

Spielberg v Boemio
2015 NY Slip Op 30363(U)
February 11, 2015
Supreme Court, Bronx County
Docket Number: 15459/06
Judge: Wilma Guzman
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.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX**

Index No. 15459/06
Motion Calendar No. 24
Motion Date: 12/1/14

LEONARD I. SPIELBERG and CAROL MASONE,
As Executor/Executrix of the Estate of JOHN
LUCADAMO, Deceased,

Plaintiff,

-against-

DECISION/ ORDER
Present
Hon. Wilma Guzman
Justice Supreme Court

MICHAEL BOEMIO, MILLENIUM MASONRY, INC.,
KATHLEEN SZANTO and ALL PRO HOME CORPORATION
Defendant.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation in Support, and Exhibits thereto.....	1
Affirmation in Opposition of Motion and Exhibits thereto	2
Reply Affirmation	3

Upon the foregoing papers and after due deliberation, following oral argument, the Decision/Order on this motion is as follows:

Defendants Boemio and Szanto move this Court pursuant to C.P.L.R. 3212 dismissing the plaintiffs complaint and all cross-claims.

Defendant All Pro Home Corporation moves this Court for an Order dismissing the plaintiffs complaint and all cross-claims.

Plaintiff submitted opposition to both motions. For purpose of disposition, all motions are consolidated and decided as follows:

Defendant Boemio testified that both he and defendant Szanto are the owners of the property located at 6 Innisfree Place upon which he was constructing a home. Mr. Boemio hired All Pro Home Corporation to be the general contractor, there was no written contract. The home was three levels and there were plans to install an elevator to service all three levels. At the time of the plaintiff's accident the house was framed, the roof was on and the windows were in. All Pro did the

framework for the installation of the elevator. During construction the front entrance to the property was covered by a plywood door and there were no trespassing signs and the elevator shaft was covered with plywood. Mr. Boemio would visit the job site a couple of times a week but all information about the progress of the job came from All Pro. Mr. Boemio indicated that he met deceased plaintiff during the construction when the decedent would visit the property to chat. He last saw the decedent on the day of his accident. At that time the two by fours that were in front of the elevator shaft were still present. Upon his return to the property after decedent's accident, Mr. Boemio noticed the two by fours were off. Boemio owns a company that does stonework called Mastercraft, which is co-owned by his cousin Luis Tantilla. Millenium Masonry is a company owned by his cousins, however, plaintiff could not recall if he was a partner in this company.

Silvester "Sal" Salzano testified that All Pro was contracted to frame and sheetrock the house being constructed at 6 Innesfree Place. He testified that Mr. Boemio was the general contractor on the job and All Pro was a subcontractor. All Pro did not hire any subcontractor. Pursuant to an agreement in the contract, All Pro agreed to coordinate with the other trades doing work. Although Mr. Salzano testified that Mr. Boemio had a foreman. Mr. Salzano testified that on the day of decedent's accident, the work site was closed because it was Sunday. The opening for the elevator was protected with two by fours, plywood and a rail around it. To his knowledge the plumber also used the hole where the elevator would be located. There was also a "private property" sign and a fence around the property that would have to be dislodged in order to enter the property. Mr. Salzano testified that the Saturday afternoon prior to the decedent's Sunday accident, he placed some wood around the railing and plywood was placed around the elevator. Mr. Salzano's understanding was that no one was responsible for the safety on the job, however if someone removed the protection, it was their responsibility to put it back. Mr. Salzano testified that Milleinum Masonry was also working on the site. Mr. Salzano testified that the decedent would often come to the work site looking for plywood.

Richard Lazzari testified that in November 2005 he was the deputy building inspector for the Town of Eastchester. As such, he was familiar with the subject location doing routine inspections of the property. On one of these inspection dates, Mr. Boemio and the decedent were both present. The decedent was introduced to Mr. Lazzari as the next door neighbor who would come over to talk to the workers and go through the material waste pile. He also observed decedent on the property at times when Mr. Boemio was not present for the inspection. On the date of the decedent's accident,

Mr. Lazzari went to the scene. Although he observed evidence of a guardrail surrounding the hole in which decedent fell, he did not know who removed the guardrail which was now on the floor, or when it was removed. No violations were issued after the decedent's accident.

