Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS V. POLIZZI IA Part 14
Justice

CARLOS RAMIREZ,

Plaintiff,

-against-

ROTHNA BEGUM and DUD MIAH,

Defendants.

Index Number 2242 2003

Motion Date March 22, 2005

Motion Cal. Number 28

ROTHNA BEGUM,

Third-Party Plaintiff,

-against-

LUIS VALDEZ d/b/a ANTON ROOFING CONSTRUCTION,

Third-Party Defendant.

Third-Party Index Number 350194 2003

The following papers numbered 1 to 20 read on this motion by third-party defendant pursuant to CPLR § 3212 for summary judgment in his favor dismissing third-party plaintiff's claims; on the cross motion by defendants for summary judgment in their favor dismissing the complaint; and on the cross motion by plaintiff for summary judgment in his favor under Labor Law § 240(1).

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-5
Notice of Cross Motion - Affidavits - Exhibits ...	6-13
Answering Affidavits - Exhibits	14-16
Reply Affidavits	17-20

Upon the foregoing papers it is ordered that the motion and cross motions are decided as follows:

On June 3, 2002, plaintiff, who was employed by the third-party defendant, was removing siding from the roof of the residence owned by the defendants when he allegedly fell off a ladder and was injured. The plaintiff commenced this action to recover damages for personal injuries alleging common-law negligence and violations of Labor Law §§ 240(1) and 241(6).

Workers' Compensation Law § 11 bars common-law claims against an employer, as well as third-party claims for contribution or indemnity, except those based on a written contract, unless the employee suffered a grave injury (Tonking v Port Authority of New York & New Jersey, 3 NY3d 486, 490 [2004]; Konior v Zucker, 299 AD2d 320, 321 [2002]).

The third-party defendant met its burden of proof through its submission of the deposition testimony of the plaintiff, the verified bill of particulars, the Workers' Compensation Board Notice of Decision, the report of Dr. Ernesto Seldman, who examined plaintiff on February 20, 2003, and the report of Dr. Sandford R. Wert, who examined the plaintiff on behalf of the New York State Insurance Fund. This evidence indicates that plaintiff suffered a partial permanent injury and thus although the injury is serious, it did not rise to the level of grave as defined in Workers' Compensation Law § 11 (Meis v ELO Org., LLC, 97 NY2d 714 [2002]; Castro v United Container Machinery Group, Inc., 96 NY2d 398 [2001]; Blackburn v Wysong & Miles Co., 11 AD3d 421 [2004]; Aguirre v Castle American Const. LLC, 307 AD2d 901 [2003]). Thus, third-party defendant has established, prima facie, his entitlement to judgment as a matter of law. In response, third-party plaintiff has failed to raise any triable issue of fact. Furthermore, the third-party plaintiff's claims for contribution and indemnity are not contractually based. Therefore, third-party defendant is entitled to summary judgment dismissing third-party plaintiff's claims for common-law contribution and indemnification (Meis, 97 NY2d at 716; Marshall v Arias, 12 AD3d 423 [2004]; Aguirre, 307 AD2d at 901).

Defendants cross-move for summary judgment to dismiss plaintiff's Labor Law §§ 240(1) and 241(6) claims, while plaintiff cross-moves for summary judgment on the issue of liability under Labor Law § 240(1). Owners and contractors are subject to strict liability under Labor Law §§ 240(1) and 241(6). However, owners of one- and two-family dwellings who contract for but do not direct or control the work are exempt from this provision (Acosta v Hadjigavriel, ___ AD3d ___, 794 NYS2d 445 [2005]; Murphy v Sawmill Const. Corp., 17 AD3d 422 [2005]; Bruce v Lawrence, 303 AD2d 616, 617 [2003]; Latino v Nolan &

Taylor-Howe Funeral Home, Inc., 300 AD2d 631 [2002]). The defendants claim that the exemption applies as they own a two-family dwelling and did not direct or control the work of the plaintiff. The plaintiff contends that the exemption does not apply because the dwelling was a three-family dwelling.

The property in question consisted of a primary dwelling house and a separate detached structure in the backyard. When the defendants purchased the dwelling, it had a store on the ground floor and an upstairs apartment. Defendants now live on the ground floor, where the store previously was located, and have tenants on the second floor, making the primary dwelling a two-family house. Although the defendants' cousin lived with them on the ground floor and paid rent, the primary residence was structurally a two-family residence as there was no evidence that the cousin had separate living quarters (see Hosler v Northern Eagle Beverages, Inc., 15 AD3d 925 [2005]). The defendants also had tenants living in the secondary dwelling in the backyard. Plaintiff argues that because there are three living units on the property, as a matter of law the property cannot be considered a two-family dwelling. However, the only description of the property came from the deposition testimony of one defendant, in which she described the secondary dwelling as being distinct from the primary dwelling. There was no evidence that there were any shared or unifying features between the structures that could raise an issue of fact as to whether the dwelling was a three-family dwelling (compare Mandelos v Karavasidis, 86 NY2d 767 [1995]; O'Brien v Chih, 236 AD2d 236 [1997]). Thus, the primary dwelling is a two-family dwelling and is subject to the exemption(see Cannon v Putnam, 76 NY2d 644 [1990]; Hosler, 15 AD3d at 926; Suydan v Kaden, 272 AD2d 832 [2000]; Milan v Goldman , 254 AD2d 263 [1998]).

Additionally, the defendant testified that the work was only done on the primary dwelling and the purpose of the work was to make her home look beautiful. Where work done on a home relates to the residential use of the home, even if the work also serves a commercial purpose, the owner is protected by the two-family dwelling exemption (Bartoo v Buell, 87 NY2d 362, 368 [1996]; Cannon v Putnam, 76 NY2d at 650). Therefore, the branch of defendants' cross motion dismissing the Labor Law §§ 240(1)and 241(6) claims is granted and plaintiff's cross motion for liability under Labor Law § 240(1) is denied.

Defendants further seek summary judgment on the issue of liability under plaintiff's common-law negligence claim. On this issue, defendants have established as a matter of law that they had no actual or constructive knowledge of the defective condition at the work site and exercised no control or supervision over plaintiff's work. The branch of defendants'

motion for summary judgment in their favor dismissing the plaintiff's claim for negligence is, therefore, granted (DeBlase v Herbert Const. Co., Inc., 5 AD3d 624 [2004]; Miller v Shah, 3 AD3d 521 [2004]).

Accordingly, third-party defendant's motion is granted and all cross claims against him are dismissed; defendants' cross motion is granted dismissing all claims against them; and plaintiff's cross motion seeking partial summary judgment on the issue of liability under Labor Law § 240(1) is denied.

Dated: June 14, 2005

J.S.C.