

**Leon v Myhyre Carpentry Contr. Inc.**

2017 NY Slip Op 30233(U)

January 6, 2017

Supreme Court, Suffolk County

Docket Number: 12-10967

Judge: Joseph Farneti

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INDEX No. 12-10967

CAL. No. 15-012080T

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 37 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. JOSEPH FARNETI  
Acting Justice of the Supreme Court

MOTION DATE 11-19-15 (003 & 004)

MOTION DATE 3-2-16 (005)

ADJ. DATE 3-3-16

Mot. Seq. #003 - MG

#004 - MotD

#005 - XMG

-----X  
NILDO LEON and LEYLI MAGDELI LEON,

Plaintiffs,

- against -

MYHYRE CARPENTRY CONTRACTING  
INC., d/b/a MY BOYS CONTRACTING, WILL  
MASSARO, KATHLEEN DEBENEDICTIS and  
PASQUALE DEBENEDICTIS,

Defendants.  
-----X

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MYHYRE CARPENTRY CONTRACTING  
INC., d/b/a MY BOYS CONTRACTING,

Third-Party Plaintiff,

- against -

MASSARO FRAMING CORP.,

Third-Party Defendant.  
-----X

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Third-Party Defendant P & P Remodeling

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MYHYRE CARPENTRY CONTRACTING  
INC., d/b/a MY BOYS CONTRACTING,

Second Third-Party Plaintiff,

- against -

P&P REMODELING, INC.,

Second Third-Party Defendant.

-----X  
 MASSARO FRAMING CORP.

Third Third-Party Plaintiff.

- against -

P&P REMODELING, INC.,

Third Third-Party Defendant.  
 -----X

Upon the following papers numbered 1 to 32 read on these motions for partial summary judgment and summary judgment; Notices of Motions/ Order to Show Cause and supporting papers 1 - 5; 13 - 17; Notice of Cross Motion and supporting papers 26 - 29; Answering Affidavits and supporting papers 8 - 10; 18 - 25; Replying Affidavits and supporting papers 11 - 12; 30 - 32; Other Memo of Law - Myhyre Carpentry Contracting 6 - 7; it is:

**ORDERED** that motion (seq. #003) for partial summary judgment by defendant/third-party plaintiff/second third-party plaintiff Myhyre Carpentry Contracting, Inc. d/b/a My Boys Contracting is granted, and the Labor Law § 200 and common-law negligence claims in the complaint are hereby severed and dismissed as asserted against this defendant; and it is

**ORDERED** that motion (seq. #004) by defendant Will Massaro and third-party defendant/third third-party plaintiff Massaro Framing Corp. for summary judgment dismissing all claims and cross claims asserted against them, and for judgment in favor of Massaro Framing on its third third-party claims for contractual and common-law indemnity against third third-party defendant P&P Remodeling, Inc. is decided as set forth below; and it is further

**ORDERED** that the cross motion by plaintiffs to amend their complaint to add as a defendant Massaro Framing Corp. is decided as set forth below.

This is an action for personal injuries sustained by plaintiff Nildo Leon on September 28, 2009, while working on a renovation project at a house in Huntington, New York owned by the DeBenedictis defendants. Plaintiff's index finger was amputated while using a table saw to cut cedar shingles for installation on the side of the DeBenedictis defendants' house.

Defendant Myhyre Carpentry Contracting, Inc. d/b/a My Boys Contracting ("My Boys") was the general contractor for the project and subcontracted the framing, exterior trim and siding work to third-party defendant/third third-party plaintiff Massaro Framing Corp. ("Massaro Framing"), which in turn subcontracted the siding work to second third-party defendant/third third-party defendant P&P Remodeling, Inc. ("P&P"), plaintiff's employer.

Plaintiff, and his wife suing derivatively, commenced this action against the defendants alleging violations of Labor Law §§ 241 and 200, and for common-law negligence. Issue has been joined by all

defendants,<sup>1</sup> prompting My Boys to commence a third-party action against Massaro Framing, the corporate entity of which defendant Will Massaro is the president and sole shareholder. In the third-party complaint, My Boys alleges causes of action against Massaro Framing for common law and contractual indemnification, contribution and breach of contract for failure to procure insurance naming My Boys as an additional insured. After issue was joined, additional impleader actions were commenced by My Boys and Massaro Framing against P&P for the same claims set forth in the third-party action. Discovery has been completed and the note of issue filed. The instant motions and cross motion ensued.

The Court will first address the cross motion. CPLR 3025 (b) provides that a party may amend or supplement a pleading at any time by leave of court and that such leave shall be freely given upon such terms as may be just. In deciding whether to grant an application to amend a pleading, the court considers such factors as the delay in moving, surprise, and significant prejudice, the latter being the foremost consideration (*see Murray v City of New York*, 43 NY2d 400, 401 NYS2d 773 [1977]; *Nassi v Joseph DiLemme Constr. Corp.*, 250 AD2d 658, 672 NYS2d 431 [2d Dept 1998]; *Rosenthal v Allstate Ins. Co.*, 248 AD2d 455, 670 NYS2d 862 [2d Dept 1998]). To establish actual prejudice, there must be an indication that a defendant has been hindered in case preparation or prevented from doing something in support of the case (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 444 NYS2d 571 [1991]; *Garafola v Wing Inc.*, 139 AD3d 793, 33 NYS3d 287 [2d Dept 2016]).

Based on the aforementioned principles, plaintiffs' cross motion is granted. The proposed amendment to the caption does not fundamentally change the nature of the allegations which must be proven by the plaintiffs or diminish the defenses available to the defendants (*see Nassi v DiLemme Constr. Corp.*, 250 AD2d 658, 672 NYS2d 431). Plaintiffs are not seeking leave to add any new theories of liability or to amend the allegations in the complaint, but only to add Massaro Framing as a direct defendant. Massaro Framing has been served with the impleader actions and all prior pleadings as required under CPLR 1007. Moreover, the parties have not demonstrated that plaintiffs' mere lateness in seeking the amendment was a barrier to granting the motion (*see Fahey v County of Ontario*, 44 NY2d 934, 408 NYS2d 314 [1978]; *Garafola v Wing Inc.*, *supra*). Despite the fact that the three-year statute of limitations has expired against proposed direct defendant Massaro Framing, a direct claim asserted against a third-party defendant relates back to the date of service of the third-party complaint for statute of limitations purposes (*see Duffy v Horton Memorial Hosp.*, 66 NY2d 473, 497 NYS2d 890 [1985]; *Schuler v Grand Metro Bldg. Corp.*, 118 AD2d 633, 499 NYS2d 786 [2d Dept 1986]). The third-party complaint served upon Massaro Framing was timely interposed. Further, there is no surprise or prejudice to Massaro Framing as it has been an active participant at each EBT, and has received all discovery exchanged to date. Therefore, Massaro Framing had actual notice of plaintiffs' potential direct claim and cannot proclaim surprise or prejudice as a result of the granting of the cross motion. Hence, plaintiffs are granted leave to amend the caption with Massaro as a direct defendant, and Massaro Framing is directed to accept service of the amended pleadings in the form attached to the cross motion.

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<sup>1</sup> Pursuant to a stipulation dated April 4, 2014 executed by all parties, the claims and cross claims asserted against the homeowners, the DeBenedictis defendants, were discontinued with prejudice.

As to the motion by Will Massaro and Massaro Framing (collectively “Massaro defendants”), Will Massaro argues that all claims and cross claims asserted against him should be summarily dismissed as at all times he acted in his capacity as president of Massaro Framing and thus cannot be held personally liable. Massaro Framing argues that it is entitled to judgment on its claims against P&P for indemnification and contribution and breach of contract for failure to procure insurance naming it as an additional insured.

A corporation has a separate existence from that of its officers and shareholders, and the complaint is devoid of any allegations sufficient to pierce the corporate veil of Massaro Framing to reach Will Massaro in his individual capacity (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 603 NYS2d 807 [1993]; *Mondone v Lane*, 106 AD3d 1062, 966 NYS2d 164 [2d Dept 2013]). Moreover, there has been no evidence presented that Will Massaro should be personally liable. It is true that if Will Massaro so dominated the activities of the corporation, piercing of the corporate veil would be permitted; however, dominance of a corporation, standing alone is insufficient (*see Matter of Morris v New York State*, 82 NY2d 135, 603 NYS2d 807 [1993]; *Azad v 270 5th Realty Corp.*, 46 AD3d 728, 848 NYS2d 688 [2d Dept 2007]; *see also First Capital Asset Mgt., Inc. v N.A. Partners, L.P.*, 300 AD2d 112, 755 NYS2d 63 [1st Dept 2002]). Here, plaintiffs have not offered any basis or any evidence of such dominance (*Azad v 270 5th Realty Corp.*, *supra*). Therefore, granted is the branch of the motion by the Massaro defendants for summary judgment dismissing the case against individual defendant Will Massaro.

Turning to the motion by My Boys, it is argued that it cannot be held liable under Labor Law § 200 or for common law negligence as it did not supervise or control the plaintiff’s work. Labor Law § 200 is a codification of the common-law duty imposed on owners, contractors, and their agents to provide workers with a reasonably safe place to work (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816 [1993]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 609 NYS2d 168 [1993]; *Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 35 NYS3d 700 [2d Dept 2016]; *Rojas v Schwartz*, 74 AD3d 1046, 1046, 903 NYS2d 484 [2d Dept 2010]). A cause of action sounding in a violation of Labor Law § 200 or common-law negligence may arise from a dangerous or defective condition on the premises, or the manner in which the work was performed (*see Pilato v 866 U.N. Plaza Assoc., LLC*, 77 AD3d 644, 909 NYS2d 80 [2d Dept 2010]; *Ortega v Puccia*, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]). Where, as here, the claim arises out of the means and methods used to perform the work, My Boys may be held liable for common-law negligence or a violation of Labor Law § 200 only if it had “the authority to supervise or control the performance of the work” (*Pilato v 866 U.N. Plaza Assoc., LLC*, *supra* at 646; *Ortega v Puccia*, *supra* at 61).

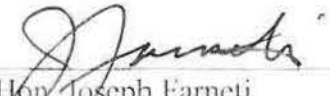
Plaintiff testified that all the tools he used to install the cedar shingle siding were provided by P&P, his employer, and his only supervisor at the project site was Josh Greenfield, P&P’s foreman. Plaintiff further testified he only received instructions from Josh, and that Josh directed him and the other P&P employees as to where to install the cedar shingles. Plaintiff testified that he was explicitly directed by Josh Greenfield to cut the cedar shingles using the subject table saw. Based on this testimony, My Boys cannot be held liable under Labor Law § 200 or for common-law negligence. Therefore, granted is the motion by My Boy for partial summary judgment dismissing these claims.

As to the portion of the Massaro defendants' motion for judgment in favor of Massaro Framing on its third-party claim for indemnification, since no finding has yet been made with respect to the parties' fault, if any, it is premature to determine claims for either common-law or contractual indemnification (*see Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 658 NYS2d 903 [1997]; *Erickson v Cross Ready Mix, Inc.*, 75 AD3d 519, 906 NYS2d 284 [2d Dept 2010]). Therefore, summary judgment must be denied.

The Hold Harmless Agreement proffered by Massaro Framing, which also includes a provision requiring P&P to procure liability insurance naming Massaro Framing as an additional insured does not specifically refer to the subject renovation project, raising an issue of fact. Moreover, "[a] party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with" (*see Marquez v L & M Dev. Partners, Inc.*, *supra* at 701; *Ginter v Flushing Terr., LLC*, 121 AD3d 840, 844, 995 NYS2d 95 [2d Dept 2014]). Therefore, this branch of the Massaro defendants' motion is also denied.

Accordingly, the motion by Myhyre Carpentry Contracting, Inc. d/b/a My Boys Contracting for partial summary judgment is granted. The portion of the motion by the Massaro defendants for summary judgment in favor of Will Massaro is granted and all claims and cross claims asserted against him are hereby severed and dismissed; the remainder of this motion is denied. The cross motion by plaintiffs is granted and the caption is amended to include Massaro Framing Corp. as a defendant.

Dated: January 6, 2017

  
 Hon. Joseph Farneti  
 Acting Justice Supreme Court

FINAL DISPOSITION     NON-FINAL DISPOSITION