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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

TOMASZ SROKA and DOROTA SWIEBODA-SROKA,	Index No. 11093/12
Plaintiffs,	Motion Date March 19, 2015
- against-	
ANTARCTICA, LLC c/o REINHARDT, LLP, TEDESCHI USA, LLC and CERTIFIED OF N.Y., INC.,	Motion Cal. No. 147 & 148
Defendants.	Motion Seq. No. 4 & 5

The following papers numbered 1 to 37 read on this motion by Tedeschi USA, LLC, (Tedeschi), for summary judgment in its favor pursuant to CPLR 3212; motion by Certified of N.Y., Inc., (Certified), for summary judgment in its favor pursuant to CPLR 3212; cross motion by plaintiffs for partial summary judgment as against Tedeschi, finding Tedeschi to be a statutory "contractor" and or agent of the owner and or agent of the general contractor for purposes of Labor Law § 241 (6); and cross motion by plaintiffs for summary judgment as against Certified, finding Certified to be a statutory "contractor" and or agent of the owner for purposes of Labor Law § 241 (6).

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-7
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Upon the foregoing papers it is ordered that the motions and cross motions are determined as follows:

Plaintiffs in this negligence/labor law action seek damages for personal injuries sustained by Tomasz Sroka while performing construction work in a townhouse located at 45 East 74th Street, in New York City (premises). Specifically, Tomasz Sroka was operating an unguarded electric table saw when he cut his fingers while performing the said work. The action of Dorota Swieboda-Sroka is derivative.

Tedeschi is a furniture retailer and acted as a liaison to import artisan Italian cabinets for installation at the premises. In moving for summary judgment in its favor, Tedeschi submits that it is not a contractor or carpenter, performs no construction work, and did not perform or supervise any construction work at the site. Certified was charged with hiring and coordinating the various trades at the worksite and conducting weekly safety meetings for the project. As to the actual trade work, Certified only performed framing work and installed Sheet Rock. Antarctica was the owner of the premises, and Antarctica was owned by Valerio Morabito.

Facts

Plaintiff was injured on November 10, 2011, in the course of his employment with non-party, LJG Construction, LLC (LJG). The accident occurred when plaintiff cut himself while using a table saw supplied by his employer. The owner of the premises was Antarctica, whose principal was Valerio Morabito.

The following facts are based upon the testimony of plaintiff and Arkadius Tume, and the affidavit of Felice Tedeschi, which was properly translated from Italian to English. Tedeschi had no involvement with plaintiff's accident. Its sole role at the site was selling cabinets that plaintiff was preparing to install. Tedeschi was not the owner of the site and not the general contractor for the site. While Tedeschi did retain plaintiff's employer, LJG, to install the cabinets, Tedeschi played no role in the installation of the cabinets, or in supervising Tedeschi's work. Tedeschi did not direct, control or supervise the means or methods of plaintiff's work, or supervise other trades at the site. In fact, Tedeschi was not at the site on the date of the subject accident. Tedeschi did not design, own or furnish the saw plaintiff was using, or provide the blades or any other equipment or tools to plaintiff, and did not direct plaintiff as to what tools to use (including the subject saw), or instruct plaintiff on how to use any tools.

O'Leary testified that Certified oversaw the construction of the renovation project including the electrical, plumbing, framing and Sheetrock, painting, stone work, tile work, the masonry and a new roof. O'Leary also testified that Certified excavated for a new pool on the property also. Although asked questions about a contract which provided for LJG to "comply with all requests and instructions of Tedeschi and Certified," O'Leary was adamant that at no point, did Certified supervise or control the work performed by LJG. In fact, O'Leary testified, when he first learned that LJG would be performing the installation of the cabinets, he was told that LJG would have their own supervisors on the site.

Discussion

The branches of the motions by Tedeschi and Certified for summary dismissal of plaintiff's claims pursuant to Labor Law § 200, are granted.

Section 200 provides that construction sites "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." The statute "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]). An implicit pre-condition to this duty "is that the party charged with that responsibility have the authority to control the activity bringing about the injury" (*Id.*), *quoting Russin v Louis N. Picciano & Son*, 54 NY2d 311 [1981]). Thus, "when a claims arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work" (*Ortega v Puccia*, 57 AD3d 54 [2d Dept 2008]). "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" (*Id.*).

In the instant case, by plaintiff's own admission, only LJG had the authority to direct the manner of his work. Plaintiff contends that Certified maintained supervisory authority over the entire work site, but "mere general supervisory authority at a worksite for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200" (*Ortega v Puccia*, *supra*). That a defendant's supervisory authority includes inspecting for safety violations and stopping work if violations are found does not change the result (*see Capolino v Judlau Contracting, Inc.*, 46 AD3d 733 [2d Dept 2007]). Since there is no evidence that either Tedeschi or Certified controlled the manner in which plaintiff performed his work, they are not liable under Section 200. Furthermore, since Section 200 codifies common-law duties, they are not liable on a theory of common-law negligence.

Labor Law § 241 (6) requires "[a]ll contractors and owners and their agents" to maintain "[a]ll areas in which construction, excavation or demolition work is being performed" so "as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places." The duties imposes are non-pdelegable and, unlike the duties imposed by Section 200, do not depend on the defendant's supervision or control over the work or the work site (*see St. Louis v Town of N. Elba*, 16 NY3d 411, 413 [2011]).

Section 241 (6) is not self-executing. Rather, "a plaintiff must set forth a violation of a specific rule or regulation promulgated pursuant to it" (*Willinski v 334 E. 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 111-12 [2011]). Those rules and regulations are embodied in New York's Industrial Code, 12 N.Y. Comp. Codes R. & Regs., ch. I, subch. A, which is promulgated by the Commissioner of the Department of Labor. The New York Court of Appeals has drawn a distinction "between provisions of the Industrial Code mandating compliance with concrete specification and those that establish general safety standards": The former gives rise to a non-delegable duty, while the latter does not" *(Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]).

Plaintiff proffers the following four sections of the New York Industrial Code as the bases for liability under Sections 241(6): 23-1.5 (c)(1), 23-1.5(c)(3), 23-1.12 and 23.9.2(a).

Section 23-1.5(c)(1) provides that "no employer shall suffer or permit an employee to use any machinery or equipment which is not in good repair and in safe working condition." Section 2301.5(c)(3) requires that "all safety devices, safeguards and equipment shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged." Defendants correctly contend that 12 NYCRR 23-1.5 (c)(1) and (c)(3) are not sufficiently specific to serve as predicates for liability pursuant to Labor Law § 241 (6) cause of action as those provisions merely sets forth general standards of care (*see Wilson v Niagara Univ.*, 43 AD3d 1292, 1293 [2007]; *Maldonado v Townsend Ave. Enters., Ltd. Partnership*, 294 AD2d 207, 208 [2002]; *Greenwood v Shearson, Lehman & Hutton*, 238 AD2d 311, 312 [2d Dept 1997]).

Section 23-1.12(c), which requires table saws "used for ripping . . . to be provided with a spreader . . . to prevent material kickback, is inapplicable to the facts at hand. First, the saw was not "used for ripping." Rather, plaintiff was using the saw to make a "Dado" cut to create a groove. Moreover, no testimony was adduced that the saw here lacked a spreader or other device. Furthermore, witnesses including plaintiff, testified the accident occurred because plaintiff stacked two blades together rather than using a "dado" blade. This improper and unsafe act caused the accident, not the absence of any spreader.

Nor does 12 NYCRR § 9.2(a), support Tomasz Sroka's claim. This regulation provides:

> (1) Maintenance - all power operating equipment shall be maintained in good repair and in proper operating conditions at all times;
>
> (2) inspection - sufficient inspections of adequate frequency shall be made of such equipment to ensure such maintenance, and;
>
> (3) Repair - upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement. The servicing and repair of such equipment shall be performed by or under the supervision of designated persons. Any servicing or repair of such equipment shall be performed only while equipment is at rest.

The Court of Appeals has held that the first two sub-provisions, dealing with "maintenance" and "inspection", lack the specificity required for a Labor Law § 241(6) cause of action (*see Misicki v Caradonna*, 12 NY3d 511 [2009]. The final sentence, pertaining to repair, is inapplicable because the subject accident did not stem from a lack of repair. Rather, as plaintiff and his supervisor testified, the accident occurred because plaintiff double-stacked "regular" saw blades rather than using a "dado" blade.

Even if Certified and Tedeschi were statutory agents, the Labor Law § 241(6) cause of action must fail because plaintiffs do not allege sufficiently specific and applicable provisions of the Industrial Code.

Cross Motions

The branches of the cross motions which seek to hold defendants liable as "statutory agents" of the owner are denied. Defendants established that they were not owners, contractors, or statutory agents under the statute (*see Caiazzo v Mark Joseph Contr., Inc.,* 119 AD3d 718, 720 [2d Dept 2014]; *Medina v R.M. Resources,* 107 AD3d 859 [2d Dept 2013]; *Holifield v Seraphim, LLC,* 92 AD3d 841 [2d Dept 2012]), through the submission of evidence which demonstrated that they did not have the authority to supervise or control the manner in which the injured plaintiff performed his work (*see Medina v R.M. Resources,* 107 AD3d at 861; *Koat v Consolidated Edison of N.Y., Inc.,* 98 AD3d 474, 475–476 [2d Dept 2012]; *Cambizaca v New York City Tr. Auth.,* 57 AD3d 701, 702 [2d Dept 2008]; *McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.,* 41 AD3d 796, 798 [2d Dept 2007]). To the extent that Certified had general supervisory authority over the work, this is insufficient in itself to impose liability under the Labor Law (*see Rodriguez v JMB Architecture, LLC,* 82 AD3d at 951; *Cambizaca v New York City Tr. Auth.,* 57 AD3d at 702 ; *Haider v Davis,* 35 AD3d 363, 364 [2d Dept 2006]).

Conclusion

Accordingly, the summary judgment motion by Tedeschi is granted, and themotion by Certified is granted.

The cross motions by plaintiffs are denied.

Dated: July 8, 2015

DARRELL L. GAVRIN, J.S.C.