

**Baczewski v White**

2010 NY Slip Op 32051(U)

July 15, 2010

Sup Ct, NY County

Docket Number: 107977/09

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: J. GISCHE  
HON. JUDITH J. GISCHE Justice  
J.S.C.

PART 10

BACZEWSKI

INDEX NO. 107977/09

- v -

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

WHITE et al

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

Dated: 11/5/10

J. GISCHE  
HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X

JERZY BACZEWSKI,  
  
Plaintiff,

-against-

ANNE M. WHITE, THE FIFTEEN CENTRAL  
PARK WEST CONDOMINIUM, W2001Z/CPW  
REALTY, LLC, W2001Z/15CPW HOLDINGS LLC,  
AZWZ/15CPW, LLC, and BROWN HARRIS  
STEVENS RESIDENTIAL MANAGEMENT, LLC,

Defendants.

-----X

**DECISION/ ORDER**  
Index No.: 107977/09  
Seq. No.: 001

**PRESENT:**  
Hon. Judith J. Gische  
J.S.C

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Def n/m 3212 w/SAB affirm, AW affid, PSS affid, exhs . . . . .	1
Pltf opp w/ DJ affirm . . . . .	2
Def reply w/SAB affirm . . . . .	3
Transcript 4/15/10 . . . . .	4

-----X

*Upon the foregoing papers, the decision and order of the court is as follows:*

This is a personal injury action arising from alleged violations of the Labor Law. Issue has been joined by the moving defendant, Anne M. White ("White" or "defendant"), who now seeks summary judgment dismissing the complaint against her. The note of issue has not yet been filed. The motion is, therefore, properly before the court and will be decided on the merits. CPLR § 3212; *Brill v. City of New York*, 2 N.Y.3d 648 (2004).

**Arguments**

Plaintiff, Jerzy Baczewski ("Baczewski" or "plaintiff"), commenced this action, for negligence and violations of Labor Law §§ 200, 240 and 241(6), seeking damages for

injuries he sustained when he fell from a scaffold with allegedly defective wheels.

The accident occurred on January 29, 2009, while plaintiff was working on a construction project in unit 32D at 15 Central Park West, New York City ("premises"). At the time of the injury, Baczewski was employed by non-party Zen Restoration, Inc. ("Zen") and was supervised by non-party project manager Przemyslaw Sobus ("Sobus"). Zen was hired or otherwise retained by defendant-owner White as the contractor of this project.

White now moves for summary judgment, arguing that: ( I ) she cannot be held liable pursuant to Labor Law §§ 240 and 241(6) because she is a homeowner who did not direct or control the injured plaintiff's work, and ( II ) the Labor Law § 200 and the common-law negligence causes of action should be dismissed because she had no actual or constructive notice of the alleged unsafe condition which caused the accident.

In support of her motion, White submits a sworn affidavit in which she asserts that she owns and resides at the subject premises and did so at the time of the alleged accident. She further states that the subject premises are solely residential and that the purpose of the work performed was to renovate the interior of the home and not for commercial purposes. Also, she asserts that the premises are not used as income producing property. In further support of her motion, White states that she hired Zen to perform interior renovations, and that she did not direct or control the work performed by Zen and its employees. She did not provide Zen with any equipment or material necessary to perform the contracted to work. Nor did she have any involvement with the work performed by Zen and its employees, including the plaintiff. She was not present at the time of the occurrence of the alleged accident.

In further support of Defendant's motion, Zen's project manager, Sobus, also

submits an affidavit. In the affidavit, Sobus asserts that on January 29, 2009, plaintiff, an employee of Zen, was painting the walls of the subject premises using a 49" high Baker Scaffold provided by Zen. Sobus states that plaintiff jumped off the scaffold and claimed that he hurt his foot because he landed in an awkward position. Sobus further affirms that White was not present at the time of the incident; she did not direct or control, nor have involvement in, any of the work performed by Zen and its employees. Sobus states that White did not provide Zen with any materials, nor instruct its employees with respect to performing their work. Specifically "all directions or instructions with respect to how Plaintiff Baczewski performed his work came directly from Zen, including on the date of his injury." Sobus states: "In sum, neither Anne White nor her husband had any involvement in the subject accident or the work performed by plaintiff on the date of the alleged accident."

Plaintiff opposes the motion and asserts, inter alia, that the homeowner's exemption of Labor Law §§ 240 and 241(6) does not apply because the property at issue is a condominium as opposed to a one or two-family dwelling. Plaintiff further contends that even if the homeowner's exemption applies, Defendant White can still be held statutorily liable under Labor Law §§ 240, 200 and/or common law negligence, regardless of whether she personally directed or controlled the work, since she hired others, causing them to be her agents, and who were in a position to direct or control the work.

#### **Standard applied to motions for summary judgement**

A party seeking summary judgment in its favor has the initial burden of setting forth evidentiary facts to prove a *prima facie* case, such that it would be entitled to judgment in its favor, without the need for a trial. CPLR § 3212; *Winegrad v. NYU Medical Center*, 64 N.Y.2d 851 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Only if this

to his individual unit as well as an undivided interest in the common elements of the parcel. *Murphy v. State*, 14 A.D.3d 127 (2d Dep't 2004). New York's Real Property Law ("RPL") §339-g directs that a condominium be treated as real property "for all purposes." New York's Multiple Dwelling Law ("MDL") § 4 (44) defines the term "owner" to include "the owner of the freehold of the premises or lesser estate therein..." MDL § 4 (7) defines a "multiple dwelling" to be a "dwelling which is ... occupied as the residence or home of three or more families living independently of each other," MDL § 4 (8) extends MDL § 4 (7) to include numerous forms of apartments and "all other multiple dwellings" which are occupied as a rule, for permanent residence purposes.

In accordance with existing law, plaintiff's argument that the homeowner's exception of Labor Law §§ 240 and 241(6) extends only to free standing houses and co-operative apartments, but not to condominiums, is rejected. The protection afforded to homeowners does not turn on the form of ownership, but whether that property is used for residential as opposed to commercial purposes. See *Cannon v. Putnam, supra*.

The sworn affidavits of White and Sobus make it clear that White owns and resides at the subject premises with her husband and that the premises are used solely for residential purposes. White's affidavit and the contract with Zen make it clear that the purpose of the work performed was to renovate the interior of the White family home and not for commercial purposes. Thus, the term "dwelling," as applied under the homeowner's exemption, includes a condominium unit, as long as that unit is used for a residential purpose. Plaintiff has not provided any evidence that the condominium in question is used by the Whites as anything other than a personal residence. Thus, Defendant White's motion for summary judgment, dismissing the Labor Law §§ 240 and 241(6) claims against

her, is granted.

( II ) Labor Law § 200 and Common Law Negligence

Labor Law § 200 codifies the common law duty imposed upon an owner or general contractor to maintain a safe construction site. *Rizzuto v. L.A. Wenger Contracting Co.*, *supra*. Liability can be imposed only if the defendant has actually been negligent. At trial, plaintiff must prove the defendant exercised a supervisory role and control over the work performed or had actual or constructive notice of the dangerous condition alleged, or created the condition. *Sheridan v. Beaver Tower Inc.*, 229 A.D.2d 302 (1<sup>st</sup> Dep't 1996) *lv den* 89 NY2d 860 (1996); *O'Sullivan v. IDI Construction Co., Inc.*, 7 N.Y.3d 805 (2006); *Rizzuto v. L.A. Wenger Contracting Co.*, *supra* at 352; *Gonzalez v. United Parcel Serv.*, 249 A.D.2d 210 (1<sup>st</sup> Dep't 1998).

Where the alleged defect or dangerous condition arises from the contractor's methods, and the owner exercised no supervisory control over the operation, no liability will be imposed on the owner or general contractor under either the common law or Labor Law § 200. *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876 (1993); *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 505 (1993).

Thus, it is well settled that a homeowner can only be held liable under Labor Law § 200, or for common-law negligence, if the owner supervised and controlled the work or had actual or constructive notice of the unsafe condition which is alleged to have caused the accident. *Miller v. Shah*, 3 A.D.3d 521 (2d Dep't 2004); *see also Selora v. Spring*, 2009 N.Y. Misc LEXIS 1443 (Bx. Co. Sup Ct. 2009); *Maciejewski v. 975 Park Ave*, 814 N.Y.S.2d 891 (Kings Co. 2005). Simply having a general right to supervise the work, or retaining contractual inspection privileges is insufficient to constitute supervisory control so as to

impose liability on an owner or general contractor under Labor Law § 200 or a common law negligence claim. *Hughes v. Tishman Construction Corp.*, 40 A.D.3d 305 (1<sup>st</sup> Dep't 2007); *Brown v. New York City Economic Dev. Corp.*, 234 A.D.2d 33 (1<sup>st</sup> Dep't 1996); *Gonzalez v. United Parcel Serv.*, *supra*.

Plaintiff argues that the fact that White hired someone to direct and control the work means she directed and controlled the work. Plaintiff further argues that it makes no difference whether she personally directed or controlled the work, since she put others in charge of directing and controlling the work for her. Plaintiff claims that such a contractual relationship, that of the architect-client relationship, establishes the architect as White's agent.

Plaintiff's argument fails, however, in light of the established case law. In virtually all Labor Law cases, the contractors work as the agent of the owners. The limitation on liability to circumstances only when the owner supervises the work, would have no meaning if plaintiff's agency argument was correct. The operative inquiry is whether White personally controlled or supervised the work being done to her condominium, not whether she hired someone to do the work. The affidavits provided, particularly that of Sobus, support a conclusion that White did not. She did nothing more than hire Zen to perform interior renovations to her residence. That White hired an architect, who coincidentally is not a party to this action, is of no consequence. The affidavits further make it clear that White did not provide plaintiff with any equipment or work materials. Nor was she not present at the time when plaintiff's alleged accident occurred. Thus, White's motion for summary judgment, dismissing the Labor Law § 200 (common law negligence) negligence claim against her, is granted.

**Conclusion**

In accordance herewith, it is hereby

**Ordered** that defendant Anne M. Whites' motion for summary judgment dismissing plaintiff's Labor Law § 240 claim against her is granted; and it is further

**Ordered** that defendant Anne M. Whites' motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim against her is granted; and it is further

**Ordered** that defendant Anne M. Whites' motion for summary judgment dismissing plaintiff's Labor Law § 200 (common law negligence) claim against her is granted; and it is further

**Ordered** that the clerk shall enter a judgment in favor of Anne M. White and against Jerzy Baczewski dismissing this action, and it is further

**Ordered** that the remaining claims are severed and continued, and it is further

**Ordered** that any relief not expressly addressed is hereby denied; and it is further

**Ordered** that this constitutes the decision and order of the court.

Dated: New York, New York  
July 15, 2010

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, J.S.C.

**FILED**  
JUL 23 2010  
NEW YORK  
COUNTY CLERK'S OFFICE