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SHORT FORM ORDER

INDEX No. 07-29473
CAL. No. 11-02237OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 4-4-12 (#005)
MOTION DATE 4-5-12 (#006 & #007)
ADJ. DATE 4-5-12
Mot. Seq. # 005 - MG
006 - MG
007 - MotD

JASON HARTSHORNE, Plaintiff, - against - PENGAT TECHNICAL INSPECTIONS, INC., H2M CONSTRUCTION MANAGEMENT, INC., INTERCOUNTY PAVING ASSOCIATES OF NEW YORK, LLC, INTERCOUNTY PAVING ASSOCIATES, LLC, HOLZMACHER, McLENDON & MURRELL, P.C., TOWN OF HUNTINGTON and COUNTY OF SUFFOLK, Defendants.	HALLOCK & MALERBA Attorney for Plaintiff 334 Deer Park Avenue Babylon Village, New York 11702 MILBER, MAKRIS, PLOUSADIS & SEIDEN LLP Attorney for Pengat Technical Inspections 3 Barker Avenue, 6th Floor White Plains, New York 10601 L'ABBATE, BALKAN, COLAVITA & CONTINI Attorney for H2M Construction Management & Holzmacher, McLendon & Murrell, P.C. 1001 Franklin Avenue Garden City, New York 11530 CARROLL, McNULTY & KULL, L.L.C. Attorney for Intercounty Paving Associates of NY, LLC, Intercounty Paving Associates LLC & Town of Huntington 570 Lexington Avenue, 8th Floor New York, New York 10022 CHRISTINE MALAFI, ESQ., Suffolk Cty Attorney Attorney for County of Suffolk H. Lee Dennison Building 100 Veterans Memorial Highway P.O. Box 6100 Hauppauge, New York 11788-0099

Upon the following papers numbered 1 to 59 read on this motion to amend pleadings; and these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-21; 22-40; 41-59 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers ___; Other plaintiff's memorandum of law ; it is,

ORDERED that the motion (#007) by defendant Pengat Technical Inspections, Inc., the motion (#006) by defendants H2M Construction Management Inc. and Holzmacher, McLendon and Murrell, PC, and the motion (#005) by defendants Intercounty Paving Associates of New York, LLC, Intercounty Paving Associates, LLC, and the Town of Huntington, are consolidated for the purposes of this determination; and it is

ORDERED that the unopposed motion by defendants H2M Construction Management Inc. and Holzmacher, McLendon and Murrell, PC, for summary judgment dismissing the complaint and all cross-claims against them is granted; and it is

ORDERED that the unopposed motion by defendants Intercounty Paving Associates of New York, LLC, Intercounty Paving Associates, LLC, and the Town of Huntington for summary judgment dismissing the complaint and all cross-claims against them is granted; and it is

ORDERED that the unopposed motion by defendant Pengat Technical Inspections, Inc. for summary judgment dismissing the complaint and all cross-claims against it is granted to the extent that the cross-claims against it are dismissed, and is otherwise denied.

Plaintiff Jason Hartshorne commenced this action to recover damages for personal injuries he allegedly sustained on September 25, 2007, while working at a sewer improvement project located near the intersection of Route 110 and Prime Avenue in Huntington, New York. The sewer system allegedly was owned by defendants Town of Huntington ("the Town") and the County of Suffolk ("the County"). Plaintiff, who was directing traffic, allegedly was injured when a motor vehicle hit a hose placed in the roadway, causing it to strike plaintiff's feet and knock him to the ground. The fire hose allegedly was placed in the roadway by defendant Pengat Technical Inspections, Inc. ("Pengat"), a subcontractor hired to perform digital inspections and to vacuum the sewer lines. Defendant H2M Construction Management, Inc. was hired by the Town to prepare design specifications for sewer improvement, and to provide administrative services for the project. Defendant Holzmacher, McLendon and Murrell, PC, which is a part of an organization known as the H2M Group, was hired by the Town to provide engineer consulting services for the project. Defendants Intercounty Paving Associates of New York, LLC and Intercounty Paving Associates, LLC, (collectively referred to as "Intercounty") allegedly were hired as the general contractors for the project. At the time of the accident, plaintiff allegedly worked for nonparty New Pipe Liners. By way of his complaint, plaintiff alleges causes of action against defendants for common law negligence, premises liability, and violations of Labor Law §§ 200, 240 (1), and 241 (6).

Pengat joined issue on November 29, 2007, and asserted a cross-claim for contribution and common law indemnification against H2M Construction. Intercounty and the Town joined issue on September 29, 2008, and asserted a cross-claim for contribution against Holzmacher, McLendon and Murrell. H2M Construction joined issue on June 19, 2008, and asserted cross-claims against Pengat and Intercounty for contractual and common law indemnification, contribution, and breach of contract based on their alleged failure to obtain insurance naming it as an additional insured.

Intercounty now moves, pursuant to CPLR 3025, for an Order granting leave to amend its answer *nunc pro tunc* to include a defense based on Worker's Compensation Law §§ 11 and 29 (6). Intercounty also seeks an Order, pursuant to CPLR 3212, dismissing the complaint on the ground the Town did not

own the subject roadway and merely provided general supervisory authority over the project. Intercounty further asserts that, as the parent company of plaintiff's employer, it is entitled to the protections of the Workers' Compensation Law since plaintiff applied for and received workers' compensation benefits as a result of his accident. H2M Construction and Holzmacher, McLendon and Murrell (hereinafter collectively referred to as "H2M") also move for summary judgment in their favor dismissing the complaint and all cross-claims against them on the grounds that they were not a statutory agent for the Town or the general contractor at the worksite, that they did not control, direct or supervise plaintiff's work, and that they were not responsible for worksite safety. H2M further argues that as the engineer and administrative manager for the project, its role was limited to providing administrative services and inspecting the project and, therefore, it neither owed nor breached any duty to plaintiff. Pengat seeks summary judgment on similar grounds, arguing that it was not the owner, general contractor, or statutory agent for the project, that it lacked the authority to control worksite safety or plaintiff's work, and that it was absent from the worksite on the day of the alleged accident. In the alternative, Pengat argues that plaintiff failed to state a claim under Labor Law § 240, as the alleged accident occurred as a result of a ground level tripping hazard. It further asserts that plaintiff failed to set forth the violation of any specific section of the Industrial Code in relation to its Labor Law § 241 (6) claim, and that the subject accident was caused by plaintiff's own negligence and the negligence of the operator of the motor vehicle that struck the hose.

Initially, the Court notes that Labor Law § 240 (1) is inapplicable under the circumstances of this case, as it is undisputed that the subject accident, which occurred as a result of a ground level tripping hazard, is not among the type of perils Labor Law § 240 (1) was designed to prevent (*see* ***Spence v Island Estates at Mt. Sinai II, LLC***, 79 AD3d 936, 914 NYS2d 203 [2d Dept 2010]; ***Favreau v Barnett & Barnett, LLC***, 47 AD3d 996, 849 NYS2d 691 [3d Dept 2008]). Therefore, plaintiff's claims under Labor Law § 240 (1) are dismissed. Additionally, where, as here, plaintiff failed to identify a specific violation of the Industrial Code in relation to his claims under Labor Law § 241 (6), and did not seek to correct such defect by way of an amended pleading or in opposition the motion, the claims under Labor Law § 241 (6) are deficient and must be dismissed (*see* ***Hart v Commack Hotel, LLC***, 85 AD3d 1117, 927 NYS2d 111 [2d Dept 2011]; ***Owen v Commercial Sites***, 284 AD2d 315, 725 NYS2d 574 [2d Dept 2001]; ***Smith v Hercules Constr. Corp.***, 274 AD2d 467, 468, 711 NYS2d 453 [2d Dept 2000]). Based upon the foregoing, the cross-claims by defendants for contribution or indemnification predicated upon alleged violations of Labor Law §§ 240 (1) and 241 (6) are dismissed. Plaintiff's remaining claims against defendants based upon common law negligence and Labor Law § 200 shall be determined herein.

As for the branch of Intercounty's motion seeking leave to amend its answer to include a defense based on Worker's Compensation Law, pursuant to CPLR 3025 (b), a party may amend its pleading at any time by leave of the court, which shall be freely given upon such terms as may be just. It is within the court's discretion as to whether a party may amend its pleadings (***Murray v City of New York***, 43 NY2d 400, 404-405, 401 NYS2d 773 [1977]; ***Lanpont v Sawas Cab Corp., Inc.***, 244 AD2d 208, 209, 664 NYS2d 285 [1st Dept 1997]). The factors the court must consider in making this determination are whether the proposed amendment would "surprise or prejudice" the opposing party (***Murray v City of New York***, *supra* at 405; ***Lanpont v Sawas Cab Corp., Inc.***, *supra* at 209; ***Norwood v City of New York***, 203 AD2d 147, 148, 610 NYS2d 249 [1st Dept 1994], *lv denied* 84 NY2d 849, 617 NYS2d 139), and whether such amendment is meritorious (***Thomas Crimmins Contr. Co., Inc. v City of New York***, 74 NY2d 166, 170, 544 NYS2d 580 [1989]; ***Ancrum v St. Barnabas Hosp.***, 301 AD2d 474, 475, 755

NYS2d 28 [1st Dept 2003]). Prejudice to the defendant is shown by proof that it "has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (***Loomis v Civetta Corinno Constr. Corp.***, 54 NY2d 18, 23, 444 NYS2d 571 [1981]).

The protection against lawsuits brought by injured workers which is afforded to employers by Workers' Compensation Law §§ 11 and 29 (6) also extends to entities which are alter egos of the entity which employs the plaintiff (*see* ***Cappella v Suresky at Hatfield Lane, LLC***, 55 AD3d 522, 522-523 [2d Dept 2008]; ***Hageman v B & G Bldg. Servs., LLC***, 33 AD3d 860, 861 [2006]). A defendant may establish itself as the alter ego of a plaintiff's employer by demonstrating that one of the entities controls the other or that the two operate as a single integrated entity (*see* ***Cappella v Suresky at Hatfield Lane, LLC***, *supra* at 523; ***Ortega v Noxxen Realty Corp.***, 26 AD3d 361, 809 NYS2d 546[2d Dept 2006]; ***Crespo v Pucciarelli***, 21 AD3d 1048, 803 NYS2d 586 [2d Dept 2005]). Separate corporate entities can be shown to be a part of a single integrated entity through proof that they operated under the control of the same parent corporation (*see* ***Paulino v Lifecare Transp.***, 57 AD3d 319, 869 NYS2d 439 [1st Dept 2008]). Indicia of such a relationship includes the sharing of corporate officers and board members (*see* ***Hernandez v Sanchez***, 40 AD3d 446, 447, 836 NYS2d 557 [1st Dept 2007]), a common payroll department and human resource department, and workers covered under the same general liability and Workers Compensation insurance policies (*see* ***Paulino v Lifecare Transp.***, *supra* at 319; ***Anduaga v AHRC NYC New Projects, Inc.***, 57 AD3d 925, 869 NYS2d 801 [2d Dept 2008]; ***Ortega v Noxxen Realty Corp.***, *supra*; ***Crespo v Pucciarelli***, *supra*).

Here, Intercounty has demonstrated that the proposed amendment is meritorious through the affidavit of its chief financial officer, Thomas Parrinello, which states, *inter alia*, that New Pipe Liners and Intercounty Paving Associates of New York are wholly owned subsidiaries of Intercounty Paving Associates that they operate as a single integrated entity with shared offices and corporate structures, that they are held out to the public as one single integrated entity, and that their employees are all insured under the same general liability and Workers' Compensation policies, for which one premium is paid to insure all of the entities. The affidavit further states that Intercounty Paving Associates of New York did not enter into any agreement with the Town of Huntington or perform any work in relation the sewer project, and that plaintiff applied for and received Workers' Compensation benefits. Intercounty also submitted copies of the General Liability and Workers' Compensation Insurance policies naming all three entities as beneficiaries of common policies. In light of such evidence, plaintiff can hardly claim surprise or prejudice from the proposed amendment, as his employer shares the same offices and corporate structure as Intercounty. Thus, the unopposed branch of Intercounty's motion for leave to amend their answer *nunc pro tunc* to include an affirmative defense based on the exclusivity of the Workers' Compensation Law is granted (*see* ***Alatore v Hee Ju Chun***, 44 AD3d 596, 848 NYS2d 174 [2d Dept 2007]; ***Crespo v Pucciarelli***, *supra*; ***Nastasi v Span Inc.***, 8 AD3d 1011, 778 NYS2d 795 [4th Dept 2004]).

Further, Intercounty has established its entitlement to summary judgment dismissing plaintiff's remaining claims against it under the common law and Labor Law § 200, as it undisputed that plaintiff did not suffer a grave injury and that he received Workers' Compensation benefits from his employer (*see* ***Coonjbeharry v Altone Elec., LLC.***, 94 AD3d 1306, 942 NYS2d 681 [3d Dept 2012]; ***Len v State of New***

York, 74 AD3d 1597, 906 NYS2d 622 [3d Dept 2010]; ***Alatore v Hee Ju Chun***, *supra*; ***Crespo v Pucciarelli***, *supra*; ***Nastasi v Span Inc.***, *supra*). Therefore, the unopposed branch of Intercounty's motion seeking dismissal of those claims is granted.

With respect to the branch of Intercounty's motion for summary judgment dismissing the cross-claims against it for contribution and common law and contractual indemnification, Workers' Compensation Law § 11 bars claims for contribution or indemnification against an employer whose employee is injured in a work-related accident, except for where the injured worker has suffered a "grave injury" or the employer has entered into a written contract agreeing to provide such indemnification (*see* ***Flores v Lower E. Side Serv. Ctr., Inc.***, 4 NY3d 363, 365, 795 NYS2d 491 [2005]; ***Rodrigues v N & S Bldg. Contrs., Inc.***, 5 NY3d 427, 429-430, 805 NYS2d 299 [2005]; ***Auchampaugh v Syracuse Univ.***, 67 AD3d 1164, 1164, 889 NYS2d 706 [3d Dept 2009]). As it is undisputed that plaintiff did not suffer a grave injury and Intercounty did not enter any agreement with H2M obligating it to provide indemnification for injuries to its own employees, H2M's cross-claim for such relief is barred, as a matter of law. Therefore, the unopposed branch of Intercounty's motion seeking dismissal of the cross-claims against it for contribution, and common law and contractual indemnification is granted.

As to the branch of Intercounty's motion seeking dismissal of the complaint as against the Town, "[g]eneral supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common-law negligence and under Labor Law § 200" (***Dos Santos v STV Engrs., Inc.***, 8 AD3d 223, 224, 778 NYS2d 48 [2d Dept 2004], *lv denied* 4 NY3d 702, 790 NYS2d 648 [2004]; *see* ***McKee v Great Atl. & Pac. Tea Co.***, 73 AD3d 872, 905 NYS2d 601 [2d Dept 2010]; ***Ortega v Puccia***, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]). Moreover, the authority to review safety at the site is insufficient if there is no evidence that the defendant actually controlled the manner in which the work was performed (*see* ***Loiacono v Lehrer McGovern Bovis***, 270 AD2d 464, 465, 704 NYS2d 658 [2d Dept 2000]).

Here, Intercounty demonstrated, *prima facie*, the Town's entitlement to summary judgment dismissing the complaint by submitting evidence that it did not own the subject roadway and merely exercised general supervisory authority over the project (*see* ***Dos Santos v STV Engrs., Inc.***, *supra*; ***McKee v Great Atl. & Pac. Tea Co.***, *supra*). Specifically, the Town's Deputy Director of Environmental Waste Management testified that the subject roadway was owned by the State of New York, and that the Town was not contractually responsible for safety at the worksite. He further testified that the Town did not direct or control the method or manner of plaintiff's work, that none of the its employees were present at the worksite on the day of the accident, and that the Town relied on H2M to oversee the progress of the work. Plaintiff, who did not oppose the motion, failed to raise any triable issue warranting denial of the motion (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). Accordingly, the unopposed branch of Intercounty's motion for summary judgment dismissing the complaint as against the Town of Huntington is granted.

As to the motion by H2M for summary judgment dismissing the complaint and all cross-claims against it, having determined that Labor Law §§ 240 (1) and 241 (6) are inapplicable under the

circumstances of this case, the branches of the motion seeking dismissal of plaintiff's claim and the cross-claims predicated upon violations of those sections of the Labor Law are granted. It is noted that H2M submitted an affidavit by its Executive Vice President which states, among other things, that the Town did not enter any contract with H2M Construction Management in relation to the subject property. Further, a review of the agreement for consulting and engineering services entered by the Town and Holmacher, McLendon and Murrell did not name H2M Construction Management as a party, and was limited to design, observation and administrative services. Thus, plaintiff erroneously named H2M Construction Management as a party to the instant action. The claims and cross-claims against it, therefore, are dismissed.

H2M also established its *prima facie* entitlement to summary judgment dismissing plaintiff's common law negligence and Labor Law § 200 claims by demonstrating that its task as the project's engineer was merely to assure compliance with construction plans and specifications, that it had no contractual authority to direct or control the manner in which plaintiff performed his duties, and that it did not have actual or constructive knowledge of the alleged dangerous condition, or the alleged unsafe manner in which the work was being performed (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 877, 609 NYS2d 168 [1993]; ***Lombardi v Stout***, 80 NY2d 290, 295, 590 NYS2d 55 [1992]; ***Turner v Sano-Rubin Constr. Co.***, 6 AD3d 910, 911, 775 NYS2d 417 [3d Dept 2004]; ***Biance v Columbia Washington Ventures, LLC***, 12 AD3d 926, 927, 785 NYS2d 144 [3d Dept 2004]). In this regard, H2M submitted the affidavit of its Executive Vice President, which states that H2M did not perform any construction work or manage, operate, maintain or control the worksite, that H2M did not hire or engage any general or subcontractor to perform work at said worksite, that it had no involvement with the placement of the hose across the subject roadway, and that the contractors at the worksite, including plaintiff's employer, were responsible for the safety of their own employees. Thus, the unopposed branch of H2M's motion for summary judgment dismissing plaintiff's claims under common law negligence and Labor Law § 200 is granted.

Furthermore, H2M demonstrated that it was not actively at fault, played no part in causing or augmenting plaintiff's alleged injuries, and lacked the authority to control the method of plaintiff's work or the safety of the worksite. Therefore, the unopposed branch of H2M's motion for summary judgment dismissing the cross-claims against it for contribution and common law indemnification is granted (*see* ***McCarthy v Turner Constr., Inc.***, 17 NY3d 369, 929 NYS2d 556 [2011]; ***Cahn v Ward Trucking, Inc.***, 95 AD3d 466, 944 NYS2d 501 [1st Dept 2012]; ***Delahaye v Saint Anns School***, 40 AD3d 679, 836 NYS2d 233 [2d Dept 2007]; ***Landgaff v 1579 Bronx Riv. Ave., LLC***, 18 AD3d 385, 796 NYS2d 58 [1st Dept 2005]).

As to Pengat's motion for summary judgment dismissing the complaint and all cross-claims against it, having determined that Labor Law §§ 240 (1) and 241 (6) are inapplicable in this case, the unopposed branches of its motion seeking dismissal of plaintiff's claims and the cross-claims against it predicated upon alleged violations of those sections of the Labor Law are granted. With respect to plaintiff's remaining claims against Pengat based upon alleged violations of common law negligence and Labor Law § 200, Labor Law § 200 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 (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Haider v Davis***, 35 AD3d 363, 827 NYS2d 179 [2d Dept 2006]). It applies to owners, contractors, or their agents (***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]). "Where a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, an owner or contractor may be held liable in common-law negligence and under Labor Law § 200 if they had control over the work site and either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" (***Azad v 270 Realty Corp.***, 46 AD3d 728, 730, 848 NYS2d 688 [2d Dept 2007]; *see* ***Russin v Louis N. Piccado & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]; ***Ortega v Puccia***, *supra*; ***Chowdhury v Rodriguez***, 57 AD3d 121, 128, 867 NYS2d 123 [2d Dept 2008]; ***Kehoe v Segal***, 272 AD2d 583, 709 NYS2d 817 [2d Dept 2000]).

Here, Pengat failed to establish, as a matter of law, its entitlement to summary judgment dismissing plaintiff's claims pursuant to common law negligence and Labor Law § 200 (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986];***Winegrad v. N.Y. Univ. Med. Ctr.***, 64 NY2d 851,487 NYS2d 316 [1985]). Significantly, plaintiff testified that the hose was laid across the roadway by one of Pengat's employees, and that said Pengat employee failed to place a ramp over the hose in order to shield it from the wheels of oncoming vehicles. Although Pengat submitted deposition testimony by plaintiff's supervisor that he gave the instructions for the hose to be laid across the roadway, such conflicting testimony merely raises a triable issue as to whether Pengat created the alleged dangerous condition (*see* ***Winegrad v. N.Y. Univ. Med. Ctr.***, *supra*; ***Nasuro v PI Assoc., LLC***, 49 AD3d 829, 831, 858 NYS2d 175 [2d Dept 2008];***Van Salisbury v. Elliott-Lewis***, 55 AD3d 725, 867 NYS2d 454 [2d Dept 2008]; ***Lehner v. Dormitory Auth.***, 221 AD2d 958, 633 NYS2d 911 [4th Dept 1995]). Therefore, the unopposed branch of Pengat's motion for summary judgment dismissing the complaint against it is denied.

Inasmuch as plaintiff's claims against H2M and Intercounty have been dismissed, the unopposed branch of Pengat's motion seeking dismissal of their cross-claims against it for contribution and common law indemnification is denied, as academic. Nevertheless, Pengat is granted summary judgment dismissing H2M's cross-claims for breach of contract and contractual indemnification, as no evidence has been adduced that Pengat entered any agreement obligating it to indemnify or obtain such insurance on behalf of H2M.

Dated: July 20, 2012

Hon. Joseph Farneti
Acting Justice Supreme Court

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION