Cornell v Feinstein
2019 NY Slip Op 33927(U)
June 14, 2019
Supreme Court, Tompkins County
Docket Number: 2015-0039
Judge: Joseph A. McBride

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 17th day of May 2019.

PRESENT: HON. JOSEPH A. MCBRIDE
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TOMPKINS COUNTY

JEFFREY E. CORNELL,

Plaintiff,

-vs-

ROSALIND D. FEINSTEIN and
HOWARD M. FEINSTEIN,

Defendants.

DECISION AND ORDER

Index No. 2015-0039

APPEARANCES:

COUNSEL FOR PLAINTIFF:

SCHLATHER, STUMBAR, PARKS & SALK LLP
By: Jacob P. McNamara, Esq.
200 East Buffalo Street
PO Box 353
Ithaca, NY 14851

COUNSEL FOR DEFENDANTS:

HURWITZ & FINE, P.C.
By: Todd C. Bushway, Esq.
1300 Liberty Building
Buffalo, NY 14202

JOSEPH A. MCBRIDE, J.S.C.

On this motion, Defendants, Dr. Howard and Rosalind Feinstein (collectively "Defendants") seek summary judgment pursuant CPLR §3212 against Plaintiff, Jeffrey Cornell ("Plaintiff"). The case at hand follows a complaint alleging physical injury subsequent a fall by Plaintiff in the course of his work as a contractor. Plaintiff filed a response in opposition, and each appeared through counsel for oral argument on May 17, 2019. Court received and reviewed said motions and decided; as discussed below. [1]

BACKGROUND FACTS

It is undisputed that Defendants own the property located at 206 Hanshaw Road, Ithaca, NY. Dr. Feinstein specializes in psychopharmacology and owns and runs a psychiatric practice while Mrs. Feinstein is a licensed social worker with a mental health practice out of the building located on the property. In the spring of 2012, the Defendant contracted with Austin Construction to replace the roof of the building of said property. On March 21, 2012, Plaintiff, an employee of Austin Construction, fell from the roof and suffered severe injuries.

The disputed facts in the case revolve around the primary purpose of the Defendants' building. According to the deposition testimony in this case the Court is aware of the following. The building is a two-story building in which the Defendants maintain a residence on the second story. The Defendants' psychiatric practice and mental health counseling practice business offices as well as an income-producing rental unit are on the first floor with a separate entrance from the residence entrance. There is also a staircase that connects the two floors located in Dr. Feinstein's office. The hot water tank and furnace used by the entire building is located on the first floor. There are three phone lines for the building, one for each respective business practice as well as a third for the Defendants' residence. In 2012, the Defendants saw patients each at their respective business, and derived 100% of their income from the businesses and the rental unit, all located at the Hanshaw Road property. As indicated on their tax returns, the Defendants

[1] All the papers filed in connection with this motion are included in the electronic file maintained by the County Clerk and have been considered by the Court.

claimed a home office deduction. In 2012, the roof needed repair due to a leak and the Defendants paid for the repair out of their joint bank account that was used for both business and personal expenses. The Defendants did not provide any tools or any supervision for the roof repair. The fall occurred on the first day of this project when Plaintiff looked up and stepped too close to the edge of the roof.

Plaintiff filed a summons and complaint alleging in the first two causes of action that the Defendants violated Labor Law §§240 and 241 by not providing scaffolding, ladders, pulleys, braces etc. to the Plaintiff for proper and adequate safety protection. Further, alleging a third cause of action as to the Defendants' negligence for failure to provide proper supervision and the degree of care of a reasonable and prudent person. Defendants filed an answer disputing the allegations claiming they are protected from strict liability under the homeowners' exception specifically delineated in the Labor Law and further that Plaintiff is more than 51% contributory in negligence by taking on the assumption of risk. After several depositions occurred, Defendants filed the current motion for summary judgment, and the Defendant filed opposition.

Both parties, through counsel, appeared for oral argument on May 17, 2019. At oral argument, Defendant argued the theory that the Defendants should receive the benefit of the homeowners' exception because this building is a one to two family dwelling and the Defendants' just worked out of their residence. Moreover, that the main purpose of the repair work was related to the residential portion and that the Defendants did not have control over the work being done so the exception is still applicable. Alternatively, the Plaintiffs argued that the Defendants are not the class of people that the exception was meant for because they run a successful business on these premises. Further, Plaintiff stated that for mixed-use properties, the Court must look to what extent the property was used for commercial and to what extent it was used for residential and here, there were three commercial uses and one residential use, and the repairs were structural in nature and therefore the exception does not apply.

LEGAL DISCUSSION AND ANALYSIS

Pursuant CPLR §3212(b), the motion for summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to

warrant the court as a matter of law in directing judgment in favor of either party. When seeking summary judgment, the movant must make a *prima facie* showing of entitlement to judgment as a matter of law, by offering evidence which establishes there are no material issues of fact. Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853 (Ct. of App. 1985); Zuckerman v. New York, 49 N.Y.2d 557 (Ct of App. 1980). Once this burden is met, the burden shifts to the respondent to establish that a material issue of fact exists. Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (Ct. of App. 1986); Winegrad, 64 N.Y.2d 851, 853. "When faced with a motion for summary judgment, a court's task is issue finding rather than issue determination (see, Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [Ct. of App. 1957]) and it must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact." Boston v. Dunham, *274* AD2d 708, 709 (3rd Dept. 2000); see, Boyce v. Vazquez, 249 AD2d 724, 726 (3rd Dept. 1998). The motion "should be denied if any significant doubt exists as to whether a material factual issue is present or even if it is arguable that such an issue exists." Haner v. DeVito, 152 AD2d 896, 896 (3rd Dept. 1989); Asabor v. Archdiocese of N.Y., 102 AD3d 524 (1st Dept. 2013). Mere conclusions and expressions of hope are insufficient to conquer a motion for summary judgement and the defendant must submit admissible evidence when stating their defense. See Zuckerman, 49 N.Y.2d 557. Finally, it "is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact." Vega v. Restani Constr. Corp., 18 NY3d 499, 505 (Ct. of App. 2012).

In the case at bar, the Defendants, as the moving party, must establish a *prima facie* case that they are entitled to the homeowners' exception under Labor Law §§ 240(1) and 241(6) in the first two causes of action as well as the negligence claim in the third cause of action as a bar from recovery for the Plaintiff's injuries.

First, the Court will look at the first and second causes of action claiming strict liability against the Defendants and whether they are entitled to judgment as a matter of law under the homeowners' exception under the labor law. Labor Law §240 (1) provides:

> "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 § 241(6) reads:

> "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, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements… All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Case law has determined that, "the homeowners' exception under Labor Law §§240(1) and 241(6) to liability imposed upon property owners for work site accidents is available to 'owners of one and two-family dwellings who contract for but do not direct or control the work.'" See Sanchez v. Palmiero, 118 A.D.3d 860, 862 (2nd Dept. 2014); citing, Bartoo v. Buell, 87 N.Y.2D 362, 367 (Ct. of Appeals 1996). If the work, "directly relates to the residential use of the home, even if the work also serves a commercial purpose, is shielded by the homeowner exception." Bartoo, 87 NY2D at 366. "The availability of the exemption then depends upon the site purposes of the work performed." Bagley v. Moffett, 107 A.D.3d 1358, 1360 (3rd Dept. 2013); Telfer v. Gunnison Lakeshore Orchards, 245 A.D.2d 620, 621 (3rd Dept. 1997). In Bartoo, the Court of Appeals held that the Defendants were entitled to the homeowners' exception because, "the repair work on the roof was undertaken to preserve the structural integrity of the barn…though the repair work served the commercial purpose… any commercial benefit was ancillary to the substantial residential purpose served by fixing the leaking barn roof." 87 NY2D at 369. Moreover, in Telfer, the Third Department affirmed the lower court's ruling that the defendants were entitled to the homeowners' exception, despite being used for some minimal business purposes, because the construction work related to the residential use of the building, and the defendant officers did not have control over how the work was performed. 245 A.D.2d at 621-22.

Here, the Court finds that the Defendants have established a *prima facie* defense that they are entitled to the homeowners' exception as a matter of law. It is clear that the Defendants did not control the work that was to be performed on the roof repair job. The Defendants did not provide tools or ladders to the Plaintiff, nor did they direct the Plaintiff in his job performance. The Court must look at the purpose of the work to be performed as it related to the property. The Defendants' property is a mixed-use property. The Defendants reside on the second story of the building while they each have their own offices on the first floor as well as an income generating rental space. Like in Bartoo, the repair work done to the roof here was for the structural integrity of the building as the roof was leaking. While the roof repair also happens to serve the commercial purpose, the roof repair was directly related to the residential use of the property. Therefore, the Court finds that the repair work was directly related to the residential use and the Defendants have made a *prima facie* showing they are entitled to the homeowners exception as a matter of law.

Now, after the Defendants met their burden, the burden now shifts to the Plaintiff to show, through admissible evidence, that there are material issues of fact. The Plaintiff argues that a triable issue of fact exists as to whether the building was used primarily for residential or commercial purposes. The Court tends to agree. While the Defendants argue that the commercial purpose is ancillary to the residential purpose, the Plaintiff points to facts for the jury to decide if the property at question here is commercial in nature with the residence being the secondary purpose. To further, their analysis, the Plaintiff suggests that when making the determination the Court should look at the legislative intent, where "words must be given their ordinary and accepted meaning." Zahn v. Parker, 107 A.D.2d 118, 119 (3rd Dept. 1985). In Zahn, the Third Department held that the defendants were not entitled to the homeowners' exception because the building where the defendants resided on the second story and maintained a doctor's office in the first story and taken income deductions based on the use of the business on the premises was not a dwelling in its ordinary meaning.

Here, like in Zahn, the layout of the building at issue distinguishes the mixed-use building from a dwelling in its ordinary meaning. The Defendants own a building where there are three commercial income-driving sections on the first floor of the building and one residential section on the second floor. On the income tax returns, the Defendants take a

business tax deduction for their in-home businesses. Therefore, looking at the facts in the light most favorable to the Plaintiff and giving every reasonable inference, he successfully defeats the motion for summary judgment by presenting admissible evidence that raises questions of fact for the jury to decide. The Defendant's motion for summary judgment as to the first two causes of action is DENIED.

Finally, as to the third cause of action negligence claim, in contractor cases, "where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law §200." Comes v. NYSEG Corp., 82 NY2d 876, 877 (Ct. of App. 1993). In Comes, the Court of Appeals held that the Appellate Division correctly dismissed the plaintiff's claim because there was no evidence that defendant exercised supervisory control or had any input. Id.

Here, like in Comes, there is no evidence that the Defendants had any control over the operation and did not impose any supervisory input. Therefore, the Defendants have met their *prima facie* burden as to the third cause of action. The burden now shifts to the Plaintiff to show there are material issues of fact as to the third cause of action. The Plaintiff does not point to a single fact that would counter the Defendants claim. Further, the Court cannot find anywhere in the record that shows that the Defendants supervised or had any control over the Plaintiff's methods. As to the third cause of action, for negligence, the Defendants' motion for summary judgment is GRANTED and the third cause of action is DISMISSED.

CONCLUSION

Based on all the factors and viewing the information in light most favorable to Plaintiff, the Court finds that Plaintiff has met his burden of providing a material issue of fact as to the first two causes of action to combat the outstanding motion for summary judgment yet has not provided sufficient factual allegations to defeat the motion for the third cause of action. Therefore, Defendants' motion for summary judgment must be DENIED in part and GRANTED in part.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this **DECISION AND ORDER** by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: 6/17, 2019
Ithaca, New York

HON. JOSEPH A. MCBRIDE
Supreme Court Justice

Entered 06/17/2019