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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Weiss IA Part 2
Justice

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| JULIO GONZALEZ, Plaintiff, -against- MAGESTIC FINE CUSTOM HOME a/k/a MAJESTIC CAPITAL PARTNERS LLC, DRAGHI CONTRACTING AND ITALIANO BROS. DRYWALL, INC., Defendants. x | Index Number 1955 2009<br>Motion Date March 28, 2012<br>Motion Cal. Number 9<br>Motion Seq. No. 3 |

DRAGHI CONTRACTING,

Third Party Plaintiff,

-against-

ITALIANO BROS. DRYWALL INC.,

Third Party Defendant.
x

ITALIANO BROS. DRYWALL INC.,

Fourth Party Plaintiff,

-against-

NICO DRYWALL CORP.,

Fourth Party Defendant.
x

[* 2]

The following papers numbered 1 to 3 read on this motion by defendant Draghi Contracting (Draghi) for leave to renew its prior cross motion for, inter alia, summary judgment dismissing the complaint against it

| | Papers Numbered |
|---|---|
| Notice of Motion - Affidavits - Exhibits ........................................... | 1 |
| Answering Affidavits - Exhibits ........................................................ | 2 |
| Reply Affidavits ............................................................................... | 3 |

Upon the foregoing papers it is ordered that: Leave to renew is granted. The branch of the cross motion which is for summary judgment dismissing the cause of action based on Labor Law §200 is granted. The branch of the cross motion which is for summary judgment dismissing the cause of action based on Labor Law 240(1) is granted. The branch of the cross motion which is for summary judgment dismissing the cause of action based on Labor Law §241(6) is denied. The branch of the cross motion which is for summary judgment on the cause of action for contractual indemnity is denied.

The parties entered into a stipulation which permitted them to make motions for summary judgment returnable not later than June 8, 2011. On September 14, 2011, defendant/third party plaintiff Italiano Bros submitted a motion for, inter alia, summary judgment dismissing the complaint against it and defendant/third party plaintiff Draghi submitted a cross motion for, inter alia, summary judgment dismissing the complaint against it. By decision and order dated September 16, 2011 (one paper), this court denied the motion and cross motion as untimely pursuant to *Brill v. City of New York* ( 2 NY3d 648) because the parties made their motions returnable after June 8, 2011. On October 12, 2011, the case appeared in the Trial Assignment Part, and, after the attorney for Draghi expressed his intent to appeal from the order dated September 16, 2011, the judge vacated the note of issue and removed the case from the trial calendar. Draghi now moves for leave to renew its prior cross motion based on changed circumstances, i.e, the vacatur of the note of issue. Draghi is entitled to renew its previous application. The vacatur of the note of issue rendered the stipulation providing a deadline for summary judgment motions inoperative. (*See*, *Deans v. Jamaica Hosp. Medical Center,* 64 AD3d 742.) The time for the parties to bring their motions for summary judgment is controlled by the filing of a new note of issue, not from the filing of the original note of issue which has been vacated. (*See*, *Williams v. Peralta,* 37 AD3d 712; *Johnson v. Ladin*, 18 AD3d 439.)

The owner of property located at 21 Elm Street, Woodbury, New York hired Majestic Fine Custom Homes to construct a single family home on the grounds. Majestic subcontracted drywall work to defendant Italiano Bros. Drywall, Inc., which, in turn, sub-sub contracted some of the work to Nico Drywall Corp. Majestic subcontracted the framing work to defendant Draghi Contracting. While Gary Draghi also assisted in the "direction of the construction, " he alleges that he did not supervise any of the other subcontractors on the job site. Gary Draghi testified at his deposition that his company assisted in the "direction of the construction" until the completion of the project and that he was at the job site every day or every other day. When asked if a Majestic owner gave instructions to the tradesmen, Gary Draghi replied: " Nobody did, the only people that would give instructions to the trades would be the company hired to perform the task." (Tr. 24.) However, when asked "[I]f you saw one of the trades doing something that looked dangerous to you, would you say something to them?", Gary Draghi replied, "If I saw something dangerous, yes." He would tell them to stop. (TR.24.) Although Draghi alleges that it played no role in the hiring of Italiano Bros. and Nico or in their supervision, Italiano Bros executed a broad indemnification agreement dated September 15, 2008 in favor of Draghi.

When Italiano Bros. and Nico arrived at the construction site, the carpenters had completed their framing work, and the electricians had completed some of their work. On or about October 16, 2008, plaintiff Julio Gonzalez, employed by Nico Drywall Corp., did spackling and taping work using stilts. Nelson Rodriguez, the owner of Nico Drywall, or another Nico employee ( Felipe Galeano), supervised the plaintiff's work. The plaintiff never heard of Draghi construction before his accident, and he took no direction from Gary Draghi.

On the date of the accident Rodriguez instructed the plaintiff to perform spackling and taping work in the kitchen and the bedroom located on the first floor of the house under construction. The plaintiff used stilts, which he owned, to perform this work, and he admits that every part of the stilts (springs, buckles, laces, and "shoes") all functioned properly. The plaintiff, who stands only about five feet 2¾ inches tall, worked on a ceiling approximately nine to ten feet tall, and so he allegedly had to extend his stilts to their maximum height of 40 inches.

At the time of his accident, the plaintiff was walking on his stilts and applying spackling compound to the ceiling of the kitchen. He was looking forward and upward, holding his "plate" in his left hand and his "knife" in his right hand. According to the plaintiff, the bottom of his right stilt became entangled in a yellow cable on the kitchen floor, he lost his balance, and he fell forward. The plaintiff alleges that he never saw the cable before he took his fall and that it did not appear to be plugged into anything. He did not remember when electricians last worked in the kitchen prior to his fall. The kitchen floor did not have any debris on it when the plaintiff took his fall.

On January 28, 2009, the plaintiff began this action by the filing of a summons and a complaint. The plaintiff asserts causes of action against Draghi based on Labor Law §§ 200, 240(1), and 241(6).

"Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work." (*Comes v New York State Electric and Gas Corp.*, 82 NY2d 876, 877.) Where a defendant has not exercised supervisory control and an injury results from a contractor's methods, liability does not attach pursuant to Labor Law § 200. (*Comes v New York State Electric and Gas Corp., supra.*) The court notes that there is an issue of fact pertaining to Draghi's alleged supervisory control, although this is not dispositive on the section 200 cause of action. Moreover, regarding a Labor Law §200 claim, " [i]n addition to showing that the defendant exercised supervisory direction or control over the operation, the plaintiff also must show that the defendant had actual or constructive notice of the alleged unsafe condition that caused the accident ***." ( *Nevins v. Essex Owners Corp.*, 276 AD2d 315, 316; *Maldonado v. Metropolitan Life Ins. Co.*, 289 AD2d 176.) There is no evidence in this case supportive of a Labor Law §200 claim or of a negligence claim that Draghi created or had notice of the dangerous condition (the cable) from which the plaintiff allegedly sustained his injury. (*See*, *Bond v. York Hunter Const., Inc.*, 95 NY2d 883; *Carty v. Port Authority of New York and New Jersey,* 32 AD3d 732; *DeRosa v. Union Square 14th Street Associates*, 269 AD2d 486.) Draghi is entitled to the dismissal of the cause of action based on Labor Law § 200.

Labor Law § 240(1) provides in relevant part: "All contractors and owners and their agents *** in the erection, *** of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, *** and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed." ( *See*, *Blake v. Neighborhood Housing Services of New York City, Inc.* 1 NY3d 280.) The duty imposed upon contractors and owners pursuant to Labor Law § 240(1) is nondelegable (*see*, *Rocovich v Consolidated Edison Co.*, 78 NY2d 509), and a violation of the duty results in absolute liability. (*Bland v Manocherian*, 66 NY2d 452.) Insofar as a subcontractor, rather than an owner or general contractor, is concerned, a subcontractor cannot be found liable under Labor Law § 240 unless it was the statutory agent of the owner or general contractor . ( *See*, *Passananti v. City of New York*, 268 AD2d 512.) No liability pursuant to Labor Law § 240(1) attaches to a subcontractor who exercises no supervisory control over an injured worker's activities because it does not act as the agent of either the owner or of the general contractor. ( *See*, *Passananti v. City of New*

*York, supra*.) The court notes that there is an issue of fact concerning whether Draghi functioned as the agent of the general contractor, although this is not dispositive on the section 240(1) cause of action. In *Melber v. 6333 Main Street, Inc*. (91 NY2d 759), the Court of Appeals held that a carpenter who was injured when he walked down a corridor wearing 42–inch stilts that he had been using to install metal studs in drywall and who tripped over an electrical conduit protruding from an unfinished floor had no cause of action based on Labor Law § 240. The Court of Appeals reasoned that the carpenter's injury resulted from the conduit on the floor, not from a failure of the stilts, and that therefore the injury did not result from an elevation-related risk. The " plaintiff's accident fell outside the scope of Labor Law § 240(1)***." ( *Melber v. 6333 Main Street, Inc*., *supra*, 762.) Plaintiff Gonzalez failed to distinguish the *Melber* case, which is dispositive. Draghi is entitled to the dismissal of the cause of action based on Labor Law §240(1).

Labor Law §241(6) provides, inter alia, that areas in which construction is being performed shall be "guarded, arranged, operated, and conducted" in a manner which provides "reasonable and adequate protection and safety to the persons employed therein," that the Commissioner of Labor may make rules to implement the statute, and that owners, contractors, and their agents shall comply with them. (*See*, *Rizzuto v. L.A. Wenger Contracting Co., Inc*., 91 NY2d 343.) The duty imposed by Labor Law § 241(6) upon owners and contractors is nondelegable.(*Rizzuto v. L.A. Wenger Contracting Co., Inc., supra; Comes v New York State Electric and Gas Corp.,* 82 NY2d 876.)

A cause of action based on Labor Law § 241(6) "must refer to a violation of the specific standards set forth in the implementing regulations (12 NYCRR Part 123)." (*Simon v Schenectady North Congregation of Jehovah's Witnesses*, 132 AD2d 313, 317; *Vernieri v Empire Realty Co.*, 219 AD2d 593.) The plaintiff must allege a violation of more than the general safety standards of the Industrial Code. (*See, Comes v. New York State Elec. and Gas Corp*., *supra*.)

12 NYCRR 23-5.22, "Stilts," provides in relevant part: "(a) Limited use. (1) Stilts shall be used only for the work of taping joints in wallboard used for wall and ceiling construction, commonly known as "dry wall" construction. The use of stilts for any other purpose is prohibited. ***(c) Scaffolds required. Whenever stilts are used, scaffolds commonly used and appropriate for wallboard construction and which are in compliance with this Part (rule) shall be provided at all times such work is being performed. Such scaffolds shall be readily available for any person performing such work who may elect to use such scaffold. ***(e) Stilt elevation. Stilts shall not elevate the feet of any person more than 24 inches above the floor. (f) Protection from hazards. Stilts shall be used only on even floor surfaces kept free from obstructions ***." The regulation pertaining to stilts is specific enough to provide a basis for a cause of action pursuant to Labor Law §241(6) (*See*, *Garcia*

*v. Mt. Airy Estates, Inc.,* 35 Misc.3d 1208(A) [table], 2012 WL 1216280 [text].) In the case at bar, this regulation was allegedly violated by, inter alia, the use of stilts elevating plaintiff Gonzalez more than 24 inches above the floor and by use on a floor not kept clear of obstructions. The plaintiff allegedly used his stilts to work 40 inches above a floor that had a cable upon it..

A subcontractor's liability under Labor Law §241(6) as a statutory "agent" "is limited to those areas and activities within the scope of work delegated to it, i.e., where it has been given authority to supervise and control the injury producing activity ***." ( *Rice v. City of Cortland*, 262 AD2d 770,771.) In the case at bar, there is an issue of fact concerning whether defendant Draghi was merely a subcontractor without authority to supervise the plaintiff's work. Gary Draghi admits that his company directed the course of construction and that he was at the job site every day or every other day. He would tell subcontractors engaged in dangerous activities to cease doing so. Italiano Bros. executed a broad indemnification agreement in favor of Draghi of the kind typically demanded by construction managers, and Draghi failed to explain why such an agreement would be necessary if it was merely another subcontractor without authority over the drywall subcontractors. Italiano Bros. even named Draghi as an additional insured on its liability insurance policy. Under all of these circumstances, summary judgment dismissing the Labor Law §241(6) cause of action is precluded by an issue of fact concerning whether defendant Draghi functioned as the statutory agent of the general contractor.

In regard to the indemnification agreement, General Obligations Law § 5-322.1 essentially bars indemnification in favor of an owner or contractor by a party who performs "construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances" where the owner or contractor is responsible for the injury, either in whole or in part. (*See*, *Juliano v. Prudential Securities Inc*., 287 AD2d 260.) ) "[T]he statute applies to the indemnification agreements in their entirety *** where the general contractor/promisee is actually found to have been negligent." ( *Itri Brick and Concrete Corp. v. Aetna Casualty and Surety Company*, 89 NY2d 786, In other words, General Obligations Law § 5-322.1 does not bar an owner or contractor who was not actually negligent from receiving contractual indemnification, even if the contract language purports to provide indemnification for an owner's or contractor's own negligence. (*See*, *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co., supra; Brown v. Two Exch. Plaza Partners*, 76 NY2d 172; *Lazzaro v. MJM Industries, Inc*., 288 AD2d 440.) In the case at bar, summary judgment on Draghi's cause of action for contractual indemnification is precluded by issues of fact pertaining to whether it had the authority to supervise Nico's work and whether it discharged that responsibility in a negligent manner.

Dated: June 4, 2012

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J.S.C.