

**Valasquez v Long Is. Power Auth.**

2007 NY Slip Op 33854(U)

November 21, 2007

Supreme Court, Nassau County

Docket Number: 6123-05/

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 6  
NASSAU COUNTY

\_\_\_\_\_  
CEVERO VELASQUEZ, as Administrator of  
the Estate of SANTOS VELASQUEZ, PAULINA  
VELASQUEZ and JOSE RAUL ALVARENGA  
BONILLA,

INDEX No. 6123/05

MOTION DATE: Oct. 4, 2007  
Motion Sequence # 013

Plaintiffs,

-against-

LONG ISLAND POWER AUTHORITY, KEYSpan  
ELECTRIC SERVICES, LLC, CLAUDIA YOUNG  
THOMPSON, BASSETT W. THOMPSON, RICHARD  
GERDES d/b/a GERDES HOME IMPROVEMENT,  
KEITH GARDNER d/b/a C.N.B. HOME  
IMPROVEMENT, ADASSA GARDNER d/b/a C.N.B.  
HOME IMPROVEMENT, KEITH GARDNER d/b/a  
K&D HOME IMPROVEMENT, ADASSA GARDNER  
d/b/a K&D HOME IMPROVEMENT, R.B.A.  
CONSTRUCTION, INC., INC., MICHAEL J.  
BONACASA d/b/a MICHAEL J. BONACASA  
ARCHITECT, P.C., MICHAEL ANGELONE d/b/a  
MICHAEL ANGELONE, P.E., LLC, W.A.M.  
ELECTRIC, INC.,

Defendants.

\_\_\_\_\_  
The following papers read on this motion:

Notice of Motion..... X  
Affirmation in Opposition..... X X  
Reply Affirmation..... X

This motion, by the defendant W.A.M. Electric Inc., for an order pursuant to CPLR §3212 granting summary judgment in favor of the defendant, W.A.M. Electric Inc., dismissing plaintiff's complaint and all cross claims against W.A.M. Electric Inc., together with such other and further relief as this Court deems just and proper, is determined as hereinafter set forth.

### FACTS

This action in which the plaintiffs, Santos Alonso Garcia Velasquez (hereinafter "Velasquez") and Jose Raul Alvarenga Bonilla (hereinafter "Bonilla") allege that the defendant, W.A.M. Electric Inc. ("WAM"), was negligent in its duties at a construction site that was jointly worked on by the plaintiffs and that the defendant violated §§200, 240 and 241(6) of the Labor Law. The plaintiffs were employed by K&D Home Improvement, and were working outdoors while installing siding on the exterior of a home. The plaintiffs were electrocuted when the scaffold they were working on came into contact with exterior live wires, which they had believed to be shut off. The plaintiff Velasquez died as a result of being electrocuted and the plaintiff Bonilla sustained serious burns on his body. The defendant, W.A.M. Electric Inc. ("WAM"), was hired as a sub-contractor to do work on the interior of the same home as the plaintiffs.

### DEFENDANT'S CONTENTIONS

The defendant contends that summary judgment should be granted in this action because there is no genuine, triable issue of fact and no legal merit to the plaintiffs' causes of action. The defendant argues that it cannot be held liable for common law negligence because the sole responsibility of WAM for this job was to provide and install basic interior electrical outlets, receptacles, switches and lights to code. The defendant asserts that there is no evidence showing that WAM was negligent with regard to the plaintiffs' work area outside. Mr. Lee Rudnitsky, the representative for WAM, was deposed about WAM's services and responded that they were only to work on the interior of the home and no work was done on any exterior of the house or with regard to the power lines running into the house from the outside where the plaintiffs' alleged accident took place.

The defendant also argues that it cannot be held liable under Labor Law §§200, 240 and 241(6) which attach liability to an owner or contractor only when the contractor is found to have exercised supervisory control over the work performed on the premises or in cases where they had notice of the alleged dangerous condition. The defendant asserts that it had no connection with the scaffolding or any materials being used by the plaintiffs at the time of the accident, and it did not have the responsibility of directing or supervising the work that was being performed by plaintiffs. The defendant points out that it was not involved with any electrical wiring from the exterior of the house. The

language of the pertinent statutes refers to liability for an owner or general contractor and the defendant was neither the owner nor the general contractor on the project. In fact, the owners of the project site are the Thompsons who are the homeowners and the general contractor, Keith Gardner. Therefore, the plaintiffs must establish that WAM was a statutory agent for the owner or general contractor in order to establish liability.

The defendant contends that they had no authority to direct, supervise or control the plaintiff or the plaintiff's work and as a result cannot be held liable. The defendant argues that controlling case law holds that without supervisory control over the condition or operation, a defendant cannot be liable under Labor Law § 200. The defendant also argues that there is pertinent case law stating that sub-contractors (similar to the defendant) could not be held liable under Labor Law statutes. In order to prove that a subcontractor is a statutory agent or the general contractor, there must be a showing that the subcontractor had the authority to supervise and control the work, and because WAM was not the plaintiffs' employer and did not hire plaintiffs' employer and therefore the defendant had no authority to direct, control or supervise the plaintiffs or their work, it cannot be liable.

#### **PLAINTIFF BONILLA'S CONTENTIONS**

This plaintiff contends that the defendant's motion for summary judgment must be denied as a matter of law and fact as the motion is untimely made and there exists unresolved questions of fact. The plaintiff claims that Mr. Rudnitsky, while at the work site, noticed electrical power lines in close proximity and perpendicular to the right side of the house. However, Mr. Rudnitsky was unsure of what the proper distance of the lines should have been and he failed to notify anyone at the job of this observation. The plaintiff also alleges that each individual county had jurisdiction over electricians licensed in their area and at the time of the project, Mr. Rudnitsky was not licensed in any county in the State of New York. The plaintiff asserts that this job was in fact performed under Mr. Cooper's license for the defendant. The plaintiff argues that these facts present a question as to whether the defendant was in any part liable for the injuries sustained by both plaintiffs. The plaintiff asserts that summary judgment is a drastic remedy that may only be used when no triable issue of fact exists, and that Mr. Rudnitsky's deposition testimony presents a question of fact for the trier to determine the culpable conduct of the defendant.

The plaintiff also contends that the defendant has made an untimely motion and should be sanctioned for its conduct. The plaintiff explains that by an Order of February 26, 2007, the Court set May 14, 2007 as the last date to file motions for summary judgment. The plaintiff's Note of Issue was filed on January 5, 2007. The plaintiff asserts that statutory law states that a motion for summary judgment must be made within

120 days following the Note of Issue unless further extended by the court (as was done herein to May 14, 2007), and defendant's motion was dated and is untimely.

### **PLAINTIFF VELASQUEZ'S CONTENTIONS**

The plaintiff joins in the arguments of the co-plaintiff set forth above but stresses that summary judgment is a drastic remedy and can only be granted where no genuine issue of fact is presented. The plaintiff asserts that the defendant has failed to even mention many of the claims mentioned in the complaint and bill of particulars, no less refute the allegations contained in the plaintiffs' complaint concerning this matter. The plaintiff contends that the dual role that the defendant played in causing and failing to have prevented this occurrence created the requisite question of fact mandating a denial of defendant's motion.

### **DEFENDANT'S REPLY**

The defendant asserts that the motion for summary judgment is not untimely because the Order dated July 16, 2007, vacated the plaintiff's Note of Issue. Inasmuch as there is currently no Note of Issue on file, the time for the defendant to prepare and file a motion for summary judgment has not yet expired.

The defendant also contends that the motion for summary judgment should be granted since the plaintiffs have presented no evidence to establish that the defendant was in any way negligent in the happening of the plaintiffs' accidents. In response to the plaintiff's allegation that Mr. Rudnitsky observed electrical lines and did nothing about it, the sole responsibility of the defendant for this job was to provide and install basic interior electrical outlets, receptacles, switches and lights to code. The defendant was hired as a subcontractor to install electrical wiring to the interior second story addition of the premises. Mr. Rudnitsky's duties consisted of laying out the job of the interior electrical wiring, managing the interior electrical wiring and making sure the job of the interior electrical wiring was completed. The deposition testimony of Mr. Rudnitsky establishes that the defendant was only working on the interior of the home and had no work on any exterior of the house or with regard to the power lines running into the house from the outside where the plaintiffs' alleged accident took place.

The defendant contends that courts cannot allow a trier of fact to speculate as to a party's connection to an accident and that this Court should award summary judgment in favor of the defendant dismissing all claims made against them. The defendant points to case law explaining that the absence of any evidence indicating that actions by the defendant breached a duty owed to the plaintiff or were the proximate cause of the accident, entitles the defendant to judgment as a matter of law.

The defendant also asserts that the plaintiffs have failed to prove that the defendant exercised some supervisory control over the plaintiffs. The plaintiffs were hired to install exterior siding on the premises while the defendants were hired to install interior items in the home and therefore the defendant had no authority to direct, supervise or control the plaintiffs' work. For all of the above reasons, the defendant asserts that the motion for summary judgment should be granted.

### DECISION

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in (**Stewart Title Insurance Company, Inc. v Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651, 1994):

“It is well established that a party moving for summary judgment must make a **prima facie** showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (**Winegrad v New York Univ. Med. Center**, 64 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642; **Zuckerman v City of New York**, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (**State Bank of Albany v McAuliffe**, 97 AD2d 607, 467 NYS2d 944), but once a **prima facie** showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (**Alvarez v Prospect Hosp.**, 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572; **Zuckerman v City of New York**, *supra*, 49 NY2d at 562, 427 NYS2d 595, 404 NE2d 718)”.

In applying the above legal principles to the facts of the case at bar, this Court has thoroughly examined the entire record, as presented, in the context of the applicable case law and statutory law. Even construing the evidence in the light most favorable to the plaintiff (**Museums at Stony Brook v Village of Patchogue Fire Department**, 146 AD2d 572, 536 NYS2d 177, 2<sup>nd</sup> Dept., 1989), summary judgment herein is warranted.

Through the deposition testimony of Mr. Rudnitsky, the defendant has demonstrated that the sole responsibility of the defendant was to complete tasks inside the home which did not affect anything on the exterior of the home, including power lines running into the house from the outside where the plaintiffs' alleged accident took place.

The plaintiffs' allegation that the defendant took no action when noticing power lines close to the home is irrelevant, as the outside area was not part of the defendant's work area and responsibility.

The plaintiffs also alleged that the defendant violated Labor Law §§200, 240 and 241(6) which attach liability to an owner or general contractor only when the contractor is found to have exercised supervisory control over the work performed on the premises or in cases where they had notice of the alleged dangerous condition. (Sprague v Peckham Materials Corp., 240 AD2d 392, 658 NYS2d 97, 2<sup>nd</sup> Dept., 1997). It has been established and noted by the plaintiff that the defendant is neither the owner nor the general contractor on this project and therefore the burden is on the plaintiff to prove that that defendant exercised some supervisory control over the plaintiffs or the plaintiffs' work. (Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494, 618 NE2d 82, 601 NYS2d 49, 1993; Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343, 693 NE2d 1068, 670 NYS2d 816, 1998). Consequently, the plaintiffs have provided no evidence to establish that the defendant was a statutory agent for the owner or general contractor and therefore the defendant cannot be held liable. It has been held that, "[t]he determinative factor on the issue of control is not whether a subcontractor furnishes equipment but whether it has control of the work being done and the authority to insist that proper safety practices be followed" (Kehoe v Segal, 272 AD2d 583, 584, 709 NYS2d 817, 2<sup>nd</sup> Dept., 2000). The defendant's work was confined to the interior of the home and was not responsible for persons in the outside work area who were not even employed by the defendant. The defendant had no authority to direct, supervise or control the plaintiffs or the plaintiffs' work, and that without supervisory control over the condition or operation, a defendant cannot be held liable under Labor Law §200. (Russin v Picciano & Son, 54 NY2d 311, 429 NE2d 805, 445 NYS2d 127, 1981). It has therefore been established that the defendant cannot be held liable under the Labor Law statutes.

With respect to the plaintiffs' contention that the defendant's motion was untimely, the defendant has explained that the Note of Issue was vacated by an Order dated July 16, 2007 and therefore the time to file a motion has not expired.

Given that the plaintiff has provided no evidence of negligence on the part of the defendant, the Court cannot permit a trier of fact to speculate as to a party's connection to an accident, (Maggi v Innovax Methods Group Co., Inc., 250 AD2d 576, 672 NYS2d 404, 2<sup>nd</sup> Dept., 1998). It has been further held that the absence of any evidence indicating that actions by the defendant breached a duty owed to the plaintiff or was the proximate cause of the accident, entitles the defendant to judgment as a matter of law. (Pizzaro v City of New York, 188 AD2d 591, 591 NYS2d 485, 2<sup>nd</sup> Dept., 1992).

As for the plaintiff's request of sanctions against the defendant, pursuant to CPLR

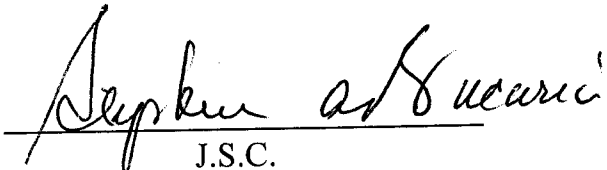
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§2215 any application for affirmative relief must be made by a formal motion or cross-motion and any such application made by the plaintiff in the opposition cannot be considered.

The plaintiff has failed to establish liability under common law negligence and under Labor Law §§ 200, 240(1) and 241(6), accordingly the motion for summary judgment by the defendant is **granted**. This action is **severed** and **continued** against the remaining defendants.

Dated NOV 21 2007

  
J.S.C.

**ENTERED**

NOV 28 2007

NASSAU COUNTY  
COUNTY CLERK'S OFFICE