SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

Cristina Flores, as Administratrix of the Goods, Chattels and Credits of the Estate of Samantha R. Gonzalez,
Plaintiff,

-against-

Gjelosh Nikac and Nina Nikac,
Defendant(s).

Index No. 303858/2011

DECISION and ORDER

Hon. Sharon A. M. Aarons:

Defendants move for summary judgment pursuant to CPLR 3212 dismissing the complaint. Plaintiff submits written opposition. The motion is granted in part and denied in part.

On October 3, 2010, the decedent Samantha R. Gonzalez, a 31 year-old school teacher, fell from the "flat" roof[1] of a one-storey building owned by defendant Gjelosh Nikac, sustaining injuries that resulted in her death on October 10, 2010. At the time of the accident, the decedent, as a favor to her "best friend," the owner's daughter defendant Nina Nikac, was placing a tarp over the roof to remedy a leak in the roof. The complaint seeks damages for wrongful death and pain and suffering. The bill of particulars and plaintiff's expert's disclosures allege that the defendants violated Labor Law §§ 200, 240 (1), and 241 (6), various section of the Industrial Code, and OSHA regulations.

In support of the motion, the defendants submit the pleadings, the amended bill of particulars, and plaintiff's expert disclosure pursuant to CPLR 3101-d; the deposition testimony of defendant Nina Nikac, and that of non-party witnesses Daisy Perea and Rosalva Lucero; and photographs of the roof and surrounding accident site. The testimony of defendant Nina Nikac indicates that she and the

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[1]Although considered a "flat" roof, and appearing so to the unaided eye, the plaintiff's expert calculated that the roof has a 14 degree slope.

decedent, who were close personal friends, had been on then roof on prior occasions "hanging out" when the defendants' family lived at the premises from which access to the roof was obtained through the window. On the day of the accident, the decedent (who was not employed to spread out the tarp, or receiving compensation of any kind) and Nina again gained access to the roof through the low window leading from the former bedroom in the adjoining building to the roof; Nina was able to step out over the radiator in front of the window. After spreading out the tarp, Nina turned her attention to cleaning out a drain near the same window which they used to access the roof. As Nina was doing this, she observed the decedent step backwards off the roof. The area of the roof over which the decedent fell was unprotected by any barrier, parapet or railing. Defendant argues that, based on the foregoing evidence, the decedent was a mere volunteer, and not within the class of persons protected by the Labor Law or regulations protecting workers, and thus the complaint must be dismissed.

In opposition, plaintiff relies on the evidence submitted by the defendants, as well as an affidavit by plaintiff's expert. The plaintiff does not offer any argument in support of her prior claims that the defendants violated the Labor Law or associated regulations governing work safety practices. Plaintiff points out that contrary to the testimony of defendant Nina Nikac, the non-party witnesses Daisy Perea and Rosalva Lucero testified at their depositions that they were in the restaurant of the building at which the accident happened; that they observed the decedent go to the roof while defendant Nina Nikac remained in the car; and that defendant Nina Nikac was in the car when the decedent fell. Plaintiff argues that apart from this factual dispute (and even if the Court were to accept as true defendant's version of the events), the defendants are nevertheless liable under common law principles for failing to secure the roof with a parapet, or otherwise protect the plaintiff from falling. Plaintiff's expert similarly does not identify any relevant regulation or building code provision which required railings or other installations to prevent falls from the roof.

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, 144 N.E.2d 387, 165 N.Y.S.2d 49 [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, 385 N.E.2d 1068, 413 N.Y.S.2d 141 [1978].) 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, 167 N.E.2d 328, 200 N.Y.S.2d 627 [1960]; *Sillman*, 3 N.Y.2d at 404).

Initially, the plaintiff has abandoned any reliance on Labor Law §§ 200, 240 (1), and 241 (6), the Industrial Code, or OSHA regulations. Plaintiff properly abandoned these arguments, as the Labor Law and related provisions do not apply to volunteers. (*Stringer v Musacchia*, 11 NY3d 212, 213, 898 NE2d 545, 869 NYS2d 362 [2008] [volunteer not covered by Labor Law § 240]; *Fuller v. Spiesz*, 53 A.D.3d 1093, 861 N.Y.S.2d 896 [4th Dept. 2008] [Labor Law §§ 240(1) and 241(6) are inapplicable to friends who voluntarily performed work on roof in exchange for promise of reciprocal help in future from defendant]; *Luthringer v. Luthringer*, 59 A.D.3d 1028, 872 N.Y.S.2d 779 [4th Dept. 2009] [dismissing volunteer's Labor Law §§ 200, 240(1) and 241(6) causes of action].)

Nevertheless, the fact that a plaintiff was a volunteer at the time of the accident does not absolve defendants of liability, if any, for common-law negligence. An owner of land has a duty under the common law to maintain its premises "in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*see, Basso v Miller,* 40 N.Y.2d 233, 241, 386 N.Y.S.2d 564, 352 N.E.2d 868 [1976]). The present case is controlled by *Kellman v. 45 Tiemann Assocs.* (87 N.Y.2d 871, 662 N.E.2d 255, 1995 N.Y. LEXIS 4743, 638 N.Y.S.2d 937 [1995].) In *Kellman*, issues of fact existed barring summary judgment in favor of the owner where a tenant climbed out of her apartment onto a fire

escape and sustain injuries by inadvertently misstepping and falling through the stairway opening in the fire escape landing. The owner's alleged compliance with the applicable statutes and regulations was held not to be dispositive of the question whether it satisfied its duties under the common law. The Court held that questions of fact were presented (1) whether it was foreseeable that tenants would use the fire escape landings to clean windows or for other purposes, and, if so, (2) whether defendant landlord exercised reasonable care to protect tenants from injuring themselves by falling through the unguarded hatchways in fire escape landings.

Here, the defendants were clearly aware that the roof was accessed through the window not just for repair, but indeed, in the past by defendant Nina Nikac for "hanging out." Despite the absence of any parapet or railing, the defendants in fact invited the decedent onto the roof for their own benefit. Issus of fact exist as to whether both defendants acted reasonably in inviting the plaintiff onto the roof, given the unguarded condition of the rooftop, and whether defendant Gjelosh Nikac was negligent as owner in failing to provide protection to persons whose presence on the roof was reasonably foreseeable.

The motion is granted in part, and denied in part. It is hereby,

ORDERED that all claims predicated on Labor Law §§ 200, 240 (1), and 241 (6) are dismissed; and it is further,

ORDERED that the defendants shall serve on the plaintiff a copy of this Order with Notice of Entry.

Dated: January 13, 2014

SHARON A.M. AARONS. J.S.C.