3212 [b]; *cf. Mid-Hudson Equip. v Allcity Ins. Co.*, 282 AD2d 723, 724).

The parties' remaining contentions are without merit.

SPOLZINO, J.P., COVELLO, ANGIOLILLO and CHAMBERS, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court