Figueroa v Minott

2020 NY Slip Op 35238(U)

May 15, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 616336-2016

Judge: Robert F. Quinlan

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SHORT FORM ORDER INDEX # 616336-2016

SUPREME COURT - STATE OF NEW YORK
PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT F. QUINLAN
Justice of the Supreme Court

Mot. Date: 12-05-19
Adj Date: 01/09/20; 02/13/20
Submit Date: 02/27/20
Mot. Seq.: #003-MotD

---X
MARCOS MAYEN FIGUEROA

Plaintiff,

- against -

VERNETTA L. MINOTT

Defendants.
---X

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Upon the following papers read on defendant's motion for summary judgment seeking dismissal: Notice of Motion and supporting papers of defendant: NYSCEF Docs. # 44-67, 70-71; Affirmation in opposition of plaintiff: NYSCEF Doc. # 73; and Reply Affirmation: NYSCEF Doc. # 78; it is,

ORDERED that defendant Vernetta L. Minott's motion for summary judgment is granted to the extent that the claims contained in plaintiff Marcos Mayen Figueroa's third and fourth causes of action are dismissed, but that part of her motion seeking dismissal of the claims in plaintiff's first and second causes of action is denied; and it is further

ORDERED that the trial of plaintiff's action against defendant shall proceed upon these remaining claims.

Plaintiff Marcos Mayen Figueroa ("plaintiff") allegedly was injured on September 23, 2015 while performing general exterior home cleaning services at a residence known as 9 Caroline Street, Medford, Town of Brookhaven, Suffolk County, New York ("the property") owned by defendant Vernetta L. Minott ("defendant"). Plaintiff commenced this action by filing a summons and complaint with the Suffolk County Clerk on October 13, 2016 (NYSCEF Doc. #1). The complaint alleged two causes of action against defendant for causing plaintiff's injuries; the first, alleging common law negligence in that defendant in her ownership, operation, management, control, supervision and maintenance of the property caused and allowed a dangerous and unsafe condition to exist thereon, which she caused, was aware or had notice of, and which she failed to remedy; the second cause of action, based upon the same allegations, claimed those acts of negligence and the condition violated Section 200 of the Labor Law. Subsequently, by notice of motion filed March 15, 2018 (NYSCEF Doc. #28), plaintiff moved to amend the complaint to add two further causes of action, one each claiming that plaintiff's injuries were a result of defendant violating Labor Law §§ 240 (1) (plaintiff's third cause of action) and 241 (6) (plaintiff's fourth cause of action). The motion was unopposed, and by order dated August 17, 2018 (NYSCEF Doc. # 38) the court (Luft, A.S.J.) granted the amendment. Defendant filed her present motion for summary judgment seeking to dismiss the complaint on November 7, 2018.

LABOR LAW §§ 240 (1) and 241 (6) CLAIMS DISMISSED

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a mater of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Gilbert Frank Corp. v Federal Insurance*, 70 NY2d 966[1988]; *Torres v Industrial Container*, 305 AD2d 136 [1st Dept 2003]). The movant has the initial burden of proving entitlement to summary judgment, failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposition (*see Winegrad v New York University Medical Center*, 64 NY2d 851[1985]; *William J. Jenack Estate Appraiser and Auctioneers v Rabizadeh*, 22 NY3d 470 [2013]; *Jacobsen v New York City Health & Hospital Corp*, 22 NY3d 824 [2014]). Once such proof has been offered, the burden then shifts to the opposing party, who in order to defeat the motion, must proffer evidence in admissible form to establish a factual issue sufficient to require a trial (CPLR 3212 [b]; *see Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Winegrad v New York Univ. Med. Center*). It has long been recognized as a general principle of summary judgment that a moving party, as well as an opponent, is required to assemble and lay bare all its proof in support, or opposition, of the motion (*see Maurice O'Meara Co. v National Park Bank of New York*, 239 NY 386 [1925]; *Dodwell & Co. Inc. v Silverman*, 234 AD 362 [1st Dept 1932]; *M&S Mercury Air Conditioning Corp. v Rodolitz*, 24 AD2d 873 [2d Dept 1965]). Failure to do so is done at the party's risk (*see Deleon v New York City Sanitation Dept.*, 25 NY3d 1102 [2015]). In deciding the motion the court is to determine whether there are bonafide issues of fact and generally is not to delve into or resolve issues of credibility (*see Vega v Restani Corp.*, 18 NY3d 499 [2012]), unless it clearly appears that the issues are not genuine, but feigned (*see Curry v MacKenzie*, 239 NY 267 [1925]; *Sullivan v Pilevsky*, 281 AD2d 410 [2d Dept 2001]; *Dorazio v Delbene*, 37 AD3d 645 [2d Dept 2007]; *Pryor & Mandelup, LLP v Sabbeth*, 82 AD3d 731 [2d Dept 2011]; *Carthen v Sherman*, 169 AD3d 416 [1st Dept 2019]).

Here, defendant's submissions, particularly the testimony of plaintiff at his deposition, have established her prima facie proof of entitlement to summary judgment warranting dismissal of the claims raised by plaintiff in violations of Labor Law §§ 240 (1) and 241 (6), absent plaintiff presenting evidence in admissible form sufficient to raise a triable issue of fact as to those violations. Although both Labor Law §§ 240 (1) and 241 (6) provide what could be termed almost "absolute" liability for owners of property for injuries sustained by contract workers at their properties due to "elevated-related risks," both sections carve out a specific exemption for "owners of one and two-family dwellings who contract for but do not control the work."

Through both documentary evidence and the testimony presented, defendant has established that the property is a one family dwelling. Defendant presented a copy of the deed to the property indicating her ownership, certified by the Suffolk County Clerk's Office, (NYSCEF # 63) and as part of that exhibit a copy of the "property card" maintained by the Assessor's Office of the Town of Brookhaven which describes the property. Additionally, defendant provided another copy of the "property card" certified by the Assessor's Office (NYSCEF Doc. #71). The "property card" establishes that the property is a "single family year-round" residence in an A-1 Zoning District of the Town. The court takes judicial notice that §§ 85-190A and 197A of the Code of the Town of Brookhaven designates one-family dwellings as a principle use in such zones, not multi-family dwellings.

The fact that defendant testified that at the time of the accident, she, her three adopted children and five members of another family resided at the property does not take the property out of that zoning classification, or the exceptions to Labor Law §§ 240 (1) and 241 (6). Although plaintiff never raised a claim in his pleadings, or multiple bills of particulars, that the property was not a one or two family residence, in opposition to defendant's motion plaintiff's counsel attempts to raise a triable question of fact as to whether or not the property is a multi-family residence outside the exceptions. Counsel attempts this by offering speculation that because the 81 year old defendant stated at her deposition that there were "about 11 bedrooms" in the home, it may in fact be a "three family" home. Plaintiff never followed up on this "issue" at the deposition or in later discovery demands. Speculation is not evidentiary proof in admissible form sufficient to raise a triable issue of fact in the face of defendant's proof, nor is a statement by counsel who has no personal knowledge of the facts, sufficient to raise a triable issue of fact to defeat summary judgment (*see Matter of Zlomek*, 40 AD3d 774 [2d Dept 2007]; *Barcov Holding Corp. v Bexin Realty*

Corp., 16 AD3d 282 [1st Dept 2005]; *US National Bank Assn. v Melton*, 90 AD3d 742 [2d Dept 2011]; *Bank of N.Y. Mellon v Aiello*, 164 AD3d 632 [2d Dept, 2018]).

Further plaintiff's counsel's speculative argument is not supported by his citations to *Zheng v Cohen*, 52 AD3d 801 (2d Dept 2008) or *Hannan v Freeman*, 169 AD3d 1016 (2d Dept 2019). Unlike here, in both caes there was not speculation that the properties might not meet the exclusion, but actual municipal records presented that showed there was at least a question of fact as the the property's entitlement to the exemption. In *Zheng*, the property was registered as a legal three family residence, despite the owner's claim that it was intended to be renovated to a two family residence. A review of the trial court decision in *Hannnan* (*Hannan v Freeman*, Index # 503109-12 [Sup. Ct., Kings County, November 4, 2016, Ash, J.]) shows that the question of fact found by the Second Department on appeal was raised in the trial court by the presentation of conflicting municipal documents that showed that the city registered the house as both a two family and a three family residence at the same time. There is no such documentary evidence offered to support plaintiff's counsel's speculation here. In fact the only evidence in admissible form provided by plaintiff concerning the status of the property is his affidavit of March 14, 2018 in which he says in paragraph 3 that "9 Caroline Street in Medford, [is] a single-family house..." contradicting his counsel's speculation.

As plaintiff's attempt to raise a triable issue of fact by claiming that defendant supervised and controlled plaintiff's work at the property, plaintiff's counsel supports this by a few isolated statements made by plaintiff during his 171 pages of testimony on liability at his deposition of April 10, 2018 and equivocal statements in his prepared affidavit of March 14, 2018. A review of the full testimony of plaintiff given at his deposition gives a more complete picture of whether defendant supervised, directed or controlled plaintiff's work any more than any homeowner who examines the performance of services being rendered at his or her home. Plaintiff had preformed work for defendant at her home once before. In the months between that date and the day of the accident, September 23, 2015, plaintiff and defendant had two phone conversations about the work, defendant told plaintiff what work she needed done, but did not tell defendant how he was to do the work, what tools he was to use, and if he was to do the work alone. In fact plaintiff's testimony shows that he decided to bring a friend to work with him, that he offered to use a ladder he could get from a friend and that defendant only said he could use her ladder but did not order him to use it, she did not tell him how to perform his work power washing her house and cleaning her gutters other than to say she wanted it "very clean," she did not tell him what equipment to use to clean her house, he brought his own. This does not provide evidence of a homeowner who was controlling how plaintiff was to do his job.

When he got to the property on the day of the accident with his friend who he decided to bring as a co-worker, plaintiff's testimony shows that defendant did not tell him how to or where to use his power wash machine, how to set it up, that other than using her ladder he brought his own equipment and hoses, merely needing to connect his equipment to defendant's electric outlet and her water supply. Plaintiff testified that defendant did not tell tell him how to use his power washer to clean the gutters or the side of her house. Defendant's only instruction about the gutters and the side of the house was that she wanted them "very clean," and after inspecting what he had done, she said the gutters needed to be cleaned again. Plaintiff never testified that defendant stood outside the house directing, overseeing or supervising his work in any way, nor did she ever help him perform any of the work. When he went to clean the gutter again and moved the ladder, she did suggest that he put it on concrete rather than the dirt, but he testified she took no part in how he set up the ladder. He testified that she did not instruct him how to hold or place his power washer to clean the gutter or otherwise how to perform his work.

When asked at his deposition about his statement in his affidavit of March 14, 2018 in which he said defendant "came in and out of the house to watch and monitor what I was doing," he testified she gave him no instructions as to his method of work in doing that, and that she "just came out to look."

The conduct and statements of defendant that plaintiff provided in his extensive examination on liability does not show a homeowner who was directing, controlling and supervising plaintiff's work. Rather it shows the normal conduct of a homeowner who has contracted with a workman to perform services on their home. They go out to see

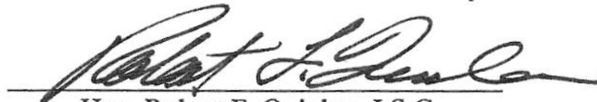
how well the work is coming along, to "monitor" the course of that work, to inspect it to see if the work is what they expected. A consistent theme that runs through cases such as this is that a homeowner will not be deprived of the exemption for exhibiting typical homeowner interest or for involvement no more extensive than would be expected of the typical homeowner (*see DiMaggio v. Cataletto*, 117 A.D.3d 984 (2d Dept 2014); *Mondone v. Lane*, 106 A.D.3d 1062, 1063 (2d Dep't 2013); *Ruiz v. Walker*, 93 A.D.3d 838 (2d Dep't 2013). Under the circumstances as testified to by plaintiff himself, by occasionally inspecting the work being done on her home, expecting and asking that a gutter be "very clean," requesting that area of the gutter that was not cleaned to her satisfaction be cleaned again, allowing a tradesman to use your ladder and suggesting that he put the ladder on a hard concrete surface rather than dirt in a garden, does not expose defendant to liability under Labor Law §§ 240 (1) and 241 (6). She did not control, direct or supervise plaintiff's work. Accordingly plaintiff's third and fourth causes of action are dismissed.

LABOR LAW § 200 CLAIM AND COMMON LAW NEGLIGENCE CLAIMS REMAIN

But the evidence presented not only by plaintiff, but also through defendant's submissions, raise a question of fact as to whether or not defendant violated the duty under Labor Law § 200 to provide a safe place to work and/or the common law negligence claim that plaintiff's injury was caused by a defective conditions at the premise on the day of the acciden (see DeFelice v Seako, Const. Co., LLC 150 AD3d 677 [2d Dept 2017]). Therefore, those claims cannot be dismissed and this action shall proceed to trial.

This constitutes the decision and order of this court.

Dated: May 15, 2020



Hon. Robert F. Quinlan, J.S.C.

FINAL DISPOSITION X NON-FINAL DISPOSITION