

Cassella v Katlenco Enters., Inc.
2015 NY Slip Op 30505(U)
March 31, 2015
Supreme Court, Suffolk County
Docket Number: 12-7303
Judge: Denise F. Molia
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INDEX No. 12-7303
CAL No. 14-00336OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 6-9-14 (#003)
MOTION DATE 8-15-14 (#004)
ADJ. DATE 10-24-14
Mot. Seq. # 003 - MG
004 - XMD

-----X
JOHN R. CASSELLA and JENNIFER
CASSELLA,

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- against -

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KATLENCO ENTERPRISES, INC., LEONARD
GRANELLI, JAMES HUDSON, CAM
HARDWOOD FLOORING, INC., OLD
WORLD MOULDINGS, MILLWORK and
FLOORING, DON KALOGERAS and JILL
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Defendants.
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Cassella v Katlenco
Index No. 12-7303
Page No. 2

Upon the following papers numbered 1 to 88 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 27; Notice of Cross Motion and supporting papers 28 - 55; Answering Affidavits and supporting papers 56 - 57; 58 - 59; 60 - 61; 62 - 63; 64 - 65; 66 - 76; Replying Affidavits and supporting papers 77 - 78; 79 - 80; 81 - 82; 83 - 84; Other memoranda of law, 85 - 86; 87 - 88; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Don Kalogeras and Jill Kalogeras for summary judgment dismissing plaintiffs' complaint against them is granted; and it is further

ORDERED that the cross motion by plaintiffs for summary judgment in their favor against defendants Katlenco Enterprises, Inc., Leonard Granelli, James Hudson, and CAM Hardwood Flooring, Inc. is denied.

Plaintiff John Cassella commenced this action to recover damages for personal injuries he allegedly sustained on January 14, 2012 while working on a renovation project at the home of defendants Don Kalogeras and Jill Kalogeras. The accident allegedly occurred when plaintiff was descending a temporary staircase and it collapsed, causing him to fall. The Kalogeras defendants had contracted with defendants Katlenco Enterprises Inc. and Leonard Granelli to be the general contractor for the renovation of a single family home located at 467 Links Drive South, North Hills, New York. Plaintiff, an independent contractor, was hired by the Kalogeras defendants to provide painting services for the subject premises. The complaint alleges causes of action against defendants for common law negligence, premises liability, and violations of Labor Law §§ 200, 240 and 241(6). The complaint also asserts a claim by plaintiff's wife, Jennifer Cassella, for loss of consortium and services.

The Kalogeras defendants now move for summary judgment dismissing plaintiff's Labor Law claims on the ground that they are exempted from liability for such claims under the statute's homeowner's exception. In support of their motion, the Kalogeras defendants submit, among other things, copies of the pleadings and transcripts of the parties' deposition testimony.

Defendants Katlenco Enterprises and Leonard Granelli oppose the motion by the Kalogeras defendants, arguing that a triable issue of fact exists as to the Kalogeras defendants' status as a contractor under Labor Law § 200 and common law negligence. Defendants CAM and James Hudson also oppose the Kalogeras' defendants' motion and both adopt the arguments of the Katlenco defendants.

Plaintiffs cross-move for summary judgment in their favor on the issue of liability as against defendants Katlenco, Granelli, Hudson, and CAM Hardwood, on the ground that they violated Labor Law §240(1) of the Labor Law by failing to ensure he was provided with a proper temporary staircase while working at the subject premises. Plaintiffs argue they established their claim pursuant to Labor Law §241(6), as defendants Katlenco, Granelli, Hudson, and CAM Hardwood violated 12 NYCRR 23-1.7(f). Plaintiffs further argue that they established their claim pursuant to Labor Law §200 as defendants Katlenco, Granelli, Hudson, and CAM Hardwood created and had notice of the alleged defect. Plaintiffs also oppose the motion by the Kalogeras defendants, arguing that a triable issue of fact exists as to whether the Kalogeras defendants directed and controlled the work performed at the

premises. In support of their motion, plaintiffs submit, among other things, copies of the pleadings and transcripts of the parties' deposition testimony.

Katlenco opposes plaintiffs' cross motion, arguing that a triable issue of fact exists as to whether it is liable. Katlenco also argues that defendant Granelli is not liable as he acted solely in his official capacity as owner of Katlenco and not in his individual capacity. Cam Hardwood opposes plaintiffs' cross motion, arguing that the cross motion was untimely and that plaintiffs failed to establish good cause for the late filing. Cam Hardwood also argues that plaintiffs are not viable against it, as it was not an owner or general contractor for purposes of liability under Labor Law §§240(1) and 241(6). It further argues that a triable issue of fact exists as to whether it had a duty to plaintiff. Defendant Hudson also opposes plaintiffs' cross motion and adopts the arguments of the Katlenco defendants and defendant CAM Hardwood.

The homeowner's exemption to liability under Labor Law § 240 and § 241 is available to "owners of one and two-family dwellings who contract for, but do not direct or control the work" (*see Castellanos v United Cerebral Palsy Assn. of Greater Suffolk, Inc.*, 77 AD3d 879, 909 NYS2d 757 [2d Dept 2010]; *Boccio v Bozik*, 41 AD3d 754, 839 NYS2d 525 [2d Dept 2007]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 823 NYS2d 477 [2d Dept 2006]; *Murphy v Sawmill Constr. Corp.*, 17 AD3d 422, 792 NYS2d 616 [2d Dept 2005]). The exception was enacted to "protect those who, lacking business sophistication, would not know or anticipate the need to obtain insurance to cover them against absolute liability" (*Acosta v Hadjigavriel*, 18 AD3d 406, 406-407, 794 NYS2d 445 [2d Dept 2005]; *see Szczepanski v Dandrea Constr. Corp.*, 90 AD3d 642, 934 NYS2d 432 [2d Dept 2011]). When the owner of a one-or two-family dwelling contracts for work that directly relates to the residential use of the home, the owner is shielded by the homeowner's exemption if the owner did not direct or control the work (*see Bartoo v Buell*, 87 NY2d 362, 639 NYS2d 778 [1996]; *Castellanos v United Cerebral Palsy Assn. of Greater Suffolk, Inc.*, 77 AD3d 879, 909 NYS2d 757 [2d Dept 2010], *lv denied* 16 NY3d 704, 919 N.Y.S.2d 119 [2011])

Here, the Kalogeras defendants established, prima facie, that they are entitled to the homeowner's exemption from liability under Labor Law §240 and §241(6) by demonstrating that the subject premises was a one-family dwelling used primarily for residential purposes, and that they did not direct or control plaintiff's work as those terms are defined by the statute (*see Duda v Rouse Constr. Corp.*, *supra*; *Nai Ren Jiang v Shane Yeh*, 95 AD3d 970, 944 NYS2d 200 [2d Dept 2012]; *Ruiz v Walker*, 93 AD3d 838, 940 NYS2d 896 [2d Dept 2012]; *Ortega v Puccia*, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]; *Umanzor v Charles Hofer Painting & Wallpapering, Inc.*, 48 AD3d 552, 852 NYS2d 205 [2d Dept 2008]; *Arama v Fruchter*, 39 AD3d 678, 833 NYS2d 665 [2d Dept 2007]; *Rodas v Weissberg*, 261 AD2d 465, 690 NYS2d 116 [2d Dept 1999]). Significantly, the Kalogeras defendants testified that they hired defendant Granelli, the owner of defendant Katlenco, to be the general contractor for the renovations and oversee the day-to day operations, and that Katlenco was in charge of coordinating the schedule of the contractors. While Mrs. Kalogeras testified that she visited the construction site every other day to discuss with Granelli or Hudson, the foreman, how the renovations were progressing, she only discussed with the contractors how she wanted things to look, and did not instruct them as to how to do the work. Furthermore, plaintiff testified that he provided his own paint,

rollers, brushes, and ladders, and that the Kalogeras defendants did not have input into his work other than regarding paint textures and aesthetics.

Plaintiffs and codefendants oppose the motion, but failed to raise any triable issues as to whether the Kalogeras defendants' supervision over the work-site was any more extensive than would be expected of typical homeowners who hired a contractor to renovate their home (*see Nai Ren Jiang v Shane Yeh, supra; Ruiz v Walker, supra; Chowdhury v Rodriguez, supra; Garcia v Petrakis*, 306 AD2d 315, 760 NYS2d 551 [2d Dept 2003]; *Edgar v Montechiari*, 271 AD2d 396, 706 NYS2d 117 [2d Dept 2000]; *compare Affri v Basch*, 13 NY3d 592, 894 NYS2d 370 [2009]). The testimony of Granelli, who states that the Kalogeras defendants directed and controlled the work of the subcontractor by hiring various subcontractors and scheduling when they would start work, reviewing the progress of the work and making general decisions, describes activities which are no more extensive than would be expected of an ordinary homeowner (*see Nai Ren Jiang v Shane Yeh, supra; Jumawan v Schnitt*, 35 AD3d 382, 825 NYS2d 728 [2d Dept 2006]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 823 NYS2d 477 [2d Dept 2006]).

The Kalogeras defendants are also entitled to summary judgment in their favor dismissing plaintiffs' claims under Labor Law §200 and common law negligence. "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]; *see Chowdhury v Rodriguez*, 57 AD3d 121, 128, 867 NYS2d 123 [2d Dept 2008]). Where a premises condition is at issue, an owner or contractor may be held liable for a violation of Labor Law § 200 if they either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*see Kuffour v Whitestone Const. Corp.*, 94 AD3d 706, 941 NYS2d 653 [2d Dept 2012]; *Azad v 270 Realty Corp.*, 46 AD3d 728, 730, 848 NYS2d 688 [2d Dept 2007]). In contrast, when a claim arises out of alleged dangers in the method of the work or the use of defective equipment, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work or the provision of the alleged defective equipment (*see Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 352, 670 NYS2d 816 [1998]; *Persichilli v Triborough Bridge & Tunnel Auth.*, 16 NY2d 136, 262 NYS2d 476 [1965]; *Ortega v Puccia, supra*).

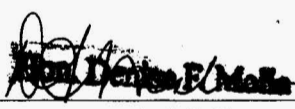
Here, the Kalogeras defendants have established that they did not create or have notice of the alleged defective condition (*see Rojas v Schwartz*, 74 AD3d 1046, 903 NYS2d 484 [2d Dept 2010]; *Ortega v Puccia*, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]; *Payne v 100 Motor Parkway Assoc., LLC*, 45 AD3d 550, 553, 846 NYS2d 211 [2d Dept 2007]). The Kalogeras defendants both testified that they did not install the temporary staircase, and that they did not observe them to be unsafe or dangerous before the subject accident. Further, as noted above, the evidence demonstrates that the Kalogeras defendants did not possess the authority to supervise or control plaintiff's work, and that their involvement during the project was limited to general supervision of the progress of the work, the aesthetics and design of the work, and urging the workers to complete the project on schedule. Additionally, the evidence reveals that Katlenko installed the temporary staircase. The burden, therefore, shifted to plaintiffs and codefendants to raise triable issues in opposition requiring denial of

the motion (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]).

In opposition, defendants Katlenco, Granelli, Hudson, and CAM Hardwood and plaintiffs fail to raise any triable issues as to whether the Kalogeras defendants created or had notice of the alleged defective condition, or whether any of them had the authority to supervise or control the temporary staircase which plaintiff fell from (*see Persichilli v Triborough Bridge & Tunnel Auth.*, *supra*; *Tomecek v Westchester Additions & Renovations, Inc.*, 97 AD3d 737, 948 NYS2d 671[2d Dept 2012]; *Ortega v Puccia*, *supra*; *Garcia v Petrakis*, *supra*; *Decavallas v Pappantoniou*, 300 AD2d 617, 752 NYS2d 712 [2d Dept 2002]). Accordingly, the motion by the Kalogeras defendants for summary judgment dismissing the complaint against them is granted.

As to plaintiffs' cross motion for summary judgment in their favor, CPLR 3212(a) provides that, unless the court fixes a deadline for filing a summary judgment motion, such motion shall be made no later than 120 days after the filing of the note of issue, except with leave of court on "good cause" shown. Here, the note of issue was filed on February 28, 2014. Therefore, any motion for summary judgment had to be made by June 27, 2014. Plaintiffs, without leave of court, cross-moved for summary judgment on August 13, 2014. While counsel for plaintiffs states that the reason for the delay was because he had to select, prepare and conduct three trials between May and August of 2014, demands of other matters handled by counsel is not a meritorious reason for delay (*see generally State Farm Fire & Cas. v Parking Sys. Valet Serv.*, 48 AD3d 550, 849 NYS2d 891 [2d Dept 2008]; *McNally v Beva Cab Corp.*, 45 AD3d 820, 846 NYS2d 328 [2d Dept 2007]). In addition, while it is true that an untimely cross motion for summary judgment may be considered by the court where a timely motion for summary judgment was made, the timely motion must be based on "nearly identical" grounds (*see Alexander v Gordon*, 95 AD3d 1245, 945 NYS2d 397 [2d Dept 2012]; *Grande v Peteroy* 39 AD3d 590, 833 NYS2d 615 [2d Dept 2007]). Here, the timely motion by the Kalogeras defendants and the untimely cross motion by plaintiffs were not made on nearly identical grounds, as the Kalogeras defendants' motion focused on the homeowner's exemption to Labor Law §§240 and 241 (*see generally Bickelman v Herrill Bowling Corp.*, 49 AD3d 578, 853 NYS2d 383 [2d Dept 2008]; *Filannino v Triboro Bridge and Tunnel Authority*, 34 AD3d 280, 824 NYS2d 244 [1st Dept 2006]). Hence, the court is without discretion to consider plaintiffs' late motion, whether meritorious or not (*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 786 NYS2d 379 [2004]; *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]). Accordingly, the cross motion by plaintiffs for summary judgment in their favor is denied.

Dated: 3-31-15



A.J.S.C.

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