

Penafiel v Castro

2008 NY Slip Op 33558(U)

November 13, 2008

Supreme Court, Suffolk County

Docket Number: 06-33834

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 8-22-08
ADJ. DATE 10-17-08
MNEMONIC: # 001 - MG; CASEDISP

-----X	:	
EDGAR PENAFIEL,	:	KEEGAN & KEEGAN, ROSS & ROSNER, LLP
	:	Attorneys for Plaintiff
Plaintiff,	:	147 North Ocean Avenue, P.O. Box 918
	:	Patchogue, New York 11772
- against -	:	
	:	RICHARD T. LAU & ASSOCIATES
ROBERT CASTRO, STACEY CACCAVALE,	:	Attorneys for Defendants Castro & Caccavale
"JOHN DOE" CONSTRUCTION COMPANY,	:	P.O. Box 9040
intending to be the General Contractor and	:	Jericho, New York 11753-9040
"JOHN DOE 2 COMPANY," intending to be a	:	
subcontractor,	:	
	:	
Defendants.	:	
-----X	:	

Upon the following papers numbered 1 to 24 read on this motion and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-13; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers 14-18; Replying Affidavits and supporting papers 19-20; Other Defts' Mem/Law 21-22; Pltf's Mem/Law 23-24; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the defendants Robert Castro and Stacey Castro s/h/a Stacey Caccavale pursuant to CPLR 3212 for summary judgment dismissing the causes of action asserted under common law negligence, New York Labor Law §§200 and 241 on the basis that the defendants have no liability, is granted.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff, Edgar Penafiel (hereinafter plaintiff), on July 27, 2005, while he was performing renovations, construction and demolition work and fell off a scaffold at the defendants' premises located at 109 Fourth Avenue, Holtsville, County of Suffolk, State of New York, during the course of his employment as a laborer. Causes of action sounding in common law negligence, and violation of New York Labor Law §§ 200 and 240 have been pleaded.

The defendants now seeks summary judgment on the basis that they bear no liability for the occurrence of the accident and that the action is precluded by New York Labor Law §§ 200 and 240.

In support of this motion, the defendants have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, the verified answer of the moving defendants, plaintiff's verified bill of particulars; copies of the transcripts of the examinations before trial of Stacey Castro (Caccavale), Robert Castro (incomplete transcript), and the plaintiff; and the affidavits of Stacey Castro and Robert Castro.

In opposing this motion, the plaintiff has submitted an attorney's affirmation; the affidavits of the plaintiff and Walter Castro; and a copy of the application for a building permit from the Town of Brookhaven (hereinafter Town), New York.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form.. and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

The defendants Castro have set forth in their respective affidavits that they are the co-owners of a single family home located at 109 4th Avenue, Holtsville, New York, and they have owned that home since 1999. They state that in July, 2005, Sunrise to Sunset Construction Co. (hereinafter Sunset), commenced a renovation project at their home for partial demolition of their single story ranch home with the addition of a second floor and a porch. The plans for the project were prepared by an architect prior to contracting with Sunset and prior to the commencement of construction. The defendants Castro state they are not in the construction business and have no special knowledge as to how to perform construction work, and that they hired other contractors on an as needed basis. Stacy Castro stated that although they visited the site, they did not remain at the site for more than one half hour, and that they never directed, controlled or supervised any of the work or workers at the premise, and more specifically, never directed, controlled or supervised the work performed by Sunset. They further stated that the foreman employed by Sunset supervised, directed and controlled the work, and they did not provide any ladders, tools or equipment to any of the workers present at the site.

Stacey Castro testified that an architect by the name of Joe (Galvan) drew up the plans for the renovation to her home and made application, with an expediter, to the Town for the building permit, submitting a copy of the survey with the application. She entered into a contract with Craig (Leonard) from Sunrise which provided for Sunrise to do the demolition and framing, build the shell, put in the windows, get whatever concrete work that had to be done, and obtain the lumber and dumpsters, but did not include the electrical work which was to be done by Jerry (Thullis). They painted most of the house themselves. She stated she and her husband got a home equity loan for the construction and paid the contractors. They lived at her mother's home during the construction which commenced in July 2005. When the construction first started they visited the house about every other day. She did not speak to the workers at the construction site other than Craig (Leonard), and heard the workers speaking Spanish, which she does not speak. Sunrise finished its work sometime in September 2005. They were notified of the incident involving the plaintiff about a year later after they had moved back into the house in about April 2006. She did not know who the workers were at the house on July 27, 2005 and was never told anyone was hurt.

Robert Castro testified that Martin Passante was the architect for the job, but he never met with him, but did meet with Joe Galvin who called him to come to the site one day as the contractor was not following the plans on a specific wall as the knee wall was not the proper height and Joe (Galvin) thought the carpenters were trying to do a short cut which would not be to the Town code. When Joe (Galvin) approached Craig (Leonard) about the wall, Craig (Leonard) told him that he thought it would be a little better to do it this way. Robert Castro stated he is a trucker, he is not a carpenter, but after Joe (Galvin) spoke to Craig (Leonard), he agreed to take the wall down and build it according to plans. Robert Castro also testified that Sunrise arranged for the cement work with the mason for the foundation, but per Craig's (Leonard) instructions, he paid the mason separately. He stated he and his wife (Stacy Castro) would take turns going to the house, just pass by to make sure nothing was going on, and they were excited to see the progress. He stated he does not speak Spanish. He stated he heard that the electrician, Jerry Thullis, had a problem with the sheathing not being done right on the front porch by Sunrise as pieces of plywood were just rigged together and that the electrician had to fix it. Robert Castro stated that they were first time home renovators and they didn't really know what was going on. He testified that at the very end of the job when he was going over the final billing with Craig (Leonard), he advised him he received a letter about one of his guys being hurt, and Craig (Leonard) told him to throw the letter out as the guy just cut his finger. He then received a letter from State Farm Insurance Company indicating someone had gotten hurt on July 27, 2005.

The plaintiff testified at his examination before trial that he was working for Craig (Leonard) for about seven months, and on July 27, 2005 was involved in a construction site accident. He did not know Craig's (Leonard) last name, but reported to his house in the mornings for work. He did not know the name of the community where the accident took place. He stated he had his own car and Craig (Leonard) would then lead them to the job. He testified that this job involved renovation. They were framing and he had been on the job for about a week and two days when the accident occurred about 10 a.m. inside the structure.

He stated he was in the roof as roof rafters were being installed; he was standing on the rear hip beam on a wood scaffold board (consisting of two 2 by 12's about 5 feet long which were not secured to each other) on the top of the second floor plate (top plate for the top of the wall), kind of hanging off the side of the top plate about 2 to 3 feet, on a diagonal nailed to the wall. He testified the scaffold was not nailed or secured in any way to the plate and he did not recall if the opposite end from where he was was nailed to the 2 by 4 frame in any way. He testified that he had never used this scaffold arrangement before on this job, but did use it on one or more previous jobs. He stated he had been on the scaffolding for about a half hour, the first time for about two to three minutes making sure the scaffold was secure. They were pulling the double 22 foot hips (microlams-beams each weighing about 200 pounds) into place by bringing it up from the floor to the top where it was supposed to go. He stated it took five guys to pull them up and they were not using any type of lifting device or crane. He was holding the two microlams on his right arm and shoulder while crouching and went to raise them up to put them in place so the other guy that was sitting on top of the ridge could nail them (the bottom part had already been nailed) when the scaffold raised up and slammed him down to the floor. He testified that the 2 by 12 that he was standing on was about 1 or 2 feet over the edge of the scaffold and his foot was a little bit on the edge. He stated that both feet had been on the scaffold at the time, one forward and one back. Prior to using the scaffold, he had not been instructed to use any kind of safety harness and there were none available to use to help prevent him from moving. As they were lifting the beam into place, there was no one giving verbal directions to the crew. He stated he instructed the new guy on the job who was to nail the microlams to nail them as soon as he got them in place. Craig (Leonard) came to him after he fell. After he fell, he got up and walked to his car and his foreman took him to the hospital.

The plaintiff testified he never met the defendants before the accident, but he stated that Robert Castro sometimes came to the house and spoke with Craig (Leonard). He said one day Robert Castro told them not to worry about the pipes and that they could break it all down because there was still water outside the house and he asked them to save one of the doors. He further testified that Robert Castro came every day to site for about an hour and looked around. He also stated that he saw Stacy Castro twice, but he never heard her give any instructions to the crew. He also testified that Craig (Leonard) would tell them what to do. One Saturday, he stated, the architect came looking for Craig (Leonard) who was not there, so he was told by the architect that because the whole second floor was done, they had to get the rafters and start the roof, but then that something in the roof was to change and he didn't want them to start on it.

In his affidavit, the plaintiff stated that Robert Castro came to the site everyday for about an hour and gave directions through the foremen, Juan Carlos Vera, or the owner of the company, Craig Leonard, but did not speak Spanish. He stated that Craig Leonard would drive a truck to the site that had the tools they used for the day, and that Craig Leonard gave them their assignments. He further set forth that although there was a scaffold, there were no safety devices, harnesses or ropes provided.

Walter Castro, an employee of Sunrise, stated in his affidavit that on July 27, 2005 he was working on the job when the plaintiff was injured. He stated that every day (although he couldn't swear to it) that Robert Castro came to the scene and gave directions for any changes or modifications. He stated that one change set them behind schedule and caused them to rush to catch up when the plaintiff got hurt because after conversation with Robert Castro, Craig Leonard made them rip out an approximate 2 feet extension on top of an 8 foot (sic) wall and had them rebuild a single 10 foot (sic) high wall. On the day the plaintiff got hurt, he stated that the plaintiff was on the scaffolding and they were moving quickly as they thought they would be safe, but they were a bit behind schedule because they had to rip down the wall a day or so before.

Based upon the admissible evidence submitted, the defendants, Robert Castro and Stacey Castro, have demonstrated prima facie entitlement to summary judgment dismissing the complaint as a matter of law. The plaintiff has failed to raise a triable issue of fact.

Under New York Labor Law §§240, and 241, an owner of a one or two-family dwelling is exempt unless he or she directed or controlled the work being performed (*McGlone et al v Johnson et al*, 27 AD3d 702, 810 NYS2d 915 [2nd Dept 2006]). New York Labor Law §200 represents a codification of the common-law duty which the owner and the general contractor owed to workmen to exercise reasonable care to render safe the places of work provided by them, together with the ways and approaches thereto. This duty of the owner, however, does not extend to injuries arising from a defect in the contractor's own plant, tools and methods or through the negligent acts of the contractor occurring as a detail of the work (*Rimoldi et al v Schanzer et al*, 147 AD2d 541, 537 NYS2d 839 [2nd Dept 1989]). New York Labor Law §2412(6) imposes a nondelegable duty of insuring that the area where the work is to be performed is so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed (*Rimoldi et al v Schanzer et al*, supra). The Court finds as a matter of law that the defendants did not exercise supervision and control over the manner and method of construction work being performed, nor did they have actual or constructive notice of the allegedly unsafe condition of the scaffold that caused the accident. Here the owners of the premises did not provide or suggest any tools, equipment, scaffolding, materials or safety equipment be utilized. "The phrase "direct or control" is construed strictly and refers to the situation where the owner supervised the method and manner of work. The premise of the exemption is that strict liability under the (New York) Labor Law should not be imposed upon owners who are not in a position to know about, or provide for the responsibilities of absolute liability" (see, *Spinello v Strober Long Island Building Material Centers, Inc.*, 192 AD2d 515, 595 NYS2d 825 [2nd Dept 1993]; *Jumawan v Schnitt et al*, 35 AD3d 382, 825 NYS2d 728 [2nd Dept 2006]). The conclusory allegations that the defendants directed or controlled plaintiff's work is unsupported by the record. Merely requesting that certain fixtures be preserved, that a fence not be knocked down, that various pipes need not be preserved does not rise to the level of directing or supervising the method and manner of work, what materials are to be used, including safety equipment and scaffolding. This is no different than the type of control any homeowner has over work being done in his or her home (*Schwartz v Foley*, 142 AD2d 635).

As to the common law negligence claim, it is undisputed that the plaintiff and his co-workers were in sole control of the scaffold at the time of the occurrence and that the evidence clearly demonstrates that the use of the scaffold arose solely out of the contractor's method of performing the particular job. Therefore, there is found neither duty nor proximate cause attributable to the defendants to impose any liability premised upon a claim of ordinary negligence upon the homeowners. Nor has it been demonstrated that the defendants in any way exercised supervision or control of the work or method in which the work was being performed. The duty to provide a safe work place is not breached when the injury arises out of a defect in the contractor or subcontractor's own plan, tools and methods or negligent acts occurring as a detail of the work (*Ortega et al v Puccia et al*, 2008 NY Slip Op 8305, 2008 NY App Div Lexis 8140 [2nd Dept 2008], citing *Persichilli v Triborough Bridge & Tunnel Auth.*, 16 NY2d 136, 262 NYS2d 476).

Accordingly, motion (001) for summary judgment dismissing the complaint is granted and the complaint is dismissed in its entirety with prejudice.

Dated: November 13, 2008



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION