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SHORT FORM ORDER

INDEX No. 12-13575
CAL. No. 14-02054OT



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

***PRESENT:***

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 4-28-15 (#004 & #005)
MOTION DATE 6-25-15 (#006)
ADJ. DATE 10-15-15
Mot. Seq. # 004 - MotD
# 005 - MotD
# 006 - XMD

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| JOHN DRAKOS and VALERIE DRAKOS,<br><br>Plaintiffs,<br><br>- against -<br><br>BRENDAN J. HACKETT and ROSEWOOD CUSTOM BUILDERS, INC. and PAUL J. PORCO,<br><br>Defendants. | SALENGER, SACK, KIMMEL & BAVARO, LLP<br>Attorney for Plaintiffs<br>180 Froehlich Farm Boulevard<br>Woodbury, New York 11797<br><br>McANDREW, CONBOY & PRISCO<br>Attorney for Defendant Brendan J. Hackett<br>1860 Walt Whitman Road, Suite 800<br>Melville, New York 11747<br><br>MARK E. NADJAR, P.C.<br>Attorney for Defendants Rosewood Custom Builders, Inc. & Paul J. Porco<br>366 Veterans Memorial Highway, Suite 1<br>Commack, New York 11725 |

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Upon the following papers numbered 1 to 31 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11, 12 - 20 ; Notice of Cross Motion and supporting papers 21 - 25 ; Answering Affidavits and supporting papers 26 - 27 ; Replying Affidavits and supporting papers 28 -29, 30 - 31 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the motion (004) by defendant Brendan Hackett, the motion (005) by defendants Paul Porco and Rosewood Custom Builders, Inc., and the cross motion (006) by plaintiff John Drakos are consolidated for the purposes of this determination; and it is

***ORDERED*** that the motion by defendant Brendan Hackett for summary judgment dismissing the complaint against him is granted to extent indicated herein and is otherwise denied; and it is

***ORDERED*** that the motion by defendants Paul Porco and Rosewood Custom Builders, Inc. for summary judgment dismissing the complaint and cross claim against them is granted as set forth herein, and is otherwise denied; and it is

***ORDERED*** that the cross motion by plaintiff John Drakos for partial summary judgment on his complaint is denied.

Plaintiff John Drakos commenced this action to recover damages for injuries he allegedly sustained on September 1, 2011, when he fell down an exterior stairway while exiting a residence known as 17 Cedar Valley Lane, Huntington, New York. The residence allegedly was owned by defendant Brendan Hackett, who was in the process of remodeling the property. The accident allegedly occurred when plaintiff, who was descending the stairway parallel to Hackett and discussing an estimate for some proposed electrical work to the premises, slipped and fell. Prior to the date of the accident, plaintiff allegedly worked at the residence as a flooring subcontractor for non-party Mike Camarada, who had been hired by Hackett to install new flooring throughout the residence. Defendant Rosewood Custom Builders, Inc. ("Rosewood"), allegedly served as the general contractor for the remodeling project. Paul Porco, president of Rosewood and the uncle of Hackett, also was named as a defendant to the action. By way of an amended complaint, plaintiff alleges causes of action against defendants for common law negligence and violations of Labor Law §§ 200, 240 (1), and 241(6). The amended complaint also asserts a derivative claim by plaintiff's wife, Valerie Drakos, for loss of consortium and reimbursement of medical expenses. Defendants joined issue denying plaintiffs' claims and asserting affirmative defenses. Hackett also asserted cross claims against Rosewood for indemnification and/or contribution.

By order dated December 5, 2012, the Court (Jones, J.) denied a motion by Rosewood seeking dismissal of the initial complaint filed against it pursuant to CPLR 3211 (a) (1) and (7). After service of the amended complaint which added Porco as a defendant to the action, Rosewood and Porco made another motion seeking its dismissal. However, by order dated August 10, 2013, Justice Jones also denied that motion.

Hackett now moves for summary judgment dismissing the complaint against him on the grounds plaintiff should not be considered an "employee" for the purposes of the Labor Law, since none of the activities protected by the statute was underway at the time of the accident, and plaintiff was on the premises for the sole purpose of submitting an estimate for proposed electrical work. Hackett further argues that plaintiff was distracted when he slipped and fell, and that he had no actual or constructive notice of any purported defective or dangerous condition existing on the stairway at the time of the alleged accident. By way of a separate motion, Rosewood and Porco move for summary judgment dismissing the complaint, arguing that they did not owe plaintiff a duty of care, as neither of them shared any contractual relationship with Hackett or were involved with the work being carried out at the subject property. Rosewood and Porco also request an award of attorneys' fees pursuant to Part 130 of the Uniform Rules of Court. Plaintiff cross-moves for partial summary judgment in his favor on the issue of liability. Plaintiff argues that the project to remodel the subject premises was proceeding in phases at the time of his accident, that he previously participated in the installation of flooring at the premises, and that he had returned to the property to secure further employment in the electrical services phase of the project.

In order to invoke the protections afforded by the Labor Law a "plaintiff must demonstrate that he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it owner, contractor or their agent" (***Whelen v Warwick Val. Civic & Social Club***, 47 NY2d 970, 971, 419 NYS2d 959 [1979]; *see* ***Stringer v Musacchia***, 11 NY3d 212, 869 NYS2d 362 [2008]). Therefore, it has been held that the Labor Law does not apply to volunteers at a worksite (*see* ***Stringer v Musacchia***, 11 NY3d 212, 215, 869 NYS2d 362 [2008]), contract-vendees waiting to take possession of a home (***Mordkofsky v V.C.V. Dev. Corp.***, 76 NY2d 573, 561 NYS2d 892 [1990]), or those frequenting the worksite for the purpose of submitting an estimate for proposed work (***Gibson v Worthington Div. of McGraw-Edison Co.***, 78 NY2d 1108, 578 NYS2d 127 [1991]). Moreover, it is well settled that the statute does not provide protection where a plaintiff's work precedes the commencement of the proposed construction project, or occurs within a separate phase of the larger project when none of the activities protected under the statute were being carried out (*see* ***Cicchetti v Tower Windsor Terrace, LLC***, 128 AD3d 1262, 9 NYS3d 727 [3d Dept 2015]; ***Orellana Siguenza v Cemusa, Inc.***, 127 AD3d 727, 6 NYS3d 568 [2d Dept 2015]; ***Jones v Village of Dannemora***, 27 AD3d 844, 811 NYS2d 186 [3d Dept 2006]).

Here, Hackett established a prima facie case of entitlement to summary judgment dismissing the Labor Law claims against him by demonstrating that plaintiff was at the subject work site to submit an estimate for proposed electrical work, and that the accident occurred during a separate distinguishable phase of the larger renovation project when none of the activities protected under the statute were being carried out (*see* ***Mordkofsky v V.C.V. Dev. Corp.***, *supra*; ***Gibson v Worthington Div. of McGraw-Edison Co.***, *supra*; ***Fabrizio v City of New York***, 306 AD2d 87, 762 NYS2d 41 [1st Dept 2003][notwithstanding any oral understanding concerning the eventual hiring of plaintiff's company, a plaintiff who is injured while inspecting a premises for the purposes of giving an estimate is not covered by the Labor Law]; ***Lukasinski v First New Amsterdam Realty, LLC***, 3 AD3d 302 , 770 NYS2d 307 [1st Dept 2004][taking measurements to provide an estimate is not within the scope of activities protected by the Labor Law]). Significantly, plaintiff testified that no work was underway, and that he had not completed his estimate or procured the contract to perform the required electrical work prior to the accident. Plaintiff failed to raise a triable issue in opposition, as this case is distinguishable from those where a plaintiff or his employer had already procured the contract to perform a covered activity (*see* ***DeFreece v Penny Bag, Inc.***, 137 AD2d 744, 524 NYS2d 825 [2d Dept 1988]), or where a plaintiff, having been hired to perform covered work, was not performing his assigned duties at the time of the accident (*see* ***Reeves v Red Wing Co.***, 139 AD2d 935, 527 NYS2d 916 [4th Dept 1988]). Therefore, the branch of Hackett's motion seeking summary judgment dismissing plaintiff's Labor Law claims against him is granted. Based on the foregoing, the court also grants the branch of the motion by Porco and Rosewood seeking dismissal of the Labor Law claims against them.

As for the branch of Hackett's motion seeking dismissal of the common law negligence claims against him, a party moving for summary judgment in a slip and fall action bears the initial burden of establishing a prima facie entitlement to judgment as a matter of law (***Altieri v Golub Corp.***,292 AD2d 734, 734, 741 NYS2d 126 [2002]), and the burden will shift to the opposing party only after the movant has demonstrated that it neither created the defective condition nor had actual or constructive notice of the defective condition (*see* ***Gordon v American Museum of Natural History,*** 67 NY2d 836, 501 NYS2d 646 [1986]; ***Moss v JNK Capital***, 85 NY2d 1005, 631 NYS2d 280 [1995]; ***Lowrey v Cumberland Farms, Inc.***, 162 AD2d 777, 557 NYS2d 689 [1990]; *see also* ***Altieri v Golub Corp.***, *supra*; ***Portanova v Trump Taj Mahal Associates***, 270 AD2d 757, 704 NYS2d 380; *lv denied* 95 NYS2d 768, 716 NYS2d 39 [2000]).

Although Hackett met his prima facie burden on the motion by submitting evidence that he did not have actual or constructive notice of the presence of moss or some other slippery substance on the stairway (*see* ***Decker v Schildt***, 100 AD3d 1339, 955 NYS2d 259 [3d Dept 2012]), in opposition, plaintiff raised triable issues as to whether Hackett violated Huntington Town Code and New York State Building Codes by failing to ensure that the subject stairway was equipped with hand railings and wider treads, and, if so, whether such failure was a proximate cause of the accident (*see* ***Bencebi v Baywood Realty, LLC***, 123 AD3d 1071, 1 NYS3d 214 [2d Dept 2014]; ***Sanchez v Irun***, 83 AD3d 611, 922 NYS2d 324 [1st Dept 2011]; ***Brice v Vermeulen***, 74 AD3d 858, 901 NYS2d 853 [2d Dept 2010]; ***Antonia v Srour***, 69 AD3d 666, 893 NYS2d 186 [2d Dept 2010]; ***Babich v R.G.T. Rest. Corp.***, 75 AD3d 439, 906 NYS2d 528 [1st Dept 2010]; ***Peters v 1625 E. 13th St. Owners, Inc.***, 18 AD3d 456, 794 NYS2d 446 [2d Dept 2005]; ***Viscusi v Fenner***, 10 AD3d 361, 781 NYS2d 121 [2d Dept 2004]; ***Hotzoglou v Hotzoglou***, 221 AD2d 594, 634 NYS2d 501 [2d Dept 1995]). Notably, plaintiff testified that he reached out for a handrail to stop himself from falling, but none was present. Plaintiff also submitted an expert affidavit by Paul Angelides, P.E., which states, among other things, that based upon his personal inspection of the subject stairway, Hackett violated section 124-18 of the Huntington Town Code by failing to ensure that the stairway, which has four steps and five risers, was equipped with a handrail. Additionally, the expert affidavit states that the inspection of the stairway revealed that the surface of the steps were cracked and uneven, and failed to comply with various New York State property maintenance and building codes, including the requirement that stairway treads be 10 or 11 inches wide when not equipped with nosings. According to the affidavit, it is the opinion of plaintiff's expert, within a reasonable degree of engineering certainty, that the absence of hand railings combined with cracked and excessively narrow treads, created a tripping hazard that was a substantial factor in causing plaintiff's accident.

Having determined that a triable issue exists as to whether Hackett violated Huntington Town Code by failing to ensure that the subject stairway was equipped with hand railings, and, if so, whether such failure was a proximate cause of the accident, the cross motion by plaintiff for partial summary judgment in his favor on his common law negligence claims against Hackett is denied (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]). Plaintiff also failed to meet his burden on the branch of the motion seeking partial summary judgment on his common law negligence claim as against Porco and Rosewood. Accordingly, plaintiff's cross motion for partial summary judgment in his favor on the issue of liability with respect to the claims contained in his complaint is denied.

As to the branch of Porco's and Rosewood's motion seeking dismissal of plaintiff's common law negligence claim against them, it is well settled that liability for a dangerous condition on real property must be predicated upon occupancy, ownership, control or a special use of the premises (*see* ***Grover v Mastic Beach Prop. Owners Assn.***, 57 AD3d 729, 869 NYS2d 593 [2d Dept 2008]; ***Dugue v 1818 Newkirk Mgt. Corp.***, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]). Where none of these elements are present, a party owes no duty of care and cannot be held liable for injury caused by a defective or dangerous premises condition (***Clifford v Woodlawn Volunteer Fire Co., Inc.***, 31 AD3d 1102, 1103, 818 NYS2d 715 [4th Dept 2006]). Here, Porco and Rosewood established their prima facie entitlement to summary judgment by demonstrating that they did not owe plaintiff a duty of care under the circumstances of this case, since they did not own, occupy, control, or make special use of the subject property (*see* ***St. John v State of New York***, 124 AD3d 1399, 1 NYS3d 697 [4th Dept 2015]; ***Farruggia v Town of Penfield***, 119 AD3d 1320, 989 NYS2d 715 [4th Dept 2014]; ***DeCourcey v Briarcliff Cong. Church***, 104 AD3d 799, 961 NYS2d 487 [2d Dept 2013]; ***Russo v Frankels Garden City Realty Co.***, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]). Significantly, Hackett

and Porco both testified that Porco did not possess any ownership interest in the subject property, only visited the premises occasionally as a show of familial support, and did not control the property or the work being carried out there. Porco also testified that he never made any representations to either plaintiff or Camarada that the remodel of the property was a Rosewood project, or that he was acting personally or on behalf of Rosewood, as Hackett's general contractor.

In opposition, plaintiff's bare conclusory assertions regarding Porco's mannerisms, his experience, and presumed "authoritative control" are insufficient to raise a triable issue warranting denial of the motion (*see* ***Roth v Barreto***, *supra*; ***O'Neill v Fishkill***, *supra*). Plaintiff's single recollection of one occasion when Porco remarked that the electrical work was taking too long is insufficient to establish Porco's control over the work site. Additionally, plaintiff testified that he knew Camarada was an independent contractor, and that neither Hackett nor anyone else at the work site held themselves out as employees of Rosewood. Furthermore, plaintiff could not identify Porco or Rosewood as owners of the premises or the ones who provided him compensation for his work. Indeed, plaintiff admitted that it was Camarada who told him about the job, and that he jumped at the opportunity because Camarada hinted that Rosewood, a leader in the local construction industry, was somehow connected to the project. Accordingly, the branch of the motion by Porco and Rosewood seeking dismissal of plaintiff's common law negligence claim against them is granted.

Inasmuch as all the claims have been dismissed as against Porco and Rosewood, the court also grants the unopposed branch of their motion seeking dismissal of the indemnification cross claims by Hackett (*see* ***McCarthy v Turner Constr., Inc.***, 17 NY3d 369, 377-378, 929 NYS2d 556 [2011]; ***Raquet v Braun***, 90 NY2d 177, 659 NYS2d 237 [1997]). Nevertheless, the branch of Porco's and Rosewood's motion requesting an award of attorneys fees pursuant to Part 130 of the Uniform Rules of Court is denied, as the court finds that plaintiff did not engage in frivolous conduct as that term is defined in 22 NYCRR 130-1.1 [c] (*see* ***McGee v J. Dunn Constr. Corp.***, 54 AD3d 1009, 864 NYS2d 167 [2d Dept 2008]; *cf.* ***Makan Land Dev. - Three, LLC v Prokopov***, 42 AD3d 439, 839 NYS2d 787 [2d Dept 2007]).

Dated: FEB 19 2016

HON. JOSEPH A. SANTORELLI
J.S.C.

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