

Korotayev v Kerzhner
2021 NY Slip Op 31314(U)
April 7, 2021
Supreme Court, Kings County
Docket Number: 500862/12
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 7th day of April, 2021.

PRESENT:

HON. CARL J. LANDICINO,
Justice.

-----X

ALEXANDER KOROTAYEV,

Plaintiff,

Index No. 500862/12

-against-

ZINOVIIY KERZHNER, as Limited Administrator of the Estate of YEFIM KERZHNER, KLARA KERZHNER, individually, and ZINOVIIY KERZHNER, individually,

Motion Sequence #9, #10

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF #:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

126-138, 143-153

Answer/Opposing Affidavits (Affirmations) _____

159

Reply Affidavits (Affirmations) _____

161-163

Plaintiff Alexander Korotayev moves for an order, pursuant to CPLR 3212, granting partial summary judgment in his favor with respect to liability on his Labor Law §§ 240 (1) and 241 (6) claims (motion sequence number 9). Defendants Zinoviyy Kerzhner, as Limited Administrator of the Estate of Yefim Kerzhner, Klara Kerzhner, individually, and

Zinoviy Kerzhner, individually, cross-move for an order, pursuant to CPLR 3212, dismissing the complaint (motion sequence number 10).

Plaintiff's motion (motion sequence number 9) is denied.

Defendants' cross motion (motion sequence number 10) is granted to the extent that the complaint is dismissed as against defendants Zinoviy Kerzhner, as Limited Administrator of the Estate of Yefim Kerzhner (Yefim's estate), and Klara Kerzhner, individually, and granted to the extent that the common-law negligence and Labor Law § 200 causes of action are dismissed as against defendant Zinoviy Kerzhner, individually. Defendants' cross motion is denied with respect to the Labor Law §§ 240 (1) and 241 (6) causes of action as against Zinoviy Kerzhner, individually.

The action is severed accordingly, and the caption is amended to read as follows:

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ALEXANDER KOROTAYEV,

Plaintiff,

Index No. 500862/12

-against-

ZINOVIIY KERZHNER, individually,

Defendant.

-----X

BACKGROUND

Plaintiff alleges causes of action premised on common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6), based on injuries that he suffered on

March 6, 2012 when he fell from the top of an exterior staircase railing to the ground below. Plaintiff was performing work at a premises that was owned, at the time, by Yefim Kerzhner (Yefim)¹ and Klara Kerzhner (Klara). The house on the premises was a single-family house with five bedrooms, and, at the time of the accident, Yefim and Klara lived there, along with their son Zinoviyy Kerzhner (Zinoviyy), Zinoviyy's spouse, and Zinoviyy's two children.

Plaintiff first started performing work at the premises in September 2010, when he and another worker, Igor Zakhorov, who had performed work for Zinoviyy in the past, were hired by Zinoviyy to do some exterior painting work at the house. Thereafter, Zinoviyy hired plaintiff to perform various repair/renovation projects on the premises. Klara, in her deposition testimony, made clear that, while she was aware that work was being done on the house at times, she had no involvement with the work. According to Klara, her son Zinoviyy took care of issues relating to the work and neither her husband, Yefim, nor son bothered her with issues relating to paying for the work. Yefim, in his deposition testimony, likewise asserted that he had no involvement with the workers. Yefim asserted that the decision relating to the work that was performed in 2010 was a family decision that was made together, and that it was his son, Zinoviyy, who dealt with seeing that the work was performed. From the beginning of 2011, Yefim asserted that he was very sick and

¹ Yefim died on November 18, 2016. After the Surrogate's Court, Richmond County, issued limited letters of administration to Zinoviyy by way of an order dated September 26, 2018, this court, in an order dated October 30, 2019, substituted Zinoviyy, as Limited Administrator for the estate of Yefim Kerzhner in place and stead of Yefim, Kerzhner, individually.

that he was not involved in decisions relating to the work on the house, and that it was his son who took it upon himself to see that work was performed on the house. While Yefim conceded that he would generally help in paying for the work that was done, he was not specifically asked about helping with the payments for the retaining wall project.²

In his deposition testimony, Zinoviy stated that it was plaintiff who hired Dmytro Festo to assist with the work and that he never gave any instructions to plaintiff to hire any day laborers. Plaintiff, however, testified that it was Zinoviy who dealt with Festo, and that Zinoviy was the one who determined how many day laborers were needed for the work. When asked whether Zinoviy gave him instructions on how to do his job, plaintiff's response indicated that plaintiff knew how to perform the carpentry work, but that Zinoviy was very involved in the details of the results, determined how long the work should take and controlled the costs of the work.

At the time of the accident, plaintiff's work involved the construction of a concrete fence around the property. Digging the trench for the fence's foundation entailed cutting through the roots of trees that were on the property. With respect to this work, Zinoviy stated that he only had limited discussions with plaintiff relating to the work to be done, that he was not present when the accident happened, that he told plaintiff to remove any trees that were in the way of constructing the wall, that he gave no instructions on how to remove the trees, and that he did not tell plaintiff to secure the trees with chains. In

² Other than stating that his parents provided at least some of the money used to pay plaintiff, Zinoviy did not testify regarding any agreement with his parents regarding having the work done.

contrast, plaintiff, at his deposition, testified that Zinoviyy did not want to cut down some of the trees that would be affected by this foundation work, but rather, wanted plaintiff to stabilize these trees by way of attaching them to chains or rods. According to plaintiff, Zinoviyy ultimately told plaintiff to buy chains for the stabilization work because their use was simpler and cheaper than rods. Although plaintiff concedes that Zinoviyy was not present on the day when they were actually performing the work, he asserts that Zinoviyy told him to finish the stabilization work by the end of the work day or he and his coworkers would not get paid for the day.

According to plaintiff's deposition testimony, the work he was performing at the time of the accident involved stabilizing a tree, that stood near an exterior staircase to the house, by wrapping one end of a chain around the tree at issue and tethering the other end of the chain to the house's foundation. In order to attach one end of the chain to the tree, plaintiff climbed up to the landing of the staircase to the house, and, while he was standing on the landing, another worker passed up the chain plaintiff was going to attach to the tree. Holding one end of the chain in his right hand, plaintiff then climbed up onto the stucco parapet/railing that was approximately three feet above the landing and held onto a branch of the tree with his left hand for support. When plaintiff threw the chain over the tree branch he was holding in order to wrap it around the tree trunk, the branch plaintiff was holding broke, and plaintiff lost his balance and fell forward off of the parapet, approximately 13 feet to the ground.³

³ Dmytro Festo, who, contrary to plaintiff's testimony that he witnessed the accident, testified that he could not see

DISCUSSION

LABOR LAW §§ 240 (1) & 241 (6)

Defendants' primary contention in opposition to plaintiff's summary judgment motion and in support of their own cross motion for summary judgment is that they are protected by the homeowner exemption under Labor Law §§ 240 (1) and 241 (6) and thus may not be held liable to plaintiff under either section.⁴ Initially, contrary to plaintiff's contentions, defendants' failure to plead the homeowner exemption as an affirmative defense is no impediment to their asserting the exemption at this time (*see Telfer v Gunnison Lakeshore Orchards*, 245 AD2d 620, 621 n1 [3d Dept 1997], *lv denied* 92 NY2d 803 [1998]; *Assevero v Hamilton & Church Props., LLC*, 35 Misc 3d 1222 [A], 2012 NY Slip Op 50813, *13-14 [U] [Sup Ct, Kings County 2012]). In order for defendants to receive the protection of the homeowner's exemption, "they must show that the work was conducted at a dwelling that is a residence for only one or two families" and that the defendants did "not direct or control the work" (*Ramirez v I.G.C. Wall Sys., Inc.*, 140 AD3d 1047, 1048 [2d Dept 2016] [internal quotation marks omitted]; *see also Affri v Basch*, 13 NY3d 592, 596 [2009]; *Sanders v Sanders-Morrow*, 177 AD3d 920, 921 [2d Dept 2019]).

plaintiff from where he was standing at the time of the accident. However, Festo presumed that plaintiff must have fallen from the railing given that plaintiff had been standing on the staircase landing when Festo last saw him before the accident, and given where plaintiff ended up on the ground after his fall.

⁴ As is relevant here, Labor Law § 240 (1) 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*, 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 (emphasis added)" Labor Law § 241 (6) contains a similar homeowner exemption.

The focus of the determination relating to direction and control is on the “degree of supervision exercised over the manner and method of the work to be performed” (*Affri*, 13 NY3d at 596 [internal quotation marks omitted]; *Ramirez*, 140 AD3d at 1048). For purposes of the exemption, family members and other residents who live at an otherwise qualifying one to two family residence, but who do not have an ownership interest in the residence, are not covered by the homeowner exemption (*see Fisher v Coghlan*, 8 AD3d 974, 976 [4th Dep 2004], *lv dismissed* 3 NY3d 702 [2004]; *Sanders*, 177 AD3d at 921; *Diaz v Trevisani*, 164 AD3d 750, 754 [2d Dept 2018]; *Rodriguez v Mendlovits*, 153 AD3d 566, 568-569 [2d Dept 2017]).

Here, plaintiff, in the complaint, specifically alleges that Klara and Yefim were the owners of the premises at issue at the time of the accident, and plaintiff further asserts their ownership in his motion and opposition papers (*see Diaz*, 164 AD3d at 753; *Rodriguez*, 153 AD3d at 568). Plaintiff also submits no evidentiary proof rebutting defendants’ testimony that the house was a single family house (*see Sanders*, 177 AD3d at 921; *Sandals v Shemtov*, 138 AD3d 720, 721 [2d Dept 2016]). The deposition testimony of the parties further demonstrates that Klara and Yefim gave no direction or instructions relating to the work performed by plaintiff, and that the only member of the household who interacted with plaintiff was their son, Zinoviy. Yefim’s estate and Klara have thus demonstrated their *prima facie* entitlement to dismissal of the Labor Law §§ 240 (1) and 241 (6) claims against them based on the homeowner’s exemption, and plaintiff has failed to demonstrate the existence of a factual issue with respect to the applicability of the exemption as to Klara

and/or Yefim's estate (*see Sanders*, 177 AD3d at 921; *Diaz*, 164 AD3d at 753; *Abdou v Rampaul*, 147 AD3d 885, 886 [2d Dept 2017]). On the other hand, Zinovi, even though he was a family member living at an otherwise qualifying home, cannot rely on the homeowner's exemption because he was not an owner at the time of the accident (*see Sanders*, 177 AD3d at 921; *Diaz*, 164 AD3d at 754; *Rodriguez*, 153 AD3d at 568-569; *Abdou*, 147 AD3d at 886-887; *Westgate v Broderick*, 107 AD3d 1389, 1390-1391 [4th Dept 2013]; *Fisher*, 8 AD3d at 976).⁵

Plaintiff asserts that Zinovi may be held liable under Labor Law §§ 240 (1) and 241 (6) as an agent of the owners Klara and Yefim. "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it ha[d] supervisory control and authority over the work being done at the location a plaintiff is injured, and [it had] the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition" (*see Perez v 347 Lorimer, LLC*, 84 AD3d 911, 912 [2011][internal quotations and citations omitted]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]; *Diaz*, 164 AD3d at 754; *Linkowski v City of New York*, 33 AD3d 971, 974-975 [2d Dept 2006]). The determinative factor is whether the defendant had "the right to exercise control over the work, not whether it actually exercised

⁵ The cases relied upon by defendants in their reply papers in support of their argument that Zinovi is entitled to the protections of the homeowner exemption address issues relating to the residential, as opposed to commercial, use of a dwelling (*see Flores v Sleepy Hollow Estates*, 2012 NY Slip Op 30452 [U] [Sup Ct, Nassau County 2012]; *Muniz v Church of Our Lady of Mt. Carmel*, 238 AD2d 101, 102-103 [1st Dept 1997], *lv denied* 90 NY2d 804 [1997]; *Castellanos v United Cerebral Palsy Assn. of Greater Suffolk, Inc.*, 77 AD3d 879, 880 [2d Dept 2010], *lv denied* 16 NY3d 704 [2011]). None of these cases support the proposition that a non-owner residing at a premises would be entitled to the benefit of the exemption (*cf. Sanders*, 177 AD3d at 921; *Fisher*, 8 AD3d at 876).

that right” (*Williams v Dover Home Improvement*, 276 AD2d 626, 626 [2d Dept 2000]; *Kavouras v Steel-More Contr. Corp.*, ___ AD3d ___, 2021 NY Slip Op 01402, *2 [2d Dept 2021]; *Cabrera v Arrow Steel Window Corp.*, 163 AD3d 758, 759 [2d Dept 2018]; *Johnsen v City of New York*, 149 AD3d 822, 822 [2d Dept 2017]). As such, the determination focuses on what powers are delegated to the agent by the owner rather than those actually exercised by the agent (*see Walkow v MJ Peterson/Tucker Homes, LLC*, 185 AD3d 1463, 1466-1467 [4th Dept 2020]; *White v 31-01 Steinway, LLC*, 165 AD3d 449, 452 [1st Dept 2018]; *Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 193-194 [1st Dept 2011]; *Fisher v Hart*, 27 AD3d 998, 999-1000 [3d Dept 2006]; *I.P. v Bonilla*, 2020 NY Slip Op 33181, * 9-10 [Sup Ct, Kings County 2020]; *see also Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]; *Blake v Neighborhood Hous. Servs. Of N.Y. City*, 1 NY3d 280, 292-293 [2003]; *Samaroo v Patmos Fifth Real Estate, Inc.*, 102 AD3d 944, 946 [2d Dept 2013]). Although the focus is on the powers delegated, evidence that an agent actually exercised supervision and control over the work or delegated such supervision and control over the work to another entity may be relevant in determining how much authority was delegated to the agent (*see Nascimento*, 86 AD3d at 193-195; *cf. Fisher*, 27 AD3d at 999-1000).

Here, the court finds that the record presents factual issues with respect to the extent of Zinoviyy’s authority over the work that requires denial of both plaintiff’s motion and defendants’ cross motion with respect to Zinoviyy’s liability under Labor Law §§ 240 (1) and 241 (6). The deposition testimony of Yefim, although it did not provide a great

amount of detail regarding the authority granted to Zinoviy, is sufficient to allow an inference that he delegated to Zinoviy his authority to act as his agent with respect to the work (*Westgate*, 107 AD3d at 1390-1391; *Reinoso v Biordi*, 105 AD3d 491, 491-492 [1st Dept 2013]; *see also see Merino v Continental Towers Condominium*, 159 AD3d 471, 472 [1st Dept 2018]; *Ragubir v Gibraltar Mgt. Co., Inc.*, 146 AD3d 563, 564-565 [1st Dept 2017]; *Corona v Metropolitan 298-308 Assoc.*, 281 AD2d 447, 447-448 [2d Dept 2001]; *Villarroel v Marilou Dev. Co., Inc.*, 58 Misc 3d 1224 [A], 2018 NY Slip Op 50237, *3 [Sup Ct, Queens County 2018]).⁶ Further, plaintiff's testimony suggesting that Zinoviy, in effect, acted as his own general contractor, suggests that Zinoviy had the authority to supervise and control the method and manner of the work -- even if he did not exercise such authority (*see Westgate*, 107 AD3d at 1390-1391; *see also Kavouras*, 2021 NY Slip Op 01402, *2; *Cabrera*, 163 AD3d at 759; *Williams*, 276 AD2d at 626). This inference regarding Zinoviy's authority, however, fails to demonstrate that Zinoviy had such authority as a matter of law because Yefim's testimony regarding the family agreement regarding Zinoviy arranging for the work to be performed did not specifically address the work relating to the erection of the wall at issue (*see Fisher*, 27 AD3d at 999-1000; *see also Sanders*, 177 AD3d at 922). Further, Zinoviy, in his own testimony, stated he had a more limited role in supervising plaintiff's work (*Sanders*, 177 AD3d at 922).⁷

⁶ The record on appeal in *Westgate* demonstrates that, although the defendant decedent Thomas Hogan, who was a relative of the owner, effectively acted as a general contractor in hiring the various contractors that performed the work at issue that led to the injury and provided input with respect to the location and appearance of details of the work, did not supervise or control the method or manner of the work (*see Brief of Defendant - Respondent*, 2013 WL 12228751).

⁷ The court notes that defendants do not rebut plaintiff's assertion that his fall from the railing of the staircase, in the

COMMON-LAW NEGLIGENCE AND LABOR LAW § 200

With respect to plaintiff's common-law negligence and Labor Law § 200 causes of action, defendants' motion papers demonstrate that plaintiff's claims here arise out of his method and manner of performing his work rather than a dangerous property condition (*see Mondragon-Moreno v Sporn*, 189 AD3d 1574, 1576 [2d Dept 2020]; *Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 671 [2d Dept 2018]; *Melendez v 778 Park Ave. Bldg. Corp.*, 153 AD3d 700, 702 [2d Dept 2017], *lv denied* 31 NY3d 909 [2018]; *Klimowicz v Powell Cove Assoc., LLC*, 111 AD3d 605, 607-608 [2d Dept 2013]). When common-law negligence and section 200 claims arise out of alleged defects or dangers in the methods or manner of the work, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged with liability had the authority to supervise or control the performance of the work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Hart v Commack Hotel, LLC*, 85 AD3d 1117, 1118 [2d Dept 2011]; *Shaw v RPA Assoc., LLC*, 75 AD3d 634, 635-636 [2d Dept 2010]). An owner's authority to stop the work or its general supervisory authority over the injury-producing work is, in and of itself, insufficient to demonstrate supervision and control for purposes of liability under the common law and Labor Law § 200 (*see Debenedetto v Chetrit*, 190 AD3d 933, 938 [2d

absence of any safety device, is an elevation related accident covered by Labor Law § 240 (1) (*see Swiderska v New York Univ.*, 10 NY3d 792, 793 [2008]; *Hoyos v NY-1095 Ave. of the Ams., LLC*, 156 AD3d 491, 495-496 [1st Dept 2017]; *Raia v Berkeley Coop. Towers Section II Corp.*, 147 AD3d 989, 991-992 [2d Dept 2017]; *Doto v Astoria Energy II, LLC*, 129 AD3d 660, 662 [2d Dept 2015]). The court further notes that defendants, in their cross motion, have not specifically addressed the applicability of the Industrial Code sections relied upon by plaintiff in support of his Labor Law § 241 (6) cause of action (*cf. Rodriguez v HY 38 Owner, LLC*, ___ AD3d ___, 2021 NY Slip Op 01436, *2 [2d Dept 2021] [defendant did not make prima facie showing regarding Labor Law § 200 claim based on premises liability where defendant failed to address it in its moving papers]).

Dept 2021]; *Poulin*, 166 AD3d at 670-673; *Goldfien v County of Suffolk*, 157 AD3d 937, 938 [2d Dept 2018]; *Messina v City of New York*, 147 AD3d 748, 749-750 [2d Dept 2017]).

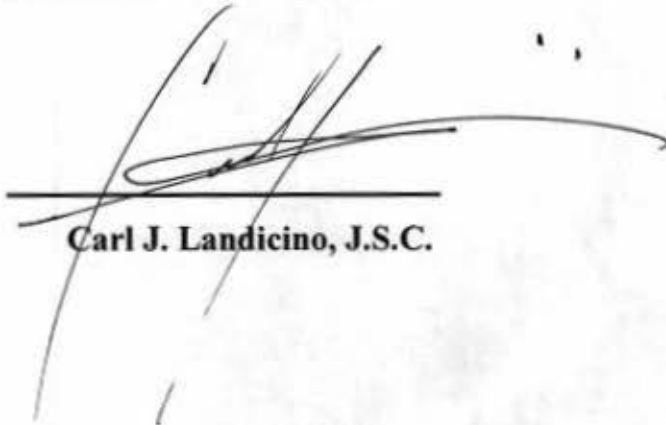
As supervision and control for purposes of common-law negligence and Labor Law § 200 cannot be founded on instructions about aspects of the job unrelated to plaintiff's work at the time of the accident (*see McParland v Travelers Ins. Co.*, 302 AD2d 328, 328 [1st Dept 2003]), the focus of the inquiry here in this respect is on defendants' instructions relating to what was to be done with the trees. It is undisputed that Zinoviyy was not present at the time of the accident, and, even accepting plaintiff's testimony that Zinoviyy told plaintiff that he did not want to cut down the tree at issue, but rather, that he wanted plaintiff to stabilize the tree using chains, such an instruction is a general instruction relating to what work Zinoviyy wanted to have performed rather than an instruction relating to the means or methods of performing the stabilization work (*see Afri*, 13 NY3d at 596; *Debenedetto*, 190 AD3d at 938; *Salgado v Rubin*, 183 AD3d 617, 618-619 [2d Dept 2020]; *Harrison v State of New York*, 88 AD3d 951, 954 [2d Dept 2011]).⁸ Plaintiff's assertion that Zinoviyy had threatened to not pay him or the other workers if the stabilization work was not completed that day is likewise insufficient to establish supervision and control (*see Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD 476, 477 [1st Dept 2011]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 307 [1st Dept 2007]; *Haider v Davis*, 35 AD3d 363, 364 [2d Dept 2006]). As plaintiff has failed to submit any evidentiary proof

⁸ As noted above with respect to the discussion of the homeowner's exemption, neither Klara nor Yefim, who did not interact with plaintiff, supervised or controlled his work.

demonstrating the existence of a factual issue in this respect, defendants are entitled to dismissal of the Labor Law § 200 and common-law negligence causes of action.

This constitutes the decision and order of the court

ENTER:



A handwritten signature in black ink, appearing to read 'Carl J. Landicino', is written over a horizontal line. The signature is somewhat stylized and overlaps the line.

Carl J. Landicino, J.S.C.

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