Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

ZHAO FENG WANG,

Plaintiff,

-against-

MASPETH RECYCLING INC. and CIPICO CONSTRUCTION INC. and ADC CONSTRUCTION LLC,

Defendants.

Index No: 705522/13

Motion Date: 12/8/15

Motion Seq. No.: 1 & 2

MASPETH RECYCLING INC. and CIPICO CONSTRUCTION INC.,

Third-party Plaintiffs,

-against-

HI & LOW COMPUTERS, INC., HI-LITE COMPUTER CORP. and HAPPY HOME, LLC,

Third-party Defendants.

The following papers numbered 1 to 18 read on this motion by plaintiff (Seq. 1), motion by third-party defendant, Hi & Low Computers, Inc. (Hi & Low) (Seq. 2), and cross motion by defendants, all seeking summary judgment, pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion (Seq. 1) - Affirmation - Exhibits	1 - 4
Notice of Motion (Seq. 2) - Affirmation - Exhibits	5 - 8
Notice of Cross Motion - Affirmation - Exhibits	9 - 12
Plaintiff's Answering Affirmation and Reply - Exhibit	13 - 15
Hi & Low Reply Affirmation - Exhibit	16 -18

Upon the foregoing papers, it is ordered that plaintiff's and third-party defendant's motions, and defendants' cross motion, all seeking summary judgment pursuant to CPLR 3212, are determined as follows:

Plaintiff, an employee of Happy Home, LLC (Happy Home), a nonparty having been stipulated out of this action, allegedly sustained serious personal injuries while working at a property owned by defendant, Cipico Construction, Inc. (Cipico), and shared as business offices with defendants, Maspeth Recycling Inc. (Maspeth) and ADC Construction LLC (ADC), on February 14, 2013. Defendant, ADC, hired Hi & Low to install eight security cameras at the property. Hi & Low was owned by the same individual who owned Happy Home. Plaintiff was assigned by that individual to work on Hi & Low's job for ADC. Plaintiff and two Hi & Low employees were working on the property, drilling holes and running wires for the security cameras. Plaintiff was on a ladder, found on the premises, which was being held at the bottom by one of the Hi & Low employees. At some point, that employee left his position at the bottom of the ladder, and the ladder fell, injuring plaintiff.

Plaintiff's complaint alleges violations of Labor Law §§ 240, 241, and 200. Plaintiff moves for summary judgment on his Labor Law §§ 240 and 241 causes of action, on liability only, pursuant to CPLR 3212. Defendants cross move for summary judgment dismissing plaintiff's complaint against defendant, Maspeth, only, and for judgment in the third-party action on the ground of common law indemnity. Third-party defendant, Hi & Low, moves for summary judgment dismissing the third-party complaint based upon Workers Compensation Law §§11 and 29 (6), alleging that plaintiff was a special employee of Hi & Low at the time of the accident.

Initially, plaintiff's motion papers are incomplete, warranting denial of the motion, as they are not "supported ... by a copy of the pleadings," as required by CPLR 3212 (b) (*see Mieles v Tarar*, 100 AD3d 719 [2012]; *Ahern v Shepherd*, 89 AD3d 1046 [2011]). However, as such denial would be properly made "without prejudice to renew upon proper papers" (*Fiber Consultants, Inc. v Fiber Optek Interconnect Corp.*, 84 AD3d 1153, 1154 [2011]; *see Wider v Heller*, 24 AD3d433 [2005]), and the omitted papers were included in the motion papers of third-party defendant, Hi & Low, and, also, in plaintiff's reply (*see Ramade v C.B. Contracting Corp.*, 127 AD3d 596 [1 Dept 2015]), in the interest of judicial economy, the court will proceed to determine this motion on its merits.

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *see Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2014]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). Once

a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v New York Med. Ctr.*, 64 NY2d 851 [1985]).

Plaintiff moves for summary judgment against defendants pursuant to Labor Law §§ 240 (1) and 241 (6). Labor Law § 240 (1) protects a worker from "specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured," and, to be applicable, the harm must flow "directly ... from the application of the force of gravity to an object or person" *(Ross v Curtis Palmer Hydro-Electric Company,* 81 NY2d 494, 501 [1993]). Such statute should be construed as liberally as possible for the accomplishment of the purpose of imposing absolute liability for a breach which proximately causes an injury (*see Nicometi v Vineyards of Fredonia, LLC,* 25 NY3d 90 [2015]; *Fabrizi v 1095 Ave. of the Ams., LLC,* 22 NY3d 658 [2014]; *Misseritti v Mark IV Construction Co, Inc.*, 86 NY2d 487 [1995]; *Zamora v 42 Carmine St. Associates, LLC,* 131 AD3d 531 [2015]), and the duty imposed upon owners, contractors and lessees that control the work being performed pursuant to it is nondelegable (*see McCarthy v Turner Constr., Inc., 17 NY3d 369 [2011];Rocovich v Consolidated Edison Co.*, 78 NY2d 509 [1991]; *Scofield v Avante Contracting Corp, – N.Y.S.3d –, 2016 N.Y. Slip Op. 00493 [2016]).* Liability under the statute is imposed where there is a failure to utilize, or the use of an inadequate, safety device enumerated in the statute, and "plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential " (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see Wilinski v 334 East 92nd Housing Development Fund Corp.*, 18 NY3d 1 [2011]).

"To recover on a cause of action pursuant to Labor Law § 240 (1), a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident" (*Przyborowski v A & M Cook, LLC*, 120 AD3d 651, 653 [2014]). Such statute is not applicable unless plaintiff's injuries result from an elevation-related risk and the inadequacy of the safety device (see *Fabrizi v 1095 Ave. of the Ams., LLC,* 22 NY3d 658). A fall from a ladder, in and of itself, does not establish that proper and adequate protection was not provided (*see Carrion v City of New York*, 111 AD3d 872 [2013]; *Melchor v Singh*, 90 AD3d 866 [2011]). Where there is no statutory violation, or where the plaintiff's actions are the sole proximate cause of his or her own injuries, Labor Law §240 (1) will not apply (see Garcia v Market Assoc., 123 AD3d 661 [2014]).

In the case at bar, based upon the evidence presented, plaintiff has satisfied his *prima facie* burden of demonstrating that defendants violated Labor Law § 240 (1). As plaintiff could have been expected to, and did, perform his duties using the subject property owner's ladder, which was present and available at the job site, the ladder functioned as a safety device pursuant to Labor Law § 240 (1) (*see Ramirez v Metropolitan Transp. Authority*, 106 AD3d 799 [2013]; *De Jara v 44-14 Newton Rd. Apt. Corp.*, 307 AD2d 948 [2003]). Plaintiff testified, and the video taken at the scene demonstrated, that the ladder was not secured, that it slid backward and fell, and that the co-worker who had been holding the ladder was no longer holding it at the time it fell, all of which suffices to establish that such safety device was inadequate to prevent plaintiff's fall (*see Estevez-Rivas v W2001Z/15 CPW Realty, LLC*, 104 AD3d 802 [2013]; *Robinson v Goldman Sachs Headquarters, LLC*, 95 AD3d 1096 [2012]; *Jimenez v RC Church of Epiphany*, 85 AD3d 974 [2011]).

Plaintiff has demonstrated that the violation of Labor Law § 240 (1) was a contributing cause of his fall (*see Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280), and defendants have failed to show that "plaintiff's injuries did not result from the type of elevation related hazard to which the statute applies" (*Parker v 205-209 East 57th Street Associates, LLC*, 100 AD3d 607, 609 [2012]). Once a statutory violation which was a proximate cause of plaintiff's fall is established, there cannot be a finding that the sole proximate cause of the accident was some alleged negligence of plaintiff (*see Blake v Neighborhood Hous. Servs. of N. Y. City*, 1 NY3d 280; *Weininger v Hagedorn & Co*, 91 NY2d 958 [1998]).

Further, under this section, the term "owner" is not limited to titleholders, but also includes one who "has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit" (*Sarata v Metropolitan Transp. Authority*, 134 AD3d 1089 [2015], quoting *Copertino v Ward*, 100 AD2d 565, 566 [1984]; *see Seferovic v Atlantic Real Est. Holdings, LLC*, 127 AD3d 1058 [2015]). In the case at bar, there exists, at a minimum, a question of fact as to whether defendant, ADC, as an occupant of the property and the party who contracted for the work being performed at the time of plaintiff's injury, is to be considered an "owner" under the statute.

As such, defendants have failed to rebut plaintiff's *prima facie* entitlement to summary judgment herein, and plaintiff's motion is granted with respect to his Labor Law § 240 (1) claim.

Additionally, plaintiff moves for summary judgment on his Labor Law § 241 (6) claim. This statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v*

Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable, "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]; *see Misicki v Caradonna*, 12 NY3d 511 [2009]; *Lopez v New York City Dept. of Environmental Protection*, 123 AD3d 982 [2014]; *Jimmy v Batista*, 123 AD3d 668 [2014]). In this matter, defendants' opposition has raised issues of fact as to the negligence of plaintiff in this accident. The issue of comparative negligence on the part of plaintiff is an issue necessarily to be decided by a jury (*see Misicki v Caradonna*, 12 NY3d 511; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]), thereby warranting the denial of summary judgment on this branch of plaintiff's motion.

One branch of defendants' cross motion seeks summary judgment dismissing plaintiff's complaint as against defendant, Maspeth. Said defendant demonstrated its *prima facie* entitlement to summary judgment as a matter of law dismissing plaintiff's complaint against it by establishing that it did not own or control the premises; had no property interest in the subject premises; neither contracted for nor controlled the work being performed on the premises; and did not have authority to supervise or control the manner in which the work was performed (*see Piatek v Oak Drive Enterprises, Inc.*, 129 AD3d 812 [2015]; *Alvarez v Hudson Valley Realty Corp.*, 107 AD3d 748 [2013]; *Torres v Levy*, 32 AD3d 845 [2006]; *Billman v CLF Mgt.*, 19 AD3d 346 [2005]). In opposition, plaintiff failed to raise a triable issue of fact. Absent such ownership or control, liability will not arise under Labor Law §§ 200, 240, and 241 (*see Russin v Picciano & Son*, 54 NY2d 311 [1981]; *Bennett v Hucke*, 131 AD3d 993 [2015]). Consequently, this branch of defendants' cross motion is granted, and the action as against defendant, Maspeth, is dismissed.

Third-party defendant, Hi & Low, moves for summary judgment dismissing the third-party complaint, on the ground that plaintiff was a special employee of Hi & Low at the time of the accident, thereby barring the third-party action pursuant to Workers Compensation Law §§ 11 and 29 (6). It is noted that third-party defendant, Hi-Lite Computer Corp., has not appeared in this action, and the action against third-party defendant, Happy Home, LLC, was previously discontinued by stipulation.

A special employee is "one who is transferred for a limited time of whatever duration to the service of another" (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]). Factors to be considered when determining whether a special employment relationship exists include who controls and directs the manner, details and result of the employee's work; the responsibility for payment of wages; the furnishing of equipment; the right to discharge the employee; and which business was the ultimate beneficiary of the employee's labor (*see Thompson v Grumman Aerospace Corp.*, 78 NY2d 553; *Wilson v A.H. Harris & Sons, Inc.*, 131 AD3d 1050 [2015]). "General employment will be presumed

to continue unless there is a 'clear demonstration of surrender of control by the general employer and assumption of control by the special employer" (*Pena v Automatic Data Processing, Inc.*, 105 AD3d 924, 925 [2013], quoting *Thompson v Grumman Aerospace Corp.*, 78 NY2d at 557).

In the case at bar, Hi & Low's motion for summary judgment is denied. The fact that Walter Lin was the principal, and "boss," of both entities, compromised Hi & Low's ability to clearly demonstrate the requisite surrender of control by Happy Home, and assumption of control by itself. Further, simply "being told what job to do does not suffice to demonstrate the existence of a special employment relationship" (see *Digirolomo v Goldstein*, 96 AD3d 992, 994 [2012] quoting *Bellamy v Columbia Univ.*, 50 AD3d 160, 164 [1 Dept 2008]). Where, as here, plaintiff 's work contained elements of both a general and a special employment relationship, the "characterization as a special employee is a question of fact for the jury to determine" (*Pena v Automatic Data Processing, Inc.*, 105 AD3d at 925).

With respect to the branch of defendants' cross motion against third-party defendant, Hi & Low, seeking summary judgment on the ground of common-law, or "implied," indemnification, the law is clear that "[w]hile owners owe nondelegable duties ... to plaintiffs who are employed at their work sites, these defendants can recover in indemnity, either contractual or common-law, from those considered responsible for the accident" (*Kennelty v Darlind Constr.*, 260 AD2d 443, 445-446 [1999]; *see Shea v Bloomberg*, 124 AD3d 621 [2015]). If it is determined that the owner is liable to plaintiff, and its liability is only vicarious, the owner is entitled to implied indemnity, shifting the loss, on the basis that failure to do so would result in the unjust enrichment of the actual wrongdoer at the expense of the owner (*see Mas v Two Bridges Assoc.*, 75 NY2d 680 [1990]; *Baek v Red Cap Services, Ltd.*, 129 AD3d 752 [2015]). "[A] party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part." (*McCarthy v Turner Const., Inc.*, 17 NY3d 369, 377-378 [2011]; *see Bermejo v New York City Health & Hospitals Corp.*, 119 AD3d 500 [2014]). On the evidence submitted, the branch of the cross motion seeking common-law indemnification is denied as premature, as plaintiff's injury has not yet been shown to be attributable solely to Hi & Low (*see Arrendahl v. Trizechahn Corp.*, 98 AD3d 699 [2012]; *Bellefleur v. Newark Beth Israel Med. Ctr.*, 66 AD3d 807 [2009]).

Accordingly, the branch of plaintiff's motion for summary judgment against defendants based on his Labor Law § 240 claim, is granted. The branch based on plaintiff's Labor Law § 241 claim, is denied. The branch of defendants' cross motion seeking dismissal of plaintiff's complaint as against defendant, Maspeth, is granted. The branch of defendants' cross motion seeking summary judgment against third-party defendant, Hi &

Low, is denied. Hi & Low's motion seeking summary judgment dismissing the third-party complaint is denied.

Dated: February 16, 2016

J.S.C.