Ghulam v Naseri
2015 NY Slip Op 32378(U)
November 5, 2015
Supreme Court, Bronx County
Docket Number: 302926/2009
Judge: Alison Y. Tuitt

NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

GHOUSGHLL GHULAM,

Plaintiff,

-against-

MOHAMMED NASERI and MANIJEH NASERI,

Defendants.

INDEX NUMBER: **302926/2009**

Present:
HON. **ALISON Y. TUITT**
Justice

The following papers numbered 1 to 2,

Read on this Defendants' Motion for Summary Judgment

On Calendar of **5/4/15**

Notice of Motion-Exhibits, Affirmation 1

Affirmation in Opposition and Exhibits 2

Upon the foregoing papers, defendants' motion for summary judgment is denied for the reasons set forth herein.

This is an action for personal injuries sustained by plaintiff arising out of an accident which occurred on September 17, 2006 at the premises located at 46 Banksville Road, Armonk, New York. At the time of the accident, plaintiff was on a ladder cutting a tree limb when the limb hit the ladder causing the ladder and plaintiff to fall. Defendants move for summary judgment on the grounds that pursuant to Labor Law, defendants are entitled to the exemption for one and two family dwellings. Defendants further argues that Labor Law §200 and common law negligence claims are inapplicable because defendants did not control, supervise or direct the work being done. Plaintiff opposes the motion arguing that defendants directed and controlled the work plaintiff was engaged in at the time of his accident. Plaintiff argues that defendants are liable under common law theories of negligence, codified in Labor Law §200 in that defendants created the negligent

condition that led to plaintiff's accident. Plaintiff further argues that defendants directed and controlled the work plaintiff performed and violated Industrial Code provisions making them liable under Labor Law §240 and §241(6).

On the date of the accident, plaintiff was working on defendants' property. He had previously done work at defendants' home on many Saturdays and Sundays before the accident. On these previous dates, plaintiff would work on the outside of the home performing various jobs. On the date of the accident, plaintiff was asked by defendant Mohammed Naseri to cut down several trees on the property. Plaintiff states that he had never performed this type of work before and that he told Mohammed Naseri that he had never cut down trees before. Plaintiff states that Mohammed Naseri told him to go ahead anyway. Plaintiff claims that defendant did not give him any special instructions or show him how to do it. Defendant provided all of the materials and tools for the job including a ladder, rope, wheelbarrow and chainsaw. Before his accident, plaintiff had worked on 11 or 12 trees, either cutting down trees or removing limbs, with Mohammed Naseri watching and supervising his work. Immediately prior to his accident, plaintiff claims that defendant told him to cut a limb off a tree which was about twenty feet above. Plaintiff states that he was very hesitant to climb up the ladder but defendant insisted that he do it. Plaintiff claims that defendant helped him put the ladder against the tree and was physically holding the ladder when he climbed up. Defendant used a yellow rope to tie the ladder to the tree. The ground the ladder was resting on had a large slope and was uneven. The ground the tree was on was about three to three and a half feet above the rest of the yard and sloped down to the yard. Plaintiff claims that the extreme slope was dangerous and was the reason defendant tied the ladder to the tree. Plaintiff climbed the ladder and began to cut the limb. When the limb fell, it hit the ladder as it came down causing the ladder to fall and since plaintiff's legs were tangled in the ladder rungs, he also fell with the ladder.

Defendant Mohammed Naseri testified at his deposition that he owns the premises which is a single family home. Defendant and plaintiff had entered into an arrangement in which plaintiff would work on his property on some weekends. On the date of the accident, defendant told plaintiff that there was a fallen tree in the backyard and another tree that was falling down and asked him to cut those two trees. Defendant testified that at the time of the accident, defendant and one of the workers plaintiff brought with him were working in the garden at the side of the house and was not in the backyard when the accident occurred. Defendant claims that he did not instruct plaintiff to do any work other than those two tasks and he never saw the plaintiff perform any

of the work. Defendant testified that he did not have any conversation with plaintiff regarding using the yellow rope to tie the ladder to the tree. He also testified that he did not provide plaintiff with the ladder and that plaintiff took the ladder without his permission. Defendants Mohammed Naseri and Manijeh Naseri, his wife, submit affidavits wherein they state that at no time did they supervise, direct or instruct plaintiff in the manner in which the work was to be performed and they were not present when plaintiff was performing the work.

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 (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 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). 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, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*. The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

An owner of a premises has a non-delegable duty under the Labor Law to provide a safe work environment to workers. However, an implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition. Russin v. Louis N. Picciano & Son, 54 N.Y.2d 311 (1981) citing Reynolds v Brady & Co., 329 N.Y.S.2d 624 (2d Dept. 1972). Moreover, the work giving rise to these duties may be delegated to a third person or party. Russin 54 at 317. (Although §§ 240 and 241 make these duties nondelegable, the duties themselves may in fact be delegated. When the work giving rise to these duties has been delegated to a third-party, that third-party then obtains the concomitant authority to supervise and

control that work and becomes a statutory "agent" of the owner or general contractor.) Thus, the authority to supervise and control the work operates to transform the subcontractor into a statutory agent of the owner or construction manager. Kelly v. Diesel Construction Division of Karl A. Morse, Inc., 35 N.Y.2d 1 (1974).

Specifically, Labor Law §240(1) provides in pertinent part that: "[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect... for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The question of whether an owner has sufficiently directed the work so as to lose the benefits of the single family homeowner exception depends on the degree to which the owner controls the particulars of the work. Ennis v. Hayes, 544 N.Y.S.2d 99 (4th Dept. 1989)("Whether an owner's conduct amounts to directing or controlling the work depends upon the degree of supervision exercised over the method and manner in which the work is performed."); Chura v. Baruzzi, 596 N.Y.S.2d 592)(3rd Dept. 1993)("In analyzing whether a homeowner's actions with respect to a particular construction or renovation project amount to direction and control thereof within the meaning of Labor Law §240(1), the relevant inquiry is the degree to which he or she supervised or directed the method and manner of the work."); Rimoldi v. Schanzer, 537 N.Y.S.2d 839 (2d Dept. 1989)("the phrase 'direct and control' contemplates the situation in which the owner supervised the method and manner of the work, can order changes in the specifications, reviews the progress and details of the job with the general contractor and/or provides the equipment necessary to perform the work."). As such, courts find a question of fact as to whether the homeowner is entitled to the exemption where "the homeowner's involvement went beyond the mere expression of dissatisfaction and demands for timely completion of the work. Garcia v. Martin, 728 N.Y.S.2d 455 (1st Dept. 2001). See also, Chura, *supra* ("Here, there can be no argument that defendant's actions went well beyond those of an interested homeowner who simply presented his ideas and suggestions, made observations and inquiries, and inspected the work."); Emmi v. Emmi, 588 N.Y.S.2d 481 (4th Dept. 1992)("Defendant's participation in the construction of his home, however, went far beyond '[a] homeowner's typical involvement in a construction project'".)

Defendants argue that this statute absolves them from any liability by virtue of the fact that the

structure was a one family dwelling and argue that they did not exercise direction and control in the work. The exception to Labor Law §240(1) is limited to "owners of one and two-family dwellings". However, plaintiff contends that defendants are not entitled to the exception because Mohammed Naseri directed and supervised the work he was performing. It is undisputed that the subject premises was a one family dwelling. Based on the testimony of the parties and the evidence presented, there are questions of fact as to whether the exception to Labor Law §240(1) excluding "owners of one and two-family dwellings" applies here. The exception to Labor Law is limited to those "who contract but do not direct or control the work." Here, plaintiff's claims that defendant supervised and directed his work requires a denial of the motion. Plaintiff testified that defendant Mohammed Naseri told him what tree and/or limbs to cut, notwithstanding that plaintiff told him he had never done the work before. Additionally, plaintiff claims that defendant provided all of the materials and tools for the job including a ladder and rope, and defendant helped him put the ladder against the tree. Plaintiff also claims that defendant himself tied the rope from the ladder to the tree and was actually holding the ladder at the time of plaintiff's fall. This contradicting testimony raises an issue of fact that warrants a denial of the motion.

Accordingly, defendants' motion for summary judgment is denied.

This constitutes the decision and Order of this Court.

Dated: 11/5/15

Hon. Alison Y. Tuitt