

Davis v Petranek

2013 NY Slip Op 33909(U)

June 14, 2013

Supreme Court, Queens County

Docket Number: 28226/2011

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

OS

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

ORIGINAL

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RICKY DAVIS and SHERRIE DAVIS,

Index No.: 28226/2011

Plaintiff,

Motion Date: 03/13/13

- against -

Motion No.: 27

GREGOR C. PETRANEK, MICHELLE G.
PETRANEK and JACQUELINE M. GAUTHIER,
TRUSTEE OF THE JACQUELINE M. GAUTHIER
LIVING TRUST,

Motion Seq.: 2

2013 JUN 26 P 12:25
QUEENS COUNTY CLERK
FILED

Defendants.
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The following papers numbered 1 to 16 were read on this motion by plaintiffs RICKY DAVIS and SHERRIE DAVIS for an order pursuant to CPLR 3212 granting partial summary judgment on the causes of action for common law negligence and violation of Labor Law § 240(1):

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	1 - 7
Affirmation in Opposition-Affidavits-Exhibits.....	8 - 12
Reply Affirmation.....	13 - 16

In this action, plaintiffs seek to recover damages for personal injuries which arose as the result of plaintiff Ricky Davis' fall from a ladder on November 26, 2011 while he was making repairs to the exterior of the home owned by defendants Gregor C. Petranek and his sister Michelle G. Petranek.

Plaintiffs commenced an action by filing a summons and complaint on December 16, 2011. Plaintiffs' complaint asserts causes of action alleging common-law negligence and violations of Labor Law §§ 200 and 240(1). The complaint alleges that defendant

contracted with plaintiff to perform trimming and painting on the front portion of the defendants' home located at 77-37 170th Street, Fresh Meadows, Queens County, New York. The complaint states that on November 26, 2011, while engaged in trimming and painting the exterior of the defendant's house, the plaintiff placed a ladder against a column that went from ground level to roof level. Plaintiff alleges that the wood which formed the column was rotted and while he was performing his work the column against which the ladder was leaning collapsed. Plaintiff alleges that the occurrence was caused by the negligence of the defendants in the ownership, maintenance, and control of the premises and in failing to timely and properly inspect the defective column and the gutter above the column which leaked causing the wood above the column to become rotted and hazardous. As a result of his fall the plaintiff allegedly sustained severe and permanent injuries.

In addition to the cause of action for ordinary negligence and a violation of Labor Law § 200, plaintiff asserts a cause of action for a violation of Labor Law § 240(1) alleging that defendant, Gregor Petranek supervised and controlled the work being performed by the plaintiff, that the balcony and column were not constructed to provide proper protection to the plaintiff and the ladder on which plaintiff was engaged in his work was not safely placed and secured. Plaintiff also asserts a cause of action pursuant to Labor Law § 241(6) alleging that the area to which the plaintiff was assigned was not constructed, shored, equipped, guarded, arranged, operated and or conducted as to provide reasonable and adequate protection for the plaintiff. The complaint also asserts a cause of action on behalf of the plaintiff's wife, Sherri Davis, for loss of services.

Issue was joined by the service of defendants' verified answer with affirmative defenses dated January 20, 2012. The plaintiffs now move for summary judgment pursuant to CPLR 3212 on the two causes of action for violation of Labor Law § 240(1) and common law negligence on the ground that the evidence establishes that defendants were negligent in failing to maintain their premises in a reasonably safe condition and that the defendants failed to provide plaintiff with a safe place to work and failed to warn Ricky Davis of a dangerous and hazardous condition which defendant Gregor Petranek knew or should have known existed at the premises.

In support of the motion for summary judgment the plaintiffs annex copies of the pleadings; excerpts from the deposition transcripts of plaintiff Ricky Davis and defendant Gregor C. Petranek and a photograph of the column taken after the accident.

[* 3]

In opposition defendant contends that the motion for summary judgment is untimely having been filed with the court on February 21, 2013 which defendant contends is beyond the 120 day deadline for bringing summary judgment motions which expired on February 7, 2013. Counsel also objects to the deposition transcripts submitted by the plaintiff on the ground that the transcripts provided do not show that they were executed by the deponents and the excerpted portions provided do not contain the reporter's certification page and therefore defendant contends that the transcripts are not competent evidence.

Labor Law § 240 (1) provides that contractors, owners and their agents "shall furnish or erect, or cause to be furnished or erected ... scaffolding ... and other devices which shall be so constructed, placed and operated as to give proper protection" to workers employed on the premises. "In order to prevail on a cause of action pursuant to Labor Law § 240(1), a plaintiff must establish a violation of the statute and that such violation was a proximate cause of his or her injuries" (Rakowicz v Fashion Inst. of Tech., 56 AD3d 747 [2d Dept. 2008]; see Chlebowski v Esber, 58 AD3d 662 [2d Dept. 2009]).

Labor Law § 200 codifies the common-law duty imposed upon an owner or contractor to maintain a safe construction site (see Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343 [1998]; Colon v Bet Torah, Inc., 66 AD3d 731 [2d Dept. 2009]; Lane v Fratello Constr. Co., 52 AD3d 575 [2d Dept. 2008]). Liability for a violation of Labor Law § 200 and common-law negligence may be imposed upon a property owner where the plaintiff's injuries arose not from the manner in which the work was performed, but rather from an allegedly dangerous condition at the work site, when the owner had actual or constructive notice of the dangerous condition (see Hirsch v Blake Hous., LLC, 65 AD3d 570 [2d Dept. 2009]; Fuchs v Austin Mall Assoc., LLC, 62 AD3d 746 [2d Dept. 2009]; Lane v Fratello Constr. Co., 52 AD3d 575 [2d Dept. 2008]; Keating v Nanuet Bd. of Educ., 40 AD3d 706 [2d Dept. 2007]).

In support of the motion plaintiff has attached only partial and incomplete excerpts of the depositions of the parties which include only selected pages from the full deposition transcript. Moreover, many of the pages referred to by plaintiff's counsel in his affirmation in support of the motion are not attached to the portions of the transcripts provided to the court. Due to the incomplete and partial transcripts and the fact that pages referred to are missing from the motion papers, this Court is left to speculate as to the entirety of each parties testimony and why pages were omitted. Without the full and complete transcripts the court is unable to determine whether the

plaintiff sustained its burden of proof on the motion as the plaintiff has failed to eliminate all factual issues precluding summary judgment (see Lopez v Knipfing, 2013 NY Slip Op 30461(U) [Sup Ct Suffolk County, 2013]). Further, the unsigned partial transcripts of the examinations before trial are not in admissible form, are not accompanied by an affidavit pursuant to CPLR 3116, and fail to comport with the requirements of CPLR 3212. Although in its reply plaintiffs' counsel submits single pages containing signatures purportedly belonging to the parties as well as single pages containing certifications of court reporters, the pages are not attached to any transcripts and such cannot be accepted out of context. Therefore, the transcripts submitted are not admissible evidence for the purposes of the motion (see CPLR 3116[a] [b]; McDonald v Mauss, 38 AD3d 727 [2d Dept. 2007]).

Accordingly, for all of the above stated reasons, the plaintiffs' motion for an order granting partial summary judgment on the issue of liability is denied.

Dated: June 14, 2013
Long Island City, N.Y.



ROBERT J. MCDONALD, J.S.C.

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