902 N.Y.S.2d 613
74 A.D.3d 744

Ryan GITTINS, plaintiff-respondent,
v.
BARBARIA CONSTRUCTION CORP., et al., defendants-respondents,
Danny Levy, appellant.

Supreme Court, Appellate Division, Second Department, New York.

June 1, 2010.

[902 N.Y.S.2d 614]

Hoey, King, Toker & Epstein (Mischel & Horn, P.C., New York, N.Y. [Scott T. Horn and Naomi M. Taub], of counsel), for appellant.

Jonathan D'Agostino & Associates, P.C., Staten Island, N.Y. (Glen Devora of counsel), for plaintiff-respondent.

PETER B. SKELOS, J.P., JOSEPH COVELLO, L. PRISCILLA HALL, and SANDRA L. SGROI, JJ.

[74 A.D.3d 744]

In an action to recover damages for personal injuries, the defendant Danny Levy appeals from an order of the Supreme Court, Kings County (Balter, J.), dated June 10, 2009, which denied his motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against him.

ORDERED that the order is reversed, on the law, with one bill of costs, and the motion of the defendant Danny Levy for summary judgment dismissing the complaint and all cross claims insofar as asserted against him is granted.

The plaintiff allegedly was injured in the course of his employment as a carpenter at the home of the defendant Danny Levy (hereinafter the homeowner). The plaintiff was performing framing work on the third floor of the structure, which did not yet have walls, and was standing a few feet from the edge of the building. He was operating an electrical saw that was attached to an extension cord that ran outside the frame of the house and was plugged into an outlet on the first floor. When he attempted to pull on the extension cord, he lost his balance and tripped on an unidentified object on the floor, causing him to fall out of the building onto a fence three stories below. The plaintiff testified at his deposition that the homeowner occasionally

[74 A.D.3d 745]

visited the work site prior to the accident, but never spoke with the plaintiff or directed the manner of his work.

[902 N.Y.S.2d 615]

The plaintiff thereafter commenced this action, asserting that the homeowner was liable for common-law negligence and violations of Labor Law §§ 200, 240(1), and § 241(6). The homeowner moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against him, which the Supreme Court denied. We reverse.

To receive the protection of the homeowners' exemption under Labor Law § 240(1) and § 241(6), a homeowner must show the work was performed at a one- or two-family dwelling and that the defendant did not direct or control the plaintiff's work (*see* Labor Law §§ 240[1], 241[6]; *Chowdhury v. Rodriguez,* 57 A.D.3d 121, 126-127, 867 N.Y.S.2d 123).

Here, the homeowner established his prima facie entitlement to judgment as a matter of law dismissing the causes of action alleging violations of Labor Law § 240(1) and § 241(6) by submitting, inter alia, the parties' deposition transcripts. The homeowner's testimony showed that the work was being performed on a one-family dwelling and that he did not direct or control the plaintiff's work. The plaintiff testified that he never met the homeowner prior to the accident and that the homeowner never gave him directions as to how

he should perform his work. Thus, the homeowner established, prima facie, that he was not liable under those statutes. The plaintiff did not offer any evidence in opposition, but instead, relied on his own deposition testimony that he would sometimes see the homeowner talking to his supervisors. This was insufficient to raise a triable issue of fact as to whether the homeowner exercised supervision or control over the plaintiff's work (*see Chowdhury v. Rodriguez,* 57 A.D.3d at 126-127, 867 N.Y.S.2d 123; *see also Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718).

Finally, the homeowner was entitled to summary judgment dismissing the causes of action alleging a violation of Labor Law § 200 and common-law negligence insofar as asserted against him (*see Ortega v. Puccia,* 57 A.D.3d 54, 62-63, 866 N.Y.S.2d 323; *Arama v. Fruchter,* 39 A.D.3d 678, 679, 833 N.Y.S.2d 665; *Ferrero v. Best Modular Homes, Inc.,* 33 A.D.3d 847, 850-851, 823 N.Y.S.2d 477).

Accordingly, the homeowner's motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against him should have been granted.

204 A.D.3d 1125
166 N.Y.S.3d 369

Scott A. HAWVER et al., Appellants,
v.
Laura T. STEELE et al., Respondents.

532898

Supreme Court, Appellate Division, Third Department, New York.

Calendar Date: February 16, 2022
Decided and Entered: April 7, 2022

[166 N.Y.S.3d 371]

Metzger Injury Law, Poughkeepsie (David L. Steinberg of McCabe, Coleman, Ventosa & Patterson, PLLC, Poughkeepsie, of counsel), for appellants.

McCabe & Mack LLP, Poughkeepsie (Nicholas Tarkazikis of counsel), for respondents.

Before: Egan Jr., J.P., Aarons, Pritzker, Reynolds Fitzgerald and Ceresia, JJ.

MEMORANDUM AND ORDER

Reynolds Fitzgerald, J.

[204 A.D.3d 1126]

Appeal from an order of the Supreme Court (Zwack, J.), entered January 29, 2021 in Columbia County, which, among other things, granted defendants' motion for summary judgment dismissing the complaint.

Plaintiff Scott A. Hawver was injured when barn doors fell, striking him on the right shoulder and back while he was delivering sheetrock to property owned by defendants. Hawver and his spouse, derivatively, commenced this action alleging common-law negligence and violations of Labor Law §§ 200, 240(1) and 241(6). Following joinder of issue and discovery, defendants moved for summary judgment dismissing the complaint, and plaintiffs thereafter cross-moved for partial summary judgment as to their claims of common-law negligence and violations of Labor Law §§ 200 and 240(1). Supreme Court granted defendants' motion and dismissed the complaint finding that, with respect to common-law negligence and Labor Law § 200, the barn doors were not inherently dangerous and that, with respect to Labor Law §§ 240(1) and 241(6), defendants are entitled to the homeowner exemption. As a result, Supreme Court denied plaintiffs' cross motion for partial summary judgment. Plaintiffs appeal.[1]

Plaintiffs contend that Supreme Court erred in granting defendants' motion for summary judgment because there are triable issues of fact. We agree. The appellate standards for reviewing a summary judgment motion are well established (*see e.g. Abreu v. Rodriguez,* 195 A.D.3d 1277, 1278–1279, 150 N.Y.S.3d 805 [2021] ; *Mister v. Mister,* 188 A.D.3d 1334, 1334–1335, 135 N.Y.S.3d 165 [2020]). "In order to establish a prima facie entitlement to judgment as a matter of law, [the] defendants are required to tender sufficient, competent, admissible evidence demonstrating the absence of any genuine issue of fact" (*Myers v. Home Energy Performance by Halco,* 188 A.D.3d 1327, 1328–1329, 133 N.Y.S.3d 674 [2020] [internal quotation marks and citations omitted]; *see Dunham v. Ketco, Inc.,* 135 A.D.3d 1032, 1033, 24 N.Y.S.3d 417 [2016]). Addressing first plaintiffs' common-law negligence and Labor Law § 200 claims, " Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (

[204 A.D.3d 1127]

Edwards v. State Univ. Constr. Fund, 196 A.D.3d 778, 780, 151 N.Y.S.3d 464 [2021] [internal quotation marks and citations omitted]; *see Wiley v. Marjam Supply Co., Inc.,* 166 A.D.3d 1106, 1109, 87 N.Y.S.3d 675 [2018], *lv denied* 33 N.Y.3d 908, 2019 WL 2441712 [2019]).

[166 N.Y.S.3d 372]

"Where, as here, the injured worker contends that the underlying accident arose not from the manner in which the work was performed, but rather from an allegedly dangerous condition at the work site, liability for a violation of Labor Law § 200 and common-law negligence will be imposed if the property owner created the condition or had actual or constructive notice of it, and failed to remedy the condition within a reasonable amount of time" (*Abreu v. Rodriguez,* 195 A.D.3d at 1278–1279, 150 N.Y.S.3d 805 [internal quotation marks and citations omitted]; *Mister v. Mister,* 188 A.D.3d at 1334, 135 N.Y.S.3d 165 ; *Vogler v. Perrault,* 149 A.D.3d 1298, 1299, 52 N.Y.S.3d 544 [2017]).

In support of their motion, defendants offered, among other things, the deposition testimony of Hawver and defendant John R. Esposito. Hawver testified that he was employed as a delivery driver at the time of the accident and that his duties included unloading the contents of a delivery at a customer's location, in this case, sheetrock at a barn located on defendants' property. Hawver and his coworker entered the barn, spoke to several men who were installing sheetrock and thereafter moved the truck around to the side of the building where its double doors were situated. As Hawver was preparing to unload the sheetrock, the doors, which were elevated and described by him as "big and heavy," fell on him, causing injury. At the time of the accident, the doors were being restored and, as such, were not on hinges and were secured only by wooden wedges.

Esposito testified that he is employed as both a professional musician and a university professor, that the barn was being renovated to provide a "raw workspace" consisting of a music studio for him and a photography workspace for his wife. He confirmed that he did not witness the accident, nor was he present at the barn at the time that the accident happened. However, he stated that he subsequently learned of the accident from his sheetrock contractor, who informed him that the doors had fallen after being knocked by one of the workers. He admitted that he had been advised not to use the doors by the contractor responsible for restoring them and that, at some point over the course of the construction, the contractor had posted a note on the interior of the door advising same.[2] Finally, he described the doors as being heavily wedged and "really, really heavy." Based on the foregoing, and viewing the evidence

[204 A.D.3d 1128]

in the light most favorable to plaintiffs, defendants failed to meet their initial burden as their own proof reveals disputable triable issues as to whether the unhinged barn doors fell as a result of the actions of an intervening third party, may have constituted a dangerous condition, and whether the use of the wooden wedges was sufficient to guard against the barn doors falling.

Initially, defendants offer only hearsay evidence in support of their contention that the doors fell as a result of the actions of an intervening third party over whom they had no control. Such evidence is not competent to support the motion (*see* CPLR 3212[b] ; *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718 [1980] ; *Durr v. Capital Dist. Transp. Auth.,* 198 A.D.3d 1238, 1239, 156 N.Y.S.3d 505 [2021]). Moreover, while defendants contend that the condition of the doors was not dangerous, they have failed to proffer any evidence to that effect other than Esposito's conclusory and hearsay statements (*see Ryan v. Cenci,* 95 A.D.2d 963, 964, 464 N.Y.S.2d 289 [1983] ;

[166 N.Y.S.3d 373]

Phillips v. Flintkote Co., Glens Falls Portland Cement Div., 89 A.D.2d 724, 725, 453 N.Y.S.2d 847 [1982]). Nor are we persuaded by defendants' contention that the open and obvious nature of the condition of the doors negates any liability on their part. "The fact that a dangerous condition is open and obvious does not relieve [defendants] of all duty to maintain [their] premises in a reasonably safe condition" (*Mister v. Mister,* 188 A.D.3d at 1334, 135 N.Y.S.3d 165 [internal quotation marks and citations omitted]). Accordingly, Supreme Court erred in granting

defendants' motion for summary judgment dismissing plaintiffs' common-law negligence and Labor Law § 200 claims. Moreover, given that these issues of fact exist, Supreme Court properly denied plaintiff's cross motion for partial summary judgment on these claims.

We agree with plaintiffs that Supreme Court also erred in granting that portion of defendants' motion for summary judgment dismissing the Labor Law § 240(1) claim. "As relevant here, liability under Labor Law § 240(1) arises when a worker's injuries are the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Begeal v. Jackson,* 197 A.D.3d 1418, 1418, 153 N.Y.S.3d 681 [2021] [internal quotation marks, brackets and citations omitted]; *see Wright v. Ellsworth Partners, LLC,* 143 A.D.3d 1116, 1117–1118, 39 N.Y.S.3d 289 [2016]). "[I]n determining whether an elevation differential is physically significant or de minimis, we must consider not only the height differential itself, but also the weight of the falling object and the amount of force it was capable of generating, even over the course of a relatively short descent" (

[204 A.D.3d 1129]

Wright v. Ellsworth Partners, LLC, 173 A.D.3d 1409, 1409, 104 N.Y.S.3d 360 [2019] [internal quotation marks, brackets and citation omitted], *lv denied* 34 N.Y.3d 907, 2019 WL 6910127 [2019] ; *see Runner v. New York Stock Exch., Inc.,* 13 N.Y.3d 599, 605, 895 N.Y.S.2d 279, 922 N.E.2d 865 [2009]). Although Labor Law § 240(1) imposes a nondelegable duty upon owners to protect workers engaged in construction-related activities, "the Legislature has carved out an exemption for the owners of one and two-family dwellings who contract for but do not direct or control the work" (*Pelham v. Moracco, LLC,* 172 A.D.3d 1689, 1690, 100 N.Y.S.3d 744 [2019] [internal quotation marks and citations omitted]; *see* Labor Law § 240[1] ; *Sanchez v. Marticorena,* 103 A.D.3d 1057, 1057, 962 N.Y.S.2d 425 [2013]). "That exemption, however, is not available to an owner who uses or intends to use the dwelling only for commercial purposes" (*Bagley v. Moffett,* 107 A.D.3d 1358, 1360, 969 N.Y.S.2d 184 [2013] [internal quotation marks, brackets and citations omitted]; *see Feilen v. Christman,* 135 A.D.3d 1130, 1130, 23 N.Y.S.3d 452 [2016], *lv denied* 27 N.Y.3d 903, 2016 WL 1691910 [2016]).

As a threshold matter, defendants, as the parties seeking the benefit of the statutory exemption, had the burden of establishing that the property was not being used solely for commercial purposes at the time of Hawver's accident (*see Bagley v. Moffett,* 107 A.D.3d at 1360, 969 N.Y.S.2d 184). This they failed to do. Esposito's deposition testimony established that he is a professional musician and that the structure was being altered to use as a music studio and a photography workspace. Moreover, defendants failed to submit an affidavit addressing whether they intended to use the structure for commercial or noncommercial purposes. In these circumstances, we find that defendants failed to demonstrate their entitlement to the homeowner exemption as a matter of law and that a question of fact

[166 N.Y.S.3d 374]

exists regarding the application of the homeowner exemption (*see Battease v. Harrington,* 90 A.D.3d 1124, 1125, 935 N.Y.S.2d 152 [2011] ; *Landon v. Austin,* 88 A.D.3d 1127, 1128, 931 N.Y.S.2d 424 [2011]). Next, there is insufficient evidence to determine from the present record whether Hawver's injuries arose from a physically significant elevation differential, as there is no indication of Hawver's height, the weight of the doors, how far the doors fell or the amount of force that the doors generated when falling (*see Wilinski v., 334 E. 92nd Hous. Dev. Fund Corp.,* 18 N.Y.3d 1, 9–10, 935 N.Y.S.2d 551, 959 N.E.2d 488 [2011] ; *Runner v. New York Stock Exch., Inc.,* 13 N.Y.3d at 605, 895 N.Y.S.2d 279, 922 N.E.2d 865 ; *Wright v. Ellsworth Partners, LLC,* 143 A.D.3d at 1119, 39 N.Y.S.3d 289 ; *Scribner v. State of New York,* 130 A.D.3d 1207, 1209, 13 N.Y.S.3d 637 [2015]). Given that questions of fact exist regarding plaintiffs' claim alleging a violation of Labor Law § 240(1), we find that

Supreme Court erred in granting defendants' motion for summary judgment dismissing this claim and properly denied plaintiffs' cross motion for partial summary judgment as to this claim (*see Vogler v. Perrault,* 149 A.D.3d at 1300, 52 N.Y.S.3d 544 ; *Edick v. General Elec. Co.,* 98 A.D.3d 1217, 1219, 951 N.Y.S.2d 251 [2012]).

Egan Jr., J.P., Aarons, Pritzker and Ceresia, JJ., concur.

[204 A.D.3d 1130]

ORDERED that the order is modified, on the law, without costs, by reversing so much thereof as granted defendants' motion for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 240(1) causes of action; motion denied to said extent; and, as so modified, affirmed.

Notes:

[1] Plaintiffs do not challenge Supreme Court's dismissal of their cause of action alleging a violation of Labor Law § 241(6).

[2] It is unknown if this note was attached to the doors on the day of Hawver's injuries.

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67 Misc.3d 1237 (A)
129 N.Y.S.3d 263 (Table)

Nikolaos TSONGAS, Plaintiff,
v.
APEX CONSTRUCTION/MASONRY CORP., Alan Cumming, and Grant L. Shaffer, Defendants.

150586/2017

Supreme Court, New York County, New York.

Decided on July 2, 2020

Rosenberg, Minc, Falkoff & Wolf, New York, NY (Steven Falkoff of counsel), for plaintiff.

Ahmuty, Demers, & McManus, New York, NY (Steven Zecca of counsel), for defendant Apex Construction/Masonry Corp.

Eustace, Marquez, Epstein, Prezioso, & Yapchanyk, New York, NY (Christopher Yapchanyk of counsel), for defendants Alan Cumming and Grant Shaffer.

Gerald Lebovits, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 68 were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67 were read on this motion for SUMMARY JUDGMENT.

This Labor Law action arises out of injuries suffered by plaintiff, Nikolas Tsongas, when he fell in a hole dug by employees of defendant Apex Construction/Masonry Corp. while working on a construction project on land owned by defendants Alan Cumming and Grant Shaffer ("Homeowner Defendants"). Apex and the Homeowner Defendants now separately move for summary judgment.

BACKGROUND

According to the allegations of the complaint, the Homeowner Defendants own the premises at issue, located at 404 East 9th Street in Manhattan. The Homeowners hired non-party IA Construction Management Inc. as the general contractor. (*See* NYSCEF No. 1 at 3.) IA Construction subcontracted out part of the work to Apex. (*See* NYSCEF No. 59.)

Plaintiff is an IA Construction employee. In November 2016, plaintiff was badly injured when he fell into an unguarded and uncovered hole in the backyard of the premises. Apex employees had previously excavated that hole as part of creating footings for a rear deck. (*See* NYSCEF No. 63 at 1-2.)

Plaintiff sued both Apex and the Homeowner Defendants, asserting claims under Labor Law §§ 200, 240, and 241 (6), and also common-law negligence principles.

In motion sequence 001, the Homeowner Defendants move under CPLR 3212 for summary judgment dismissing the complaint as against them. In motion sequence 002, Apex moves under CPLR 3212 for summary judgment dismissing plaintiff's claims against it. Motion sequences 001 and 002 are consolidated here for disposition. Both motions are denied.

DISCUSSION

A party moving for summary judgment under CPLR 3212 "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Jacobsen v. New York City Health & Hospitals Corp.* , 22 NY3d 824, 833 [2014], citing *Alvarez v. Prospect Hosp.* , 68 NY2d 320, 324 [1986].) Once the movant has shown prima facie of entitlement, the burden then shifts to the opposing party to produce "evidentiary proof in admissible form

sufficient to require a trial of material questions of fact." (*Fair v. Fuchs* , 219 AD2d 454, 455 [1st Dept 1995].)

I. The Homeowner Defendants' Motion for Summary Judgment

As an initial matter, the Homeowner Defendants move for summary judgment dismissing any claims brought by plaintiff against them Labor Law §§ 240 and 241 (6). These statutes exempt "owners of one and two-family dwellings who contract for but do not direct or control the work" from liability. (*Affri v. Basch* , 13 NY3d 592, 598 [2009]). Plaintiff concedes that this exemption applies to the Homeowner Defendants. (*See* NYSCEF Doc No. 39 at 1.) Any Labor Law claims made against the Homeowner Defendants under § 240 and 241 (6) are therefore subject to dismissal.

The Homeowner Defendants also move for summary judgment on plaintiff's claim against them under Labor Law § 200. This motion is denied.

To hold a defendant liable under Labor Law § 200, a plaintiff must show that the accident occurred in circumstances under which (i) the homeowners exercised supervisory control of the manner and method of the work (*Comes v. NY State Electric* , 82 NY2d 876, 877 [1993]); or (ii) the homeowners had actual or constructive notice of a dangerous or defective condition and an opportunity to take action, but failed to do so (*Buckley v. Columbia Grammar & Preparatory* , 44 AD3d 263, 272 [1st Dept 2007]). Here, plaintiff testified that neither Homeowner Defendant supervised or directed his work. (*See* NYSCEF No. 32 at 189, 198-199.) The Homeowner Defendants, though, fail to establish prima facie that they lacked constructive notice of the dangerous condition that brought about plaintiff's injuries.

The Homeowner Defendants emphasize that they were not living on the premises during the renovation of their home (and the construction of a deck in their backyard), and that they did not have first-hand knowledge of the conditions or progress on the project site. But neither the Homeowner Defendants' lack of direct involvement with the renovation project, nor the fact that they were living elsewhere, relieved them of their duty to keep their property in a safe condition and provide workers on the project with a safe place to work. (*See DeFelice v. Seakco Constr. Co.* , 159 AD3d 677, 678-679 [2d Dept 2017].) And the evidence relied upon by the Homeowner Defendants (principally deposition testimony given by the parties) does not establish when they or their contractors last inspected the backyard, or how long the hole into which plaintiff fell at been left unguarded and uncovered at the time of plaintiff's fall. Absent that evidence, the Homeowner Defendants cannot meet their initial burden under Labor Law § 200 to show a lack of constructive notice of the dangerous condition at issue. (*See id.* at 679.)

II. Apex's Motion for Summary Judgment

As an initial matter, Apex moves for summary judgment dismissing any claims brought against it under Labor Law §§ 240 and 241 (6). Apex argues that it cannot be liable under these provisions because it was merely a subcontractor on the project, rather than the owner or general contractor. Plaintiff concedes that any claims against Apex under §§ 240 and 241 (6) are subject to dismissal. (*See* NYSCEF No. 62 at 1 & n 1.)

Apex also moves for summary judgment on plaintiff's Labor Law § 200 and common-law-negligence claims. The motion is denied.

As a subcontractor, Apex may be held liable under Labor Law § 200 and common-law negligence principles "for injuries caused by a dangerous condition that it caused or created." (*Hewitt v. NY 70th Street LLC* , 2020 NY Slip Op 03280, at *2 [1st Dept June 11, 2020]; *see also Farrugia v. 1440 Broadway Assocs.* , 163 AD3d 452, 455 [1st Dept 2018] [noting that a party to a contract may be held liable to a third party where the contracting party fails to exercise reasonable care in its duties and thereby launches a force or instrument of harm].) It is undisputed that the

hole into which plaintiff fell was dug by an employee of Apex. Thus, if Apex failed to exercise reasonable care with respect to ensuring that no one fell into that hole, it may be held liable.

Apex argues that it is entitled to summary judgment because it has established as a matter of law that IA Construction, rather than Apex, was responsible for covering the hole after it had been dug. This court disagrees.

To be sure, Apex's co-owner, Michael Flannery, testified at his deposition that IA Construction was responsible for covering the holes dug by Apex before they were used as footing for the backyard deck under construction. (*See* NYSCEF No. 51 at 20.) But the contract between IA Construction and Apex does not include any provision dictating that division of responsibility. (*See* NYSCEF No. 59.) And IA Construction provides affidavits from two IA employees who worked on the project site (Ralph Andino and Tyrone Jackson), each attest to *Apex* being responsible under accepted industry practice for covering up the holes that they had dug. (*See* NYSCEF Nos. 63, 64.)

The Andino affidavit states that consistent with that division of responsibility, Apex employees covered up the holes they had dug overnight—but left the holes uncovered (and unguarded) during the day. (*See* NYSCEF No. 63 at 2-3.) And Andino further states that both he and Jackson repeatedly raised with Apex employees the issue of safety risks due to the uncovered holes; and that the only safety measure taken by Apex in response was to spray orange paint around the holes to make them more noticeable. (*See id.*)

These affidavits are sufficient to raise a fact question as to whether Apex negligently failed to exercise reasonable care as to the potentially dangerous condition that it created when it dug the holes in the premises' backyard.

Accordingly, it is hereby

ORDERED that the Homeowner Defendants' motion under CPLR 3212 for summary judgment dismissing plaintiff's claims against them is granted as to any claims brought against them under Labor Law §§ 240 and 241, and otherwise denied; and it is further

ORDERED that defendant Apex's motion under CPLR 3212 for summary judgment dismissing plaintiff's claims against it is granted as to any claims brought against it under Labor Law §§ 240 and 241, and otherwise denied.

57 A.D.3d 54
866 N.Y.S.2d 323
2008 NY Slip Op 08305
JAVIER ALCIDES ORTEGA et al., Appellants,
v.
TROY PUCCIA et al., Respondents.
2007-03580.
Appellate Division of the Supreme Court of the State of New York, Second Department.
October 28, 2008.

[57 A.D.3d 55]

Martin R. Munitz, P.C., New York City (*Louis A. Badolato* of counsel), for appellants.

Kelly, Rode & Kelly, LLP, Mineola (*Loris Zeppieri* of counsel), for respondents.

OPINION OF THE COURT

DILLON, J.

This appeal presents us with an occasion to discuss the precise standard that must be applied in determining summary judgment motions involving causes of action asserting violations of Labor Law § 200, when an accident arises out of the methods or manner of work at a work site rather than a dangerous or defective condition of the premises.

[57 A.D.3d 56]

I. Relevant Facts

The facts underlying this appeal are fairly straightforward. The plaintiff Javier Alcides Ortega (hereinafter the plaintiff) was injured on Sunday, August 8, 2007, while performing work in the scope of his employment with Blue Bird Drywall (hereinafter Blue Bird). On the date of the accident, and for three to five days prior to the accident, the plaintiff performed his work within a single-family house in Bethpage, which was owned by the defendants Troy Puccia (hereinafter Puccia) and Stacey Puccia (hereinafter together the defendants).[1] Blue Bird had been hired by the defendants to perform drywall work on a second story that had been added to the house earlier in the year. Blue Bird's on-site supervisor, Americo Laird, brought a scaffold to the defendants' house on the first day of the drywall project, and assembled it there. The plaintiff and Puccia both testified at their depositions that they believed that the scaffold had been disassembled on the day before the accident. Their testimony also reveals that the scaffold had been reassembled at some point prior to the accident and that, in the course of reassembly, the wheels with which the scaffold had been equipped were not reattached to it. The scaffold was so large that, when fully assembled, it could not be moved through the hallways of the house.

On the morning of the accident, the plaintiff arrived at the defendants' house to continue taping the walls and ceilings. The parties disagree on what happened next. The plaintiff testified at his deposition that Puccia moved the disassembled scaffold from a bedroom to a great room, where Puccia reassembled it. He asserted that the wheels of the scaffold were attached to it, but the wheels were not locked because the locks were not working. According to the plaintiff, Puccia placed four wood blocks under the wheels to hold them in place.

In contrast, Puccia testified at his deposition that he never touched the scaffold during the days leading up to the accident, except when he slightly moved it out of his way on two occasions. He further testified that, while the wheels of the scaffold were equipped with a locking mechanism, he did not know whether it functioned properly prior to the accident. Puccia

[57 A.D.3d 57]

denied ever touching the scaffold or its wheels on the date of the plaintiff's accident and had no recollection of the presence of wood blocks under the scaffold's wheels at that time. Puccia did, however, recall seeing wood blocks under the scaffold's wheels on earlier occasions.

The parties agree that Puccia left the premises before the accident. The accident occurred between 10:00 A.M. and 11:00 A.M., when the plaintiff allegedly fell from the scaffold. The plaintiff had no specific recollection of his accident, remembering only that he woke up in a hospital. Puccia's wife, Stacey, who was at home at the time, heard a "boom" and found the plaintiff at the bottom of the stairs that led to the great room. Puccia believed that, while he was off-premises, the scaffold had been moved to a new location near the stairs of the great room.

The plaintiff commenced this action to recover damages for personal injuries sustained as a result of the defendants' alleged negligence and violations of Labor Law §§ 200, 240 and 241 (6). The plaintiff's wife, Marie Mujica, asserted a cause of action for loss of services. The defendants' answer denied the material allegations of the complaint, the parties proceeded with discovery, and the defendants thereafter moved, along with Alleyne, for summary judgment dismissing all of the claims.

The defendants argued that summary judgment was appropriate under the single-family homeowners' exemption of Labor Law §§ 240 and 241. They also contended that summary judgment was warranted as to the common-law negligence and Labor Law § 200 claims, on the grounds, inter alia, that the plaintiff was in "sole control" of the scaffold at the time of the occurrence, their actions or omissions thus were not proximately related to the accident, and there was no evidence that any scaffold defect was proximately related to the plaintiff's fall.

In opposition, the plaintiff argued that his testimony regarding Puccia's assembly and bracing of the scaffold before the accident raised triable issues of fact as to the defendants' supervision and control of the work, requiring the denial of the defendants' motion for summary judgment dismissing all of the claims.

The Supreme Court, in an order entered February 20, 2007, found that there was no evidence that the defendants exercised supervision or control over the work, and that any dangerous condition arose out of the contractor's own methods. Absent supervision or control over the work, the Supreme Court held that the defendants were entitled to invoke the single-family

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homeowners' exemption of Labor Law §§ 240 and 241, and that the defendants were not liable under Labor Law § 200 or for common-law negligence as a matter of law. The court thus granted the defendants' motion for summary judgment dismissing the complaint. For the reasons set forth below, we affirm.

II. Labor Law § 240

Labor Law § 240 requires contractors and property owners, engaged in, among other things, the construction, demolition, or repair of buildings or structures, to furnish or erect scaffolding, ladders, pulleys, ropes, and other safety devices, which must be constructed, placed, or operated as to give proper protection for workers (*see* Labor Law § 240 [1]). The statute is intended to protect workers from gravity-related occurrences stemming from the inadequacy or absence of enumerated safety devices (*see Narducci v Manhasset Bay Assoc.,* 96 NY2d 259, 268 [2001]). The duties articulated in Labor Law § 240 are nondelegable, and liability is absolute as to the general contractor or owner when its breach of the statute proximately causes injuries (*see Jock v Fien,* 80 NY2d 965, 967-968 [1992]; *Rocovich v Consolidated Edison Co.,* 78 NY2d 509, 513 [1991]).

The language of Labor Law § 240 (1) expressly exempts "owners of one and two-family dwellings who contract for but do not direct or control the work." This exemption is intended to protect residential homeowners lacking in sophistication or business acumen from their failure to recognize the necessity of insuring against the strict liability imposed by the statute (*see Bartoo v Buell,* 87 NY2d 362, 368 [1996]; *see*

also Cannon v Putnam, 76 NY2d 644, 649 [1990]; *Mayen v Kalter,* 282 AD2d 508, 509 [2001]).

As the parties seeking summary judgment, the defendants bore the initial burden of establishing their prima facie entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.,* 100 NY2d 72, 81 [2003]; *Friends of Animals v Associated Fur Mfrs.,* 46 NY2d 1065, 1067 [1979]). In order to satisfy their prima facie burden on the basis of the "homeowners' exemption," the defendants were required to demonstrate not only that their house was a single- or two-family residence, which is not contested here, but also, that they did not "direct or control" the work being performed (Labor Law § 240 [1]; *see Arama v Fruchter,* 39 AD3d 678, 679 [2007]; *Miller v Shah,* 3 AD3d 521, 522 [2004]; *Saverino v Reiter,* 1 AD3d 427 [2003];

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Stejskal v Simons, 309 AD2d 853, 854 [2003], *affd* 3 NY3d 628 [2004]). The statutory phrase "direct or control" is construed strictly and refers to situations where the owner supervises the method and manner of the work (*see Boccio v Bozik,* 41 AD3d 754, 755 [2007]; *Arama v Fruchter,* 39 AD3d at 679; *Ferrero v Best Modular Homes, Inc.,* 33 AD3d 847, 849 [2006]; *Siconolfi v Crisci,* 11 AD3d 600, 601 [2004]; *Miller v Shah,* 3 AD3d at 522).

Here, contrary to the plaintiffs' contention, the defendants made a prima facie showing that they were entitled to the protection of the homeowners' exemption by submitting evidence demonstrating that they did not direct or control the method and manner of the work being performed (*see Ferrero v Best Modular Homes, Inc.,* 33 AD3d at 849-850; *Cardace v Fanuzzi,* 2 AD3d 557, 558 [2003]). The defendants hired Blue Bird as an independent contractor, and the plaintiff's supervisor at Blue Bird was Laird. The plaintiff did not speak to the defendants other than to exchange greetings and, on one occasion, to discuss a problem with the framing of the ceiling. At the time of the occurrence, neither defendant was even present in the room where the accident occurred. Puccia's testimony that the scaffold had been moved between the time he left the premises and the time of his return is uncontradicted. The defendants' involvement with the drywall project was no more extensive than that of an ordinary homeowner who was not supervising, directing, or controlling the manner of the work. Consequently, the defendants established their prima facie entitlement to judgment as a matter of law based upon the homeowners' exemption from statutory liability (*see Torres v Levy,* 32 AD3d 845, 846 [2006]; *Cardace v Fanuzzi,* 2 AD3d at 558; *Decavallas v Pappantoniou,* 300 AD2d 617, 618 [2002]; *Mandelos v Karavasidis,* 213 AD2d 518, 519-520 [1995], *mod* 86 NY2d 767 [1995]; *Spinillo v Strober Long Is. Bldg. Material Ctrs.,* 192 AD2d 515, 516 [1993]).

In opposition, the plaintiff failed to raise an issue of fact as to the applicability of the homeowners' exception. The plaintiff was working on his own and was in control of the scaffold which had been provided by his employer, Blue Bird. There is no evidence that the defendants instructed the plaintiff how to perform his work or how to use the scaffold (*see Jumawan v Schnitt,* 35 AD3d 382, 383 [2006]; *Garcia v Petrakis,* 306 AD2d 315, 316 [2003]; *Jacobsen v Grossman,* 206 AD2d 405, 406 [1994]). At most, if Puccia moved and assembled the scaffold on one isolated occasion, his actions do not rise to the level of direction

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and control, absent evidence that he was also affirmatively directing the plaintiff in the manner of the work or the use of the scaffold (*see Ferrero v Best Modular Homes, Inc.,* 33 AD3d at 849-850; *Garcia v Petrakis,* 306 AD2d at 315-316; *Lang v Havlicek,* 272 AD2d 298 [2000]).

III. Labor Law § 241

Labor Law § 241 (6), which applies to contractors and owners engaged in construction, excavation, and demolition activities, requires that the work be constructed, shored, equipped,

guarded, arranged, operated, and conducted as to provide reasonable and adequate protection and safety to persons employed therein. The obligations of Labor Law § 241 (6) are nondelegable (*see Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 502 [1993]; *Long v Forest-Fehlhaber,* 55 NY2d 154, 159 [1982]; *Allen v Cloutier Constr. Corp.,* 44 NY2d 290, 301 [1978]), and causes of action invoking that statute must be based upon violations of specific codes, rules, or regulations applicable to the circumstances of the accident (*see Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d at 502; *Ares v State of New York,* 80 NY2d 959, 960 [1992]; *Adams v Glass Fab,* 212 AD2d 972, 973 [1995]).

Labor Law § 241 (6) contains language identical to that contained in section 240 (1) exempting from its application "owners of one and two-family dwellings who contract for but do not direct or control the work" (Labor Law § 241 [6]; *see Umanzor v Charles Hofer Painting & Wallpapering, Inc.,* 48 AD3d 552 [2008]; *Saverino v Reiter,* 1 AD3d at 427). The defendants are entitled to the protection of the homeowners' exemption under Labor Law § 241 for the same reasons that they are entitled to it under Labor Law § 240 (*see Saverino v Reiter,* 1 AD3d at 427; *Garcia v Petrakis,* 306 AD2d at 316; *Duarte v East Hills Constr. Corp.,* 274 AD2d 493, 494 [2000]; *Lang v Havlicek,* 272 AD2d at 298).

IV. Labor Law § 200

The Supreme Court properly granted that branch of the defendants' motion which was for summary judgment dismissing the cause of action alleging a 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 (*see Rizzuto v L.A. Wenger Contr. Co.,* 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.,* 82 NY2d 876, 877 [1993]; *Lombardi v Stout,* 80 NY2d 290, 294

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[1992]; *Ferrero v Best Modular Homes, Inc.,* 33 AD3d at 850; *Brown v Brause Plaza, LLC,* 19 AD3d 626, 628 [2005]; *Everitt v Nozkowski,* 285 AD2d 442, 443 [2001]; *Giambalvo v Chemical Bank,* 260 AD2d 432, 433 [1999]). Unlike Labor Law §§ 240 and 241, section 200 does not contain any single- and two-family homeowners' exemption. It makes sense that since homeowners may be held liable in ordinary negligence, the statute's codification of the common law cannot logically exempt one- and two-family homeowners from its scope.

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. These two categories should be viewed in the disjunctive.

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 (*see Azad v 270 5th Realty Corp.,* 46 AD3d 728, 730 [2007]; *Kerins v Vassar Coll.,* 15 AD3d 623, 626 [2005]; *Kobeszko v Lyden Realty Invs.,* 289 AD2d 535, 536 [2001]; *Giambalvo v Chemical Bank,* 260 AD2d at 433).

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" (*Dennis v City of New York,* 304 AD2d 611, 612 [2003]; *see Comes v New York State Elec. & Gas Corp.,* 82 NY2d at 877; *Ferrero v Best Modular Homes, Inc.,* 33 AD3d at 851; *Colon v Lehrer, McGovern & Bovis,* 259 AD2d 417, 419 [1999]). 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 (*see Rizzuto v L.A.*

Wenger Contr. Co., 91 NY2d 343, 352 [1998]; *Russin v Louis N. Picciano & Son,* 54 NY2d 311, 317 [1981]; *Gallello v MARJ Distribs., Inc.,* 50 AD3d 734, 735 [2008]; *Dooley v Peerless Importers, Inc.,* 42 AD3d 199, 204-205 [2007]; *Guerra v Port Auth. of N.Y. & N.J.,* 35 AD3d 810, 811 [2006]; *Perri v Gilbert Johnson Enters., Ltd.,* 14 AD3d 681, 683 [2005]; *Everitt v Nozkowski,* 285 AD2d at 443; *Reynolds v Brady & Co.,* 38

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AD2d 746, 746-747 [1972]).[2] Although property owners often have a general authority to oversee the progress of the work, mere general supervisory authority at a 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 (*see Natale v City of New York,* 33 AD3d 772, 773 [2006]; *Perri v Gilbert Johnson Enters., Ltd.,* 14 AD3d at 683; *Dos Santos v STV Engrs., Inc.,* 8 AD3d 223, 224 [2004]). A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed.

In this case, the plaintiff's accident did not involve any dangerous or defective condition on the defendants' premises. The accident instead involved the manner in which the plaintiff performed his work, which was not supervised by the defendants, and which was performed on equipment provided by the plaintiff's employer, not by the defendants. As stated by the Court of Appeals, "the duty to provide a safe place to work is not breached when the injury arises out of a defect in the subcontractor's own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work" (*Persichilli v Triborough Bridge & Tunnel Auth.,* 16 NY2d 136, 145 [1965]). In *Persichilli,* the Court of Appeals further stated that while a subcontractor must furnish safe ladders and scaffolds to its employees, a subcontractor's failure to provide safe appliances does not render the "premises" unsafe or defective. The allegedly defective scaffold should instead be viewed as a device involving the methods and means of the work. Under such circumstances, Labor Law § 200 imposes no liability upon owners (*see Persichilli v Triborough Bridge* &

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Tunnel Auth., 16 NY2d at 146), absent evidence of the owner's authority to supervise or control the manner and methods of the work.

Here, there is nothing in the record to indicate that the defendants either had the authority to control the manner or method by which the plaintiff performed his work or provided the subject scaffold. Thus, the plaintiffs failed to satisfy the requisite elements of Labor Law § 200 (*see Dupkanicova v Vasiloff,* 35 AD3d 650, 651 [2006]; *Reilly v Loreco Constr.,* 284 AD2d 384, 385 [2001]; *Benefield v Halmar Corp.,* 264 AD2d 794, 795 [1999]).[3]

The plaintiff's inability at his deposition to recall how the accident occurred and what caused him to fall warranted the Supreme Court's granting of that branch of the defendants' motion which was for summary judgment dismissing the Labor Law § 200 claim in any event (*see Blanco v Oliveri,* 304 AD2d at 599-600). In opposition to the defendants' prima facie showing of entitlement to judgment as a matter of law with respect to that claim, the plaintiff, regardless of his theory of recovery pursuant to Labor Law § 200, was unable to raise a triable issue of fact as to whether any scaffold defect was proximately related to his accident (*see Capellan v King Wire Co.,* 19 AD3d 530, 531 [2005]; *Weingarten v Windsor Owners Corp.,* 5 AD3d 674, 676-677 [2004]; *Misirlakis v East Coast Entertainment Props.,* 297 AD2d 312 [2002]).

V. Common-Law Negligence

The Supreme Court properly granted that branch of the defendants' motion which was for summary judgment dismissing the plaintiff's claim based on common-law negligence, for the same reasons that it appropriately granted that branch of the defendants' motion which was for

summary judgment dismissing the claim under Labor Law § 200 (*see Lombardi v Stout,* 80 NY2d at 295; *Meng Sing Chang v Homewell Owner's Corp.,* 38 AD3d 625, 627 [2007]; *Blanco v Oliveri,* 304 AD2d at 599-600).

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The plaintiffs' remaining contentions either are without merit or have been rendered academic by our determination. Accordingly, the order is affirmed, with costs.

Notes:

1. The caption of the case also names Denise Alleyne as a defendant, and she appears as a respondent on this appeal. Since the plaintiffs' complaint makes no allegations about Alleyne, and the record is otherwise silent as to her, our discussion focuses upon the duties and conduct of Troy Puccia and Stacey Puccia, notwithstanding Alleyne's appellate status.

2. While the cited cases focus on the authority to supervise or control the work activity as a precondition to a defendant's liability under Labor Law § 200, some reported cases appear to require the actual exercise of supervision or control before liability may attach (*see Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d at 504-505; *Kwang Ho Kim v D & W Shin Realty Corp.,* 47 AD3d 616, 620 [2008]). Still others appear to blend both standards (*see Comes v New York State Elec. & Gas Corp.,* 82 NY2d at 877; *Lombardi v Stout,* 80 NY2d 290, 294 [1992]; *McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.,* 41 AD3d 796, 798 [2007]). To interpret Labor Law § 200 as limiting the imposition of liability to only those situations in which the defendant actually exercised supervision or control would, we believe, encourage defendants to purposefully absent themselves from work sites to provide insulation from liability under the statute, as well as under the common law. Thus, in our view, the better standard to apply when the manner and method of work is at issue in a Labor Law § 200 analysis is whether the defendant had the authority to supervise or control the work.

3. Cases cited by the plaintiffs in their brief regarding Labor Law § 200 are largely inapplicable, as they involve circumstances where defendant owners created or had actual or constructive notice of dangerous premises conditions (e.g. *Murphy v Columbia Univ.,* 4 AD3d 200, 202 [2004]; *Abayev v Jaypson. Jewelry Mfg. Corp.,* 2 AD3d 548, 549 [2003]; *Alvarez v Long Is. Fireproof Door Co.,* 305 AD2d 343, 344 [2003]; *Blanco v Oliveri,* 304 AD2d 599 [2003]; *Shipkoski v Watch Case Factory Assoc.,* 292 AD2d 589, 590 [2002]; *Hernandez v Board of Educ. of City of NY,* 264 AD2d 709, 710 [1999]; *Akins v Baker,* 247 AD2d 562, 563 [1998]).

FISHER, J.P., RITTER and McCARTHY, JJ., concur.

Ordered that the order is affirmed, with costs.