

**Villalobos v Rivera**

2011 NY Slip Op 31753(U)

June 17, 2011

Sup Ct, Nassau County

Docket Number: 010761/09

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

**JUSTICE**

**TRIAL/IAS PART 18**

**X**

**MARCO A. VILLALOBOS,**

**Plaintiff,**

**Index No.: 010761/09**

**Motion Sequence... 01**

**Motion Date...04/26/11**

**-against-**

**XXX**

**DAVID RIVERA,**

**Defendant.**

**X**

**Papers Submitted:**

**Notice of Motion .....X**

**Affirmation in Opposition.....X**

**Reply Affirmation.....X**

Upon the foregoing papers, The Defendant's motion, pursuant to CPLR § 3212, seeking an order granting him summary judgment and dismissing the Plaintiff's complaint, is decided as hereinafter provided.

This is an action for personal injuries allegedly sustained by the Plaintiff, MARCO A. VILLALOBOS ("Villalobos"), when he fell from a ladder while working on a roof of the gazebo and/or porch at the Defendant's residence, located at 2 Family Lane, Levittown, New York on September 28, 2007. The Plaintiff commenced this action by the filing of a Summons and Complaint, dated June 4, 2009. Issue was joined by the service of

a Verified Answer, dated September 17, 2009.

As extrapolated from the deposition testimony of the parties, the Plaintiff, Villalobos, and the Defendant, Rivera, were introduced to one another by an electrician, Ray Vega, in or about January, 2007. (*See* deposition testimony of Villalobos, dated March 2, 2010, attached to the Defendant's Notice of Motion as Exhibit "E"; *see also* deposition testimony of Rivera, dated March 2, 2010, attached to the Defendant's Notice of Motion as Exhibit "F"). Initially, the Plaintiff was hired by the Defendant to assist Mr. Vega with the electrical work Mr. Vega was performing at the Defendant's home.

The Plaintiff testified that on the day before the accident the Defendant hired the Plaintiff to perform roofing work at the Rivera residence. *See* Exhibit "E", pages 17-18. Specifically, the Plaintiff was hired by the Defendant to install roofing shingles on the top of a porch. *Id.* The Plaintiff had approximately two years of experience with roofing work. *Id.* The top of the porch where the Plaintiff was to install the shingles was approximately ten feet in height. On the date of the accident, September 28, 2007, the Plaintiff arrived at the Defendant's residence at approximately 8 a.m. The Plaintiff testified that the Defendant told him to use the ladder that was left in the backyard and to use the materials that were previously left on the roof, as well as the shingles that were already at the premises. The Plaintiff brought his own tools, hammer and meter. *See* Exhibit "E", page 21. The Defendant testified that he ordered the shingles himself. *See* Exhibit "F", page 40. Further, the Defendant remained on the premises during the course of the work being performed on the

roof.

As adduced from the Defendant's deposition transcript, the materials that were provided to the Plaintiff remained on the roof from the time the previous contractor stopped working at the Defendant's residence, a period of approximately three to four months. *Id.* at page 40. Further, the ladder from which the Plaintiff fell was left at the Rivera residence by the previous contractor approximately six months prior to the date of the accident. The Plaintiff used the same ladder on several prior occasions without incident.

The Plaintiff testified that the Defendant came outside of his home to "take a look" at the Plaintiff's work on three occasions prior to the accident, and communicated that he was happy with the Plaintiff's work. *See* Exhibit "E", page 27. The Plaintiff also testified that he was told by the Defendant to perform the roofing from "left to right" because of the shape of the porch. As indicated in the Plaintiff's transcript, the Plaintiff already knew to start from left to right. No further instruction was given by the Defendant regarding the work to be performed.

The Plaintiff, without any assistance, brought the ladder from the back of the house to the front of the house, where the work was to be performed. He set up the ladder on his own, as he had done on many prior occasions, and did not tie off the top of the ladder to any portion of the house. *See* Exhibit "E", page 23. While the Plaintiff was at the top of the ladder placing the roof on the Rivera residence, at approximately 1:00 p.m., the ladder shifted approximately one to four inches which caused the Plaintiff to fall backwards

approximately ten feet. After falling off the ladder and before hitting the ground, the Plaintiff's right foot came into contact with a 2 X 4 blazer (support plank) which caused him to fall on his back. *See* Exhibit "E". The Plaintiff's right foot and leg became lodged underneath him when he came into contact with the ground which caused severe injuries.

The Plaintiff alleges in his Verified Bill of Particulars that he suffered severe injuries as a result of the accident, including, but not limited to, multiple right ankle fractures, painful and restricted ranges of motion of the right leg and ankle, post-operative pain, swelling and permanent scarring, right leg closed reduction splint/ace bandaging, right ankle surgery, leg cast application and the need for future right lower extremity hardware removal and future rehabilitative therapy. *See* Plaintiff's Verified Bill of Particulars, dated October 14, 2009, attached to the Defendant's Notice of Motion as Exhibit "D".

The underlying action was thereafter commenced on or about September 19, 2008, setting forth allegations predicated upon a common law negligence theory.

The Defendant's counsel contends that the Defendant cannot be found liable for the Plaintiff's injuries as the Plaintiff was essentially working as an independent contractor at the Defendant's home. Counsel posits that the Plaintiff acknowledged that the his use of the ladder on several prior occasions without incident, as well as the good condition of the ladder, is further evidence that the Defendant is not liable. Counsel further states that no evidence was proffered by the Plaintiff that establishes that a negligent or unsafe condition led to his fall. Rather, the Defendant's counsel argues that the Plaintiff's

accident was caused solely by the manner and/or method in which the Plaintiff was performing the roofing work.

The Defendant contends that, pursuant to the applicable law, the Plaintiff did not demonstrate that the Defendant had notice, either actual or constructive, of a dangerous or defective condition at the premises. Moreover, the Defendant's counsel avers that the Defendant neither created nor contributed to a dangerous condition on the premises. *See* Affirmation in Support, ¶ 8.

“A landowner must act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk”. *Basso v. Miller*, 40 N.Y.2d 233 (1976).

A business visitor is one who is invited to remain on property for a purpose directly or indirectly connected with business dealings with the possessor of the property *Restatement, Torts 2d*, § 332, subd [3]; *Meiers v. Koch Brewery*, 229 N.Y. 10, 13-14 (1920). The duty owed to an invitee is to use due care to keep the property in a reasonably safe condition so that invitees will not unnecessarily be exposed to danger. *See Haefeli v Woodrich Eng. Co.*, 255 N.Y. 442, 448 (1931); *Restatement, Torts 2d*, §§ 341A, 343, 343A; Prosser, *op cit* § 61, at pp 392-394. This includes an obligation to warn an invitee of any hidden danger if the possessor is unable to maintain the property in a reasonably safe condition. *See Schwab v. Rubel Corp.*, 286 N.Y. 525, 529-530 (1941); Prosser, *op cit*, at p

393.

The Defendant met his prima facie burden in establishing that the premises was maintained in a reasonably safe condition and, further, that the Defendant had no notice, actual or constructive, of a defective or dangerous condition on the premises. In opposition, the Plaintiff failed to raise an issue of fact with respect to the common law negligence claim.

As codified in Labor Law § 200, the common law duty owed by a landowner to laborers will not give rise to liability unless the property owner had constructive or actual knowledge of the dangerous condition. *See, Leon v. Peppe Realty Corp.*, 190 A.D.2d 400 (1st Dept. 1993). Moreover, it is settled that “[a]n owner’s duty to provide a safe workplace does not extend to injuries arising from a defect in the contractor’s own ... methods or through negligent acts of the contractor occurring as a detail of the work”. *Kelly v. Bruno & Son*, 190 A.D.2d 777, 778 (2d Dept. 1993), *quoting Rimoldi v. Schanzer*, 147 A.D.2d 541, 546 (2d Dept. 1989); *see also, Lombardi v. Stout*, 80 N.Y.2d 290 (1992). The Plaintiff failed to put forth sufficient evidence to raise an issue of fact as to whether the Defendant was on notice of a defective or dangerous condition on the premises.

In opposition to the motion for summary judgment, the Plaintiff alleges, for the first time, violations of Labor Law §§ 240 and 241 (6), as well as certain sections of the New York Industrial Code.

The Defendant correctly contends that the Plaintiff failed to adequately plead any Labor Law claim in their Complaint, and, further, failed to allege same in his Verified

Bill of Particulars. In order to defeat a motion for summary judgment, the Plaintiff cannot assert a new theory of liability raised for the first time in opposition. *See Epps v. State of New York*, 151 A.D.2d 545 (2d Dept. 1989) (city employee allegedly injured in fall required to cite specific section of Labor Law to state a claim); *see also, Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494 (1993). Here, the Plaintiff's Complaint and Verified Bill of Particulars failed to identify any specific safety regulation which allegedly was violated in this case. *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494 (1993); *Rojas v. County of Nassau*, 210 A.D.2d 390 (2d Dept. 1994).

Even if the Court were to consider the Plaintiff's attempt to raise allegations of violations of New York Labor Law §§ 240 and 241 (6), summary judgment in favor of the Defendant would still be warranted.

A review of the record reveals that the Defendant did not exercise the requisite direction and control required by the statute to overcome the one and two family dwelling exception recited therein. The testimony that the Defendant instructed the Plaintiff to perform the roofing work from "left to right" would be viewed as an instruction related to aesthetic design, no different than the type of control any homeowner has over work being done at their home. The phrase "direct or control" is construed strictly and refers to the situation where the "owner supervises the method and manner of the work". *Rimoldi v Schanzer*, 147 A.D.2d 541, 545; *see also, Duda v. Rouse Constr. Corp.*, 32 N.Y.2d 405 (1973). The premise of the exemption is that strict liability under the 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”. *Cannon v. Putnam*, 76 N.Y.2d 644, 649 (1990).

In the instant matter, both the Plaintiff and the Defendant testified that no instruction or assistance was provided to the Plaintiff regarding the work to be performed other than the instruction that the shingles were to be installed from “left to right”. Moreover, the Defendant did not direct or control the set up of the ladder which the Plaintiff had used on several prior occasions without complaint. *See Jumawan v. Schnitt*, 35 A.D.3d 382 (2d Dept. 2006) (summary judgment granted where there was no evidence that homeowner instructed the plaintiff or any workers as to how to perform their work or provided or suggested that any particular tools, materials, or safety devices be used).

Further, the mere fact that the ladder was provided to the Plaintiff is likewise insufficient to raise an issue of fact. *Patterson v. Pasa*, 203 A.D.2d 866 (3d Dept. 1994).

Accordingly, based upon the foregoing, it is hereby

**ORDERED**, that the Defendant’s motion, pursuant to CPLR § 3212, seeking an order granting him summary judgment and dismissing the Plaintiff’s complaint, is **GRANTED**.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York  
June 17, 2011

  
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Hon. Randy Spe Marber, J.S.C.

XXX

**ENTERED**  
JUN 21 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE