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| Rosenblatt v Wagman |
| 2007 NY Slip Op 32349(U) |
| July 23, 2007 |
| Supreme Court, Albany County |
| Docket Number: 0009672/0051 |
| Judge: Joseph C. Teresi |
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

PAUL B. ROSENBLATT and EILEEN P.
ROSENBLATT,

Plaintiffs,

-against-

DECISION and ORDER
RJI NO.: 19073057
INDEX NO.:967-05

TERRY WAGMAN, JAMES M. WAGMAN and
JOANNE Z. WAGMAN,

Defendant.

Albany County Supreme County All Purpose Term, July 6, 2007
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Defendant, Terry Wagman, and Defendants, James & Joanne Wagman, bring separate motions for summary judgment pursuant to CPLR § 3212. Plaintiffs oppose both motions.

After fully reviewing the record, this Court grants Defendants' motions in part by dismissing Plaintiff's claims pursuant to Labor Law §§ 240, 241 and Real Property Law § 235b, against both Terry Wagman and James and Joanne Wagman. This Court, however, denies Defendants' motion for summary judgment ~~for~~ ^{dismissing} Plaintiff's claims pursuant to common law negligence and Labor Law § 200.

In September 2002, Defendant, Terry Wagman, contracted with Plaintiff, Paul Rosenblatt, for him to repair and paint the wrought iron railings on her front porch. Terry Wagman maintains a life tenancy in the subject property, having passed ownership to her son and his wife, Defendants, James and Joanne Wagman, in 2000. According to Mr. Rosenblatt, Terry Wagman (who denies that the conversation took place) approached him as he was painting the second story railings and complained that the bucket truck that he was using to reach those railings was creating ruts in her lawn and damaging the bushes. Mr. Rosenblatt claims that she insisted that he use the ladder by the side of the house despite his expressed discomfort with ladders. Defendants all deny ownership and knowledge of the ladder, which ultimately slipped due to a combination of uneven ground and wobbly railings, causing Mr. Rosenblatt to sustain various injuries. He and his wife have commenced this action for violations of Labor Law §§ 200, 240 and 241, Real Property Law § 235b and common law negligence.

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue" (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept 1996]). The court's main function in granting summary judgment is issue identification, rather than issue determination (See Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]). The party seeking summary judgment has the burden of establishing its entitlement

thereto as a matter of law (See Wingrad v. New York University Medical Center, 64 NY2d 851 [1985]). The party opposing the motion will be given the benefit of every reasonable inference (See Boyce v. Vazquez, 249 AD2d 724; see also Dykestra v. Winridge Condominium One, 175 AD2d 482 [3d Dept 1991])

The facts, as alleged by Mr. Rosenblatt cannot sustain a cause of action pursuant to Labor Law §§ 240 & 241 because the homeowner exception protects Defendants from liability. As owners of a residential, two family home, Defendants are not in a position to understand and insure against the responsibilities imposed by Labor Law §§ 240 & 241 and the statute recognizes this (*Lieberth v. Walden*, 223 A.D.2d 978 [3d Dept 1996]). Accordingly, only those homeowners deemed to "direct or control" or control the labor may be held liable and the terms "direct or control" are strictly construed to require a significant degree of participation before a homeowner is deemed to be functioning in a supervisory capacity (*Kolakowski v Feeney*, 204 AD2d 693 [2d Dept 1994]). Even crediting all of Plaintiffs' allegations as true, mere complaints about damage to her lawn and the suggestion of a ladder of a ladder are insufficient in this context.

Additionally, Plaintiffs' Real Property Law § 235b claim must be dismissed because the statute is inapplicable to the current action which is not a landlord tenant dispute.

Triable issues of fact remain, however, in regards to Plaintiffs' Labor Law § 200 and common law negligence claims. Mr. Rosenblatt's deposition testimony that he was instructed to use an unsafe aluminum ladder on even ground, when the only available support would be wobbly railings sufficiently raises a question of fact regarding to what degree the owners and life tenant should have known about the hazard and had a duty to prevent it.

Accordingly, this Court grants Defendants' motions in part by dismissing Plaintiff's claims pursuant to Labor Law §§ 240, 241 and Real Property Law § 235b, but denies Defendants' motion for summary judgment for Plaintiffs' claims pursuant to common law negligence and Labor Law § 200.

All papers, including this Decision and Order, are being returned to the attorney for the Defendant. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED!

Dated: July 23, 2007

Albany, New York



JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Defendant, Terry Wagman's Notice of Motion, dated June 5, 2007 with attached Exhibits A-F.
2. Defendants, James & Joanne Wagman's Notice of Motion, dated June 19, 2007 with Attached affidavits and Exhibits A-C.
3. Plaintiffs' Opposition, dated June 28, 2007 with Attached Exhibits A-D.
4. Defendants, James & Joanne Wagman's Reply Affidavit, dated July 3, 2007.
5. Defendant, Terry Wagman's Reply, dated July 5, 2007