

Ceccato v Liolos

2015 NY Slip Op 32741(U)

December 22, 2015

Supreme Court, Erie County

Docket Number: 2013-801820

Judge: Henry J. Nowak

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

JOHN C. CECCATO,

Plaintiff,

vs.

MEMORANDUM DECISION

INDEX NO. 2013-801820

JAMES LIOLOS,

Defendants.

HON. HENRY J. NOWAK, J.S.C.
Justice Presiding

Plaintiff John C. Ceccato commenced this action asserting, inter alia, causes of action based on Labor Law § 240 (1) and 241 (6). He is seeking damages for injuries sustained when he fell while performing construction work on a single-family home owned by defendant James Liolos. Defendant moves for summary judgment seeking dismissal of plaintiff's complaint based largely on the exception under the Labor Law given to "owners of one and two-family dwellings who contract for but do not direct or control the [injury producing] work."

In *Bombard v Pruiksma* (110 AD3d 1304, 1305-1306 [3rd Dept 2013]), the court wrote:

Although Labor Law §§ 240 (1) and 241 each "impose nondelegable duties upon contractors, owners and their agents to comply with certain safety practices for the protection of workers engaged in various construction-related activities . . . [,] the Legislature has carved out an exemption for the owners of one and two-family dwellings who contract for but do not direct or control the work" (*Bagley v Moffett*, 107 AD3d 1358, 1360 [2013] [internal quotation marks and citations omitted]; see *Chapman v Town of Copake*, 67 AD3d 1174, 1175 [2009]; *Snyder v Gnall*, 57

AD3d 1289, 1290 [2008]). In this context, “the phrase ‘direct or control’ is to be strictly construed and, in ascertaining whether a particular homeowner’s actions amount to direction or control of a project, the relevant inquiry is the degree to which the owner supervised the method and manner of the actual work being performed by the injured [party]” (*Jenkins v Jones*, 255 AD2d 805, 805-806 [1998] [internal citation omitted]; see *Van Hoesen v Dolen*, 94 AD3d 1264, 1266 [2012], *lv denied* 19 NY3d 809 [2012]; *Rosenblatt v Wagman*, 56 AD3d 1103, 1104 [2008]; *Van Alstine v Padula*, 228 AD2d 909, 910 [1996], *appeal dismissed* 89 NY2d 858 [1996]; *Young v Krawczyk*, 223 AD2d 966, 967 [1996]).

* * * *

In an effort to raise a question of fact on this point, plaintiff attempted to portray defendant as the general contractor for the project. The case law makes clear, however, that neither providing site plans (see *Nai Ren Jiang v Shane Yeh*, 95 AD3d 970, 971 [2012]; *Lane v Karian*, 210 AD2d 549, 550 [1994]), obtaining a building permit (see *Chapman v Town of Copake*, 67 AD3d at 1175-1176), hiring contractors, purchasing materials (see *Van Hoesen v Dolen*, 94 AD3d at 1266; *Lane v Karian*, 210 AD2d at 550), offering suggestions/input (see *Stephens v Tucker*, 184 AD2d 828, 829 [1992]), inspecting the site (see *Jenkins v Jones*, 255 AD2d at 806; *Van Alstine v Padula*, 228 AD2d at 910), retaining general supervisory authority (see *Nai Ren Jiang v Shane Yeh*, 95 AD3d at 971; *Stephens v Tucker*, 184 AD2d at 829), performing certain work (see *Snyder v Gnall*, 57 AD3d at 1291; *Clark v Mann*, 280 AD2d 866, 867 [2001]) nor physical presence at the site (see *Jenkins v Jones*, 255 AD2d at 806) operates to deprive a homeowner of the statutory exemption—so long as the homeowner did not exercise direction or control over the injury-producing work (see *Van Hoesen v Dolen*, 94 AD3d at 1266; *Snyder v Gnall*, 57 AD3d at 1290-1291; *Rosenblatt v Wagman*, 56 AD3d at 1104; *Soskin v Scharff*, 309 AD2d 1102, 1104 [2003]; *Jenkins v Jones*, 255 AD2d at 806; compare *Fiorentine v Militello*, 275 AD2d 990, 991 [2000]; *Chura v Baruzzi*, 192 AD2d 918, 918-919 [1993]). Given the uncontroverted proof that defendant did not exercise direction or control over the work that plaintiff was performing at the time of the accident, Supreme Court properly granted defendant’s motion for summary judgment as to the Labor Law §§ 240 and 241 causes of action.

Here, defendant did not supervise, direct or control the injury producing work. In fact, defendant was out of town on the day of and the days surrounding the accident. As in *Bausenwein v Allison* (126 AD3d 1466, 1467 [4th Dept 2015]), defendant "did not give [plaintiff] any direction as to how to do his work," defendant "did not supervise any of the work and did not tell any of the workers how to do their jobs," and "[p]laintiff does not identify a single incident in which [defendant] supervised him or told him how to perform his work." Moreover, defendant's "actions at the construction site 'were those of a legitimately concerned homeowner' and not those of a supervisor' " (*id*; see also *McNabb v Oot Bros., Inc.*, 64 AD3d 1237, 1239 [4th Dept 2009] ["The fact that they were in effect acting as their own general contractor 'will not bar application of the single-family homeowner exemption so long as [they] did not control or direct the method or manner of the work being performed by plaintiff at the time of the injury' "]).

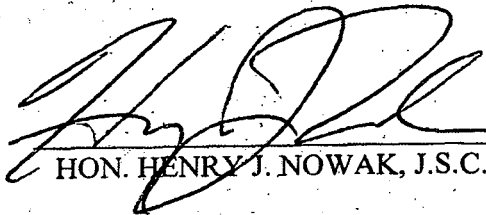
In *Burnett v Waterford Custom Homes, Inc.* (41 AD3d 1216, 1217 [4th Dept 2007]), the court wrote:

" 'Whether an owner's conduct amounts to directing or controlling depends upon the degree of supervision exercised over the method and manner in which the work is performed' " (*Gambie v Dunford*, 270 AD2d 809, 810 [2000]). Although Fabbio [the homeowner] was not present at the home on the day of plaintiff's accident, it is undisputed that he supplied the materials for work on the home, hired the architect and subcontractors, scheduled the work, and checked in to determine progress on the construction. Nevertheless, defendants established as a matter of law that Fabbio did not exercise any supervision over the method or manner of plaintiff's work by submitting the deposition testimony of plaintiff in which plaintiff admitted that Fabbio did not instruct him in the performance of his work or provide him with equipment, and plaintiffs failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Based on the foregoing, this court concludes that defendant is entitled to summary judgment inasmuch as the record establishes that he did not "direct or control the injury producing work" as a matter of law and is thus entitled to the benefit of the homeowner's exception under the Labor Law. Plaintiff's reliance on *Garcia v Martin* (285 AD2d 391 [1st Dept 2001]) and *Rimoldi v Schanzer* (147 AD2d 541 [2nd Dept 1989]) is misplaced given the more recent and controlling case law discussed above. Moreover, given that defendant did not exercise supervisory control over the work that plaintiff was performing on the date of the accident, defendant cannot be held liable based on either Labor Law § 200 or common law negligence (see *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 296 [1992]).

Submit order.

DATED: December 22, 2015



HON. HENRY J. NOWAK, J.S.C.