

Argueta v Hall & Wrighttight LLC.
2022 NY Slip Op 35201(U)
April 14, 2022
Supreme Court, Suffolk County
Docket Number: Index No. 602608/2019
Judge: Joseph A. Santorelli
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SHORT FORM ORDER

ORIGINALINDEX No. 602608/2019CAL. No. 2021005700TSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY**PRESENT:**Hon. JOSEPH A. SANTORELLI
Justice of the Supreme CourtMOTION DATE 9/23/21
MOTION DATE 10/14/21
ADJ. DATE 12/16/21
Mot. Seq. # 001 MG
Mot. Seq. # 002 MG; CASEDISP-----X
JOSE DANIEL SANTIAGO ARGUETA,

Plaintiff,

FERRO, KUBA, MANGANO, SKLYAR, P.C.
Attorney for Plaintiff
825 Veterans Highway
Hauppauge, New York 11788

- against -

REBORE, THORPE & PISARELLO, P.C.
Attorney for Defendant Hall & Wright, LLC
500 Bi-County Boulevard, Suite 102
Farmingdale, New York 11735HALL AND WRIGHT LLC., 520X
RESIDENTIAL, LLC,Defendants.
-----XCUOMO, LLC
Attorney for Defendant 520X Residential, LLC
200 Old Country Road, Suite 2 South
Mineola, New York 11501

Upon the following papers read on these e-filed motions for summary judgment : Notice of Motions/ Order to Show Cause and supporting papers by defendant Hall and Wright, LLC, dated August 20, 2021, and by defendant 520X Residential, LLC, dated September 13, 2021 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers by plaintiff, dated December 2, 2021 ; Replying Affidavits and supporting papers by defendant Hall and Wright, LLC, and by defendant 520X Residential, LLC, dated December 15, 2021 ; Other _____; it is

ORDERED that the motion (001) by defendant Hall & Wright, LLC, and the motion (002) by defendant 520X Residential, LLC, are consolidated for the purpose this determination; and it is further

ORDERED that the motion (001) by defendant Hall and Wright, LLC, for summary judgment dismissing the complaint against it is granted; and it is

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ORDERED that the motion (002) by defendant 520X Residential, LLC, for summary judgment dismissing the complaint against it is granted.

Plaintiff Jose Argueta commenced this action to recover damages for personal injuries he allegedly sustained while working on the renovation of home located at 520 Montauk Highway, Southampton, New York, on April 22, 2017. Plaintiff allegedly was injured when he slid from the roof and fell to the ground after attempting to install roof brackets on the roof of the premises. At the time of the accident plaintiff was employed by nonparty MCJM Custom Builders ("MCJM"), a subcontractor hired to perform carpentry work during the project. The residence was owned by defendant 520X Residential, LLC ("520X"). 520X allegedly retained defendant Hall and Wright, LLC ("Hall"), as the construction manager for the project. By his complaint, plaintiff alleges causes of action against the defendants based on common law negligence and Labor Law §§ 200, 240 (1), and 241 (6).

Hall now moves for summary judgment dismissing the complaint against it on the ground it did not serve as the 520X's statutory agent and was merely a construction manager coordinating the work of prime contractors who exercised control over their own work. In addition, Hall asserts that the Labor Law § 200 and negligence claims against it should be dismissed, because the accident arose out of the means and methods of plaintiff's work, and it neither possessed the authority to control nor exercised control over the means and methods of such work. By way of a separate motion, 520X also moves for summary judgment dismissing the complaint. 520X argues that the single-family home under renovation at the time of the accident was meant to be utilized as a residence for its members and, as the members neither directed nor controlled plaintiff's work, the Labor Law homeowners' exemption precludes the Labor Law §§ 240 (1) and 241 (6) claims against it. 520X further argues that the common law negligence and Labor Law § 200 claims against it should likewise be dismissed, as the accident arose out of the manner of plaintiff's work and it neither exercised control nor possessed the authority to control the means and manner of plaintiff's work.

Plaintiff opposes both motions. Plaintiff argues that Hall's motion should be denied, since its principal testified that he served as the eye and ears of the owners of the premises and, as such, a triable issue exists as to whether it should be regarded as a statutory agent for the purposes of the Labor Law. Additionally, plaintiff contends that triable issues exist as to whether its members intended that the subject property, which consisted of nine acres, be subdivided to facilitate the construction of six separate homes and recreational structures.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (*see Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573, 574, 774 NYS2d 792 [2d Dept 2004]). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (*see O'Neill v Town of Fishkill*, 134 AD2d 487, 488, 521 NYS2d 272 [2d Dept 1987]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). Once the movant meets this burden, the burden shifts to the opposing party to show by tender of

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sufficient facts in admissible form that triable issues remain which preclude summary judgment (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316). However, in opposing a summary judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (*Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

A construction manager will not be held liable under Labor Law §§ 200, 240 (1) and 241 (6) unless it has been delegated the authority and duties of a general contractor, or if it functions as an agent of the owner of the premises (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 798 NYS2d 351 [2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318, 445 NYS2d 127 [1981]). The construction manager must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition to be held liable (*see Lamar v Hill Intl., Inc.*, 153 AD3d 685, 59 NYS3d 756 [2d Dept 2017]; *Myles v Claxton*, 115 AD3d 654, 981 NYS2d 447 [2d Dept 2014]; *Linkowski v City of New York*, 33 AD3d 971, 824 NYS2d 109 [2006]; *Natoli v City of New York*, 32 AD3d 507, 820 NYS2d 313 [2006]). Mere general supervisory authority to oversee safety on the worksite and coordinate subcontractors is insufficient (*Rodriguez v JMB Architecture, LLC*, 82 AD3d 949, 919 NYS2d 40 [2d Dept 2011]; *Delahaye v Saint Ann's School*, 40 AD3d 679, 836 NYS2d 233 [2d Dept 2007]; *Loiacono v Lehrer McGovern Bovis, Inc.*, 270 AD2d 464, 704 NYS2d 658 [2d Dept 2000]). Moreover, the conduct of regular walk-throughs, holding worksite meetings, and the authority to stop the work if it observed an unsafe condition are insufficient to establish a construction manager's liability as an agent of the owner (*see Kindlon v Schoharie Cent. School Dist.*, 66 AD3d 1200, 887 NYS2d 310 [3d Dept 2009]; *Geonie v OD & P NY Ltd.*, 50 AD3d 444, 855 NYS2d 495 [1st Dept 2008]; *Singh v Black Diamonds LLC*, 24 AD3d 138, 805 NYS2d 58 [1st Dept 2005]).

Here, Hall established its prima facie entitlement to summary judgment dismissing the complaint against it by submitting evidence that it possessed mere general supervisory authority over the worksite, that its coordination and oversight authority did not rise to the level of a statutory agent, and that the accident arose out of the means and methods of plaintiff's work rather than a dangerous condition (*see Uhl v D'Onofrio Gen. Contrs., Corp.*, 197 AD3d 770, 153 NYS3d 168 [2d Dept 2021]; *Yiming Zhou v 828 Hamilton, Inc.*, 173 AD3d 943, 103 NYS3d 472 [2d Dept 2019]; *Lamar v Hill Intl., Inc.*, 153 AD3d 685, 59 NYS3d 756; *Hargrave v LeChase Constr. Servs., LLC*, 115 AD3d 1270, 982 NYS2d 650 [4th Dept 2014]; *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449, 961 NYS2d 91 [1st Dept 2013]; *Linkowski v City of New York*, 33 AD3d 971, 824 NYS2d 109 [2d Dept 2006]). Significantly, plaintiff testified that his employer controlled the means and manner of his work, and that he exclusively relied on his employer to address worksite safety concerns, including his concern that it was unsafe to work on the roof on the day of the accident because it was wet. Plaintiff further testified that Hall's principal, Bryan McGowin, did not tell workers how to perform their work and, instead, only advised them about whether they were following the architectural plans and work schedule. McGowin testified that Hall's role at the worksite was limited to the coordination of paperwork and obtaining permits, and that he did not have the authority over work performed in the premises or regulation of the workers' safety rules. Indeed, McGowin averred that the coordination and oversight of the renovation of the residence was assigned to plaintiff's employer, MCJM, and that his role in stopping unsafe work practices were limited to expressing his concerns to the respective principals of the various contractors. McGowin further testified that he did not attend any worksite safety meetings, and that he only held meetings to ensure compliance with architectural plans

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and work schedule. Additionally, Hall submitted evidence that its agreement with the owners specified that its agency was limited to the responsibility for processing paperwork, and not for comprehensive supervision or coordination of the worksite.

In opposition, plaintiff failed to raise any triable issues sufficient to defeat Hall's prima facie showing (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595). As noted above, mere general supervisory authority over the worksite and the authority to stop work in the event unsafe conditions are observed are insufficient to establish a construction manager's liability as an agent of the owner (*see Lamar v Hill Intl., Inc.*, 153 AD3d 685, 59 NYS3d 756; *Rodriguez v JMB Architecture, LLC*, 82 AD3d 949, 919 NYS2d 40; *Kindlon v Schoharie Cent. School Dist.*, 66 AD3d 1200, 887 NYS2d 310; *Delahaye v Saint Ann's School*, 40 AD3d 679, 836 NYS2d 233). Moreover, the "Pre-construction Services Agreement" executed by Hall and the owners for the "Elderberry Community" project referenced by plaintiff, did not assign Hall comprehensive supervision or coordination of the worksite and was, in any event, abandoned when the owners encountered unexpected financial difficulties. Therefore, the motion by Hall for summary judgment dismissing the complaint against it is granted.

Turning to the motion by 520X seeking dismissal of the complaint against it, Labor Law §§ 240 (1) and 241 (6) precludes liability against "owners of one and two-family dwellings who contract for but do not direct or control the work" performed on their premises (*see Castellanos v United Cerebral Palsy Assn. of Greater Suffolk, Inc.*, 77 AD3d 879, 909 NYS2d 757 [2d Dept 2010]; *Boccio v Bozik*, 41 AD3d 754, 839 NYS2d 525 [2d Dept 2007]). The phrase "direct or control" refers to the situation where the home owner supervises the method and manner of the work performed (*Rimoldi v Schanzer*, 147 AD2d 541, 545, 537 NYS2d 839 [2d Dept 1989]; *see also Duda v Rouse Constr. Corp.*, 32 NY2d 405, 345 NYS2d 524 [1973]; *Mayen v Kalter*, 282 AD2d 508, 508-509, 722 NYS2d 760 [2d Dept 2001]). Merely providing instructions about the aesthetic design of the premises, offering suggestions, scheduling work, and retaining limited powers of general supervision reflects a typical homeowner interest in the ongoing progress of the work and does not constitute the kind of direction or control necessary to overcome the homeowners' exemption from liability (*see DiMaggio v Cataletto*, 117 AD3d 984, 986 NYS2d 536 [2d Dept 2014]; *Bombard v Pruiksma*, 110 AD3d 1304, 975 NYS2d 183 [3d Dept 2013]). Although the exemption is not available to an owner who uses or intends to use a dwelling solely for commercial purposes (*see Van Amerogen v Donnini*, 78 NY2d 880, 573 NYS2d 443 [1991]), in cases of mixed residential and commercial use, the availability of the exemption is determined by the site and purpose test (*Khela v Neiger*, 85 NY2d 333, 337, 624 NYS2d 566 [1995]; *Lenda v Breeze Concrete Corp.*, 73 AD3d 987, 989, 903 NYS2d 417 [2d Dept 2010]). The "site and purpose" test is "employed on the basis of the homeowners' intentions at the time of the injury underlying the action and not their hopes for the future" (*Truppi v Busciglio*, 74 AD3d 1624, 1625, 905 NYS2d 291 [3d Dept 2010], *quoting Allen v Fiori*, 277 AD2d 674, 675, 716 NYS2d 414 [3d Dept 2000]; *see Lenda v Breeze Concrete Corp.*, *supra*). Where the work performed relates to the residential nature of the premises, the exemption applies, even if the work also serves a commercial purpose, since the commercial benefit will be deemed ancillary to the substantial residential use of such premises (*see Bartoo v Buell*, 87 NY2d 362, 639 NYS2d 778 [1996]; *Muniz v Church of Our Lady of Mt. Carmel*, 238 AD2d 101, 655 NYS2d 38 [1st Dept 1997]). Moreover, the fact that title to an otherwise qualifying one- or two-family dwelling is held by a corporation rather than an individual

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homeowner does not, in and of itself, preclude application of the exemption (*see Assevero v Hamilton & Church Props., LLC*, 131 AD3d 553, 556, 15 NYS3d 399 [2d Dept 2015]; *Parise v Green Chimneys Children's Servs., Inc.*, 106 AD3d 970, 965 NYS2d 608 [2d Dept 2013]; *Baez v Cow Bay Constr.*, 303 AD2d 528, 756 NYS2d 281 [2d Dept 2003]; *Telfer v Gunnison Lakeshore Orchards*, 245 AD2d 620, 664 NYS2d 493 [3d Dept 1997]).

In this case, 520X met its burden on the branch of its motion seeking dismissal of the Labor Law §§ 240 (1) and 241 (6) claims against it by demonstrating, prima facie, that the claims were precluded under the homeowners' exemption (*see Navarra v Hannon*, 197 AD3d 474, 152 NYS3d 489 [2d Dept 2021]; *Garcia v Pond Acquisition Corp.*, 131 AD3d 1102, 16 NYS3d 755 [2d Dept 2015]; *Parise v Green Chimneys Children's Servs., Inc.*, 106 AD3d 970, 965 NYS2d 608; *Baez v Cow Bay Constr.*, 303 AD2d 528, 756 NYS2d 281). Notably, 520X submitted evidence that the subject premises was a single-family home, and that the work being performed at the time of the accident related exclusively to its residential use. In this regard, 520X's principal, Laura Sillerman, testified that due to unexpected financial difficulties, she and her late husband never even embarked on the larger project, known as the Elderberry Community, to construct multiple single family homes and recreational facilities on her property. Instead, according to Sillerman, they decided that they would live in the home that was already located on the property, and that they had chosen to perform a "gut renovation" of a portion of the existing premises to accommodate that plan. Sillerman testified that she began visiting the premises after the heavy structural work was completed, and that on those occasions she would discuss the scheduling of the work, and the installation of fittings, finishes, and lighting for the home. She testified that her husband was unable to visit the worksite, and that on the occasions she visited the premises to conduct walkthroughs she only spoke with McGowin, the architect retained by herself and her husband, and the principal of MCJM, who she believed was the general contractor for the renovation project.

520X similarly met its burden on the branch of its motion seeking dismissal of the common law negligence and Labor Law § 200 claims against it, by submitting evidence that the accident arose out of the means and methods of plaintiff's work, and that its principals neither possessed the authority to control, nor exercised control, of such work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352, 670 NYS2d 816 [1998]; *Ortega v Puccia*, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]). As discussed above, Sillerman testified that she believed that plaintiff's employer served as the general contractor for the renovation of the premises, and that she did not personally interact with the contractors working at the premises. Labor Law § 200 is a codification of the common-law duty of property owners and general contractors to provide workers with a safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352, 670 NYS2d 816; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877, 609 NYS2d 168 [1993]). Where, as here, a plaintiff's claim arises out of alleged defects or dangers in work methods, to prevail on a Labor Law § 200 cause of action, the plaintiff must show that the defendant "had the authority to supervise or control the performance of the work" (*Ortega v Puccia*, 57 AD3d 54, 61, 866 NYS2d 323; *see Pilato v 866 U.N. Plaza Assoc., LLC*, 77 AD3d 644, 646, 909 NYS2d 80 [2d Dept 2010]). However, "the right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications, is insufficient to impose liability under Labor Law § 200 or for common-law negligence" (*Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684, 913 NYS2d 684 [2d Dept 2010])[internal

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quotation marks omitted]; see *Klimowicz v Powell Cove Assocs., LLC*, 111 AD3d 605, 975 NYS2d 419 [2d Dept 2013]).

Plaintiff's opposition, which consists of general allegations concerning whether 520X should be regarded as a commercial developer due to the proposed Elderberry Community project, fails to defeat 520X's prima facie showing of entitlement to summary judgment in its favor, as it is undisputed that the larger project was abandoned, no work on that development had commenced, and plaintiff was working on the separate renovation of the subject premises at the time of the alleged accident (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595). Accordingly, the motion by 520X seeking summary judgment dismissing the complaint against it also is granted.

Dated: APR 14 2022



HON. JOSEPH A. SANTORELLI
J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION