Hernandez v L.A. Wyandanch, L.L.C.
2017 NY Slip Op 30507(U)
March 21, 2017
Supreme Court, Suffolk County
Docket Number: 13-21271
Judge: Joseph A. Santorelli
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[* 1]

SHORT FORM ORDER

INDEX No. 13-21271
CAL. No. 16-00425OT

PUBLISH

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 7-14-16 (003)
MOTION DATE 7-7-16 (004)
MOTION DATE 9-1-16 (005)
ADJ. DATE 11-17-16
Mot. Seq. # 003 - MG
004 - MG
005 - MD

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RICKIE HERNANDEZ,

Plaintiff,

- against -

L.A. WYANDANCH, L.L.C., RK DEVELOPMENT, L.L.C., and MICHAEL REILLY d/b/a KMR CONSTRUCTION CORP., and JOSEPH PAUL ROPERTO and PATRICIA A. ROPERTO,

Defendants.

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Upon the following papers numbered 1 to 64 read on these motions for summary judgment ; Notice of Motion and supporting papers 1 - 17, 22 - 36, 39 - 54 ; Answering Affidavits and supporting papers 18 - 19, 55 - 60, 61 - 62, 63 - 64 ; Replying Affidavits and supporting papers 20 - 21, 37 - 38 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. 003) by defendant Michael Reilly, the motion (seq. 004) by defendant L.A. Wyandanch, L.L.C., and the motion (seq. 005) by plaintiff Rickie Hernandez are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant Michael Reilly for summary judgment dismissing the complaint and all cross claims against him is granted; and it is

ORDERED that the motion by defendant L.A. Wyandanch, L.L.C. for summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED that the motion by plaintiff Rickie Hernandez for summary judgment is his favor as to defendants' liability is denied.

This action was commenced by plaintiff Rickie Hernandez to recover damages for injuries he allegedly sustained on June 20, 2013, when he fell from a ladder while painting a pergola at the premises known as 141 Wyandanch Road, Southampton, New York. Plaintiff alleges he was injured during the course of his employ by Calco Painting, Inc., and asserts claims against defendants for violations of the Labor Law and for common law negligence. Defendant Michael Reilly is alleged to have constructed the pergola; defendant L.A. Wyandanch, L.L.C., is alleged to own the subject premises; and defendants RK Development, L.L.C., Joseph Paul Roperto, and Patricia A. Roperto are alleged to have been the general contractors for the construction project at the subject premises.

Defendant Reilly now moves for summary judgment in his favor, arguing that neither he or his company hired the plaintiff, controlled or supervised the plaintiff's work, had a duty to provide a safe workplace for the plaintiff, and were not general contractors. In support of his motion, he submits copies of the pleadings, transcripts of the parties' deposition transcripts, a transcript of the deposition testimony of nonparty Joseph Calascibetta, and two photographs.

Defendant L.A. Wyandanch, L.L.C., also moves for summary judgment in its favor on the grounds that plaintiff's claims under Labor Law §§ 240 (1) and 241 (6) are barred by the single-family homeowner exemption; that no dangerous condition was present at the subject premises; and that it did not supervise, direct, or control plaintiff's work. In support of its motion, it submits, among other things, uncertified copies of its "Electronic Articles of Organization," and a copy of its "Operating Agreement." Similarly, Hernandez moves for summary judgment in his favor, arguing that defendants violated Labor Law §§ 200, 240, and 241(6). In support of his motion, he submits, among other things, copies of nine checks, and two notices to admit.

At his deposition, Hernandez testified that at the time of his accident, he was employed by Calco Painting (Calco) as a "painting estimator" and that his supervisor's name was "Jay." He stated that on the date in question, his crew's task was to prepare, prime, and paint a large outdoor pergola located at the subject premises. Hernandez indicated that he did not know who hired Calco to paint the pergola, but that there was a man named "Joe" at the site who "always" told him to "[d]o a good job." Plaintiff stated that he believes "Joe" was associated with defendant RK Development. Plaintiff noted that as the most senior painter at the site, he "set everybody up" and "gave out the duties." Plaintiff testified that

after assigning work to the other painters, he set up an eight-foot-tall A-frame aluminum ladder to "do some preparation work on the header of the gazebo." He states that the weather was sunny, that the lighting conditions were good, and that his ladder was placed securely on the grass. Plaintiff indicated that after he had ascended approximately five feet up the ladder, the ladder "gave way" and fell sideways, causing him to fall to the ground. Upon questioning, plaintiff stated that he never made any complaints about the worksite, that he never saw Reilly at the worksite, and that, other than Jay, no one directed or controlled his work. Plaintiff denied that Calco provided any safety equipment, denied that there was any safety equipment at the site, and denied that any safety meetings were convened. He further testified that all equipment used by his team to accomplish their work, including the ladder from which he fell, was provided by Calco.

Defendant Joseph Roperto testified that he works for defendant RK Development, L.L.C. (RK) as an expediter. Roperto explained that RK is owned by his wife, Patricia Roperto, that its sole employees are himself and his wife, and that it buys property for the purpose of building new homes on that property. Roperto stated that his position requires him to order material, work in the office, and perform estimates. He further stated that RK did not build houses itself; rather, it subcontracted the work to others. Regarding the subject premises, Roperto testified that it is owned by his friend, Laura Andrassy, that RK was involved in constructing the single-family house at that premises in approximately 2011, that he "believes" KMR Contracting was the general contractor for that job, and that no pergola was present at the time of the home's completion. He indicated that his contact at KMR Contracting was Mike Reilly.

In addition, Roperto testified that at some point after the home's construction, Andrassy contacted him, seeking to add a pergola to the subject premises. He stated that he told her he would not build it, because "we are developers," but he knew somebody that could build it for you. Roperto indicated that he provided Andrassy with Reilly's name at that time, and that he contacted Reilly himself "within a couple days" and asked him if he would be interested in constructing the pergola. Roperto stated that from that point on, he acted as the intermediary between Reilly and Andrassy, with Reilly having no contact with Andrassy. He testified that to pay for the pergola, Andrassy sent him a personal check made out to "Joe Roperto," that he deposited that check in the joint personal checking account he held with his wife, and that he subsequently disbursed monies from that checking account to Reilly, in stages, as the work progressed. Roperto stated that he also distributed payments to the electricians and painters, as Reilly was doing the carpentry work only. As to Calco Painting, Roperto testified that it had done work for RK on prior occasions, as did All Pro Painting. He indicated that both Calco and All Pro Painting were owned by "Jay," but he was unsure if they were one and the same. He stated that all checks as payment for painting the pergola were made out to All Pro Painting. Roperto testified that RK "had nothing to do with this project," that he acted as Andrassy's "eyes and ears" for the project since she was in Florida for its entire duration, and that he "was at the house constantly." Roperto insisted that he provided the aforementioned services to Andrassy "as a friend."

Laura Andrassy testified that her primary residence is in West Palm Beach, Florida, and that the subject premises is her summer residence. She stated that it is owned by 141 Wyandanch Lane, L.L.C., of which she is the sole member, and that she has never rented the premises. She indicated that she purchased the land in 2010, built a house there, and moved into that house in 2011. She explained that

Roperto is a friend of hers and that she hired his company, RK, to build her house at the subject premises "because [she] felt he was a great builder." She testified that Roperto and his wife, Pat Roperto, are general contractors and conduct business as RK. When questioned as to her knowledge of defendant Michael Reilly, Andrassy described him as "sort of like the foreman." She also testified she had never heard of KMR Construction Corp.

Andrassy further testified that in 2013, she reached out to RK, seeking to have a pergola built at the subject premises, by contacting Joseph Roperto. She indicated that RK was to act as the general contractor for the project and that it, as well as Roperto, had the authority to supervise and coordinate the work. She further indicated that RK hired all of the subcontractors necessary to complete the project, was responsible for obtaining any necessary permits, and was responsible for making sure the job site was safe. Andrassy explained that she was in Florida for the duration of the pergola construction, but that Roperto would send her photographs as the project progressed. With regard to payment for the work, Andrassy testified that "Joe and Pat" told her to make the checks out to "Joe Roperto" instead of RK. She explained that she made payments to Roperto alone, and that he "pa[id] people with that."

Defendant Michael Reilly testified that he is self-employed in the construction field, that he has been doing business as KMR Contracting since approximately 2000, and that he also owns KMR Construction Corp., which was incorporated in approximately 2012. He stated that neither of his companies has ever worked as a general contractor or a construction manager. In relation to the pergola project in question, Reilly indicated that Roperto informed him that Andrassy wanted a pergola built. Reilly testified that, subsequently, Andrassy held a meeting at her house with Joe and himself, whereat she hired him to construct the pergola. No written agreement was signed. Reilly testified that Andrassy "designed" the pergola by standing on her porch and "point[ing] with her finger, [describing] what she wanted." He explained that after he completed the pergola's carpentry, he left the premises; that Calco was brought in to paint the pergola; and that he did not hire Calco or have authority to supervise its work. While Reilly stated that he does not know if Roperto had the authority to supervise subcontractors, Roperto purchased all of the materials needed to construct the pergola. Reilly testified that all payments he received for his work came from Roperto.

At his deposition, nonparty witness Joseph Calascibetta testified that he is the owner of Calco, that plaintiff was an employee of Calco at the time of his accident, and that Roperto was the person who hired Calco to paint the pergola in question. Calascibetta indicated that he never spoke to the homeowner, but would meet with Roperto once a week to obtain payment. Calascibetta stated that he purchased all of the materials necessary to complete his work, and provided all tools. He denied ever seeing Roperto or any other tradespeople at the premises during the time Calco was working, and stated that he was responsible for the safety of his own workers. Regarding the circumstances of plaintiff's accident, Calascibetta testified that he observed plaintiff performing work on a 10-foot-high horizontal beam located on the outside of the pergola, using an eight foot tall A-frame ladder, prior to the accident. Calascibetta, however, did not observe plaintiff's fall, as he had left the premises to go to a paint store.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (***Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP***, 26 NY3d 40, 19

NYS3d 488 [2015]; ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (***Nomura***, *supra*; *see also* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (***Daliendo v Johnson***, 147 AD2d 312, 543 NYS2d 987 [2d Dept 1989]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (***Nomura***, *supra*; *see also* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Labor Law § 240 (1) provides, in relevant part, that "[a]ll contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected 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." Labor Law § 240 (1) is "an exception to CPLR 1411, which recognizes contributory negligence as a defense in personal injury actions" (***Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.***, 1 NY3d 280, 287, 771 NYS2d 484 [2003]). It has been long held that Labor Law § 240 (1) imposes liability even on contractors and owners who had nothing to do with a plaintiff's accident (*see* ***Dahar v Holland Ladder & Mfg. Co.***, 18 NY3d 521, 941 NYS2d 31 [2012]). The law "imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks" (***Saint v Syracuse Supply Co.***, 25 NY3d 117, 124, 8 NYS3d 229 [2015]). The hazards intended to be mitigated by Labor Law § 240 (1) "are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 514, 577 NYS2d 219 [1991]; *see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 501, 601 NYS2d 49 [1993]). However, a plaintiff cannot prevail on a Labor Law § 240 (1) claim if "his or her actions were the sole proximate cause of the accident" (***Saavedra v 64 Annfield Ct. Corp.***, 137 AD3d 771, 772, 26 NYS3d 346 [2d Dept 2016]).

Labor Law § 241 (6) imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed (***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 670 NYS2d 816 [1998]). It imposes liability upon a general contractor for the negligence of a subcontractor, even in the absence of control or supervision of the worksite (*id.*). However, an owner or general contractor may raise any valid defense to the imposition of vicarious liability, including contributory and comparative negligence (*id.*). To support a claim under this section, the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles (***Misicki v Caradonna***, 12 NY3d 511, 882 NYS2d 375 [2009]). Furthermore, a plaintiff must show that

the violation of the regulation was a proximate cause of his or her accident (*see* ***Seaman v Bellmore Fire Dist.***, 59 AD3d 515, 873 NYS2d 181 [2d Dept 2009]).

Labor Law § 200 is a codification of the common-law duty imposed upon an owner, contractor, or their agent, to provide construction site workers with a safe place to work (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Haider v Davis***, 35 AD3d 363, 827 NYS2d 179 [2d Dept 2006]). "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" (***Messina v City of New York***, 46 NYS3d 174, 2017 NY Slip Op 00640 [2017], quoting ***Ortega v Puccia***, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]). When the methods or materials of the work are at issue, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged "had the authority to supervise or control the performance of the work" (*id.*). General supervisory authority at a work site is not enough; rather, a defendant must have had the responsibility for the manner in which the plaintiff's work is performed (*see* ***Messina v City of New York***, *supra*).

Labor Law §§ 240 and 241 apply to "[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, when constructing or demolishing buildings or doing any excavating in connection therewith." To establish entitlement to the protection of the homeowner's exemption, a defendant must demonstrate that his house was a single- or two-family residence and that he did not "direct or control" the work being performed (***Ortega v Puccia***, *supra* at 58). "The statutory phrase 'direct or control' is construed strictly and refers to situations where the owner supervises the method and manner of the work" (*id.* at 59).

The owner or possessor of real property also has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Milewski v Washington Mut., Inc.***, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]). Thus, "[w]here a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" (***Ortega v Puccia***, *supra* at 61; *see* ***Pacheco v Smith***, 128 AD3d 926, 9 NYS3d 377 [2d Dept 2015]; ***Chowdhury v Rodriguez***, 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]).

Defendant Reilly has established a prima facie case of entitlement to summary judgment (*see generally* ***Alvarez v Prospect Hosp.***, *supra*). Through the testimony of the deposed witnesses in this matter, Reilly established that he was hired by Roperto to perform the carpentry work necessary to construct the pergola in question, that he was paid for his services by Roperto, that he did not hire the painters of the pergola, and that he was not present at any time plaintiff was at the subject premises. Furthermore, Andrassy testified that she hired RK to act as the general contractor for the pergola construction, not Reilly. That evidence supports Reilly's contention that he was not the general contractor for the project and had no authority to supervise any aspect of plaintiff's work (*see* ***Messina v City of New York***, *supra*). Reilly having established prima facie entitlement to summary judgment, the burden shifted to the nonmoving parties to raise a triable issue (*see* ***Nomura***, *supra*).

Plaintiff alone opposes defendant Reilly's motion, but fails to raise a triable issue. In opposition to Reilly's motion, plaintiff argues that certain testimony of Andrassy and Roperto tends to prove Reilly was the general contractor or, at minimum, someone with supervisory authority. This argument is unavailing. First, Andrassy specifically testified that she hired RK to act as the project's general contractor, that she had never heard of KMR Construction Corp, and that she was under the impression that Reilly worked as some type of "foreman" for RK. Roperto's testimony regarding Reilly was admittedly based upon "assumptions" and "beliefs" as to what Reilly's role was on the project. Such speculative testimony is insufficient to raise a triable issue (*see generally* ***Daliendo v Johnson***, *supra*). Accordingly, the motion by Reilly for summary judgment dismissing the complaint and any cross claims against him is granted.

Defendant L.A. Wyandanch, L.L.C., also has established as a matter of law its entitlement to judgment in its favor on the causes of action asserted under Labor Law §§ 240 and 241 (6) (*see* ***Ortega v Puccia***, *supra*; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). The fact that title to an otherwise qualifying one- or two-family dwelling is held by a corporation rather than an individual homeowner does not, in and of itself, preclude application of the exemption (***Assevero v Hamilton & Church Props., LLC***, 131 AD3d 553, 556, 15 NYS3d 399 [2d Dept 2015]). Here, it is undisputed that the subject premises is a one-family dwelling owned by defendant L.A. Wyandanch, and that it serves as the summer residence of that limited liability company's member, Laura Andrassy. While some evidence has been adduced that Andrassy is in the business of real estate development, no evidence has been offered connecting the subject premises to any business venture. Further, there is nothing in the record to indicate that L.A. Wyandanch "directed or controlled" the work being performed by the contractors (*see* ***Ortega v Puccia***, *supra*). Significantly, Andrassy was absent for the entirety of the construction process. Thus, L.A. Wyandanch is entitled to the benefit of the homeowner's exemption (*see* ***Ortega v Puccia***, *supra*). Further, there has been no allegation that a dangerous condition was present at the subject premises prior to plaintiff's placement of his ladder (*see* ***Comes v New York State Elec. & Gas Corp.***, *supra*). Therefore, L.A. Wyandanch has established a prima facie case of entitlement to summary judgment with regard to Labor Law § 200 as well.

L.A. Wyandanch, having established its prima facie entitlement to summary judgment in its favor as to plaintiff's claims, the burden shifted to the nonmoving parties to raise a triable issue (*see generally* ***Nomura***, *supra*). In opposition, plaintiff argues that L.A. Wyandanch "was not a typical homeowner," as Andrassy was "in the business of building and selling spec homes" and had worked with defendants on prior projects. However, plaintiff fails to provide any support for his contention that L.A. Wyandanch is not entitled to the homeowner exemptions in the Labor Law. Accordingly, the motion by L.A. Wyandanch, L.L.C., for summary judgment dismissing the complaint and any cross claims against it is granted.

Finally, turning to plaintiff's motion for summary judgment, the Court finds that he has failed to eliminate all triable issues. First, questions of fact exist as to whether it was defendant Joseph Roperto, defendant Patricia Roperto, or defendant RK who acted as the general contractor on the project. Further, questions of fact exist as to whether a safety device was appropriate under the circumstances and as to whether plaintiff was comparatively negligent (*see* Labor Law § 241 (6); ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*). Plaintiff has also failed to establish, prima facie, that defendants violated Labor Law § 240

(1) by not providing "proper" protection, and that the statute's violation was a proximate cause of plaintiff's injury (*see* ***Nazario v 222 Broadway, LLC***, 28 NY3d 1054, 43 NYS3d 251 [2016]; ***Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.***, *supra*; *see also* ***Holly v County of Chautauqua***, 13 NY3d 931, 895 NYS2d 308 [2010]). Here, whether or not the ladder plaintiff was using was "proper protection" is a question of fact (*see* ***Nazario v 222 Broadway, LLC***, *supra*). For those reasons, plaintiff's motion for summary judgment is denied.

Accordingly, the motion by defendant Michael Reilly, and the motion by defendant L.A. Wyandanch, L.L.C., for summary judgment dismissing the complaint and all cross claims against them is granted. The motion by plaintiff Rickie Hernandez for summary judgment in his favor is denied.

Dated: MAR 21 2017

HON. JOSEPH A. SANTORELLI
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION