

**Patino v Drexler**

2013 NY Slip Op 30693(U)

April 9, 2013

Sup Ct, New York County

Docket Number: 103348/2011

Judge: Saliann Scarpulla

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

SALIANN SCARPULLA

PRESENT: J.S.C. Justice

PART 19

Index Number : 103348/2011  
PATINO, JOSE  
vs.  
DREXLER, MILLARD  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

*Handwritten:* 4/9/13

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

decided per the memorandum decision dated 4/9/13  
which disposes of motion sequence(s) 002

**FILED**  
APR -9 2013  
COUNTY CLERK'S OFFICE  
NEW YORK

RECEIVED  
APR -9 2013  
EAS MOTION SUPPORT OFFICE  
NYS SUPREME COURT-CIVIL

Dated: 4/9/13

*Signature:* Saliann Scarpulla, J.S.C.

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

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: .....MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 19

-----X  
JOSE PATINO,

Plaintiff,  
-against-

Index No.: 103348/2011  
Submission Date: 12/19/2012

MILLARD DREXLER and PEGGY F. DREXLER

**FILED**

DECISION AND ORDER

Defendants.

APR - 9 2013

-----X  
For Plaintiff:  
Daniel J. Hansen, Esq.  
767 Third Avenue, 24th Floor  
New York, NY 10017

For Defendants:  
**COUNTY CLERK'S OFFICE**  
Havkins Rose **NEW YORK** & Varriale, LLP  
114 Old Country Road, Suite 300  
Mineola, NY 11501

Papers considered in review of this motion for summary judgment and cross motion for partial summary judgment:

Notice of Motion/Affirm. of Counsel in Supp/Memo of Law.....	1
Affirm. of Counsel in Opp. to Motion.....	2
Reply Affirm. of Counsel in Supp.....	3

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendants Millard Drexler and Peggy F. Drexler (“the Drexlers”) move for summary judgment dismissing plaintiff Jose Patino’s (“Patino”) complaint pursuant to CPLR § 3212.

Patino is a carpenter who performed construction and renovation work at a residence owned by the Drexlers, located at 16 Cliff Drive, Montauk, NY (“the premises”). Patino was employed by Wright & Company Construction, Inc. (“Wright & Company”), a contractor hired by the Drexlers to renovate the premises. The premises consists of a main residence, four cottages, a barn, and a garage.

Patino alleges that, on February 11, 2009, he was working at the premises, using a table saw to cut wood. While Patino was using the saw, his left hand came in contact with the blade, causing injuries to his left hand and fingers. Patino commenced this action seeking to recover damages for the injuries he sustained. He asserts negligence and Labor Law §§200, 240(1) and 241(6) causes of action against the Drexlers.

In his bill of particulars, Patino alleges that his injuries were caused by the table saw, which was dangerous and defective. Patino submits an affidavit stating that the table saw did not have safety features such as a guard or a cut-off switch.

In their motion for summary judgment, the Drexlers argue that: (1) Patino’s negligence and Labor Law § 200 claims should be dismissed because they did not direct, supervise, or control his work; and (2) Patino’s Labor Law § 240(1) and § 241(6) claims should be dismissed because they are entitled to the homeowner exemption as the premises consists of a one family dwelling.

In support of their motion, the Drexlers submit their own affidavits stating that they never provided any “supervision, direction or control over” over Patino’s work. The Drexlers also submit affidavits from Kenneth B. Wright (“Wright”) and Scott McMahon (“McMahon”) from Wright & Company, which state that the Drexlers never supervised or controlled Patino’s work, and that it was McMahon who supervised Patino. Wright and McMahon further state that the table saw and other tools used by Patino were supplied by Wright & Company.

The Drexlers argue that they are entitled to the homeowner exemption because the premises consists of one family dwelling. Millard Drexler states in his affidavit that the premises is “comprised of a main single family residential dwelling, four separate one story guest cottages for use by our family and friends, a barn and a garage.”

In opposition, Patino argues that the Drexlers’ motion should be denied because: (1) the Drexlers are not entitled to the homeowner exemption because the premises consists of five family dwellings; and (2) the motion is premature under CPLR § 3212(f) because the Drexlers have failed to respond to discovery requests and are in exclusive possession of facts necessary to oppose the motion.

Patino argues that the premises consists of five family dwellings: the main residence and the four cottages. In his affidavit, Patino states that he worked at the main residence as well as each of the four cottages over a six month period. According to Patino, “at least three different unrelated families lived at the property at 16 Cliff Drive: first, the defendants who lived in and used the main house; second, the household staff that lived in another house on the same property; and third, the groundskeeper who lived in a third house on the property.” According to Patino, the two cottages occupied by household staff and the groundskeeper each contain two bedrooms, two bathrooms, a living space, and a kitchen.

In reply, Millard Drexler submits a second affidavit stating that neither his children, nor the housekeepers Ana C. Mattos and Ofelia Battistini, and handy man Jose

Guarin, occupied any portion of the premises on the date of the accident. Mr. Drexler also stated that the premises “was not rented by anyone on February 11, 2009.”

### **Discussion**

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law and offer sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party to demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). A motion for summary judgment must be denied if there is any doubt as to the existence of a triable issue of fact. *See Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

#### **I. Negligence and Labor Law § 200**

In a negligence action, the plaintiff must show that: (1) the defendant owed a duty of reasonable care to the plaintiff; (2) the defendant breached that duty; (3) which caused plaintiff's injury. *Akins v. Glens Falls City School Dist.*, 53 N.Y.2d 325, 333 (1981). Labor Law §200 is a codification of the common-law duty imposed upon an owner or contractor to provide construction workers with a safe place to work. *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877 (1993).

However, a landowner will not be liable under Labor Law § 200 or under common law negligence principles for injuries sustained by workers on the property “in the

absence of evidence that the landowner exercised supervision or control over the work.”  
*Sheehan v. Gong*, 2 A.D.3d 166, 170 (1st Dep’t 2003).

Here, the Drexlers demonstrated their entitlement to judgment as a matter of law dismissing Patino’s negligence and Labor Law § 200 claims. Through the affidavits submitted, the Drexlers establish that they did not supervise or control Patino’s work. Wright and McMahon both stated that it was in fact McMahon who supervised Patino’s work, not the Drexlers. Wright and McMahon also stated that the table saw and other tools and equipment used by Patino were supplied by Wright & Company. Because the Drexlers are landowners who did not supervise or control Patino’s work, they are not liable for Patino’s Labor Law § 200 and negligence claims as a matter of law.

Patino failed to raise a triable issue of fact as to whether the Drexlers supervised or controlled his work. In fact, Patino did not submit any evidence on this issue.

However, Patino argues that the motion should be denied as premature pursuant to CPLR § 3212(f). Under CPLR § 3212(f), the court may deny a summary judgment motion if it appears “from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated.” Here, I find that Patino failed to show that essential facts may exist that cannot be stated at this time. Patino possesses sufficient facts to oppose this motion based on his first-hand knowledge of whether the Drexlers supervised or controlled his work, and the discovery responses provided by the Drexlers prior to Patino’s opposition to this motion.

Accordingly, the Drexlers' motion for summary judgment dismissing Patino's negligence and Labor Law §200 claims is granted.

## II. Labor Law § 240(1)

Labor Law § 240(1) imposes absolute liability on building owners, construction contractors and their agents with regard to elevation-related risks to workers at construction sites. *Rodriguez v. Forest City Jay St. Assocs.*, 234 A.D.2d 68, 68 (1st Dep't 1996). The statute was designed to prevent those types of accidents in which the protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person. *Runner v. New York Stock Exchange*, 13 N.Y.3d 599, 604 (2009).

Here, I find that the Drexlers demonstrated their entitlement to judgment as a matter of law dismissing Patino's Labor Law § 240(1) claim. Patino fails to make a *prima facie* showing that § 240(1) applies to the circumstances of this case. In his affidavit, Patino states that his accident was caused by a defective and dangerous table saw, which lacked safety features such as a guard and cut-off switch. However, Patino fails to submit any evidence to support a claim under Labor Law § 240(1) – i.e., he does not state that he fell, or that an object fell on him, due to an inadequate safety device designed to prevent an elevation-related risk. *Narducci v. Manhasset Bay Associates*, 96 N.Y.2d 259, 267 (2001).

Accordingly, the Drexlers' motion for summary judgment dismissing Patino's Labor Law § 240(1) claim is granted.

### III. Labor Law § 241(6)

Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers. *Ross v. Curtis-Palmer Hydro-Electric Company*, 81 N.Y.2d 494, 501-502 (1993). Labor Law § 241(6) is not self-executing, and in order to show a violation of this statute, the plaintiff must show that the defendant violated a specific regulation of the Industrial Code. *Walker v. Metro-North Commuter R.R.*, 11 A.D.3d 339, 341 (1st Dep't 2004).

Section 241(6) also provides an exemption from liability for "owners of one and two family dwellings who contract for but do not direct or control the work." Labor Law § 241(6) (known as the "homeowner exemption"). To claim the homeowner exemption, the defendant bears the burden of showing that: (1) he or she did not direct or control plaintiff's work; and (2) the plaintiff's work was conducted at a one or two family dwelling. *Chambers v. Tom*, 95 A.D.3d 666, 666 (1st Dep't 2012); *Chowdhury v. Rodriguez*, 57 A.D.3d 121, 126 (2d Dep't 2008).

Here, I find that the Drexlers made a *prima facie* showing that the homeowner exemption applies. First, the Drexlers established that they did not direct or control Patino's work as discussed above. Second, the Drexlers submitted evidence to show that the premises consists of a one family dwelling. The Drexlers stated in their affidavits that

they purchased the premises as a second home, and that they intended to occupy the main residence on the premises. Millard Drexler further stated in his affidavit that neither his children, nor the two housekeepers or handy man occupied the premises on the date of the accident.

Patino argues that the Drexlers are not entitled to the homeowner exemption as a matter of law because the premises consists of five family dwellings, not one family dwelling. Patino argues that the main residence and each of the four cottages constitute separate family dwellings.

Although section 241(6) does not define the term “family dwelling” – where there is evidence of independent housing units with separate living areas, those units may constitute separate family dwellings. *See Mandelos v. Karavasidis*, 86 N.Y.2d 767, 768-69 (1995) (finding a triable issue of fact as to whether two semiattached buildings each containing two separate apartments constitute separate family dwellings); *O’Brien v. Chih*, 236 A.D.2d 236, 237 (1st Dep’t 1997) (finding a triable issue of fact as to whether an existing home and two newly built two-family homes on same property constitute separate dwellings); *Hossain v. Kurzynowski*, 92 A.D.3d 722, 724 (2d Dep’t 2012).

Based on the documentary evidence submitted, I find that Patino raises a triable issue of fact as to whether three or more family dwellings exist on the premises. In his affidavit, Patino stated that two of the four cottages were occupied by the household staff and groundskeeper year round. Patino also stated that the two cottages contain their own

separate bedrooms, bathrooms, living area, and kitchen. This evidence was sufficient to raise a triable issue of fact as to whether the cottages constitute separate family dwellings. *Mandelos v. Karavasidis*, 86 N.Y.2d at 768-69. See also Multiple Dwelling Law § 4 (defining a family as “a person occupying a dwelling and maintaining a household... or two or more persons, occupying a dwelling, living together and maintaining a common household” and defining a dwelling as a building occupied as “the home, residence or sleeping place of one or more human beings”).

Moreover, although the Drexlers stated in their affidavits that the housekeepers and handy man did not occupy the premises on the date of the accident, the Drexlers did not state whether the housekeepers or handy man lived at the premises, or whether they paid rent or reduced rent as part of their salary. The availability of the homeowner exemption depends on the residential and commercial uses of the property, and must be determined by “the site and purpose of the work.” *Cannon v. Putnam*, 76 N.Y.2d 644, 650 (1990). Based on the affidavits submitted, I find that the Drexlers failed to demonstrate their entitlement to the homeowner exemption as a matter of law.

Accordingly, the Drexlers’ motion for summary judgment dismissing Patino’s Labor Law §241(6) claim is denied.

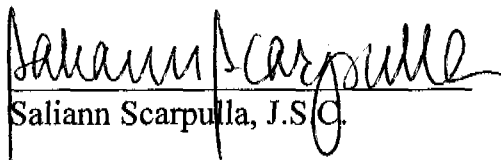
In accordance with the foregoing, it is hereby

ORDERED that defendants Millard Drexler and Peggy F. Drexler's motion for summary judgment dismissing the complaint pursuant to CPLR § 3212 is granted to the extent that the negligence, Labor Law § 200 and § 240(1) claims are dismissed, and the action shall continue as to the Labor Law §241(6) claim.

This constitutes the decision and order of the Court.

Dated: New York, NY  
April 9, 2013

ENTER:

  
Saliann Scarpulla, J.S.C.

**FILED**  
APR - 9 2013  
COUNTY CLERK'S OFFICE  
NEW YORK