[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES J. GOLIA IA Part 33
Justice

EDUARDO MARAGLIANO, x

Plaintiff(s)

- - against - -

THE PORT AUTHORITY OF NY & NJ AND ZANO INDUSTRIES, INC.,

Defendant(s). x

Index Number 025787 2007

Motion Date October 27, 2011

Motion Cal. Number 13

Motion Seq. No. 4

The following papers numbered 1 to 11 read on this motion by defendant The Port Authority of NY & NJ (the Port Authority), for leave to renew a prior motion, dated June 27, 2011, in which the court denied summary judgment dismissing the complaint; and on the cross motion by plaintiff Eduardo Maragliano (plaintiff) for leave to renew that portion of the court's prior order, dated June 27, 2011, which granted the Port Authority the right to renew its motion for summary judgment.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits	5-7
Reply Affidavits	8-11

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This is an action for personal injuries that plaintiff allegedly sustained as a result of violations of Labor Law §§ 200, 240 (1), 241 (6), and common-law negligence. Plaintiff has alleged that, on March 26, 2007, while he was working at premises owned by defendant Zano Industries, Inc. (Zano), located at 20-25 130 Street, in the County of Queens, he was injured

when plywood fell on him. Plaintiff was employed as a helper by nonparty Maracap Construction, Inc. (Maracap). The Port Authority hired Maracap to act as the general contractor for repair work performed on a ramp to the George Washington Bridge (GWB). Maracap leased storage space from Zano at the premises and used that space to prepare materials for its work under the contract with the Port Authority. In an order dated June 27, 2011 and entered on July 19, 2011, this court denied summary judgment to the Port Authority without prejudice to renew within 45 days of the date of entry of the order, on the basis that the Port Authority relied upon unsigned deposition transcripts.

The Port Authority has moved for leave to renew its prior motion for summary judgment. Plaintiff has cross-moved for leave to renew that portion of the June 27 order which granted the Port Authority the right to renew its motion and, upon renewal, to have the court deny the Port Authority's initial motion for summary judgment without leave to renew. CPLR 2221 (e) provides, in relevant part, that "[a] motion for leave to renew . . . shall be identified specifically as such . . . shall be based upon new facts not offered on the prior motion that would change the prior determination . . . [and] shall contain reasonable justification for the failure to present such facts on the prior motion."

The Port Authority has explained that it omitted the signature pages of the transcripts and proof that the transcripts had been sent to the deponents on its initial motion to condense the record. It is within the court's discretion to grant renewal to allow a party the opportunity to submit its papers in the proper form (CPLR 2221 [e]; *see Hayden v Gordon*, ___ AD3d ___, ___, 2012 NY Slip Op 00487, *1-*2 [2012]; *Coccia v Liotti*, 70 AD3d 747, 752 [2010], *lv dismissed* 15 NY3d 767 [2010]; *Arkin v Resnick*, 68 AD3d 692, 694 [2009]). Moreover, while a motion for renewal is generally based on newly discovered facts, this is a flexible rule and it is also within the court's discretion to grant renewal upon facts known to the movant at the time of the original motion, if the issue was raised, sua sponte, by the court (*see Moncrief v DiChiaro*, 52 AD3d 789, 790 [2008]; *Wilder v May Dept. Stores Co.*, 23 AD3d 646, 648 [2005]). Therefore, inasmuch as the instant branch of the Port Authority's motion has been made within the 45-day deadline set forth in the June 27 order, under the circumstances, leave to renew is granted to the Port Authority, while plaintiff's is not entitled to leave to renew on its cross motion (*see Hayden v Gordon*, 2012 NY Slip Op 00487 at *1; *Coccia v Liotti*, 70 AD3d at 752; *Moncrief v DiChiaro*, 52 AD3d at 790).

The evidence submitted in support of the Port Authority's instant motion includes the affidavit of Paul Gembara, an employee of the Port Authority. However, this court will limit its consideration to the evidence submitted by the Port Authority in support of the initial motion. While, as discussed above, it is within the court's discretion to grant leave to renew upon facts known by a party at the time of the initial motion, renewal is not a second chance for parties who have not practiced due diligence in making their initial motion (CPLR

2221 [e]; *see Coccia v Liotti*, 70 AD3d at 752; *Matter of Weinberg*, 132 AD2d 190, 210 [1987]).

Turning to the merits of the Port Authority's motion for summary judgment, it has argued that it is not liable to plaintiff under Labor Law because it does not own the premises where the accident occurred. In support of its motion, the Port Authority 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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). "Labor Law §§ 200, 240, and 241 apply to owners, general contractors, or their 'agents'" (Labor Law § 200 [1]; § 240 [1]; § 241; *Guclu v 900 Eighth Ave. Condominium, LLC*, 81 AD3d 592, 593 [2011]). "[T]he term 'owner' is not limited to the titleholder of the property where the accident occurred and encompasses a person 'who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit'" (*Scaparo v Village of Ilion*, 13 NY3d 864, 866 [2009], quoting *Copertino v Ward*, 100 AD2d 565, 566 [1984]; *see Dahar v Holland Ladder & Mfg. Co.*, 79 AD3d 1631, 1633 [2010]).

In support of its motion, the Port Authority has relied upon, among other things, the deposition testimony of plaintiff, Mostafa Yacoub (Yacoub), Michael Margolis (Margolis), and a copy of its agreement with Maracap. Plaintiff testified that the accident occurred at Maracap's rented storage space on Zano's property. He further testified that he was working on steel beams that were approximately 20 feet long, 2 feet high and 1 foot wide, which Maracap had stored at Zano's property and that he was preparing the beams for later use at the construction site at the GWB. He testified that, after his co-workers used a backhoe to lift a steel beam onto a table, his job was to drill holes using a magnetic drill into the beams, through which screws would be placed. Plaintiff testified that at the time of the accident, he had finished drilling holes through a beam when a co-worker lifted the beam from the table using a backhoe and that the beam came into contact with a pallette loaded with plywood, which knocked the plywood over and caused it to fall on him.

Yacoub, testified that he was an assistant resident engineer for the Port Authority, that the Port Authority had an agreement with Maracap to rehabilitate the 178 Street ramp deck to the GWB, and that in order for Maracap to perform its work it had to fabricate some steel by modifying it. He further testified that, although this fabrication work did not take place at the construction site located at the GWB, he did not know where it took place, and that he had never been to Zano's property. Margolis, Maracap's president, testified that Maracap's employees were at Zano's property on the date of the accident to fabricate steel beams that were to be used at the GWB project and that Zano was hired to transport the steel beams to the GWB.

It is undisputed in the record that the Port Authority owned the GWB at the time of the incident, that it had an agreement with Maracap to repair a ramp to the bridge and that the Port Authority's representatives did not give instructions to plaintiff and were not present at the location of the accident. The record has demonstrated that while the Port Authority, in fact, contracted for the work that ultimately led to plaintiff's injury, it did not have any interest in the property which would allow it to have any measure of control over Maracap's storage space (*see Scaparo v Village of Ilion*, 13 NY3d at 866; *Flores v ERC Holding LLC*, 87 AD3d 419, 421 [2011]). Therefore, the Port Authority has demonstrated, under the circumstances in the instant matter, that it was not an "owner" as contemplated by the Legislature under the Labor Law.

Furthermore, in general, a worker engaged in the fabrication of steel is not protected under the Labor Law (*see Jock v Fien*, 80 NY2d 965, 968 [1992]; *Flores v ERC Holding LLC*, 87 AD3d at 420; *Davis v Wind-Sun Constr., Inc.*, 70 AD3d 1383 [2010]; *Solly v Tam Ceramics*, 258 AD2d 914 [1999]). The record has demonstrated that at the time of his injury, plaintiff was engaged in the fabrication of steel beams using a magnetic drill at his employer's storage space located in Queens, New York, and was not engaged in construction work at the construction site located at the 178 Street ramp deck to the GWB (*see e.g. Flores v ERC Holding LLC*, 87 AD3d at 421 [plaintiff injured 12 miles away from construction site at his employer's facility]; *Shields v General Elec. Co.*, 3 AD3d 715, 716 [2004] [fabrication of steel using magnetic drill]). Thus, in the instant matter, plaintiff was not engaged in a protected activity under Labor Law §§ 240 (1) and 241 (6) (*see Jock v Fien*, 80 NY2d at 968; *Flores v ERC Holding LLC*, 87 AD3d at 421).

In opposing this branch of the Port Authority's motion, plaintiff has relied upon several cases where Labor Law protection has been extended to workers who were preparing construction materials for use, including *Gonnerman v Huddleston* (78 AD3d 993 [2010]), *D'Alto v 22-24 129th St., LLC* (76 AD3d 503 [2010]), *Shields v General Elec. Co.* (3 AD3d 715), and *Brogan v International Bus. Machs. Corp.* (157 AD2d 76 [1990]). The distinguishing factors between these cases and the facts of the instant case is the physical proximity of the accident to the actual construction site and the common ownership and operation of the premises (*Flores v ERC Holding LLC*, 87 AD3d at 421). In these cases, the injury-producing work was being done in a location or staging area that was in close proximity to the construction site and on property owned and operated by the defendant.

In the instant case, the accident occurred 14 miles away from the GWB at a storage space Maracap rented from Zano. The evidence has demonstrated that the steel beams were to be transported the 14-mile distance for use at the construction site and that, contrary to plaintiff's assertion, the beams were not being "readied for immediate use" in a staging area in close proximity to the work site (*Peterkin v City of New York*, 5 AD3d 652 [2004],

lv denied 3 NY3d 605 [2004] [internal quotes and citation omitted]; *c.f. Gonnerman v Huddleston*, 78 AD3d at 994; *D'Alto v 22-24 129th St., LLC*, 76 AD3d at 506). Therefore, under these circumstances, the Port Authority has demonstrated that Labor Law §§ 240 (1) and 241 (6) are inapplicable in the instant matter and that it is entitled to summary judgment dismissing these claims (*see Flores v ERC Holding LLC*, 87 AD3d at 421; *Peterkin v City of New York*, 5 AD3d at 652). In opposition, plaintiff has failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Travers v RCPI Landmark Props., LLC*, 74 AD3d 956, 957 [2010], *lv denied* 15 NY3d 710 [2010]).

The Port Authority has also argued that it is not liable to plaintiff under Labor Law § 200 and for common-law negligence. Labor Law § 200 "is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work" (*Ortega v Puccia*, 57 AD3d 54, 60 [2008]). Claims brought under § 200 are generally brought in two possible categories, those where workers were injured as a result of dangerous or defective conditions on a work site and those involving the manner in which the work was performed (*LaGiudice v Sleepy's Inc.*, 67 AD3d 969, 972 [2009]). Where, as here, a claim arises out of the methods or materials of the work, an owner may be liable if it is shown that the owner had the authority to supervise or control the work (*see LaGiudice v Sleepy's Inc.*, 67 AD3d at 972; *Ortega v Puccia*, 57 AD3d at 61). It is undisputed in the record that the Port Authority did not own the premises where the plaintiff was injured or have the authority to control or supervise plaintiff's work at the time of the accident. Therefore, the Port Authority has satisfied its prima facie burden. Taking note of plaintiff's failure to oppose this branch of the Port Authority's motion, the Port Authority is entitled to the dismissal of the claims brought under Labor Law § 200 and for common-law negligence.

Accordingly, the branches of the Port Authority's motion for leave to renew and for summary judgment dismissing plaintiff's causes of action brought under Labor Law §§ 200, 240 (1), 241 (6), and for common-law negligence are granted. Plaintiff's cross motion is denied in its entirety.

Dated: February 9, 2012

James J. Golia, J.S.C.