SHORT FORM ORDER

INDEX No. 15-600732
CAL. No. 17-01130OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 5-3-17 (001)
MOTION DATE 6-28-17 (002)
ADJ. DATE 8-9-17
Mot. Seq. # 001 - MotD
Mot. Seq. # 002 - MotD

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LUIS LUCERO,

Plaintiff,

- against -

FAMILY HQ LLC and MICHAEL DAVIS CONSTRUCTION, INC.,

Defendants.

LAMBROU LAW FIRM, P.C.
Attorney for Plaintiff
45 Broadway, 31st Floor
New York, New York 10006

CONGDON, FLAHERTY, O'CALLAGHAN
Attorney for Defendant Davis
333 Earle Ovington Blvd. Suite 505
Uniondale, New York 11553

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MICHAEL DAVIS CONSTRUCTION, INC.,

Third-Party Plaintiff,

- against -

EPZ CONTRACTING, INC.,

Third-Party Defendants.

WADE CLARK & MULCAHY, ESQS.
Attorney for Defendant Family HQ LLC
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New York, New York 10038

SMITH SOVIK KENDRICK & SUGNET
Attorney for Third-Party Defendant/Second Third-Party Defendants EPZ Contracting
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East Meadow, New York 11554

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FAMILY HQ LLC.,

Second Third-Party Plaintiff,

- against -

EPZ CONTRACTING, INC.,

Second Third-Party Defendants.

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Upon the following e-filed papers read on these motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers dated March 27, 2017 and June 2, 2017 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers dated April 26, 2017, July 21, 2017 and August 1, 2017 ; Replying Affidavits and supporting papers dated May 9, 2017 and August 9, 2017 ; Other Memorandum of Law dated March 27, 2017, May 9, 2017 and July 21, 2017 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the pending motions (001 and 002) are combined herein for disposition; and it is

ORDERED that the motion by defendant/second third-party plaintiff Family HQ, LLC for summary judgment dismissing the complaint and all cross claims and counterclaims asserted against it, and for summary judgment on its cross claims against defendant Michael Davis Construction Inc. for contractual indemnification and defense costs, and for breach of contract for failure to procure liability insurance naming it as an additional insured, and on its third-party complaint against EPZ Contracting, Inc. for contractual indemnification and defense costs is decided as set forth herein; and it is further

ORDERED that the motion by plaintiff for summary judgment in his favor on the issue of liability against defendants Family HQ, LLC and Michael Davis Construction, Inc. is decided as set forth herein.

Plaintiff commenced this action seeking damages for personal injuries he sustained on January 6, 2015 at approximately 11:30 a.m. when he fell from the first floor to the basement level of a house being constructed on Mecox Road in Bridgehampton, New York (the "Property"). Family HQ, LLC ("Family HQ"), whose only officers are husband and wife Thomas and Kristin Patrick (the "Patricks"), own the Property. The Patricks entered into a written construction agreement with defendant Michael Davis Corporation, Inc. ("MDCI") as the general contractor, and MDCI entered into a written agreement with third-party defendant EPZ Contracting, Inc. ("EPZ") to do the framing and trim work. At the time of the accident, plaintiff was employed as a carpenter by EPZ.

In his complaint, as amplified by his bill of particulars, plaintiff alleges that Family HQ and MDCI were negligent in failing to provide him with adequate safety devices to protect him from falling in violation of, among other rules and regulations pertaining to construction, Labor Law §§ 240, 241(6) and 200. He also alleges Family HQ and MDCI are liable for common-law negligence. In their separate answers, MDCI and Family HQ each deny liability, interpose several affirmative defenses, including that plaintiff's conduct was the sole proximate cause of his accident and a recalcitrant worker, and each allege cross claims against the other for common-law and contractual contribution and indemnification, breach of contract in failing to procure insurance naming the other as an additional insured, and attorneys' fees. MDCI and Family HQ also each implead EPZ seeking common-law and contractual indemnification. In addition, MDCI asserts a third-party claim against EPZ for breach of contract in failing to procure insurance for its benefit. Issue has been joined in the impleader actions.

Discovery has been completed and the note of issue filed. Family HQ now moves for summary judgment dismissing plaintiff's complaint and all cross claims asserted against it on the grounds that it cannot be held liable based on the homeowner's exemption in the Labor Law statute. Family HQ also seeks summary judgment on its cross claims against MDCI and third-party claims against EPZ. Plaintiff

moves for summary judgment on the issue of liability on his Labor Law § 240 claim against Family HQ and MDCI.

EPZ began working at the Property on January 5, 2015, the day before plaintiff's accident. At that time, the foundation had been poured and steel I-beams installed by other trades. On the morning of the accident, plaintiff arrived at the Property with EPZ foreman Robert Vera. EPZ had approximately 15 employees at the Property to start the framing, i.e., to install floor joists on the first level and window frame headers in the basement. Vera assigned plaintiff to install window frame headers.

Immediately prior to the accident plaintiff was on the first floor level at the rear of the foundation, and the tools and materials he needed to perform his assigned task were in the front of the Property. Plaintiff testified he intended to walk across the I-beams to retrieve the tools as he had done several times previously that morning without incident. He explained that walking across the I-beams was quicker than walking around the perimeter of the house. At that time, EPZ employees Jose Alexsi Marquez and Michael Stevenson were installing floor joists. Plaintiff testified he stepped up on an I-beam, and as he approached Marquez, had to walk around him. Plaintiff denies that Marquez said anything to him about the joists not being secured, and proceeded to the other side without incident. On his return with the materials he needed, he stepped on a joist, it collapsed and plaintiff fell to the ground in the basement. According to plaintiff, he was not provided with a harness or any other safety device to prevent him from falling, there were no safety meetings, and he was never informed not to walk on the I-beams. Plaintiff also states that he received all of his instructions from Vera, that no one associated with MDCI told him how to perform the work, and that he never saw the Patricks at the Property.

MDCI, by way of an affidavit by Stevenson, offered a slightly different version of plaintiff's accident. Stevenson asserts that he was an eyewitness to the events leading up to plaintiff's fall, and that Marquez warned plaintiff that the joists were not secured. Stevenson states plaintiff disregarded the warning, passed by Marquez and proceeded across the I-beams. It was on plaintiff's way back across the I-beams that he stepped onto an unsecured joist, and he fell.

Eric Zaczynski, the owner of EPZ, testified he was at the Property on the morning of the accident, but left before plaintiff's accident occurred. He testified that other than EPZ employees, no other trades were at the Property. He also testified that the materials needed for the framing had been delivered to the Property by MDCI and that EPZ provided its own tools and safety equipment. He admitted that other than scaffolding erected in the basement and the availability of ladders at the Property, there were no safety nets or harnesses and lanyards provided to EPZ workers. The lack of these safety devices, Zaczynski conceded, resulted in EPZ receiving OSHA violations for which monetary fines were paid. Zaczynski testified that plaintiff had worked for EPZ for approximately three years, and had been informed of safety protocol, which included a prohibition against walking on I-beams. Similarly, Vera testified that EPZ workers were informed not to walk on I-beams but he was aware they often did. Vera, however, denied that he saw plaintiff walking on the I-beams while at the Property.

Thomas Patrick testified on behalf of Family HQ and has submitted an affidavit in support of the motion for summary judgment. Thomas Patrick testified and asserts in his affidavit that he and his family now live in the house on the Property, which was built for use as their exclusive residence and not

for any commercial purpose. Thomas Patrick also states that neither his family members, Family HQ nor any of its officers directed, controlled, supervised or managed any of the construction being performed or supplied any tools, materials or equipment. Additionally, he asserts that the Patricks only visited the Property to observe the progress of the work.

Labor Law § 240(1) and § 241(6) impose a nondelegable duty upon owners and general contractors to provide protective equipment, devices and other adequate and reasonable protection to persons employed in the construction or alteration of a building (*see* ***Ross v Curtis-Palmer Hydro Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]; ***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 577 NYS2d 219 [1991]; ***Cannon v Putnam***, 76 NY2d 644, 563 NYS2d 16 [1990]). A contractor, owner or agent will be held strictly liable where a violation of these sections of the Labor Law statute is the proximate cause of a plaintiff's injuries (***Ross v Curtis-Palmer Hydro Elec. Co.***, *supra*; ***Rocovich v Consolidated Edison Co.***, *supra*; ***Zimmer v Chemung County Perf. Arts, Inc.***, 65 NY2d 513, 493 NYS2d 102 [1985]). Moreover, an owner or contractor may be held liable in damages regardless of whether it has actually exercised supervision or control over the work (***Ross v Curtis-Palmer Hydro Elec. Co.***, *supra*; ***Rocovich v Consolidated Edison Co.***, *supra*).

Excluded from the strict liability provisions of Labor Law §§ 240 and 241 are owners of one and two-family dwellings who contract for but do not direct or control the work (Labor Law § 240(1); Labor Law § 241; ***Cannon v Putman***, *supra*; ***Abdou v Rampaul***, 147 AD3d 885, 47 NYS3d 430 [2d Dept 2017]; ***Assevero v Hamilton & Church Props., LLC***, 131 AD3d 553, 15 NYS3d 390 [2015]). Corporate ownership of a property, in and of itself, does not preclude application of the homeowner exception to sections 240 and 241(6) (***Assevero v Hamilton & Church Props., LLC***, *supra*; *see* ***Baez v Cow Bay Constr.***, 303 AD2d 528, 756 NYS2d 281 [2d Dept 2003], *lv denied* 2 NY3d 701, 778 NYS2d 459 [2004] [defendant corporation entitled to exemption where the project upon which the injured plaintiff was working involved construction of two single-family houses that the sole shareholder of defendant and his family planned to use for residential purposes]).

Labor Law § 200 is a codification of the common-law duty of owners and general contractors to provide workers with a reasonably safe place to work (***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Banscher v Actus Lend Lease, LLC***, 132 AD3d 707, 17 NYS3d 774 [2d Dept 2015]). To be held liable under Labor Law § 200 and for common-law negligence for injuries arising from the means and methods used to perform the work, an owner or general contractor must have authority to exercise supervision and control over the work (***Paolchin v Mall Props., Inc.***, 155 AD3d 900, 64 NYS3d 310 [2d Dept 2017]; ***Banscher v Actus Lend Lease, LLC***, *supra*). Where a plaintiff's injuries stem from a dangerous condition on the premises, a defendant may be held liable if it either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition (***Paolchin v Mall Props., Inc.***, *supra*; ***Banscher v Actus Lend Lease, LLC***, *supra*).

Here, Family HQ has met the criteria for qualification under the homeowner's exemption; consequently, it cannot be held liable for plaintiff's injuries under Labor Law § 240 or § 241 (*see* ***Abdou v Rampaul***, *supra*; ***Sandals v Shemtov***, 138 AD3d 720, 29 NYS3d 448 [2d Dept 2016]). Family HQ has also established that it did not have the authority to control or supervise the means and methods of the plaintiff's work, nor did it have actual or constructive notice of any dangerous conditions at the work site to support the imposition of liability under Labor Law § 200 or for common-law negligence (*see*

Sandals v Shemtov, *supra*; ***Banscher v Actus Lend Lease, LLC***, *supra*; ***Wejs v Heinbockel***, 142 AD3d 990, 37 NYS3d 569 [2d Dept 2016]).

Having concluded that Family HQ cannot be held liable necessarily defeats the cross claims for indemnification and contribution asserted against it by MDCI (*see* ***Stone v Williams***, 64 NY2d 639, 485 NYS2d 42 [1984]; ***Tapinekis v Rivington House Health Care Facility***, 17 AD3d 572, 793 NYS2d 484 [2d Dept 2005]). *A fortiori*, plaintiff's cross motion for summary judgment against Family HQ is denied as moot. Family HQ's cross claims against MDCI and its third-party claim against EPZ, however, remain viable.

"A contractor may properly obtain insurance to insure an owner against its own acts of negligence, in contrast to an indemnification provision, which insures an owner against the imposition of vicarious liability based on another party's negligence" (***Town of Hempstead v East Coast Resource Group, LLC***, 67 AD3d 777, 778, 889 NYS2d 88 [2d Dept 2009]). Here, Family HQ established its prima facie showing of entitlement to summary judgment on its cross claim for breach of contract by demonstrating that MDCI failed to satisfy a contractual obligation to obtain insurance in Family HQ's name as an additional insured. As a result of the breach, Family HQ is entitled to summary judgment on its breach of contract claim and to recover damages from MDCI for costs and attorneys' fees incurred in defending the plaintiff's action to date (*see* ***Darowski v High Meadow Co-op. No. 1***, 239 AD2d 541, 657 NYS2d 457 [2d Dept 1997]). In opposition, MDCI failed to raise an issue of fact.

Family HQ is also entitled to recover attorneys' fees from EPZ. The Independent Contractor Agreement between MDCI and EPZ contains a broad indemnification provision whereby EPZ agreed to "indemnify and hold harmless Michael Davis Construction and the property owner against any claims, damages, losses and expenses arising out of or resulting from performance of sub-contracted work to the extent caused in whole or in part by the negligence of the subcontractor...." This broad indemnification provision must be read to include attorneys fees, even though the provision does not expressly mention such fees (***Milani v Broadway Mall Properties, Inc.***, 261 AD2d 370, 689 NYS2d 203 [2d Dept 1999]). Moreover, the provision does not run afoul of Workers' Compensation Law § 11, and thus is enforceable (*see* ***Stabile v Viener***, 291 AD2d 395, 737 NYS2d 381 [2d Dept 2002]).

Therefore, Family HQ is entitled to summary judgment on that branch of its motion seeking indemnification from EPZ pursuant to the Agreement, but only to the extent that EPZ is to reimburse Family HQ for reasonable attorneys fees incurred in defending the action (*see* ***Merchants Mut. Ins.Co. v Saxon Indus., Inc.***, 170AD2d 654, 568 NYS2d 933 [2d Dept 1991]). The grant of summary judgment, however, is conditional. Where, as here, the party seeking to be indemnified is not negligent, nor had the authority to supervise, direct or control the work that caused the injury (*see* ***Brown v Two Exch. Plaza Partners***, 76 NY2d 172, 556 NYS2d 991[1990]; ***Naranjo v Star Corrugated Box Co., Inc.***, 11 AD3d 436, 783 NYS2d 607 [2d Dept 2004]), "a court my render a conditional judgment on the issue of indemnity pending determination in the primary action in order that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed" (***Masciotta v Morse-Diesel Intl., Inc.***, 303 AD2d 309, 310, 758 NYS2d 286 [1st Dept 2003]).

Turning to plaintiff's motion, he has established prima facie entitlement to partial summary judgment on his Labor Law § 240 (1) claim against MDCI. The evidence proffered demonstrates that

MDCI failed to provide any safety devices, such as a safety net, harness or lifeline, to prevent plaintiff's fall and that the lack of such devices was a proximate cause of his injuries (*see* ***Bland v Manocherian***, 66 NY2d 452, 497 NYS2d 880 [1985]; ***Poalacin v Mall Properties, Inc.***, 155 AD3d 900, 64 NYS3d 310 [2d Dept 2017]; ***Melchor v Singh***, 90 AD3d 866, 935 NYS2d 106 [2d Dept 2011]). Having made a prima facie showing, the burden shifts to MDCI to defeat the motion with sufficient evidence to raise a question of fact as to whether there was a statutory violation and whether plaintiff's own acts or omissions were the sole proximate cause of the accident (***Blake v Neighborhood Hous. Servs of New York City***, 1 NY3d 280, 771 NYS2d 484 [2003]; ***Bermejo v New York City Health & Hosps. Corp.***, 119 AD3d 500, 989 NYS2d 490 [2d Dept 2014]). MDCI has failed to do so.

Where a violation of Labor Law § 240(1) is a proximate cause of an accident, the plaintiff's conduct, of necessity, cannot be deemed the sole proximate cause (*see* ***Blake v Neighborhood Hous. Servs. of New York City***, *supra*; ***Melchor v Singh***, *supra*). Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation (*see* ***Blake v Neighborhood Hous. Servs. of New York City***, *supra*; ***Melchor v Singh***, *supra*). Thus, unavailing are MDCI's arguments that plaintiff's conduct of walking on the I-beam was the sole proximate cause of his accident, and that plaintiff elected to perform his job recklessly. To the extent MDCI attempts to invoke the "recalcitrant worker" defense, it has no application where, as here, no adequate safety devices have been provided (***Stolt v General Foods Corp.***, 81 NY2d 918, 920, 597 NYS2d 650 [1993]). Notably, it has been held that "an instruction by an employer to avoid using unsafe equipment or engaging in unsafe practices is not itself a 'safety device'" (*id.*).

Moreover, it is not a defense to a recovery under Labor Law § 240 (1) that it was unnecessary for the plaintiff to walk across the I-beam to get the materials he needed to do the work (*see* ***Hagins v State of New York***, 81 NY2d 921, 597 NYS2d 651 [1993]; ***Birbuluis v Rapp***, 205 AD2d 569, 613 NYS2d 414 [2d Dept 1994]; *cf.* ***Cordeiro v Shalco Investments***, 297 AD2d 486, 747 NYS2d 194 [1st Dept 2002] [finding that defendants could establish plaintiff's conduct was the sole proximate cause of his fall if plaintiff needlessly used the beam as a shortcut and voluntary detour out of the garage, not serving any work-related purpose]). Additionally, "[i]t is well settled that the injured's contributory negligence is not a defense to a claim based on Labor Law § 240 (1) and that the injured's culpability, if any, does not operate to reduce the owner/contractor's liability for failing to provide adequate safety devices" (***Stolt v General Foods Corp.***, *supra* at 920; *see* ***Bland v Manocherian***, *supra*).

Hence, MDCI is absolutely liable, as it is undisputed that plaintiff fell from an elevated work site, and that no adequate safety devices were operating to prevent his fall. Therefore, plaintiff is entitled to summary judgment in his favor against MDCI on the issue of liability on his Labor Law § 240 (1) cause of action.

Dated: May 2, 2018

J.S.C.
HON. DAVID T. REILLY

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