

Perez v Curth

2008 NY Slip Op 30486(U)

February 5, 2008

Supreme Court, Queens County

Docket Number: 0023982/2006

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

DENIS PEREZ, x Index
Plaintiff, Number 23982 2006

- against -

Motion
Date December 19, 2007

ROBERT F. CURTH, et al.,
Defendants.

Motion
Cal. Number 27

ROBERT F. CURTH, X
Third-Party Plaintiff,

Motion Seq. No. 3

- against -

CONNOLLY CONSTRUCTION, INC.,
Third-Party Defendant.

X

The following papers numbered 1 to 21 read on this motion by plaintiff for summary judgment in his favor on his claims, pursuant to Labor Law § 240(1), and on this cross motion by Robert F. Curth for summary judgment in his favor, pursuant to CPLR 3212.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits ..	5-9
Answering Affidavits - Exhibits	10-16
Reply Affidavits	17-21

Upon the foregoing papers it is ordered that the motion is granted and the cross motion is denied.

Plaintiff in this negligence action seeks damages for personal injuries sustained on November 5, 2005, when he was struck on the hand by a concrete portion of a septic system which he was moving while working at defendant/third-party plaintiff Robert Curth's ("defendant") home during a renovation project. Plaintiff moves for summary judgment in his favor on his claims pursuant to Labor Law § 240(1), based upon the undisputed fact that plaintiff was not furnished with a hoist or other device designed to give proper protection to plaintiff. Defendant claims that, as the owner of the single family residence where the accident occurred, he is exempt from the requirements of Labor Law § 240(1) because he did not direct or control plaintiff's work and did not exercise supervision and control over the methods and materials used by plaintiff in his work. Based thereon, defendant cross-moves for summary judgment in his favor dismissing the complaint.

Labor Law § 240(1) requires owners of buildings, who contract for, among other things, the construction, demolition, repair, alteration or painting of their buildings, to provide various equipment, including ladders, hoists and scaffolding, which are constructed, placed and operated so as to protect workers from injury. Failure to comply with the statutory requirement of this section subjects building owners to strict liability for damages for injuries incurred by workers as a result of such failure (see Zimmer v Chemung County Performing Arts, Inc., 65 NY2d 513 [1985]; Melo v Consolidated Edison Co. of New York, Inc., 246 AD2d 459, affd 92 NY2d 909 [1998]). Owners of a one- or two-family dwelling are exempt from this strict liability provision of Labor Law § 240(1), however, unless it is shown that the owner(s) directed or controlled the work being performed (see Barnes v Lucas, 234 AD2d 405 [1996]; Malloy v Hanache, 231 AD2d 693 [1996]). The phrase "direct or control" is construed strictly and refers to a situation where the owner supervises the method and manner of the work (Kolakowski v Feeney, 204 AD2d 693 [1994]).

In support of his motion for summary judgment on his Labor Law § 240(1) claims, plaintiff submitted undisputed evidence which, plaintiff contends, establishes that defendant acted as his own general contractor by hiring subcontractors and that defendant directed plaintiff and plaintiff's employer as to how to perform the work which resulted in plaintiff's injury. The evidence indicates that plaintiff was injured when a large pre-cast concrete septic tank ring, which was being hoisted from above the ground and then lowered about fourteen feet to the bottom of an excavation, fell onto plaintiff's hand. Plaintiff states that this item was not properly secured and that there were no protective devices in place when the accident occurred. During his examination before trial plaintiff recounted how he had gone to a location on

Roosevelt Avenue and was asked by "Eddie" if he wanted to work. Eddie Connolly is the owner of Connolly Construction, which was hired by defendant to dig an excavation hole for a septic tank. The record indicates that the tank was to be installed at a one-family residence which was being completely renovated, allegedly by defendant Curth. Plaintiff testified that defendant was acting as his own general contractor, with the help of his son; that defendant specified the location of the hole and the dimensions of which Eddie was to dig; when the depth of the hole had reached ten feet, defendant measured the depth, told Eddie that he wanted the hole dug three feet deeper, to a depth of thirteen feet; Defendant made several measurements while the digging was underway and finally told Eddie to stop digging as they had reached the depth which he wanted; plaintiff was then directed to climb inside the excavated hole to make sure that the pre-cast concrete septic tank ring would not move or turn and would keep in balance; plaintiff followed Eddie's directions which were given in defendant's presence and climbed inside the hole and held the chains; Eddie was operating the back-hoe and defendant was directing him, telling him to bring it down slowly; there was nothing attached to the tank to control its horizontal motion to keep it from swinging as it was being lowered; at some point it made contact with the side of the excavation and got stuck; this caused the chain attached to the top of the tank to become slack and ultimately to fall into the excavation hole, and a piece of it struck plaintiff's hand pinching it between the chain and the inner concrete tank wall.

In short, plaintiff alleges that the tremendous weight of the concrete form caused the chain to crush his hand until the tank reached the bottom of the excavation and its weight became supported by the ground. Significantly, plaintiff clearly testified that Eddie was on the machine and he (plaintiff) was told by defendant to "stay in one spot," and not to move while the tank or lid was being hoisted. Plaintiff contends that the tank fell because it was not properly secured to the back hoe.

Defendant testified, that the lid to the tank, which weighed about three tons, is what fell and caused injury to plaintiff (not the tank itself). Defendant also testified that he had in fact performed various parts of the renovation of the house, with the help of his son. When specifically asked whether he acted as "general contractor" for the renovation of his house, defendant responded "yes."

Defendant's testimony, coupled with plaintiff's submissions, indicate that defendant would not be exempt from the requirements of Labor Law § 240(1). The undisputed submissions indicate that

defendant does not fall within the scope of the homeowner's exception to the Labor Law's absolute liability provisions (see Labor Law §§ 240, 241; Boccio v Bozik, 41 AD3d 754 [2007]; Acosta v Hadjigavriel, 18 AD3d 406 [2005]; Holocek v Nowak Constr. Co., 259 AD2d 466 [1999]; cf. Reilly v Loreco Constr., 284 AD2d 384 [2001]; Lang v Havlicek, 272 AD2d 298 [2000]). Therefore, plaintiff's motion for partial summary judgment in his favor on his claims pursuant to Labor Law § 240(1) is granted.

Cross Motion

The cross motion for summary judgment in defendant's favor is denied as untimely (see CPLR 3212[a]; Brill v City of New York, 2 NY3d 648 [2004]), and otherwise on the merits. Defendant failed to establish, prima facie, that he did not exercise supervisory control over the methods and materials used by the plaintiff in his work (see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]).

Dated: February 5, 2008

J.S.C.