

Yanez v Kwan Shan Chan

2012 NY Slip Op 30796(U)

March 22, 2012

Sup Ct, Nassau County

Docket Number: 004748/10

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 14

_____ X

NALDO YANEZ,

Plaintiff,

Index No.: 004748/10

Motion Sequence...01

Motion Date...02/02/12

-against-

XXX

KWAN SHAN CHAN and TIK NA SUM
CHAN,

Defendants.

_____ X

Papers Submitted:

Notice of Motion.....X

Affirmation In Opposition.....X

Reply Affirmation..... X

Upon the foregoing papers, this motion by the Defendants, KWAN SHAN CHAN (“Kwan”) and TIK NA SUM CHAN (“Tik”), seeking an order pursuant to CPLR § 3212, granting them summary judgment based upon the homeowner’s exemption contained in New York’s Labor Law §§ 240 and 241 (6), is decided as hereinafter provided.

This is an action to recover damages for personal injuries allegedly sustained by the Plaintiff on November 5, 2009, at approximately 11 a.m. The Plaintiff commenced this action on March 10, 2010, by the filing of a summons and complaint. Issue was joined

by service of the Defendants' Verified Answer, dated June 29, 2010. The Plaintiff claims in his complaint that he was hired by the Defendant, Kwan, to perform certain construction work, labor and/or services upon the Defendants' premises located at 129 Kings Street, Hicksville, New York. (*See* Plaintiff's Complaint ¶8, dated March 4, 2010, attached to the Defendants' Notice of Motion as Exhibit "A") The Plaintiff alleges that he was caused to suffer personal injuries while performing the aforementioned work, labor and/or services at the Defendants' premises. (*Id.* at ¶ 28) The complaint advances causes of action pursuant to New York's Labor Law §§ 240 and 241.

The Defendants herein move for summary judgment, seeking dismissal of the Plaintiff's complaint based upon Labor Law § 240 (1). The Defendants contend that they are entitled to the "homeowners exemption" under Labor Law § 240 (1) as they did not "direct or control" the work being performed.

In support of the motion, the Defendants rely on the deposition testimony of the Plaintiff and the Defendant, Kwan. The Plaintiff testified that a construction worker, Jesus Moreno, brought him to the Defendants' residence and advised him of the stucco work that was to be performed there. (*See* Examination Before Trial of Plaintiff, dated February 24, 2011, pp. 36-37, attached to the Defendants' Notice of Motion as Exhibit "D") Mr. Moreno told the Plaintiff how much he was going to be paid. (*Id.* at 37) The residence was a one-story ranch. (*Id.* at 50) According to the Plaintiff's testimony, the Defendant, Kwan, was at the residence while the work was being performed for only a part of the day on a

Sunday. (*Id.* at 51) During the weekdays, the Defendant, Kwan, would leave at 8:00 a.m. The Plaintiff saw him in the morning prior to commencing the work and would not see him for the rest of the day. (*Id.* at 52)

On the day of the accident, the Plaintiff used a ladder to perform framing work above an overhang. (*Id.* at 60) Specifically, the Plaintiff was using a grinder to even out a piece of wood that was sticking out between the roof and the overhang. (*Id.* at 76) The Plaintiff was standing on the third step of the ladder when, after two minutes of grinding the wood, the ladder moved which caused the grinder to come down and cut his hand. (*Id.* at pp. 80-83) The Plaintiff testified that the ladder had four legs, all of which were on loose soil. One of the legs of the ladder sunk into the soil which caused the ladder to tip to one side, resulting in the grinder falling on the Plaintiff's hand. (*Id.*)

The Defendant, Kwan, also testified at an Examination Before Trial on February 24, 2011. Kwan testified that he hired Jesus Moreno to perform renovations to the home including framing, stucco work and some plumbing. (*See Examination Before Trial of Kwan*, pp. 9-12) Kwan hired between two and five people to perform the work. He testified that the work would begin at 8:30 a.m. and cease at 4:30 p.m., five days per week. Kwan left his home in the morning at 8:30 during the weekdays. (*Id.* at 15) According to the Defendant, Kwan, he only communicated with Mr. Moreno regarding the renovations and did not speak with Mr. Moreno's workers. (*Id.* at 15-16) He further testified that he did not own any of the tools utilized for the renovations. (*Id.* at 20) Prior to the date of the accident,

Kwan had made requests to change the work that was being done in terms of the size of the stucco. (*Id.* at 22)

Based upon the testimony of the Plaintiff and the Defendant, Kwan, counsel for the Defendants contends that the homeowner's exemption of the Labor Law is applicable as the Defendants did not direct or control the means and methods of the work. Additionally, counsel avers that the Plaintiff was not an employee of the Defendants. Counsel for the Plaintiff also contends that this is not a "height" case since the Plaintiff did not fall from any height.

In opposition, the Plaintiff refers to his own deposition wherein he testified that the Defendant, Kwan, instructed him and Mr. Moreno regarding what needed to be done before the work began. (*See* Exhibit "D", pg. 46) Specifically, according to the Plaintiff, the Defendant told him that he wanted to adapt another tube from the bathroom. (*Id.* at 47) Moreover, the Defendant communicated with him regarding the design and size of the stucco. (*Id.* at 69) The Plaintiff further states that Mr. Moreno told him that the grinder and the ladder belonged to the owner of the residence.

Additionally, the Plaintiff submits his Affidavit, sworn to on December 23, 2011. The Affidavit states that the Defendant, Kwan, hired him, paid him in cash and gave him and Mr. Moreno instructions on what to do and how he wanted it done. (*See* Yanez Affidavit, ¶ 2) The Plaintiff further states in his Affidavit that it was his understanding that the ladder and the grinder provided to him by Mr. Moreno were the property of the

Defendant, Kwan. (*Id.* at ¶ 4) According to the Plaintiff, the unstable ladder shifted causing him to lose his grip on the grinder. (*Id.*)

Based on the foregoing testimony, the Plaintiff contends that the Defendant, Kwan, directed and controlled the means and methods of the construction work due to the Defendant, Kwan's verbal instructions to the Plaintiff. Further, the Plaintiff contends that by providing the ladder and the grinder that were the cause of the accident, he provided "the equipment necessary to perform the work". See *Killian v. Vesuvio*, 253 A.D.2d 480 (2d Dept. 1998)

The language of Labor Law § 240 (1) expressly exempts "owners of one and two-family dwellings who contract for but do not direct or control the work". This 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 the statute. *Bartoo v. Buell*, 87 N.Y.2d 362, 368 (1996); see also *Cannon v. Putnam*, 76 N.Y.2d 644, 649 (1990); *Mayen v. Kalter*, 282 A.D.2d 508, 509 (2d Dept. 2001). Direction and control will be found where the owner "supervises the method and manner of the work, can order changes in the specifications, reviews the progress and details of the job with the general contractor, and/or provides the equipment necessary to perform the work". *Devodier v. Haas*, 173 A.D.2d 437, 438 (2d Dept. 1991).

As the party seeking summary judgment, the Defendants bear the initial burden of establishing their *prima facie* entitlement to judgment as a matter of law. *Giuffrida v.*

Citibank Corp., 100 N.Y.2d 72, 81 (2003); *Friends of Animals v. Associated Fur Mfrs.*, 46 N.Y.2d 1065, 1067 (1979). In order to satisfy their *prima facie* burden on the basis of the “homeowner’s exemption”, the Defendants are required to demonstrate not only that their house is a single or two-family residence, but also, that they did not “direct or control” the work being performed. *See* Labor Law § 240 (1); *see Arama v. Fruchter*, 39 A.D.3d 678, 679 (2d Dept. 2007).

The single-family homeowner exemption from liability under Labor Law § 240(1) is applicable here, as there is no dispute that the work being performed at the time of the Plaintiff’s accident was on a one or two family dwelling and was for a residential purpose.

The Defendants have established their *prima facie* showing that they did not “direct or control” the work being performed on their home. The statutory phrase “direct or control” is construed strictly and refers to situations where the owner supervises the method and manner of the work. *Boccio v. Bozik*, 41 A.D.3d 754, 755 (2d Dept. 2007); *Arama v. Fruchter, supra*; *Ferrero v. Best Modular Homes, Inc.*, 33 A.D.3d 847, 849 (2d Dept. 2006), *lv to app disp.* 8 N.Y.3d 841 (2007).

The record reveals that the Defendants were seldom on site while the work was being performed. The Defendant, Kwan’s instructions as to what he wanted done to the home and decisions regarding the size and design of the stucco were “no more extensive than would be expected of the ordinary homeowner”. *Lane v. Karian*, 210 A.D.2d 549 (2d Dept.

1994)

The Plaintiff has failed to raise an issue of fact as to the applicability of the homeowner's exemption. *Ortega v. Puccia*, 57 A.D.3d 54 (2d Dept. 2008). The hearsay evidence proffered by the Plaintiff, namely that Mr. Moreno "told him" that the ladder and grinder belonged to the Defendant, Kwan, is insufficient to raise a question of fact. Indeed, the record is devoid of any admissible evidence tending to show that the equipment used for the construction work was provided by the Defendants. Even in the event the ladder was provided by the Defendants, the record reveals that the ladder was placed on loose soil which was the cause of the accident, not that the ladder was in any way defective. The Plaintiff testified that one of the legs of the ladder sunk into the loose soil which caused the ladder to tip and the grinder to fall out of his hands. Where the alleged defect or dangerous condition arises from the subcontractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200. *See Comes v. New York State Elec. & Gas Corp* 82 N.Y.2d 876, 877 (1993).

Contrary to the Plaintiff's contentions, Mr. Moreno, if anyone, was supervising the method and manner of the work. The Plaintiff testified that Mr. Moreno advised him of the work that was to be performed at the Defendants' residence, advised him of his daily pay rate and made daily trips to purchase materials for the work being performed at the residence. (*See Exhibit "D"*, pp. 36-37) The Defendant, Kwan, did not become a general contractor, responsible for supervising the entire construction project and enforcing safety standards, by


virtue of the fact that he gave general instructions regarding the renovations.

Accordingly, it is hereby

ORDERED, that the Defendants' motion, seeking an order pursuant to CPLR § 3212, granting them summary judgment based upon the homeowner's exemption contained in New York's Labor Law §§ 240 and 241 (6), is **GRANTED**.

This decision constitutes the decision and order of the Court.

DATED: Mineola, New York
March 22, 2012



Hon. Randy Sue Marber, J.S.C.
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ENTERED
MAR 26 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE