

Marquez v Castellana
2020 NY Slip Op 35117(U)
July 24, 2020
Supreme Court, Nassau County
Docket Number: Index No. 601801/2018
Judge: Leonard D. Steinman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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VICTOR MARQUEZ,

Plaintiff,

-against-

PETER CASTELLANA, JR.,

Defendant.

Part 12
Index No. 601801/2018
Motion Seq. No. 002

DECISION AND ORDER

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LEONARD D. STEINMAN, J.

The following submissions, in addition to any memoranda of law, were reviewed in preparing this Decision and Order:

Defendant's Notice of Motion, Affirmation & Exhibits.....	1
Plaintiff's Affirmation in Opposition & Exhibits.....	2
Defendant's Reply Affirmation.....	3

This action stems from personal injuries sustained by plaintiff Victor Marquez in November 2017 while using a table saw¹ to cut wood at the property owned by defendant, Peter Castellana, Jr. At the time of the accident, Marquez was employed as a construction worker by APAZ Contracting Corp. (non-party), a residential construction company owned by Andrew Pasquarella. Castellana now moves for summary judgment pursuant to CPLR 3212 dismissing the complaint against him on the grounds that he is the owner of a single-family residence and did not direct or control the method and means of Marquez's work.

BACKGROUND

The subject property is comprised of three buildings, two garages and a garage with living quarters. Castellana purchased the property as a private residence where he intended to store his personal car collection. Soon after Castellana purchased the property, he hired APAZ to perform construction renovations of the three structures.

¹ A woodworking tool consisting of a circular blade that is powered electronically and mounted on the top of a table.

Marquez testified that while working on this project, he was given orders by Pasquarella, APAZ's owner. Pasquarella instructed Marquez on how to use a table saw, including the technique to push wood through the blade. "Izzy," another employee of APAZ, was Marquez's supervisor when Pasquarella was not at the property.

At the time of this accident, Marquez was working on the building containing the living quarters. Marquez was cutting wood using a table saw that was provided to him by APAZ. It is undisputed that the table saw was not fashioned with a blade guard. Marquez attempted to push wood through the blade while simultaneously grabbing the wood from the other side. Marquez testified that the piece of wood was wet, and when the blade hit a "knot" in the wood, it caused the wood to kick back. Marquez's fingers were cut by the blade as a result. Marquez testified that prior to this accident, he made complaints to Izzy regarding the lack of a blade guard, but nothing was done.

SUMMARY JUDGMENT STANDARD

It is the movant who has the burden to establish an entitlement to summary judgment as a matter of law. *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623 (1997). "CPLR §3212(b) requires the proponent of a motion for summary judgment to demonstrate the absence of genuine issues of material facts on every relevant issue raised by the pleadings, including any affirmative defenses." *Stone v. Continental Ins. Co.*, 234 A.D.2d 282, 284 (2d Dept. 1996). A court must view the evidence submitted in the light most favorable to the nonmoving party. *Bank of New York Mellon v. Gordon*, 171 A.D.3d 197, 201 (2d Dept. 2019). A moving defendant's burden cannot be satisfied merely by pointing to gaps in the plaintiff's proof. *In re New York City Asbestos Litigation (Carriero)*, 174 A.D.3d 461 (1st Dept. 2019); *Vittorio v. U-Haul Co.*, 52 A.D.3d 823 (2d Dept. 2008).

Where the movant fails to meet its initial burden, the motion for summary judgment should be denied. *U.S. Bank N.A. v. Weinman*, 123 A.D.3d 1108 (2d Dept. 2014).

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts

presented by the opposing party must be presented by evidentiary proof in admissible form. *Zuckerman v. New York*, 49 N.Y.2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 (1979).

LEGAL ANALYSIS

In his Verified Complaint, Marquez asserts causes of action under Labor Law §§200 and 241(6).

Labor Law §200 and the provisions therein embodied are a codification of the common law and impose upon owners, contractors and agents thereof, a duty to provide workers with a safe environment in which to perform their assigned duties. *See Lombardi v. Stout*, 80 N.Y.2d 290 (1992). “An implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition.” *Russin v. Picciano & Son*, 54 N.Y.2d 311, 317 (1981).

The common law and Labor Law §200 impose a duty upon an owner or general contractor to provide construction site workers with a safe place to work. *Comes v. N.Y. State Electric and Gas Corp.*, 82 N.Y.2d 876 (1993). More specifically, this duty applies to owners, contractors, or their agents, who had control over or supervised the work, or who created the dangerous condition and had actual or constructive notice of it. *Kim v. Herbert Construction. Co.*, 275 A.D.2d 709 (2d Dept. 2000).

Where the alleged defect or dangerous condition arises from the contractor's methods—such as the case here—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*, 82 N.Y.2d at 877; *Lombardi v. Stout*, 80 N.Y.2d 290, 295 (2000).

In this matter, there is nothing in the record to indicate that Castellana possessed the supervisory power or exercised the requisite degree of control over the manner and method of construction work performed by Marquez that gave rise to his accident. It is undisputed that the tools used by Marquez were provided by his employer, APAZ. Marquez conceded at

his deposition that Castellana never gave any direction regarding how to use tools or perform work on the project. Marquez also testified Castellana never even stayed an entire day at the property and was not present at the time of Marquez's accident. Although Castellana would visit the property daily, he would drop off donuts and coffee for the workers and ensure work was running "smoothly." According to Marquez, Castellana's only substantive involvement with the construction project was reviewing blueprints and "occasionally" telling workers what needed to get done. Pasquarella similarly testified that Castellana's involvement in the project was that of a "normal customer." Castellana's involvement was no more extensive than would be expected of an ordinary homeowner and does not rise to the level to impute liability. *See Edgar v. Montechiari*, 271 A.D.2d 396 (2d Dept, 2000)(instructions about aesthetic design matters or retention of limited power of general supervision did not constitute direction and control).

In opposition, Marquez submits an affidavit wherein he avers that Castellana directed his work through agents, Nick Pedone and an unnamed helper. But Marquez's affidavit runs afoul of his own deposition testimony. It remains clear from the record that Pedone was a real estate manager of Western Beef, the company of which Castellana is a chairman. Based on the testimony proffered, Pedone was not involved in the construction project at Castellana's private property. Castellana, Pasquarella and Pedone himself all testified that Pedone was not a foreman on this project nor did he have any involvement in the work being performed. Pedone's involvement at the subject premises was merely to open the doors for the workers and make sure the doors were locked at night. Marquez's deposition testimony is not to the contrary. Further, at his deposition Marquez characterized Castellana's unnamed worker as one who would "clean up" and collect the garbage at the end of the day. Marquez did testify that he suspected this unnamed worker was watching the workers to report back to Castellana. Although clearly speculation, even if Marquez is correct that this unnamed worker reported his observations to Castellana, nothing in Marquez's description would suggest that this unnamed worker was an agent of Castellana who possessed supervisory power or authority over Marquez's work. It is clear that Marquez's affidavit

presents feigned issues of fact to avoid the consequences of his deposition testimony.

Cuebas v. City of Yonkers, 97 A.D.3d 779 (2d Dept. 2012).

Given the foregoing, Marquez's claim under Labor Law § 200 is dismissed.

Labor Law § 241(6)

Labor Law § 241 provides that,

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* (emphasis added), when constructing or demolishing or doing any excavating in connection therewith comply with the following requirements... (6) 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.

The homeowner exemption of Labor Law § 241 was "intended by the Legislature to shield homeowners from the harsh consequences of strict liability under the provisions of the Labor Law [and] reflect[s] the legislative determination that the typical homeowner is no better situated than the hired worker to furnish appropriate safety devices and to procure suitable insurance protection." *See Bartoo v. Buell*, 87 N.Y.2d 362 (1996). Although the Labor Law statutes do not define "dwelling," courts have avoided an overly rigid interpretation and application of the homeowner exemption, employing a flexible "site and purpose (of the work)" test to determine whether the exemption applies. *Id.*; *see also Cannon v. Putnam*, 76 N.Y.2d 644 (1990).

Here, Castellana has sufficiently established that the homeowner exemption of Labor Law § 241 precludes a finding of liability against him. Castellana testified at his deposition that the property is his primary residence where he lives with his wife and no one else. Contrary to Marquez's contention, it is immaterial that Castellana garages his private car collection on the property and that two of the three structures on the property are garages. Indeed, courts have consistently refused to limit their application of the homeowner exemption solely to work performed on a residential structure itself, but rather have found

that garages, barns and other ancillary structures located on property that also contains a residence fall within the exemption. *See Jiminez v. Pacheco*, 73 A.D.3d 1129 (2d Dept. 2010); *see also Lista v. Newtown*, 41 A.D.3d 1280 (4th Dept. 2007); *Lyon v. Kuhn*, 279 A.D.2d 760 (3d Dept. 2001). There is no evidence that the renovations on the detached garages were performed exclusively for commercial purposes or that it was unrelated to the residential use of Castellana’s home. *Jiminez v. Pacheco*, 73 A.D.3d 1129 (2d Dept. 2010).


Since Marquez failed to raise a triable issue of fact with respect to the residential character of the subject property and in light of this court’s finding above that Castellana did not direct or control Marquez’s work, Castellana cannot be held liable under Labor Law §241 and the claim must be dismissed.

Accordingly, defendant’s motion is granted in its entirety and the complaint is hereby dismissed.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: July 24, 2020
Mineola, New York

ENTER:

LEONARD D. STEINMAN, J.S.C.
XXX

ENTERED

Jul 27 2020

NASSAU COUNTY
COUNTY CLERK’S OFFICE