

Peck v Szwarcberg

2013 NY Slip Op 33851(U)

March 27, 2013

Supreme Court, Saratoga County

Docket Number: 2010-3991

Judge: Ann C. Crowell

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

**GEORGE A. PECK, JR., Individually, and as
Administrator of the ESTATE OF BRETT R.
PECK, Deceased,**

Plaintiff,

-against-

JACOB D. SZWARCBERG,

Defendant and Third-Party
Plaintiff,

-against-

FISKE BUILDING CONSTRUCTION, LLC,

Third-Party Defendant.

DECISION and ORDER
RJI #45-1-2011-1653
Index # 2010-3991

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ANN C. CROWELL, J.

The defendant/third-party plaintiff, Jacob D. Szwarcberg ("defendant"), has requested an Order pursuant to CPLR §3212 granting summary judgment dismissing

the plaintiff's complaint against him. The third-party defendant, Fiske Building Construction, LLC ("Fiske LLC"), has also requested an Order pursuant to CPLR §3212 granting summary judgment dismissing the defendant's third-party complaint. The plaintiff has opposed both motions.

This is a personal injury action. The plaintiff's son, Brett Peck, was an employee of Fiske LLC. On October 20, 2008, Brett Peck was working at the defendant's home in an eight (8)-foot trench when the walls of the trench caved in around him, causing his tragic and untimely death. The plaintiff commenced this action against the defendant alleging violations of Labor Law §§ 200(1), 240, 241(6), and common law negligence. The defendant brought a third-party action against Fiske LLC seeking indemnification claiming that Brett Peck's death was caused solely by the alleged negligence and labor law violations of Fiske LLC.

The defendant asserts summary judgment should be granted pursuant to Labor Law §200(1) and common law negligence because the defendant did not have notice of any unsafe conditions or exercise supervisory control of Brett Peck's work. The defendant claims the Labor Law §§240 and 241(6) causes of action fail because those statutes exempt defendant from liability as an owner of a one-family dwelling who contracted for but did not direct or control the construction work.

In opposition, the plaintiff contends the defendant is not entitled to the liability protection afforded to single family homeowners because defendant acted as "general contractor" and maintained sufficient control of the work. Alternatively, the plaintiff argues there is a material question of fact as to whether the defendant's actions defeat the single-family exemption of Labor Law §§240 and 241(6).

Labor Law §§240(1) and 241(6) contain identical language exempting from the

statutory liability “owners of one and two-family dwellings who contract for but do not direct or control the work.” To receive the protection of the homeowners’ exemption, the defendant must show work was conducted at a dwelling that is a residence for only one or two families. *See Mandelos v Karavasidis*, 86 NY2d 767 [1995]. The defendant has shown this and it is not disputed. Additionally, the defendant must establish he did “not direct or control the work.” The owner must significantly participate in the project “before he or she will be deemed to have crossed the line from being a legitimately concerned homeowner to a *de facto* supervisor.” *Rosenblatt v Wagman*, 56 AD3d 1103 [3d Dept 2008], citing *Lieberth v Walden*, 223 AD2d 978 at 979 [3d Dept 1996].

The defendant hired several contractors to construct an addition to his family’s home. Fiske LLC was hired to do the excavation work and pour the foundation for the addition. Fiske LLC owner Steve Fiske (“Mr. Fiske”) and his employees Bryon Faulkner and Tyler Faulkner each testified at depositions that the defendant did not direct or control the manner in which they did their work. The defendant provided Mr. Fiske with blue prints for the job. Mr. Fiske prepared a proposal for the work. The defendant approved the scope and cost of the work. Fiske LLC ordered all the materials and provided all equipment. Fiske LLC was in charge of deciding how and when the work would be performed.

Mr. Fiske told Brett Peck what tasks he wanted accomplished on the job. A trench was dug with an excavator. Brett Peck climbed into the trench to check the grade and proper placement of the drain pipes. Mr. Fiske never provided Brett Peck any instructions regarding how and when to reinforce the walls of the trench while working in it. Furthermore, there was no trench box, sheeting or shoring system on site. Following the collapse of the trench, an investigation by OSHA was commenced and

Fiske LLC was cited for numerous OSHA violations.

The plaintiff argues the defendant engaged in actions that constitute control of the work. Specifically, the plaintiff alleges the defendant: hired an architect to draft the design plans in which the defendant was named as “the builder”; sought bids from subcontractors; applied for and signed the building permit on which his name appeared as “general contractor”; approved design changes; maintained an on-site presence; approved work completed by subcontractors; prepared the work site by pressure washing it; and was present on the day of Brett Peck’s death.

The defendant did discuss the excavation work with Brett Peck. He requested Brett Peck try to preserve the irrigation lines for the sprinklers. He also confirmed with Brett Peck a photo of the “check valve” would be taken. The defendant routinely reviewed the progress of the work. However, his participation was never so significant to support the conclusion that he directed or supervised the plaintiff’s work. See *Snyder v Gnall*, 57 AD3d 1289, 1290-91 [3d Dept 2008]. Defendant’s involvement in the project reflects typical homeowner interest in the work and does not constitute the kind of direction or control necessary to overcome the homeowners’ exemption from liability. See *Jonchuk v Weafer*, 199 AD2d 591 [3d Dept 1993] and *Chura v Baruzzi*, 192 AD2d 918 [3d Dept 1993]. Nor does inspection of the work as it progresses constitute the requisite direction or control necessary for the imposition of liability. See *Valentia v Giusto*, 182 AD2d 987 [3d Dept 1992].


Unlike the defendant in *Chura*, this defendant did not perform work on his own or oversee the project in its entirety, or organize the subcontractors and tell them where to work. *Chura v Baruzzi*, at 918. At most, the evidence presented by the plaintiff has

shown that the defendant monitored the progress of the work and was conscientious about meeting the building inspector's requirements for the addition to his home. There is no material question of fact that precludes the defendant from the protection of the homeowners' exemption under Labor Law §§ 240 and 241(6) causes of action.

Regarding claims under Labor Law §200 and common law negligence, Labor Law §200 is a codification of the common-law duty of property owners and general contractors to provide workers with a reasonably safe place to work. *See Lombardi v Stout*, 80 NY2d 290, 294. But where an alleged defect or dangerous condition arises solely from the contractor's methods, and the owner exercises no supervisory control over the operation, no liability attaches to the owner. *Id.* Fiske LLC directed and controlled all of the work. The defendant did not and there is no proof the defendant had any notice that the methods used were unsafe. Plaintiff's Labor Law §200 and negligence claims are dismissed.

The defendant's and the third-party defendant's motions for summary judgment dismissing the complaints against them are granted. Any relief not specifically granted is denied. No costs are awarded to any party. This decision shall constitute the Order of the Court. The original Decision shall be forwarded to the attorney for the defendant, Jacob D. Szwarcberg, for filing and entry. The underlying papers will be filed by the Court.

Dated: March 27, 2013
in Ballston Spa, New York

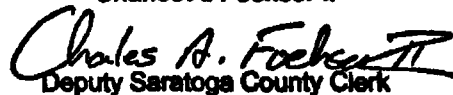

ANN C. CROWELL, J.S.C.
ENTERED
Charles A. Foehner II

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Papers Received and Considered:

Notice of Motion dated December 18, 2012


Deputy Saratoga County Clerk

Affirmation of Louise E. Dunn, Esq., dated December 18, 2012, with Exhibits A-H