Christopher Johnson testified that he lived next door to the decedent. On the date of the accident, Mr. Johnson went looking for the decedent after being alerted that he was missing by his daughter. He found the decedent lying at the bottom of the hole. He did not recall seeing any fence around the property and noted that he did not have to climb over anything to gain access.

Leonard Spielberg, the co-executor of the decedent's estate testified that he had been to the subject property during construction prior to the decedent's accident and did not recall if he observed fencing on the property.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986) and Winegrad v. New York University Medical Center, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in Court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party. *See, Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dept., 1989). It is well settled that issue finding, not issue determination, is the key to summary judgment. *See, Rose v. Da Ecib USA*, 259 A.D.2d 258 (1st Dept., 1999). Summary judgment will only be granted if there are no material, triable issues of fact. *See, Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

At the outset, this Court finds the AllPro motion timely as it seeks the same judgment as the Boemio/Szanto motion for summary judgment. Burke v. Hilton Resorts Corp., 85 A.D.3d 419 (1st Dept. 2011). Furthermore, this Court dismisses all Labor Law claims as the plaintiffs have failed to show that decedent was working on the construction site at the time of his accident. Whelan v. Warwick Val Civic & Social Club, 47 N.Y.2d 970 (1979).

In eliminating the distinction between an invitee, licensee and trespasser, the Court of Appeals held that the liability of the owner of a land is measured by the "single standard or reasonable care under the circumstances." Basso v. Miller, 40 N.Y.2d 233 (1976). In providing "reasonable care" a landowner must take into account those individuals whose presence on the property might be foreseen. Scurti v. New York, 40 N.Y.2d 433 (1976). In the instant case, there

is no dispute that the decedent had been present on the property on several occasions, befriending both the owner and workers and being allowed to take waste materials from the site. As such, it can be argued that his presence on the property was foreseeable. See Fagan v. Long Island Realty & Development, Ltd., 17 Misc 3d 1115 (Sup. Ct. Nassau County 2007). Even if at very minimum, the decedent was considered a trespasser, the landowner must still exercise reasonable care to prevent injury. Kush v. City of Buffalo, 59 N.Y. 2d 26 (1983). Both Mr. Boemio and Mr. Salzano testified that the property was protected by a construction fence and that there was a plywood barricade surrounding the elevator shaft. In fact, Mr. Salzano testified that when he left the construction site the Saturday afternoon, before the decedent's accident, the barricade to the elevator shaft was in place. However, the testimony of Mr. Johnson and Mr. Speilberg raise issues of fact as to the credibility of the Boemio/Salzano testimony of the presence of the fence. Both Mr. Johnson and Mr. Speilberg testified that they did not recall seeing a fence and that the property was accessible without having to climb anything. This Court also notes that Boemio and Salzano also differ as to who is responsible for the placing the barricades around the elevator shaft. As such, questions of fact exist as to whether reasonable care was taken to prevent the decedent's injury.

Accordingly, it

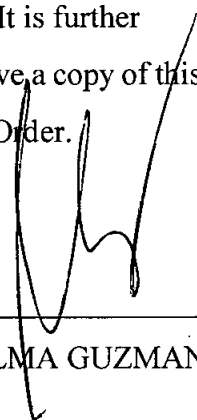
ORDERED that defendants Boemio and Szanto's motion for summary judgment is granted to the extent that all Labor Law claims are dismissed as to defendants Boemio and Salzano. All other portions of defendants Boemio and Szanto's motion are denied. It is further

ORDERED that defendants All Pro Home Corporations motion for summary judgment is granted to the extent that all Labor Law claims are dismissed as to defendants Boemio and Salzano. All other portions of defendant's All Pro's motion are denied. It is further

ORDERED that defendant Boemio and Szanto shall serve a copy of this Order with Notice of Entry upon all parties within thirty (30) days of entry of the Order.

This constitutes the decision and order of this Court.

DATE 2/11/15



HON. WILMA GUZMAN, JSC.