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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 114995/2008
MROCZKOWSKI, KAMIL
vs.
50 WEST 10TH STREET OWNERS,
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10/25/12

_____, J.S.C.
HON. EILEEN A. RAKOWER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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KAMIL MROCZKOWSKI,

Plaintiff,

Index No.
114995-2008

- against -

DECISION and ORDER

50 WEST 10TH STREET OWNERS, INC., DAMO CONSTRUCTION CO., INC., AND T&L CONTRACTING OF N.Y., INC.,

Mot Seq. 005, 006

Defendants.

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T&L CONTRACTING OF N.Y., INC.,

Third Party Plaintiff,

-against-

AMSTERDAM RESTORATION CORP.,

Third Party Defendant.

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HON. EILEEN A. RAKOWER:

Plaintiff brings this action to recover for injuries allegedly sustained when he was performing work at Fifty West 10th Street, New York, New York ("the Premises"), which is owned by 50 West 10th Street Owners, Inc. ("50 West"). 50 West contracted with general contractor, T&L Contractors ("T&L"), to do a gut renovation of a three story townhouse on the property. The plans included creating a basement where there had been none, and adding a fourth floor. The excavation and underpinning needed to add the basement were to be done by Damo Construction Co., Inc. T&L hired subcontractor Amsterdam Restoration Corp. ("Amsterdam") to repair

and repaint the elevation of the townhouse. Amsterdam required a sidewalk shed to be erected in connection with its work, and hired Inter Systems Corp. ("Inter Systems") to supply and assemble a scaffold and sidewalk shed.

At the time of his accident, Plaintiff was employed as a truck driver for Inter Systems. As a truck driver, Plaintiff's job was to deliver and/or pick up pieces of sidewalk bridges and scaffolds. On September 25, 2007, Plaintiff drove to 50 West 10th Street, New York, New York to pick up a sidewalk bridge that was being disassembled outside the Premises. Plaintiff describes working on the sidewalk while another employee of Inter Systems who was atop the sidewalk shed being dismantled, tossed materials down to him. First the co-worker tossed one crow bar, which plaintiff caught. After Plaintiff successfully caught the first crowbar, he "gestured" with his hand for the Inter Systems co-worker situated atop the sidewalk bridge not to toss the second crowbar because there was a pedestrian attempting to cross the area. Plaintiff says that he then turned his head toward the pedestrian to signal to her that it was safe for her to pass. As Plaintiff was gesturing towards the pedestrian, he states that he was struck on the head by the second crowbar. Plaintiff was not wearing a hard hat.

Plaintiff alleges in his complaint that Defendants violated Labor Law §200 and Labor Law §241(6) in that they failed to provide a safe place for him to work, and to provide him with protective apparel.

Labor Law §241(6) imposes a non-delegable duty upon contractors and owners of demolition and construction work sites. (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49 [1993]). It provides in relevant part,

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the person employed therein or lawfully frequenting such place. The commissioner may make rules to carry into effect the provisions of this

subdivision, and the owners and contractors and their agents for such work shall comply therewith.

T&L, the general contractor, now moves to dismiss the complaint in its entirety pursuant to CPLR §3212. 50 West, the owner, by separate motion, seek to dismiss all claims and cross-claims as against it, and/or summary judgment granting it contractual and/or common law indemnification from Defendant/Third-Party Plaintiff T&L. Plaintiff opposes both motions. T&L opposes 50 West's motion for contractual and common law indemnification.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

T&L, in support of its motion, provides the Verified Complaint, its Verified Answer, the Order impleading Amsterdam, the Order granting Amsterdam a Default Judgment, Plaintiff's Verified Bill of Particulars, the Preliminary Conference Order dated August 14, 2009, the Note of Issue, the deposition of Kamil Mroczkowski, the deposition of T&L, the deposition of Andrea Timpone, this court's Order dated September 27, 2011 granting Damo Construction Co.'s motion for summary judgment and dismissing all claims and cross-claims asserted against Damo Construction Co., the contract between 50 West and T&L, T&L's proposal for performing the work at the premises, Amsterdam's proposal for installation and removal of the sidewalk shed, and 50 West's Verified Answer.

50 West, in support of its motion provides the Verified Complaint, Verified Answers, the Third Party Summons and Complaint, the Deposition of Kamil Mroczkowski, the deposition and Affidavit of Merit of Andrea Timpone, a representative for 50 West, the deposition of Tadeusz Gawel, the President of T&L,

the Note of Issue, T&L's proposal for performing the work at the premises, Mr. Mroczkowski's workers compensation application, letters from 50 West requesting indemnity from T&L's general liability carrier West Heritage Insurance Co., and the contract between 50 West and T&L.

Labor Law §241(6) is applicable to owners, even where they were not active in the construction and did not supervise the work in question. (*Adimey v. Erie County ind. Dev. Agen.*, 89 NY2d 836 v. 652 NYS2d 724 [1996]). Yet "owners of one and two-family dwellings who contract for but do not direct or control the work," are excluded from liability provisions of Labor Law §241(6). (*Thompson v. Geniesse*, 62 AD3d 541, 880 NYS2d 19 [1st Dept 2009]; *Labor Law §241*). Whether the exemption is available turns on the site and purpose of the work being performed which results in injury. (*Khela v. Neiger*, 85 NY2d 333, 624 NYS2d 566 [1995]). When the site and purpose of the work being performed indicate that the work was performed solely in connection with the property's residential usage, a homeowner is covered under the exemption. (*Cannon v. Putnam*, 76 NY2d 644, 563 NYS2d 16 [1990]).

50 West provides the contract with T&L dated March 7, 2009, entitled "townhouse renovation", as well as the Affidavit of Andrea Timpone, an authorized representative of 50 West, which attests, "the purpose of the construction at the Premises was to convert the existing townhouse into a single-family dwelling to be used exclusively as a home for the family of 50 West's principal, David Sonnenberg." To prove that it did not direct or control Plaintiff's work, 50 West provides Plaintiff's deposition testimony which states that he never had any contact with a representative of 50 West, and that he received all of his work instructions from his boss, Silvester Savarin or foreman Robert. Inasmuch as the purpose of the construction was for residential usage and the construction was not directed or controlled by 50 West, 50 West is entitled to the protection of the single-family dwelling exception from liability.

Plaintiff's Labor Law §241(6) claims, which remain as to T&L, are premised upon NYCRR §23-2.1 Maintenance and Housekeeping and NYCRR §23-1.8(c)(1). NYCRR §23-2.1 states,

> (a) Storage of material or equipment. (1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under

all conditions and so located that they do not obstruct any passageway, walkway, stairway, or other thoroughfare.

(2) Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge.

Additionally, NYCRR §23-1.8(c)(1) provides,

(c)Protective Apparel. (1) Head protection. Every person required to work or pass within any area where there is a danger of being struck by falling objects or materials or where the hazard of head bumping exists shall be provided with and shall be required to wear an appropriate safety hat. Such safety hats shall be provided with liners during work in areas or at such times where the temperature is below 55 degrees Fahrenheit.

The accident that allegedly took place here was a result of a crowbar being tossed from one worker to another. There is no allegation that the crowbar accidentally fell off the edge of the platform . As such, NYCRR §23-2.1 (a)(1) and (2) cannot serve as a basis for a Labor Law §241(6) claim. The claim pursuant to NYCRR 23-1.8(c)(1) remains, as there is evidence that Plaintiff was not wearing proper headgear at the time of the accident.

Plaintiff also brings a Labor Law §200 cause of action against Defendants. Labor Law §200 codifies the common law duty of the owner or employer to provide employees with a safe place to work. In cases arising from the manner in which the work was performed, the owner or general contractor may only be held liable if it exercised supervision or control of the work that led to the injury. *(O'Sullivan v IDI Const. Co., Inc.*, 7 NY3d 805, 822 NYS2d 745 [2006]). In addition to a showing of supervision or control over the injury-producing work, a Plaintiff must also prove that Defendants had notice, either actual or constructive, of the defective condition which caused the accident, to prove a case under either Labor Law §200 or the common law. (*Ross v. Curtis Palmer Hydro Electric Co., Inc.*, 81 NY2d 494, 601 NYS2d 49 [1993]).

Plaintiff provides no evidence that the owner of the property, 50 West, directed, supervised or controlled the means or methods of Mr. Mroczkowski's work, or had notice of the dangerous condition that he did not wear a hard hat. Mr. Mroczkowksi testified that he did not have any contact with anyone affiliated with 50 West while he worked on the site. In fact, Mr. Mroczkowksi states in his deposition that he received his instructions from his boss Silvester Savarin or his foreman Robert. As such, there may be no Labor Law §200 cause of action against 50 West.

Likewise, T&L's alleges that it cannot be liable under Labor Law §200 because it did not supervise or control Plaintiff, as he was an employee of Inter Systems. T&L also points to Mr. Mroczkowski's deposition testimony, which again indicates that his instructions came from Silvestor Savarain or the foreman Robert. However, Mr. Gawel, the President of T&L, states in his deposition that he did, in fact, have the authority to direct workers to wear hard hats, to stop their work until they corrected a hazardous condition, and that there actually had been times that he had corrected hazardous conditions on this very job site in the past. Mr. Gawel admits that he was not present during the incident. However the fact that neither Mr. Gawel, nor anyone else from T&L, were present at the site, does not relieve T&L of its obligation to keep the work site and workers safe under Labor Law §200. Therefore, a question of fact exists as to whether T&L may be found liable under Labor Law §200.

Wherefore, it is hereby,

ORDERED that 50 West 10th Street's motion for summary judgment is granted in its entirety; and it is further,

ORDERED that all claims and cross-claims asserted against 50 West 10th Street are dismissed with costs and disbursements, and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED that T&L's motion for summary judgment is granted to the extent that Plaintiff's Labor Law §241(6) cause of action pursuant to NYCRR §23-2.1 (a)(1) and (2) is dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: October 25, 2012

EILEEN A. RAKOWER, J.S.C.