

Cabral v Grullon
2022 NY Slip Op 35137(U)
April 28, 2022
Supreme Court, Bronx County
Docket Number: Index No. 23136/2019E
Judge: Doris M. Gonzalez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX-----X
Victor Cabral,

Plaintiff,

- against -

DECISION and ORDER

Index No. 23136/2019E

Jeury's Grullon and Alfonso Bravo,

Defendants.
-----X

Doris M. Gonzalez, J.

Upon the foregoing papers, defendant Jeury's Grullon (hereinafter, "defendant") moves pursuant to CPLR 3212 for an order granting summary judgment dismissing all claims against him.

Plaintiff's amended complaint interposes claims against the defendants sounding in common law negligence and violations of Labor Law §§ 200, 240(1) and 241(6). Plaintiff alleges that on January 10, 2019,¹ at 155 Summit Place in Bronx County, he was injured while installing a fence. According to plaintiff's EBT, on the day of the accident, he needed to enter the basement apartment to obtain water. Plaintiff stated the apartment was vacant, but that "they were going to rent it."

The fence installation required that the plaintiff and his co-workers drill into a concrete sidewalk to install the fence posts. The area was littered with wood debris. The drill being used for this purpose was defective, in that it had no functioning "on/off" switch. Plaintiff claims that while drilling a hole in the concrete, the drill bit became stuck. The drill body itself began to spin. When plaintiff stepped back to avoid the spinning drill, he stepped on a piece of wood that was present at the jobsite, causing him to fall. After he fell, the drill then struck him.

Defendant Grullon argues that the deed to the premises establishes that the place where the accident occurred was a two-family home. He argues that plaintiff's complaint must be dismissed as against him as he is entitled to the home owners' exemption under Labor Law §§240(1) and

¹ Defendant testified that he purchased the premises in December 2018, and moved in after construction finished in January 2019.

241(6). As to Labor Law §240(1), defendant argues, in addition, that the action was not caused by a height differential, and thus that section does not apply.

Likewise, defendant argues that plaintiff's Labor Law §200 and common-law negligence claims must be dismissed as there is no evidence of any negligence by defendant. Defendant argues that he was not present during the installation of the fence, did not provide plaintiff with any instructions, and did not own or otherwise control the drill that caused plaintiff's accident.

Plaintiff contends that issues of fact exist as to whether the subject premises were being used as a three-family multiple dwelling, and thus dismissal based on the homeowner's exception is not warranted. In particular, plaintiff argues that his EBT testimony indicates that while he was working to install a fence at the premises, a separate renovation project was ongoing to renovate the basement unit to be rented as a separate, third unit; a photo of the premises post-accident shows that three mailboxes are present at the front entrance, one marked "BSMT;" a real estate listing post-accident listed the house as having three units; the basement unit has a separate entrance and bathroom.

In addition, plaintiff maintain that the accident was caused, and least in part, by the debris left in the yard, and ostensibly created by contractors hired by defendant. Plaintiff argues that defendant had actual knowledge of the presence of the debris, as defendant had been present at the site of the accumulated debris the day of the accident (and indeed every day as it was in the front yard of his residence) with an opportunity to correct the hazardous and dangerous condition.

Labor Law § 240(1)

Labor Law § 240(1) imposes a nondelegable duty upon owners and general contractors to provide safety devices to protect workers from elevation-related risks. (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 618 NE2d 82, 601 NYS2d 49 [1993]). Labor Law § 240(1)

imposes upon owners, contractors and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work. Where an accident is caused by a violation of the statute, a plaintiff's own negligence will not furnish a defense; however, where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability. Thus, in order to recover under § 240(1), the plaintiff must establish that the statute was violated and that such violation was a proximate cause of his injury. (*Barreto v. Metropolitan Transp. Auth.*, 25 N.Y.3d 426, 430, 34 N.E.3d 815, 817, 13 N.Y.S.3d 305, 307 [2015].)

It is clear in this action that plaintiff slipped on a piece of wood, and fell. No height differential was involved. Plaintiff concedes that this section does not apply, and the Court so holds.

Labor Law § 241(6),

Both Labor Law § 241(6) provides that its provisions do not apply to "owners of one and two- family dwellings who contract for but do not direct or control the work." However, it is the actual use of the premises, not the legal designation of the premises as a multiple dwelling, that determines the whether the exemption applies. "The statutory exemptions in §240(1) and §241(6) of the Labor Law are intended to make the law more nearly reflect the practical realities of the liability of small homeowners to insure against the responsibilities imposed by those provisions. Similar practicalities are reflected in the Court of Appeals' determination that 'whether the exemption is available to an owner in a particular case turns on the site and purpose of the work'". (*Sheehan v. Gong*, 769 N.Y.S.2d 507 [1st Dept. 2003] [internal citations omitted]).

In *Khela v Neiger* (85 N.Y.2d 333, 624 N.Y.S.2d 566, 648 N.E.2d 1329 [1995]), the Court of Appeals addressed a case in which the owner was renovating a multiple dwelling into a two-family dwelling when the plaintiff construction worker was injured. The Court determined that the owner was entitled to the homeowner's exemption since the site and purpose of the construction was connected with remodeling the building into a residential and single-tenant space, and not enhancing a commercial usage. The owner was entitled to the benefit of the exemption albeit that at the time of the accident, the building was legally a three-family dwelling.

More recently, in *Del Carnen Diaz v Boheciamp* (140 A.D.3d 408, 409, 33 N.Y.S.3d 218 [1st Dept. 2016]), as here, the structure was a legal two-family dwelling with a basement apartment. The First Department found no issue of fact was raised as to whether the building was to be treated as a three-family unit. Most importantly, the court reasoned that the fact that three families, two of which were related, lived in the home was insufficient to raise an issue of fact as to whether the home was a three-family dwelling:

“The applicability of the homeowner exemption is determined by a "site and purpose" test (*Bartoo v Buell*, 87 NY2d 362, 367-368, 662 NE2d 1068, 639 NYS2d 778 [1996]), which "hinges upon the site and the purpose of the work" and "must be employed on the basis of the homeowners' intentions at the time of the injury" (*Farias v Simon*, 122 AD3d 466, 467, 997 NYS2d 28 [1st Dept 2014] [internal quotation marks omitted]). Here, the evidence established that, at the time of the accident, defendants' house was a two-family residential home with a basement apartment, where a family friend lived, and three upper floors, which defendants shared with an adult child and two grandchildren. Defendants did not receive any rental income. That three families, two of which are related, lived in the home is insufficient to raise an issue of fact as to whether the home was a three-family dwelling (*see Patino v Drexler*, 116 AD3d 534, 535, 984 NYS2d 38 [1st Dept 2014]). Nor do the notices of property value from the New York City Department of Finance raise an issue as to whether defendants intended to use the home as a three-family dwelling (*see Farias*, 122 AD3d at 467), particularly given defendant Elyvan Vasquez Boheciamp's uncontradicted testimony regarding the use and layout of the home. Although plaintiff refers to the top floor of the home as an "apartment," she points to no evidence that it contained anything other than two bedrooms, which were occupied by defendants' grandchildren.” (*Del Carnen Diaz v Boheciamp*, 140 A.D.3d 408, at 409.)

Del Carnen Diaz v Boheciamp governs the present case. The uncontroverted evidence advanced by the defendant is that related parties (a mother and son) occupied the basement and first floor unit under one lease at the time of the accident. While there may have been separate entrances, and some measure of privacy with respect to the basement apartment, there is no showing that it had more than a half-bath, lacking a shower or bathtub, and no showing that there was a kitchen which would be required for separate living. Plaintiff has offered no evidence to the contrary. Even if the defendant had listed the premises for sale as having three units, there is no showing that the premises was configured as to provide separate living facilities at the time of the accident.

Common law negligence and violation of Labor Law § 200

"Labor Law § 200(1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work" (*Ortega v Puccia*, 57 AD3d 54, 60, 866 N.Y.S.2d 323; see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502, 618 N.E.2d 82, 601 N.Y.S.2d 49). "Cases involving Labor Law § 200 fall into two broad categories, namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Torres v City of New York*, 127 AD3d 1163, 1165, 7 N.Y.S.3d 539). "Where a premises condition is at issue, a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice" (*Villada v 452 Fifth Owners, LLC*, 188 AD3d at 1294; see *Ortega v Puccia*, 57 AD3d at 61).

Generally, to rule out constructive notice of a dangerous condition, the movant has the burden of establishing that when it last inspected the premises. The burden is on the movant to establish lack of notice. (*Johnson v 101-105 S. Eighth St. Apts. Hous. Dev. Fund Corp.*, 185 A.D.3d 671, 672, 124 N.Y.S.3d 852, 853 [2d Dept. 2020] ["To meet its burden on the issue of lack of constructive notice, a defendant must offer some evidence as to when the accident site was last cleaned or inspected prior to the accident."])

Defendant has not established that the presence of wood debris was not a proximate cause of the accident. Defendant has also not demonstrated the absence of actual or constructive knowledge of the presence of the debris.

Accordingly, it is hereby,

ORDERED that motion is granted, in part, to the extent of dismissing the claims sounding in Labor Law §§ 240(1) and 241(6), and the motion is otherwise denied.

This is the Decision and Order of the Court.

Dated: 4-28-2022


Doris M. Gonzalez, J.S.C.