

Vignola v Quick

2019 NY Slip Op 34136(U)

July 11, 2019

Supreme Court, Albany County

Docket Number: 901077-17

Judge: Gerard E. Maney

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At a Term of the Supreme Court of the State of New York, held in and for the County of Albany, at Albany, New York

PRESENT: Hon. Gerard E. Maney
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

NICHOLAS VIGNOLA and
DORREN VIGNOLA,
Plaintiffs

DECISION AND ORDER ON MOTION AND
CROSS-MOTION FOR SUMMARY
JUDGMENT
Index No. 901077-17

-against-

STEVEN A. QUICK and
SHAUN M. KEVLIN,
Defendants.

Appearances: Paul Briggs, Esq.
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Maney, J.

On November 3, 2016, plaintiff Nicholas Vignola (hereinafter Vignola) was injured when he fell off the roof of a two-family home owned by defendants Steven A. Quick and Shaun M. Kevlin at 173 Congress Street in the City of Cohoes, Albany County. Vignola, and his wife

derivatively, commenced this action alleging causes of action under Labor Law §§ 200, 240 and 241(6) predicated on a violation of Industrial Code sections (12 NYCRR 23-1.7 and 23-1.24) as well as common law negligence. Defendants answered and now move for summary judgment dismissing the complaint on the ground that Vignola was not an “employee” entitled to the protections provided under the Labor Law. Plaintiffs oppose the motion and cross-move for summary judgment on their complaint.

The Court has reviewed the Notice of Motion dated January 31, 2019, the affidavit of Steven A. Quick in support of defendants’ motion sworn to on February 5, 2019, the affirmation of Paul Briggs, Esq., dated January 31, 2019, and exhibits A through E, which include the pleadings, plaintiffs’ verified bill of particulars and page 11 of Vignola’s deposition, the affirmation of Paul Briggs, Esq., in opposition to plaintiffs’ cross-motion for summary judgment dated February 26, 2019 and exhibits A and B.

The Court also reviewed the Notice of Cross-Motion dated February 21, 2019, the affirmation of Lawrence D. Lissauer, Esq., dated February 21, 2019, in support of the cross-motion, the affidavit of Nicholas Vignola sworn to on February 15, 2019, and exhibits A through G, which included the deposition of Nicholas Vignola dated April 6, 2018, the June 12, 2018 Examination Before Trial of Steven A. Quick, the October 15, 2016 City of Cohoes Building Permit for proposed work at 173 Congress Street, a copy of an August 6, 2013 MRI Inspection of 173 Congress Street by the City of Cohoes Code Enforcement Officer, a copy of an April 1, 2014 ROP Inspection of 173 Congress Street by the City of Cohoes Code Enforcement officer, real estate listings for 173 Congress Street, Cohoes, New York, and sales receipts.

It is upon these documents that the Court renders this determination and finds that material issues of fact remain that preclude summary judgment.

Discussion

It is well settled that the court's role on a motion for summary judgment is limited to finding issues, rather than resolving them (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). It is a "drastic remedy that should not be granted where there is any doubt as to the existence of such issues" (*Sillman*, 3 NY2d at 404). The success of the motion depends on whether the proponent of the motion can "make a prima facie showing of entitlement to judgment as a matter of law [by] tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad*, 64 NY2d at 853; see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If a prima facie showing cannot be made, the motion must be denied, regardless of the sufficiency of the opposing papers (*Winegrad*, 64 NY2d at 853; see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If a prima facie showing can be made, the burden shifts to the party opposing the motion to produce evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact requiring a trial (see *Zuckerman*, 49 NY2d at 562; CPLR 3212 [b]).

"[T]o invoke the protections afforded by the Labor Law and to come within the special class for whose benefit liability is imposed upon contractors, owners and their agents, a 'plaintiff must demonstrate that he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it owner, contractor or their agent'" (*Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 576 [1990], citing *Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970, 971 [1979] [internal citations omitted]).¹ The Legislature's principal objective in enacting Labor Law

¹ See Labor Law § 2 (5) defining an employee as "a mechanic, workingman or laborer working for another for hire; and Labor Law § 2 (7) defining one who is employed as one "permitted or suffered to work".

§§ 200, 240 and 240 was “to provide for the health and safety of employees” (*Mordkofsky*, 76 NY2d at 577). Recovery has been denied where the plaintiff’s role was that of a volunteer or a contract-vendee and not an employee as defined in the Labor Law (*id.*).

Defendants, the non-resident co-owners of the property at 173 Congress Street in the City of Cohoes, argue that plaintiff Nicholas Vignola was not an ‘employee’ or ‘employed’ and thus not entitled to Labor Law protections. Defendants contend that Vignola ha not been hired to replace the roof, perform any roofing work or work on the chimney at the 173 Congress Street property. Instead, the only work he had been hired to perform was plastering work on the foundation of the property, which by its very nature was performed on the ground. Defendant Steven Quick, in his examination before trial, testified that he hired Vignola to perform the plaster work on the foundation on or about November 1, 2016 and, according to the transcript of Vignola’s examination before trial, Vignola admitted that he had completed the foundation work “roughly . . . two days before and ten days before” the November 3, 2016 accident (Defendant’s Exhibit E, page 11).

Quick averred that he had hired and paid the Sicley brothers roofing company for the roofing work. Quick maintained that Vignola was not employed by the Sicley brothers roofing company and, at the time of his fall from the roof, his plaster work on the foundation of the building was complete and his status as an employee of defendants had ended.

However, defendants relied, in part, on Vignola’s testimony in his examination before trial, which in and of itself presents a material issue of fact as to what Vignola had, in fact, been hired by defendants to do. Vignola’s testimony on page 11 of Plaintiff’s exhibit E reads as follows:

Q. What were you hired to do for the job that led to your fall?

Vignola: *To reroof the 173 Congress Street*

Q You were hired to reroof the Congree [sic] Street?

Vignola: Yes.

Q You weren't hired to do any plaster work?

Vignola: *Not at that time. The plaster work was prior.*

In the Court's view, this testimony precludes summary judgment as it raises a material question of fact as to whether Vignola was, in fact, an "employee", i.e. a working man or laborer working for defendants on the roof for hire (Labor Law §2 [5]) and "employed" by defendants at the site, i.e., permitted or suffered to work on the reroofing project (Labor Law § 2 [7]), and whether Vignola was a person in the class of persons entitled to protection afforded by the Labor Law. As a consequence, defendants' motion for summary judgment dismissing the complaint under the Labor Law must be denied.

Plaintiffs' Cross Motion for Summary Judgment

For the same reason, plaintiffs' cross motion for summary judgment must fail. Questions of fact exist as to whether Vignola was both "permitted or suffered to work" on the roofing project and whether he was hired or retained by Quick, the co-owner, to do so.

Vignola averred in his affidavit that Quick had previously hired him to do plaster on the outside of the property at 173 Congress Street, but that the job Quick hired him to do that led to his fall was to reroof the building. He averred that his job was to "supervise the job on the roof" and he (and not Quick) had retained the Sicley brothers to do the physical labor. He testified that Quick was to pay him and he would pay the Sicley brothers for their work. Vignola testified in his examination before trial that it was he who determined the materials needed for the job, he priced the roof project for Quick, he purchased the roofing materials and he delivered it to the property on

the day roofing work began. Vignola testified that he provided planks, roof jacks, cones and caution tape for the project but no other safety equipment. Vignola averred that, at the time of his fall, he was on the roof in furtherance of the job he had been retained to do by Quick, and was bringing tools and materials to the roof that he had purchased for the project and brought to the site earlier in the day.

However, the examination before trial testimony of Quick, which was evidence contained in plaintiffs' cross motion, presented issues of fact requiring a hearing. Quick maintained that he had only hired Vignola to perform the plaster work on the foundation, which was complete and paid for at the time of his fall. He claimed that he had not hired Vignola to do any type of roofing at the location and had never even discussed the possibility of hiring him. Nevertheless, Quick testified that Vignola had referred him to Joshua and Robert Sicley to do the roofing work and he did not dispute the fact that he asked Vignola to pick up the materials for the roofing job because the Sicley brothers would agree only to do the labor. Quick testified that he paid cash for the material and agreed to pay Vignola for his time. He did not dispute that Vignola brought the roofing materials over to the 173 Congress Street property on November 3, 2016, the morning of Vignola's accident. Quick admitted that he supplied no safety equipment for the project and did not check on the Sicley brothers until 4:00 p.m. that afternoon, when he went to the property "to talk to the Sicley brothers and talk with Nick and that's when the Sicley brothers told me that he fell."

Quick's testimony raised issues of fact as to the scope of Vignola's employment with defendants, which precludes summary judgment. Specifically, questions of fact exist as to whether Vignola was hired in connection to the reroofing project, whether he was permitted or suffered to work on the premises on the day the accident occurred and whether he was, or was not, within the

special class that is protected by the Labor Law. The issue cannot be decided by this Court on this record as a matter of law.

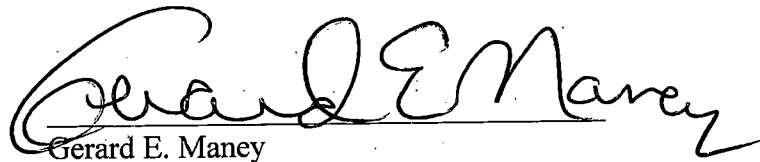
Accordingly, the motion and cross motion for summary judgment are denied.

This constitutes the decision/order/judgment of the Court. The original decision/order/judgment is being returned to the attorney for plaintiffs. All other original papers will be delivered by the Court to the Albany County Clerk for filing. The signing of this decision/order/judgment does not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule regarding filing, entry and notice of entry.

So Ordered.

Dated:

7/11/19



Gerard E. Maney
Acting Supreme Court Justice

