

210 A.D.2d 380, 621 N.Y.S.2d 87  
 (Cite as: 210 A.D.2d 380, 621 N.Y.S.2d 87)

**H**

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

Arthur JARVIS, et al., Plaintiffs-Respondents-Appellants,

v.

Nicholas DIANTO, et al., Defendants and Third-Party Plaintiffs-Appellants-Respondents, Falluca's Construction Corp., Third-Party Defendant-Respondent-Appellant (and another third-party action).

Dec. 19, 1994.

Worker injured in fall from ladder brought action under Scaffold Law against owners of home on which he was working, and owners moved for summary judgment based on assertion that they were immune from liability. After motion was denied by the Supreme Court, Richmond County, Sangiorgio, J., the Supreme Court, Cusick, J., granted worker's motion for directed verdict after finding that exemption in Scaffold Law did not apply. Owners appealed, and the Supreme Court, Appellate Division, held that: (1) issues raised on appeal and cross-appeal from order were considered even though intermediate order was dismissed because right of direct appeal terminated with entry of judgment, and (2) owners were covered by exemption under Scaffold Law for owners of one and two-family dwellings who contract for but do not direct or control work on dwelling.

Reversed and complaint dismissed.

West Headnotes

**[1] Appeal and Error 30 ↪74**

30 Appeal and Error

30III Decisions Reviewable

30III(D) Finality of Determination

30k67 Interlocutory and Intermediate Decisions

30k74 k. Effect of Right to Review on

Appeal from Final Judgment. Most Cited Cases  
 Right of direct appeal from intermediate order terminates with entry of judgment in action.

**[2] Appeal and Error 30 ↪870(1)**

30 Appeal and Error

30XVI Review

30XVI(B) Interlocutory, Collateral, and Supplementary Proceedings and Questions

30k869 On Appeal from Final Judgment

30k870 Interlocutory Proceedings

Brought Up in General

30k870(1) k. In General. Most

Cited Cases

In action where entry of judgment was made, issues raised on appeal and cross-appeal from intermediate order which terminated with entry of judgment were considered on appeal from judgment. McKinney's CPLR 5501(a), par. 1.

**[3] Negligence 272 ↪1204(6)**

272 Negligence

272XVII Premises Liability

272XVII(G) Liabilities Relating to Construction, Demolition and Repair

272k1204 Accidents and Injuries in General

272k1204(4) Safe Workplace Laws

272k1204(6) k. Scaffolding Laws.

Most Cited Cases

(Formerly 272k31)

Homeowner is not automatically covered under exception to Scaffold Law for owners of one and two-family dwellings who contract for but do not direct or control work when there are both commercial and residential uses on homeowner's property. McKinney's Labor Law § 240, subd. 1.

**[4] Negligence 272 ↪1204(6)**

272 Negligence

272XVII Premises Liability

272XVII(G) Liabilities Relating to Construc-

210 A.D.2d 380, 621 N.Y.S.2d 87  
 (Cite as: 210 A.D.2d 380, 621 N.Y.S.2d 87)

tion, Demolition and Repair  
 272k1204 Accidents and Injuries in General  
 272k1204(4) Safe Workplace Laws  
 272k1204(6) k. Scaffolding Laws.

Most Cited Cases

(Formerly 272k31)

Homeowner comes within exemption under Scaffold Law for owners of one and two-family dwellings who contract for but do not direct or control work when site and purpose of work indicate that work on home was performed solely in connection with residential use of property. McKinney's Labor Law § 240, subd. 1.

[5] Negligence 272 ↪ 1204(6)

272 Negligence

272XVII Premises Liability

272XVII(G) Liabilities Relating to Construction, Demolition and Repair  
 272k1204 Accidents and Injuries in General

272k1204(4) Safe Workplace Laws  
 272k1204(6) k. Scaffolding Laws.

Most Cited Cases

(Formerly 272k31)

Homeowners came within exemption under Scaffold Law for owners of one and two-family dwellings who contract for but do not direct or control work on dwelling, and were not liable for injuries suffered by worker, where it was undisputed that worker was injured while working on roof of homeowners' one-family dwelling, work was performed solely in connection with residential use of property, and homeowners did not supply ladder involved in accident, had never met or spoken to injured worker, and had absolutely no involvement in his work, even though there was only one contract and one price for repairs to be made to both roof of dwelling and roof of detached garage and office. McKinney's Labor Law § 240, subd. 1.

**\*\*88** Quirk & Bakalor, P.C., New York City (Richard H. Bakalor and Loretta A. Redmond, of counsel), for defendants third-party plaintiffs-appellants-respondents.

pellants-respondents.

Zachary & Tracy, P.C., Staten Island (John J. Tracy, of counsel), for plaintiffs-respondents-appellants.

Raymond C. Green, New York City (Herzfeld & Rubin, P.C. [Herbert Rubin, David B. Hamm, Noreen M. Giusti, and Jeanie Lu], of counsel), for third-party defendant-respondent-appellant.

Before MANGANO, P.J., and THOMPSON, BRACKEN and ALTMAN, JJ.

**\*380 MEMORANDUM BY THE COURT.**

In an action to recover damages for personal injuries, etc., (1) the defendants third-party plaintiffs appeal, as limited by their notice of appeal, from so much of an order of the Supreme Court, Richmond County (Sangiorgio, J.), dated March 11, 1992, as denied their motion for summary judgment dismissing the complaint, (2) the plaintiffs cross-appeal, as limited by their notice of appeal, from so much of the same order as denied their cross motion for partial summary judgment on the issue of liability under Labor Law § 240, (3) the third-party defendant appeals from a judgment of the same court (Cusick, J.), dated July 13, 1993, which, upon a directed verdict, is in favor of the defendants third-party plaintiffs and against it on the issue of indemnification, and (4) the defendants third-party-plaintiffs cross appeal from so much of the judgment as, upon a directed verdict in favor of the plaintiffs on the issue of the applicability of the homeowner exemption under Labor Law § 240 and upon a jury verdict in favor of the plaintiffs on the issue of a violation of Labor Law § 240, is in favor of the plaintiffs and against them.

ORDERED that the appeal and the cross appeal from the order are dismissed; and it is further,

ORDERED that the judgment is reversed, on the law, the provision of the order which denied the defendants third-party plaintiffs' motion for summary

210 A.D.2d 380, 621 N.Y.S.2d 87  
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judgment dismissing the complaint is vacated, and the complaint and the third-party complaint are dismissed; and it is further,

ORDERED that the defendants third-party plaintiffs are awarded one bill of costs payable by the plaintiffs; and it is further,

ORDERED that the third-party defendant is awarded one bill of costs payable by the plaintiffs.

\*381 [1][2] The appeal and cross appeal from the intermediate order must be dismissed \*\*89 because the right of direct appeal therefrom terminated with the entry of the judgment in the action (*see, Matter of Aho*, 39 N.Y.2d 241, 248, 383 N.Y.S.2d 285, 347 N.E.2d 647). The issues raised on the appeal and cross appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see, CPLR 5501[a][1]*).

The sole issue on this appeal is whether the defendants are covered by the exemption contained in Labor Law § 240(1) for “owners of one and two family dwellings who contract for but do not direct or control the work”. Upon our review of the record, we find that the defendants established, as a matter of law, that they are so covered, and we therefore dismiss the complaint.

[3][4][5] A homeowner is not automatically covered by the exemption when there are both commercial and residential uses on his or her property (*see, Cannon v. Putnam*, 76 N.Y.2d 644, 650, 563 N.Y.S.2d 16, 564 N.E.2d 626; *Pigott v. Church of Holy Infancy*, 179 A.D.2d 161, 583 N.Y.S.2d 534). A homeowner, however, is covered by the exemption when the site and purpose of the work indicate that the work was performed solely in connection with the residential use of the property (*see, Cannon v. Putnam, supra; Pigott v. Church of Holy Infancy, supra*). In this case, it is undisputed that at the time of the plaintiff Arthur Jarvis's injury, he was working on the roof of the defendants' one-family dwelling. The fact that there was only one contract and one price for the repairs to be done to

both the roof of the defendants' one family dwelling and the roof of a detached garage/office, does not alter the fact that the injured plaintiff was performing work solely in connection with the residential use of the defendants' property.

Furthermore, there is no evidence that the defendants directed or controlled the injured plaintiff's work. The defendants did not supply the ladder that was involved in the injured plaintiff's accident. The defendants had never met or spoken to the injured plaintiff, and they had absolutely no involvement in his work. Therefore, it cannot be said that the defendants supervised the method and manner of the injured plaintiff's work (*see, Kolakowski v. Feeney*, 204 A.D.2d 693, 612 N.Y.S.2d 243; *Spinillo v. Strober Long Is. Bld. Material Ctrs.*, 192 A.D.2d 515, 595 N.Y.S.2d 825; *Sarvis v. Maida*, 173 A.D.2d 1019, 569 N.Y.S.2d 997). Accordingly, the defendants are covered by the exemption contained in Labor Law § 240(1) and the complaint against them is dismissed.

N.Y.A.D. 2 Dept., 1994.  
*Jarvis v. Dianto*  
210 A.D.2d 380, 621 N.Y.S.2d 87

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