Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

DARIO CABRERA,	Index No. 5225/08
Plaintiff,	Motion Date April 3, 2012
-against-	Motion Cal. No. 5
OCEANVIEW VILLAS II CORP., et al., Defendants.	Motion Sequence No. 8

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Notice of Motion-Affidavits-Exhibits...	1-4
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Upon the foregoing papers it is ordered that this motion by defendant, Metropolitan Renovations, Inc. ("Metropolitan") for summary judgment pursuant to CPLR 3212 dismissing the plaintiff, Dario Cabrera's Complaint against it upon the grounds that there are no questions of fact is hereby decided as follows:

Plaintiff, Dario Cabrera, maintains that on November 13, 2007, he was lawfully working on a construction project at the premises located at Beach Channel Drive between 37th Avenue and 38th Avenue, Rockaway, New York when he was struck by a leveling tool which fell from the second floor to the first floor. Plaintiff maintains that he was caused to sustain severe and disabling personal injuries as a result of defendants' negligence. Plaintiff commenced this action to recover for serious injuries, alleging liability against defendants pursuant to Labor Law §§ 200, 240(1) and 241(6). It is undisputed that defendant Oceanview Villas II Corp. was the land developer for the construction project, defendant OV2 Construction, Inc. was a general contractor for the construction project, and defendant R&B Drywall Corp. was a subcontractor for the construction

project, and Corona Drywall was plaintiff's employer. Defendant, Metropolitan Renovations, Inc. moves for an order pursuant to CPLR 3212 granting summary judgment to it and dismissing the plaintiff's Complaint as against it. Plaintiff and all co-defendants oppose the motion.

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee' s Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]).

Labor Law § 200

It is well settled that liability for negligence will attach pursuant to common law or under Labor Law § 200 if the plaintiff's injuries were sustained as a result of a dangerous condition at the work site and only if the owner, contractor or agent exercised supervision and control over the work performed at the site or had actual or constructive notice of the alleged dangerous condition (*see, Pirotta v. EklecCo.*, 292 AD2d 362 [2002]; *Kobeszko v. Lyden Realty Investors*, 289 AD2d 535 [2001]; *Giambalvo v. Chemical Bank*, 260 AD2d 432 [1999]). Labor Law § 200 codifies the common law duty of owners and general contractors to provide construction site workers with a safe working environment (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). In order for a defendant to be liable under this section, "the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition" (*Damiani v. Federated Department Stores, Inc.*, 23 AD3d 329 [2d Dept 2005][internal citations omitted]). Liability is dependent upon the amount of control or supervision exercised over the plaintiff's work. (*Id.*).

Moving defendant, Metropolitan, established a prima facie case that the plaintiff's claims under Labor Law § 200 must be dismissed as against it. Moving defendant submitted, inter alia,

the examination before trial transcript testimony of Patricia Johnson, the office manager from moving defendant, wherein she testified that: Metropolitan was hired as a construction manager in connection with the Oceanview Villas project, it was only after the instant lawsuit was filed that Metropolitan first became aware that Corona Drywall was hired to perform work at the construction site; the examination before trial transcript testimony of Howard Schneidler, the owner of defendant R&B Drywall Corp., a sub-contractor, who testified that plaintiff was under the control of both R&B Drywall Corp. and Corona Drywall at the time of his alleged accident, R&B Drywall Corp. hired plaintiff's employer, Corona Drywall, to perform the framing work R&B Drywall was originally hired to perform, R&B Drywall Corp. did not have consent to hire Corona Drywall; the examinations before trial transcript testimonies of Allison Novak who testified on behalf of defendants Oceanview Villas II Corp. and OV2 Construction Inc., wherein she testified that: Metropolitan contracted with R&B Drywall to perform work at the Oceanview Villas construction site; a contract between defendant Oceanview Villas II Corp. and moving defendant Metropolitan, and a contract between defendant R&B Drywall Corp. and moving defendant Metropolitan. Moving defendant established that there is no evidence that Metropolitan exercised any degree of control over the framing operations performed by plaintiff's employer, Corona Drywall.

In opposition, plaintiff and all co-defendants raise triable issue of fact. In opposition, plaintiff and co-defendants present, inter alia, the examination before trial transcript testimony of moving defendant's witness, Patricia Johnson, who testified, inter alia, that: Metropolitan was actually the general contractor for the job; the examination before trial transcript testimony of Howard Schneidler, who testified, inter alia, that he believed Metropolitan was the general contractor; and the examination before trial transcript testimony of Alison Novak, a witness for defendants Oceanview Villas II Corp. and OV2 Construction, who testified, inter alia, that: Metropolitan hired the trades, Metropolitan hired a number of different sub-contractors, and that Metropolitan's employee, Gene Davera, was the site super and he coordinated the work on site, coordinated between the various trades, and monitored the work.

The Court finds that there are triable issues of fact raised as to whether moving defendant, Metropolitan, was the general contractor for the job and whether Metropolitan assumed the responsibilities as a statutory agent as defined in the Labor Law.

Accordingly, that branch of the motion seeking summary judgment pursuant to Labor Law §200 is denied.

Labor Law § 240(1)

Labor Law § 240 (1) requires owners, contractors, and their agents to provide workers with appropriate safety devices to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *see, Rocovich v. Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Gasques v. State of New York*, 59 AD3d 666 [2009]; *Rau v. Bagels N Brunch, Inc.*, 57 AD3d 866 [2008]). The duty to provide scaffolding, ladders, and similar safety devices is non-delegable, as the purpose of the section is to protect workers by placing the ultimate responsibility on the owners and contractors (*see, Gordon v. Eastern Ry. Supply, Inc.*, 82 NY2d 555, 559 [1993]; *Ortega v. Puccia*, 57 AD3d 54 [2008]; *Riccio v. NHT Owners, LLC*, 51 AD3d 897 [2008]). In order to prevail on a cause of action pursuant to Labor Law § 240(1), the plaintiff must establish that the statute was violated and that said violation was the proximate cause of his or her injuries (*see, Chlebowski v. Esber*, 58 AD3d 662 [2009]; *Rakowicz v. Fashion Inst. of Tech.*, 56 AD3d 747 [2008]; *Rudnik v. Brogor Realty Corp.*, 45 AD3d 828 [2007]).

Moving defendant, Metropolitan established a prima facie case that the plaintiff's claims under Labor Law § 240(1) must be dismissed as against it. Moving defendant submitted, inter alia, the examination before trial transcript of plaintiff, himself, wherein he testifies, inter alia, that: he was injured when a leveling tool fell from the second floor to the first floor of a home where plaintiff was performing framing work as part of a construction project, several of his co-employees were working on the second floor, he and his co-workers shared a leveling tool, the type of level plaintiff was using was made of metal and 6 feet in length, because of the size of the level, it could not fit inside a tool belt, the level remained on the floor when it was not in use, and there were no scaffold, ladders, hoists, or lifts in the area where the accident happened. Moving defendant established a prima facie case that there was no evidence that the leveling tool which struck the plaintiff was being lifted or hoisted at the time it fell.

In opposition, plaintiff raises a triable issue of fact. In opposition, plaintiff establishes that there was a failure to secure the leveling tool when it was not in use and there was no

type of device to prevent objects from falling from above.

Accordingly, that branch of the motion seeking summary judgment pursuant to Labor Law 240(1) is denied.

Labor Law § 241(6)

Labor Law § 241(6) imposes a non-delegable duty upon owners and contractors to provide necessary equipment to maintain a safe working environment, provided there is a specific statutory violation causing plaintiff's injury (*see, Toefer v. Long Island R.R.*, 4 NY3d 399 [NY 2005]; *Bland v. Manocherian*, 66 NY2d 452 [1985]; *Kollmer v. Slater Electric, Inc.* 122 AD2d 117 [2d Dept 1986]). The Court of Appeals has held that the standard of liability under this section requires that the regulation alleged to have been breached be a "specific positive command" rather than a "reiteration of common law standards which would merely incorporate into the State Industrial Code a general duty of care" *(Rizzuto v. LA Wenger Contracting*, 91 NY2d 343 [NY 1998]). In order to support a Labor Law § 241(6) cause of action, such a regulation cannot merely establish only "general safety standards" but rather must establish "concrete specifications" (*see, Mancini v. Pedra Construction*, 293 AD2d 453 [2d Dept 2002]; *Williams v. Whitehaven Memorial Park*, 227 AD2d 923 [4th Dept 1996]).

Moving defendant, Metropolitan established a prima facie case that the plaintiff's claims under Labor Law § 241(6) must be dismissed as against it.

Defendant established a prima facie case that there has been no violation pursuant to Industrial Code Sections 12 NYCRR 23-6.1(d), 23-6.1(c)(1), and 23-6.1(h).

12 NYCRR 23-6.1, which deals with "Material Hoising" states in relevant part that: "[t]he general requirements of this Subpart shall apply to all material hoisting equipment . . . such equipment shall be operated in a safe manner at all times . . . all loads shall be properly trimmed to prevent dislodgement of any portions of such loads during transit . . . [s]uspended loads shall be securely slung and properly balanced before they are set in motion".

Specifically, the sections read as follows:

> 23-6.1(d) - Loading. Material hoisting equipment shall not be loaded in excess of the live load for which it was designed as specified by the manufacturer. Where there is any hazard to persons, all loads shall be properly trimmed to prevent dislodgment of any portions of such loads during transit. Suspended loads shall be securely slung and properly balanced before they are set in motion.
>
> 23-6.1(c)(1) Operation. Only trained, designated persons shall operate hoisting equipment and such equipment shall be operated in a safe manner at all times.
>
> 23-6.1(h) Tag line. Loads which have a tendency to swing or turn freely during hoisting shall be controlled by tag lines.

Moving defendant contends that it is not liable under Labor Law § 241(6) because the leveling tool which struck plaintiff was not being hoisted or loaded when it struck him. Moving defendant establishes that plaintiff himself testifies that there was no hoisting or loading equipment being used anywhere near where the plaintiff was working at the time of his accident (*Smith v. Homart Development Co.*, 237 AD2d 77 [3d Dept 1997]).

In opposition, neither plaintiff, nor co-defendants raised triable issues of fact.

Accordingly, this branch of the motion is granted and plaintiff's claims pursuant to Labor Law § 241(6) are dismissed.

Accordingly, the moving defendant's motion is denied as to summary dismissal pursuant to Labor Law §§ 200 and 240(1), and granted as to summary dismissal regarding Labor Law 241(6).

This constitutes the decision and order of the Court.

Dated: June 26, 2012

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Howard G. Lane, J.S.C.