

Fajardo v Clark

2007 NY Slip Op 30908(U)

April 19, 2007

Supreme Court, Suffolk County

Docket Number: 0028375/2003

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 12-13-06
ADJ. DATE 2-21-07
Mot. Seq. # 002 - MotD
 # 003 - XMG
 # 004 - XMD

-----X
FABIAN FAJARDO, :

Plaintiff, :

- against - :

STEPHEN CLARK, ROBERT PALERMO, :
JOHN DOE II ROOFING COMPANY, :
JOHN DOE III FRAMING COMPANY, :
PALLADINO ROOFING, INC. and :
BRUCE PALLADINO, :

Defendants. :

-----X

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Upon the following papers numbered 1 to 31 read on this motion and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; Notice of Cross Motions and supporting papers 10 - 15; 16 - 21; Answering Affidavits and supporting papers 22 - 25; Replying Affidavits and supporting papers 26 -27; 28 -29; 30 -31; Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (#002) by defendants Palladino Roofing, Inc. and Bruce Palladino for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint as well as any cross claims against them, is granted as to plaintiff's Labor Law §§ 240(1) 241(6) causes of action, and is otherwise denied; and it is further

ORDERED that the cross motion (#003) by defendant Stephen Clark for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint as well as any cross claims

Fajardo v Clark, et. al.
Index No. 03-28375
Page No. 2

asserted against him, is granted; and it is further

ORDERED that the cross motion (#004) by plaintiff for an order pursuant to CPLR 3212 granting him summary judgment is denied.

Plaintiff commenced this action to recover damages, pursuant to Labor Law §§ 200, 240(1) and 241(6), and common-law negligence, for injuries he sustained in a fall at the home of Stephen Clark on March 6, 2002. Plaintiff was employed by nonparty Bill Court Roofing, which was installing a cedar shake roof on a newly-constructed guest house on Mr. Clark's property located at Steeles Walk, Water Island, at Fire Island. Plaintiff was injured when the scaffold he and his employer were working on collapsed.

An owner of a one or two family dwelling is exempt from the absolute liability imposed under Labor Law § 240(1) and the vicarious liability imposed under Labor Law §241(6) unless he directed or controlled the work being performed (*Lombardi v Stout*, 80 NY2d 290, 590 NYS2d 55 [1992]; *Miller v Shah*, 3 AD3d 521, 770 NYS2d 739 [2004]; *Duncan v Perry*, 307 AD2d 249, 762 NYS2d 275 [2003]). The phrase "direct or control" is "construed strictly and refers to the situation where the owner supervises the method and manner of the work" (*Garcia v Petrakis*, 306 AD2d 315, 316, 760 NYS2d 551 [2003]). The fact that a homeowner acts as his own general contractor will not bar application of the exemption, as long as the homeowner did not control or direct the manner or method of the work being performed by the injured plaintiff (*Soskin v Scharff*, 309 AD2d 1102, 1104, 766 NYS2d 248 [2003]; *Reilly v Loreco Constr.*, 284 AD2d 384, 386, 726 NYS2d 142 [2001]). Here, the homeowner, Stephen Clark, established that he lacked the requisite supervision and control over plaintiff's work and is entitled to the protection of the homeowner's exemption as a matter of law and plaintiff did not rebut this with admissible evidence to the contrary. The protection provided by Labor Law § 200 codifies the common-law duty of an owner or employer to provide employees a safe place to work (*Jock v Fien*, 80 NY2d 965, 590 NYS2d 878 [1992]). It applies to owners, contractors, or their agents (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 445 NYS2d 127 [1981]), who exercise control or supervision over the work, or either created an allegedly dangerous condition or had actual or constructive notice of it (*Lombardi v Stout*, *supra*; *Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 713 NYS2d 190 [2000]). Where, as here, the alleged defect or dangerous condition arises from the contractor's work and the owner exercises no supervisory control over the method and manner of the work, no liability attaches to the owner under the common law or under Labor Law § 200 (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877, 609 NYS2d 168 [1993]; *Mas v Kohen*, 283 AD2d 616, 725 NYS2d 90 [2001]). Accordingly, defendant Clark's cross motion for summary judgment is granted and the complaint is dismissed as against him.

Defendant Bruce Palladino, owner of Palladino Roofing, testified at his deposition that he learned of the roofing job from defendant Robert Palermo. However, the roof for the new guest house was to be cedar shake and he had no experience with wood roofs. Therefore, he communicated with his life-long friend and sometimes coworker, Billy Court, who did have experience with wood roofs. They decided that they would do the job together, as they sometimes did, that Mr. Court would show Mr. Palladino how to install a wood roof, and that their employees would work together. They agreed that they would charge \$70 a bundle for the installation and split the profits, after paying their employees.

Mr. Court's deposition testimony is consistent with Mr. Palladino's as to their oral agreement. At the time of plaintiff's fall, work on the roof had just begun. According to the parties' testimony, the shingles were already present at the home and the roofing equipment, including aluminum stages, roofing brackets, ladders and ladder brackets were brought to the island by Billy Court, the lumber used was already at the site. There was more than one scaffold erected and it appears that the scaffold which collapsed was not erected by plaintiff or his coworkers but by Palladino and his employee.

Defendant Palladino now moves for summary judgment dismissing plaintiff's complaint. He argues that plaintiff is limited to the workers' compensation benefits he accepted as an employee of Bill Court Roofing, because the roofing job was a joint venture between Palladino and Court. Generally, an injured employee's sole remedy against his employer is recovery under the Workers' Compensation Law (Workers' Compensation Law §§ 11, 29[6]; *Billy v Consolidated Machine Tool Corp.*, 51 NY2d 152, 156, 432 NYS2d 879 [1980]). When a plaintiff's injuries occur during the course of his employment, the defense afforded by the exclusivity provisions of the Workers' Compensation Law may also extend to suits brought by the injured plaintiff against a company or corporation which is the alter ego of, or joint venturer with, the company or corporation which employed the plaintiff (*Ortega v Noxxen Realty Corp.*, 26 AD3d 361, 809 NYS2d 546, *lv denied* 7 NY3d 710, 822 NYS2d 758 [2006]). Where there is more than one employer in a joint venture, an employee working for one employer is considered an employee of the other employers in the joint venture (*Mitchell v AF Roosevelt Ave. Corp.*, 207 AD2d 388, 615 NYS2d 707 [1994]; *Felder v Old Falls Sanitation Co.*, 39 NY2d 855, 386 NYS2d 214 [1976]). Here however, the record is too vague for the Court to conclude as a matter of law that the roofing job was a joint venture. Nevertheless, there is no dispute that Palladino was neither an owner nor a general contractor. Therefore, Palladino is not subject to the vicarious liability imposed by Labor Law §§ 240(1) or 241(6), and those causes of action are dismissed as to Palladino (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 445 NYS2d 127 [1981]; *Morales v Federated Dept. Stores, Inc.* 5 AD3d 744, 774 NYS2d 180 [2004]). Accordingly, Palladino's motion for summary judgment is granted as to plaintiff's Labor Law §§ 240(1) or 241(6), and is denied as to plaintiff's Labor Law § 200 and common-law negligence causes of action.

Plaintiff's cross motion also seeks summary judgment. It is well settled that on a motion for summary judgment, movant has the initial burden of setting forth evidentiary facts sufficient to establish its entitlement to judgment as a matter of law (*Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Fabbricatore v Lindenhurst Union Free Sch. Dist.*, 259 AD2d 659, 686 NYS2d 822 [1999]). Here, the plaintiff has not met this initial burden. As set forth above, there remain questions of fact as to whether the roofing job was a joint venture with plaintiff's employer, thereby insulating Palladino from all of plaintiff's claims. Moreover, even if Palladino is found not to be insulated by the Workers' Compensation Law, any liability under Labor Law § 200 and/or common-law negligence are issues to be resolved by the jury. Further, the record does not establish, as a matter of law, that Robert Palermo was the general contractor for the purposes of Labor Law §§ 240(1) and 241(6).¹ Mr. Palermo testified that he contracted to perform some of the initial work but that Mr. Clark acted as his own general contractor.

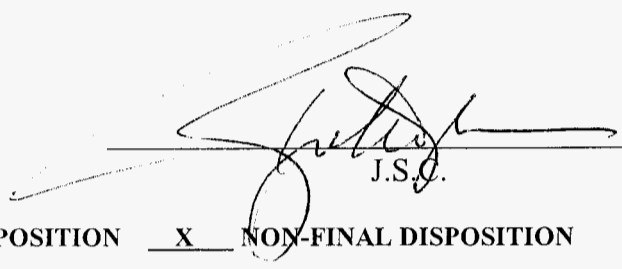
¹ Nevertheless, since plaintiff did not offer which provision of the Industrial Code Palermo is alleged to have violated, summary judgment as to his Labor Law § 241(6) would have been unavailable.

Fajardo v Clark, et. al.
Index No. 03-28375
Page No. 4

Mr. Palermo also testified that, although it is his insurance information that appears on the building permits, he was not listed as the general contractor until after plaintiff's accident.² While Mr. Clark testified that Palermo was the general contractor, Mr. Palladino testified that he was told that he would be working directly for the homeowner. It is not the Court's function to resolve issue of credibility on motions for summary judgment (*Ferrante v American Lung Assn.*, 90 NY2d 623, 631, 665 NYS2d 25 [1997]). Further, it appears from the testimony of Mr. Palladino and Mr. Court, that the person actually supervising the worksite and directing the work, and the person who indicated to Bill Court that the scaffold was ready to go, was nonparty Jim Walsh, a carpenter hired by Mr. Clark. Accordingly, plaintiff's motion for summary judgment is denied.

In summary, the complaint is dismissed as to defendant Clark and the Labor Law §§ 240(1) and 241(6) claims are dismissed as against the Palladino defendants. The remaining claims are severed and shall continue.

Dated: APR 19 2007



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION

² The Court notes that since there is no dispute that Mr. Palermo did not direct or control plaintiff's work or that he had notice of the defective scaffold, he cannot be liable under Labor Law § 200 or the common-law.