Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

----------X

ROBERT MALEY,

Plaintiff,

-against-

STEVEN GRAPSTEIN, BARBARA GRAPSTEIN, BRIT HOME IMPROVEMENTS, DANNY CORPAC and ANTHONY ESPOSITO,

Defendants.

----------X

Index No.: 15496/01

Motion
Dated: May 10, 2005

Cal. No.: 8&9

The following papers numbered 1 to 19 read on these motions by defendants STEVEN GRAPSTEIN and BARBARA GRAPSTEIN for summary judgment and dismissal of plaintiff's Complaint and all cross-claims and counterclaims against it, by defendant BRIT HOME IMPROVEMENTS and DANNY CORPAC for summary judgment and dismissal of plaintiff's Complaint and all cross-claims and counterclaims against it, and by plaintiff ROBERT MALEY for summary judgment on liability.

	Papers Numbered
Defendants Grapstein's Notice of Motion, Affirm., Exhs.	1-4
Defendant Brit Home's Notice of Motion, Affirm., Exhs.	5-8
Plaintiff's Notice of Cross-Motion, Affirm., Exhibits.	9-12
Brit Home's Affirmation in Partial Opp., Exhibits	13-15
Brit Home's Affirm. in Opp. & Reply	16-17
Grapsteins' Reply Affirmation	18-19

Upon the foregoing papers, it is ordered that these motions are determined as follows:

On December 29, 2000, plaintiff was working for Acacia Construction on defendants Steven and Barbara Grapstein's home when he fell off a beam and went through the first floor ceiling,

causing various injuries to his left knee, left shoulder, neck and back. Plaintiff commenced this action against defendants Grapsteins as home owners, defendants Brit Home Improvements and Danny Corpac (hereinafter referred to as "Brit Home") as general contractors, and defendant Anthony Esposito, who also worked on defendants Grapsteins' home.

Defendants Grapstein move for summary judgment and dismissal against plaintiff, arguing that they are not liable for plaintiff's accident. They argue that plaintiff does not have a viable claim under Labor Law § 200 because they had no notice of a dangerous condition and did not control or direct plaintiff's work. Defendants Grapstein also argue that they cannot be liable under Labor Law § 240(1) because they are exempt under the statute as single family owners who do not control or direct plaintiff's work. Defendants Grapstein oppose plaintiff's cross-motion for summary judgment, arguing that they cannot be held as general contractors merely for hiring workers. Defendants cite their deposition testimony, plaintiff's deposition testimony and defendant Danny Corpac's testimony in support of their motion.

Defendants Brit Home Improvements and Danny Corpac cross-move for summary judgment, arguing that they are not general contractors and therefore cannot be liable for plaintiff's injuries. Brit Home argues that it cannot be liable under Labor Law § 200 because it was not a general contractor that hired or supervised plaintiff's work. Brit Home presents defendant Corpac, plaintiff and defendants Grapstein's deposition testimony in support of its argument. Brit Home was not a general contractor, as it did not enforce safety standards or hire any subcontractors. Brit Home had no knowledge that plaintiff was working at the Grapstein's home until after plaintiff's accident. Brit Home had not worked at the Grapstein's home for five months prior to the accident and had never directed, controlled or even spoken with plaintiff or Acacia Construction. Brit Home also had no notice of any dangerous condition because when it had stopped working at the Grapstein home, the second floor bathroom had no openings through which plaintiff could fall. Brit Home also argued that it cannot be liable under Labor Law § 241(6) because plaintiff failed to cite a specific statutory violation for which it could be liable.

Plaintiff opposes defendants' motions and cross-moves for summary judgment on liability. Plaintiff argues that defendant Brit Home is liable because it failed to cap off the water pipes and left an opening in the second floor bathroom. Plaintiff contends that he was forced to walk on the slippery beams to avoid the opening in the floor. He further contends that the beams were wet and slippery from the uncapped pipes, thereby

creating a dangerous condition for which defendant Brit Home should be liable. Plaintiff argues that defendants Grapstein and Brit Home are liable under Labor Law § 240(1) as general contractors who failed to provide plaintiff proper safety devices. Plaintiff argues that defendants Grapstein should be considered general contractors, as they hired Brit Home and Acacia Construction to perform work on their home. Plaintiff also argues that defendants are liable under Labor Law § 200 because defendants Grapstein hired Acacia Construction to perform work and Brit Home caused the dangerous condition. Plaintiffs also argue that defendants are liable under Labor Law § 241(6) because they violated Industrial Codes 23-1.7, 23-1.15, 23-1.16, and 23-1.17.

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986].) Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact. (*See Zuckerman v. City of New York*, 49 NY2d 557 [1980].) It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2nd Dept. 1991].) However, the alleged factual issues must be genuine and not feigned. (*Gervasio v. DiNapoli*, 134 AD2d 235 [2nd Dept. 1987].)

Labor Law § 200 codifies the common law duty of an owner or contractor to provide construction site workers with a safe working environment, provided that the owner or contractor has control over the performance of the activity causing the injury. (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993].) Labor Law § 240(1) imposes a non-delegable duty upon owners and contractors to provide safe work places and breach of the duty may result in liability notwithstanding the absence of actual supervision or control over the work. (Id.) Labor Law § 241(6) imposes a nondelegable duty upon homeowners and contractors to provide necessary equipment to maintain a safe working environment, provided there is a specific statutory violation causing plaintiff's injury. (*See Toefer v. Long Island R.R.*, _N.E.2d_, 2005 WL 756604 [4/5/2005]; *Bland v. Manocherian*, 66 NY2d 452 [1985]; *Kollmer v. Slater Electric, Inc.* 122 AD2d 117 [2nd Dept. 1986].)

Defendants Grapstein presented a prima facie entitlement to summary judgment with regard to Labor Law §§ 200 and 240(1). Defendants demonstrated that they had no control or direction

over plaintiff's work. Defendants also demonstrated that they had no notice of any dangerous condition, as they received no complaints or violations prior to plaintiff's accident. (*See Duarte v. East Hills Constr. Corp.*, 274 AD2d 493 [2nd Dept. 2000].) Defendants established that they are single family owners who are exempt from liability under Labor Law § 240(1), regardless of the fact that they hired the contractors. (*See Reilly v. Loreco Constr., Inc.*, 284 AD2d 384 [2nd Dept. 2001]; *Duarte*, 274 AD2d at 494.)

Plaintiff failed to present sufficient evidence to raise an issue of fact as to his claim under Labor Law §§ 200 and 240(1) against defendants Grapstein. An owner will be liable for a violation of Labor Law § 200 and common law negligence when the injuries are caused by a dangerous condition at work only if the owner exercised supervision and control over the work performed or had actual or constructive notice of the dangerous condition. (*Cuartas v. Kourkoumelis*, 265 AD2d 293 [2nd Dept. 1999].) Plaintiff presents no evidence that defendants either directed the work or had notice of a dangerous condition. (*See Comes v. New York State Elec. and Gas Corp.*, 82 NY2d 876 [1993].) Further, plaintiff presents no statutory or case law to support its theory that the Grapsteins should be deemed general contractors because they hired Acacia Construction. Rather, that theory contradicts the purpose and intent behind the homeowner exception under Labor Law § 240(1), which was to exempt owners of one and two family homes from liability under that statute.

However, there are issues of fact with regard to defendants Grapstein's liability under Labor Law § 241(6) that preclude summary judgment. Plaintiff has presented evidence that Industrial Code § 23-1.7 has been violated, thereby giving rise to evidence of some negligence on the part of defendants Grapstein as homeowners. (*See Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998].) However, defendants have presented some evidence of comparative negligence on plaintiff's part, thereby precluding a finding of summary judgment for plaintiff. (*See Edwards v. C&D Unlimited, Inc.*, 295 AD2d 310 [2nd Dept. 2002].)

Defendant Brit Home also presented a prima facie entitlement to summary judgment under Labor Law § 200, 240(1) and 241(6). (*See Lozado v. Felice*, 8 AD3d 633 [2nd Dept. 2004].) Brit Home presented sufficient evidence that it neither controlled, directed or supervised plaintiff's work, as there is no evidence that Brit Home hired plaintiff or even knew plaintiff was working at the Grapstein's home prior to the accident. (*See Rosenberg v. Ben Krupinski General Contractors, Inc.*, 284 AD2d 523 [2nd Dept.

2001].) Further, there is no evidence that Brit Home created, or had notice of, a dangerous condition five months prior to plaintiff's fall for which Brit Home should be liable. Brit Home also established that it was not a general contractor for whom liability could be imposed under the Labor Law. A general contractor will be liable for under the Labor Law if it was responsible for coordinating and supervising the entire construction project and was invested with a concomitant power to enforce safety standards and to hire responsible contractors. (*Id.*) Without that authority, a contractor may be considered a prime contractor for whom liability cannot be imposed unless it is invested with the power to supervise and control the work. (*See id.*; *Walsh v. Sweet Associates, Inc.*, 172 AD2d 111 [3rd Dept. 1991], *lv. denied* 79 NY2d 755 [1992].) Brit Home presented sufficient evidence that it was not a general contractor on the Grapstein's home as it did not hire, supervise or control plaintiff or Acacia Construction, and did not establish safety standards or choose any subcontractors on the job. (*See Kulaszewski v. Clinton Disposal Services, Inc.*, 272 AD2d 855 [4th Dept. 2000].)

Plaintiff failed to raise an issue of fact with regard to defendant Brit Home. (*See Aranda v. Park East Const.*, 4 AD3d 315 [2nd Dept. 2004].) Plaintiff presented no evidence that defendant was a general contractor who can be found liable under the Labor Law, as Brit Home did not hire plaintiff and had no authority to control or supervise his work. (*See Russin v. Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]; *Edwards v. C & D Unlimited, Inc.*, *supra*.) There is no evidence that Brit Home had authority to control plaintiff's work or that it could establish safety standards for the job. (*See Williams v. Dover Home Improvement, Inc.*, 276 AD2d 626 [2nd Dept. 2000].) In *Williams*, the Court found the defendant was a contractor for purposes of liability under Labor Law § 240(1) because it hired parties, entered into oral contracts with the parties and required them to provide certificates of insurance. In the present case, it is conceded that plaintiff was hired by the homeowners. Further, there is no evidence that Brit Home had any direct communications with plaintiff or was even aware that plaintiff was working on the Grapstein's home.

Plaintiff argues that Brit Home is liable because it created or had notice of a dangerous condition that caused plaintiff's injury. However, plaintiff presented no evidence that defendant Brit Home created or had notice of the dangerous condition. (*See Gordon v. Museum of American History*, 67 NY2d 836 [1986]; *Kerins v. Vassar College*, 293 AD2d 514 [2nd Dept. 2002].) The evidence is clear that Brit Home last worked at the Grapstein's home five months prior to the accident, but no evidence that the dangerous

condition existed at that time. There is also a claim against defendant Anthony Esposito, who it appears may have worked on the premises during the time prior to plaintiff's fall but subsequent to Brit Home's work. However, defendant Esposito failed to appear in this action or oppose the motions. Nevertheless, plaintiff failed to demonstrate that Brit Home caused a dangerous condition five months prior to plaintiff's accident. Further, there is no evidence that Brit Home had notice of any dangerous condition, as it had not known of plaintiff or Acacia Construction prior to the accident.

Accordingly, defendant Grapstein's motion for summary judgment and dismissal is granted, and the causes of action relating to Labor Law §§ 200 and 240(1) are dismissed, but the cause of action relating to Labor Law § 241(6) remains. Defendants Brit Home Improvements and Danny Corpac's motion for summary judgment is granted, and all causes of action against them are dismissed. Further, plaintiff's cross-motion for summary judgment is denied.

Dated: May 26, 2005

_____

Augustus C. Agate, J.S.C.