Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE RUDOLPH E. GRECO, JR. IAS PART 32
Justice

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STANLEY BRUNSON,

Plaintiff,

-against-

THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION and NAZLI BEGUM,

Defendants.

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Index No.: 701325/2013

Motion Dated: April 15, 2015
Seq. No.: 4
Cal. No.: 19

The following papers numbered 1 to 7 read on this motion by defendant Nazli Begum for summary judgment, dismissing plaintiff's complaint pursuant to CPLR §3212.

	Papers Numbered
Notice of Motion, Affirmation.....	1-3
Opposition.....	4
Reply, Exhibit.....	5-7

Upon the foregoing papers, it is ordered that this motion is determined as follows:

FACTUAL BACKGROUND

Plaintiff commenced this labor law claim pursuant to sections 200, 240(1) and 241(6) alleging he sustained serious injuries as a result of unsafe working conditions existent at the defendant Nazli Begum's[1] residence located at 139-13 87th Drive, Jamaica, New York ("the property") while he was assisting in renovations to such property on April 29, 2012. The property is a one family home with a converted basement wherein plaintiff resided as defendant's tenant for approximately 9 years prior to the underlying accident. Defendant and her family, including husband, 2 sons and daughter lived in the home as well.

Plaintiff filed his complaint as well as a bill of particulars and was deposed. Defendant was deposed, and in connection with this motion submitted the affidavit of her eldest son along

[1]The New York City Health and Hospitals Corporation is no longer a defendant in this action, all claims against them having been dismissed by Order dated July 31, 2014 (J. O'Donoghue.)

with Michael Stephenson, a contractor allegedly involved in this incident and often hired by defendant to perform work at the property. The accounts of the accident follow.

Within the complaint plaintiff asserts that defendant hired and/or retained him to perform construction work at the property, and in his bill of particulars he alleges the accident occurred pursuant to an instruction from the defendant to carry a cast iron bathtub down the stairs; one of the carriers lost their grip on the tub and it fell on plaintiff's foot causing injury. His testimony, somewhat contradictory indicates that he was hired by "Mike" the contractor who paid him $100.00 per day to assist in a complete demolition/renovation to the property[2]. As part of such demolition he was removing the cast iron tub from the second floor bathroom, along with the contractor and defendant's two sons when again, one of them lost their grip and it fell. The situs of the fall was in the backyard, after the tub had been carried down the stairs. Also, in a contrary fashion, plaintiff testified that defendant and her family were consistently present during the renovation, but defendant herself was not there on the date of the incident. He stated generally that defendant's sons actively participated in the whole of the renovations, providing direction and guidance including direction at the instant of the accident. However, he also indicated that no one instructed him as to how to take the tub down the stairs, and the only communication between the carriers was plaintiff asking "are you ready?'.

Defendant testified and confirmed that plaintiff had resided in her home, that she asked him to vacate the basement apartment by April 2012 so that her son could occupy same upon his engagement, and that she often hired a contractor Mike to perform various projects on the house. She denies however, ever employing, directing, supervising or observing plaintiff with respect to any work done on the home and that she completely renovated the house in April 2012. Rather, she claims to have hired Mike at that time to fix a leak in the second floor bathroom and to paint, and in connection with these repairs she does not recall being told the tub was being removed. However, she did testify that she now has a new bathtub, but could not recall when same was installed and the type of tub present prior thereto. Also, she was not present when this repair was done. Defendant further denies that her son assisted Mike with any work performed at that time. While he may have been present during the work, he was there to help her communicate with Mike given his English fluency. Finally, she claims to have been unaware that plaintiff was injured allegedly performing work at her home until she received a letter from plaintiff's attorney.

Defendant's eldest son corroborated that in April 2012 Mike was hired to repair a leak in the second floor bathroom and may have had to replace tiles in connection therewith. He states that he aided his mother in communicating with Mike, but did not have any authority to order or direct Mike with respect to repairs/renovations made, or to make decisions save minor cosmetic ones. Further, that although he may have accompanied Mike to purchase materials and was present in the home during the work, he never assisted with any tasks. With respect to the allegations in this matter, he declares that he neither saw nor asked or directed plaintiff to perform work at the home, and he wouldn't do so based on his physical condition. He denied any involvement in and knowledge of the tub being removed from the second floor bathroom.

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[2]Notably, plaintiff did not sue the contractor, nor was he joined in this action.

Finally, by virtue of an affidavit Mike the contractor also confirms that in April 2012 he was hired by defendant to repair a leak in the bathroom. He denies being contracted to perform demolition, removing a tub, hiring plaintiff or seeking assistance from defendant's son. He also denied that anyone was injured while performing work on defendant's home in April 2012.

APPLICABLE LAW & DISCUSSION

In seeking summary judgment, it is well settled that the proponents must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact, (*see* CPLR §3212[b]: Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 852 [1985]); Zuckerman v. City of New York, 49 N.T.2d 557, 562 [1980].

Labor Law §240(1)

More specifically, to prevail on summary judgment in a Labor Law §240(1) case an injured worker must demonstrate the existence of a hazard contemplated under that statute "and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein", (*see* Narducci v Manhasset Bay Assoc., 96 NY2d 259, 267 [2001] *citing* Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]; *see also* Fabrizi v 1095 Ave. of the Americas, 22 NY3d 658, 662 [2014]). Essentially, the plaintiff when applying the statute to a falling object case must demonstrate a hazard relative to an elevation differential, (*see* Rocovich v Consolidated Edison Co., 78 NY2d 509, 514 [1991]), and "that the object fell, while being hoisted or secured, because of and/or the absence or inadequacy of a safety device such as, for example a scaffold, hoist, sling, or pulleys, (*see* Narducci at 268; *see also* Wilinski v 334 E. 92nd Hous. Dev. Fund Corp., 18 NY3d 1, 7 [2011], Quattrocchi v F.J. Sciame Constr. Corp., 11 NY3d 757, 758 [2008], Ross v DD 11th Ave., LLC., 109 AD3d 604, 605 [2nd Dept. 2013]).

Defendant has established her prima facie entitlement to summary judgment dismissing the cause of action alleging a violation of section 240(1) to that extent that circumstances of this falling object case do not fit within those contemplated in such statute, (*see e.g.* Runner v New York Stock Exch., Inc., 13 NY3d 599 [2009], Rodriguez v Margaret Tietz Ctr. for Nursing Care, Inc., 84 NY2d 841 [1999], Mendez v Jackson Dev. Group, Ltd., 99 AD3d 677 [2nd Dept. 2012], Carroll v Timko Contr. Corp., 264 AD2d 706 [2nd Dept. 1999]). The object fell while being carried by hand across a level surface. Plaintiff failed to raise an issue of fact or to demonstrate with any support that section 240(1) is applicable.

As the Court has found the whole of section 240(1) inapplicable to the present matter, it necessarily passes on the issue of whether the homeowners' exception found therein applies here, and the arguments relative thereto. However, same will be dealt with in connection with Labor Law §241(6)

Labor Law §241(6)

Section 241 which deals with construction, demolition and excavation contains a similar homeowner's exception as section 240(1) and they have been subject to the same analysis and application, (*see* Cannon v Putnam, 76 NY2d 644, 650 [1990]; *see also* Bartoo v Buell, 87 NY2d

362, 368 [1996]). Essentially, owners of one and two family homes who contract for but do not direct or control the work done are exempt from liability under such statute, (*see* Labor Law §241). Defendant argues that this exception applies in that she contracted to have work performed on her one-family home and did not direct or control such work. Further, that she was not even present when the work was performed and was not aware that the plaintiff was assisting with the work. Plaintiff counters that the premises was being used for commercial purposes and that defendant/owner acted through an agent, her eldest son in directing the work.

Plaintiff's first contention based on defendant's rental of the basement must be categorically dismissed. While one or two family homes used entirely and solely for commercial purposes do not enjoy the benefit of the exception, (*see* Van Amerogan v Domini, 78 NY2d 880, 884 [1991]), those with a mixed use are subject to a flexible "site and purpose" test, (*see* Cannon at 650; *see also* Bartoo at 368 [1996], DeSabato v 674 Carroll Street Corp., 55 AD3d 656, 658 [2nd Dept. 2008], Ramirez v Begum, 65 AD3d 578 [2nd Dept. 2006]). Here, the removal of the tub,(if in fact same was removed), directly related to the residential use of the home as defendant resided in that portion of the home allegedly being renovated, (*see e.g.* Bartoo at 367-68, Ramirez at 578).

As to their arguments relative to agency direction, "for one person to be directed by another, there must be supervision of the manner and method of the work to be performed. These words are to be construed strictly and literally", (Duda v Rouse Construction Corp., 32 MY2d 405, 409 [1973]; *see also* Garcia v Petrakis, 306 AD2d 315, 315-16 [2nd Dept. 2003], Kelly v Bruno and Son, Inc., 190 AD2d 777, 777-78 [2nd Dept. 1993], Rimoldi v Schanzer, 147 AD2d 541, 545 [2nd Dept. 1989]), and can include circumstances where the owner can order changes in the specifications, reviews progress and job details with the contractor and/or provides necessary equipment, (*see* Rimoldi at 545; *see also* Valentine v Thirty-Four Square Corp., 227 AD2d 467, 468 [2nd Dept. 1996]). There is no indication that defendant and/or her son's conduct as her alleged agent rose to such level of direction and control. Plaintiff only offers conclusory and general assertions of direction by defendant's eldest son which are belied by his own testimony that no one explained how to carry the tub down stairs and out of the premises, and the only communication had between those carrying the tub was plaintiff's inquiry of readiness. Moreover, the contractor denied any such direction. The son's assistance with purchasing materials, carrying the tub, facilitating communication and making minor cosmetic decisions as necessary do not rise to the level of direction and control contemplated by the statute, (*see e.g.* Decavallas v Pappantoniou, 300 AD2d 617, 618 [2nd Dept. 2002], Killian v Vesuvio, 253 AD2d 480, 480-81 [2nd Dept. 1998], Richichi v Constr. Mgmt. Tech., Inc., 244 AD2d 540, 541 [2nd Dept. 1997], Garcia at 316, Kelly at 778), and the existence of an agency relationship is therefore, a needless diversion.

In light of the above, it can be said that defendant is exempt from liability under section 241 on the Labor Law.

Labor Law §200

Similar to the above there is a component of supervisory control with respect to section 200 that is a codification of the common law duty of an employer or owner to provide a safe

work environment, (*see* Allen v Cloutier Constr. Corp., 44 NY2d 290, 299 [1978]; *see also* Kim v Herbert Constr. Corp., 275 AD2d 709, 712 [2nd Dept. 2000], Jack v Fien, 80 NY2d 965, 967 [2nd Dept. 1992]). To be liable hereunder an owner must have the authority to supervise or control performance and/or method of the work, (*see* Ortega v Puccia, 57 AD3d 54, 61 [2nd Dept. 2008], Haider v Davis, 35 AD3d 363, 364 [2nd Dept. 2006]), i.e. the party to be charged must have control over the activity bringing about injury, (*see* Eldoh v Astoria Generating Co., LP, 81 AD3d 871, 875 [2nd Dept. 2011]; *see also* Russian v Louis N. Picciano & Son, 54 NY2d 311, 316-17 [1981], Singleton v Citnalta Constr. Corp., 291 AD2d 593, 594 [2nd Dept. 2002], Giambalvo v Chemical Bank, 260 AD2d 432, 433 [2nd Dept. 1999]). Again, plaintiff failed to demonstrate that level of control necessary to impose liability under section 200. His general contentions are contradicted by his own testimony, which itself is confused as to who hired and directed him on the date of the incident, as well as the contractor's affidavit (*see above*).

CONCLUSION

Defendant's motion is granted.

Dated: June 4, 2015

Rudolph E. Greco, Jr.
J.S.C.