Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present:HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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JAVIER ALCIDES ORTEGA,

Plaintiff,

Index No: 2862/05
Motion Date: 11/8/06
Motion Cal. Nos: 27

-against-

TROY PUCCIA, STACEY PUCCIA a/k/a
STACEY NAPOLITANO, DENISE ALLEYNE,

Defendants.

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The following papers numbered 1 to 9 read on this motion by the Puccia defendants for an order granting them summary judgment.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Answering Affidavits-Exhibits.....	5 - 7
Reply.....	8 - 9

Upon the foregoing papers, it is hereby ordered that the motion is determined as follows:

It is well established that a motion for summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231(1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth. , 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of such a motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form in support of the counter position. See, Zuckerman v. City of New York, supra.

Here, plaintiff was injured when he fell from a scaffolding supplied by his employer, but allegedly constructed by defendant Troy Puccia on the morning of the accident, while plaintiff was attempting to tape the ceiling of one of the rooms in the Puccia defendants' ("defendants") home. Defendants seek summary judgment and dismissal of the complaint, which asserts violations of Labor Law §§§ 200, 240 and 241, upon the grounds that they are afforded the benefit of the Homeowners' Exemption, and did not exercise control over the manner in which plaintiff performed his work.

A cause of action under section 240(1) of the Labor Law imposes a nondelegable duty upon owners and general contractors which applies when an injury is the result of one of the elevation-related risks contemplated by that section [see, Rose v. A. Servidone, Inc., 268 A.D.2d 516 (2nd Dept. 2000)], which prescribes safety precautions to protect laborers from unique gravity-related hazards such as falling from an elevated height or being struck by a falling object when the work site is positioned below the level where materials or loads are being hoisted or secured. See, Narducci v. Manhasset Bay Assocs., 96 N.Y.2d 259 (2001); Misseritti v. Mark IV Constr. Co., Inc., 86 N.Y.2d 487 (1995); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494 (1993); Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509 (1991). Thus, "[t]he extraordinary protections of Labor Law § 240(1) extend only to a narrow class of special hazards, and do 'not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity." Nieves v. Five Boro Air Conditioning & Refrig. Corp., 93 N.Y.2d 914, 915-916 (1999)[italics in the original]. "[R]outine maintenance activities in a non-construction, non-renovation context are not protected by Labor Law § 240 [see, Brown v. Christopher St. Owners Corp., 87 N.Y.2d 938, 939 (1996), 641 N.Y.S.2d 221, 663 N.E.2d 1251; Vanerstrom v. Strasser, 240 A.D.2d 563, 659 N.Y.S.2d 77(2nd Dept. 1997)]." Paciente v. MBG Development, Inc., 276 A.D.2d 761 (2nd Dept. 2000); see, Jani v. City of New York, 284 A.D.2d 304 (2nd Dept. 2001).

Moreover, Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety to all persons employed in areas in which construction, excavation, or demolition work is being performed." See, Rizzuto v. Wenger Contr. Co., 91 N.Y.2d 343, 347 (1998); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 501-502 (1993). It is well settled that to support a § 241(6) claim, a plaintiff must allege a violation of the New York State Industrial Code, the implementing regulations promulgated by the State Commissioner of Labor, which sets forth a " specific" standard of conduct, and that such violation was the proximate cause of his injuries. See , Vernieri v. Empire Realty Co., 219 A.D.2d 593, 597 (2nd Dept.1995); Ross v. Curtis-Palmer Hydro-Elec. Co., supra at 501-502 (1993). As with Labor Law § 240(1), only owners and general contractors can be held absolutely liable for statutory violations of Labor Law § 241(6). See, Rocovich v Consolidated Edison Co., 78 N.Y.2d 509 (1991); Bland v Manocherian, 66 N.Y.2d 452 (1985); Zimmer v Chemung County Perf. Arts, Inc., 65 N.Y.2d 513 (1985), and all other parties are liable "only if they are acting as the 'agents' of the owner or general contractor. See, Serpe v Eyris Prods., Inc., 243 A.D.2d 375, 379-380 (2nd Dept. 1997).

In the case at bar, defendants have made a prima facie showing of their entitlement to summary judgment under Labor Law §§ 240 and 241. "Labor Law § 240 and § 241 imposes a nondelegable duty upon contractors and owners to provide scaffolding and other adequate and reasonable protection to persons employed in construction, excavation, or demolition. However, the owners of one- and two-family dwellings, who do not direct or control the work, are statutorily exempt from liability (citations omitted)." Putnam v. Karaco Industries Corp., 253 A.D.2d 457 (2nd Dept. 1998); see, Chang v. Chunbukyo Church, 17 A.D.3d 390, (2nd Dept. 2005.)[1] Here, contrary to plaintiffs' contentions, as defendants are the owners of a one family dwelling who never possessed the right to direct, control or supervise the work bringing about

the injury, they are not subject to the strict liability imposed by these statutory provisions, and therefore are entitled to summary judgment and dismissal of the Labor Law §§ 240 and 241 claims.

Likewise, defendants are entitled to dismissal of the claim asserted under Section 200 of the Labor Law. "Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide a safe workplace [see, Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d 876, 609 N.Y.S.2d 168, 631 N.E.2d 110 (1993)]. To be held liable under Labor Law § 200, the owner or general contractor must have the authority to control the activity which brings about the injury... (citations omitted)." Mas v. Kohen, 283 A.D.2d 616 (2nd Dept. 2001); see, Quintavalle v. Mitchell Backhoe Service, Inc., 306 A.D.2d 454 (2nd Dept. 2003). Further, liability attaches where the owner or contractor created the hazard, or had actual or constructive notice of the unsafe condition, and exercised sufficient control over the work being performed to correct or avoid the unsafe condition. See, Leon v J & M Peppe Realty Corp.,190 A.D.2d 400 (1st Dept. 1993).

In the case at bar, the evidence adduced clearly establishes that although defendant Troy Puccia was alleged by plaintiff to have put together the scaffolding on the day of the accident, and plaintiff was aware that the scaffolding wheels were defective, the record is devoid of evidence that defendant Troy Puccia exercised the requisite control over the work being performed to impose liability. Moreover, the record further indicates that defendant Troy Puccia was not home at the time of the accident and the scaffolding was moved from the area where the it was in use an hour prior to the accident. Lastly, despite plaintiff Ortega's assertion, he was aware that the wheels were not locking properly prior to his use of the scaffolding. Consequently, where the dangerous condition is the result of the contractor's methods and the owner exercises no supervisory control over the construction, liability will not attach to the owner. See, Young Ju Kim v. Herbert Const. Co., Inc., 275 A.D.2d 709 (2nd Dept. 2000); Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d 876, 877 (1993).

Accordingly, the Puccia defendants' motion for summary judgment and dismissal of the claims asserted under sections 200, 240 and 241 of the Labor Law, and common-law negligence is granted, and the complaint hereby is dismissed in it entirety as against defendants Troy Puccia and Stacey Puccia a/k/a Stacey Napolitano.

Dated: February 8, 2007

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J.S.C.

1 The Court of Appeals, in Bartoo v. Buell, 87 N.Y.2d 362, 367 (1996), stated the following with regard to the legislative intent of the Homeowners exception:

> In 1980, the Legislature amended Labor Law §§ 240 and 241 to exempt "owners of one and two-family dwellings who contract for but do not direct or control the work" from the absolute liability imposed by these statutory provisions. The amendments, intended by the Legislature to shield homeowners from the harsh consequences of strict liability under the

provisions of the Labor Law, reflect the legislative determination that the typical homeowner is no better situated than the hired worker to furnish appropriate safety devices and to procure suitable insurance protection [see, Cannon v. Putnam, 76 N.Y.2d 644, 649, 563 N.Y.S.2d 16, 564 N.E.2d 626(1990)]. As stated by the Law Revision Commission, "an exemption for one and two family dwelling owners is needed" because "the theory of dominance of the owner over the subcontractor or worker breaks down at this level" (Recommendation of NY Law Rev Commn, reprinted in 1980 McKinney's Session Laws of NY, at 1659).