Saravia v Jahoda
2021 NY Slip Op 33627(U)
March 3, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 608209/2016
Judge: Linda Kevins

SHORT FORM ORDER

INDEX No. 608209/2016

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

P R E S E N T :

Hon. LINDA J. KEVINS
Justice of the Supreme Court

MOTION DATE 4/30/20 (004)
MOTION DATE 6/24/20 (005)
MOTION DATE 6/30/20 (006)
MOTION DATE 9/14/20 (007)
ADJ. DATE 12/15/20
Mot. Seq. # 004 MD
Mot. Seq. # 005 MG
Mot. Seq. # 006 MD
Mot. Seq. # 007 MD

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REDANI SARAVIA,

Plaintiff,

- against -

ROBERT JAHODA,

Defendant.

LAW OFFICE OF JAY D. JACOBSON, PLLC
Attorneys for Plaintiff
Redani Saravia
225 Broadhollow Road, Suite 200
Melville, New York 11747

KELLY, RODE, & KELLY, LLP
Attorneys for Defendant/Third-Party Plaintiff
Robert Jahoda
330 Old Country Road, Suite 305
Mineola, New York 11501

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ROBERT JAHODA.,

Third-Party Plaintiff,

- against -

NORTH FORK DRYWALL & INSULATION, INC.,

Third-Party Defendant.

GOGGINS & ASSOCIATES
Attorneys for Third-Party Defendant
North Fork Drywall & Insulation, Inc.
13235 Main Road
P.O. Box 65
Mattituck, New York 11952

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Upon the following papers read on these e-filed motions to vacate the note of issue/ file a late note of issue/ for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers by defendant/third-part plaintiff dated March 4, 2020, by plaintiff dated June 4, 2020; by plaintiff dated June 10, 2020; and by defendant/third-party plaintiff dated August 7, 2020 ; Notice of Cross Motion and supporting papers ____ ; Answering Affidavits and supporting papers by plaintiff dated June 4, 2020, by defendant/third-party plaintiff dated August 7, 2020; by plaintiff dated September 14, 2020 ; Replying Affidavit and supporting papers by defendant/third-party plaintiff dated October 9, 2020 ; Other _____ ; it is

ORDERED that the motions (004 and 007) by defendant Robert Jahoda and the motions (005 and 006) by plaintiff Redani Saravia are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant Robert Jahoda for an order vacating the note of issue is denied; and it is

ORDERED that the motion by plaintiff for leave to file a late note of issue is granted, and plaintiff shall file his note of issue within 30 days of service upon him of a copy of this decision and order; and it is

ORDERED that the motion by plaintiff for summary judgment in his favor on the issue of liability is denied; and it is

ORDERED that the motion by defendant Robert Jahoda for summary judgment dismissing the complaint against him is denied; and it is further

ORDERED, that if this Order has not already been entered, the movant is directed to promptly serve a certified copy of this Order, pursuant to CPLR §§8019(c) and 2105, upon the Suffolk County Clerk, who is directed to hereby enter such Order; and it is further

ORDERED, that upon Entry of this Order, the movant is directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the affidavits of service with the Clerk of the Court.

This action arises out of an accident which occurred at the construction site of a new single-family home located at 6 Beach Avenue, Sag Harbor, New York, on June 4, 2015. Plaintiff Redani Saravia allegedly injured himself when he fell through a rectangular opening in the attic floor of the new residence. Plaintiff, who had previously climbed a ladder leading through the same opening to access the attic, allegedly fell through the opening as he was using a foam gun to fill the gaps in its wooden frame. While backing up from one end of the attic to the other, plaintiff allegedly stepped backwards into the uncovered opening and fell through ten to twelve feet to the floor below. Robert Jahoda was the owner of the premises. Jahoda hired third-party defendant North Fork Drywall & Insulation, Inc., to perform the task of insulating the home. North Fork then subcontracted its insulation work to plaintiff's employer, Cary Insulation and Garage Doors, Inc.

Plaintiff commenced the instant action (Action No. 1) against Jahoda only, under index number 608209/2016. Jahoda then brought third-party claims against Sepia Construction and North Fork under that action. Thereafter, in December 2017, plaintiff commenced a separate action (Action No. 2) under index number 623093/2017, against North Fork and Specia Construction. North Fork and Specia

Construction joined the action and asserted cross claims against each other. By order dated August 28, 2018, the court (Rebolini, J.) granted an unopposed motion by Jahoda for an order joining Action No. 1 and Action No. 2 for purposes of discovery and trial. On December 4, 2019, plaintiff and Jahoda signed a so-ordered stipulation directing the parties to file the note issue in both actions on or before February 14, 2020. Thereafter, the parties filed a note of issue in Action No. 2. However, no note of issue was filed in the instant action.

Relying on the court's previous order consolidating action No.1 and Action No. 2, Jahoda now moves for an order vacating the note of issue and extending his time to file for summary judgment in the instant action. Jahoda further requests an order directing plaintiff to comply with its outstanding discovery request that he appear for an independent medical examination. Plaintiff opposes the motion on the ground that the actions maintain their separate identities as they were consolidated for trial only, and that as no note of issue has been filed in this action, the motion should be denied. Alternatively, plaintiff asserts that the parties attempted to schedule additional independent medical examinations to comply with the court's order to file a note of issue by February 14, 2020; however, due initially to a family emergency, and then to the unavailability of the originally scheduled doctor, no examination was conducted. Plaintiff contends that while he filed the note of issue in Action No. 2, no note of issue was ever filed in the instant action, as Jahoda has failed to respond to his request that another independent medical examination be re-scheduled with the initially designated doctor. By way of a separate motion plaintiff seeks an order extending his time to file a note of issue in this action. Plaintiff argues that he has outlined the reason for the delay, that the delay has not been inordinate, and that Jahoda would not be prejudiced, as he has already received the note of issue filed in connection with Action No. 2. Jahoda submitted no papers in opposition to the motion.

Plaintiff also moves for summary judgment in his favor on the issue of liability with respect to his Labor Law 240 §§ (1) and 241 (6) claims against Jahoda. Plaintiff avers that as Jahoda owned the subject premises and acted as his own general contractor for the construction project, Jahoda should be held liable for failing to provide plaintiff with adequate safety devices designed to prevent him from falling through the attic opening to the floor below. Plaintiff further contends that Jahoda violated 12 NYCRR 23-1.7 (b) of the Industrial Code, which requires that every hazardous opening into which a person may step or fall be guarded by a substantial cover fastened in place, or by an adequate safety railing. Jahoda opposes the motion and moves for summary judgment dismissing the complaint against him, arguing that as the owner of the subject single-family home, he is exempt from plaintiff's Labor Law claims.

At the outset, the court notes that the motion by Jahoda for an order vacating the note of issue and extending his time to file for summary judgment in the instant action should be and is denied. A review of the court records indicates that a note of issue has not been filed in the instant action. Rather, the note of issue referenced by Jahoda was filed in Action No. 2. Thus, Jahoda's motion is defective, as the two actions have been consolidated for trial only (*see* CPLR 602 [b]; ***Inspiration Enters. v Inland Credit Corp.***, 57 AD2d 800, 394 NYS2d 701 [1st Dept 1977]). The unopposed branch of plaintiff's motion seeking leave to file a late note of issue is granted, as plaintiff showed good cause for being unable to certify that discovery was complete given the repeated failure of the parties to reschedule an additional independent medical examination. Further, plaintiff demonstrated that Jahoda, aware of the

efforts to reschedule the examination and the filing of the note of issue in the companion case, would not be prejudiced by such relief (*see* CPLR 2004, 3126; ***Oliver v Town of Hempstead***, 68 AD3d 1079, 891 NYS2d 456 [2d Dept 2009]; ***Parker v Hasem Grocery***, 13 AD3d 507, 787 NYS2d 363 [2d Dept 2004]; ***Reyes v Ross***, 289 AD2d 554, 735 NYS2d 198 [2d Dept 2001]). Therefore, plaintiff's motion for an order granting him leave to file a late note of issue is granted, and plaintiff shall file his note of issue within 30 days of service upon him of a copy of this decision and order.

Turning to the parties' respective motions for summary judgment, Labor Law § 240 (1) "imposes a nondelegable duty upon owners and general contractors to provide safety devices to protect workers from elevation-related risks" (***Salinas v 64 Jefferson Apts., LLC***, 170 AD3d 1216, 1222, 97 NYS3d 136 [2d Dept 2019]; ***Carlton v City of N.Y.***, 161 AD3d 930, 931, 77 NYS3d 445 [2d Dept 2018]), "'instead of on workers, who are scarcely in a position to protect themselves from accident'" (***Mingo v Lebedowicz***, 57 AD3d 491, 493, 869 NYS2d 163 [2d Dept 2008], quoting ***Zimmer v Chemung County Performing Arts***, 65 NY2d 513, 520, 493 NYS2d 102 [1985]). Specifically, "[t]he statute was designed to prevent accidents in which a protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (***Sullivan v N.Y. Athletic Club of City of N.Y.***, 162 AD3d 950, 953, 80 NYS3d 99 [2d Dept 2018], *lv dismissed* 32 NY3d 1196, 95 NYS3d 150 [2019]). To prevail on a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*see* ***Bland v Manocherian***, 66 NY2d 452, 497 NYS2d 880 [1985]; ***Sprague v Peckham Materials Corp.***, 240 AD2d 392, 658 NYS2d 97 [2d Dept 1997]).

Labor Law § 241 (6) requires that owners and contractors provide adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed (***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 348, 670 NYS2d 816 [1998]; *see* ***Harrison v State***, 88 AD3d 951, 931 NYS2d 662 [2d Dept 2011]). To recover damages on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish the defendant's violation of a specific, applicable, section of the Industrial Code, and that such violation was a proximate cause of the accident (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Forschner v Jucca Co.***, 63 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; ***Hricus v Aurora Contrs., Inc.***, 63 AD3d 1004, 883 NYS2d 61 [2d Dept 2009]). Unlike a violation of Labor Law § 240 (1), which demonstrates negligence as a matter of law, a violation of Labor Law § 241 (6) is merely some evidence which the jury may consider on the question of a defendant's negligence (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*). Once such a violation is established, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused plaintiff's injury. If proven, the general contractor, or owner, as the case may be, is vicariously liable without regard to his or her fault (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Marshall v Glenman Indus. & Commercial Contr. Corp.***, 117 AD3d 1124, 985 NYS2d 169 [3d Dept 2014]).

Here, plaintiff established his prima facie entitlement to summary judgment on his Labor Law § 240 (1) claim by submitting evidence that he fell ten to twelve feet through an uncovered opening in the floor as he was stepping backward and spraying foam insulation into the gaps of the attic's wooden frame (*see* ***Yiming Zhou v 828 Hamilton, Inc.***, 173 AD3d 943, 103 NYS3d 472 [2d Dept 2019]; ***Poulin v Ultimate Homes, Inc.***, 166 AD3d 667, 87 NYS3d 189 [2d Dept 2018]; ***Kupiec v Morgan Contr.***

Corp., 137 AD3d 872, 26 NYS3d 779 [2d Dept 2016]; ***Ortiz v 164 Atl. Ave., LLC***, 77 AD3d 807, 909 NYS2d 745 [2d Dept 2010]; ***Brandl v Ram Builders, Inc***., 7 AD3d 655, 777 NYS2d 511 [2d Dept 2004]). Such evidence also demonstrates the violation of Industrial Code 12 NYCRR 23-1.7(b) (1) (i), which mandates that holes or "hazardous openings" at construction sites "into which a person may step or fall" be "guarded by a substantial cover fastened in place or by [the installation of] a safety railing" (*see* ***Keegan v Swissotel N.Y.***, 262 AD2d 111, 114, 692 NYS2d 39 [1st Dept 1999]; *see* ***Ortiz v 164 Atl. Ave., LLC***, 77 AD3d 807, 909 NYS2d 745; ***Norero v 99-105 Third Ave. Realty, LLC***, 96 AD3d 727, 945 NYS2d 720 [2d Dept 2012]; ***Ellis v J.M.G., Inc***., 31 AD3d 1220, 1221, 818 NYS2d 724 [4th Dept 2006]).

In opposition to plaintiff's prima facie showing, Jahoda submitted evidence raising a significant triable issue as to whether he is exempt from plaintiff's Labor Law §§ 240 (1) and 241 (6) claims pursuant to the Labor Law's homeowners' exemption (*see* ***Khela v Neiger***, 85 NY2d 333, 624 NYS2d 566; ***Chapman v Town of Copake***, 67 AD3d 1174, 888 NYS2d 322 [3d Dept 2009]; ***Snyder v Gnall***, 57 AD3d 1289, 1290, 870 NYS2d 562 [3d Dept 2008]; ***Lieberth v Walden***, 223 AD2d 978, 636 NYS2d 885 [3d Dept 1996]; ***Lane v Karian***, 210 AD2d 549, 550, 619 NYS2d 796 [3d Dept 1994]). Notably, Jahoda submitted an affidavit stating that he built the subject property for residential purposes and that he did not regard himself as the construction project's general contractor clothed with the authority to control the safety procedures of the contractors at the worksite. Jahoda further states that he did not supervise, direct, or control any of the contractor's work, including the work done by plaintiff's employer, which came to the worksite as a subcontractor hired by North Fork Drywall & Insulation. Additionally, Jahoda avers that the subject property continues to be his personal residence, that no part of it was used to conduct business, and that although there have been years when he rented out the residence for two weeks in the summer, the purpose of the house was for his personal residential use. Jahoda also submitted an affidavit by the production manager of plaintiff's employer, Matthew Scott, which states, among other things, that plaintiff's work and safety practices were exclusively controlled by Cary Insulation & Garage Doors. Therefore, plaintiff's motion for summary judgment in his favor on the issue of liability is denied.

As to Jahoda's cross motion for summary judgment, while Jahoda's submissions raise a triable issue as to the applicability of the homeowners' exemption, the adduced evidence did not conclusively establish his entitlement to dismissal of the complaint. In this regard, Jahoda's own submissions raise significant triable issues as to whether the work was being done for the purpose of constructing a home meant for residential purposes, or for rental to others (*see* ***Lombardi v Stout***, 80 NY2d 290, 296, 590 NYS2d 55 [1992]; ***Vogler v Perrault***, 149 AD3d 1298, 52 NYS3d 544 [3d Dept 2017]; ***Truppi v Busciglio***, 74 AD3d 1624, 905 NYS2d 291 [3d Dept 2010]). Specifically, Jahoda's testimony belies the assertion contained in his affidavit indicating that his rental of the subject premises was sporadic and consisted of a mere two weeks during the summer. In contrast to his affidavit, Jahoda testified that it was his intention to list the premises for rent for the entire three months of summer the very year the home was completed, and that he has consistently done so ever since. Further, Jahoda testified that he continues to list the subject premises with a number commercial real estate agencies, that he earns substantial sums of money in connection with the yearly rentals, and that he and his fiancee resume their stay at his father's home – where they lived prior to the property's completion – during rental periods. The homeowner's exemption is not intended to insulate from liability owners who use their one or two-

family houses purely for commercial purposes (***Lombardi v Stout***, 80 NY2d 290, 296, 590 NYS2d 55 [1992]). In this regard, "renovating a residence for resale or rental plainly qualifies as work being performed for a commercial purpose" (***Landon v Austin***, 88 AD3d 1127, 1128, 931 NYS2d 424 [3d Dept 2011]; *see* ***Lombardi v Stout***, 80 NY2d 290, 297, 590 NYS2d 55), and the relevant inquiry as to the purpose of the premises is "'the homeowners' intentions at the time of the injury underlying the action'" (***Landon v Austin***, 88 AD3d 1127, 1128, 931 NYS2d 424, quoting ***Truppi v Busciglio***, 74 AD3d 1624, 1625, 905 NYS2d 291 [3d Dept 2010]). Accordingly, the motion by Jahoda for summary judgment dismissing the complaint against him also is denied.

Dated: 3/3/21

LINDA KEVINS, JSC

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION