

<b>Marcano v Hailey Dev.</b>
2013 NY Slip Op 33663(U)
October 17, 2013
Sup Ct, Bronx County
Docket Number: 0308961/2008
Judge: Alison Y. Tuitt
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[\* 1]

PART 05

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX:Case Disposed   
Settle Order   
Schedule Appearance -----X  
MARCANO, MICHAEL

Index No. 0308961/2008

-against-

Hon. ALISON Y. TUITT

HAILEY DEVELOPMENT

Justice.  
-----XThe following papers numbered 1 to 5 Read on this motion, SUMMARY JUDGMENT DEFENDANT  
Noticed on March 22 2013 and duly submitted as No. \_\_\_\_\_ on the Motion Calendar of 6/24/13

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2, 3	
Replying Affidavit and Exhibits	4, 5	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion is decided inaccordance with the annexed  
memorandum decision

Motion is Respectfully Referred to:

Justice:

Dated:

Dated: 10/17/2013Hon. ALISON Y. TUITT

ALISON Y. TUITT, J.S.C.

NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

MICHAEL MARCANO,

INDEX NUMBER: 308961/2008

Plaintiff,

-against-

Present:  
HON. ALISON Y. TUITT  
Justice

HAILEY DEVELOPMENT GROUP, LLC, MARK LASALA, LASALA CONTRACTING COMPANY, INC., NEW TOWN CORP., TOWN MASONRY CORP., BURNSIDE MECHANICAL, INC., MAGENTA ELECTRIC LLC and DESIGN LIGHTING BY MARKS, INC.,

Defendants.

The following papers numbered 1 to 5,

Read on this Defendant Mark LaSala's Motion for Summary Judgment

On Calendar of 6/24/13

Notice of Motion-Exhibits, Affirmation 1

Affirmations in Opposition and Exhibits 2, 3

Reply Affirmations 4, 5

Upon the foregoing papers, defendant Mark Lasala's (hereinafter "Lasala") motion for summary judgment is granted for the reasons set forth herein.

This is an action for personal injuries sustained by plaintiff arising out of an accident which occurred on February 27, 2007 while plaintiff was engaged in working on a construction and renovation of a basement project of the one family home owed by defendant Lasala and located at 10 Hope Farm Lane in Bedford, New York. Plaintiff has asserted causes of action under Labor Law §§ 241(6) and 200 and common law negligence. Defendant Lasala moves for summary judgment on the grounds that pursuant to Labor Law §

241(6), defendant is entitled to the exemption for one and two family dwellings. Defendant further argues that Labor Law § 200 is inapplicable because Lasala was not at the job site and did not control or direct the work being done. Plaintiff opposes the motion arguing that defendant Lasala was not the type of owner whom the exemption was designed to protect. Plaintiff argues that defendant is a project manager for his own contracting company, Town Masonry.

At the time of the accident, plaintiff was in the course of his employment with Promax Plumbing Corp. (hereinafter "Promax") which was owned by Max Montemagno. Plaintiff testified at his deposition that the only employees of Promax were plaintiff and Mr. Montemagno. Plaintiff was injured while working on this renovation job when in the process of cutting a PVC pipe with a saw, he caused injuries to his right hand. On February 20, 2007, plaintiff and Mr. Montemagno were hired by "Hailey" (defendant Hailey Development Group) to work on the basement of the subject premises. Plaintiff testified that the house was a one family home and that the work would take about one month. Mr. Montemagno spoke to him about the job and told him they were working for Hailey and whatever was needed to be done when they got to the job site, Hailey would instruct them what to do. Plaintiff testified that he was familiar with Hailey and he had met the owner Richard Petrosa previously and that he had also worked on a plumbing job at his residential home. When they arrived at the premises, Hailey was already on site; there were about five Hailey workers already there; plaintiff was able to identify them through their blue t-shirts which said "Hailey"; and there were no other contractors other than Hailey at the site. On that morning, plaintiff and Mr. Montemagno met with the foreman from Hailey, a man with a very heavy accent. Mr. Montemagno went over the blueprints with Hailey and Hailey told them where they were allowed to work, showed them the areas they wanted Promax to work as well as where they could set up their tools. Plaintiff and Mr. Montemagno brought their own equipment to this job. Plaintiff testified that the only person who directed his work was from Hailey.

Plaintiff also testified that his job involved cutting PVC piping and upon arriving at the job site, he was told by the Hailey contractor to use a saw that was on the floor in the middle of the room because that was the saw that they were using. Plaintiff noticed that the guard and vice were missing from the saw but he did not say anything because it was his first day on the job and he did not want to create any problems with the other contractors. Plaintiff testified that the saw he used which caused his injuries was the one Hailey told him to use, it was owned by Hailey and it was the only saw on site on the date of the accident. Plaintiff's accident occurred

the first day he was on the job site. Plaintiff further testified that he was aware the owners of the home were the Lasalas but he never saw them at the work site and he never met Mark Lasala. Plaintiff never had any dealings with the Lasala Contracting Company or any dealings with New Town Corporation or Town Masonry Company.

Defendant Lasala testified at his deposition that he did not perform any renovations on his home. Sometime in late December 2006, he hired a general contractor to turn his unfinished basement into a finished basement. Defendant testified that he is self employed and is the owner of Town Masonry Corporation, a masonry business. Defendant further testified that he was not involved in any of the work performed on his basement, nor did any of the companies he had been associated with perform any work in the basement. Defendant hired Hailey as his general contractor and they entered into a verbal agreement to build off the architectural drawings to develop and finish the basement. Defendant Lasala further testified that Hailey was responsible for hiring all of the sub-contractors for the project, including plumbing. Lasala was not involved in hiring any subcontractors, was not involved in approving work done by the subcontractors, nor did he pay the subcontractors. Lasala paid Hailey and Hailey was responsible for paying the subcontractors. Defendant Lasala also testified that he met with Hailey on the first day of the renovation to discuss logistics and thereafter he only dealt with the foreman from Hailey, Rich Petrosa, regarding any issues regarding the basement renovation. Lasala testified that the work performed in his basement was done strictly by Hailey and the subcontractors Hailey obtained. He did not provide any type of equipment or purchase any of the materials for the renovation. Hailey never presented him with any safety plans, safety documents, meeting minutes, logs or documents reflecting the daily work performed. Defendant Lasala further testified that he did not have any conversations with Hailey employees about the scope of the work to be performed, he did not direct them in terms of what they should be doing, he did not supervise any of the work being performed and he did not provide any employees with any personal protection equipment that was not available to them. With respect to Promax, Lasala testified that he did not converse with anyone from Promax about the scope of the work, nor did he direct any Promax employee in their work or provide them with any safety equipment. Finally, Lasala testified that he occasionally went down and inspected the work that was being performed and sometime after the incident, he had become unsatisfied with the work Hailey was performing. When Hailey was approximately 60% completed with the job, Lasala discharged them and engaged another general contractor to finish the renovation.

Gennadiy Khleborodov testified at a deposition on behalf of Hailey. He testified that he was employed by Hailey as a foreman and he was in charge of the job at the subject premises. On the date of the accident, there were four people working in the basement; two people from Hailey and two from Promax, and they worked separately from each other. Mr. Khleborodov testified that he had never heard of Mark Lasala. During the time that he was on the site, the owner was never a regular presence. He testified that he took direction from his boss, was supervised and directed by his boss to whom he reported on a daily basis and that person was Rich Petrosa. He further testified that Hailey brought their own equipment and tools to the job and the owner did not provide them with any tools. He believed that the saw used by plaintiff belonged to the plumbers and that the saw was old and not in great condition. Mr. Khleborodov saw plaintiff using the saw on the floor and stated that it was not placed on top of a table because there were no tables on site.

Maxwell Montemagno, President of Promax, testified at a deposition that he knew Richard Petrosa and knew Hailey to be the general contractor on the renovation. Promax was subcontracted to do the plumbing work on the project. Mr. Montemagno testified that he was familiar with Mark Lasala but he was not contracted by Lasala to do the work; he was contracted specifically by Hailey. There were no contracts between Hailey and Promax; it was a verbal agreement and handshake. He received payments only from Hailey. Mr. Montemagno brought his own equipment to the job site and that the saw that plaintiff used was not owned by Promax but belonged to Hailey. The day of plaintiff's accident was their first day on the job. At the time they arrived, people from Hailey were already there and they were let into the resident by Richard Petrosa. Hailey was directing their work. Lasala was not present when the accident occurred and he never had any conversations with Lasala as it related to the job. Lasala never instructed him or directed his work at the job site.

Richard Petrosa testified at a deposition that he is a managing member of Hailey whose responsibilities included overseeing daily operations and job site supervision. Hailey has four full time employees, one of which is Mr. Khleborodov. Lasala hired Hailey for the basement renovation and they had a verbal agreement. He would meet with Lasala to go over work and coordination. Mr. Khleborodov was in charge of the Hailey workers at the job site. Mr. Petrosa testified that he was hired directly by Lasala but maintained that he was not the general contractor for the project and did not know who was acting as the general contractor. Mr. Petrosa when asked who directed the work Hailey was doing, he stated he followed the

blueprints and spoke with Lasala; whom he testified directed his work, but did not supervise his work. Hailey obtained the permit for the job as the licensed contractor and Hailey was listed on the Building permit as the contractor. He further testified that Hailey was involved in hiring subcontractors but he did not bring Promax into the job; another business, Burnside Mechanical, brought Promax into the job. They did deal with Promax but he did not pay the trades and testified that Hailey did not pay Promax. However, during his deposition, Mr. Petrosa was presented with three checks which he identified as Hailey checks made payable to Promax which had been signed off by his accountant whom had permission of Hailey to sign the checks. Mr. Petrosa testified that the checks indicated a relationship between Hailey and Promax and based upon the checks, he testified that Promax was a subcontractor of Hailey. Hailey brought its own equipment to the job but that Hailey did not own a chop saw in 2007. He believed the saw belonged to Promax based on conversations with Mr. Montemagno who said he was going to throw the saw out because it had “bad karma”. He further testified that Lasala was not present at the site on the date of the accident.

The court’s function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*. The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the “burden of production” (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1<sup>st</sup> Dept. 1997).

An owner of a premises has a non-delegable duty under the Labor Law to provide a safe work

environment to workers. However, an implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition. Russin v. Louis N. Picciano & Son, 54 N.Y.2d 311 (1981) citing Reynolds v Brady & Co., 329 N.Y.S.2d 624 (2d Dept. 1972). Moreover, the work giving rise to these duties may be delegated to a third person or party. Russin 54 N.Y.2d at 317. (Although §§ 240 and 241 make these duties nondelegable, the duties themselves may in fact be delegated. When the work giving rise to these duties has been delegated to a third-party, that third-party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor.) Thus, the authority to supervise and control the work operates to transform the subcontractor into a statutory agent of the owner or construction manager. Kelly v. Diesel Construction Division of Karl A. Morse, Inc., 35 N.Y.2d 1 (1974).

Specifically, Labor Law §240(1) provides in pertinent part that: “[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect... for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.”

The question of whether an owner has sufficiently directed the work so as to lose the benefits of the single family homeowner exception depends on the degree to which the owner controls the particulars of the work. Ennis v. Hayes, 544 N.Y.S.2d 99 (4<sup>th</sup> Dept. 1989)(“Whether an owner’s conduct amounts to directing or controlling the work depends upon the degree of supervision exercised over the method and manner in which the work is performed.”); Chura v. Baruzzi, 596 N.Y.S.2d 592 )(3<sup>rd</sup> Dept. 1993)(“In analyzing whether a homeowner’s actions with respect to a particular construction or renovation project amount to direction and control thereof within the meaning of Labor Law §240(1), the relevant inquiry is the degree to which he or she supervised or directed the method and manner of the work.”); Rimoldi v. Schanzer, 537 N.Y.S.2d 839 (2d Dept. 1989)(“the phrase ‘direct and control’ contemplates the situation in which the owner supervised 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.”). As such, courts find a question of fact as to whether the homeowner is entitled to the exemption where “the homeowner’s involvement

went beyond the mere expression of dissatisfaction and demands for timely completion of the work. Garcia v. Martin, 728 N.Y.S.2d 455 (1<sup>st</sup> Dept. 2001). See also, Chura, supra (“Here, there can be no argument that defendant’s actions went well beyond those of an interested homeowner who simply presented his ideas and suggestions, made observations and inquiries, and inspected the work.”); Emmi v. Emmi, 588 N.Y.S.2d 481 (4<sup>th</sup> Dept. 1992)(“Defendant’s participation in the construction of his home, however, went far beyond ‘[a] homeowner’s typical involvement in a construction project’”.)

Defendant Lasala argues that this statute absolves him from any liability by virtue of the fact that the structure was a one family dwelling and argue that he did not exercise direction and control in the work. The exception to Labor Law §240(1) is limited to “owners of one and two-family dwellings”. However, plaintiff and defendant Hailey contend that defendant Lasala is not entitled to the exemption as he was not an ordinary homeowner as he is a project manager for his own contracting company, Town Masonry. They further argue that Town Masonry operates out of New York City and did not have the requisite license to acquire a permit for the subject project. They contend that Lasala request that defendant Hailey obtain the permit and that Hailey testified that it was not the general contractor, but was on site to do framing work only which would evolve based on defendant Lasala’s direction. Defendant argues that Mr. Petrosa’s testimony that Lasala ran the job on a day to day basis, that Lasala was involved with meeting in the morning to tell the workers what he wanted, that Lasala directed or supervised Promax and that Town Masonry workers were at the site shows that Lasala is not entitled to the exemption.

It is undisputed that the subject premises was a one family dwelling. Based on the testimony of the parties and the evidence presented, there are no questions of fact as to whether the exception to Labor Law §240(1) excluding “owners of one and two-family dwellings” applies here. The exception to Labor Law is limited to those “who contract but do not direct or control the work.” Here, other than ancillary unsubstantiated arguments, there is no evidence that Lasala directed, supervised or controlled any of the work at the construction site. All of the testimony, with the exception of Mr. Petrosa’s unsubstantiated claims, shows that Lasala was not involved in the renovation project.

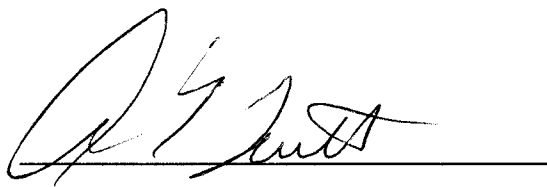
Labor Law §241(6) concerns reasonable and adequate protection and safety through the worksite. Labor Law §200 is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe site. In the instant action, the opposing parties have failed to establish that defendant Lasala

exercised supervision or control over the work plaintiff was performing when he was injured, as would subject him to a duty to provide a safe work environment.

Accordingly, for the reasons stated, defendant Lasala's motion for summary judgment is granted and the complaint against him is dismissed.

This constitutes the decision and order of this Court.

Dated: 10/17/2013

A handwritten signature in black ink, appearing to read "Alison Y. Tuitt", is written over a horizontal line.

**Hon. Alison Y. Tuitt**