SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. R. BRUCE COZZENS, JR.
Justice.

TRIAL/IAS PART 10
NASSAU COUNTY

CLAUDE BIRONG, JR.,
Plaintiff(s),

-against-

LOSTRITTO FARMS, JOSEPH LOSTRITTO and ANGELA LOSTRITTO,
Defendant(s).

MOTION #9, 10, 11
INDEX#8870/2000
MOTION DATE:
February 27, 2007

JOSPEH LOSTRITTO and ANGELA LOSTRITTO,
Third-Party Plaintiff(s),

-against-

MAGNER BUILDERS, INC.,
Third-Party Defendant(s).

The following papers read on this motion:

Notice of Motion.....1
Cross Motion.....2
Answering Affidavits.....3

Upon the foregoing papers, it is ordered that the third party defendant's, motion for summary judgment, the defendants/third-party plaintiffs', cross-motion, and the defendant, Partnerville Stable, Inc.'s, cross motion is determined as hereinafter set forth.

The plaintiff, Claude Birong, Jr., commenced this action to recover damages for personal injuries he sustained on January 13, 2000 when, while working for the third-party defendant Magner Builders, Inc., he was accidentally struck in the head by a nail shot from a nail gun being used by his co-worker while they were erecting a structure on the premises owned by the defendant/third-party plaintiffs, Joseph and Angela Lostritto.

The third-party defendant, Magner Builders Inc., (hereinafter Magner) now moves for summary judgment for dismissal of the third-party complaint and all cross-claims and counterclaims against said third party pursuant to Section 11 of the Worker's Compensation Law. The third-party defendant asserts that Mr. Birong neither suffered a grave injury as defined by Worker's Compensation law, nor was there an indemnification provision between the third-party plaintiffs and Magner until after the accident.

In their cross motion, the defendants/third-party plaintiffs move for an Order pursuant to CPLR 3212 granting them summary judgment, dismissing the Complaint and all cross-claims

on the grounds that the Joseph and Angela Lostritto were exempt from liability under Labor Law §240 and §241 on the basis that they were owners of a one or two family dwelling who contracted for, but did not directly control the work. They further contend that under Labor law §200 they had no actual or constructive knowledge of the dangerous condition and therefore cannot be held liable. The Lostrittos also assert that if they are held liable for Mr. Birong's injury, then they are entitled to indemnification from Magner because Magner failed to submit admissible evidence as to Mr. Birong's injuries in its motion and because it is the third party plaintiffs' position that the indemnification agreement was signed prior to Mr. Birong's injury.

In the cross-motion of Partnerville Stables, Inc. (hereinafter Partnerville), the defendant moves for summary judgment pursuant to CPLR §3212 on the grounds that at the time Mr. Birong's accident; the owner of the property on which the structure was built had no business relationship with Partnerville, Partnerville did not own any portion of the property in question, and Partnerville did not use any of the property in question in connection with its business.

The plaintiff asserts in response to defendants', Joseph and Angela Lostritto, cross-motion that the Lostrittos are not the type of unwary homeowners that the homeowner's exemption to the duties imposed by Labor Law §§240(1) and 241(a) was enacted to protect and further that the Lostrittos' property was not solely for residential purposes, but also used to derive a commercial use. The plaintiff puts forth no opposition to the defendant, Partnerville's, cross-motion.

In a summary judgment action the movant must make a prima facia showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Once the proponent of a summary judgment motion makes the prima facia showing of entitlement to judgment, the burden shifts to the party opposing for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of the material issues of fact which require the trial of the case (*Zuckerman v City of New York,* 49 NY2d 557, 427 NYS2d 595, 597-98, 404 NE2d 718).

In the instant action, the defendant has made a prima facia showing of entitlement to judgment as a matter law. The defendants have shown they fit into a category of exceptions to Labor Law 240(1) and 241(a) which includes "owners of one and two-family dwelling who contract for but do not direct the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." Here the defendants were living in a one family dwelling and were building a garage near their home for their cars. Further, the defendants assert they had no actual or constructive knowledge of the conditions that caused the plaintiff's actions. As the defendants have shown they fit into exceptions of Labor Law §§200, 240(1) and 241(a), under which the plaintiff claims the defendants are liable, the burden then shifts to the plaintiff to show there is a question of fact as to whether the defendants fit into these exceptions.

The plaintiff has failed to show that there is an issue of fact as to whether Joseph and Angela Lostritto can be categorized by the aforementioned exceptions. Plaintiff argues that Joseph Lostritto has a "business sophistication" and that the property is used in order to derive a commercial benefit, namely in a horse training business run by the defendant. The plaintiff supports this proposition by claiming that the defendant houses mares on his property and that

he keeps certain "horse stuff" in the garage being built. However, although a homeowner is not automatically covered by the exemption when there are both commercial and residential uses on the same property, the question of whether the exemption is available depends on "the site and purpose of the work being performed" (*Telfer v Gunnison Lakeshore Orchards Inc.*, 245 AD2d 620, 664 NYS2d 493). "When an owner of a one-or two-family dwelling contracts for work that directly relates to the residential use of the home, even if the work also serves a commercial purpose, that owner is shielded by the homeowner exemption for the absolute liability of Labor Law §240 and 241" (*Bartoo v Buell*, 87 NY2d 362, 368, 639 NYS2d 778, 662 NE2d 1068).

The garage in which the injury took place is not used solely and exclusively to advance a commercial enterprise (*See, Van Amerogen v Donnini*, 78 NY2d 880, 573 NYS2d 443, 577 NE2d 1035; *Telfer*, 664 NYS2d 493, *supra*). Although some "horse stuff" is contained in a small portion of the 3 to 4 car garage, the extent to which the garage is used for commercial purposes is de minimis (*See, Krukowski v Steffensen*, 194 AD2d 179, 605 NYS2d 773; *Telfer*, 664 NYS2d 493, *supra*). This principal use of the dwelling is a single-family residence. The fact that the structure on which work was performed was a garage and not on the residential home itself does not alter the analysis and the garage should be considered an extension of the dwelling within the scope of the homeowner exemption (*Bartoo v Buell*, 87 NY2d 362, 639 NYS2d 778, 662 NE2d 1068). As such, plaintiff has not provided any evidence that raises a question of fact as to whether the Lostrittos qualify for the exemptions under 240(1) and 241(a).

Accordingly, the cross motion of the defendants, Joseph and Angela Lostritto, and the unopposed cross-motion of the defendant, Partnerville, are granted. As such, the motion of the third party defendant, Magner, is denied as moot.

Dated: JUN 13 2007

J.S.C.

ENTERED

JUN 20 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE