

Pacheco v Smith

2013 NY Slip Op 30813(U)

March 7, 2013

Sup Ct, Suffolk County

Docket Number: 29049/10

Judge: Jeffrey Arlen Spinner

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DEFT'S
Proposed order
UC-001 11-15-11
7-18-12

NEW YORK STATE SUPREME COURT - SUFFOLK COUNTY

PRESENT: HONORABLE JEFFREY ARLEN SPINNER

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BRAULIO PACHECO AND GLORIA PACHECO,

Index # 29049/10

ORDER

Plaintiffs,

-against-

LAWRENCE SMITH,

Defendant.

MOTION SEQUENCE # 001-116 CABOD/SP
RETURN DATE 11-15-2011
FINAL SUBMITTED DATE 1-16-2013

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- Notice of Motion - Affirmation in Support - Exhibits
- Affirmation in Opposition - Exhibits
- Affirmation in Reply

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

This case involves personal injuries allegedly sustained by the plaintiff, BRAULIO PACHECO (hereinafter "PACHECO"), on July 6, 2009 at 1:30 p.m. when he fell from a ladder while working at the defendant's single family house located at 29 Smith Street, East Moriches, Suffolk County, New York. The plaintiff was hired by the defendant to build two small roofs over the back doors of his house and to finish the rear decking. As a result of the foregoing, plaintiffs' complaint alleges three causes of action for common law negligence, violation of Labor Law §200, and loss of consortium. Plaintiffs also allege in their Bill of Particulars violations of Labor Law §§240 and 241.

The defendant moves for summary judgment dismissing the plaintiffs' complaint against him on the grounds that (1) he is not liable for the plaintiff's injuries as he did not supervise, direct or control the plaintiff's work; (2) he did not create or have actual or constructive notice of any alleged dangerous condition; and (3) he is exempt from the strict liability provisions of Labor Law §§240 and 241 as the premises at issue was a single family home and he did not direct or control the work. The plaintiffs oppose the motion.

In support of summary judgment, the defendant submits copies of transcripts of the parties' Examination Before Trial testimony.

Plaintiff PACHECO testified that he was working for Dan Lodato as a carpenter at the time of the accident. He admitted that he has worked in the carpentry field almost his whole life. Mr. PACHECO learned what work he was going to be performing when he got to Mr. SMITH's house. Mr. PACHECO was familiar with the work he was doing at the defendant's house and knew how to do it.

Mr. PACHECO further testified that he did not know if anyone was instructing him on the day of the accident before the accident occurred. Mr. PACHECO did not know whether he set up the ladder in question on the date of the accident before the accident occurred.

Mr. PACHECO recalls that he was installing a roof over a rear door of the house at the time of the accident. He was working alone at the time. Mr. PACHECO testified that Mr. SMITH supplied the materials for the job. He claims that Mr. SMITH was helping him the day of the accident, but he could not recall if he was helping him up until the time of the accident. He also could not recall how Mr. SMITH was helping him that day, although he did at one point state that on prior occasions Mr. SMITH would hand him wood.

Mr. PACHECO was using a metal extension ladder at the time of the accident. He did not know who owned this ladder. He admitted to using this ladder before the accident without incident and specifically denied any problems with the ladder. The plaintiff claims that the ladder was positioned on the lower deck in the back of the house. He testified that the feet of the ladder were resting on a green, plastic tarp belonging to Mr. SMITH immediately before he fell. Mr. PACHECO claims that Mr. SMITH put the tarp on the deck as he did not want any garbage to get on the deck. He was present when the tarp was put down, but does not remember assisting Mr. SMITH in putting down the tarp. Mr. PACHECO did not complain about the tarp before his accident.

Mr. PACHECO testified that Mr. SMITH was not present at the moment of his accident and he does not remember any witnesses to his accident. Mr. PACHECO believes that the feet of the ladder slid backwards causing him to fall.

Plaintiff's wife, GLORIA PACHECO, testified that she did not witness her husband's accident. She testified that Mr. PACHECO had his own ladders and that he brought a metal ladder to the SMITH job. Ms. PACHECO learned from Mr. SMITH and her husband that Mr. PACHECO was working and the ladder he was on slid and he fell. Ms. PACHECO claims that her husband told her that Mr. SMITH had helped him during this job by passing him materials and tools.

Defendant SMITH testified that he lives at 29 Smith Street in East Moriches, NY with his family. He and his wife are the deeded owners of this private, single-family house. Mr. SMITH hired the plaintiff at the recommendation of Dan Lodato, a contractor he had previously worked with. Mr. PACHECO was hired to build two small roofs over the back

doors of his house and to finish the rear decking. The defendant admitted that he purchased the materials for this job, but only after consulting with the plaintiff.

Contrary to the plaintiff's testimony, Mr. SMITH denied assisting plaintiff with the work. The defendant never instructed the plaintiff on how to do the work and he never directed any changes be made to the work. According to the defendant, the plaintiff brought the metal ladder with him to the job. It was not Mr. SMITH's ladder and none of the ladders at the job were his. Mr. SMITH did not provide any tools to the plaintiff.

Mr. SMITH admitted that before the work commenced he told the plaintiff to protect the deck as it was newly installed and he did not want it to get damaged by falling materials or tools. He did not tell Mr. PACHECO how to protect the deck, but suggested that he could use a tarp or plywood, both of which Mr. SMITH had at the house at the time. According to Mr. SMITH plaintiff chose to use the tarp to protect the lower deck and Mr. PACHECO put the tarp down himself. Mr. SMITH denied helping to put the tarp down.

Mr. SMITH testified that he was not present at the time of the plaintiff's accident as he was at work. Mr. SMITH did not conduct any formal inspection of the work other than to look at it when he arrived home at the end of the day and determine whether it looked good.

Initially, the Court rejects plaintiffs' argument that the *Noseworthy* doctrine applies in the instant case. Plaintiffs maintain that the injuries sustained in this accident have affected Mr. PACHECO's memory of the events surrounding the accident and he should therefore be held to a lesser standard of proof. It is undisputed that defendant SMITH was not present at the time of the accident and there were no witnesses to the happening of the accident. The defendant does not have any unique knowledge regarding the circumstances surrounding the accident. Thus, the *Noseworthy* doctrine does not apply, and the plaintiff is not entitled to a lesser burden of proof,

as the defendant and the plaintiff are similarly situated insofar as accessibility to the facts of the plaintiff's accident. *Gayle v. City of New York*, 256 A.D.2d 541, 682 N.Y.S.2d 426 (2nd Dept. 1998).

It is well established that liability of a party pursuant to common law or under Labor Law § 200 arises when they have both exercised supervision and control over the worker's methods, and have actual or constructive notice of the dangerous condition. *Comes v. New York State Elec. And Gas Corp.*, 82 N.Y.2d 876, 609 N.Y.S.2d 163 (1993). It is alleged that the dangerous condition was the ladder set up on the tarp-covered deck. It is undisputed that Mr. SMITH was not present at the time of the accident. He did not assist in the building of the roof; he did not instruct the plaintiff on how to do the work; he did not provide the ladder or tools; and he did not set up the ladder before the accident. Merely helping the plaintiff by passing materials up to him as plaintiff alleges or requesting that his deck be protected does not establish that the defendant exercised supervision and control of the work performed at the site. "Although property owners often have a general authority to oversee the progress of work, mere general supervisory authority at a worksite for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law 200. A defendant had the authority to supervise or control the work for purposes of Labor Law 200 when that defendant bears the responsibility for the manner in which the work is performed." *Ortega v. Puccia*, 57 A.D.3d 54, 866 N.Y.S.2d 323 (2d Dept. 2008). In the instant case there is insufficient evidence to establish that defendant SMITH supervised, directed or controlled the plaintiff in the means and methods of his work.

In addition, no issue of fact has been raised as to whether the defendant created the allegedly defective condition or had actual or constructive notice of same. There is no evidence

in the record that the ladder or the tarp, independently, were in any way defective. The issue here is not the placement of the tarp, but rather the placement of the ladder. There is no evidence that Mr. SMITH set up the ladder, observed the ladder being set up or had any knowledge of how the ladder was set up before the accident.

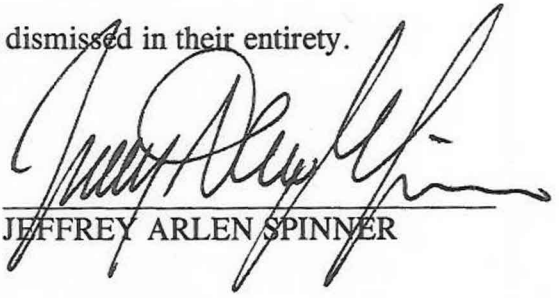
Defendant SMITH did not direct, control or supervise the means and methods of the plaintiff's work, and he had no notice of any allegedly dangerous condition. Accordingly, the defendant's motion for summary judgment dismissing the plaintiffs' claims predicated on common law negligence and Labor Law §200 is granted.

Although the defendant also moves to dismiss any claims pursuant to Labor Law §§240 and 241 based upon the exclusion from liability for owners of one-family dwellings "who contract for but do not direct and control the work" N.Y. Lab. Law §§240 & 241 (McKinney 2008), the Court recognizes that the plaintiffs did not plead in their Complaint any causes of action for violations of Labor Law §§240 and 241. They only raised these allegations in their Bill of Particulars. Moreover, the plaintiffs did not oppose that portion the defendant's motion seeking to dismiss any Labor Law §§240 and 241 claims and the plaintiffs have not presented any evidence in admissible form to establish that the defendant homeowner supervised and controlled the manner and method of the plaintiff's work. In any event, the Court finds that defendant SMITH has proved that he did not direct and control the plaintiff's work within the meaning of Labor Law §§240 and 241 as his involvement constituted "limited power of general supervision" that was no more extensive than a typical homeowner who hired a contractor to renovate their home and wanted certain actions taken to protect their premises or property. *Decavallas v. Pappantoniou*, 300 A.D.2d 617, 752 N.Y.S.2d 712 (2d Dept. 2002). As such, Mr. SMITH fits

squarely within the exception to the Labor Law for single-family homeowners and the defendant's motion for summary judgment dismissing any claims pursuant to Labor Law §§240 and 241 is granted.

In light of the foregoing, the claims asserted by plaintiff's wife, GLORIA PACHECO, for loss of consortium are also dismissed in their entirety.

Dated: ~~August~~, 2012
March 7, 2013


JEFFREY ARLEN SPINNER