

Pajuelo v Diamaghi

2015 NY Slip Op 32135(U)

October 16, 2015

Supreme County, Queens County

Docket Number: 705044/2013

Judge: Darrell L. Gavrin

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DARRELL L. GAVRIN
Justice

IA Part 27

MANUELO PAJUELO,

x

Index
Number 705044 2013

Plaintiff,

Motion
Date May 22 2015

- against -

Motion Seq. Nos. 1-2

HONEY DIAMAGHI & KENSINGTON HOMES,
LLC,

Defendants.

x

FILED
OCT 23 2015
COUNTY CLERK
QUEENS COUNTY

The court previously issued a short form order dated July 27, 2015, determining motion sequence numbers 1 and 2, and a corresponding cross motion. It is now ordered that said order is herewith amended, sua sponte, pursuant to CPLR 5019(a), to correct inadvertent mistakes, and more clearly reflect the court's intended holding as supported by its recited reasoning, and shall read as follows:

The following papers numbered 1-14, EF10 to EF23 read on this (1) motion by Honey Damaghi to dismiss the complaint against her, pursuant to CPLR 3212; (2) motion by plaintiff for partial summary judgment in his favor on his claims pursuant to Labor Law §240(1), as against Kensington Homes, Inc. (Kensington); and (3) cross motion by plaintiff for partial summary judgment in his favor on his claims pursuant to Labor Law §240(1), as against Damaghi.

Papers
Numbered

Notices of Motions - Affidavits - Exhibits..... 1-6, EF10-EF21
Notice of Cross Motion - Affidavits - Exhibits 7-8
Answering Affidavits - Exhibits..... EF22
Reply Affidavits..... EF23,9-14

Upon the foregoing papers it is ordered that the motions and cross motion are joined for the purpose of disposition and are determined as follows:

Plaintiff in this labor law action seeks damages for personal injuries sustained on July 31, 2013, when he fell from a ladder during the course of his employment. The accident occurred at 54 Remsen Road, in Great Neck, New York, a property owned by Damaghi. Kensington Homes, LLC (Kensington), was the general contractor for the construction work. The undisputed record indicates that Damaghi was one of the two principals of Kensington. Damaghi moves to dismiss the complaint, insofar as asserted against her on the ground that she did not exercise supervision or control over the work that caused plaintiff's injury. Plaintiff opposes the motion and cross moves for partial summary judgment on his claims against Damaghi, pursuant to Labor Law §240(1). Defendant Damaghi opposes the cross motion. By separate motion, plaintiff moves for partial summary judgment against Kensington for violation of Labor Law §240(1).

Facts

Plaintiff testified upon his examination before trial, as follows: on July 31, 2013, he was caused to fall from an unsecured eight foot aluminum A-frame ladder which had been improperly placed on an uneven and unfinished wooden plank floor. At the time of the fall, no one was holding the ladder, and there was no other area to place the ladder in order for plaintiff to perform his work. Specifically, plaintiff was performing plumbing construction at a construction site. Plaintiff climbed the ladder and, as he was attempting to remove a pipe cover with the aid of a pipe wrench, upon applying force to the wrench to loosen the cover, the unsecured eight foot ladder moved, and plaintiff fell from the ladder.

The general contractor for the project was Kensington. Damaghi did not live at the construction site on the date of the accident as Damaghi was constructing a new home with her company, Kensington. Damaghi was one of the two members of Kensington. As a member of Kensington, Damaghi had the speaking authority on behalf of Kensington. She wrote checks on its behalf, signed permits for Kensington. When asked at her deposition whether she signed subcontracts on behalf of Kensington, Damaghi could not recall.

Motion by Damaghi and Cross Motion by plaintiff

The motion by Damaghi for summary judgment in her favor is denied. Relatedly, the cross motion by plaintiff for summary judgment in his favor on the issue of Damaghi's liability pursuant to Labor Law §240(1), is denied. There is an issue of fact as to whether Damaghi—who was an educated, sophisticated business woman, was on the job site daily, visited the site bi weekly, consulted with the other member of Kensington (Herzel) about the work progress, wrote and signed checks on behalf of Kensington regularly for the project and signed permit applications for the job site—had the requisite degree of direction and control

over the construction of her home to impose liability under Labor Law §§ 240 (1) and 241 (6) (*see Zamora v Frantellizzi*, 45 AD3d 580, 581 [2d Dept. 2007]; *Boccio v Bozik*, 41 AD3d 754, 755 [2d Dept. 2007]; *Acosta v Hadjigavriel*, 18 AD3d 406 [2d Dept. 2005]; *Murphy v Sawmill Constr. Corp.*, 17 AD3d 422, 424 [2d Dept. 2005]).

Owners and contractors are subject to liability pursuant to Labor Law §§ 240(1) and 241(6), except owners of one- and two-family dwellings who contract for but do not direct or control the work. 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 such liability (*see Van Amerogen v Donnini*, 78 NY2d 880, 882 [1991]; *Mayen v Kalter*, 282 AD2d 508 [2001]). “The phrase ‘direct and control’ as used in those statutes is construed strictly and refers to the situation where the owner supervises the method and manner of the work” (*Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 849 [823 N.Y.S.2d 477 [2d Dept. 2006] [internal quotes and citations omitted]; *see Siconolfi v Crisci*, 11 AD3d 600, 601 [2d Dept. 2004]). Here, Damaghi failed to establish a prima facie entitlement to summary judgment dismissing the Labor Law §§ 240(1) and 241(6) causes of action (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Murphy v Sawmill Constr. Corp.*, 17 AD3d 422, 424 [2d Dept. 2005]). There is a triable issue of fact as to whether Damaghi, who owned the construction business which retained plaintiff’s employer, exercised the requisite degree of direction and control over the construction of her home to impose liability under Labor Law §§ 240(1) and 241(6) (*see Acosta v Hadjigavriel*, 18 AD3d 406, 407 [2d Dept. 2005]; *Rothman v Shaljian*, 278 AD2d 297 [2d Dept. 2000]; *Holocek v Nowak Constr. Co.*, 259 AD2d 466, 467 [2d Dept. 1999]).

Similarly, to be held liable under Labor Law § 200 or for common-law negligence arising from the manner in which work is performed at a work site, an owner must have supervised or controlled the work performed at the site (*see Lombardi v Stout*, 80 NY2d 290, 295 [1992]; *Acosta v Hadjigavriel, supra*). Since there is a triable issue of fact as to whether Damaghi exercised direction or control over the plaintiff’s work, the branches of Damaghi’s motion which are for summary judgment dismissing the plaintiff’s causes of action alleging common-law negligence and a violation of Labor Law § 200 are also denied (*see Acosta v Hadjigavriel, supra*).

Motion by Plaintiff

Labor Law § 240 (1) imposes a nondelegable duty and absolute liability upon owners . . . for failing to provide safety devices necessary for protection to workers subject to the risks inherent in elevated work sites who sustain injuries proximately caused by that failure” (*Jock v Fien*, 80 NY2d 965, 967-968 [1992]). Although “[a] fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240 (1),” liability will be imposed when the evidence shows “that the subject ladder was . . . inadequately secured and that . . . the

failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries" (*Melchor v Singh*, 90 AD3d 866, 868 [2011]). Here, plaintiff made a prima facie showing of his entitlement to judgment as a matter of law on the issue of liability as against Kensington, under that statute by showing that, although he was provided with a ladder, as required by the statute, the ladder was not secured so as to prevent it and him from falling. Further, there was no assistance provided in holding the ladder while the plaintiff attempted to remove a pipe cover with the aid of a pipe wrench (*see Hossain v Kurzynowski*, 92 AD3d 722 [2012]; *Santiago v Rusciano & Son, Inc.*, 92 AD3d 585 [2012]; *Georgia v Urbanski*, 84 AD3d 1569 [2011]; *Kijak v 330 Madison Ave. Corp.*, 251 AD2d 152 [1998]).

The burden then shifted to defendant to "present[] some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his . . . injuries" (*Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [2007]). In opposition to plaintiff's prima facie showing, defendant failed to raise a triable issue of fact as to whether the plaintiff's conduct was the sole proximate cause of the accident (*see Hossain v Kurzynowski*, 92 AD3d 722 [2012]). Since plaintiff was provided only with an unsecured ladder and no safety devices, the plaintiff cannot be held solely at fault for his injuries (*see Velasco v Green-Wood Cemetery*, 8 AD3d 88 [2004]; *Davis v Selina Dev. Corp. of N.Y.*, 302 AD2d 304 [2003]). Accordingly, the motion by plaintiff for summary judgment on the issue of liability as against Kensington, on the cause of action alleging a violation of Labor Law § 240 (1), is granted.

Conclusion

The motion by Damaghi for summary judgment in her favor, and the cross motion by plaintiff for summary judgment in his favor on the issue of Damaghi's liability pursuant to Labor Law §240(1), are denied.

The motion by plaintiff for summary judgment on the issue of liability as against Kensington, on the cause of action alleging a violation of Labor Law § 240 (1), is granted.

Dated:

Oct. 16, 2015

J.S.C.

FILED
 OCT 23 2015
 COUNTY CLERK
 QUEENS COUNTY