Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable **JAMES J. GOLIA** IAS TERM, PART 33
Justice

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ZDZISLAW KLIMOWICZ, Index No: 16726/09

Plaintiff(s), Motion Date: 07/14/11

-- against -- Cal. No: 7

POWELL COVE ASSOCIATES, LLC AND AVR REALTY COMPANY, LLC, Sequence No. 1

Defendant(s).
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AVR POWELL DEVELOPMENT CORP., POWELL COVE ASSOCIATES, LLC AND AVR REALTY COMPANY, LLC

Third-Party Plaintiff(s),

-- against --

VINNY CONSTRUCTION CORP.,

Third-Party Defendant.
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The following papers numbered 1 to 38 were read on this motion by plaintiff for partial summary judgment on the issue of liability pursuant to Labor Law 240(1); and cross motion by defendants/third-party plaintiffs for summary judgment against plaintiff dismissing the complaint and summary judgment against third-party defendant and cross motion by third-party defendant for summary judgment dismissing the complaint.

	PAPERS NUMBERED
Notice of Motion, Affirmation, Affidavits and Exhibits.....	1 - 8
Cross Motions, Answering Affirmations, Affidavits and Exhibits.....	9 - 33
Reply Affirmation, Affidavit and Exhibits.....	34 - 38

Upon the foregoing papers it is ordered that this motion is decided as follows:

This is a labor law claim based on Labor Law §§ 200, 240(1) and 241(6). Plaintiff moves this court for an order granting partial summary judgment on the cause of action based on labor law 240(1). Defendants/Third Party Plaintiffs cross move for an order denying plaintiff's motion; granting summary judgment dismissing the complaint; and granting summary judgment against Third Party Defendant on its claim for attorney fees and contractual indemnification. Third Party Defendant cross moves for an order denying plaintiff's motion for summary judgment and granting summary judgment dismissing the plaintiff's complaint.

To grant summary judgment, it must clearly appear that there are no material issues of fact (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 144 N.E.2d 387 [1957]). 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 in admissible form to eliminate any material issues of fact from the case (Zuckerman v. City of New York, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718 [1980]; Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 144 N.E.2d 387 [1957]).

Turning first to plaintiff's motion for summary judgment on the issue of liability pursuant to Labor Law 240(1).

Labor Law § 240 (1) was designed 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 (*Runner v New York Stock Exch., Inc.*, 2009 NY Slip Op 9310, 3 (N.Y. 2009); *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 499-500 (N.Y. 1993)).

Generally, to succeed on a cause of action alleging a violation of Labor Law § 240 (1), a plaintiff must establish a violation of the statute and that such violation was a proximate cause of his or her resulting injuries (see Labor Law § 240 [1]; *Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, 287, 803 NE2d 757, 771 NYS2d 484 [2003]; *Plass v Solotoff*, 5 AD3d 365, 366, 773 NYS2d 84 [2004]); *Treu v Cappelletti*, 2010 NY Slip Op 2545, 2-3 (N.Y. App. Div. 2d Dep't 2010)

In this action plaintiff testified that on June 20, 2008, he was working for Vinny Construction Corp., Third party defendant, at a site owned by defendants AVR Powell Development Corp. At

the time of the accident plaintiff avers that he was placing bricks to build an exterior wall; that he was standing on scaffolding approximately three stories above the ground; that he had to walk on the scaffolding to get additional materials; that while walking his right foot went into a space in the scaffolding where two boards were either missing or removed; that he did not fall through to the ground but was able to brace himself, with his arms, on the scaffolding; and that as a result of this fall he injured his right shoulder.

Plaintiff also submitted an affidavit from a co-worker who corroborated his account of the happening of the accident. Based on the papers submitted by plaintiff, plaintiff has established a prima facie case of a violation of Labor Law 240(1), and the burden therefore shifts to the defendants,

In opposition to the motion and in support of their cross motion defendants submit, inter alia, a certified copy of a transcript from plaintiff's Workers' Compensation Board Hearing and uncertified copies of various medical records. Defendants argue that plaintiff's claim pursuant to Labor Law 240(1) should be dismissed on the grounds that during the hearing before the Worker's Compensation Board, plaintiff testified that he nearly fell and that he hurt his right shoulder while attempting to move building materials. Defendant's further argue that plaintiff's medical reports indicate that he suffered his injury as the result of pulling a heavy object.

Although the medical reports are inadmissible and are not considered, based on plaintiff's inconsistent testimony, defendant's have sufficiently raised an issue of fact precluding the entry of summary judgment on the issue of liability pursuant to Labor Law 240(1).

Defendants further argue the plaintiff's claims pursuant to Labor Law 241(6) and 200 should be dismissed.

In order to state a claim under Labor Law § 241(6), plaintiff must identify a specific Industrial Code provision mandating compliance with concrete specifications (see Ross v Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 505, 601 N.Y.S.2d 49, 618 N.E.2d 82 [1993]).

The record demonstrates that plaintiff's complaint, filed in June 2009, and the bill of particulars, dated December 2009, fail to identify any specific Industrial Code provisions violated. Pursuant to the preliminary conference order dated July 9, 2010, a supplemental bill of particulars specifying the industrial code

violations was to be filed 30 days after defendants examination before trial. Defendants examination before trial was held on September 17, 2010 and plaintiff failed to serve a supplemental bill of particulars. Thereafter, in February 2011 plaintiff filed the note of issue indicating that all discovery was complete, the parties appeared for a pre-trial conference and the matter is currently on the trial scheduling part calendar, for the second time, on February 2, 2012. It is only in opposition to defendants' motion that plaintiff submits a Supplemental Verified Bill of Particulars in which he sets forth specific Industrial Code provisions. To allow plaintiff to supplement the bill of particulars at this time, in this manner and without demonstrating any good cause for the delay in serving the document is extremely prejudicial to the defendants. Therefore, plaintiff's claim based on Labor Law §241(6) is dismissed.

Liability on claims under Labor Law § 200 cannot be imposed on an owner or general contractor unless it is shown that it exercised some supervisory control over the work (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 505, 618 NE2d 82, 601 NYS2d 49 [1993]). An implicit precondition to the duty to maintain a safe construction site is that the party to be charged with that obligation have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 352, 693 NE2d 1068, 670 NYS2d 816 [1998]) General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed (see O'Sullivan v IDI Constr. Co., Inc., 7 NY3d 805, 855 NE2d 1159, 822 NYS2d 745 [2006], affg 28 AD3d 225, 813 NYS2d 373 [2006]; Cahill v Triborough Bridge & Tunnel Auth., 31 AD3d 347, 819 NYS2d 732 [2006]; Dalanna v City of New York, 308 AD2d 400, 764 NYS2d 429 [2003]; see also Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 631 NE2d 110, 609 NYS2d 168 [1993]).

On the record before the court defendant AVR established a prima facie defense that it had no notice of the alleged condition and no authority to control the construction and maintenance of the scaffolding.

Therefore, plaintiff's claim based on Labor Law §200 is dismissed.

The branch of defendant/third party plaintiff's motion seeking summary judgment on the their claim for contractual indemnification and attorney fees is granted, without opposition.

Accordingly, plaintiff's motion for partial summary judgment is denied. The cross motions by defendants/third party plaintiff and third party defendant to dismiss the complaint is granted only to the extent that plaintiff's claims pursuant to Labor Law §§ 241(6) and 200 are dismissed. Plaintiff's claim pursuant to Labor Law §240(1) may proceed. The branch of the cross motion by defendants/third party plaintiff for summary judgment against third party defendant for contractual indemnification and attorney fees is granted, without opposition.

This constitutes the Order of the Court.

Dated: December 12, 2011

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JAMES J. GOLIA, J.S.C.