Villatoro v Mineola Home Improvement Serv.
2008 NY Slip Op 33079(U)
November 12, 2008
Supreme Court, Nassau County
Docket Number: 21740/07
Judge: William R. LaMarca
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ORDER AND JUDGMENT

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17

Present: HON. WILLIAM R. LaMARCA
Justice

JOSE VILLATORO, as Administratrix of the Estate of JUAN RAMOS, Deceased, and MICHELLE RAMOS, Daughter of JUAN RAMOS, Deceased, by her Mother and Natural Guardian, WENDY YANES,

Plaintiffs,

-against-

MINEOLA HOME IMPROVEMENT SERVICE, JORGE GALVEZ, HUNT CLUB HOMEOWNERS ASSOCIATION and EVELYN GIMAN and JOHN DOE GIMAN, First and Last Name Fictitious,

Defendants.

Motion Sequence #001, #2
Submitted August 1, 2008

INDEX NO: 21740/07

The following papers were read on these motions:

GIMAN Notice of Motion....................1
HUNT CLUB Notice of Cross-Motion....................2
Plaintiff's Omnibus Reply Affirmation....................3
GIMAN Reply Affirmation....................4
HUNT CLUB Reply Affirmation....................5

Requested Relief

Defendant, EVELYN GIMAN, moves for an order, pursuant to CPLR §3212 granting summary judgment dismissing the complaint and all cross-claims against her. Co-defendant, H. CLUBOWNERS ASSOCIATION, incorrectly s/h/a HUNT CLUB

HOMEOWNERS ASSOCIATION (hereinafter referred to as "H CLUB"), cross-moves for an order, pursuant to CPLR §3212, for the same relief. Plaintiffs, JOSE VILLATORO, As Administrator of the Estate of JUAN RAMOS, Deceased, and MICHELLE RAMOS, Daughter of JUAN RAMOS, By Her Mother and Natural Guardian, WENDY YANES, oppose the motions, which are determined as follows:

Background

This is an action to recover damages for the alleged wrongful death of JUAN RAMOS. On December 1, 2005, defendant GIMAN became the owner of a single family residence located at 9 Hunt Court, Jericho, New York. Prior to December 6, 2005, GIMAN hired defendant, MINEOLA HOME IMPROVEMENT SERVICE, (hereinafter referred to as "MINEOLA"), to perform wallpapering and painting services at the residence as well as to waterproof a basement wall in the rear of the home. On December 6, 2005, plaintiff, JUAN RAMOS, was in the employ of MINEOLA and, while moving dirt from the rear foundation, the dirt gave way along with the plywood and the 2 x 4's at said location. Plaintiff and another worker, Giovany Guevara, became trapped in the hole. This put heavy pressure on Mr. RAMOS' chest area which prevented him from breathing and ultimately caused his death. The complaint advances theories based upon common-law negligence and violations of Labor Law § § 200, 240(1) and 241(6).

In support of her motion, defendant GIMAN argues that she is exempt from liability as she is the owner of a single family residence who did not direct, control or supervise the work performed at her home. Defendant GIMAN contends that she dealt directly with defendant, JORGE GLAVEZ, the owner of MINEOLA.

Defendant, H. CLUB, asserts that it did not own the property where the accident occurred; that it did not hire the contractor involved in the operation; and that it had no authority to direct, control or supervise the work being performed at the GIMAN's residence. In this respect, H. CLUB claims that it was "formed to own, operate and maintain the Common Properties for the benefit of the Members of the Association". (Article III of the By-Laws).

The Law

Labor Law § 240

Labor Law §240(1), known as the "Scaffolding Law," in pertinent part provides:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the . . . repairing, altering. . . of a building or structure shall furnish . . . for the performance of such labor, scaffolding. . . ladders . . . and other devices which shall be so . . . placed and operated as to give proper protection to a person so employed.

The liability established by this statute has been described as "absolute" in the sense that owners or contractors not actually involved in construction can be held liable, regardless of whether they exercise supervision or control the work (*Blake v Neighborhood Housing Services*, 1 NY3d 280, 771 NYS2d 484, 803 NE2d 757 [C.A. 2003]). However, it is perhaps more accurate to speak of "strict liability" because plaintiff must establish not only a statutory violation but also proximate cause, i.e., that the violation was a contributing cause of plaintiff's fall (*Id*). Once these elements are established, comparative negligence cannot defeat or diminish plaintiff's claim (*Id*).

The exemption in Labor Law § 240 (1) for owners of one and two-family homes was designed to protect those who, lacking business sophistication, would not know or anticipate the need to obtain insurance to cover them against the strict liability imposed by the subdivision (*Lombardi v Stout*, 80 NY2d 290, 590 NYS2d 55, 604 NE2d 117 [C.A. 1992]). On a motion for summary judgment, the party claiming the benefit of the homeowner's exemption has the burden of showing that it applies, i.e., that the owner did not direct or control the work (*Id* at 297). The phrase "direct or control" is construed strictly and refers to the situation where the owner supervises the method and manner of the work being performed (*McGlone v Johnson*, 27 AD3d 702, 810 NYS2d 915 [2nd Dept. 2006]).

Labor Law §241

Labor Law §241 provides in pertinent part, as follows:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings . . . shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequent such places. The commissioner [of Labor] may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

This statute is meant to protect workers engaged in duties connected to the inherently hazardous work of construction, excavation or demolition (*Nagel v D & R Realty Corp.*, 99 NY2d 98, 752 NYS2d 581, 782 NE2d 558 [C.A.2002]. Subdivision 6 imposes a

nondelegable duty of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety" to persons employed in all areas in which construction work is being performed (*Rizzuto v L.A. Wenger Construction Co.*, 91 NY2d 343, 670 NYS2d 816, 693 NE2d 912 [1998]). Because the duty imposed by subdivision 6 is nondelegable, the owner need not exercise supervision or control over the work site for liability to attach (*Gordon v Eastern Railway Supply*, 82 NY2d 555, 606 NYS2d 127, 626 NE2d 912 [C.A.1993]).

However, owners of one and two family dwellings are exempt from liability under Labor Law §241, if they do not direct or control the work giving rise to plaintiff's injury. The homeowner's exemption in this statute is construed in a similar fashion to the exemption contained in Labor Law § 240 (*McGlone v Johnson, supra*).

Labor Law § 200

Labor Law §200, entitled "General duty to protect the health and safety of employees," provides, as follows:

> All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted so as to provide reasonable and adequate protection to all such persons.

This section is a codification of the common law duty of a landowner to provide workers with a reasonably safe place to work (*Lombardi v Stout, supra*). An implicit precondition to this duty is that defendant have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition (*Rizzuto v L.A. Wenger*

Construction Co., *supra*). Thus, even though Labor Law § 200 does not contain a specific exemption for owners of one and two-family dwellings, an owner will not be liable if he/she lacks the authority to control the work which is being performed.

A landowner may be liable for injuries caused by a dangerous condition on the land if the owner had actual or constructive notice of the condition. However, where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200 (*Lombardi v Stout, supra*).

In the present action, a critical element as to all of plaintiff's claims is who exercised supervisory control over the work which caused plaintiff's injury. On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law; tendering sufficient evidence to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v Congress Financial Corp.*, 4 NY3d 373, 795 NYS2d 502, 828 NE2d 604 [C.A.2005]). Failure to make such a *prima facie* showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Id*). If this showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (*Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 [C.A. 1986]).

Discussion

Defendant GIMAN submits a copy of a deed and her own affidavit wherein she states that "Mineola Home Improvement supplied all of the materials, equipment and labor

for the waterproofing job"; that she "did not supply any plans or blueprints to Mineola" and that she had "little to no communication with them at all". It is the judgment of the Court that GIMAN has established that she did not have the authority to control the method of waterproofing the basement. Accordingly, the burden shifts to plaintiff to show an issue of fact as to whether defendant GIMAN had authority to control the activity which brought about plaintiff's injury.

In opposition, plaintiff has failed to present evidence sufficient to raise a triable issue of fact. Plaintiff argues that defendant GIMAN is responsible because she had constructive notice of the dangerous condition, i.e., leaking in the basement. The Court disagrees. Following the reasoning of the Court of Appeals in *Lombardi v Stout, supra*, the accident was not caused by a dangerous condition on the premises but rather by the manner in which the waterproofing was undertaken. Therefore, plaintiff's claims against GIMAN are dismissed.

The H. CLUB has also established that it had no authority over how the work at the residence was performed and plaintiff has failed to raise an issue of fact sufficient to defeat said defendant's motion.

Plaintiff's mere expression of hope that evidence sufficient to defeat the motion might be revealed during the discovery process is an insufficient basis for denying the motion and cross-motion (*Merchant v Greyhound Bus Lines, Inc.*, 45 AD3d 745, 846 NYS2d 315 [2nd Dept. 2007]; *Marcel v Chief Energy Corp.*, 38 AD3d 502, 832 NYS2d 61 [2nd 2007]; *Grodski v Greenpoint*, 16 AD3d 623, 793 NYS2d 60 [2nd Dept. 2005], *lv to app den.* 6 NY3d 705 [2006]). Based on the foregoing, it is hereby

ORDERED, that the motion and cross-motion for summary judgment dismissing the complaint and all cross-claims against EVELYN GIMAN and the H. CLUBOWNERS ASSOCIATION, incorrectly s/h/a HUNT CLUB HOMEOWNERS ASSOCIATION, are both granted and the complaint is dismissed as against them; and it is further

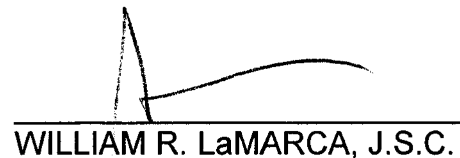
ORDERED, that the action is hereby severed and continued against defendants, MINEOLA HOME IMPROVEMENT SERVICE and JORGE GALVEZ; and it is further

ORDERED, that the parties or attorneys, if any, shall appear for a Preliminary Conference on December 16, 2008, at 9:30 A.M. in Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this order shall be served on all parties and on DCM Case Coordinator Richard Kotowski. **There will be no adjournments**, except by formal application pursuant to 22 NYCRR §125.

All further requested relief not specifically granted is denied.

This constitutes the order and judgment of the Court.

Dated: November 12, 2008



WILLIAM R. LaMARCA, J.S.C.

ENTERED

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NASSAU COUNTY
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