

Pavon v Koral

2012 NY Slip Op 33782(U)

March 13, 2012

Supreme Court, Queens County

Docket Number: 32117/2009

Judge: Marguerite A. Grays

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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4
Justice

FILED
2012 MAR 26 A 10:49
QUEENS COUNTY CLERK
RECORDED

JOSE PAVON, x

Index
Number 32117 2009

Plaintiff(s)

SEE ENTRY IN CLERK'S MINUTES

-against-

Motion ON 2/28/2014
Date November 15, 2011 OF APPELLATE

DIVISION
YOSSEF KORAL, CITI STRUCTURE, L.L.C.
and CITI INSTRUCTURE.

Motion MODIFYING ON THE LAW AMENDING

Defendant(s)

Cal. Number VACATING REVERSING

THIS ORDER.

Motion No. 2011-10000 *Andrey D. Pfeffer*
Clerk

The following papers numbered 1 to 13 read on this motion by defendant Yossef Koral (Koral) for summary judgment dismissing the complaint and all cross claims; and on the cross motion by plaintiff Jose Pavon (plaintiff) for partial summary judgment on his claim brought under Labor Law § 240 (1).

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Reply Affidavits	12-13

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

This is an action to recover for personal injuries plaintiff allegedly sustained due to violations of Labor Law §§ 200, 240 (1), 241 (6), and common-law negligence. Plaintiff has alleged that while he was working on March 30, 2007, he fell from the roof of a single-family residence at premises located at 85-47 213 Street, in the County of Queens. Koral owned the premises and hired plaintiff's employer, third-party defendant Jose Roberto Garay, doing business as New Dawn Construction (Garay), via an oral agreement, to replace the roof of the residence.

Koral has moved for summary judgment dismissing plaintiff's claims brought under Labor Law §§ 240 (1) and 241 (6), and argued that he is entitled to the protection of the homeowners' exemption set forth in these sections. Plaintiff has opposed Koral's motion, cross-moved for partial summary judgment on his section 240 claim, and argued that Koral is liable under that section because he acted as the general contractor of the construction work at the premises.

Labor Law § 240 (1) provides that contractors, owners and their agents "shall furnish or erect, or cause to be furnished or erected . . . scaffolding . . . ladders . . . and other devices which shall be so constructed, placed and operated as to give proper protection" to workers employed on the premises. Under Labor Law § 241 (6), all contractors and owners must provide workers engaged in "construction, excavation or demolition work" with "reasonable and adequate protection and safety" in areas where such work is being performed. "To receive the protection of the homeowners' exemption [that has been set forth in these two sections], a homeowner must show the work was performed at a one- or two-family dwelling and that [he or she] did not direct or control the plaintiff's work" (*Gittins v Barbaria Constr. Corp.*, 74 AD3d 744, 745 [2010]; Labor Law §§ 240 [1], 241 [6]; see *Holifield v Seraphim, LLC*, ___ AD3d ___, 2012 NY Slip Op 01433, *2 [2012]; *Szczepanski v Dandrea Constr. Corp.*, 90 AD3d 642, 643 [2011]; *Rodriguez v Gany*, 82 AD3d 863, 864 [2011]). "The phrase direct and control as used in [Labor Law §§ 240 (1) and 241 (6)] is construed strictly and refers to the situation where the owner supervises the method and manner of the work" (*Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 849 [2006] [internal quotes and citation omitted], *lv dismissed* 8 NY3d 841 [2007]; see *Pascarell v Klubenspies*, 56 AD3d 742 [2008]). To be entitled to summary judgment on the instant motion or cross motion, there must be "sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]).

The record contains, among other things, Koral's deposition testimony and plaintiff's affidavit and testimony. Plaintiff testified that he was employed and supervised by Garay and that Garay provided him with all the materials and tools necessary for the roofing work he was instructed to perform at the subject premises, including the ladder involved in the accident. Plaintiff further testified that, at the time of the accident, he was standing approximately 20 to 30 feet above the ground, on the rungs of a 40-foot aluminum extension ladder, in order to perform his work. He testified that prior to the accident, his co-worker had been on the ground below him, handing plaintiff materials by climbing the same ladder up to him several times. Plaintiff testified that, as his co-worker climbed up the rungs of the ladder at ground level, the ladder shook and caused him to fall backward, approximately 30 feet, to the ground below. He testified that he was not provided with a lifeline, harness or

any safety lines to perform his work and stated in his affidavit that the ladder was not tied or secured in any way. Plaintiff admitted that he did not know who Koral was and that, on the date of the accident, the only individual present at the premises besides himself and his co-worker, was an unknown worker from a demolition company.

Koral testified that, at the time of the accident, his intended residence on the subject premises was a single-family home, that he personally hired various subcontractors to work on the renovation of the premises, including Garay, and that when he met with Garay prior to the commencement of the work, he discussed the price and payment for the roofing work and general safety standards he wanted met when the work was performed. He further testified that he was not present when the roofing work commenced. Although Koral testified that he supervised the overall work done at the premises, he testified that he did not have the authority to control the employees of subcontractors, did not provide any of the other subcontractors at the premises with any equipment, including Garay, or discuss the use of ladders or other safety equipment with Garay. It is undisputed in the record that Koral did not instruct plaintiff and did not direct or control plaintiff's performance of his work at the time of the subject accident (*see Gittins v Barbaria Const. Corp.*, 74 AD3d at 745). Furthermore, the record has demonstrated that Koral's supervision over the worksite did not rise to the level of direction and control over the method and manner of the work plaintiff was performing at the time of the accident, that is necessary for liability under Labor Law (*see Orellana v Dutcher Ave. Bldrs., Inc.*, 58 AD3d 612, 613-614 [2009], *appeal dismissed* 12 NY3d 804 [2009]; *Ortega v Puccia*, 57 AD3d 54, 60 [2008]; *Valentin v Thirty-Four Sq. Corp.*, 227 AD2d 467, 468 [1996]).

Although plaintiff has submitted an excerpt of a transcript from a Workers' Compensation Board hearing, in which Koral testified that he acted as the general contractor at the premises, Koral has stated that he meant only that he supervised the work. The court has taken the entire record into account and the totality of the circumstances, including plaintiff's evidence and his admission that he received instructions and equipment only from Garay. There are no triable issues of fact that the home on the premises was Koral's single-family residence and that Koral did not direct or control plaintiff's work at the time of the accident (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324). Therefore, plaintiff is not entitled to partial summary judgment on his claim brought under Labor Law § 240 (1), and based upon the above evidence, Koral has demonstrated prima facie entitlement to the homeowners' exemption and the dismissal of plaintiff's claims brought under Labor Law §§ 240 (1) and 241 (6) (*see Holifield v Seraphim, LLC*, ___ AD3d ___, 2012 NY Slip Op 01433 at *2; *Gittins v Barbaria Constr. Corp.*, 74 AD3d at 745; *Pascarell v Klubenspies*, 56 AD3d at 742).

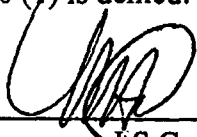
Additionally, Koral has moved for summary judgment dismissing plaintiff's claims brought under Labor Law § 200 and for common-law negligence. Labor Law § 200 "is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work" (*Ortega v Puccia*, 57 AD3d at 60). Labor Law § 200 provides that owners and contractors may be liable for injuries to workers where they supervised or controlled the work which caused the injury (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]; *Lombardi v Stout*, 80 NY2d 290, 295 [1992]). Claims brought under section 200 are generally brought in two possible categories, those where workers were injured as a result of dangerous or defective conditions on a work site and those involving the manner in which the work was performed (*LaGiudice v Sleepy's Inc.*, 67 AD3d 969, 972 [2009]). Where, as here, a claim arises out of the methods or materials of the work, an owner or general contractor may be liable if it is shown that he or she had the authority to supervise or control the work (*see LaGiudice v Sleepy's Inc.*, 67 AD3d at 972; *Ortega v Puccia*, 57 AD3d at 61-63).

The evidence in the record has served to demonstrate that, because Koral did not direct or control the method and manner of plaintiff's work which brought about the subject accident, he is not liable to plaintiff under Labor Law § 200 or for common-law negligence (*see Kajo v E. W. Howell Co., Inc.*, 52 AD3d 659, 661-662 [2008], *lv denied* 12 NY3d 713 [2009]; *Dupkanicova v Vasiloff*, 35 AD3d 650, 651 [2006]). Furthermore, the evidence has demonstrated that Koral was not present at the premises when plaintiff was working and was not aware of the lack of appropriate safety devices (*see Ford v HRH Constr. Corp.*, 41 AD3d 639, 641 [2007]). Therefore, defendant has demonstrated his prima facie entitlement to summary judgment dismissing these claims (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324), and in opposition, plaintiff has failed to raise a triable issue of fact (*see Kajo v E. W. Howell Co., Inc.*, 52 AD3d at 662).

Accordingly, Koral's motion for summary judgment dismissing plaintiff's complaint and the cross claims against him is granted. Plaintiff's cross motion for partial summary judgment on his claim brought under Labor Law § 240 (1) is denied.

Dated:

MAR 13 2012



 J.S.C.

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