SHORT FORM ORDER

INDEX No. 13-33531
CAL. No. 17-00224OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice Supreme Court

MOTION DATE 4-21-17 (003)
MOTION DATE 5-5-17 (004)
MOTION DATE 6-23-17 (005)
ADJ. DATE 9-26-18
Mot. Seq. # 003 - MotD
004 - MD
005 - MotD

JOSE A. MONTOYA,

Plaintiff,

- against -

CLEAN CUT CONSTRUCTION, INC., CLEAN CUT PROPERTIES, LLC and NICHOLAS D. COADY, d/b/a CLEAN CUT PROPERTIES,

Defendants.

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Bay Shore, New York 11706

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Attorney for Defendants/Third-Party Plaintiffs
Clean Cut and Coady
120 Fourth Avenue
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CLEAN CUT CONSTRUCTION, INC., CLEAN CUT PROPERTIES, LLC and NICHOLAS D. COADY, d/b/a CLEAN CUT PROPERTIES,

Third-Party Plaintiffs,

- against -

BUILDER SERVICES GROUP, INC., d/b/a CARY INSULATION BOHEMIA, CARY INSULATION CO., INC., and MASCO CONTRACTOR SERVICES, LLC,

Third-Party Defendants.

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Upon the following papers numbered 1 to 79 read on these motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; 20 - 38; 39 - 61 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 62 - 64; 65 - 73 ; Replying Affidavits and supporting papers 74 - 75; 76 - 79 ; Other ___; it is,

ORDERED that the motion by defendants/third-party plaintiffs Clean Cut Properties, LLC and Nicholas Coady d/b/a Clean Cut Properties for summary judgment is granted to the extent indicated herein, and is otherwise denied; and it is

ORDERED that the motion by plaintiff Jose Montoya for partial summary judgment in his favor on the issue of liability and for a preliminary injunction is denied; and it is

ORDERED that the motion by third-party defendants Builder Services Group, Inc., Cary Insulation Co., Inc., and Masco Contractor Services, LLC, for summary judgment dismissing the third-party complaint against them is granted to the extent indicated herein, and is otherwise denied.

Plaintiff commenced this action to recover damages for personal injuries he allegedly sustained on July 9, 2013 while working on the renovation of a single family home owned by defendant/third-party plaintiff Clean Cut Properties, LLC (hereinafter CCP). Defendant/third-party plaintiff Nicholas Coady is the sole member of CCP, which hired the defendant/third party plaintiff Clean Cut Construction Inc. as the general contractor for the project. Plaintiff allegedly was injured when a makeshift scaffold on which he was standing, which consisted of an aluminum plank laid across the rung of an A-frame ladder and a piece of wood that had been nailed to the wall, collapsed and caused him to fall to the ground. At the time of the accident, plaintiff was an employee of third-party defendant Cary Insulation Co., Inc., one of several subcontractors hired for the project. Plaintiff asserts causes of action against defendants based on common law negligence and violations of Labor Law §§ 240 (1), 241 (6), and 200. Defendants commenced a third-party action against Cary Insulation and several of its affiliates (hereinafter collectively known as "Cary Insulation") for indemnification, contribution, and an award of damages based on the subcontractor's alleged negligent hiring and retention of plaintiff. Cary Insulation served an answer to the third-party complaint on April 8, 2016, and the note of issue was filed on February 2, 2017.

CCP and Coady now move for summary judgment on the grounds that Coady may not be held personally liable because he was merely a member of CCP and did not own the property or act as the general contractor. CCP contends that it is entitled to the homeowner's exemption pursuant to Labor Law §§ 240 and 241. The defendants further assert that the common law negligence and Labor Law § 200 claims against CCP must be dismissed, as it neither possessed the authority to control or direct plaintiff's work, nor possessed actual or constructive notice of the danger posed by the makeshift scaffold which plaintiff himself erected. Cary Insulation moves for dismissal of the third-party complaint against it on the ground that Clean Cut Construction failed to commence the action within the 13-month contractual period of limitation for doing so set forth in the parties' agreement. Cary Insulation further argues that the third-party claims against it for damages related to plaintiff's injuries are barred by the exclusivity provisions of the Workers Compensation Law, since plaintiff did not sustain a grave injury as a result of his accident. Additionally, Cary Insulation argues that the third-party claims against it for damages predicated on its alleged negligent hiring and retention of plaintiff are not actionable, since plaintiff was acting within the scope of his employment at the time of the alleged accident and all claims based on his alleged negligence must, therefore, be brought under the theory of respondeat superior.

By way of an order to show cause, plaintiff moves for partial summary judgment on the issue of liability with respect to his Labor Law § 240 (1) claim, and for a preliminary injunction restraining CCP from selling the subject premises during the pendency of the proceeding. Plaintiff argues that because defendants failed to ensure that he was provided with safety devices other than a pair of A-frame ladders and a single scaffolding plank, he was constrained to erect the makeshift scaffold which collapsed and caused his injuries. Plaintiff further argues that a preliminary injunction restraining CCP from selling the subject premises should be granted, since he has demonstrated a great probability of success on the merits of the case, irreparable harm could occur if CCP is permitted to sell the premises, and the injunction will maintain the status quo between the parties. In opposing CCP's motion for dismissal of the complaint, plaintiff asserts, among other things, that CCP may not benefit from the statute's homeowners' exemption because it purchased the subject property for re-sale. Plaintiff further asserts that his erection of the makeshift scaffold cannot be regarded as the sole proximate of the accident, since he was neither supplied with, nor instructed to use, some other adequate safety device that was available at the worksite.

Clean Cut Construction opposes Cary Insulation's motion on the basis that an ambiguity exists as to whether the contractual period of limitations set forth in the parties' agreement applies only to contractual disputes rather than claims for indemnification based on the subcontractor's negligent acts or omissions. Alternatively, Clean Cut Construction asserts that the contractual provision setting forth the period of limitations should be disregarded, because it is unconscionable and unreasonably short. Clean Cut Construction further asserts that its third-party claims against Cary Insulation are not barred by the exclusivity provisions of the Workers' Compensation Law where, as in this case, the parties' entered an agreement expressly consenting to such claims. CCP opposes plaintiff's motion on the ground triable issues exist as to whether the subject premises was exclusively used for residential purposes and, if so, whether it should be exempt from plaintiff's Labor Law §§ 240 (1) and 241 (6) claims pursuant to the statute's homeowners' exemption. In addition, CCP contends that triable issues exist as to whether plaintiff was recalcitrant in failing to utilize safety harnesses stored on his work truck that could have prevented him from falling. As for plaintiff's request for a preliminary injunction restraining the sale of the subject residence, CCP argues that plaintiff's request should be denied, as preliminary injunctions may not be used to preserve assets as security for potential judgments, and plaintiff failed to adduce any evidence that CCP was attempting to dispose of the premises in such a way that would warrant the court granting him an order of attachment.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 574, 774 NYS2d 792 [2d Dept 2004]). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (*see* ***O'Neill v Town of Fishkill***, 134 AD2d 487, 488, 521 NYS2d 272 [2d Dept 1987]). The 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 eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues

remain which preclude summary judgment (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Initially, the record indicates that Coady was a member of CCP, that he neither owned the subject premises nor controlled or directed any of the work performed at the worksite and there is no evidence that he abused his corporate position in a way that justifies piercing the corporate veil (*see* ***Bennett v Hucke***, 131 AD3d 993, 16 NYS3d 261 [2d Dept 2015]; ***East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.***, 66 AD3d 122, 884 NYS2d 94 [2d Dept 2009]). Thus, the branch of the motion to dismiss the action as against Coady personally is granted. Further, inasmuch as plaintiff failed to oppose the branches of the motion by CCP seeking dismissal of the causes of action predicated upon common law negligence and the alleged violations of Labor Law §§ 241 (6) and 200, dismissal of those claims is also granted (*see* ***Rodriguez v Dormitory Auth. of the State of N.Y.***, 104 AD3d 529, 962 NYS2d 102 [1st Dept 2013]; ***Kronick v L.P. Thebault Co., Inc.***, 70 AD3d 648, 892 NYS2d 895 [2d Dept 2010]). In any event, not only is it undisputed that plaintiff's accident did not result from a defective premises condition or work over which CCP possessed more than mere general supervisory authority (*see* ***Zupan v Irwin Contr., Inc.***, 145 AD3d 715, 43 NYS3d 113 [2d Dept 2016]; ***Zamor v Dirtbusters Laundromat, Inc.***, 138 AD3d 1114, 31 NYS3d 130 [2d Dept 2016]), but a cursory review of the sections of the Industrial Code that plaintiff alleges were violated reveal that they either set forth inactionable general safety standards or inapplicable regulatory provisions (*see* ***Karanikolas v Elias Taverna, LLC***, 120 AD3d 552, 992 NYS2d 31 [2d Dept 2014]; ***Rau v Bagels N Brunch, Inc.***, 57 AD3d 866, 870 NYS2d 111 [2d Dept 2008]). In particular, 12 NYCRR 23-1.5 sets forth an inactionable general safety standard, and 12 NYCRR 23-1.7 and 12 NYCRR 23-1.24 which refer, respectively, to accidents which occur on roofs or inside passageways, are both inapplicable since plaintiff's accident occurred inside an open stairwell. 12 NYCRR 23-1.8, which requires the provision of personal protective equipment such as respirators and protective apparel is likewise inapplicable. Furthermore, where, as in this case, plaintiff was not provided with a scaffold, and was not standing on a ladder at the time of his accident, 12 NYCRR 23-5 and 12 NYCRR 23-1.21, which seek to regulate, rather than mandate the provision of such equipment, are inactionable under the circumstances of this case (*see* ***Karanikolas v Elias Taverna, LLC***, 120 AD3d 552, 992 NYS2d 31 [2d Dept 2014]; ***Rau v Bagels N Brunch, Inc.***, 57 AD3d 866, 870 NYS2d 111 [2d Dept 2008]). Therefore, the branch of CCP's motion for summary judgment dismissing plaintiff's common law negligence and Labor Law §§ 241 (6) and 200 claims is granted.

As to the branch of CCP's motion for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim pursuant to the statute's homeowner's exemption, CCP failed to meet its prima facie burden by eliminating triable issues as to whether the subject premises was purchased and renovated for commercial rather than residential use and, if so, whether CCP should benefit from the statutory homeowners' exemption (*see* ***Vogler v Perrault***, 149 AD3d 1298, 52 NYS3d 544 [3d Dept 2017]; ***Batzin v Ferrone***, 140 AD3d 1102, 32 NYS3d 660 [2d Dept 2016]; ***Truppi v Busciglio***, 74 AD3d 1624, 1625, 905 NYS2d 291 [3d Dept 2010]). The homeowner's exemption to liability under Labor Law § 240 is not available to an owner who uses or intends to use a dwelling only for commercial purposes (*see* ***Van Amerogen v Donnini***, 78 NY2d 880, 573 NYS2d 443 [1991]). While "renovating a residence for resale or rental plainly qualifies as work being performed for a commercial purpose" (***Landon v Austin***, 88 AD3d 1127, 1128, 931 NYS2d 424 [3d Dept 2011]; *see* ***Lombardi v Stout***, 80 NY2d 290, 297, 590 NYS2d 55 [1992]),

in the case of mixed residential and commercial use, the availability of the homeowner's exemption turns on the site and purpose of the work (***Khela v Neiger***, 85 NY2d 333, 337, 624 NYS2d 566 [1995]). The "site and purpose" test is "employed on the basis of the homeowners' intentions at the time of the injury underlying the action and not their hopes for the future" (***Truppi v Busciglio***, *supra*). Although Coady testified that CCP was formed for the purpose of purchasing properties that would be renovated and resold, he also testified that the subject premises was the first property purchased by CCP and, as such, there were "no set plans" for the residence. Further, in an affidavit he later submitted in opposition to plaintiff's motion, Coady states that he and his family have continuously lived in the premises, except for periods of temporary absences required to make repairs necessitated by damage caused by Superstorm Sandy and a basement fire which occurred in October 2015. Such evidence raises issues of fact which precludes summary judgment (*see* ***Lombardi v Stout***, *supra*; ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

With respect to plaintiff's motion seeking partial summary judgment on the issue of liability on his Labor Law § 240 (1) claim, CCP submitted a copy of an accident report prepared by Cary Insulation's supervisor, Gary Ritter, immediately after the accident. At his examination before trial, Ritter testified, based on the evidence he gathered for his report, that plaintiff failed to utilize safety harnesses stored inside his work truck in accordance with specific instructions given to all employees and that such harnesses should be used whenever they conducted work on any type of platform or scaffold. Ritter further testified that CCP employees were warned that it was against company policy for them to use the type of catwalk plank scaffold plaintiff was using at the time of the accident. Considering plaintiff was responsible for erecting the makeshift scaffold from which he fell, and evidence has been adduced that he had reason to know that safety harnesses were routinely stored in his work truck, triable issues exist as to whether plaintiff was a recalcitrant worker, or whether his conduct of erecting and using the plank scaffold in derogation of company policy was the sole proximate cause of the accident (*see* ***Cahill v Triborough Bridge & Tunnel Auth.***, 4 NY3d 35, 790 NYS2d 74 [2004]; ***Kulp v Gannet Co.***, 259 AD2d 969, 687 NYS2d 840 [4th Dept 1999]; ***Mills v Niagara Mohawk Power Corp.***, 262 AD2d 901, 692 NYS2d 493 [3d Dept 1999]; ***Job v 1133 Bldg. Corp.***, 251 AD2d 459, 674 NYS2d 710 [2d Dept 1998]). Thus, plaintiff's motion for partial summary judgment is denied.

As to the branch of plaintiff's motion seeking the imposition of a preliminary injunction restraining CCP from selling the subject premises, to obtain a preliminary injunction the movant has the burden of demonstrating a likelihood of success on the merits, irreparable injury in the absence of an injunction, and a balance of the equities in its favor (*see* CPLR 6301; ***Aetna Ins. Co. v Capasso***, 75 NY2d 860, 862, 552 NYS2d 918 [1990]; ***Dixon v Malouf***, 61 AD3d 630, 875 NYS2d 918 [2d Dept 2009]; ***Coinmach Corp. v Alley Pond Owners Corp.***, 25 AD3d 642, 643, 808 NYS2d 418 [2d Dept 2006]). "Preliminary injunctive relief is a drastic remedy which will not be granted 'unless a clear right thereto is established under the law and the undisputed facts'" (*see* ***Hoeffner v John F. Frank, Inc.***, 302 AD2d 428,756 NYS2d 63 [2d Dept 2003], quoting ***First Natl. Bank v Highland Hardwoods, Inc.***, 98 AD2d 924, 926, 471 NYS2d 360 [3d Dept 1983]). Furthermore, a preliminary injunction is inappropriate where the movant has failed to demonstrate that an award of money damages will not make it whole (*see* ***Somers Assoc. v Corvino***, 156 AD2d 218, 548 NYS2d 480 [1st Dept 1989]), or where its pleadings requests only an award of damages (*see* ***Credit Agricole Indosuez v Rossiyskiy Kredit Bank***, 94 NY2d 541, 545-46, 708 NYS2d 26 [2000]; ***Matter***

of Gebman v Pataki, 256 AD2d 854, 855, 681 NYS2d 701 [3d Dept 1998]). Here, only monetary damages have been requested in the pleadings and plaintiff has failed to demonstrate that he will suffer irreparable injury in the absence of an injunction or that an award of money damages will be insufficient to make him whole. Therefore, the branch of plaintiff's motion seeking the imposition of a preliminary injunction restraining CCP from selling the subject premises is denied.

Turning to Cary Insulation's motion for summary judgment dismissing the third-party complaint, the unopposed branch of the motion seeking dismissal of the common law indemnfication and contribution claims is granted. "[A]n employer may be held liable for contribution or indemnification only if the employee has sustained a 'grave injury' within the meaning of the Workers' Compensation Law (Workers' Compensation Law § 11; *see* ***Fleming v Graham***, 10 NY3d 296, 857 NYS2d 8 [2008]). Grave injuries are those injuries that are listed in the statute and are determined to be permanent in nature (*see* ***Persaud v Bovis Lend Lease, Inc.***, 93 AD3d 831, 941 NYS2d 208 [2d Dept 2012]). Here, it is undisputed that plaintiff did not suffer a grave injury as defined within the meaning of Section 11 of the Workers' Compensation Law. Therefore, the third-party claims for common law indemnification and contribution must be dismissed, as matter of law (*see* ***Poalacin v Mall Props., Inc.***, 155 AD3d 900, 64 NYS3d 310 [2d Dept 2017]; ***Grech v HRC Corp.***, 150 AD3d 829, 54 NYS3d 433 [2d Dept 2017]; ***Konior v Zucker***, 299 AD2d 320, 749 NYS2d 86 [2d Dept 2002]). Inasmuch as a cause of action for negligent hiring and retention against an employer may only proceed on a theory of respondent superior (*see* ***Ashley v City of New York***, 7 AD3d 742, 799 NYS2d 502 [2d Dept 2004]; ***Rossetti v Board of Educ. of Schalmont Central School District***, 277 AD2d 668, 716 NYS2d 460 [3d Dept 2000]), the branch of the motion seeking dismissal of the third-party claim for contractual indemnification predicated on Cary Insulation's alleged negligent hiring and retention of plaintiff is granted.

As to the branch of Cary Insulation's motion for summary judgment dismissing the contractual indemnfication claim against it, the work agreement between Cary Insulation and CCC contains the following action and liability limitations provision which states, in pertinent part, as follows:

> All claims and/or Lawsuits including but not limited to claims or lawsuits for indemnity and/or contribution against the company arising under this agreement must be made within 13 months from the date of completion of the installation. . . THE MAXIMUM LIABILITY, IF ANY, OF COMPANY FOR ALL DAMAGES, INCLUDING WITHOUT LIMITATION CONTRACT DAMAGES AND DAMAGES FOR INJURIES TO PERSONS OR PROPERTY, WHETHER ARISING FROM COMPANY'S BREACH OF THIS AGREEMENT, BREACH OF WARRANTY, NEGLIGENCE, STRICT LIABILITY OR OTHER TORT WITH RESPECT TO THE PRODUCTS, OR ANY SERVICES IN CONNECTION WITH THE PRODUCTS IS LIMITED TO AN AMOUNT NOT TO EXCEED THE CONTRACT PRICE. IN NO EVENT SHALL COMPANY BE LIABLE FOR ANY INCIDENTAL, CONSEQUENTIAL, LIQUIDATED, OR SPECIAL DAMAGES, INCLUDING WITHOUT LIMITATION, LOST REVENUE AND PROFITS, ATTORNEYS FEES AND/OR COSTS EVEN IF IT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE RIGHT TO RECOVER

> DAMAGES WITHIN THE LIMITATIONS SPECIFIED IS YOUR EXCLUSIVE REMEDY" IN THE EVENT THAT ANY OTHER CONTRACTUAL REMEDY FAILS OF ITS ESSENTIAL PURPOSE.

Paragraph 18 of the agreement, entitled "Indemnity" further states as follows:

> Each of the parties to this agreement agrees to defend and indemnify one another from any and all claims, actions and/or lawsuits caused by the party's negligent acts or omissions. This indemnity clause and the obligations created herein shall control and take priority over any contrary indemnity agreement entered into subsequent to the agreement unless the subsequent agreement specifically refers to this indemnity clause and declares it null and void.

Worker's Compensation Law § 11 permits third-party indemnification claims against employers where such claims are based upon express indemnification provisions in a written contract (*see* ***Rodrigues v N&S Blg. Contrs. Inc.***, 5 NY3d 427, 805 NYS2d 299 [2005]; ***Majewski v Broadalbin-Perth Cent. School Dist.***, 91 NY2d 577, 673 NYS2d 966 [1998]). Like any action based on a contract, the applicable statute of limitations for a third-party indemnfication claim is six years (*see* CPLR 213 [2]). Moreover, claims for contractual indemnfication generally do not accrue for the purpose of the statute of limitations until the party seeking indemnification has made payment to the injured party (*see* ***McDermott v New York***, 50 NY2d 211, 428 NYS2d 643 [1980]). Although contractual stipulations which attempt to limit the statutory period of time within which to sue are permitted, to be enforceable the shortened period must be fair and reasonable in view of the circumstances of each particular case (*see* ***John J. Kassner & Co. v City of New York***, 46 NY2d 544, 551, 415 NYS2d 785 [1979]). Indeed, when determining the fairness and reasonableness of the shortened period, it is the circumstances of the particular case, not the duration of the shortened time period, that will be the determining factor (*see* ***Executive Plaza, LLC v Peerless Ins. Co.***, 22 NY3d 511, 982 NYS2d 826 [2014]). Therefore, even a period of limitation which endures for more than one year may be regarded as unreasonable where it expires before an action accrues. In such a case, the provision is not really a limitation period at all, but simply a nullification of the underlying claim (*see* ***Executive Plaza, LLC v Peerless Ins. Co.***, *supra* at 519).

Although Cary Insulation established that the third-party claim in question was commenced beyond the 13-month limitations period set forth in the parties' agreement, in opposition CCP has shown that the limitations provision was unreasonably short as it expired prior to the actual accrual of the third-party indemnification claim (*see* ***Executive Plaza, LLC v Peerless Ins. Co.***, *supra*; ***Baluk v New York Cent. Mut. Fire Ins. Co.***, 126 AD3d 1426, 6 NYS3d 917 [4th Dept 2015]; ***JC Ryan EBCO/H & G, LLC v Lipsky Enterprises, Inc.***, 78 AD3d 788, 911 NYS2d 136 [2d Dept 2010]; ***Fitzpatrick & Weller, Inc. v Miller***, 309 AD2d 1273, 765 NYS2d 555 [4th Dept 2003]; ***Certified Fence Corp. v Flexis Industries, Inc.***, 260 AD2d 338, 687 NYS2d 682 [2d Dept 1999]). Specifically, CCP demonstrated that not only has the limitation period provision shortened an otherwise six year statutory period to a mere 13 months, but where, as in this case, no damages has been paid to the injured party, such that the third-party action has not even accrued, the provision may serve to nullify the indemnification claims altogether.

Accordingly, the branch of Cary Insulation's motion seeking dismissal of the third-party contractual indemnification claim against it is denied.

Dated: November 19, 2018

HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION