Cabrera v Fuentes
2017 NY Slip Op 33361(U)
July 17, 2017
Supreme Court, Suffolk County
Docket Number: Index No. 14-70285
Judge: Martha L. Luft
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SHORT FORM ORDER

INDEX No. 14-70285
CAL. No. 17-00277OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 4-19-17
ADJ. DATE 6-6-17
Mot. Seq. # 001 - MG

DENIS GRANADOS CABRERA,

Plaintiff,

- against -

GLORIA FUENTES and OCG BUILDERS CORP.,

Defendants.

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Upon the following papers read on this motion for summary judgment ; Notice of Motion and supporting papers dated March 16, 2017 ; Answering Affidavits and supporting papers dated May 1, 2017 ; Replying Affidavits and supporting papers dated May 22, 2017 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Gloria Fuentes for summary judgment dismissing the complaint against her is granted.

This action was commenced by plaintiff Denis Granados Cabrera to recover damages for injuries he allegedly sustained on June 1, 2014, when he fell from the roof of a home owned by defendant Gloria Fuentes, while he was in the employ of Sergio Rosales. The subject premises is known as 29 Pandora Drive, Brentwood, New York. Plaintiff asserts claims against defendants pursuant to Labor Law §§ 200, 240 (1), and 241 (6). Defendant Fuentes asserts cross claims against defendant OCG Builders Corp., the alleged general contractor, for contribution and indemnification.

Defendant Gloria Fuentes now moves for summary judgment in her favor, arguing that she is entitled to the homeowners' exemption contained in the Labor Law. In support of her motion, Fuentes submits copies of the pleadings, as well as transcripts of the deposition testimony of Denis Granados Cabrera and Gloria Fuentes.

Plaintiff testified that on the day of the accident in question, he was hired by a man named Sergio to replace the roof of the house located at the subject premises. Plaintiff stated that after working on the roof for approximately seven hours, he lost his footing and fell to the ground. He indicated that he was not using, and had not been offered, any safety equipment.

Defendant Gloria Fuentes, deposed on September 7, 2016, testified that she resides at 1836 Peck Avenue, Bay Shore, New York, and that she has lived there for the previous two months. She indicated that she purchased the Peck Avenue property in 2004 or 2005, and lived there for "several" years. Ms. Fuentes stated that her mother moved into the Peck Avenue residence in 2009, at which time she moved out. Ms. Fuentes testified that she owns three properties improved by single-family residences: the aforementioned Peck Avenue property; a single-family home at 78 Silver Street in Patchogue, New York; and the subject Pandora Drive premises. Ms. Fuentes stated that she is "not sure" of the time periods during which she resided at each of the three properties. Ms. Fuentes testified, however, that at the time of the incident in question, she was living at the subject premises and was renting one of its rooms to a married couple named Roxanna and Juan. She indicated that she lived at the subject premises from the time she separated from her husband "five or six years ago" until approximately July of 2016.

Regarding the circumstances surrounding plaintiff's alleged injury, Ms. Fuentes testified that the Pandora Drive house needed a new roof and that she hired a man named Sergio to perform that work. She stated that Sergio's company was called OCG Builders Corp., and that she paid $5,200.00 for its services. She indicated that she was not present at the time of plaintiff's alleged injury, but was informed of it by Sergio via telephone.

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]).

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 or her house was a single- or two-family residence and that he or she did not "direct or control" the work being performed (***Ortega v Puccia***, 57 AD3d 54, 58, 866 NYS2d 323 [2d Dept 2008]). "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).

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]).

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***, 147 AD3d 748, 749, 46 NYS3d 174 [2d Dept 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*).

Defendant Fuentes has established as a matter of law her entitlement to judgment in her favor on the causes of action asserted under Labor Law §§ 240 (1) and 241 (6) (*see* ***Ortega v Puccia***, *supra*; ***Ramirez v Begum***, 35 AD3d 578, 829 NYS2d 117 [2d Dept 2006]; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). An owner of a one- or two-family dwelling used as a residence is exempt from liability under Labor Law §§ 240 (1) and 241 (6) unless he or she directed or controlled the work being performed (***Abdou v Rampaul***, 147 AD3d 885, 47 NYS3d 430 [2d Dept 2017]). Here, it is undisputed that the subject premises is a one-family dwelling owned by defendant Fuentes. Ms. Fuentes also testified that it served as her primary residence at the time of plaintiff's alleged injury. Further, there is nothing in the record to indicate that defendant "directed or controlled" the work being performed by plaintiff. Thus, defendant is entitled to the benefit of the homeowner's exemption (*see* ***Ortega v Puccia***, *supra*). As to plaintiff's Labor Law § 200 claim, defendant Fuentes established, through the deposition testimony of plaintiff, that plaintiff's fall was caused by him "losing his footing." Thus, no evidence of a dangerous condition on plaintiff's premises has been alleged. Therefore, defendant Fuentes has established, prima facie, that a Labor Law § 200 claim is unsupported.

Defendant Fuentes having established her prima facie entitlement to summary judgment in her favor as to plaintiff's Labor Law claims, the burden shifted to plaintiff to raise issues of material fact as to those causes of action (*see generally* ***Alvarez v Prospect Hosp.***, *supra*). Initially, plaintiff neglects to address his Labor Law § 200 claims in his opposition papers and, therefore, has failed to submit evidence sufficient to establish that triable issues exist as to those claims. As to his Labor Law §§ 240 (1) and 241 (6) claims, plaintiff opposes defendant Fuentes' motion for summary judgment, arguing that Gloria Fuentes does not fall within the protections of the one- or two-family homeowner exemption in the Labor Law because the subject premises was being used for a commercial purpose. In opposition, plaintiff submits only his attorney's affirmation.

It has been held that the homeowner's exemption in the Labor Law does not apply in circumstances where the premises will be used solely for commercial purposes (*see* ***Van Amerogen v Donnini***, 78 NY2d 880, 573 NYS2d 443 [1991] [owner not able to claim homeowner's exemption when single-family home was rented, in its entirety, as a boarding house for students]). That prohibition regarding commercial purposes also applies when it was the intention of the homeowner to renovate said home for the express purpose of resale (*see* ***Batzin v Ferrone***, 140 AD3d 1102, 32 NYS3d 660 [2d Dept 2016]; ***Chorzepa v Brzyska***, 143 AD3d 935, 39 NYS3d 518 [2d Dept 2016]). The homeowner's exception was enacted "to protect those people who, lacking business sophistication, would not know or anticipate the need to obtain insurance to cover them against the absolute liability imposed by section 240 (1). It was not intended to insulate from liability owners who use their one- or two-family houses purely for commercial purposes" (***Lombardi v Stout***, 80 NY2d 290, 296-297, 590 NYS2d 55 [1992] [internal citations omitted]).

Here, defendant Fuentes testified that at the time of plaintiff's alleged injury, she resided at the subject premises and rented a single room to a married couple. Such testimony is the sole admissible evidence of any commercial use of the subject premises. As the rental of a single room of a single-

family home does not amount to it being "used solely for commercial purposes," Ms. Fuentes is entitled to the protection of the Labor Law's homeowner exemption (*see* ***Nicholas v Phillips***, ___AD3d___, 2017 NY Slip Op 04448 [2d Dept 2017]; *cf.* ***Van Amerogen v Donnini***, *supra*). Thus, plaintiff has failed to raise a triable issue as to his Labor Law §§ 240 (1) and 241 (6) claims against defendant Fuentes.

Accordingly, the motion by defendant Gloria Fuentes for summary judgment dismissing the complaint against her is granted.

Dated: July 17, 2017

HON. MARTHA L. LUFT
A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION