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SHORT FORM ORDER

COPY

INDEX No. 09-41347
CAL. NO. 10-02324OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL M. MARTIN
Justice of the Supreme Court

MOTION DATE 3-24-11
ADJ. DATE 8-1-11
Mot. Seq. # 001- MotD

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JAMES KUMMER,

Plaintiff,

- against -

JOANNA VIGNIERI,

Defendant.

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Upon the following papers numbered 17 read on this motion for summary judgment and cross motion for discovery; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 10 ; Notice of Cross Motion and supporting papers_; Answering Affidavits and supporting papers 11-15 ; Replying Affidavits and supporting papers 16-17 ; Other_; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by the defendant Joanna Vignieri pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted only to the extent that the cause of action premised upon the alleged violation of Labor Law §240 is dismissed.

James Kummer seeks damages for personal injury arising out of an incident which allegedly occurred on April 18, 2009 at the defendant's home at 390 Cadman Avenue, West Babylon, New York, while the plaintiff was using a table saw to cut wood. It is claimed that the wood kicked back and caused injury to the plaintiff's hand. The complaint sets forth causes of action premised upon common law negligence, violation of Labor Law §§ 200, 240, and 241(6) based upon the alleged violation of 12 NYCRR §§ 23-1.5. 23-1.7, 23-1.10. 23-1.12. 23-1.12 (c) (2) and 23-1.12 (3). The plaintiff claims that he was employed by the defendant Joanna Vignieri at the time of the accident.

The defendant seeks summary judgment dismissing the plaintiff's claim under Labor Law §§ 200, 241, and 241(6) on the bases that plaintiff's job did not involve any elevation related activity, the defendant did not direct or control the plaintiff's work, the defendant did not have notice of any defects existing in the table saw, and the plaintiff is barred by the single/two-family homeowner's exception pursuant to Labor Law §§ 240 and 241(6) .

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of this motion, the defendant has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, answer, and plaintiff's bill of particulars; signed transcripts of the examinations before trial of James Kummer dated June 28, 2010, Joanna Vignieri and, and Joseph Bucaro, both dated August 25, 2010; and the affidavit of Joanna Vignieri dated February 22, 2011.

James Kummer testified that the accident occurred on April 18, 2009, at 390 Cadman Avenue, West Islip, in the basement of the home owned by Joanna Vignieri, whom he knew for about two years prior to the accident. He had been to her home one time prior to April 2009, when she asked him to do some painting and to work on the ceiling in her basement. They agreed he would start the work the following day and she indicated she would pay him $100 a day. He continues that she did pay him that amount every couple of days while he was working there and that no one else ever paid him for the work he did. He went to her home, described as a two-story home, and determined that the basement needed a drop ceiling, lighting, and possibly some painting. There had been previous construction in the basement however, the work had not been completed. He worked at the defendant's house in the basement for about three weeks on a daily basis, five days a week. During that three week period, the defendant asked him to do some work upstairs as her daughter moved out from the upstairs apartment. The defendant advised him that she wanted the apartment ready for inspection by the Village of Babylon, so that it could be rented.

Kummer testified that the upstairs apartment consisted of two bedrooms, a bathroom, a kitchen, and a living room. He indicated that it needed painting and sprucing up, and that the door jamb to one of the bedrooms was falling apart and needed to be repaired. On the date of the accident, he was repairing the doorjamb. He removed the trim, or molding around the door, and determined that it needed a piece of filler wood between the two-by-four and the doorjamb, and advised the defendant accordingly. He stated that the defendant told him that there were pieces of two-by-fours and a table saw in the basement. He further testified that he did not advise her that he had not previously performed that kind of work, and the defendant did not ask him if he had any experience to do this job. Kummer testified that the only type of power equipment he previously used was a reciprocating saw, a Saws-All, and, possibly, a circular saw. He had previously worked as an electrician for twenty three years prior to his having been recently laid off. Prior to

the date of the accident, he did not use any power tools at the defendant's house and used his own hand tools.

Kummer continued that at some point that morning the defendant left the house. He went into the basement to get a two-by-four piece of lumber to make the filler pieces. He stated he remembered that when he started to work at the defendant's home, the defendant said there were tools in the basement, and if he needed to use any of the other tools, to help himself. He cleared the table of the table saw, which was the only saw available. Although he had observed carpenters using saws at his previous job, he testified that he had never used a table saw before, and, thus, had no familiarity with it. There were no operating instructions available, and he did not seek anyone's advice before attempting to use the table saw.

Kummer testified that he then adjusted the arm on the table saw for a one inch thickness. After he raised the blade, which was in the slot below the table top, he locked the bar. He plugged in the power cord and turned on the table saw. The blade started turning. He put an eighteen inch piece of two-by-four against the metal guard and started feeding it through, "nice and easy." When he came to the very end of the two-by-four, he reached for a pusher stick, which he had ready to use. He testified that he had seen Norm Abrams on television use a pusher stick to push wood forward when using a table saw. He was going to use the pusher stick to push the two-by-four through to the end, but the two-by-four bucked. One piece of the two by four hit him in the stomach, and the other piece hit him in his hand, causing injury to his hand. He wrapped his shirt around his bleeding hand, turned off the saw, unplugged it, and drove himself to the hospital. A day or so later, he returned to the defendant's house. Kummer testified that the defendant asked him to finish the work he was doing. He stated that she told him, "By the way, the safety guard and the other pieces are in the other room on a shelf somewhere." He also testified that she did not tell him about any safety equipment before he used the saw.

By way of her supporting affidavit, Joanna Vignieri states that the subject table saw was owned by her boyfriend Joseph Bucaro. The table saw was stored in the basement of her two-family home located at 390 Cadman Avenue, West Babylon. She continued that she has no construction background or knowledge of how a table saw worked and has never operated one. Prior to the accident, she had no knowledge that any safety devices existed on the table saw, or that they had been removed. She states that although she testified at her deposition that she observed a plastic piece associated with the table saw prior to the accident, she had no knowledge as to its purpose.

Joanna Vignieri testified at her examination before trial that the upstairs apartment had been created for family use so that her mother could live downstairs. Seven years ago, Joseph Bucaro moved in with her. He was finishing the basement, built walls, put up sheet rock, and put in some ceiling tiles, but did not complete it. He stored his tools in the basement with her tools. Her daughter had been living in the upstairs apartment and moved out in February 2009. She obtained a rental permit from the Town about ten years prior for the purpose of renting the apartment. The permit had to be renewed every several years, and an inspector had to come to the house to conduct a safety check. She testified that she had never asked Kummer to renovate or make any repairs to the upstairs apartment, and that she never asked him to do any type of work at her home prior to April 18, 2009. She testified that she never hired Kummer to do any work at her home. She said Kummer came to her house about five times to vent about his girlfriend, who was her friend, and to speak with her boyfriend, Bucaro. She stated that Bucaro was in charge of any work that was

done in the house, and that he had her permission to do whatever he wanted. When asked if she gave Bucaro permission to hire someone to do work in the house, she replied that he would never hire someone to work in the house because he did the work himself. She did not recall if Kummer ever performed any wood work in the house. She stated she never asked him, and he never asked her, to work for her at the house.

The defendant also testified that she had previously observed the table saw in the basement and noted there were plastic parts of the table saw shuffled about in the basement. When she asked Bucaro about the parts, he told her they were for the table saw. She testified that she never discussed the table saw with Kummer before the accident. She learned of the accident when informed by her niece who was visiting at the house. When she went into the basement, she saw blood on the steps and on the floor. She had no idea what Kummer cut his hand on. When he later told her he was cutting wood, she did not ask him why, or what he was doing. She could not recall why Kummer was at her house that day.

Joseph Bucaro testified to the effect that he was no longer living with Joanna Vignieri and moved out approximately two months prior to his testifying. They have a four year old daughter together. He stated he knew Kummer for a couple of years. In about March 2009, about a month before the incident, Kummer started coming to the defendant's home to vent about his girlfriend who knew the defendant. During the six or seven years that he lived with the defendant, there were about three or four different tenants who rented the upstairs apartment. While he lived there, he finished the basement and did repairs on the apartment as the tenants moved out. Doors had to be changed due to damage. He replaced moldings in the apartment and stated Kummer helped him with the moldings. They attempted to hang a drop ceiling in the basement together. He stated the defendant saw Kummer helping him work at the house and she never offered him money for the work he was doing, although they were aware he was out of work. Bucaro testified that he never hired Kummer to do any work at the defendant's home. On the date of the incident, he was with the defendant at a hospital visiting his son.

Bucaro stated that when the defendant's daughter moved out, the defendant hired someone to make renovations to the house, but he did not know who that person was. He had purchased the table saw involved in the incident and had previously used it at his own home. The table saw was kept in the basement at the defendant's home and he used it to finish her basement. There were safety devices and guards for the saw. The plastic guard was to be kept over the blade when it was being used, but he had taken it off because it got in his way. There were instructions which came with the machine, but he never read them. He stated that neither he nor the defendant gave instructions to Kummer concerning the use of the table saw. He did not believe the defendant ever told Kummer he could not use the saw. While Bucaro's son was in the hospital, he believed Kummer grouted the upstairs bathroom. Kummer never purchased any equipment or materials for the work he did.

Here the conflicting testimonies raise factual issues concerning whether or not the defendant hired the plaintiff to perform work at her home. A further issue exists as to whether the defendant is entitled to the one or two-family owner exemption provided for claims premised upon Labor Law §240(1) and 241(6). Such determination turns on whether the defendant directed and controlled the manner and method of the plaintiff's work. There are also factual issues concerning whether or not the defendant provided the plaintiff with the table saw to use when he was working at her home, and whether she was actual or constructive notice of an unsafe condition of the table saw relative to the removal of the safety guard.

COMMON LAW NEGLIGENCE AND LABOR LAW §200

Liability for causes of action sounding in common law negligence and for violations of Labor Law §200 is limited to those who exercise control or supervision over the plaintiff's work, or who have actual or constructive notice of an unsafe condition that causes an accident (***Aranda v Park East Constr.,*** 4 AD3d 315, 772 NYS2d 70 [2d Dept 2004]; ***Akins v Baker,*** 247 AD2d 562, 669 NYS2d 63 [1998])" (***Marin v The City of New York, et al,*** 15 Misc3d 1003A, 798 NYS2d 710 [Sup. Ct., Kings County 2004]). An implicit precondition to the common-law duty imposed upon an owner or general contractor to provide construction workers with a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury and have actual or constructive notice of the alleged unsafe condition (***Ramos v HSBC Bank et al,*** 29 AD3d 435, 815 NYS2d 504 [1st Dept 2006]). In order to prevail on a claim under Labor Law §200, a plaintiff is required to establish that a defendant exercised some supervisory control over the operation (***Mendoza v Cornwall Hill Estates, Inc.,*** 199 AD2d 368, 605 NYS2d 308 [2d Dept 1993]).

Labor Law §200 provides in pertinent part that "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded and lighted as to provide reasonable and adequate protection to all such persons...." (***Trbaci v AJS Construction Project Management, Inc, et al,*** 2009 NY Slip Op 50153U; 22 Misc3d 1116A [Sup. Ct., Kings County 2009). "New York State Labor Law §200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work" (***Kim v Herbert Constr. Co.,*** 275 AD2d 709, 713 NYS2d 190 [2d Dept 2000]).

"In New York, to establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. In order to establish the third element, proximate cause, plaintiff must show that defendant's negligence was a substantial factor in bringing about the injury. A landowner will be liable for violation of Labor Law §200 and common-law negligence when the injuries complained of fall into one of two broad categories: either a dangerous condition on the premises, or in the manner in which the work was performed.... If the cause of the loss involves a defect in the premises, the owner may be liable where he either created the dangerous condition, or had actual or constructive notice of the condition.... If the issue is the manner of work, no liability will attach to an owner even if he or she had notice of the unsafe manner in which the work was being conducted unless the owner had the authority to supervise or control the performance of the work.... A defendant has the authority to supervise or control the work for purposes of Labor Law §200 when that defendant bears the responsibility for the manner in which the work is performed.... Having control over the manner in which work is performed includes having control over the provision of, and safety of, the tools necessary to do the work. An owner, therefore, cannot be held liable for defective equipment where it did not provide the equipment or have the authority to supervise or control the provision of the equipment" (***Silva v The City of New York,*** 23 Misc3d 1122A, 886 NYS2d 72 [Sup Ct, County of Kings 2009]).

"The common law duty of an owner to provide a safe place to work, as codified by Labor Law §200(1), has been extended to include the tools and appliances without which the work cannot be performed

and completed.... A basic, underlying ground for the imposition of any liability under both Labor Law §200 and the common law is the authority of the defendant to remedy the dangerous or defective condition at issue. Accordingly, when a worker's injury results from his or her employer's own tools or methods, it makes sense that a property owner be liable only if possessed of authority to supervise or control the work, since the defendant is vested with the authority to remedy any dangers in the methods or manner of the work. Similarly, if a worker's injury results from a dangerous or defective premises condition, it logically follows that a property owner's liability should be predicated upon evidence of the owner's creation of the condition or actual or constructive notice of it, since the property owner in charge of the site has authority to remedy any dangers or defects existing at its own premises.... Where a property owner provides a worker with a dangerous or defective piece of equipment, having either created the dangerous or defective condition or having actual or constructive notice of it, the owner is possessed of the authority to remedy the condition. Remedial efforts do not involve control over the work per se, but instead involve control over the dangerous or defective device akin to the property owner's authority to remedy dangerous or defective premises condition.... When a defendant property owner lends allegedly dangerous or defective equipment to a worker that causes injury during its use, the defendant moving for summary judgment must establish that it neither created the alleged danger or defect in the instrumentality nor had actual or constructive notice of the dangerous or defective condition." (***Chowdhury v Rodriquez et al,*** 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]; *see also* ***McFadden v Lee et al,*** 62 AD3d 966, 880 NYS2d 311 [2d Dept 2009]).

Here, there are factual issues concerning whether or not the defendant hired the plaintiff to perform work at her home, whether she controlled or supervised the plaintiff, whether she provided the table saw to the plaintiff to use, and whether she failed to provide the safety devices and guards for the table saw to the plaintiff for his use. Because the defendant has not established prima facie that she did not employ the plaintiff, did not supervise or control the plaintiff's work, did not provide the table saw for his use, or that she was unaware of the dangerous condition of the table saw without the guard, summary judgment dismissing any claims for common law negligence and Labor Law §200 is precluded (*see* ***Garcia v Petrakis***, 306 AD2d 315, 760 NYS2d 551 [2d Dept 2003]).

Accordingly, to the extent that movant seeks summary judgment dismissing the plaintiff's claims premised upon common law negligence and alleged violation of Labor Law §200, the motion is denied.

LABOR LAW §240

"New York State Labor Law §240 (1) is applicable to work performed at heights or where work itself involves risks related to differentials in elevation" (*see* ***Plotnick et al v Wok's Kitchen Incorporated, et al,*** 21 AD3d 358, 800 NYS2d 37 [2d Dept 2005]; ***Handlovic v Bedford Park Development, Inc.,*** 25 AD3d 653, 811 NYS2d 677 [2d Dept 2006]). Labor Law §240 (1) was enacted to "prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (***Cruz v The Seven Park Avenue Corporation et al,*** 5 Misc3d 1018A, 799 NYS2d 159 [Sup Ct, Kings County 2004]).

In ***Ortega et al v Puccia et al,*** the court held that Labor Law §240 is intended to protect workers from gravity-related occurrences stemming from the inadequacy or absence of enumerated safety devices

(2008 NY Slip Op 8350, 2008 NY App Div Lexis 8140 [2d Dept October 28, 2008]). The duties articulated in §240 are nondelegable, and liability is absolute as to the general contractor or owner when its breach of the statute proximately causes injury. The duties articulated in §240 are nondelegable, and liability is absolute as to the general contractor or owner when its breach of the statute proximately causes injury (see ***Ortega et al v Puccia et al,*** *supra).*

The owner of a one or two-family residence is not subject to liability under Labor Law §240(1) unless the plaintiff can establish that the owner directed or controlled the manner or method of plaintiff's work. An owner's conduct in furnishing materials, expressing dissatisfaction with the work, directing the plaintiff to redo certain work, performing some of the work, and in generally planning which area of the home would be painted on a particular day does not amount to direction and control of the plaintiff's work (***Kostyj v Babiarz***, 212 AD2d 1010, 624 NYS2d 708 [4th Dept 1995]).

Although there are factual issues concerning whether the plaintiff was hired by the defendant and whether the defendant provided a defective table saw for the plaintiff's use, the facts alleged are not within the purview of Labor Law §240 as there is no allegation of a gravity related occurrence.

Accordingly, that portion of the motion which seeks summary judgment dismissing on the cause of action premised upon the defendant's alleged violation of Labor Law §240 is granted as a matter of law.

LABOR LAW §241(6)

New York State Labor Law §241(6) provides in pertinent part that "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 persons employed therein or lawfully frequenting such places." It is axiomatic that the statutory duties imposed by New York State Labor Law §241(6) place ultimate responsibility for safety practices on owners of the worksite and general contractors (***Bopp v A.M. Rizzo Electrical Contractors, Inc. et al,*** 19 AD3d 348, 796 NYS2d 153 [2d Dept 2005]).

Labor Law §241(6) places a nondelegable duty upon owners and their agents to comply with the specific safety rules set forth in the Industrial Code (***Ross v Curtis Palmer Hydro-Elec. Co.,*** 81 NY2d 494, 601 NYS2d 49). Unlike Labor Law §200, Labor Law §241(6) does not require the plaintiff to show that the defendant exercised supervision or control over the worksite (***Mendoza v Cornwall Hill Estates,*** 199 AD2d 368, 605 NYS2d 308 [2d Dept 1993]). "Thus once it has been alleged that a concrete specification of the Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused plaintiff's injury. If proven, the general contractor (or owner, as the case may be) is vicariously liable without regard to his or her fault" (***McDevitt et al v Cappelli Enterprises, Inc. et al***, 16 Misc3d 1133A, 847 NYS2d 903 [Sup. Ct., New York County 2007]). Here the plaintiff has claimed violations relating to 12 NYCRR 23-1.5. 23-1.7, 23-1.10. 23-1.12. 23-1.12(c)(2) and 23-1.12(3). It is noted that the applicable violations relating to the use of a table saw are covered under 12 NYCRR §§ 23-1-12 (2) and (3).

Labor Law §241(6) provides in pertinent part that owners of one and two-family dwellings who contract for but do not direct or control the work are excepted from this provision of the statute. In that there are factual issues concerning whether the defendant hired the plaintiff, whether she directed or controlled the manner and method of the plaintiff's work by permitting the plaintiff to use the allegedly unguarded table saw, it cannot be determined as a matter of law whether she is entitled to the aforementioned exemption.

Based upon the foregoing, the moving defendant has not demonstrated prima facie entitlement to dismissal of that part of the complaint premised upon the alleged violation of Labor Law §241(6) and the specific sections of the Industrial Code of the State of New York 12 NYCRR 23. The adduced testimonies establish that the plaintiff used the table saw located in the plaintiff's basement. There are factual issues concerning whether or not the plaintiff was employed by the defendant to perform work at her home and whether the plaintiff was given permission by the defendant or her agent to use the table saw if he needed it for his work. The plaintiff claims he was employed by the defendant and that he was paid $100 a day for the work he performed. The defendant claims that she did not hire the plaintiff, that Bucaro was in charge of the repair work and construction at the house, and that he did not hire anyone to do the work. There are factual issues concerning whether Bucaro was acting as an agent on behalf of the defendant, and who, if anyone, instructed the plaintiff to use the table saw. Although Labor Law §§ 200 and 241 now make nondelegable the duty of an owner or general contractor to conform to the requirement of those sections, the duties themselves may in fact be delegated. When work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an agent under §§ 240 and 241 (*see* ***Russin v Picciano & Son***, 54 NY2d 311, 445 NYS2d 127 [1981])

Accordingly, that part of motion which seeks summary judgment dismissing the cause of action premised upon the alleged violation of Labor Law §241(6), based upon the alleged violation of the specific sections of the Industrial Code of the State of New York 12 NYCRR 23, is denied.

While the plaintiff has opposed this motion for summary judgment with expert affirmations, such affirmations concerning the safety of the saw and compliance with the applicable rules and regulations is not dispositive as to the factual issues which preclude summary judgment.

Dated: 9/30/11

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**