Smith v Dressler
2019 NY Slip Op 32448(U)
August 13, 2019
Supreme Court, Suffolk County
Docket Number: 19548/2015
Judge: Jr., Paul J. Baisley

Short Form Order

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

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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RAEGAN M. SMITH, as Administratrix of the Goods, Chattels and Credits which were of DAMIAN SMITH, Deceased,

Plaintiff,

-against-

KENNETH P. DRESSLER and IVY DRESSSLER,

Defendants.

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INDEX NO.: 19548/2015
CALENDAR NO.: 201801827OT
MOTION DATE: 3/14/19
MOTION SEQ. NO.: 001 MG; CASEDISP

PLAINTIFF'S ATTORNEYS:
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Upon the following papers numbered 1 to 44 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1- 40; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 41-42; Replying Affidavits and supporting papers 43-44; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Kenneth P. Dressler and Ivy Dressler for summary judgment dismissing the complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff's decedent on May 21, 2014, at approximately 12:30 p.m., when he fell from an A-frame ladder while performing construction at a home located at 41 Oak Grove Road, Southampton, New York. The premises was owned by defendants Kenneth P. Dressler and Ivy Dressler. At the time of the accident, plaintiff's decedent was employed as a mechanic for nonparty Martin's General Contracting, LLC (Martin's), which was owned by nonparty Richard Miglietta. By the complaint, plaintiff alleges causes of action for violations of Labor Law §§ 200, 240 (1), and 241 (6), and for common law negligence.

Defendants now move for summary judgment dismissing the complaint, arguing that the single-family homeowner's exemption applies as to the Labor Law §§ 240 and 241claims, inasmuch as defendants observed the progress of the work and did not supervise, direct, or control plaintiff's decedent's work, nor did they provide plaintiff's decedent with any materials, tools, or equipment. Defendants also argue plaintiff's Labor Law § 200 and common law negligence claims must be dismissed, as defendants did not supervise, direct, or control plaintiff's work and they did not create, or have actual or constructive notice of, any dangerous condition on their property that caused the accident. In support of their motion, defendants submit, *inter alia*, the pleadings, plaintiff's bill of

particulars, photographs of the subject premises, and affidavit of defendant Ivy Dressler. Defendants also submit the deposition transcripts of plaintiff's decedent and defendant Ivy Dressler, and of nonparty witnesses Richard Miglietta, Jennie Finnegan, and Simone Shams. Plaintiff opposes the motion, arguing that triable issues of fact exist as to whether defendants had actual notice or constructive notice of the unsafe working conditions, namely a defect in the ground where the work was being performed.

Plaintiff's decedent, Damian Smith, testified he was employed by non-party Martin's as a mechanic, performing residential roofing. He testified he began working at the subject premises on the date of the accident, fixing a roof that had been leaking, and that the job involved removing and installing siding. Mr. Smith testified that his instructions for the work came from his supervisor, Tom McNamera. He testified he never spoke with defendants until after the accident and that they did not direct his work in any way. Mr. Smith further testified that at the time of the accident he was using an A-frame ladder to ascend the side of the house to install siding. He testified the ladder was provided by his employer, and that it was in good condition. He testified he set up the ladder along the side of the house, and that he checked that it was sturdy by bouncing with his body weight on the bottom rung. He also testified he visually inspected the ground to ensure that the ladder was level. He added that there were leaves and foliage on the ground, and that he had to "kick" some dirt under one of the ladder legs to make it level. Mr. Smith testified he then ascended the ladder, carrying approximately 3 pieces of siding. He testified he got to the rung that was second to the top when the ladder shifted forward into the side of the house, causing him to fall to the ground.

At her deposition, defendant Ivy Dressler testified she purchased the subject premises with defendant Kenneth P. Dressler in 1994, and that it was their primary residence. She testified the residence is a one-family home with 11 rooms. She further testified she is the vice president of a company called New York Biologics, that Kenneth P. Dressler is the Medical Director of the same company, and that their business is run entirely out of their home. She testified she has two or three employees who work out of one room in the home. She further testified the business operations are mostly confined to the single room but occasionally the employees are free to use the kitchen to prepare their lunch and that a portion of the unfinished basement is used for storage of files. Mrs. Dressler testified she contracted with Martin's for repair of her roof, but could not recall specifically what work was performed. She testified on the day of the accident, she did not instruct or direct the employees of Martin's, adding that there was a supervisor present and that he was "taking care of everything."

It is well settled that the proponent of a summary judgment motion bears the initial burden of establishing his or her entitlement to judgment, as a matter of law, in his or her favor by offering admissible evidence sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595

[1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of any opposition thereto (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once the moving party has made the requisite showing, the burden then shifts to the opposing party, requiring him or her to present admissible evidence and facts sufficient to require a trial on any issue of fact (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*). On such a motion, the court is charged with determining whether issues of fact exist while viewing any evidence in a light most favorable to the nonmoving party; the court is not responsible for resolving issues of fact or determining matters of credibility (*see Chimbo v Bolivar*, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; *Pearson v Dix McBride, LLC*, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; *Kolivas v Kirchoff*, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see Chimbo v Bolivar*, *supra*; *Benetatos v Comerford*, 78 AD3d 730, 911 NYS2d 155 [2d Dept 2010]). "In determining a motion for summary judgment dismissing a complaint, all of the evidence must be resolved in that party's favor" (*Santelises v Town of Huntington*, 124 AD3d 863, 865, 2 NYS3d 574 [2d Dept 2015]).

Labor Law §§ 240 (1) and 241, which impose certain non-delegable safety duties upon "contractors[,] owners and their agents," specifically exempt "owners of one and two-family dwellings who contract for but do not control the work" (*Parise v Green Chimneys Children's Services, Inc.*, 106 AD3d 970, 971, 965 NYS2d 608 [2d Dept 2013]; *see Caiazzo v Mark Joseph Contr., Inc.*, 119 AD3d 718, 990 NYS2d 529 [2d Dept 2014]). The homeowner's exemption "is construed very strictly in favor of homeowners because they generally do not have the business sophistication to obtain insurance to cover them from the absolute liability imposed by the [Labor Law]" (*Miller v Shah*, 3 AD3d 521, 522, 770 NYS2d 739 [2d Dept 2004]; *see Lombardi v Stout*, 80 NY2d 290, 296, 590 NYS 55 [1992]; *Van Amerogen v Donnini*, 78 NY2d 880, 882, 573 NYS2d 443 [1991]; *Zamora v Frantellizzi*, 45 AD3d 580, 581, 846 NYS2d 196 [2d Dept 2007]). For a homeowner to receive the protection of this exemption, he or she must show that "(1) the premises consisted of a one- or two-family residence, and (2) the owner did not direct or control the work being performed" (*Marquez v Mascioscia*, 165 AD3d 912, 913, 86 NYS3d 180 [2d Dept 2018]; *see Abdou v Rampaul*, 147 AD3d 885, 47 NYS3d 430 [2d Dept 2017]; *Chowdhury v Rodriguez*, 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]). The exemption "was not intended to insulate from liability owners who use their one- or two-family houses purely for commercial purposes" (*Batzin v Ferrone*, 140 AD3d 1102, 1103, 32 NYS3d 600 [2d Dept 2016], *quoting Lombardi v Stout*, *supra*; *see Van Amerogen v Donnini*, 78 NY2d 880, 573 NYS2d 443 [1991]). However, the use of a portion of a homeowner's premises for commercial purposes does not automatically cause the homeowner to lose the protection of the exemption under the Labor Law (*see Ramirez v Begum*, 35 AD3d 578, 579, 829 NYS2d 117 [2d Dept 2006], *lv denied* 8 NY3d 809, 834 NYS2d 90 [2007]; *Small v Gutleber*, 299 AD2d 536, 751 NYS2d 49 [2d Dept 2002]). Where a one or two-family property serves both residential and commercial purposes, "a determination as to whether the exemption applies in a particular case turns on the nature of the site and the purpose of the work being

performed, and must be based on the owner's intentions at the time of the injury" (*Marquez v Mascioscia*, *supra* at 913, *quoting Caiazzo v Mark Joseph Contr., Inc.*, *supra* at 721; *see Batzkin v Ferrone*, *supra*; *Ramirez v Begum*, *supra*; *see also Bartoo v Buell*, 87 NY2d 362, 367-368, 639 NYS2d 778 [1996]; *Khela v Neiger*, 85 NY2d 333, 337-338, 624 NYS2d 566 [1995]; *Cannon v Putnam*, 76 NY2d 644, 650, 563 NYS2d 16 [1990]; *Stejskal v Simons*, 309 AD2d 853, 855, 765 NYS2d 886 [2d Dept 2003]).

Defendants have established, *prima facie*, that they are entitled to the homeowner's exemption from liability under Labor Law §§ 240 (1) and 241 by demonstrating that the subject premises was a one-family dwelling used primarily for residential purposes, and that they did not direct or control plaintif's decendent's work as those terms are defined in the statute (*see Duda v Rouse Constr. Corp.*, *supra*; *Nai Ren Jiang v Shane Yeh*, 95 AD3d 970, 944 NYS2d 200 [2d Dept 2012]; *Ruiz v Walker*, 93 AD3d 838, 940 NYS2d 896 [2d Dept 2012]; *Ortega v Puccia*, *supra*). Significantly, Ivy Dressler testified that the defendants lived in the residence since they purchased it in 1994, and one room on the main level is dedicated as an office space for their company. The fact that business is conducted in one room of the 11-room home does not render the premises solely commercial in purpose as the presence of a home office is ancillary to the property's primary residential use (*DeSabato v 674 Carroll St. Corp.*, 55 AD3d 656, 658, 868 NYS2d 209 [2d Dept 2008]; *see Miller v Trudeau*, *supra*). Further, when an owner of a one- or two-family dwelling contracts for work that directly relates to the residential use of the home, even if the work also serves a commercial purpose, that owner is shielded by the homeowner exemption from the absolute liability of Labor Law §§ 240 and 241 (*see Bartoo v Buell*, *supra* at 368). Here, the repair work on the exterior of the home being performed by plaintiff's decedent involved fixing a roof leak and installing gutters to protect the home, and related directly to the residential use of the home (*id* at 369; *Ramirez v Begum*, *supra* at 579; *see Dasilva v Nussdorf*, 146 AD3d 859, 859, 45 NYS3d 531 [2d Dept 2017]). "[A]ny commercial benefit was ancillary to the substantial residential purpose served" (*see Bartoo v Buell*, *supra* at 369).

Defendants have also established, *prima facie*, that they did not exercise any direction or control over the manner or method of the work being performed (*see Arama v Fruchter*, 39 AD3d 678, 679, 833 NYS2d 665 [2d Dept 2007]; *Duarte v East Hills Constr. Corp.*, 274 AD2d 493, 494, 711 NYS2d 182 [2d Dept 2000]). "The statutory phrase 'direct or control' is construed strictly and refers to situations where the owner supervises the method and manner of the work" (*Ortega v Puccia*, 57 AD3d 54, 59, 866 NYS2d 323 [2d Dept 2008]; *see Boccio v Bozik*, 41 AD3d 754, 839 NYS2d 525 [2d Dept 2007]). Here, there is no evidence that defendants instructed or directed plaintiff's decedent, or anyone from Martin's, as to how to complete the construction work or how to use the ladder. Defendant testified that she observed the work being completed, but that she believed that the supervisor of the construction was "taking care of everything." Additionally, plaintiff's decedent testified defendants did not provide any materials, nor did they direct or instruct him on how to perform his work. He further testified defendant Ivy Dressler merely observed their

work and commented that it was "beautiful." In opposition, plaintiff fails to raise a triable issue of fact as to whether the defendants exercised the requisite degree of direction or control necessary for the imposition of liability (*see Dasilva v Nussdorf, supra*; *Tomecek v Westchester Additions & Renovations, Inc.*, 97 AD3d 737, 948 NYS2d 671 [2d Dept 2012]; *Duncan v Perry*, 307 AD2d 249, 762 NYS2d 275 [2d Dept 2003]). Therefore, defendants are entitled to summary judgment dismissing plaintiff's Labor Law §§ 240 and 241 claims, based on the homeowner's exemption.

Section 200 of the Labor Law is a codification of the common law duty of a landowner to provide workers with a reasonably safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816 [1998]; *Lombardi v Stout, supra*; *McKee v Great Atl. & Pac. Tea Co.*, 73 AD3d 872, 905 NYS2d 601 [2d Dept 2010]). "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, supra* at 61). Where a claim arises out of alleged defects or dangers in the methods or materials of the work, rather than a defective premises condition, recovery against the owner cannot be had under Labor Law § 200 unless it is shown that he or she had the authority to supervise or control the performance of the work (*see LaGiudice v Sleepy's Inc.*, 67 AD3d 969, 890 NYS2d 564 [2d Dept 2009]; *McFadden v Lee*, 62 AD3d 966, 880 NYS2d 311 [2d Dept 2009]; *Ortega v Puccia, supra*). 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*). In the alternative, where a defective premises condition is alleged, a property owner may be held liable for a violation of Labor Law § 200 if it either created the dangerous condition, or had actual or constructive notice of its existence (*see Pacheco v Smith*, 128 AD3d 926, 9 NYS3d 377 [2d Dept 2015]; *LaGiudice v Sleepy's Inc., supra*; *Chowdhury v Rodriguez, supra*; *Ortega v Puccia, supra*; *Azad v 270 5th Realty Corp.*, 46 AD3d 728, 848 NYS2d 688 [2d Dept 2007]). "To constitute constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time before the accident to permit the defendant an opportunity to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837, 501 NYS2d 646 [1986]). "Constructive notice will not be imputed where a defect is latent and would not be discoverable upon reasonable inspection" (*Curiale v Sharrotts Woods, Inc.*, 9 AD3d 473, 475, 781 NYS2d 47 [2d Dept 2004]; *see Lal v Ching Po Ng*, 33 AD3d 668, 823 NYS2d 429 [2d Dept 2006]).

With respect to the claim arising out of the manner in which the work was performed, defendants have established their prima facie case of entitlement to summary judgment. As noted above, defendants submitted evidence demonstrating that they did not possess the authority to control the method or manner of plaintiff's decedent's work, and that their involvement during the project, specifically defendant Ivy Dressler's involvement, was limited to observations of the progress of the work. Additionally, it is undisputed that the tools and equipment utilized during the project were provided by plaintiff's decedent himself or by his employer.

With respect to any alleged dangerous condition, defendants have established their *prima facie* case of entitlement to summary judgment. Defendants have provided sufficient evidence to establish that they neither created nor had actual or constructive notice of the alleged dangerous condition (*see LaGiudice v Sleepy's Inc.*, *supra*; *Ortega v Puccia*, *supra*; *Azad v 270 Realty Corp.*, 46 AD3d 728, 730, 848 NYS2d 688 [2d Dept 2007]). Defendant Ivy Dressler testified she was unaware of any holes or depressions on the subject premises and that she has never been notified of any complaints regarding same. Further, defendants have established that they did not have constructive notice of the alleged defect by submitting the testimony of plaintiff's decedent. Plaintiff's decedent testified that when he set up his ladder, he took measures to check for sturdiness, and that he visually inspected the ground around the feet of the ladder, adjusting the levelness of the ground below one of the legs by moving debris and kicking the dirt. As both plaintiff's decedent and defendants were unaware of the alleged defect, constructive notice cannot be imputed upon defendants, as the defect was not discoverable upon reasonable inspection (*Lal v Ching Po Ng*, *supra* at 668, *see Curiale v Sharrotts Woods, Inc.*, *supra*).

Defendants having met their *prima facie* burden, the burden now shifts to plaintiff to raise an issue of fact requiring a trial on the Labor Law § 200 and common law negligence causes of action. With respect to the claim arising out of the manner in which the work was performed, plaintiff failed to raise any triable issues as to whether defendants' general supervision of the work was any more extensive than would be expected of a typical homeowner who hired a contractor to renovate their home (*see Garcia v Petrakis*, 306 AD2d 315, 760 NYS2d 551 [2d Dept 2003]; *Edgar v Montechiari*, 271 AD2d396, 706NYS2d 117 [2d Dept2000]; *compare Affri v Basch*, 13NY3d592, 894 NYS2d 370 [2009]). With respect to the alleged dangerous condition on defendants' property, plaintiff also failed to raise a triable issue of fact as to whether defendants created the condition, or had actual or constructive knowledge of it. Plaintiff's allegations as to how the defect was created are conclusory and insufficient to raise a triable issue of fact.

Accordingly, the motion by defendants for summary judgment dismissing the complaint is granted.

Dated: August 13, 2019

HON. PAUL J. BAISLEY, JR.

J.S.C.