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SHORT FORM ORDER

INDEX No. 08-17226
CAL. No. 12-01189OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 11-15-12 (#003 & #005)
MOTION DATE 11-19-12 (#004)
ADJ. DATE 2-14-13
Mot. Seq. # 003 - MotD
004 - MotD
005 - XMotD

ANTHONY MARFOGLIO and EILEEN MARFOGLIO,

Plaintiffs,

- against -

MEADOWCREST HOMES @ GREENVILLE, LLC, MEADOWCREST DISTINCTIVE HOMES, ROBERT STRECKER, ROBERT F. STRECKER AND SUNRISE TO SUNSET CONSTRUCTION CORP.,

Defendants.

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Upon the following papers numbered 1 to 42 read on these motions for summary judgment and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; 13 -27 ; Notice of Cross Motion and supporting papers 28 - 32 ; Answering Affidavits and supporting papers 33 - 34; 35 - 38 ; Replying Affidavits and supporting papers 39 - 40; 41 - 42 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions are consolidated for the purposes of this determination; and it is further

ORDERED that the motion by Robert Strecker and Robert F. Strecker for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint and all cross claims insofar as asserted against them is granted to the extent of granting summary judgment dismissing so much of the second cause of action which asserts a violation of Labor Law § 240 (1), and is otherwise denied; and it is further

ORDERED that the motion by Sunrise to Sunset Construction Corp. for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and all cross claims insofar as asserted against it is granted to the extent of granting summary judgment dismissing so much of the second cause of action which asserts a violation of Labor Law § 240 (1), and is otherwise denied; and it is further

ORDERED that the cross motion by Meadowcrest Homes @ Greenville, LLC and Meadowcrest Distinctive Homes for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and all cross claims insofar as asserted against it is granted to the extent of granting summary judgment dismissing so much of the second cause of action which asserts a violation of Labor Law § 240 (1), and is otherwise denied.

This is an action to recover damages for personal injuries allegedly sustained by Anthony Marfoglio ("the plaintiff") on February 26, 2008, when he was injured while he was walking downstairs to the basement and the staircase collapsed. The house was in the process of being constructed, and the plaintiff–a plumber who worked for a non-party entity–was going down the stairs leading to the basement to check the pipes for any leaks. The property was owned by defendants Robert Strecker and Robert F. Strecker. The Streckers were also the owners of defendants Meadowcrest Homes @ Greenville, LLC and Meadowcrest Distinctive Homes ("Meadowcrest"), a business formed to build residential homes. Defendant Sunrise to Sunset Construction Corp. ("Sunrise") was the construction company hired by the Streckers to build the house.

In their complaint, the plaintiffs assert three causes of action. The first cause of action is for common-law negligence, the second cause of action is for violations of Labor Law §§ 200, 240 (1) and 241 (6), and the third cause of action is for loss of consortium. The plaintiff alleges that the defendants were negligent in, *inter alia*, failing to provide him with a safe place to work.

In their answers, the Streckers assert a cross claim against Sunrise for contribution and Meadowcrest asserts cross claims against Sunrise for contribution and common-law indemnification. Sunrise does not assert any cross claims in its answer.

The Streckers and Sunrise now separately move for summary judgment dismissing the complaint and cross claims asserted against them and Meadowcrest cross-moves for summary judgment dismissing the complaint and cross claims asserted against it.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141 [1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary

judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once a *prima facie* showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

With respect to the plaintiffs' causes of action for common-law negligence and violation of Labor Law § 200, a cause of action sounding in violation of Labor Law § 200 or common-law negligence may arise from either a dangerous or defective condition at a work site or the manner in which the work is performed (*see* ***Ortega v Puccia***, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]). Here, the plaintiff alleges that he was injured due to the dangerous and defective condition of the staircase leading to the basement. Specifically, as he traveled down the stairs, the staircase collapsed beneath him.

"Where, as here, a plaintiff contends that an accident occurred because a dangerous condition existed on the premises where work was being undertaken, an owner moving for summary judgment dismissing causes of action alleging common-law negligence and a violation of Labor Law §200 has the initial burden of making a prima facie showing that it neither created the dangerous condition nor had actual or constructive notice of its existence" (***Ventimiglia v Thatch, Ripley & Co., LLC***, 96 AD3d 1043, 1046, 947 NYS2d 566, 571 [2d Dept 2012]). After review, the Court finds that an issue of fact exists as to whether the Streckers either created or had actual or constructive notice that the staircase to the basement was defective (*see* ***Dalvano v Racanelli Constr. Co., Inc.***, 86 AD3d 550, 926 NYS2d 658 [2d Dept 2011]). Specifically, Robert F. Strecker testified and states in his affidavit that he and Robert Strecker are the owners of Meadowcrest, a business which was formed solely to build residential homes in upstate New York– Greenville, New York. The accident occurred during the construction of his personal home located at 2 Willow Lane, Quogue, New York. Mr. Strecker also testified that Sunrise installed the staircase. However, John Lorenzo and Craig Leonard, the co-owners/partners of Sunrise, testified that they did not install the basement staircase. They both testified that when they arrived at the house, the concrete floor for the basement had not yet been poured and that they told the Streckers that they could not install the staircase until the basement floor was completed and the walls were installed on top of the concrete floor since the staircase needed to be secured to the walls. In response, Robert Strecker told them that he would take care of it. Mr. Leonard testified that Robert Strecker is a builder and has built between 200-300 houses. They did not know who installed the basement staircase. The plaintiff testified that on the day of the accident, the basement staircase was installed but the concrete floor for the basement had not yet been poured. In addition, the certificate of liability insurance annexed to the plaintiff's opposition papers lists the insured as Sunrise and the certificate holder as Meadowcrest. Thus, an issue of fact exists as to whether the Streckers either created or had actual or constructive notice that the staircase to the basement was defective.

Turning to the plaintiff's causes of action for violation of Labor Law § 240 (1) and § 241 (6), while the "homeowner's exemption to liability under Labor Law § 240 (1) and § 241 (6) is available to owners of one and two-family dwellings who contract for but do not direct or control the work" performed therein (***Castellanos v United Cerebral Palsy Assn. of Greater Suffolk, Inc.***, 77 AD3d 879, 880, 909 NYS2d 757, 758 [2d Dept 2010] [internal quotation marks omitted]; *accord* ***Boccio v Bozik***, 41 AD3d 754, 839 NYS2d 525 [2d Dept 2007]; ***Ferrero v Best Modular Homes. Inc.***, 33 AD3d 847, 823 NYS2d 477 [2d Dept 2006]; ***Murphy v Sawmill Constr. Corp.***, 17 AD3d 422, 792 NYS2d 616 [2d Dept 2005]) here, an issue of fact exists as to whether the Streckers directed or controlled the work being performed (*see* ***Alvarez v Prospect Hosp.***, *supra*). Although the Streckers testified that they did not direct or control the work performed by Sunrise, Mr. Lorenzo and Mr. Leonard testified that Sunrise did not install the staircase. Therefore, an issue of fact exists as to who installed the staircase and whether the Streckers directed or controlled the work performed by whomever installed the staircase. As such, the claims for violation of Labor Law § 240 (1) and § 241 (6) cannot be dismissed based on the homeowner's exemption.

However, it is well settled that "a stairway which is, or is intended to be, permanent—even one that has not yet been anchored or secured in its designated location, or completely constructed—cannot be considered the functional equivalent of a ladder or other device as contemplated by section 240 (1) . . . [s]uch a structure functions as a permanent passageway between two parts of the building, not as a tool or device that is employed for the express purpose of gaining access to an elevated worksite" (***Milanese v Kellerman***, 41 AD3d 1058, 1060-1061, 838 NYS2d 256, 259 [3d Dept 2007] [internal citations and quotation marks omitted]; *see also* ***Gallagher v Andron Constr. Corp.,*** 21 AD3d 988, 801 NYS2d 373 [2d Dept 2005]; ***Parsuram v I.T.C. Bargain Stores, Inc.***, 16 AD3d 471, 791 NYS2d 616 [2d Dept 2005]). Therefore, the plaintiff's Labor Law § 240 (1) claim is dismissed.

With respect to plaintiff's Labor Law § 241 (6) claim, it is well settled that "[a] plaintiff asserting a cause of action under Labor Law § 241 (6) must demonstrate a violation of a rule or regulation of the Industrial Code which gives a specific, positive command, and is applicable to the facts of the case" (***Rodriguez v D & S Bldrs., LLC***, 98 AD3d 957, 958, 951 NYS2d 54, 56 [2d Dept 2012]). Here, the plaintiff cited New York Industrial Code Sections 23-1.2, 23-1.3, 23-1.4, 23-1.5, 23-1.7, 23-1.8, 23-1.11, 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-1.30, 23-1.32, 23-1.33, 23-2.1, 23-3.4, 23-2.7, 23-3.2, 23-3.3 and 23-3.4. "12 NYCRR 23-1.7 (f) imposes a duty upon a defendant to provide a safe staircase, free of defects" (***Vasquez v Urbahn Assoc. Inc.***, 79 AD3d 493, 493, 918 NYS2d 1, 3 [1st Dept 2010]). Contrary to the Streckers' contentions, 12 NYCRR 23-1.7 (f) is applicable to the facts of this case and since the evidence presented does not establish that the staircase was not defective, an issue of fact exists as to whether 12 NYCRR 23-1.7 (f) was violated by the Streckers. Therefore, the Streckers are not entitled to dismissal of plaintiff's Labor Law § 241 (6) claim. Insofar as there are no cross claims asserted against the Streckers, the Streckers' motion for summary judgment is granted to the extent of granting summary judgment dismissing so much of the second cause of action which asserts violations of Labor Law § 240 (1), and is otherwise denied.

Turning to Sunrise's motion for summary judgment and Meadowcrest's cross motion for summary judgment, for the reasons set forth above, the plaintiff's second cause of action, insofar as it asserts a claim for violation of Labor Law § 240 (1), is dismissed. As for that part of plaintiff's second cause of action

which asserts a claim for violation of § 241 (6), since an issue of fact exists as to whether Sunrise or Meadowcrest installed the staircase and, as stated above, the evidence presented does not establish that the staircase was not defective, an issue of fact exists as to whether 12 NYCRR 23-1.7 (f) was violated by Sunrise or Meadowcrest. Therefore, Sunrise and Meadowcrest are not entitled to dismissal of plaintiff's Labor Law § 241 (6) claim. With respect to the remainder of the second cause of action which alleged a violation of Labor Law § 200 and the plaintiff's first cause of action for common-law negligence, since an issue of fact exists as to whether Sunrise or Meadowcrest installed the staircase, an issue of fact exists as to whether Sunrise or Meadowcrest either created or had actual or constructive notice that the staircase to the basement was defective (*see* ***Dalvano v Racanelli Constr. Co., Inc.***, 86 AD3d 550, 926 NYS2d 658 [2d Dept 2011]). Specifically, Robert F. Strecker testified that Sunrise installed the staircase. However, John Lorenzo and Craig Leonard, the co-owners/partners of Sunrise, testified and stated in their affidavits that they did not install the basement staircase. In addition, Mr. Leonard testified that Robert Strecker, one of the owners of Meadowcrest, is a builder and has built between 200-300 houses. Therefore, Meadowcrest and Sunrise are not entitled to summary judgment dismissing the complaint or the cross claims asserted against them.

Accordingly, the motions by the Streckers and Sunrise as well as the cross motion by Meadowcrest are granted to the extent of granting summary judgment dismissing so much of the second cause of action which asserts a violation of Labor Law § 240 (1), and are otherwise denied.

Dated: 5/17/13

A.J.S.C.

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