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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARYLIN G. DIAMOND PART 48
Justice

STANISLAW BAJOR,

Plaintiff,

- v -

75 EAST END OWNERS, INC. et al.,

Defendants.

And Third-Party Action.

INDEX NO. 104873/08

MOTION DATE

MOTION SEQ. NO. 007

MOTION CAL. NO.

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that: Motion sequence numbers 007 and 008 are consolidated herein for decision. This is a personal injury action arising out of an accident which occurred on October 3, 2006 while the plaintiff Stanislaw Bajor, a carpenter employed by Dalwat Construction Corp., was working on a renovation project in an apartment located in a cooperative residential building on East End Avenue in Manhattan. At the time of the accident, plaintiff was operating a table saw which was not equipped with a blade guard or spreader, a device that prevents wood from being violently propelled toward the operator of the saw. The wood plaintiff was cutting kicked back, causing him to lose control of the saw, the unguarded blade of which came into contact with plaintiff's left hand. Plaintiff's left thumb and middle finger were partially amputated.

The complaint asserts causes of action under Labor Law §§ 200 and 241(6), as well as under the principles of common law negligence. The defendants include the cooperative corporation which owns the building (75 East End Owners, Inc.), the proprietary lessee of the apartment (Yvette Fromer, s/h/a Y Fromer), and the general contractor of the project (Renotal Construction Corp.). In their respective answers, Fromer and 75 East End have each asserted cross claims against Renotal for indemnification. In addition, 75 East End has asserted a cross claim against Fromer for indemnification and Renotal has brought a third-party action against plaintiff's employer, Dalwat.

In motion sequence number 007, Fromer moves, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims against her or, alternatively, for conditional summary judgment on her contractual indemnification claim against Renotal. In motion sequence number 008, plaintiff moves for partial summary judgment as against 75 East End and Renotal on the issue of liability under Labor Law § 241(6). Renotal has cross-moved for summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims as against it. 75 East End cross-moves for summary judgment dismissing all claims and cross claims as against it or, alternatively, for conditional summary judgment on its common law indemnification claim against Renotal.

Discussion

A. Labor Law § 200 and Common Law Negligence - - Fromer, 75 East End and Renotal each seek summary judgment on the issue of their liability under Labor Law § 200 and the common law. Labor Law § 200 codifies the common-law duty of employers to provide a safe place to work for their employees, and extends that duty to the owners of the building where the work is taking place and the general contractor. *See Gasper v Ford Motor Co.*, 13 NY2d 104, 110 (1963). Where the alleged defect or

dangerous condition arises from the methods being used and the owner or general contractor exercise no supervisory control over the operation, no liability attaches under the common law or under Labor Law § 200. *See Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 (1993). The First Department has specified that the showing essential to support liability pursuant to this analysis is whether the defendant oversaw or controlled the "manner or method" of the work in which plaintiff was engaged at the time of his injury. *DeSimone v Structure Tone*, 306 AD2d 90, 91-92 (1st Dept 2003). Liability is not triggered for either common law negligence or Labor Law § 200 when a defendant gives general instructions as to what needs to be done, as opposed to how to do it. *See O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 226 (1st Dept), *aff'd*, 7 NY3d 805 (2006).

As an initial matter, plaintiff opposes all three applications for summary judgment on the ground that the depositions that support these motions are not signed. This argument is without merit. Where, as here, an unsigned transcript is certified by the reporter and the plaintiff does not challenge its accuracy, the transcript may be considered for the purposes of evaluating a summary judgment motion. *See Bennett v Berger*, 283 AD2d 374, 375 (1st Dept 2001).

As to the merits, Fromer argues that she is entitled to summary judgment with respect to plaintiff's negligence and Labor Law § 200 claims because she did not supervise or control plaintiff's work. In support of this argument, Fromer refers to her own deposition testimony, in which she stated that she only visited the work site two or three times prior to moving to New York from California in late October, 2006. Although plaintiff, in opposing Fromer's application, argues that there is a question of fact as to whether she had "the authority to supervise the work," he has not submitted any evidence which suggests that she did. His reliance on the deposition testimony of Renotal foreman Miroslaw Sieminsky to show that Fromer "spent on the job site a lot of time" is misplaced since Sieminsky was clearly referring to the period after Fromer's move to New York from California, which took place subsequent to the plaintiff's accident. Since there is no evidence that Fromer was negligent, the plaintiff's section 200 and negligence claims against her must be dismissed.

As to the owner 75 East End, it, too, argues that it did not supervise or control the manner of plaintiff's work. It relies on the deposition testimony of Mark Roytman, its superintendent, who testified that he inspected the work site only to ensure that work was being done in accordance with the plans and specifications for the project, and that this inspection was usually conducted either before the workers arrived or after they left. He claimed that he therefore did not supervise any of this work. Since plaintiff has not submitted any evidence to the contrary, 75 East End's motion to dismiss plaintiff's section 200 and negligence claims against it must be granted.

As to Renotal, the general contractor, its motion relies on the deposition of its employee, foreman Sieminsky, who testified that he never controlled the means or methods of Dalwat's work at the job site and that he never discussed with Dalwat's supervisors how their employees were doing their work. Renotal contends that it had, at most, general supervisory powers at the site, which related primarily to coordination of trades and schedules, rather than the manner and methods of plaintiff's or Dalwat's work. It points out that plaintiff himself, at his deposition, testified that he received all of his instruction from his Dalwat supervisor, rather than from Renotal. In opposition, plaintiff argues that there are issues of fact with regard to Renotal's control of plaintiff's work, since Renotal admittedly supervised the work of the subcontractors, was responsible for worker safety on the job site and had the authority to stop the work if it observed a dangerous condition. However, although Renotal may have had a supervisory role over Dalwat, there is no evidence on the record that Renotal told Dalwat or plaintiff how to conduct their carpentry responsibilities on the job. *See Hughes v. Tishman Constr. Corp.*, 40 AD3d 305 (1st Dept 2007). Under the circumstances, Renotal's motion for summary judgment dismissing the plaintiff's Labor Law § 200 and common law negligence claims against must also be granted.

B. Plaintiff's Labor Law § 241(6) Claim -

1. As Against Fromer - - As a threshold matter, Fromer seeks dismissal of plaintiff's claim against her under Labor Law § 241(6) based upon the fact that the work at issue herein was performed at a one-family dwelling. Under section 241(6), an owner of a one-or-two family dwelling is subject to liability only if he or she directed or controlled the work being performed. Here, Fromer, argues that she falls within this exemption because she is the owner/proprietary lessee of a one-family dwelling and did not direct or control the renovations done to the dwelling. Since the court has already concluded that there is no evidence that Fromer directed or controlled the work at issue herein, she is clearly entitled to the exemption. Her motion for summary judgment dismissing plaintiff's section 241(6) claim as against her must therefore be granted.

2. As Against 75 East End and Renotal - - As to the merits of plaintiff's section 241(6) claim against 75 East End and Renotal, to prevail under this statute, the plaintiff is required to establish a violation of an applicable Industrial Code provision which sets forth a specific standard of conduct. *See Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 504-05 (1993). Here, the plaintiff has cited two provisions, 12 NYCRR 23-1.12(c)(2) and 23-1.12(c)(3). Although plaintiff's amended bill of particulars also alleges a violation of 12 NYCRR 23-9.2, he does not invoke this provision on his motion for partial summary judgment and it must therefore be deemed to have been abandoned. *See Musillo v Marist College*, 306 AD2d 782, 784 (3rd Dept 2003).

As to the two cited provisions, 12 NYCRR 23-1.12 (c)(2) mandates that every power-driven saw, other than a portable saw, "shall be equipped with a guard which covers the blade to such an extent as will prevent contact with the teeth." It also requires that each saw within its ambit contain "a cut-off switch within easy reach of the operator without his leaving the operating position." Similarly, 12 NYCRR 23-1.12(c)(3) provides that every table saw used for ripping "shall be provided with a spreader securely fastened in position and with an effective device to prevent material kickback." Both of these provisions are clearly sufficiently specific so as to support a Labor Law § 241(6) claim. Moreover, both provisions have clearly been violated. It is undisputed that the table saw which caused plaintiff's injuries had no guard or spreader. Nor is it disputed that the wood plaintiff was cutting kicked back, causing his fingers to come in contact with the unguarded blade.

In its opposition papers and on its cross-motion, 75 East End argues that it cannot be liable to the plaintiff under section 241 (6) claim because it did not supply the table saw to plaintiff. This argument is without merit since an owner's duty under section 241(6) is nondelegable. *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 (1998).

Pointing out that comparative negligence constitutes a valid defense to a Labor Law § 241(6) claim, *see Edwards v. C&D Unlimited, Inc.*, 295 AD2d 310, 311 (2nd Dept. 2002), Renotal argues that there is an issue of fact with regard to whether plaintiff was negligent so as to contribute to the accident. Specifically, Renotal contends that plaintiff was aware that he was using an unguarded saw and that doing so was unsafe. This argument is without merit. Labor Law § 241(6) places the burden to outfit construction sites with safe equipment on owners and contractors, rather than laborers. *See Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 (1985). In view of this imposition of responsibility, a worker cannot be found negligent by merely using unsafe equipment such as an unguarded saw which has been provided to him where no alternative piece of equipment was otherwise available. The plaintiff is therefore entitled to partial summary judgment on the issue of liability under Labor Law § 241(6) as against 75 East End and Renotal.

C. Indemnification Claims Against Renotal - - In view of this court's decision herein dismissing all claims against Fromer, her motion for conditional summary judgment against Renotal based on contractual indemnity must be denied as moot.

As to 75 East End, it seeks conditional summary judgment on its claim against Renotal for common law indemnification. It is well settled that an owner whose liability under the Labor Law is solely vicarious is entitled to common law indemnification from a contractor only if the plaintiff's injuries were caused solely by the contractor's negligence. *See Chapel v Mitchell*, 84 NY2d 345, 347 (1994); *Tapia v. 126 First Avenue, LLC.*, 282 AD2d 220 (1st Dept. 2001). Since this court has already found that there is no evidence that Renotal was negligent, 75 East End's motion must be denied.

Accordingly, in motion sequence number 007, Fromer's motion for summary judgment is granted to the extent that all claims and cross claims against her are hereby dismissed. The motion is otherwise denied. In motion sequence number 008, plaintiff's motion for partial summary judgment as against 75 East End and Renotal on the issue of liability under Labor Law § 241(6) is hereby granted. Renotal's cross-motion for for summary judgment is granted and plaintiff's Labor Law § 200 and common law negligence claims as against it are hereby dismissed. 75 East End's cross-motion for summary judgment is granted to the extent that plaintiff's Labor Law § 200 and common law negligence claims as against it are hereby dismissed. The motion is otherwise denied.

ENTER ORDER

Dated: 12/3/10

MARYLIN G. DIAMOND, *J.S.C.*

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION