

Castellanos v Arbabzadeh

2019 NY Slip Op 30548(U)

March 1, 2019

Supreme Court, Suffolk County

Docket Number: 15-0082

Judge: David T. Reilly

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INDEX No. 15-0082

CAL. No. 18-00049OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 5-2-18 (008)

MOTION DATE 5-23-18 (009, 010)

ADJ. DATE 7-18-18

Mot. Seq. # 008 - MD

Mot. Seq. # 009 - MotD

Mot. Seq. # 010 - MD

-----X
ENMA CASTELLANOS, as
ADMINISTRATRIX of the ESTATE OF
JULIAN CASTELLANOS and ENMA
CASTELLANOS,

Plaintiffs,

- against -

SHOHREH ARBABZADEH a/k/a SHERRI
ARBABZADEH & MAY ALEM a/k/a
MOHABOUBEH M. ALEMZADEH,

Defendants.
-----X

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Upon the following papers numbered 1 to 52 read on these motions for summary judgment : Notice of Motion/
Order to Show Cause and supporting papers 1 - 11, 12 - 27, 28 - 36 ; Notice of Cross Motion and supporting papers ;
Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 37 - 39, 40 - 41, 42 - 52 ; Other
Memoranda of Law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (008) by plaintiff Enma Castellanos, the motion (009) by
defendant/third-party plaintiff Shohreh Arbabzadeh, and the motion (010) by defendant May Alem are
consolidated for the purposes of this determination; and it is

ORDERED that the motion by plaintiff Enma Castellanos for partial summary judgment in her favor
on the issue of liability as to her Labor Law §240 (1) claim as against defendant/third-party plaintiff Shohreh
Arbabzadeh is denied; and it is

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ORDERED that the motion by defendant/third-party plaintiff Shohreh Arbabzadeh for, *inter alia*, summary judgment dismissing the complaint against her is granted to the extent indicated herein and is otherwise denied; and it is further

ORDERED that the motion by defendant May Alem for summary judgment dismissing the complaint against her is denied.

This wrongful death action arises from a construction-related accident which occurred on November 10, 2014, at a two-family home located at 1 Crabapple Court, Huntington Station, New York. The accident allegedly occurred when decedent Julian Castellanos, a home improvement contractor, sustained fatal injuries after a retaining wall, meant to create a pathway to the entrance for a new basement apartment under construction at the premises, collapsed on him. Defendant May Alem, a/k/a Mohaboobeh Alemzadeh ("Alem"), a real estate agent working on behalf of the homeowner, retained the decedent to construct the new basement apartment and the exterior cellar entrance leading to it. Defendant/third-party plaintiff Shohreh Arbabzadeh, a/k/a Sherri Arbabzadeh ("Arbabzadeh"), who resides in Buffalo, New York, allegedly purchased the premises as a rental property and promised to pay Alem a fee for her oversight of the renovation project. By way of an amended complaint, plaintiff alleges causes of action against defendants based on common law negligence and violations of Labor Law §§ 240 (1), 241 (6), and 200. Defendants joined issue denying plaintiff's claims, and Arbabzadeh asserted an indemnification cross-claim against Alem. Thereafter, Arbabzadeh commenced a third-party action against Wood Home Improvement, a corporation under which the decedent allegedly conducted business prior to his death. Wood Home Improvement has not appeared in the third-party action. The note of issue in this action was filed on January 9, 2018.

Plaintiff now moves for partial summary judgment on the issue of liability with respect to the Labor Law § 240 (1) claim as against Arbabzadeh, arguing that she failed to ensure that the subject retaining wall was adequately secured while the decedent was preparing the ground before it for the installation of a staircase, and that such failure was the proximate cause of the accident. Arbabzadeh opposes plaintiff's motion and moves for summary judgment dismissing the complaint on the grounds she did not possess the authority to control the means and methods of the decedent's work, and that she did not create or possess actual or constructive notice of any alleged dangerous condition on the premises. Arbabzadeh further argues that plaintiff's claim under Labor Law § 241(6) should be dismissed, because plaintiff failed to allege the violations of any specific applicable sections of the Industrial Code in support of her claim. As for the cause of action predicated on a violation of Labor Law § 240 (1), Arbabzadeh asserts that the statute is inapplicable in this case because the subject retaining wall was complete and did not require bracing, that its collapse was among those types of perils typically encountered by workers at construction sites, and that the decedent's own failure to properly design, construct, or brace the wall was the sole proximate cause of his injuries.

By way of a separate motion, Alem moves for summary judgment dismissing the complaint against her on the ground she was not an owner, contractor, or statutory agent, that she did not possess the authority to control the means and methods of the decedent's work, and that she did not create or possess notice of any alleged dangerous condition.

Plaintiff opposes Arbabzadeh's motion to the extent that it seeks dismissal of her Labor Law § 240 (1) claim and her cause of action under Labor Law §241(6) predicated upon the alleged violation of

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Industrial Code 22 NYCRR 23-1.8 (c) (1). Plaintiff opposes Alem's motion on the grounds it is untimely and that it is an improper successive motion for summary judgment. Alternatively, plaintiff asserts that Alem failed to meet her burden on the motion, as she failed to demonstrate that she did not act as Arbabzadeh's eyes and ears in relation to the renovation project, such that she should be regarded as a statutory agent for the purposes of the Labor Law.

The branch of the motion by Arbabzadeh for summary judgment dismissing plaintiff's common law negligence and Labor Law §§ 241(6) and 200 claims against her is granted to the extent that all but plaintiff's Labor Law § 241 (6) claim predicated upon the alleged violation of Industrial Code 22 NYCRR 23-1.8 (c) (1), which requires the use of a safety hat, are dismissed. It is noted that by failing to oppose all but Arbabzadeh's request for dismissal of the Labor Law § 241 (6) claim predicated upon a violation of Industrial Code 22 NYCRR 23-1.8 (c) (1), plaintiff is deemed to have abandoned those claims (*see Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 962 NYS2d 102 [1st Dept 2013]; *Kronick v L.P. Thebault Co., Inc.*, 70 AD3d 648, 892 NYS2d 895 [2d Dept 2010]; *Cardenas v One State St., LLC*, 68 AD3d 436, 890 NYS2d 41 [1st Dept 2009]; *Genovese v Gambino*, 309 AD2d 832, 833, 766 NYS2d 213 [2d Dept 2003]). Moreover, a review of the adduced evidence reveals that Arbabzadeh established her prima facie entitlement to such relief. In particular, Arbabzadeh demonstrated that the sections of the Industrial Code cited by plaintiff, namely, 12 NYCRR 23-2.2 (a) (b) & (e) (Concrete work and the use of Shores and Forms), 12 NYCRR 23-3.2 (b) (General Requirements for Demolition Work), 12 NYCRR 23-3.3 (b) & (c) (Instability arising from hand demolition), 12 NYCRR 23-4.1 (Instability caused by excavation), 12 NYCRR 23-4.2 (a)-(1) (General standard of care for employers), and 12 NYCRR 23-4.4 (a) (Cave-ins caused by unsecured excavations) are either too general to support a Labor Law § 241 (6) claim or inapplicable under the circumstances of this case (*see Forschner v Jucca Co.*, 60 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]). Furthermore, as the alleged accident arose out of the manner of the decedent's work rather than the existence of a defective or dangerous premises condition, Arbabzadeh established her prima facie entitlement to dismissal of the claim by submitting undisputed evidence that she possessed no more than mere general supervisory authority over the decedent's work (*see Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 352, 670 NYS2d 816 [1998]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317, 445 NYS2d 127 [1981]).

Turning to the branch of the motion by plaintiff seeking summary judgment on the issue of liability with respect to her Labor Law § 240(1) claim as against Arbabzadeh, that section of the statute imposes absolute liability upon owners and contractors who fail to provide or erect safety devices necessary to give proper protection to workers exposed to elevation-related hazards (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 577 NYS2d 219 [1991]). The statute creates a duty that is nondelegable, and owners are held strictly liable for any breach of the statute even if "the job was performed by an independent contractor over which they exercised no supervision or control" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 515, 577 NYS2d 219 [1991]; *see also Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49 [1993]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 518, 493 NYS2d 102 [1985]). The statute is "to be construed liberally to accomplish its legislative purpose which is the 'protection of persons in gaining access to or working at sites where elevation poses a risk'" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514, 577 NYS2d 219 [1991]). "[F]alling object' liability under Labor Law § 240 (1) is not limited to cases in which the falling object is in the process of being hoisted or secured, but also where the

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plaintiff demonstrates that, at the time the object fell, it “required securing for the purposes of the undertaking” (*Escobr v Safi*, 150 AD3d 1081, 55 NYS3d 350 [2d Dept 2017] [internal citations omitted]; see *Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 866 NYS2d 592 [2008]). “The single decisive question in determining whether Labor Law § 240(1) is applicable is whether the plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential” (*Runner v New York Stock Exch. Inc.*, 13 NY3d 599, 603, 895 NYS2d 279 [2009]; see *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1,10, 935 NYS2d 551 [2011]).

Here, plaintiff established, prima facie, that the decedent’s injuries arose from a significant elevation differential (see *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, *supra*; *Runner v New York Stock Exch. Inc.*, *supra*), and that the collapse of the subject retaining wall was not among the types of dangers ordinarily faced by workers at a construction site (see *Uvidia v Cardinal Spellman High Sch.*, 167 AD3d 421, 86 NYS3d 881 [1st Dept 2018]; *Purcell v Visiting Nurses Found. Inc.*, 127 AD3d 572, 8 NYS3d 279 [1st Dept 2015]; *Zarnoch v Luckina*, 112 AD3d 1336, 977 NYS2d 521 [4th Dept 2013]; *Greaves v Obayashi Corp.*, 55 AD3d 409, 866 NYS2d 47 [1st Dept 2008]; see also *Vasquez v Urbahn Assoc. Inc.*, 79 AD3d 493, 918 NYS2d 1 [1st Dept 2010]). Because the retaining walls were still the subject of ongoing work at the time of the accident and the decedent and his workers contemplated that such walls needed further reinforcement against possible collapse, the Court finds this case distinguishable from those cases where the structure is completed and securing it with a device of the kind enumerated in the statute would not have been necessary or even expected (see *Purcell v Visiting Nurses Found. Inc.*, 127 AD3d 572, 574, distinguishing *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 634 NYS2d 35 [1995]; see also *Vasquez v Urbahn Assoc. Inc.*, 79 AD3d 493, 918 NYS2d 1 [1st Dept 2010] [Labor Law § 240 (1) applicable where there is reason to foresee the likelihood of the collapse of a permanent structure]; *Greaves v Obayashi Corp.*, *supra*). Notably, plaintiff submitted an affidavit by Edwin Rivera, a laborer working for the decedent at the time of the accident, in which Rivera states that the retaining walls were meant to be component parts of a stairway leading down to the new exterior basement entrance, and that the walls, which measured between 8 and 12 feet high, were abutted by dirt and sand on both sides of the pathway leading to the new entrance. Rivera further states that prior to the accident, the decedent had informed him that he was relying on the installation of the concrete stairway to stabilize the walls and keep them from falling inward.

Plaintiff also submitted an affidavit by Scott Silberman, P.E., which states, among other things, that it is his opinion, based upon his experience in engineering and construction safety, that the walls should have been braced or secured in some way, because it was foreseeable that decedent’s tamping of the soil between the walls could have caused the walls to move slightly enough to permit gravity and the pressure of the abutting soil to make it collapse inward. Silberman’s affidavit further asserts that the wall should have been secured with horizontal braces or struts at the top, which would have prevented it from falling inward. The burden, therefore, shifted to Arbabzadeh to raise a triable issue warranting denial of the motion (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

In opposition, Arbabzadeh submitted evidence raising significant triable issues as to whether the collapse of the subject retaining wall was caused by its improper design and erection, rather than the lack of a safety device of the kind enumerated in the statute (see *Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 985 NYS2d 416 [2014]; *Misseritti v Mark IV Constr. Co.*, *supra*) and, if so, whether the

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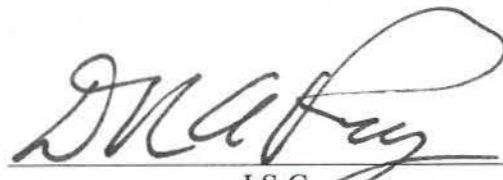
decedent's own failure to follow proper design and construction practices was the sole proximate cause of his injuries (*see Scoz v J&Y Elec. & Intercom Co. Inc.*, 137 AD3d 535, 27 NYS3d 523 [1st Dept 2016]; *Eddy v John Hummel Custom Bldrs., Inc.*, 147 AD3d 16, 43 NYS3d 507 [2d Dept 2016]; *Kerrigan v TDX Constr. Corp.*, 108 AD3d 468, 970 NYS2d 13 [1st Dept 2013]). Referring to Rivera's deposition testimony, Arbabzadeh established that all decisions relating to the construction and securing of the subject retaining walls were made by the decedent, that the decedent was aware that the earth abutting the retaining wall was composed of unstable sand, which repeatedly collapsed as the pathway toward the new basement entrance was being dug, and that the decedent, nonetheless, erected the retaining walls without first building any footing or foundation to secure it. According to Rivera's testimony, the decedent repeatedly expressed concern that the retaining walls might collapse, and wanted to build concrete steps between them with the hope that such steps would prevent the walls from falling inward.

Further, Arbabzadeh submitted an affidavit by her own expert, Walter Konon, P.E., which states, among other things, that it was his opinion, based on his expertise in construction and engineering, that the accident was caused by the improper design and erection of the wall rather than the lack of a safety device. Konon opines that the decedent failed to follow proper design and construction practices in erecting the restraining walls, including failure to ensure that the wall was tied into the existing foundation for the premises, failure to make weep holes in the walls which relieved hydrostatic pressure, and failure to utilize adequately sized cinder blocks which had the capacity to resist the lateral soil and water pressure exerted on the structure. Thus, where, as in this case, it has been demonstrated the decedent possessed sole authority over the means and methods of construction and the provision of safety equipment at the worksite, and he nonetheless proceeded to erect a "jerry rigged" structure rather than follow standard construction practices, the Court finds a triable issue exists as to whether his conduct was the sole proximate cause of his injuries (*see e.g. Scoz v J&Y Elec. & Intercom Co. Inc., supra; Kerrigan v TDX Constr. Corp., supra*). Therefore, the branch of plaintiff's motion for partial summary judgment in her favor on the issue of liability is denied. In light of the foregoing, the Court also denies the branch of Arbabzadeh's motion seeking the dismissal of plaintiff's Labor Law § 240 (1) claim against her.

Finally, the Court denies, in its entirety, the motion by Alem for summary judgment dismissing the complaint against her, such motion being untimely, successive, and barred, in part, by the law of the case doctrine (*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 786 NYS2d 379 [2004]; *Pastrana v Cutler*, 115 AD3d 725, 983 NYS2d 33 [2d Dept 2014]; *Sutter v Wakefern Food Corp.*, 69 AD3d 844, 892 NYS2d 764 [2d Dept 2010]). A review of the court's computerized system reveals that Alem's motion was made more than four months after the filing of the note of issue in this case. In any event, by Order dated November 9, 2015, this court [Hudson, J.] previously denied a motion by Alem seeking summary judgment dismissing the complaint against her.

Dated:

March 1, 2019



J.S.C.
HON. DAVID T. REILLY

___ FINAL DISPOSITION ___ X NON-FINAL DISPOSITION