Samatov v Ben-Levi
2024 NY Slip Op 35062(U)
December 12, 2024
Supreme Court, Queens County
Docket Number: Index No. 704057/2022
Judge: Ulysses B. Leverett
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
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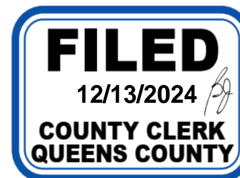
SUHROB SAMATOV, Index No.: 704057/2022

Plaintiff, Motion Seq. No.: 2

-against-

DECISION and ORDER

YAKOV BEN-LEVI,



Defendant.
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Present: **HONORABLE ULYSSES B. LEVERETT**

	Papers Numbered
Notice of Motion-Affirmation-Memorandum of Law-Exhibits	EF 31-43
Memorandum of Law in Opposition-Statement of Material Facts	EF 44-45
Affirmation in Reply	EF 47

Defendant Yakov Ben-Levi's motion pursuant to CPLR §3212 for summary judgment, dismissing all claims is decided as follows:

This is a premises liability action for personal injuries allegedly sustained by the Plaintiff as a result of an incident that occurred on December 13, 2020, at the Defendant's home located at 38 Peacock Drive, East Hills, New York. Plaintiff was a handyman who had been working for the Defendant for upward of 10 years, was in the process of cutting wood with a power table saw on the floor of the garage at the premises when a piece of wood flew into his eye. Plaintiff alleges claims of Labor Law §200, 241(6) and common law negligence.

Labor Law §200 is a codification of the common-law duty placed on property owners and general contractors to provide workers with a safe place to work. *Lombardi v. Stout*, 80 N.Y.2d 290 (1992). Cases involving Labor Law § 200, as well as common law negligence, fall in two broad categories: (1) "where workers are injured as a result of dangerous or defective premises conditions at a worksite"; or (2) when the injuries are the result of the "manner in which the work is performed." The first category, a homeowner will be liable for conditions unrelated to construction if they created the dangerous condition or had actual or constructive notice of the condition that caused the accident. The second category involves a condition or an incident that occurs because of the manner and means in which the work was conducted. Liability cannot be determined to the owner under the common law or under Labor Law § 200 where the Plaintiff has supervised and controlled their own work or when the defect arises from the actions of the contractor.

Plaintiff must show (1) Defendant created or was on notice of the alleged dangerous condition, which is alleged to be the table saw without a blade guard or (2) that Defendant had the

authority to supervise and controlled the work by the Plaintiff and had responsibility for the manner in which the work was performed through supervision of the work.

The burden on the moving party for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). The moving party seeking summary judgment has the initial burden of proving its prima facie case. *Zuckerman v. City of New York*, 49 N.Y.S.2d 557 (1980).

Plaintiff alleges violations of 12 N.Y. Comp. Codes R. & Regs. tit. 12 § 23-1.8 (a); 12 § 23-1.5 (a) and (c); and 12 § 23-1.12 (c).

12 NYCRR 12 § 23-1.12 (c), this industrial code provides in pertinent part as follows:

> (c) Power-driven saws.
>
> (1) Every portable, power-driven, hand-operated saw which is not provided with a saw table, except chain saws and circular brush saws, shall be equipped with a fixed guard above the base plate which will completely protect the operator from contact with the saw blade when the saw is operating and with a movable self-adjusting guard below the base plate which will completely cover the saw blade to the depth of the teeth when such saw blade is removed from the cut.
>
> Note: Electrically-driven portable saws are also subject to the provisions of section 23-1.10 of this Part (rule).
>
> (2) Every power-driven saw, other than a portable saw, shall be equipped with a guard which covers the saw blade to such an extent as will prevent contact with the teeth. In operation, such guard shall rise automatically by pressure from the material being cut or shall be so adjusted that as the saw cuts the material, the distance from the material to the underside of the guard does not exceed one-half inch. The exposed teeth of the saw blade beneath the table shall be effectively guarded. Every such saw shall be provided with a cut-off switch within easy reach of the operator without his leaving the operating position. Exception: Any arm saw whose upper blade half is enclosed and which is provided with a front blocking bar or rod is not required to be guarded by the automatic rising pressure guard.
>
> (3) Every table circular saw used for ripping shall be provided with a spreader securely fastened in position and with an effective device to prevent material kickback.
>
> 12 NYCRR 12 § 23-1.8(a). Section 23- 1.8(a) of the industrial code provides as follows:

(a) Eye protection. Approved eye protection equipment suitable for the hazard involved shall be provided for and shall be used by all persons while employed in welding, burning or cutting operations or in chipping, cutting or grinding any material from which particles may fly, or while engaged in any other operation which may endanger the eyes.

Section 23-1.5(a) and (c), which provides in relevant part, as follows:

(a) Health and safety protection required. All places where employees are suffered or permitted to perform work of any kind in construction, demolition or excavation operations shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection for the lives, health and safety of such persons as well as of persons lawfully frequenting the area of such activity. To this end, all employers, owners, contractors and their agents and other persons obligated by law to provide safe working conditions, personal protective equipment and safe places to work for persons employed in construction, demolition or excavation operations and to protect persons lawfully frequenting the areas of such activity shall provide or cause to be provided the working conditions, safety devices, types of construction, methods of demolition and of excavation and the materials, means, methods and procedures required by this Part (rule). No employer shall suffer or permit an employee to work under working conditions which are not in compliance with the provisions of this Part (rule), or to perform any act prohibited by any provision of this Part (rule). (b) General requirement of competency. For the performance of work required by this Part (rule) to be done by or under the supervision of a designated person, an employer shall designate as such person only such an employee as a reasonable and prudent man experienced in construction, demolition or excavation work would consider competent to perform such work. (c) Condition of equipment and safeguards. (1) No employer shall suffer or permit an employee to use any machinery or equipment which is not in good repair and in safe working condition.(2) All load carrying equipment shall be designed, constructed and maintained throughout to safely support the loads intended to be imposed thereon.(3) All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged.

Defendant argues that he did not instruct plaintiff with respect to how he should do the work, what tools or procedures to use or anything else regarding the manner or method of the work being performed. Defendant further argues that he did not direct the means or methods of the work being performed at the premises done by the plaintiff using a table saw without a protective blade guard that he allegedly removed a decade prior to the accident. Defendant further argues that Plaintiff violated industry standards by knowingly operating the table saw without a guard, on the garage floor

while not wearing any type of goggles or other protective eyewear though he testified they would have prevented his eye injury.

Defendant argues that Plaintiff testified that he never wore protective eyewear when using the subject table saw throughout the decade, he worked for Defendant including the date of accident. Plaintiff's testimony was that he never asked the defendant to purchase new goggles for him, and that Defendant never denied any of plaintiff's requests for materials. Defendant testified that it was the plaintiff, who removed the guard from the saw and opted to use it without the guard before he started working at the premises.

Plaintiff in opposition, argues that Defendant directed and controlled the work that the Plaintiff was performing. Further, that the Defendant would tell what work he wanted the Plaintiff to perform that day. Plaintiff argues that the Defendant stood by the Plaintiff while he was performing the work. He even helped the Plaintiff and even held the table saw to prevent it to from shaking. Other than those times when the Defendant had an appointment elsewhere, the Defendant was next to the Plaintiff to direct and control the work that the Plaintiff was performing. Plaintiff argues that his testimony supports the allegations that there was never a guard on the table saw from the time that Plaintiff started working for the Defendant.

To establish liability against an owner pursuant to Labor Law § 200, it must be established that the owner exercised supervision and control over the work performed at the site, or had actual or constructive notice of the allegedly unsafe condition. *Akins v. Baker*, 247 A.D.2d 562 (2d Dep't 1998). In reply, Defendant argues that plaintiff violated industry standards by using the table saw without the guard and the existence of an open and obvious condition negated the Defendant's duty to abate. *Shamir v. Extrema Mach. Co., Inc.*, 125 A.D.3d 636 (2d Dep't 2015), *Liriano v. Hobart Corp.*, 92 N.Y.2d 232 (1998) and *Westbrook v. WR Activities-Cabrera Mkts.*, 5 A.D.3d 69 (1st Dep't 2004). Defendant further argues that no liability will attach to the owner solely because it may have had notice of the allegedly unsafe manner in which work was performed. *Comes v. New York State Elec. and Gas Corp.*, 82 N.Y.2d 876 (1993). The Court finds that this standard is not on point with the facts of this case, as that standard was placed on manufacturers and not homeowners.

To the extent that the affidavit of the plaintiff contradicted his deposition testimony and it presented only feigned issues of fact, it is insufficient to defeat summary judgment. *See Bloom v. La Femme Fatale of Smithtown*, 273 A.D.2d 187 (2000). The plaintiff's affidavit failed to offer any evidence to rebut the showing of the defendant that the defendant did not supervise or control the plaintiff, or direct the construction procedures or safety measures employed by the third-party defendants as it contains new information that was not presented in his original deposition testimony. However, the Plaintiff's testimony during his November 21, 2023 deposition was that he was not as experienced in using the type of table saw that was in use at the time of the accident and while he was using the table saw on the ground. *See* NYSCEF Doc. 37, p. 143-148. This testimony creates a question as to whether the accident occurred solely due to his own actions, which should be left to the trier of fact.

Defendant alleges that the common law negligence and Labor Law §200 claims should be dismissed where the manner in which a plaintiff performs the work creates the dangerous or

hazardous condition that causes his injuries. In Sarvis v. Maida, 173 A.D.2d 1019 (3rd Dept. 1991), the Appellate Division affirmed summary judgment to a defendant homeowner where, as in the case at bar, the plaintiff created the dangerous condition through the manner in which he performed the work. Indeed, the court held, "Since the unsafe condition was created by the manner in which the work was being performed, there can be no liability on the owner under Labor Law §200 in the absence of supervision and control over the activity producing the injury." See also Reilly v. Loreco Construction, 284 A.D.2d 384 (2nd Dept. 2001), in which the Second Department held that a homeowner was not liable in common law negligence for injuries suffered by a worker that were due solely to a dangerous condition that arose entirely from his (plaintiff's) methods of performing the work. The testimonies of the parties as to the condition of the table saw do not definitively prove that the happening of the accident was due to the Plaintiff's own methods in performing his work. As such, there are questions of fact as to whether the Plaintiff was injured as a result of dangerous or defective premises conditions that the Defendant had notice of.

Defendant alleges that Plaintiff's 241(6) claims should be dismissed as the language of Labor Law §241 expressly exempts owners of one and two-family dwellings who, like here, contract for but do not direct or control the work. The testimony by the Plaintiff and Defendant supports the Defendant's arguments that the Defendant generally supervised the Plaintiff's work and were merely aesthetic decisions as to how the Defendant wanted the home to look after construction was complete. *See Affri v. Basch*, 13 N.Y.3d 592 (2009). As such, the method and manner were ultimately left up to the Plaintiff.

Accordingly, it is hereby

ORDERED, that Defendant's motion for an order pursuant to CPLR §3212 granting Defendant summary judgement, dismissing Plaintiff's Complaint and all-cross claims against them is denied as to the claims on common law negligence and Labor Law §200 due to the existence of issues of fact, but granted as to Labor Law §241(6).

This is the Decision and Order of this Court.

Dated: December 12, 2024

Hon. Ulysses B. Leverett, J.S.C.

HON. ULYSSES B. LEVERETT