

Buchanan v De Orio

2023 NY Slip Op 34831(U)

March 23, 2023

Supreme Court, Kings County

Docket Number: Index No. 516478/2019

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 23rd day of March, 2023.

PRESENT:

HON. CARL J. LANDICINO,
Justice.

-----X

JOHN BUCHANAN,

Plaintiff(s),

- against -

MICHAEL DE ORIO and KIMBERLEY DE ORIO,

Defendants.

-----X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)

| | |
|--|---------------|
| Notice of Motion/Cross Motion and | |
| Affidavits (Affirmations) Annexed..... | 16-23, 31-40, |
| Opposing Affidavits (Affirmations)..... | 48, |
| Reply and Sur-Reply Affidavits (Affirmations)..... | 41-45, |

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DECISION AND ORDER

Motions Sequence #1, #2

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After oral argument and a review of the submissions herein, the Court finds as follows:

This is an action to recover damages for personal injuries allegedly sustained by the Plaintiff John Buchanan (hereinafter “the Plaintiff”) on February 16, 2019. The Plaintiff alleges that he was injured while he was working at a property owned by Defendants Michael DeOrio and Kimberly DeOrio (hereinafter referred to individually or collectively as “the Defendants”), located at 2171 East 35th Street, Brooklyn, N.Y. (hereinafter “the Property” or “Premises”). At the time of the alleged incident the Plaintiff was apparently at the Property in furtherance of his employment with non-party A-1 Unlimited Services. The Plaintiff alleges in his Verified Bill of Particulars that he “was performing construction/renovation work on the roof of Defendants' property located at 2171 East 35th Avenue, Brooklyn, NY, he was caused to fall from an unsecured ladder 20 feet to the ground below.” (See Plaintiff’s Bill of Particulars, Paragraph 18).

The Defendants now move (motion sequence #1) for an order pursuant to CPLR 3212, granting summary judgment in their favor and dismissing all causes of action against them. The Defendants contend that the Plaintiff's Labor Law §§ 240(1) and 241(6) claims should be dismissed given that the Defendants are entitled to a "homeowner's exemption", because the home is a two-family residence and the Defendants did not control the Plaintiff's work. As to the Plaintiff's Labor Law §200 and common law negligence claims, the Defendants contend that these claims should be dismissed as the Defendants did not control or have a supervisory role over the Plaintiff's work.

The Plaintiff opposes the motion and cross moves (motion sequence #2) pursuant to CPLR 3212 for summary judgment on the issue of liability relating to Plaintiffs' Labor Law 240(1) claim. The Plaintiff argues that the Defendants' motion should be denied and his motion relating to his Labor Law 240(1) claim should be granted as the Defendants did actually supervise the Plaintiff's work, failed to provide him with adequate safety equipment, and had actual knowledge of the condition of the awning prior to the Plaintiff's accident.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff*, 14 AD3d 493 [2nd Dept, 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to

establish the existence of material issues of fact which require a trial of the action.” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Motion Sequence #1 (Defendants’ Motion for Summary Judgment)

Labor Law § 200 and Common Law Negligence

Labor Law § 200 “is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe construction site.” *Rizzuto v. L.A. Wenger Contracting Co.*, 91 N.Y.2d 343, 352, 693 N.E.2d 1068, 1073 [1998]. “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 worksite, and those involving the manner in which the work is performed.” *Ortega v. Puccia*, 57 AD3d 54, 61, 866 N.Y.S.2d 323, 329 [2d Dept 2008]. “Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law §200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident.” *Id.* “By contrast, when the manner of work is at issue, ‘no liability will attach to the owner solely because [he or she] may have had notice of the allegedly unsafe manner in which work was performed.’” *Id.*, quoting *Dennis v. City of New York*, 304 AD2d 611, 611, 758 N.Y.S.2d 661, 663 [2d Dept 2003]. “Rather, when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the

work.” *Id.* “For an owner to be liable for common-law negligence or pursuant to Labor Law § 200, the plaintiff must show that the owner supervised or controlled the work, or had actual or constructive notice of the unsafe condition causing the accident.” *Saverino v. Reiter*, 1 AD3d 427, 428, 767 N.Y.S.2d 445, 447 [2d Dept 2003]; *Garcia v. Petrakis*, 306 AD2d 315, 316, 760 N.Y.S.2d 551, 553 [2d Dept 2003].

The deposition of the Plaintiff was conducted on March 20, 2020 (NYSCEF Docs. # 22). When asked if he was familiar with A1 Unlimited Services, the Plaintiff replied, “[i]t’s the small business Vinny owned, Vinny Valenti.” (Page 14). When asked if this was the business he worked for when the accident occurred, the Plaintiff stated, “[a]s far as I’m aware, yes.” (Page 15). When asked when he had spoken to Mr. Valenti prior to his accident, the Plaintiff stated, “[i]t would be Friday. I got injured on Saturday.” When asked if he was familiar with Michael and Kimberly De Orio, the Plaintiff stated, “[n]o.” (Page 15). When asked again if he knew the names of the homeowners of the house where he was working when he was allegedly injured, the Plaintiff stated, “I do not, dear.” (Page 15). When asked if he ever spoke to either of the owners, the Plaintiff stated, “I have spoken to the detective, but no more than passing words.” (Page 15). When asked if he meant Mr. DeOrio, the Plaintiff stated, “[y]es, ma’am.” (Page 15). When asked to describe the nature of the conversation with Mr. DeOrio, the Plaintiff stated, “[w]ell, when we were working on his home before, he would come out and tell us to put our tools in certain places, you know, things of that nature.” The Plaintiff also stated that “[w]hen we remodeled his front porch, he would come out every two or three hours to look at it, check on it.” (Page 16).

When asked about his conversation with Mr. Valenti regarding the work the Defendants needed done, the Plaintiff stated, “[h]e said that, the homeowner, his gutter is turning green and that he wants to pay someone to come clean it and clear-coat it and would I be interested in doing it for \$150.” (Page 44). When the Plaintiff was asked if he understood what the job entailed, the Plaintiff stated, “[n]ot entirely, no.” (Page 45). When asked if Mr. Valenti gave him any tools or materials for the job, the Plaintiff stated,

“[o]n top of the porch, the clear-coat was there and a rag and Vinny had dropped the ladders off already for me before I got there because he had to go do something.” (Page 47). When asked why there were two ladders, the Plaintiff stated, “[f]irst, he dropped off one and then I told him that I couldn't reach the second gutter. So he brought me another ladder.” (Page 48). When asked what he did with the second ladder, the Plaintiff stated, “I got soapy water with the brush and I went up on the roof and started scrubbing the gutter.” (Page 55). When asked if he used the first ladder to get onto the roof, the Plaintiff stated “[y]es, ma'am.” (Page 55). When asked what he did then, the Plaintiff stated, “I went on the first step of the other ladder and started scrubbing the gutter.” (Page 55). When asked whether he put the six foot ladder on the awning, the Plaintiff stated, “[c]orrect.” (Page 56). When asked to describe the accident, the Plaintiff stated, “I was scrubbing the gutter one minute, and the next minute, I'm sliding down the awning and landing in his driveway.” (Page 69). When asked if the ladder moved from underneath him, the Plaintiff stated, “[w]hen it slipped out from underneath me, it went with me, but other than that, no.” (Page 70).

In relation to the Plaintiff's Labor Law § 200 and common-law negligence claim (motion sequence #1), the Defendants argue that they cannot be held liable for the Plaintiff's injuries pursuant to Labor Law § 200 given that they contend that they did not supervise or control the work of the Plaintiff. As an initial matter, the subject matter of this claim relates to means and methods not an unsafe construction site. The papers generally concede this and the facts as alleged support it. *See Medina-Arana v. Henry St. Prop. Holdings, LLC*, 186 AD3d 1666, 1667, 131 N.Y.S.3d 110 [2d Dept 2020][scaffold allegation]; and *Roblero v. Bais Ruchel High Sch., Inc.*, 175 AD3d 1446, 1447, 109 N.Y.S.3d 329 [2d Dept 2019][fall from scaffold]. “When the methods or materials of the work are at issue, ‘recovery against the owner or general contractor cannot be had... unless it is shown that the party to be charged had the authority to supervise or control the performance of the work.’” *Messina v. City of New York*, 147 A.D.3d 748, 749, 46 N.Y.S.3d 174, 176 [2nd Dept 2017], quoting *Ortega v. Puccia*, 57 A.D.3d 54, 866 N.Y.S.2d

323 [2nd Dept 2008]. The Defendants argue that Plaintiff's claim arises out of the alleged unsafe and dangerous means and methods used by the Plaintiff to perform his work, and, thus, there can be no liability imposed upon the Defendants as they did not direct, supervise, instruct, or control the work Plaintiff performed. Here, the court finds that, as the Plaintiff's claim is based on the manner in which the work was performed (placement of the ladder on the awning, the awning became wet, and the ladder slipped as a result), the Defendants have established, *prima facie*, that neither of them supervised or controlled the means and methods of the work that the Plaintiff was performing while in the employ of A-1 Unlimited Services. *See Teodoro v. C.W. Brown, Inc.*, 200 A.D.3d 999, 160 N.Y.S.3d 345, 349 [2d Dept 2021].

In opposition, the Plaintiff failed to raise a material issue of fact that would prevent the Court from granting summary judgment. First, it must be noted that the Plaintiff testified that the ladder was given to him by Mr. Valenti. Accordingly, “the ‘supervisory authority’ standard governs defendants' liability for worksite injuries under Labor Law § 200, where the dangerous or defective equipment is provided by the plaintiff's employer rather than by the property owner.” *Chowdhury v. Rodriguez*, 57 AD3d 121, 129, 867 N.Y.S.2d 123, 130 [2d Dept 2008]. The Plaintiff also argues that the Defendants had control over the project in as much as he hired the contractor. The Plaintiff contends that Mr. De Orrior would inspect the Premises. This is insufficient and speculative assertions regarding a party's ability to direct or control the manner and method of the work is not sufficient to raise a material issue of fact. *See Mondragon-Moreno v. Sporn*, 189 AD3d 1574, 1576, 138 N.Y.S.3d 606, 608 [2d Dept 2020]. Visits to “the work site to inspect the work, make requests, and ask questions does not preclude summary judgment, as [m]ere general supervisory authority at [the] work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200.” “Moreover, although [General Contractor] employees had the power to stop any unsafe work at the site, this alone is insufficient to impose liability under Labor Law § 200.” *Debenedetto v. Chetrit*, 190 A.D.3d 933, 938,

140 N.Y.S.3d 569 [2d Dept 2021]. Accordingly, the Plaintiff's Labor Law 200 and common law negligence claims against the Defendants are dismissed.

Homeowner's Exemption of Labor Law 240(1) and 241(6)

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.”

“An owner of a one- or two-family dwelling is exempt from liability under Labor Law §§ 240(1) and 241(6) unless he or she directed or controlled the work being performed.” *Ferrero v. Best Modular Homes, Inc.*, 33 A.D.3d 847, 849, 823 N.Y.S.2d 477, 479 [2nd Dept, 2006]; *Ortega v. Puccia*, 57 A.D.3d 54, 59, 866 N.Y.S.2d 323, 328 [2nd Dept, 2008]. “A building's classification as a ‘multiple dwelling’ does not automatically cause the homeowner to lose the protection of the exemption.” *Hossain v. Kurzynowski*, 92 A.D.3d 722, 723–24, 939 N.Y.S.2d 89, 91 [2nd Dept, 2012].

Labor Law § 241(6) also contains a homeowner's exemption and 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, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

The Defendants have met their *prima facie* burden regarding their motion (motion sequence #1) for Summary Judgment pursuant to CPLR 3212 as it relates to the Plaintiff's Labor Law §§ 240(1) and 241(6) claims.¹ "To receive the protection of the homeowners' exemption, the defendant has the burden, *inter alia*, of showing that 'the work was conducted at a dwelling that is a residence for only one or two families.'" *Rossi v. Flying Horse Farm, Inc.*, 131 A.D.3d 1033, 1035, 16 N.Y.S.3d 316, 318 [2nd Dept, 2015], quoting *Chowdhury v. Rodriguez*, 57 A.D.3d 121, 867 N.Y.S.2d 123 [2nd Dept, 2008].

The deposition of the Defendant Michael De Orio was conducted on March January 28, 2021 (NYSCEF Docs. # 39). When asked if he owned the Premises, Mr. De Orio stated, "[y]es." (Page 9). When asked who he owns the Premises with, he stated, "[m]y wife." When asked her name, Mr. De Orio stated, "Kimberly." (Page 9). When asked what type of property it is, Mr. De Orio stated, "[t]wo family home." (Page 10). When asked if he occupies the entire residence, Mr. De Orio stated, "[y]es." (Page 12). When asked if he saw the workers using the ladders when he went outside to speak to Mr. Valenti, Mr. De Orio stated, "[a]t times, yes, I observed them on ladders, sure." (Page 41). When asked if he had ladders that were used in the project, Mr. De Orio stated, "[n]o, I did not give them any ladder whatsoever." (Page 42). When asked whether he gave the workers any materials, Mr. De Orio stated, "I gave him a sealer for the gutters and I believe that was it." (Page 43).

The deposition of the Defendant Kimberly De Orio was conducted on May 21, 2021 (NYSCEF Docs. #40). When asked where she resides, Mrs. De Orio stated "2171 East 35th Street, Brooklyn, New York 11234." (Page 7). When asked how long she has lived there, Mrs. De Orio stated "[a]pproximately, I would say, just about five years." (Page 10). When asked if anyone else resides there

¹ The Plaintiff in his own Affirmation in Support of Cross-Motion and in Opposition to Motion (Paragraph 4) states "[t]his action arises from a work-related accident that occurred on February 16, 2019, when Defendant Michael De Orio hired Mr. Buchanan to perform work on his residential property located at 2171 East 35th Street, Brooklyn, New York 11234 ("property")."

beside her husband and children, Mrs. De Orio stated, “[n]o.” (Page 11). When asked if her and her husband owned the premises, Mrs. De Orio stated, “[y]es.” (Page 13).

In opposition, the Plaintiff has failed to raise a material issue of fact regarding whether the Defendants had supervised the Plaintiff’s work.² The Plaintiff argues (Affirmation in Support of Cross-Motion and in Opposition to Motion (Paragraph 5)) that the “Homeowner’s Exemption to Labor Law § 240(1) is unavailable under circumstances where Defendants inexplicably exposed Plaintiff to the risk of falling by failing to provide Plaintiff with any safety device while working at a height under dangerous conditions on an angled slick roof that Defendants constructed on their property.” However, the Plaintiff has not provided evidence either that the Property at issue does not qualify under the Homeowner’s exemption or that the Defendant owners were supervising the methods and manner of the Plaintiff’s work. The testimony of the both the Plaintiff and Defendant Michael De Orio suggests that there was little communication between them and that Mr. De Orio did not otherwise supervise the work being conducted. The affidavit of Mr. Valenti is insufficient to raise an issue of fact regarding whether Defendant Michael De Orio supervised the means and methods of the work being performed. Mr. Valenti stated that Mr. De Orio “declined the use of scaffolding as he did not want an eye sore to his property nor did he agree on the additional cost.” (See Valenti Affidavit Paragraph 8). Mr. Valenti also stated that, “I explained to Mr. De Orio that the only available means of performing the work was through the use of ladders to reach the height necessary for the roof to be installed on the porch awning.” These statements from Mr. Valenti do not show that the Defendants’ involvement was anything more than merely a retention of the limited power of general supervision and that they were otherwise requiring the Plaintiff to use certain means and methods by excluding the use of a scaffold for the work at issue. *See Nai Ren Jiang v. Yeh*, 95 AD3d 970, 971, 944 N.Y.S.2d 200, 203 [2d Dept 2012]; *Orellana v. Dutcher Ave. Builders, Inc.*, 58 AD3d 612, 612,

² Moreover, the Plaintiff has failed to meet his prima facie burden in relation to his own motion (motion sequence #2).

871 N.Y.S.2d 352, 353 [2d Dept 2009]. Compare *Ramirez v. I.G.C. Wall Sys., Inc.*, 140 AD3d 1047, 35 N.Y.S.3d 159 [2d Dept 2016], where the owner’s actions were clearly related to the means and method of the work. The owner in *Ramirez* “was involved in the construction, assembled and placed the ladder where it was.” That is not what occurred in this action. There is no indication that Valenti indicated that the work, without the use of the scaffold, would be dangerous or that the method Valenti chose instead was dangerous. When the Defendants declined the use of the scaffold they did not subject themselves to liability. This is not the supervision or control required for the Homeowner’s Exemption to be properly rejected. *See also Reinoso v. Han Ma Um Zen Ctr. of New York, Inc.*, 206 AD3d 772, 169 N.Y.S.3d 677 [2d Dept 2022] [ladder provided by the owner]. As stated above, the Plaintiff acknowledges that the Defendants’ property was a two family residence and Plaintiff has not shown that either Defendant supervised or directed the Plaintiff’s work at the Premises. As a result, the Defendants’ motion is granted and the Plaintiff’s motion is accordingly denied.

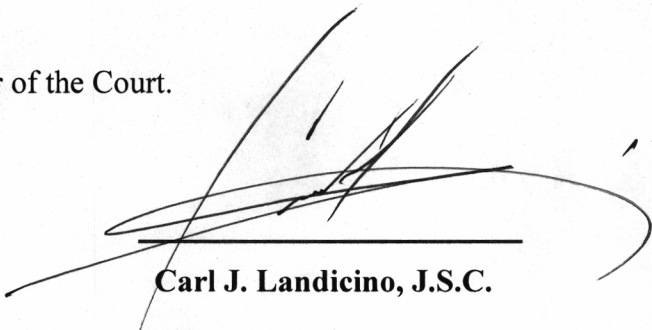
Based on the foregoing, it is hereby ORDERED as follows:

The motion by the Defendants (motion sequence #1) for summary judgment is granted and the complaint is dismissed as against the Defendants.

The Plaintiff’s motion (motion sequence #2) for summary judgment is denied.

The foregoing constitutes the Decision and Order of the Court.

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Carl J. Landicino, J.S.C.

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