

<b>Gonzalez v AALL Seasons Remodeling &amp; Dev. Corp.</b>
2009 NY Slip Op 30097(U)
January 7, 2009
Supreme Court, Suffolk County
Docket Number: 05-11898
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 12-3-08  
ADJ. DATE \_\_\_\_\_  
MNEMONIC: # 004 - MG

-----X		SIBEN & SIBEN, LLP
EDGAR GONZALEZ,	:	Attorneys for Plaintiff
	:	90 East Main Street
Plaintiff,	:	Bay Shore, New York 11706
	:	
	:	BALFE & HOLLAND, P.C.
- against -	:	Attorneys for Defendant AAll Seasons
	:	Remodeling & Development Corp.
	:	135 Pinelawn Road, Suite 125
AALL SEASONS REMODELING &	:	Melville, New York 11747-3197
DEVELOPMENT CORP., COSTAS	:	
THEODOROU and IRIS THEODOROU,	:	BAXTER SMITH TASSAN & SHAPIRO, P.C.
	:	Attorneys for Defendants Theodorou
Defendants.	:	99 North Broadway
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Upon the following papers numbered 1 to 22 read on this motion for renewal of their prior motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (004) 1 - 19; Notice of Cross-Motion and supporting papers   ; Answering Affidavits and supporting papers 20-22; Replying Affidavits and supporting papers   ; Other   ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that this motion (004) by the defendants, Costas Theodorou and Iris Theodorou (hereinafter Theodorous), pursuant to CPLR 2221 (e) and (f) for leave to renew their prior motion which was brought pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims and counterclaims against them on the basis that they cannot be held liable for violations of New York State Labor Law as the owners of a single family residence or under a theory of negligence, which application was denied without prejudice to renewal upon proper papers pursuant to CPLR 3212, is granted as to renewal, and upon renewal, the motion for summary judgment is granted and the complaint asserted against them is dismissed in its entirety.

The complaint of this action arises from an incident which occurred on October 7, 2004 wherein the plaintiff seeks damages for personal injury he sustained when he allegedly tripped and fell over fishing rods located in the basement of the Theodorous' home at 1695 Leeton Drive, Southold, Long Island, New York, and his hand went through a basement window causing lacerations and severed tendons. At the time the plaintiff was installing insulation into the ceiling of the Theodorous' basement. The plaintiff has asserted causes of action premised upon negligence, violation of New York Labor Law Sections 200, 240, 241(6) and/or Title 12 NYCRR 23 of the State of New York including, but not limited to sections 23-1.5, 23-1.7, and 23-1.7(e).

In support of this motion (004), the Theodorous have submitted a copy of their prior application for summary judgment dismissing the complaint and cross-claims and counterclaims, papers served in opposition and reply, as well as copies of the answer served by their co-defendant, Aall Seasons Remodeling and Development Corp. (hereinafter Aall Seasons), but failed to previously provide to this Court; and a copy of this Court's decision and order, dated October 3, 2008.

In reviewing the answer served by the co-defendant Aall Seasons, the Court notes that no counterclaims have been brought and no cross-claims have been asserted against the moving defendants by Aall Seasons.

Accordingly, that part of the moving defendants' application for dismissal of the counterclaims and cross-claims asserted against them is denied as moot as none have been asserted against them.

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 [2<sup>nd</sup> 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 [2<sup>nd</sup> 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 plaintiff testified at his examination before trial, on June 11, 2007, that he worked for Cary Corp. (hereinafter Cary) with whom he was employed on October 7, 2004 and by whom he was provided with a small truck, materials and tools which he needed to perform the job at the Theodorous' premises. He had begun installing insulation in the basement of the premises prior to the accident and he only used tools and materials at this site that were provided by Cary. He was told where the key was located in order to let himself in to the Theodorous' home as there was no one home when he arrived. When he entered the basement, he noticed there were two to four windows about sixteen inches by twenty four or

thirty inches with glass panes. He stated it was up to him to determine what tools he would need to install the insulation in the basement. The ceiling was about six feet high and he could reach the ceiling with his hands and did not require a ladder or stilts. There were exposed joists on the ceiling and he was to place insulation in between the joists. He used nothing to hold the insulation in place as it just stayed in place. He thought there were about four light fixtures in the basement which were working and which he stated were adequate for him to see and do what he needed to do. He testified that there were two by six pieces of wood stacked in the middle of the basement and on the sides, poles next to the wood on the sides of the cellar, gallons of paint cans, nine chairs, and fishing poles which were located about four to five feet from the basement wall. He described the basement floor as sand and uneven. He brought nine bags of insulation into the basement when he started working, along with his utility belt and an utility knife to use in cutting the material and to open the bags. As he was finishing up putting some wires on the ceiling, his right foot got entangled in the fishing rods. As he tried to reach the ceiling, the wires he was holding in both hands fell, his left foot then got caught, and he cut his left hand (wrist) when it went through the window just as his knees fell to the ground as he was falling. He then got up and, as he had already finished the job, he closed the door, left in a hurry and went to Cary where he told people at Cary about the accident.

Robert Arnemann (hereinafter Arnemann) testified at his examination before trial on June 12, 2007 on behalf of Aall that it entered into a written contract with the Theodorous regarding work to be done at their premises at 1695 Leeton Drive, Southold, Long Island, New York on September 7, 2003 for a second floor addition on their one family home. He testified that when the owners came to the house, they would not direct any of the workers, would just talk to him and had no interaction with his employees. He stated that Aall Seasons was the general contractor on the job and that Cary was an independent subcontractor whom he had hired pursuant to a written contract, and whom he previously used over the years. He testified that he spoke to the Theodorous about clearing out the basement, and that prior to the insulation, everything was done by phone and that they said they would let him know when they did it, then called and said it was clear. From the time the plaintiff spoke to the owners regarding clearing up the basement, until the accident on October 7, 2004, he did not see the condition of the basement, but prior to the clearing, saw it and stated that there was a lot of personal stuff in the basement as it was used as a storage area since they moved out of their residence so that the work could commence and everything had been put in the basement. He did not recall seeing fishing rods. He also testified that the Theodorous had additional work in the nature of relocating the water main in the basement performed by someone they hired themselves, and stated that Aall Seasons created a room for the oil tank by reframing in the basement before Cary did its work, and that Aall Seasons was responsible for cleanup when the contractors did work for it. He stated that there was cement flooring in the area of the oil tank and the remainder of the basement was sand flooring. Arnemann also testified that Aall Seasons stored construction materials in the basement in the dry areas, but he did not know what materials were stored there, and further stated that Aall Seasons put in rigid insulation in the perimeter of the basement before Cary came in. His invoice for the rigid insulation was dated December 22, 2004, but he could not determine when it was done.

Costas Theodorou testified at his examination before trial on June 12, 2007 that he entered into an agreement with Aall Seasons to have work done at his home, which he described as a two story cottage with no basement. The contract with Aall Seasons involved adding an extension, a level to the summer house, which work started in February, 2004. He moved most of the furniture and personal possessions into the basement. He and his relatives would go to the house, but he did not keep a record of who was there or when they went. He gave Aall Seasons permission to do the ceiling insulation after the wall insulation was done. At the time, he stated that in the basement were possessions such as left over vinyl siding and other personal possessions such as boxes, a bicycle and about four or five fishing poles. Before construction started, he stated he kept the fishing poles on nails at the entrance to the cellar on the right. He testified he did not see anyone move those fishing poles at any time prior to the installation of the ceiling or wall insulation. He testified he noticed a window in the basement was broken and called Aall Seasons, but was not told about the accident involving the plaintiff. After October 7, 2004 when he went to inspect the house, he did not see any fishing rods on the floor and stated that they were at the spot next to the entrance of the house to the right Aall the time. He testified that he later learned from Aall Seasons that someone was hurt when he fell down from a ladder while installing insulation.

The defendants have alleged causes of action sounding in common law negligence, violation of New Yrk Labor Law Sections 200, 240 and 241(6) premised upon the alleged violations of Title 12 NYCRR of the State of New York Sections 23-1.5, 23-1.7, and 23-1.7(e).

"New York State Labor Law §200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Kim v Herbert Constr. Co.*, 275 AD2d 709, 713 NYS2d 190 [2000]). Liability for causes of action sounding in common law negligence and for violations of Labor Law §200 is limited to those who exercise control or supervision over the plaintiff's work, or who have actual or constructive notice of an unsafe condition that causes an accident (*Aranda v Park East Constr.*, 4 AD3d 315, 772 NYS2d 70 [2004]; *Akins v Baker*, 247 AD2d 562, 669 NYS2d 63 [1998])" (*Marin v The City of New York, et al*, 15 Misc3d 1003A, 798 NYS2d 710 [Supreme Court of New York, Kings County 2004]). An implicit precondition to the common-law duty imposed upon an owner or general contractor to provide construction workers with a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury and have actual or constructive notice of the alleged unsafe condition (*Ramos v HSBC Bank et al*, 29 AD3d 435, 815 NYS2d 504 [1<sup>st</sup> Dept 2006]).

New York State Labor Law §240. Scaffolding and other devices for use of employees at section (1) provides "[a]ll 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 erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

“New York State Labor Law §240 (1) is applicable to work performed at heights or where work itself involves risks related to differentials in elevation” (see, *Plotnick et al v Wok’s Kitchen Incorporated, et al*, 21 AD3d 358, 800 NYS2d 37 [2<sup>nd</sup> Dept 2005]; *Handlovic v Bedford Park Development, Inc.*, 25 AD3d 653, 811 NYS2d 677 [2<sup>nd</sup> Dept 2006]). New York Labor Law §240 (1) was enacted to “prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person” (*Cruz v The Seven Park Avenue Corporation et al*, 5 Misc3d 1018A, 799 NYS2d 159 [Supreme Court of New York, Kings County 2004]).

In *Ortega et al v Puccia et al*, 2008 NY Slip Op 8350, 2008 NY App Div Lexis 8140 [2<sup>nd</sup> Dept October 28, 2008], the Court stated that New York Labor Law §240 is intended to protect workers from gravity-related occurrences stemming from the inadequacy or absence of enumerated safety devices. The duties articulated in §240 are nondelegable, and liability is absolute as to the general contractor or owner when its breach of the statute proximately causes injury. It also stated that the language of New York Labor Law §240 (1) expressly exempts owners of one and two-family dwellings who contract for but do not direct or control the work. That exemption is intended to protect residential homeowners lacking in sophistication or business acumen from their failure to recognize the necessity of insuring against the strict liability imposed by statute. It further stated that the statutory phrase direct or control in New York Labor Law §240 is construed strictly and refers to situations where the owner supervises the method and manner of the work.

As to that portion of the Theodorous’ motion seeking summary judgment dismissing the complaint pursuant to New York Labor Law sections §200 and §240, the Court finds that the Theodorous have demonstrated prima facie entitlement to summary judgment and no admissible evidence has been submitted controverting or raising a triable issue of fact that the risks are not related to a difference in height elevation and gravity; that they did not direct or control the method and manner of the work being performed at the premises at any stage of the construction, including during the phase of construction in which the plaintiff was engaged at the time of the accident; and further that they did not receive actual or constructive notice of the fishing rods being on the basement floor.

The testimony of all the parties has clearly established that the work in which the plaintiff was involved was unrelated to elevation-related hazard. The plaintiff testified he was installing insulation to a six foot ceiling, he could reach the ceiling with his hands, he did not use a ladder for the installation of the insulation and did not fall from a height. Nor is there a claim that a defective ladder was involved in the incident (*Cruz v The Seven Park Avenue Corporation et al*, supra).

In order for a defendant to receive the protection of the homeowner’s exemption in Labor Law §240 (1)..., “the defendant must show that the work was conducted at a dwelling that is a residence for only one or two families,” and the second requirement of the homeowner’s exemption is that the defendant not direct or control the work. The expressed and unambiguous language... focuses upon whether the defendants supervised the methods

and manner of the work" (*Chowdhury v Rodriguez et al*, 2008 NY Slip Op 8441, 2008 NY App Div Lexis 8342 [2<sup>nd</sup> Dept 2008]).

In this case, the Theodorous' home was a one-family residence, and they did not appear on the site or direct any of the work at the construction site. Because New York Labor Law §240 (1) expressly exempts owners of one and two-family dwellings who contract for but do not direct or control the work, strict liability is not imposed as against the Theodorous who did not appear at the work site, and did not manage, direct or control the actual construction of the two-story residential home. No triable issue of fact has been raised to demonstrate that the Theodorous instructed the plaintiff, or anyone else, on how to perform the work or how to install the insulation, or that a ladder was being used by the plaintiff, thus entitling the Theodorous, as owners, to the protection of the one-family residence exception in New York Labor Law §240.

The testimony of the various parties and witnesses does not in any manner demonstrate that the Theodorous did more than enter into an agreement with Aall for the construction of the one-family, two-story extension. Without supervision and control over the plaintiff's work, or actual or constructive notice of an unsafe condition that allegedly caused his accident, the plaintiff's claim must fail. Without a gravity related incident relative to differences in height, as the plaintiff testified he did not fall from a ladder, and did not use a ladder, the plaintiff's claim must fail. The Theodorous have further demonstrated that they did not create the dangerous condition of which the plaintiff complains. Costas Theodorou testified that he kept the fishing rods hanging by the entry way to the basement and did not move them from that position. The plaintiff has failed to raise a triable issue of fact to demonstrate that the Theodorous moved the fishing poles to the location of the accident or that they received actual or constructive notice that the fishing rods had been moved and placed on the basement floor creating an unsafe condition.

New York State Labor Law §241(6) provides in pertinent part that "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 persons employed therein or lawfully frequenting such places." "Labor Law §241(6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code" (citing *Ross v Curtis Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49). Accordingly, in order to support a cause of action under New York Labor Law §241(6) , a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an applicable Industrial Code requirement given the circumstances of the accident, and which contains a concrete standard of conduct rather than a mere reiteration of common-law principals (*Ross* at 502; *Ares v State*, 80 NY2d 959, 590 NYS2d 874 [1992]; see also, *Adams v Glass Fab.*, 212 AD2d 972, 624 NYS2d 705 [1995])" (*Marin v The City of New York, et al*, 15 Misc3d 1003A, 798 NYS2d 710 [Supreme Court of New York, Kings County 2004]).

New York Labor Law §241(6) merely restates the common-law duty to provide a safe working environment and thus is not sufficiently specific to support a claim (***Craemer v Amsterdam High School et al***, 241 AD2d 589, 659 NYS2d 560 [3<sup>rd</sup> Dept 1997]). Here, the plaintiff alleges that Title 12 NYCRR 23 of the State of New York, Sections 23-1.5, 23-1.7 and 23-1.7(e) were violated. 12 NYCRR 23-1.5 is a general safety standard and thus is insufficient to support a New York Labor §241(6) claim (see, ***Mahoney v Madeira Associates et al***, 32 AD3d 1303, 822 NYS2d 190 [Supreme Court of New York 4<sup>th</sup> Dept 2006]). "In order to support a cause of action under labor Law §241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable given the circumstances of the accident, and set forth a concrete standard of conduct rather than a mere reiteration of common law principals." 12 NYCRR 23-1.7 (a)(1) requires protection against falling material in areas normally exposed to such hazards while 1.7 (b) pertains to falling hazards and hazardous openings. 12 NYCRR 23-1.7(e) pertains to Tripping and other hazards: (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. In the instant action, it has been demonstrated prima facie that the Theodorous did not have actual or constructive notice of the condition allegedly giving rise to the within incident alleged to have caused the plaintiff to sustain injury from the window in the basement, nor has it been demonstrated that they created the condition complained of, nor has it been demonstrated that they controlled or supervised the construction.

Based upon the foregoing, the Theodorous have demonstrated prima facie entitlement to dismissal of the complaint, and the plaintiff has failed to raise a triable issue of fact to preclude summary judgment.

Accordingly, the defendants' motion to dismiss the complaint premised upon the alleged violation by the Theodorous of New York Labor Law §200, 240 and 241(6) premised upon the alleged violations of Title 12 NYCRR 23 of the State of New York, Sections 23-1.5, 23-1.7 and 23-1.7(e) is granted and the complaint is dismissed in its entirety as to the moving defendants.

Dated: January 7, 2009




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J.S.C.

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION