

Pelham v Morocco, LLC
2018 NY Slip Op 33998(U)
March 12, 2018
Supreme Court, Greene County
Docket Number: 16-0702
Judge: Lisa M. Fisher
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STATE OF NEW YORK
SUPREME COURT

GREENE COUNTY

MICHAEL W. PELHAM and SHANNON PELHAM, his
wife.

Plaintiffs.

DECISION & ORDER

- against -

Index No.: 16-0702
RJ No.: 19-16-9324

MORACCO, I.L.C.

Defendant.

PRESENT: HON. LISA M. FISHER:

APPEARANCES: Derek J. Spada, Esq.
Counsel for Plaintiffs
Basch & Keegan, LLP
307 Clinton Avenue
P.O. Box 4235
Kingston, New York 12402

David B. Manson, Esq.
Counsel for Defendant, movant
Goergen, Manson & McCarthy
90 Crystal Run Rd. STE 405
Middletown, New York 10941

FISHER, J.:

This is a Labor Law §§ 200, 240 (1), 241 (6) matter wherein Plaintiff Michael W. Pelham (hereinafter "Plaintiff") suffered injuries in a fall from an elevated height while building a log home on February 2, 2016 at 102 Thunderbird Terrace, Windham, New York (hereinafter "subject premises"). The subject premises was and still is owned by Defendant Moracco, I.L.C (hereinafter "Defendant"), a real estate holdings company. Alex Racco, D.O., is the sole owner and managing member of Defendant. Defendant also owns Dr. Racco's medical office in Staten Island. Defendant previously owned another property with a log house at 52 Indian Heights in Windham, which was purchased in 2007, listed for sale in December 2015, and sold in 2017.

The facts are largely uncontested. Defendant purchased the subject property and hired contractors to clear the land and complete some masonry/excavation work. To build the log home, the excavator recommended Plaintiff, a carpenter with approximately 30 years of experience including building log homes. Defendant contacted Plaintiff and the parties reached an agreement for Plaintiff to construct a single-family log home which came from a "log home package" kit.



Plaintiff was responsible for paying the independent contractors who worked for him. Plaintiff purchased the materials and provided the tools for the project. Defendant did not provide any tools, materials, or safety devices. Defendant did not supervise the project and had no control over the project.

When Plaintiff began his work on the subject premises, the foundation was already in place. At the time of the subject accident, Plaintiff was working on the second floor of the log home which was partially constructed. Plaintiff and his laborers were in the process of constructing the gables for the second floor. While working on a temporary deck at the top of the log joists on the second floor, Plaintiff fell approximately 10 to 12 feet from a loft opening down to the first floor. There were no railings or other protective devices in place to prevent him from falling from the loft area.

Where the parties disagree is whether the one and two family home exemption under Labor Law §§ 240 and 241 apply to the facts of this case. Plaintiff contends that, while he was building a single family home, the subject premises was and is owned by a commercial business, not a person or family, and Defendant was the entity that signed the agreement for the log home construction. Plaintiff argues that he was paid by "entities other than the Defendant" and he speculates this was "to evade taxes or to attempt to shield his real estate holding company from liability in cases such as this." Plaintiff further contends that Defendant owned a second log home just "a quarter mile away" and there was no reason for Plaintiff to have two weekend log homes other than for commercial purposes.

Dr. Racco argues that the subject premises was to be his weekend home. He avers he had no intent to use the subject premises commercially, and did not intend to rent out his log home. He claims he decided to sell his other log home to use this one as his new weekend home, and that he never rented out the other property which he owned for approximately 10 years. Dr. Racco further notes that he was advised by his accountant to put the subject premises under the name of Defendant, but he did not know why other than for tax purposes.

This issue was subject to a motion by Plaintiff who sought to compel the tax returns of Plaintiff for a five-year period prior to the subject accident. Defendant opposed the application with a cross-motion for a protective order, arguing same was palpably improper and irrelevant because "there is no issue in this case about whether the subject premises were used for commercial properties" because the subject premises was being constructed as a single-family dwelling.

Recognizing that the crux of this case is whether the subject premises is being used commercially pursuant to the homeowner exemption, by Decision and Order this Court partially granted Plaintiff's motion on September 7, 2017. However, this Court also partially granted Defendant's cross-motion as five years of tax returns were found to be overbroad given that the subject premises was purchased within the last two years. Therefore, this Court required two years of tax returns to be submitted for *in camera* inspection only.

Defendant duly disclosed the subject tax returns to the Court for inspection. On October 26, 2017, the Court issued an Order noting that it "thoroughly reviewed [Defendant's] 2015 and 2016 US and NYS Partnership returns[.]" and found that the subject premises was "not claimed as an asset or liability" on either tax return. Therefore, the Court ruled same would not be turned over to Plaintiff in disclosure.

Legal Analysis

It is well-settled that "the proponent of a summary judgment motion 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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *accord Hollis v Charlew Const. Co., Inc.*, 302 AD2d 700 [3d Dept 2003]). Once the movant has made such a showing, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact. (*See Zuckerman*, 49 NY2d at 562 ["mere conclusions, expressions of hope or unsubstantiated allegations or asserts are insufficient."].)

Safety devices for use of laborers is governed by Labor Law § 240, which provides the following:

All 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, 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] [emphasis added].)

The Court of Appeals has made it clear that Section 240 (1) "impos[es] absolute liability" for a breach which has proximately caused an injury. (*See Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]; *see Bland v Manocherian*, 66 NY2d 452, 459-61 [1985].) It is well-settled that "the purpose of the statute is to protect workers by placing ultimate responsibility for safety practices on owners and contractors instead of on workers themselves" (*Panek v County of Albany*, 99 NY2d 452, 456-57 [2003]; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993] [stating the purpose of Section 240 (1) is "to impose the responsibility for safety practices on those best suited to bear that responsibility."]). While Section 240 (1) is liberally construed (*Panek*, 99 NY2d at 457, quoting *Gordon*, 82 NY2d at 559), such interpretation should be done with "a commonsense approach to the realities of the workplace at issue" and not in a manner which "would be impractical and contrary to the very work at hand" (*Salazar v Novalex Contracting Corp.*, 18 NY3d 134, 140 [2011].)

Sections 240 (1) and 241 create a "homeowner exemption" for the owners of one and two-family dwellings. (*See Labor Law §§ 240 [1], 241.*) However, "this exemption does not apply to owners who use their residences 'purely for commercial purposes'" (*Landon v Austin*, 88 AD3d 1127, 1128 [3d Dept 2011], quoting *Lombardi v Stout*, 80 NY2d 290, 296 [1992]). "The availability of the exemption hinges upon 'the site and the purpose of the work, a test which must be employed on the basis of the homeowners' intentions at the time of the injury underlying the action'" (*Landon*, 88 AD3d at 1128, quoting *Truppi v Busciglio*, 74 AD3d 1624, 1625 [2010] [internal quotations and citations omitted]). The "court must determine the extent to which the dwelling is used 'entirely and solely' for commercial purposes" (*Morelock v Danbrod Realty Corp.*, 203 AD2d 733, 735 [3d Dept 1994]). "[T]he availability of the exemption depends upon the site and purpose of the work performed" (*Sanchez v Marticorena*, 103 AD3d 1057, 1058 [3d Dept 2013].)

Here, Defendant has met its burden for *prima facie* entitlement to summary judgment on Labor Law §§ 200, 240, 241 (6). This is achieved by and through the submitted exhibit and deposition testimony, including the affidavit in support of this summary judgment motion by Dr. Racco. The record reveals that Dr. Racco intended for the subject premises to be his weekend home prior to and at the time of the subject accident. While he owned a separate property approximately a quarter of a mile away, that property was listed for sale *before* the subject accident, corroborating his intention to turn the subject premises into this new weekend home. Despite

owning the other premises since 2007, he had not rented once or used those premises for commercial purposes. The evidence reveals that he did not control or direct the work on the subject property, nor did he supply the materials or tools. The record provides that Defendant did not supervise the construction site, did not know or should have known of a dangerous or defective defect on the subject premises, was not advised of same, and that Defendant did not otherwise fail to use reasonable care in maintaining the subject premises.

