NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

APOLONIO DE LA ROSA ,

Plaintiff,

-against-

GEORGE VARGHESE and MARIAMMA VARGHESE,

Defendants.

INDEX NUMBER: **300913/2017E**

Present:
HON. **ALISON Y. TUITT**
Justice

The following papers numbered 1 to 4,

Read on this Defendants' Motion and Plaintiff's Cross-Motion for Summary Judgment

On Calendar of **11/23/2020**

Notices of Motion/Cross-Motion-Exhibits, Affirmations 1, 2

Reply Affirmations 3, 4

Upon the foregoing papers, defendants' motion and plaintiff's cross-motion for summary judgment are consolidated for purpose of this decision. For the reasons set forth herein, defendants' motion is granted and plaintiff's cross-motion is denied.

This is an action for personal injuries sustained by plaintiff arising out of an accident on August 7, 2015 at 120 Van Guilder Avenue, New Rochelle, NY which is owned by defendants. Defendants hired Miguel Quevas ("Quevas") to perform renovation work on the premises, including painting the exterior of the house. Plaintiff was hired by Quevas to assist him in the renovation. On the date of the accident, plaintiff was allegedly working on a ladder perched atop a Baker's scaffold platform, painting the exterior wall of the house. When the scaffold fell backwards, plaintiff fell to the ground and was injured.

In proceedings before the Workers' Compensation Board on November 23, 2016, a decision was

rendered that plaintiff was an employee of Quevas at the time of the accident. Moreover, plaintiff testified at his deposition that Quevas was his employer and he received instructions on his work from Quevas. Quevas supervised his work, told him what work to do each day and instructed him on how to perform the work. The only conversations plaintiff had with defendant George Varghese were generally whether the job "looked ok". Defendants did not tell plaintiff what work to do or how to do it. They also did not provide plaintiff with any tools or equipment for the job. Plaintiff received all equipment and tools from Quevas. George Varghese testified that he hired only Quevas to perform the renovation project, and Quevas hired workers to perform the work.

Defendants move for summary judgment, seeking dismissal of plaintiff's causes of action pursuant to Labor Law §§200, 240 and 241 and common law negligence on the grounds that they were not plaintiff's employer, did not direct or control his work and they were not otherwise negligent. Additionally, defendants argue that they are exempt from vicarious liability under the Labor Law, as owners of a one or two-family dwelling, who contracted for but did not control the work being performed on their premises.

Plaintiff cross-moves for summary judgment on his Labor Law §240(1) claim arguing that he was engaged in Labor Law §240(1) protected work when he was caused to fall from a height and sustained injuries. Defendants owned the subject premises and failed to provide plaintiff with safety equipment to protect him from the height related risk. Plaintiff further contends that the one and two family exception to Labor Law §240(1) and §241(6) does not apply since the subject premises is registered as a three family property.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the

moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

An owner of a premises has a non-delegable duty under the Labor Law to provide a safe work environment to workers. However, an implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition. Russin v. Louis N. Picciano & Son, 54 N.Y.2d 311 (1981) citing Reynolds v Brady & Co., 329 N.Y.S.2d 624 (2d Dept. 1972). Specifically, Labor Law §240(1) provides in pertinent part that: "[a]ll 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... 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."

"At issue here is the Labor Law §§240 and 241 homeowner exemption to the strict liability rule it imposes on owners, contractors and their agents to protect workers from building construction, demolition and repair-related dangers. The exemption covers 'owners of one and two-family dwellings who contract for but do not direct or control the [contractor's] work. An owner who uses such a property solely for commercial purposes is not, however, entitled to the statutory exemption.'" Thompson v. Geniesse, 880 N.Y.S.2d 19 (1st Dept. 2009) quoting Van Amerogen v. Donnini, 78 N.Y.2d 880 (1991). See also, Farias v. Simon, 997 N.Y.S.2d 28 (1st Dept. 2014).

A homeowner's involvement in monitoring the progress of work, approving the aesthetics of the work and overseeing the work's general quality reflects typical homeowner interest in the ongoing progress of the work and does not constitute the kind of direction or control necessary to overcome the homeowner's exemption from liability under scaffold law and Labor Law. See, Garcia v. Martin, 728 N.Y.S.2d 455 (1st Dept. 2001). The question of whether an owner has sufficiently directed the work so as to lose the benefits of the

single family homeowner exception depends on the degree to which the owner controls the particulars of the work. Ennis v. Hayes, 544 N.Y.S.2d 99 (4th Dept. 1989)("Whether an owner's conduct amounts to directing or controlling the work depends upon the degree of supervision exercised over the method and manner in which the work is performed."); Chura v. Baruzzi, 596 N.Y.S.2d 592)(3rd Dept. 1993)("In analyzing whether a homeowner's actions with respect to a particular construction or renovation project amount to direction and control thereof within the meaning of Labor Law §240(1), the relevant inquiry is the degree to which he or she supervised or directed the method and manner of the work."); Rimoldi v. Schanzer, 537 N.Y.S.2d 839 (2d Dept. 1989)("the phrase 'direct and control' contemplates the situation in which the owner supervised the method and manner of the work, can order changes in the specifications, reviews the progress and details of the job with the general contractor and/or provides the equipment necessary to perform the work."). As such, courts find a question of fact as to whether the homeowner is entitled to the exemption where "the homeowner's involvement went beyond the mere expression of dissatisfaction and demands for timely completion of the work." Garcia, *supra*. See also, Chura, *supra* ("Here, there can be no argument that defendant's actions went well beyond those of an interested homeowner who simply presented his ideas and suggestions, made observations and inquiries, and inspected the work.").

Defendants raise the argument that the one and two family home exemption to Labor Law §240(1) and §241(6) does not apply here because the subject premises was registered as a three family home. Defendant George Varghese testified that the premises has never been used as a three family dwelling and have never had more than one tenant family, other than the defendants, residing there. He further testified that he disconnected one of the three electric meters, since two of the units are and were being used a single residence by the defendants themselves.

However, it is the actual use of the premises, not the legal designation of the premises as a multiple dwelling, that determines the whether the exemption applies. ""The statutory exemptions in §240(1) and §241(6) of the Labor Law are intended to make the law more nearly reflect the practical realities of the liability of small homeowners to insure against the responsibilities imposed by those provisions. Similar practicalities are reflected in the Court of Appeals' determination that "whether the exemption is available to an owner in a particular case turns on the site and purpose of the work". Sheehan v. Gong, 769 N.Y.S.2d 507 (1st Dept. 2003)(Internal citations omitted).

In a case mirroring the facts of the instant matter, Small v. Gutleber, 751 N.Y.S.2d 49 (2d Dept. 2002), the Court stated: "Although the defendants' building is classified as a multiple dwelling, the defendants occupy the entire space except for a portion of one floor which they rent to a tenant. Under these facts, the defendants are entitled to the benefit of the homeowners' exemption and the Supreme Court should have dismissed the causes of action asserted pursuant to Labor Law §§ 240(1) and 241(6)". In Hossain v. Kurzynowski, 939 N.Y.S.2d 89 (2d Dept. 2012), the Court noted that "[a] building's classification as a "multiple dwelling" does not automatically cause the homeowner to lose the protection of the exemption". In that case, the homeowner's motion for summary judgment was denied because the building was actually being used as a three-family home. Although two of the three units were occupied by the homeowner and her relatives, they were not used as a single household, but rather as separate units. The third apartment was occupied by a renter. The fact that the third unit was used for rental income was not a determining factor. The Court specifically held that "[t]herefore, as a matter of law, these two apartments did not together constitute a single-family dwelling, and the two apartments coupled with the third did not constitute a two-family dwelling. Thus, the defendants are not entitled to the homeowner's exemption".

Based on the testimony of the parties and the evidence presented, there are no questions of fact as to whether the exception to Labor Law §240(1) and §241(6) excluding “owners of one and two-family dwellings” applies here. Defendants did not direct or control plaintiff’s work, nor did they provide him with the ladder or any other equipment to perform his work. Plaintiff testified that all of the work he did was directed by his employer. Since the premises here have always been used as a two family home, the defendants are exempt from vicarious liability under the Labor Law. Absent active negligence or vicarious liability, plaintiff's complaint must be dismissed.

Labor Law §200 is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe site. In the instant action, plaintiff has failed to establish that defendants exercised supervision or control over the work plaintiff was performing when he was injured, as would subject them to a duty to provide a safe work environment. Finally, there is no evidence demonstrating that defendants were otherwise negligent as to support a common law negligence cause of action.

Accordingly, defendants’ motion for summary judgment is granted and the complaint is

dismissed. Plaintiff's cross-motion for summary judgment is denied.

This constitutes the decision and Order of this Court.

Dated: 12/22/20

Hon. Alison Y. Tuitt