Reilly-Geiger v Dougherty
2010 NY Slip Op 30706(U)
March 30, 2010
Supreme Court, Suffolk County
Docket Number: 06-20869
Judge: Arthur G. Pitts
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SHORT FORM ORDER

INDEX No. 06-20869
CAL. No. 09-01382-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 11-19-09
ADJ. DATE 2-4-10
Mot. Seq. # 001 - MotD
002 - MD
003 - XMD

THOMAS REILLY-GEIGER,

Plaintiff,

- against -

SUSAN DOUGHERTY, MICHAEL GOLDENBERG and STEVE LIVIGNI,

Defendants.

ROSENBERG & GLUCK, L.L.P.
Attorney for Plaintiff
1176 Portion Road
Holtsville, New York 11742

BAXTER SMITH & SHAPIRO, P.C.
Attorney for Defendants Dougherty & Goldenberg
99 North Broadway
Hicksville, New York 11801

WILLIAM P. GRIFFIN, III, ESQ.
Attorney for Defendant Livigni
320 Carleton Avenue, Suite 2500
Central Islip, New York 11722

Upon the following papers numbered 1 to 43 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21; 22 - 36; Notice of Cross Motion and supporting papers 37 - 39; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers 40 - 41; 42 - 43; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for the purpose of this determination; and it is further

ORDERED that the motion (#001) by defendants Susan Dougherty and Michael Goldenberg for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and any cross claims asserted against them, is granted to the extent that summary judgment dismissing the plaintiff's Labor Law §§ 240 (1) and 241 (6) claims, as against them, is granted, and is otherwise denied; and it is further

ORDERED that the motion (#002) by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in his favor as to the defendants' liability pursuant to Labor Law § 240 (1) is denied; and it is further

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ORDERED that the cross motion (#003) by defendant Steve Livigni for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and any cross claims asserted against him is denied.

The plaintiff commenced this action to recover damages pursuant to, *inter alia*, Labor Law §§ 200, 240 (1), and 241 (6), and for common-law negligence, for injuries he allegedly suffered in a fall from a ladder while working at a single-family home on April 5, 2005. The home was used as a summer/weekend home by Susan Dougherty and her husband, Michael Goldenberg, and title was held by Susan Dougherty.

As reflected in the conflicting deposition transcripts of the parties, the facts surrounding the plaintiff's alleged employment and fall are in sharp dispute. Nevertheless, the undisputed facts reflect that defendant Steve Livigni contracted to replace the flat roof on the home in the August of 2004, that Dougherty and Goldenberg asked Livigni to return because the roof was leaking in the Spring of 2005, that Livigni advised them that one problem was an old skylight, and that on April 2, 2005 he contracted to replace the skylight. Accordingly to the plaintiffs deposition testimony he was hired by Livigni to first assess the roof problem and then assist in replacing the skylight. However, the plaintiff stated that neither Dougherty nor Goldenberg were at the home when he fell from the ladder and that they did not supervise or control how he was to perform his alleged work.

The owners of a one-or two-family dwelling, as well as those who fulfill the role of owner by contracting for the work (***Copertino v Ward***, 100 AD2d 565, 473 NYS2d 494 [1984]), are exempt from the absolute liability imposed under Labor Law § 240 (1) and the vicarious liability imposed under Labor Law § 241 (6), unless they directed or controlled the work being performed (***Lombardi v Stout***, 80 NY2d 290, 590 NYS2d 55 [1992]; ***Miller v Shah***, 3 AD3d 521, 522, 770 NYS2d 739 [2004]; ***Duncan v Perry***, 307 AD2d 249, 762 NYS2d 275 [2003]). The phrase "direct or control" is "construed strictly and refers to the situation where the owner supervises the method and manner of the work" (***Garcia v Petrakis***, 306 AD2d 315, 316, 760 NYS2d 551 [2003]). Here, even viewing the evidence in a light most favorable to the plaintiff, Dougherty and Goldenberg established, prima facie, that they lacked the requisite supervision and control over any work allegedly performed by the plaintiff at their home and are entitled to the protection of the homeowner's exemption as a matter of law (***Arama v Fruchter***, 39 AD3d 678, 679, 833 NYS2d 665 [2007]), and the plaintiff failed to raise a triable issue of fact on this issue.[1] Accordingly, Dougherty and Goldenberg are granted summary judgment dismissing the plaintiffs Labor Law §§ 240 (1) and 241 (6) claims as against them.

As to the remaining claims, it is well settled that on a motion for summary judgment, a court's function is to determine whether material factual issues exist, not to resolve such issues (*see*, ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 404, 165 NYS2d 498 [1957]; ***Baker v D.J. Stapleton, Inc.***, 43 AD3d 839, 841 NYS2d 382 [2007]). A motion for summary judgment "should not be granted

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[1] Even if the plaintiff can establish that the ladder from which he fell was owned or placed by the homeowner, it is well settled that merely furnishing a ladder, without directing the plaintiff how to use the ladder in performance of his work, is insufficient to defeat the homeowner's exemption (***Facteau v Allen***, 293 AD2d 847, 740 NYS2d 518 [2002]).

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where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (***Lopez v Beltre***, 59 AD3d 683, 873 NYS2d 726 [2009]; ***Scott v Long Is. Power Auth.***, 294 AD2d 348, 741 NYS2d 708 [2002]).

Here, the record presents conflicting evidence as to whether the plaintiff was working at the home and/or was injured while working at the home, who owned the subject ladder, who placed the subject ladder, who placed the tarp under the ladder, what kind of tarp was placed, and whether such placement created a dangerous condition. Therefore, the remaining relief requested is denied.

Moreover, as to the Livigni's cross motion for summary judgment, the Court notes that it is procedurally defective because it was made more than 120 days after the filing of the note of issue, without any showing of good cause for the delay (CPLR 3212 [a]; ***Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725, 786 NYS2d 379 [2004]); ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]).

The plaintiff's Labor Law §§ 240 (1) and 241 (6) claims as against Dougherty and Goldenberg, dismissed herein, are severed and the plaintiff's remaining claims shall continue.

Dated: March 30, 2010

J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**

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