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SHORT FORM ORDER

INDEX No. 07-12150

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 3-18-11 (#006)
MOTION DATE 4-12-11 (#007)
MOTION DATE 7-1-11 (#009)
ADJ. DATE 8-16-11
Mot. Seq. # 006 - MG
007 - MD
009 - MG

JUAN CAMPOVERDE,

Plaintiff,

- against -

SOUND HOUSING LLC and JOHN DOE(S), INC. and JOHN DOE(S), FOUR C MANAGEMENT CORP., ISLAND WIDE BUILDERS, LLC, and BAYVIEW BUILDING & FRAMING CORP.,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant Island Wide Builders, LLC, dated , and supporting papers (including Memorandum of Law dated ____); (2) Notice of Motion/Order to Show Cause by the defendant Bayview Building & Framing, Corp., dated March 27, 2011, supporting papers; (3) Notice of Motion /Order to Show Cause by the plaintiff, dated June 7, 2011, supporting papers; (4)Affirmation in Opposition by the defendant Sound Housing, LLC, dated July 11, 2011, and supporting papers; (5) Affirmation in Opposition by the defendant Island Wide Builders, LLC, dated June 7, 2011, and supporting papers; (6) Affirmation in Opposition by the defendant Bayview Building

& Framing Corp., dated June 7, 2011, and supporting papers; (7) Affirmation in Opposition by the defendant Sound Housing LLC, dated July 12, 2011, and supporting papers; (8) Reply Affirmation by the defendant Island Wide Builders, LLC, dated August 9, 2011, and supporting papers; (9) Reply Affirmation by the defendant Island Wide Builders, LLC, dated August 9, 2911, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by plaintiff Juan Campoverde and the motions by defendants Island Wide Builders, LLC and Bayview Building & Framing Corp. are consolidated for the purposes of this determination; and it is

ORDERED that the motion by plaintiff Juan Campoverde for partial summary judgment on the issue of liability as against defendant Sound Housing, LLC on his claim under Labor Law 240 (1) is granted; and it is

ORDERED that the motion by defendant Island Wide Builders, LLC for summary judgment dismissing plaintiff's complaint and all cross claims against it is granted; and it is

ORDERED that the motion by defendant Bayview Building & Framing Corp. for summary judgment dismissing plaintiff's complaint and all cross claims against is denied.

Plaintiff Juan Campoverde commenced this action to recover damages pursuant to Labor Law §§ 200, 240 (1), and 241(6) for personal injuries he sustained on March 23, 2005 while working at the construction site of a new residential housing development known as the Willow Ponds on the Sound Condominiums. Plaintiff allegedly was injured when he slipped and fell from the apex of the roof of a building at the construction site. The construction site was owned by defendants Four C Management Corp. ("Four C") and Sound Housing LLC ("Sound Housing"). Defendant Island Wide Builders, LLC ("Island Wide") allegedly was hired by nonparty Atlas Site Development Co., a subsidiary of Sound Housing, to serve as the project's construction manager. Defendant Bayview Building & Framing Corp. ("Bayview") performed framing services at the construction site, while plaintiff's employer, Clean Cut Fascia ("CCF"), was responsible, for among other things, installing fascia boards on the wooden frames of the condominiums. CCF and Bayview allegedly shared a single principal and owner at the time of plaintiff's accident.

Defendants Sound Housing and Four C joined issue on March 17, 2008, and Island Wide and Bayview joined issue on March 7, 2008 and March 15, 2008 respectively. In their answer, Sound Housing and Four C deny plaintiff's claims and assert a cross claim against Island Wide and Bayview for common law indemnification. Island Wide and Bayview also deny plaintiff's claims, and Bayview asserts cross claims against its codefendants for contribution and common law indemnification. By order dated March 21, 2011, this court granted a motion by Four C for an order permitting plaintiff to voluntarily discontinue his action against it. Island Wide now moves for summary judgment dismissing plaintiff's complaint and all cross claims against it, arguing it was neither a general contractor nor statutory agent, and that it did not control or supervise plaintiff or the means, methods, or safety procedures of his employer at the time of the accident. Bayview also moves for the summary judgment on similar grounds. Alternatively, Bayview

requests an order granting it leave to serve an amended answer that includes a defense based on the Workers' Compensation Law, and summary judgment dismissing plaintiff's complaint based on such defense.

Further, plaintiff moves for partial summary judgment on the issue of liability as against defendant Sound Housing on his claim under Labor Law 240 (1). Plaintiff asserts that Sound Housing's breach of its nondelegable duty, as owner of the construction site, to provide him with safety devices designed to prevent or break his fall was the proximate cause of his injuries. Plaintiff also opposes the motions by Bayview and Island Wide, arguing they failed to meet their prima facie burden by eliminating triable issues from the case. In particular, plaintiff argues a triable issue exist as to whether Island Wide was Sound Housing's statutory agent for the project and, therefore, had the authority to supervise and control plaintiff's work at the time of the accident. Plaintiff concedes that no viable claim exist against Bayview under Labor Law §§240 (1) and 241(6). However, he avers that triable issues exist as to whether Bayview is liable under Labor Law §200 and the common law, since its principal admitted he possessed the authority to direct and control plaintiff's work at the time of the accident. Island Wide opposes Bayview's motion on a similar basis, and asserts that Bayview failed to include in its moving papers the affidavit of a person with personal knowledge of the facts of the case. Island Wide further argues that the portion of Bayview's motion seeking to amend its answer to include a defense based upon the Workers' Compensation Law should be denied, as it is contradictory to its assertion that it had no control or authority over plaintiff's work. Sound Housing joins and adopts plaintiff's oppositions to the motions of both Island Wide and Bayview. In addition, Sound Housing opposes plaintiff's motion on the grounds that it did not control or direct plaintiff's work, and that plaintiff's own acts or omissions were the sole cause of the accident.

During his examination before trial, plaintiff testified that he slipped and fell to the ground while he was bending to pick up a piece of wood laying on the unfinished surface of the roof of the building. Plaintiff testified that he and a fellow employee were framing a chimney box prior to his accident, and that the roof consisted solely of plywood. He testified that while light snow had fallen, he did not recall any ice on the surface of the roof at the time of his accident. Plaintiff further testified that Peter Bukowski was his supervisor, and that he would visit the construction site approximately two times per week. He testified that Bukowski would show him what work had to be done, and would inspect the work after it was completed.

During his examination before trial, Ron Johansen testified that he was Island Wide's managing member, and that the nature of its business at the construction site involved the inspection and verification of work and the review of payment request invoices submitted by contractors. Johansen explained that he entered a verbal agreement with George Heinlein of Atlas Development Inc. to perform the construction management services, and that their agreement did not require Island Wide to control or direct the work of subcontractors or their safety procedures. Johansen further testified that Island Wide was paid directly by Atlas Development Inc., and was not required to act as a general contractor for the project.

During his examination before trial, Peter Bukowski testified that he was the sole shareholder and president of both Bayview and CCF at the time of plaintiff's accident. Bukowski testified that he learned of the project through an employee of Island Wide, Robert McAteer, and that both entities were selected to perform work at the construction site after he submitted a bid to Sound Housing. Bukowski testified that while he coordinated with McAteer as to the schedule for the work, he was paid directly by Sound Housing

and followed their plans when determining what tasks he was required to perform. He testified that he visited the construction site two or three time per week to inspect the progress of the work performed by his employees, and that he directed and controlled plaintiff's work. He further explained that while he occasionally held safety meetings with his employees, he did not provide or discuss the use of safety devices, such as safety-belts, life-nets or harnesses with them. Bukowski testified that while Bayview was generally responsible for framing the buildings at the construction site, CCF's duties included, among other things, the framing of doors, windows, and chimney boxes such as the one plaintiff was installing prior to his accident. Bukowski also indicated that while Bayview and CCF shared no employees, he was the owner and president of both corporations, and that he submitted a single invoice under Bayview's name requesting payment for the work the two corporations allegedly performed at the construction site.

During his examination before trial, George Heinlein testified that he was one of several partners that owned Atlas and Sound Housing at the time of plaintiff's accident. Heinlein testified that Island Wide had been hired as the construction manager for the project to perform general supervision of the construction site, including handling all "paper work" and approving billing invoices submitted by the various contractors. He testified that Island Wide was responsible for interviewing contractors before they submitted job proposal bids for selection by Sound Housing. He further testified that several employees of Island Wide, including Robert Johansen and Robert McAteer, were in charge of inspecting the work of contractors to determine if they were complete and in accordance with the architectural plans before the invoices were approved for payment by Sound Housing. Heinlein testified that while Island Wide had no specific authority to control how the contractors performed their work, he generally expected that Island Wide, like any other contractor, had the authority to put an end to any unsafe practices it observed at the construction site. Heinlein also explained that he believed only Bayview had the specific authority to stop unsafe practices by its own employees.

Initially, it is well settled that Labor Law § 240 (1) imposes absolute liability upon owners and contractors who fail to provide or erect safety devices necessary to give proper protection to workers exposed to elevation-related hazards such as falling from a height (*see* ***Misseritti v Mark IV Constr. Co.***, 86 NY2d 487, 634 NYS2d 35 [1995]; ***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 577 NYS2d 219 [1991]). Specifically, Labor Law § 240 (1) requires that safety devices, including scaffolds, hoists, stays, ropes or ladders be so "constructed, placed and operated as to give proper protection to a worker" (***Klein v City of New York***, 89 NY2d 833, 834, 652 NYS2d 723 [1996]). To prevail on a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*see* ***Bland v Manocherian***, 66 NY2d 452, 497 NYS2d 880 [1985]; ***Sprague v Peckham Materials Corp.***, 240 AD2d 392, 658 NYS2d 97 [2d Dept 1997]). The statute must be liberally construed to accomplish the purpose for which it was formed, that is " to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owner and general contractor or their agent instead of on workers, who are "scarcely in a position to protect themselves from accident" (***Rocovich v Consolidated Edison Co.***, *supra* at 513).

Here, plaintiff established his prima facie entitlement to partial summary judgment on the issue of liability by submitting evidence he was injured as a result of a gravity-related accident, and that Sound Housing's failure to provide him with any safety device to prevent or break his fall was the proximate cause of those injuries (*see* ***Striegel v Hillcrest Hgts. Dev. Corp.***, 100 NY2d 974, 768 NYS2d 727 [2003]; ***Henry v Eleventh Ave., L.P.***, 87 AD3d 523, 928 NYS2d 72 [2d Dept 2011]; ***Taeschner v M&M Restorations***,

295 AD2d 598, 745 NYS2d 41 [2d Dept 2002]). The burden, therefore, shifted to Sound Housing to demonstrate the existence of triable issues as to whether there was a statutory violation, or as to whether plaintiff's own acts or omissions were the sole cause of the accident (*see* ***Blake v Neighborhood Hous. Serv. of N.Y. City***, 1 NY3d 280, 285-286, 771 NYS2d 484 [2003]; ***Squires v Robert Marini Bldrs.***, 293 AD2d 808, 809, 739 NYS2d 777, *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]).

Sound Housing's opposition fails in this respect. Labor Law § 240 (1) holds owners and general contractors absolutely liable for any breach of the statute even if "the job was performed by an independent contractor over which they exercised no supervision or control" (***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 515, 577 NYS2d 219 [1991]; *see also* ***Zimmer v Chemung County Performing Arts***, 65 NY2d 513, 518, 493 NYS2d 102 [1985]). Furthermore, where, as in this case, a contractor fails to provide adequate safety devices in violation of Labor Law §240 (1), and such failure is a proximate cause of the plaintiff's injuries, it is conceptually impossible at the same time for the plaintiff's conduct to be considered the sole proximate cause of the accident (*see* ***Blake v Neighborhood Hous. Serv. of N.Y. City***, *supra* at 290; ***Valensisi v Greens at Half Hollow, LLC***, 33 AD3d 693, 823 NYS2d 416 [2d Dept 2006]; ***Bradl v Ram Bldrs., Inc.***, 7 AD3d 655, 777 NYS2d 511 [2d Dept 2004]). Accordingly, plaintiff's motion for partial summary judgment on the issue of liability as against Sound Housing is granted.

As for the motion by Island Wide seeking summary judgment dismissing plaintiff's complaint and all cross claims against it, Labor Law §§ 200, 240, and 241 applies to owners of construction sites, as well as their general contractors and "agents." A party is deemed to be an agent of an owner or general contractor under the Labor Law when the party has supervisory control and authority over the work being done and can avoid or correct the unsafe condition (***Linkowski v City of New York***, 33 AD3d 971, 974-975, 824 NYS2d 109 [2d Dept 2006]; *see* ***Rodriguez v JMB Architecture, LLC***, 82 AD3d 949, 951, 919 NYS2d 40 [2d Dept 2011]). It is not the defendant's title that is determinative, but the degree of control or supervision it exercised (*see* ***Rodriguez v JMB Architecture, LLC***, *supra* at 951; ***Linkowski v City of New York***, *supra* at 975). Here, Island Wide met its initial burden of establishing that it was not a general contractor or agent covered under the provisions of Labor Law §§ 200, 240 (1), or § 241(6) by submitting evidence that its role as construction manger was one of general supervision, and that it exercised no authority or control over plaintiff's work or safety procedures at the time of the accident (*see* ***Rodriguez v JMB Architecture, LLC***, *supra*; ***Uzar v Louis P. Ciminelli Constr. Co. Inc.***, 53 AD3d 1078, 862 NYS2d 234 [4th Dept 2008]; ***Linkowski v City of New York***, *supra*; ***Loiacono v Lehrer McGovern Bovis***, 270 AD2d 464, 704 NYS2d 658 [2d Dept 2000]). Additionally, inasmuch as Island Wide was not actively at fault and played no role in causing or augmenting plaintiff's injuries, it is entitled to dismissal of the cross claims against it for contribution and common law indemnification (*see* ***McCarthy v Turner Constr., Inc.***, 17 NY3d 369, 377-378, 929 NYS2d 556 [2011]; ***Raquet v Braun***, 90 NY2d 177, 659 NYS2d 237 [1997]). Accordingly, the motion by Island Wide for summary judgment dismissing plaintiff's complaint and all cross claims against it is granted.

As to the branch of Bayview's motion seeking summary judgment dismissing plaintiff's complaint and all cross claims against, a prime contractor is liable as a statutory agent for the purposes of the Labor Law where it has been delegated the work in which the plaintiff was engaged at the time of the accident in such a manner that they stand in the shoes of the owner or general contractor with the authority to control or supervise the work (*see* ***Hojohn v Beltrone Constr. Co.***, 255 AD2d 658, 679 NYS2d 462 [3d Dept 1998]; ***Walsh v Sweet Assoc.***, 172 AD2d 111, 577 NYS2d 324 [3d Dept 1991]). A key criterion to this delegation

is the authority to insist that proper safety procedures are followed, and the right to control the work in light of such authority (*see* ***Walsh v Sweet Assoc.***, *supra* at 114; ***Nowak v Smith & Mahoney***, 110 AD2d 288, 494 NYS2d 449 [3d Dept 1985]).

Here, Bayview failed to establish its prima facie entitlement to summary judgment dismissing plaintiff's complaint (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Significantly, testimony by Bayview's principal indicating that he had the authority to control plaintiff's work and safety procedures at the time of the accident raises a triable issue as to whether Bayview had been delegated the work in which plaintiff was engaged and, therefore, was standing in Sound Housing's shoes for the purpose of ensuring adequate safety procedures were followed (*see* ***Hojohn v Beltrone Constr. Co.***, *supra*; ***Outwater v Ballister***, 253 AD2d 902,b678 NYS2d 396 [3d Dept 1998]; ***Kelly v Lemoyne College***, 199 AD2d 942, 606 NYS2d 376 [3d Dept 1993]; *cf.* ***Walsh v Sweet Assoc.***, *supra*). Furthermore, the branch of Bayview's motion requesting leave to amend its answer to include a defense based upon the Workers' Compensation Law and ,upon such amendment, to grant it summary judgment dismissing plaintiffs' complaint is denied. Bayview failed, as it was required, to include a copy of the proposed amended pleading in its moving papers (*see* ***Loehner v Simons***, 224 AD2d 591, 639 NYS2d 700 [2d Dept 1996]; ***Goldner Trucking Cor. v Stoll Packing Corp.***, 12 AD2d 639, 208 NYS2d 1004 [2d Dept 1960]).

Dated: 2/2/12

Peter H. Mayer
PETER H. MAYER, J.S.C.