Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

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

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ERIC HERRERA, SR., and ANA PATRICIA HERRERA,

Plaintiff,

-against-

RAY'S HOME IMPROVEMENT, SOUNDVIEW MANAGEMENT, LLC, SOUNDVIEW PROPERTY MANAGEMENT, THE KNOLLS OF FOX HILL, INC., THE KNOLLS OF FOX HILL HOMEOWNER'S ASSOCIATION, INC., BENJAMIN DEVELOPMENT CO., INC., MICHAEL MINUTOLI and ANGELA MINUTOLI,

Defendants.

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Index No: 4732/05
Motion Date: 2/20/08
Motion Cal. No.: 15
Motion Seq. No.:4

The following papers numbered 1 to 15 read on this motion for an order granting summary judgment in favor of defendants Michael Minutoli and Angela Minutoli on the ground that there is no liability against them as a matter of law and for dismissal of the complaint and cross claims; and on this cross-motion for an order granting plaintiffs summary judgment on the issue of liability, pursuant to Labor Law §§240(1) and 241(6), against defendants The Knolls of Fox Hill, Inc., the Knolls of Fox Hill Homeowner's Association, Soundview Management, LLC, Soundview Property Management, Inc., Michael Minutoli and Angela Minutoli, for the relief demanded in the complaint.[1]

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Upon the foregoing papers, it is hereby ordered that the motion and cross-motion are disposed of as follows:

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[1]The action has been discontinued against Benjamin Development Co., Inc.

Plaintiffs Eric Herrera, Sr. ("Herrera") and Ana Herrera commenced this Labor Law action to recover damages for injuries allegedly sustained by Herrera resulting from his fall from a ladder, while in the course of his employment with defendant Ray's Home Improvement ("Ray's") and while working at a condominium complex known as The Knolls of Fox Hill, Inc. ("The Knolls"), pursuant to an agreement between Ray's and The Knolls of Fox Hill Home Owners Association ("The Knolls HOA"). Ray's was hired to perform caulking and painting to the exterior of all the condominium units following the placing of aluminum siding on the condominium units by another contractor. Plaintiffs allege violations of sections 240(1) and 241(6) of the Labor Law. Defendants Michael Minutoli and Angela Minutoli ("Minutoli defendants") move for summary judgment in their favor on the ground that there is no liability against them as a matter of law, and for dismissal of the complaint and cross claims asserted against them. Plaintiffs cross-move for summary judgment in their favor against the alleged property owners, The Knolls and The Knolls HOA, and the Minutoli defendants; and the managing agents, Soundview Management LLC and Soundview Property Management ("Soundview defendants").

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 injuries incurred by workers as a result of such failure. See, Zimmer v Chemung County Performing Arts, Inc., 65 N.Y.2d 513 (1985); Melo v Consolidated Edison Co. of New York, Inc., 246 A.D.2d 459, affd 92 N.Y.2d 909 (1998). A cause of action under section 240(1) of the Labor Law arises out of the 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).

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). 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).

Motion to Dismiss by Minutoli Defendants

The Minutoli defendants, who own a unit in the condominium complex near where Herrera's accident occurred, seek summary judgment dismissing the complaint and all cross claims interposed against them based upon their contention that there can be no liability against the condominium unit owners as owners of common elements under the multiple dwelling law. In support of this position they cite Pekelnaya v. Allyn, 25 A.D.3d 111 (1st Dept. 2005), a case examining the question of "whether liability should be imposed on the owners of individual condominium units for injuries to third persons resulting from a defect in a common element." The Appellate Division, First Department, answered the question in the negative, stating, in substance, that a condominium unit owner's minority proportionate leasehold interest in a condominium's common elements is not an interest in the freehold necessary to subject the condominium unit owner to liability as an owner of the common elements under the Multiple Dwelling Law.

In Tumminello v. Hamlet Development Co., 255 A.D.2d 575, leave to appeal denied, 93 N.Y.2d 80 (1999), the Appellate Division, Second Department, in a case directly on point, affirmed the decision of the nisi prius court, which held that individual condominium unit owners were exempt from liability for failure to provide the plaintiff, who was doing work on roof, reasonable and adequate protection and safety. In making the underlying determination, the trial court stated the following rationale [Tumminello v. Hamlet Development Co., 174 Misc.2d 239, 242 664 N.Y.S.2d 211, 213(N.Y.Sup.1997)]:

> [T]here is a specific exception to owners of one and two family residences who do not direct or control the work being performed in or on the premises. Cannon v. Putnam, 76 N.Y.2d 644, 563 N.Y.S.2d 16, 564 N.E.2d 626 (1990). Unless owners of one and two family dwellings exercise direction and control of construction work and/or the workers, they are exempt from liability under the Labor Law. This is true even where the homeowner contracts for the work to be performed with plaintiff's employer. This exemption includes cooperative owners. Brown v. Christopher Street Owners, 211 A.D.2d 441, 620 N.Y.S.2d 374 (1st Dept.1995); aff'd, 87 N.Y.2d 938, 641 N.Y.S.2d 221, 663 N.E.2d 1251 (1996); DeNota v. 45 East 85th St. Corp., 163 Misc.2d 734, 622 N.Y.S.2d 192 (1995).

See, also, Putnam v. Karaco Industries Corp., 253 A.D.2d 457 (2nd Dept. 1998). The exception to this exemption from strict liability is when it is shown that the owner(s) directed or controlled the work being performed. Arama v. Fruchter, 39 A.D.3d 678 (2nd Dept. 2007); Ferrero v. Best Modular Homes, Inc., 33 A.D.3d 847 (2nd Dept. 2006); Duarte v. East Hills Const. Corp., 274

A.D.2d 493 (2nd Dept. 2000); see, also, Bartoo v Buell, 87 N.Y.2d 362 (1996); Cannon v Putnam, 76 N.Y.2d 644 (1990). As the Minutoli defendants made a prima facie showing that they were entitled to the protection of the homeowner's exemption and plaintiffs, in opposition, failed to raise a triable issue of fact as to whether these defendants exercised any degree of direction and control over the work Herrera performed, the motion for summary judgment by the Minutoli defendants is granted, and the complaint hereby is dismissed as to them.

Plaintiffs' Cross Motion for Summary Judgment

1. Labor Law § 240(1)

Plaintiffs' motion for summary judgment against defendants The Knolls, The Knolls HOA, and the Soundview defendants ("defendants"), on the issue of liability stands on a different footing. In order to recover on a claim pursuant to Labor Law § 240(1), a plaintiff must demonstrate that there was a violation of the statute, and that the violation was a proximate cause of the accident. Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 N.Y.3d 280, 287 (2003); Kwang Ho Kim v. D & W Shin Realty Corp., __ A.D.3d__, __ N.Y.S.2d__, 2008 WL 82623 (2nd Dept. 2008); Camlica v. Hansson, 40 A.D.3d 796 (2nd Dept. 2007); Delahaye v. Saint Anns School, 40 A.D.3d 679 (2nd Dept. 2007). A plaintiff cannot recover under Labor Law § 240(1) if his or her actions were the sole proximate cause of the accident. See, Camlica v. Hansson, supra, and cases cited therein. Where there is no evidence of violation and the proof reveals that the plaintiff's own negligence was the sole proximate cause of the accident, liability cannot be imposed under Labor Law § 240(1). Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 N.Y.3d 280, 287 (2003); Zimmer v. Chemung County Performing Arts, 65 N.Y.2d 513 (1985); Destefano v. City of New York, 39 A.D.3d 581 (2nd Dept. 2007).

Here, in support of their motion for summary judgment, plaintiffs submit the deposition testimony of Herrera, in which he testified that on the date of his accident, Ray Geremia ("Geremia"), the owner of Ray's Home Improvement, instructed him to repair and paint a hole in the upper portion of one of the units, and provided a forty (40) foot extension ladder for his use. Herrera further testified that after he, aided by his son, put the ladder in place and as he was climbing the ladder that was being held by his son, Geremia directed the son to help him unload the car, leaving the ladder unsecured. Herrera described what happened, as follows:

> That morning, you know, Ray was waiting for me in front of the building. The first thing he told me is that I forgot some areas that had like holes, and he asked me to please fix it. I placed the ladder. I extended the ladder 40 feet. I grabbed my caulking gun, the brush. I made sure the ladder was fine. I got on. It was the highest area. I covered the hole. I did the touch up. When I am going down – and then as I am going down, I place the caulking gun on the rails on the terrace. After I placed the caulking gun, I felt as I was going down the ladder moved a little bit. I held onto the [terrace] rail, the wood

> rail, and the area where I was holding on, it came loose, and I lost my balance and I went down.

He also testified that the only person who instructed him was Geremia. With respect to his placement of the ladder, Herrera testified that "when you extend the ladder, it has some like locks, metal locks so you make sure they are in place. I make sure that it was locked so it wouldn't go down." Plaintiffs alleged that Herrera's deposition testimony "clearly establishes the absence of **any** proper safety device that would have provided [Herrera] adequate protection from an elevation-related risk.," and that their "failure to provide adequate protection which resulted in [Herrera's] fall and was a proximate cause of his injuries [emphasis in original]."

"Labor Law § 240(1) requires that safety devices such as ladders be so 'constructed, placed and operated as to give proper protection' to a worker. Klein v. City of New York, 89 N.Y.2d 833, 835 (1996). However, to prevail on a Labor Law § 240(1) cause of action, the plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries. See, Blake v. Neighborhood Hous. Servs. of N.Y. City, supra, 1 N.Y.3d at 287; Kozlowski v. Grammercy House Owners Corp., 46 A.D.3d 756 (2nd Dept. 2007). "The mere fact that a plaintiff fell from a ladder does not, in and of itself, establish that proper protection was not provided..." [Delahaye v. Saint Anns School, 40 A.D.3d 679, 682 (2nd Dept. 2007), citing, Xidias v. Morris Park Contr. Corp., 35 A.D.3d 850 (2nd Dept. 2006); Costello v. Hapco Realty, 305 A.D.2d 445 (2nd Dept. 2003); Avendano v. Sazerac, Inc., 248 A.D.2d 340 (2nd Dept. 1998)], unless there is also evidence that the fall was proximately caused by a violation of that statute. See Blake v. Neighborhood Hous. Servs. of New York City, 1 N.Y.3d 280, 287 (2003).

However, on a motion for summary judgment under that statutory provision, a plaintiff establishes prima facie entitlement to summary judgment by presenting evidence of falling from an unsecured ladder. See, Loreto v. 376 St. Johns Condominium, Inc., 15 A.D.3d 454 (2nd Dept. 2005)[since it is uncontested that the plaintiff fell from an unsecured ladder which slipped out from underneath him, the Supreme Court properly determined that the plaintiff was entitled to summary judgment on the issue of liability on his cause of action to recover damages for violation of Labor Law § 240(1)]; Mannes v. Kamber Management, Inc.,284 A.D.2d 310 (2nd Dept. 2001)[it is uncontested that the injured plaintiff fell from an unsecured ladder, which slipped out from underneath him. Thus, the plaintiffs are entitled to partial summary judgment on the issue of liability under Labor Law § 240]; Vega v. Rotner Management Corp., 40 A.D.3d 473, 474 (1st Dept. 2007)[with respect to the section 240(1) claim, plaintiff satisfied his prima facie burden on the motion with his testimony that he fell to the ground when the unsecured 8 to 10-foot ladder on which he was standing shifted]; Lacey v. Turner Constr. Co., 275 A.D.2d 734 (2nd Dept. 2000)[if the plaintiff was injured as a result of an unsecured ladder, the appellants are liable]. Here, plaintiffs made a prima facie showing of entitlement to judgment as a matter of law by demonstrating that the defendants violated Labor Law § 240(1) by failing to provide Herrera with adequate safety devices to afford him proper protection for the work being performed, and that this failure constituted a proximate cause of his accident.

Once the plaintiff makes a prima facie showing the burden then shifts to the defendant, who may defeat the plaintiff's motion for summary judgment only if there is a plausible view of the evidence--enough to raise a fact question--that there was no statutory violation and that the plaintiff's own acts or omissions were the sole cause of the accident. If the defendant's assertions in response fail to raise a fact question as to these issues, the plaintiff must be accorded summary judgment. See, Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 N.Y.3d 280, 289; see, also, Danton v. Van Valkenburg, 13 A.D.3d 931 (3rd Dept. 2004). Here, defendants, referring to Herrera's deposition testimony, argue that it was plaintiff's own actions that were the sole proximate cause of his fall from the ladder, and point to his testimony that while he was descending the ladder, he reached to the right to place the caulking gun on the rails of the terrace, after which the ladder tilted to the right, leading him to grab for the wood railing on the building, which he held onto even after it broke away from the building and he fell. This recitation of what purportedly took place is striking similar to the facts in Costello v Hapco Realty, Inc., 305 A.D.2d 445 (2nd Dept. 2003), in which the Appellate Division, Second Department stated:

> The plaintiff fell to the ground while descending a ladder. A triable issue of fact exists as to whether the plaintiff himself undermined the stability of the ladder after he slipped on one of the ladder's rungs, lost his balance, and then, only after his own downward trajectory already had begun, caused the ladder to slide away from him by suddenly shifting his weight or by suddenly grabbing or kicking parts of the ladder. In addition, there is an issue of fact as to whether the ladder first unpredictably lost its stability, slid out from under the plaintiff, and, in so doing, caused him to fall downward as the result of his loss of support. Such issues of fact preclude the grant of summary judgment in favor of either party (citations omitted).

Defendants thus successfully raised triable issues fact with respect to whether the ladder provided "proper protection" under Labor Law § 240(1) or that Herrera's actions were the sole proximate cause of his injuries. See, Kwang Ho Kim v. D & W Shin Realty Corp., __ A.D.3d__, __ N.Y.S.2d__, 2008 WL 82623 (2nd Dept. 2008), and cases cites therein; Cabrera v. Board of Educ. of City of New York, 33 A.D.3d 641 (2nd Dept. 2006); see, also, Durkin v. Long Island Power Authority, 37 A.D.3d 400 (2nd Dept. 2007)[triable issues of fact existed as to whether the subject ladder shifted or otherwise provided the plaintiff's decedent with improper protection, and, if so, whether the ladder shifted as a subsequent effect or a preceding cause of the decedent's fall].

Moreover, where, as here, there is no evidence that a ladder was actually defective or inadequately secured, there is a question of fact as to whether it provided proper protection, and whether the injured worker should have been provided with additional safety devices. Piontek v. Huntington Public Library, 306 A.D.2d 334 (2nd Dept. 2003); Olberding v Dixie Contr., Inc., 302 A.D.2d 574 (2nd Dept.2003); Selja v American Home Prods. Corp., 307A.D.2d.840 (1st Dept. 2003); Tersigni v City of N.Y., 300 A.D.2d 389 (2nd Dept. 2002). Indeed, the issue of whether a particular safety device provided proper protection generally is a question of fact for the jury.

Delahaye v. Saint Anns School, supra, 40 A.D.3d at 683. As nothing submitted by plaintiffs in reply eliminate the questions of fact raised by defendants, plaintiffs' motion for summary judgment on their claim based upon section 240(1) of the Labor Law must be denied.

2. Labor Law § 241(6)

Plaintiffs also seek summary judgment on their section 241(6) Labor Law claim, alleging that defendants' failure to provide a properly secured ladder violated 12 N.Y.C.R.R. 23-1.2(b)(b)(iv), which provides:

> (iv) When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used.

To support a cause of action pursuant to Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision which sets forth specific safety standards. Ferrero v. Best Modular Homes, Inc., 33 A.D.3d 847 (2nd Dept. 2006); Jicheng Liu v. Sanford Tower Condominium, Inc., 35 A.D.3d 378 (2nd Dept. 2006). In order for a contractor or an owner to be liable under Labor Law § 241(6), the plaintiff must prove that his injuries where proximately caused by a violation of an Industrial Code provision that sets forth specific requirements of conduct (see Rivera v Santos, 35 A.D.3d 700 [2006]; Jicheng Liu v Sanford Tower Condominium, 35 A.D.3d 378 [2006]; Portillo v Roby Anne Dev., LLC, 32 A.D3.d 421 [2006]). In addition, even if the alleged breach is of a specific Industrial Code rule, that rule must be applicable to the facts of the case (see Thompson v Ludovico, 246 A.D.2d 642 [1998]; Vernieri v Empire Realty Co., supra). Plaintiffs allege that defendants violated section 23-1.21(b)(4)(iv) of the Industrial Code (12 NYCRR). Again, plaintiffs made a prima facie showing of their entitlement to summary judgment based upon a Industrial Code violation, by showing that the ladder, which was previously secured by Herrera's son holding the ladder, was not secured in any fashion at the time of his fall.

The Soundview defendants argue, in opposition, that summary judgment cannot be granted against them because they had no involvement in the hiring of the contractor to perform the work that resulted in Herrera's injuries, did not direct or supervise any of the work performed, and that the their sole role was to issue payment at the direction of The Knolls HOA out of a bank account administered by the Soundview defendants for The Knolls HOA. Labor Law § 240(1) imposes liability on owners, contractors, and their agents for any breach of the statutory duty thereunder that proximately causes a worker's injury. Salazar v. United Rentals, Inc. .41 A.D.3d 684 (2nd Dept.

2007). "The meaning of 'owners' under Labor Law §§ 240(1) and 241(6) has not been limited to titleholders but has 'been held to encompass a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit' (citations omitted)." Kwang Ho Kim v. D & W Shin Realty Corp., __ A.D.3d__, __ N.Y.S.2d__, 2008 WL 82623 (2nd Dept. 2008). "The key factor in determining whether a non-titleholder is an 'owner' is the 'right to insist that proper safety practices were followed and it is the right to control the work that is significant, not the actual exercise or nonexercise of control' (citations omitted)." Ryba v. Almeida, 27 A.D.3d 718 (2nd Dept. 2006). That branch of plaintiffs' motion for summary judgment seeking a judgment in their favor against the Soundview defendants must be denied, and upon a search of the record, the complaint insofar as asserted against the Soundview defendants is dismissed.

With respect to the opposition interposed by The Knolls and The Knolls HOA, they allege that there is no evidence that the ladder fell to the ground, and that plaintiffs have failed to establish that the alleged violation was the proximate cause of Herrera's injuries. See, Cunningham v. Alexander's King Plaza, LLC , 22 A.D.3d 703 (2nd Dept. 2005)[general contractor, mall owners, and tenant stores not liable to worker for where alleged failure to secure ladder from which construction worker fell was not a proximate cause of the accident]. Whether the conduct of Herrera was the sole proximate cause of his injuries raises a triable issue of fact that precludes a grant of summary judgment in favor of plaintiffs under Labor Law § 241(6).

Conclusion

Based upon the foregoing, the motion is granted for an order granting summary judgment in favor of defendants Michael Minutoli and Angela Minutoli on the grounds that there is no liability against them as a matter of law, and the complaint and all cross claims hereby are dismissed as to these defendants. Plaintiffs' cross-motion is denied for an order granting plaintiffs summary judgment on the issue of liability pursuant to Labor Law §§240(1) and 241(6) against defendants The Knolls of Fox Hill, Inc., the Knolls of Fox Hill Homeowner's Association, Soundview Management, LLC, Soundview Property Management, Inc., Michael Minutoli and Angela Minutoli, for the relief demanded in the complaint. Upon a search of the record, the complaint also is dismissed as to defendants Soundview Management, LLC and Soundview Property Management, Inc.

Dated: March 13, 2008

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J.S.C.