The burden now shifts to Plaintiff to raise a question of fact or credibility to warrant a trial, which he fails to do so. Plaintiff's main argument that Defendant was intending to use the subject premises for commercial purposes and to "evade taxes or attempt to shield [Defendant]" from liability in cases such as this" is speculative and unsupported in the record. (*See Zuckerman, supra*, 49 NY2d at 563; *see also Krouner v Travis*, 290 AD2d 917, 919 [3d Dept 2002].) The Court's previous review of the 2015 and 2016 tax returns revealed Defendant did not list the subject premises as an asset or liability. While Plaintiff contends he was paid from various accounts, the first check of \$25,000 was paid from Dr. Racco's personal account which also listed his wife's name and their residential address. Other checks were from Dr. Racco's medical practice account, but no checks from Defendant were provided. Dr. Racco had testified that he never rented his prior home, and the fact that he listed this property for sale *before* the construction on the subject premises corroborates this claim.

While Plaintiff cites for support to *Schaefer v Cohen* (50 Misc.3d 1221(A) [Sup Ct. Ulster County 2015, Fisher, J.]), this case does not help Plaintiff. In *Schaefer*, this Court rejected the homeowner exemption on the grounds of "direct or control" the work, not because the property was being used for commercial purposes. The Court even rejected the same speculative attack that the Plaintiff herein uses, and noted that it "disagrees entirety with both Plaintiff and Defendant [contractor's] argument that there is ample evidence to support a jury determination that the construction work being performed was commercial in nature rather than residential" where both Plaintiff and the defendant-contractor alleged the homeowner told them he would rent out a portion of the premises, which was sharply opposed by the homeowner.

In reviewing the facts in a light most favorable to Plaintiff, it cannot be said that the subject premises was to be used for anything other than a single family home at the time of Plaintiff's injury. While the subject premises is owned by Defendant, an LLC, there is no evidence that Dr. Racco derived any benefit from same, and he used his personal funds to finance the project in

addition to his medical practice's account. Dr. Racco's intent to turn the subject premises into his weekend home is further corroborated by the fact that he listed for sale his other weekend home, which he never rented or used commercially in about a decade of ownership. As articulated by various courts, the "well settled" principle is to place the "ultimate responsibility for safety practices" on *contractors* because the purpose of the Labor Law's "scaffolding law" is to impose the responsibility for safety practices on those best suited to bear that responsibility. (*See Panek, supra*, 99 NY2d at 456-57; *Ross, supra*, 81 NY2d at 500.) Here, the person and entity best suited was Plaintiff—a carpenter of 30 years who built log homes, supplied the tools and materials, and hired laborers and subcontractors to work for *him* to complete the subject premises. The parties testified that the plans were from a log kit from Plaintiff, and Dr. Racco was not present on the construction site. The Court finds the statutory exemption under Labor Law §§ 240 (1) and 241 applies, and these causes of action must be dismissed.

Plaintiff has offered no opposition to Defendant's application for summary judgment on the Labor Law § 200 claim, and same must also be dismissed.

To the extent not specifically addressed above, the parties' remaining contentions have been examined and found to be lacking in merit or rendered academic.

Thereby, it is hereby

ORDERED that Defendant's motion is **GRANTED**, and the Complaint is **DISMISSED**, and all claims and relief interposed therein is denied.

This constitutes the Decision and Order of the Court. Please note that a copy of this Decision and Order along with the original motion papers are being filed by Chambers with the County Clerk. The original Decision and Order is being returned to the prevailing party, to comply with CPLR R. 2220. Counsel is not relieved from the applicable provisions of this Rule with regard to filing, entry and Notice of Entry.

IT IS SO ORDERED.

DATED: March 12, 2018
Catskill, New York

ENTER :


HON. LISA M. FISHER
SUPREME COURT JUSTICE

Papers Considered:

- 1) Notice of motion, dated November 9, 2017; affirmation in support, of David D. Manson, Esq., with annexed exhibits, dated November 9, 2017; affidavit of Alex Racco, D.O., dated November 4, 2017; memorandum of law, dated November 9, 2017;
- 2) Affirmation in opposition, of Derek J. Spada, Esq., with annexed exhibits, dated December 29, 2017; affidavit of Michael Pelham, dated January 4, 2018 (*nunc pro tunc* signature accepted after date for service of opposition); and
- 3) Reply affirmation, of David B. Manson, Esq., dated December 29, 2017.