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SHORT FORM ORDER

INDEX No. 08-16044
CAL No. 10-01903OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 2-7-11 (#002)
MOTION DATE 4-20-11 (#003)
ADJ. DATE 5-11-11
Mot. Seq. # 002 - Mot D
003 - XMG

---X

RITO MEZA,

Plaintiff,

- against -

29 WEST POND DEVELOPMENT, LLC and HARRIS CONSTRUCTION, INC.,

Defendants.

---X

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---X

HARRIS CONSTRUCTION, INC.,

Third-Party Plaintiff,

- against -

D & G HOME IMPROVEMENT, INC.,

Third-Party Defendant.

---X

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Upon the following papers numbered 1 to 24 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10 ; Notice of Cross Motion and supporting papers 11 - 17 ; Answering Affidavits and supporting papers 18 - 19; 20 - 21; Replying Affidavits and supporting papers 22 - 24 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Harris Construction, Inc. for summary judgment dismissing plaintiff's complaint is decided as follows; and it is further

ORDERED that the cross motion by plaintiff for partial summary judgment on the issue of liability under Labor Law §240 (1), is granted.

Plaintiff Rito Meza commenced this action to recover damages pursuant to Labor Law §§ 200, 240(1) and 241(6) for personal injuries he allegedly sustained on November 21, 2005 while working at a construction site owned by nonparty Field of Dreams, LLC. Plaintiff allegedly was injured when the scaffold on which he was standing collapsed to the ground. At the time of the accident, plaintiff was an employee of D&G Home Improvement Co. (hereinafter "D&G"), a subcontractor hired by defendant Harris Construction, Inc. to install roofing on the premises. Harris Construction was the general contractor for the construction project. Plaintiff's complaint also names 29 West Pond Development, LLC as a defendant. However, as neither plaintiff nor Harris Construction could identify 29 West Pond Development, they executed a stipulation, dated March 24, 2010, discontinuing the action and any cross claims against it. On or about April 9, 2010, Harris Construction commenced a third-party action for common law and contractual indemnification against D&G. Harris Construction subsequently moved for an order of default granting it judgment against D&G, which has not appeared in the action. By order of the Court (J. Jones) dated December 22, 2010, the motion was denied based on Harris Construction's failure to comply with the notice requirements of CPLR 3215 (g)(4).

Harris Construction now moves for summary judgment dismissing plaintiff's complaint on the grounds it had no actual or constructive notice of the alleged dangerous condition that caused plaintiff's accident, and that it did not have any control or supervision of plaintiff's work at the time of his accident. Harris Construction further asserts that plaintiff's claim under Labor Law § 241(6) must be dismissed, as the sections of the New York Industrial Code cited in his complaint, which relate to hazardous openings, the presence of safety railings, safety nets and ladders, are inapplicable to the instant matter. Additionally, Harris Construction argues that citations issued at the construction site alleging violation of regulations promulgated by the Occupational Safety and Health Administration ("OSHA") do not provide a basis for liability under Labor Law § 241(6), since the OSHA violations were issued to D&G and only relate to its duty to its own employees. In opposition, plaintiff cross-moves for summary judgment in his favor on the Labor Law § 240 (1) claim, arguing, among other things, that the mere collapse of the subject scaffold is *prima facie* proof of Harris Construction's liability under the statute.

At his examination before trial, plaintiff testified that he did not see who constructed the subject scaffold, and that it was already erected when he arrived at the construction site at approximately 7:30 a.m on the day of the accident. Plaintiff testified he did not see anyone on the scaffold when he arrived, and that he assumed it belonged to defendant, because his boss did not have any scaffolds at the construction site. Plaintiff testified that he was the only one on the scaffold at the time of his accident, that he was standing on it for two or three hours before the incident, and that the entire scaffold collapsed when a co-worker on the roof of the building attempted to climb down on to it. Plaintiff further testified that he did not inspect the scaffold to ensure it was attached to the building via an iron bar, as required by safety rules, before climbing on to it.

At his examination before trial, David Harris, president of the Harris Construction, testified that he advised D&G and its employees they would not be required to perform any work on the on the day of the accident, as he was closing the construction site due to his father's hospitalization. Harris testified that

under his agreement with D&G, it was responsible for its own equipment and safety devices, including scaffolds. He further testified he believed that D&G's employees impermissibly set up the subject scaffold, as he removed all his scaffolds to the basement of the building on the day prior to the accident. Harris testified that he never observed D&G use his scaffolds on the construction site, that his employees were exclusively responsible for setting up or taking down their own scaffolds, and that safety equipment, such as harnesses, provided by Harris Construction were exclusively for its own employees.

The protection provided by Labor Law §200 codifies the common-law duty of an owner or employer to provide employees a safe place to work (*see* ***Jock v Fien***, 80 NY2d 965, 590 NYS2d 878 [1992]). It applies to owners, contractors, or their agents (*see* ***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]), who exercise control or supervision over the work, or who created an allegedly dangerous condition or had actual or constructive notice of it (*see* ***Lombardi v Stout***, 80 NY2d 290, 590 NYS2d 55 [1992]; ***Yong Ju Kim v Herbert Constr. Co.***, 275 AD2d 709, 713 NYS2d 190 [2d Dept 2000]). Where, as here, the alleged defect or dangerous condition arises from the subcontractor's work and the owner or general contractor exercises no supervisory control over the method and manner of the work, no liability attaches to the owner or general contractor under the common law or under Labor Law §200 (*see* ***Comes v New York State Elec. & Gas Corp***., 82 NY2d 876, 877, 609 NYS2d 168 [1993]; ***Mas v Kohen***, 283 AD2d 616, 725 NYS2d 90 [2d Dept 2001]). Plaintiff did not submit opposition to this portion of defendant's motion, thus failing to raise a triable issue of fact requiring its denial (*see* ***Alvarez v Prospect Hosp***., 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, *supra*; ***Blake v Guardino***, 35 AD2d 1022, 315 NYS2d 973 [1970]). Accordingly, the portions of Harris Construction's motion seeking dismissal of plaintiffs' common-law and Labor Law §200 causes of action is granted.

With regard to plaintiff's claims under Labor Law § 241(6), this section imposes a nondelegable duty of reasonable care upon owners and general contractors to "provide reasonable and adequate protection and safety to all persons employed in areas in which construction, excavation, or demolition work is being performed" (*see* ***Rizzuto v l.A. Wenger Contr. Co.***, 91 NY2d 343, 670 NYS2d 816 [1998]; ***Meng Sing Chang v Homewell Owner's Corp.***, 38 AD3d 625, 831 NYS2d 547 [2d Dept 2007], *lv denied* 9 NY3d 810, 844 NYS2d 786 [2007]; ***Reinoso v Ornstein Layton Mgmt.,Inc.***, 19 AD3d 678, 798 NYS2d 95 [2d Dept 2005], *lv dismissed* 5 NY3d 849, 806 NYS2d 168 [2005]). To establish liability under Labor Law § 241(6), a plaintiff must demonstrate that the defendant's violation of a specific rule or regulation was a proximate cause of his or her accident (*see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]; ***D'Elia v City of New York***, 81 AD3d 682, 916 NYS2d 196 [2d Dept 2011]; ***Krewtowski v Braender Condominium***, 57 AD3d 950, 871 NYS2d 304 [2d Dept 2008]; ***Mercado v TPT Brooklyn Assoc., LLC.***, 38 AD3d 732, 832 NYS2d 93 [2d Dept 2007]).

Here, plaintiff's bill of particulars asserts Harris Construction violated various provisions of the New York Industrial Code, including 12 NYCRR 23-1.7(b)(I), 12 NYCRR 23-1(b)(ii), 12 NYCRR 23-1(b)(iii), 12 NYCRR 23-1.15, 12 NYCRR 23-1.17, 12 NYCRR 23-1.21 (b)(1) and (b)(3), 12 NYCRR 23-1.22 (b) (1)(2)(3)(4), 12 NYCRR 23-2.4 and 12 NYCRR 23-2.7(a-e). 12 NYCRR 23-1.7(b)(I), 12 NYCRR 23-1(b)(ii), and 12 NYCRR 23-1(b)(iii), which regulate the use of safety devices for areas situated next to a "hazardous opening" are inapplicable, as plaintiff's accident did not take place near or involve falling into a hazardous opening (*see* ***Harris v Hueber-Breuer Constr. Co., Inc.***, 67 AD3d 1351, 890 NYS2d 235 [4th Dept 2009]; ***Bennion v Goodyear Tire & Rubber Co.***, 229 AD2d 1003, 645 NYS2d

195 [4th Dept 1996]). 12 NYCRR 23-1.17 and 12 NYCRR 23-1.15, which set forth the standards for"life nets" and "safety railings," likewise are inapplicable, as plaintiff was not using a life net at the time of his accident (*see* ***Kwang Ho Kim v D&W Shin Realty Corp.***, 47 AD3d 616, 852 NYS2d 138 [2d Dept 2008]; ***Dzieran v 1800 Boston Rd. LLC***, 25 AD3d 336, 808 NYS2d 36 [1st Dept 2006]). Similarly, 12 NYCRR 23-2.4 and 12 NYCRR 23-2.7 (a-e), which respectively set forth the standards for temporary stairways and the construction of skeleton steel buildings, are inapplicable to plaintiff's accident (*see* ***Bennion v Goodyear Tire & Rubber Co.***, *supra*). As plaintiff did not fall from a ladder or ladderway, 12 NYCRR 23-1.21 (b)(1) and (b)(3), which regulate the strength and maintenance of ladders, are inapplicable (*see* ***Maloney v J.W. Pfeil &Co., Inc.***, 84 AD3d 1632, 924 NYS2d 586 [3d Dept 2011]). Further, the ramps, runways or platforms contemplated by 12 NYCRR 23-1.22 (b) are those used to transport vehicular or pedestrian traffic, and plaintiff was not working on such a platform at the time of the accident (*see* ***Dzieran v 1800 Boston Rd. LLC***, *supra*; ***Curley v Gateway Communications***, 250 AD2d 888, 672 NYS2d 523 [3d Dept 1998]). As for the citations issued at the construction site in relation to alleged OSHA violations, it is well settled that a violation of an OSHA regulation does not provide a basis for liability under Labor Law § 241 (6) (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, *supra* at 351; ***Shaw v RPA Assoc.***, 75 AD3d 634, 906 NYS2d 574 [2d Dept 2010]; ***Fisher v WNY Bus Parts***, 12 AD3d 1138, 1140, 785 NYS2d 229 [4th Dept 2004]). Inasmuch as plaintiff failed to submit opposition to this portion of defendant's motion and did not raise any triable issues warranting its denial (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*), defendant is granted summary judgment dismissing plaintiff's claims under Labor Law §241(6).

Harris Construction, failed, however, to establish its entitlement to summary judgment dismissing plaintiff's claim under Labor Law § 240(1). Labor Law §240(1), commonly known as the "scaffold law," creates a duty that is nondelegable, and an owner or general contractor who breaches that duty may be held liable for damages regardless of whether they actually exercised any supervision or control over the work performed (*see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]). Specifically, Labor Law § 240(1) requires that safety devices, such as scaffolds, be so "constructed, placed and operated as to give proper protection to a worker" (***Klein v City of New York***, 89 NY2d 833, 834, 652 NYS2d 723 [1996]). To prevail on a claim pursuant to Labor Law § 240(1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*see* ***Bland v Manocherian***, 66 NY2d 452, 497 NYS2d 880 [1985]; ***Sprague v Peckham Materials Corp.***, 240 AD2d 392, 658 NYS2d 97 [2d Dept 1997]). Where an employee has been provided with an elevation-related safety device, it is usually a question of fact as to whether the device provided proper protection (*see* ***Beesimer v Albany Ave/Rte. 9 Realty***, 216 AD2d 853, 629 NYS2d 816 [3d Dept 1995]), "except in those instances where the unrefuted evidence establishes that the device collapsed, slipped or otherwise failed to perform its function of supporting the worker" (***Briggs v Halterman***, 267 AD 753, 754-755, 699 NYS2d 795 [3d Dept 1999]; *see* ***Blake v Neighborhood Hous. Serv. of N.Y. City***, 1 NY3d 280, 285-286, 771 NYS2d 484 [2003]).

Here, contrary to Harris Construction's assertion that it cannot be held liable for plaintiff's injuries because it did not control or supervise his work, Labor Law § 240 (1) holds owners and general contractors absolutely liable for any breach of the statute even if "the job was performed by an independent contractor over which they exercised no supervision or control" (***Rocovich v Consolidated Edison Co.,*** 78 NY2d 509, 515, 577 NYS2d 219 [1991]; *see also* ***Zimmer v Chemung County***

Performing Arts, Inc., 65 NY2d 513, 518, 493 NYS2d 102 [1985]). Indeed, the legislative purpose behind § 240(1) is to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owner and general contractor or their agent instead of on workers, who are "scarcely in a position to protect themselves from accident" (***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 513, 577 NYS2d 219 [1991]). Therefore, the portion of defendant's motion seeking summary judgment dismissing plaintiff's claim under Labor Law §240 (1) is denied.

Finally, with regard to plaintiff's cross motion seeking partial summary judgment on the issue of liability pursuant to Labor Law § 240(1), plaintiff's submission of evidence that the scaffold collapsed establishes his prima facie burden on the motion (*see* ***Campbell v 111 Chelsea Commerce, L.P.***, 80 AD3d 721, 915 NYS2d 619 [2d Dept 2011]; ***Silvia v Bow Tie Partners, LLC***, 77 AD3d 1143, 909 NYS2d 202 [3d Dept 2010]; ***Dos Santos v State***, 300 AD2d 434, 751 NYS2d 577 [2d Dept 2002]). The burden, therefore, shifted to Harris Construction to demonstrate the existence of triable issues as to whether there was no statutory violation, or that plaintiff's own acts or omissions were the sole cause of the accident (*see* ***Blake v Neighborhood Hous. Servs. of N.Y. City***, *supra*; ***Squires v Robert Marini Bldrs.***, 293 AD2d 808, 809, 739 NYS2d 777, *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]). Defendant's opposition, which consists of general denials of its authority to supervise or control plaintiff's work at the time of the accident, failed in this respect. Accordingly, plaintiff's cross-motion seeking partial summary judgment in his favor on the issue of liability pursuant to Labor Law § 240 (1) is granted.

Dated: 29 Sept. 2011

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION