

Da Conceicao v Posimato
2018 NY Slip Op 34335(U)
May 9, 2018
Supreme Court, Westchester County
Docket Number: Index No. 68462/16
Judge: Lewis J. Lubell
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Dispo

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

**SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF WESTCHESTER**

-----X
FRANCISCO DA CONCEICAO,

Plaintiff,

-against -

JOHN POSIMATO and PATRICIA PARDO,

Defendants.
-----X

LUBELL, J.

DECISION & ORDER

Index No. 68462/16

Sequence No. 2 & 3

The following papers were considered in connection with **Motion Sequence #2** by defendant John Posimato for an Order pursuant to CPLR 3212 granting summary judgment; and **Motion Sequence #3** by defendant Patricia Pardo for an Order pursuant to CPLR 3212 granting summary judgment:

PAPERS	NYSCEF
NOTICE OF MOTION/AFFIRMATION/AFFIDAVIT/ EXHIBITS A-D	36-43
NOTICE OF CROSS MOTION/AFFIDAVIT/AFFIRMATION/ EXHIBITS A-C	44-49
AFFIRMATION IN OPPOSITION/EXHIBITS 1-4	51-55
AFFIRMATION IN OPPOSITION/EXHIBITS 1-4	56-60
AFFIRMATION IN REPLY	61
AFFIRMATION IN REPLY	62

Plaintiff brings this personal injury action to recover damages for injuries sustained as the alleged result of a fall from a ladder which occurred while painting the two-story high foyer of 231 Baldwin Place Road, Mahopac, New York, a one-family residential dwelling (the "Premises"). At the time of the accident, plaintiff was employed by and doing work for non-party Michael's Fine Painting which was hired by defendant John

Posimato. The allegedly defective ladder from which plaintiff fell was supplied by Michael's Fine Painting.

Liability against defendant John Posimato ("Posimato") is premised on his alleged status as the lessee of the Premises and, in any event, as the alleged general contractor who hired Michael's Fine Painting prior to his moving into the Premises. Defendant Patricia Pardo ("Pardo") is sued as the owner of the Premises who was allegedly using the Premises for a commercial use, i.e., she was allegedly leasing the Premises to Posimato in exchange for Posimato paying rent in the form of mortgage, home equity loan and property tax payments for the Premises.

"It is well settled that, to recover under Labor Law §§200, 240 and 241 as a member of the special class for whose protection these provisions were adopted, a plaintiff must establish two criteria: 1) that he was permitted or suffered to perform work on a structure and, 2) that he was hired by the owner, the general contractor or an agent of the owner or general contractor (Mordkofsky v. V.C.V. Development Corp., 76 N.Y.2d 573, 576-577, 561 N.Y.S.2d 892, 563 N.E.2d 263, citing Whelen v. Warwick Val. Civic & Social Club, 47 N.Y.2d 970, 971, 419 N.Y.S.2d 959, 393 N.E.2d 1032)."

(Brown v Christopher St. Owners Corp., 211 AD2d 441, 442 [1st Dept 1995], affd, 87 NY2d 938 [1996]).

Notwithstanding the somewhat convoluted, if not confusing, transaction history with respect to the Premises, there is no genuine dispute that Pardo is the owner and, at the very least, Posimato is a person in possession, if not the tenant, who hired Michael's Fine Painting.

Without regard to the one- and two-family exemption (see infra), for plaintiff to recover from defendant Pardo in her capacity as owner pursuant to Labor Law §240 or §241, plaintiff would need to establish that he or his employer had been employed by defendant Pardo or her agent (Ceballos v. Kaufman, 249 AD2d 40, 40 [1st Dept 1998] citing Brown v. Christopher St. Owners, supra at 442)). With respect to this issue, Pardo has come forward with sufficient proof in admissible form establishing that such is not the case and, in response,

plaintiff has failed to raise a material question of fact that Pardo hired, or even knew of the retention of the painting contractor, Michael's Fine Painting, for whom plaintiff was working at the time of the accident giving rise to this action. As such, dismissal of the Labor Law causes of action is warranted as against Pardo (see, Brown, supra; Aviles v. Crystal Mgmt., 233 A.D.2d 129, 650 N.Y.S.2d 638).

Absent a showing that either defendant directed or controlled the work being performed by plaintiff at the one-family premises at which the underlying accident took place, the moving defendants are entitled to the Labor Law §§240 and 241, one- and two-family dwelling exemption to liability imposed by those statutes (see Bartoo v. Buell, 87 NY2d 362, 367 [1996]; Xirakis v. 1115 Fifth Ave. Corp., 226 AD2d 452 [1996]). This is so whether the defendants are properly characterized as an owner or lessee of this residential premises (see DeSabato v. 674 Carroll St. Corp., 55 AD3d 656, 658 [2d Dept 2008]; Brown v. Christopher St. Owners Corp., 211 AD2d 441, 442 [1st Dept 1995], affd, 87 NY2d 938 [1996] ["In view of the express exemption from the statute for owners of one- and two-family dwellings (Labor Law §240), the extension of liability to a mere tenant of residential premises is a cipher."])).

As to the direction and control issue, both defendants have come forward with sufficient proof in admissible form that neither exercised direction and control over the work under consideration at this single-family dwelling. As such, they have established entitlement to judgment in their favor as a matter of law. The Court further finds that, in response to same, plaintiff has failed to raise a triable issue of fact regarding same.

Finally, the Court finds that plaintiff's suggestion that Posimato was a general contractor is not supported by any evidence in admissible form.

Based upon the foregoing and there being no merit to any other contention raised by plaintiff in response to defendants' prima facie showing of entitlement to judgment in their favor as a matter of law, it is hereby

ORDERED, that defendants' motions are granted in all respects and the complaint is dismissed.

The foregoing constitutes the Opinion, Decision, and Order

of the Court.

Dated: White Plains, New York
May 9th, 2018


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