

Gomez v NJC Development Inc.

2011 NY Slip Op 31252(U)

April 13, 2011

Supreme Court, Queens County

Docket Number: 23593/2008

Judge: Sidney F. Strauss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS IA Part 11
Justice

JOSE GOMEZ x

Index
Number 23593 2008

Motion
Date November 17, 2010

-against-

NJC DEVELOPMENT INC., et al.

x

Motion
Cal. Number 17

Motion Seq. No. 2

NCJ DEVELOPMENT, INC., et al.

x

-against-

LONG ISLAND GUTTERS, et al.

x

The following papers numbered 1 to 16 read on this motion by defendant Leonardo Jedrzejczyk pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims; and on the cross motion by the plaintiff pursuant to CPLR 3212 for summary judgment on the issue of liability under Labor Law §§ 240(1) and 241(6) against the defendants Leonardo Jedrzejczyk and NCJ Development, Inc. s/h/a NJC Development Inc. (NCJ Development).

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Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This is an action to recover money damages for personal injuries allegedly suffered as a result of a construction site accident. The accident occurred on June 3, 2008, at premises located at 199-37 Keno Avenue, Hollis, Queens County, New York. The plaintiff was a laborer for third-party defendant Gutters of Long Island d/b/a Long Island Gutters (L.I. Gutters). The defendant Leonardo Jedrzejczyk owned the subject premises. The defendant Leonardo Jedrzejczyk was also a part-owner of the defendant NCJ Development, the general contractor hired to renovate the premises. The defendant Molina Contractor Home Improvement Corp. (Molina Home Improvement) was a subcontractor doing roofing work at the premises.

The plaintiff testified at an examination before trial that he was at the subject premises to deliver gutters. The plaintiff testified that he had been at the site for about one hour before the accident occurred. He testified that in order to deliver the right size of gutters he was instructed by his coworker to take measurements of the roof. In order to take the measurements the plaintiff needed to be on the roof. The plaintiff testified that he used a ladder, but that the ladder did not belong to his employer. He stated that prior to taking measurements the plaintiff asked a worker on site if he could use a ladder to perform this task. The ladder was a 15-foot one piece aluminum ladder. The accident occurred after taking the measurements as the plaintiff was climbing down off the ladder. The plaintiff testified that as he placed his foot on the second step the ladder slipped backwards causing him to fall to the ground.

The defendant Leonardo Jedrzejczyk testified on behalf of himself and the defendant NCJ Development. He testified that he owned the premises and that he had bought the house in 2004 or 2005. He testified that he had lived in the house since 2004 or 2005. In the summer of 2008, he started renovations to enlarge his home. He testified that NCJ Development was the general contractor for the project. He testified that NCJ hired a roofing company, the defendant Molina Home Improvement, to put on shingles, install the gutters and do the soffit. He testified that he made a telephone call to L.I. Gutters to place an order for gutters for the project at the premises. He stated that NCJ hired L.I. Gutters to deliver gutters for the project, but not to do any measuring or installation work. He testified that Molina Home Improvement was responsible to figure out how many feet of gutter was required. He testified that he was on site at least every morning and he would tell NCJ workers what to do for the day and would coordinate all other trades working at the premises. He further testified that on the day of the accident he had been at the premises in the morning prior to the delivery of the gutters and came back later that day close to leaving time. He testified that he first learned that an accident took place at the house when he

received the lawsuit. He also testified that NCJ ladders at the premises were not tall enough to reach the roof and the only ladders that were tall enough to do exterior roofing work were owned by Molina Home Improvement.

Luis Molina, the president of Molina Home Improvement testified at an examination before trial. He testified that Molina Home Improvement was hired by NCJ Development to do roofing work at the premises which consisted of putting on the soffit and afterwards to put on the gutters. He testified that he was working at the premises on the day of the accident. He testified that the defendant Leonardo Jedrzejczyk had been on the job site on the day of the accident in the morning and then left prior to the accident. He testified that after the gutter company arrived he and an employee took measurements for the gutters. He further testified that he gave the gutter measurements, on a piece of scrap paper to one of the workers from the gutter company. He also testified that he did not witness the accident. He stated that after he gave the measurements to the gutter company they began to measure the roof and that is when the accident occurred.

Owners and contractors are subject to strict liability under Labor Law §§ 240(1) and 241(6) except owners of one- and two-family dwellings who contract for, but do not direct or control the work (*see Ramirez v Begum*, 35 AD3d 578 [2006]; *Uddin v Three Bros. Constr. Corp.*, 33 AD3d 691 [2006]). Here, the defendant Leonardo Jedrzejczyk established his prima facie entitlement to judgement as a matter of law. The house where the subject accident occurred was a single-family dwelling. Further, the evidence established that Leonardo Jedrzejczyk did not supervise, direct or control the work of the plaintiff and in fact he was not at the premises when the plaintiff was there. Therefore, the defendant Leonardo Jedrzejczyk is entitled to the protection of the homeowner's exemption and is not liable under Labor Law §§ 240(1) and 241(6).

In opposition, the plaintiff and co-defendants failed to raise an issue of fact. While it is true that the defendant Leonardo Jedrzejczyk was the principal at the general contractor for the renovation project and had the sophistication and knowledge of the construction industry, there is no evidence that he actually directed and controlled the work of the plaintiff. In fact, the defendant Leonardo Jedrzejczyk was not even present at the premises at any point when the plaintiff was working. Furthermore, the argument that the premises were used for a business purpose and, therefore, should not be afforded the protection of the homeowner exemption is without merit. Where, as is the case here, work done on a home relates to the residential use of the home, even if the work also serves a commercial purpose, the owner is protected by the single dwelling exemption (*see Bartoo v Buell*, 87 NY2d 362, 368 [1996]; *Cannon v Putnam*, 76 NY2d 644, 650 [1990]).

For an owner to be liable under Labor Law § 200 or common-law negligence, the plaintiff must show that the owner supervised or controlled the work, or had actual or constructive notice of the unsafe condition causing the accident. The defendant Leonardo Jedrzejczyk established his prima facie entitlement to judgment as a matter of law dismissing these claims. The evidence submitted by the defendant Leonardo Jedrzejczyk established as a matter of law that he had no actual or constructive knowledge of any allegedly defective condition on the premises and exercised no control or supervision over the work of the plaintiff (*see Ortega v Puccia*, 57 AD3d 54 [2008]; *Lopez v Port Auth. of New York & New Jersey*, 28 AD3d 430 [2006]; *Parisi v Loewen Dev. of Wappingers Falls, LP*, 5 AD3d 648 [2003]). In opposition, the plaintiff failed to raise a triable issue of fact.

In light of the discussion above granting summary judgment to the defendant Leonardo Jedrzejczyk, the branch of the plaintiff's cross motion for summary judgment on the issue of liability under Labor Law §§ 240(1) and 241(6) against the defendant Leonardo Jedrzejczyk is denied.

With respect to the plaintiff's cross motion for summary judgment against the defendant NCJ Development, it too must be denied. The cross motion was not made within 120 days of the filing of the note of issue and the plaintiff did not seek leave of court or give a reasonable excuse for the delay in making the cross motion (*see Miceli v State Farm Mut. Ins. Co.*, 3 NY3d 725 [2004]; *Brill v City of New York*, 2 NY3d 648 [2004]). Furthermore, the cross motion by the plaintiff was not made on grounds that were nearly identical to those of the motion by the defendant Leonardo Jedrzejczyk (*see Podlaski v Long Is. Paneling Ctr. of Centereach*, 58 AD3d 825 [2009]; *Bickelman v Herrill Bowling Corp.*, 49 AD3d 578 [2008]).

In any event, there is conflicting deposition testimony as to whether the plaintiff was supposed to perform any work at the premises other than to drop off the gutters. NCJ claims that L.I. Gutters was hired only to drop off the gutters and not to do any installation, field cutting or to take any measurements. Additionally, Luis Molina testified he took measurements and had given them to an employee of L.I. Gutters prior to the accident. He further stated that his company was hired to install the gutters. Inasmuch as there are issues of fact as to whether it was part of the plaintiff's work to be on the roof taking measurements at the time of the accident, the plaintiff failed to demonstrate that he was both permitted or suffered to work on a building or structure (*see Aloise v Saulo*, 51 AD3d 829 [2008]). Therefore, the plaintiff did not establish that he is covered by the provisions of the Labor Law.

Accordingly, the motion by defendant Leonardo Jedrzejczyk is granted and the complaint and all cross claims are dismissed against the defendant Leonardo Jedrzejczyk. The cross motion by the plaintiff for summary judgment is denied.

Dated: April 13, 2011

J.S.C.