XSHORT FORM ORDER

INDEX No. 17-607726
CAL. No. 19-00196OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

ORIGINAL

PRESENT:

Hon. WILLIAM J. CONDON
Justice of the Supreme Court

MOTION DATE 7-9-19 (001 & 002x)
MOTION DATE 7-29-19 (003 & 004x)
ADJ. DATE 8-27-19
Mot. Seq. # 001 - MotD # 003 - MotD
002x - MotD # 004x - MotD

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TERRENCE HIRES,

Plaintiff,

- against -

TWO TREES FARM DEVELOPMENT, LLC, and WILLIAM H. CORWITH CONSTRUCTION, LLC.,

Defendants.

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WILLIAM H. CORWITH CONSTRUCTION, LLC,

Third-Party Plaintiff,

- against -

TWO TREES STABLES, INC.,

Third-Party Defendants.

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Upon the following papers read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by Defendant Two Trees Farm Development, LLC and Third-Party Defendant Two Trees Stables Inc., dated June 4, 2019; Notice of Cross Motion and supporting papers by Plaintiff, dated July 1, 2019; Notice of Motion/ Order to Show Cause and supporting papers by Defendant/Third-Party Plaintiff William H. Corwith Construction, LLC, dated July 2, 2019; Notice of Cross Motion and supporting papers by Plaintiff, dated July 23, 2019; Answering Affidavits and supporting papers by Defendant/Third-Party Plaintiff William H. Corwith Construction, LLC, dated June 13, 2019 and August 13, 2019; Answering Affidavits and supporting papers by Defendant Two Trees Farm Development, LLC and Third-Party Defendant Two Trees Stables Inc., dated August 5, 2019 and August 6, 2019; Replying Affidavits and supporting papers by Defendant Two Trees Farm Development, LLC and Third-Party Defendant Two Trees Stables Inc., dated August 6, 2019; Other Memorandum of Law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (001) by defendant Two Trees Farm Development, LLC and third-party defendant Two Trees Stables Inc., the cross motion (002) by plaintiff, the motion (003) by defendant/third-party plaintiff William H. Corwith Construction, LLC, and the cross motion (004) by plaintiff, are consolidated for the purpose of this determination; and it is further

ORDERED that the motion (001) by defendant Two Trees Farm Development, LLC and third-party defendant Two Trees Stables Inc. for, inter alia, summary judgment dismissing the complaints and cross claims against them is granted to the extent indicated herein and is otherwise denied; and it is

ORDERED that the cross motion (002) by plaintiff for summary judgment against defendants is granted to the extent indicated herein and is otherwise denied; and it is

ORDERED that the motion (003) by defendant/third-party plaintiff William H. Corwith Construction, LLC for summary judgment is denied; and it is further

ORDERED that the cross-motion (004) by plaintiff for, inter alia, summary judgment against William H. Corwith Construction, LLC is denied.

Plaintiff commenced this action against defendants Two Trees Farm Development, LLC and William H. Corwith Construction, LLC ("Corwith") for alleged injuries arising from an accident which occurred on November 6, 2015 at 14 Two Trees Lane, Bridgehampton, New York. It is undisputed that Two Trees Farm Development, LLC was the owner of the subject property, which was located in a subdivision where new homes were being constructed, and that Corwith was hired as the construction manager for the construction project. The accident occurred while plaintiff was performing work for Precision Irrigation ("Precision"), the contractor hired to install the irrigation sprinkler system at the subject property. In his complaint, plaintiff alleges that he fell into an unguarded, hazardous opening at the premises, and he asserts claims against defendants for violations of Labor Law §§ 240, 241, 200, and common law negligence. Corwith subsequently commenced a third-party action against Two Trees Stables Inc., alleging that Two Trees Stables contracted with Precision for the installation of the sprinklers at the property owned by Two Trees Farm.

Two Trees Farm and Two Trees Stables (hereinafter collectively "Two Trees") move for summary judgment requesting dismissal of plaintiff's claims and the cross claims and third-party claims

against them, and/or for an order granting them summary judgment with respect to their claims for indemnification and breach of contract against Corwith. In support of their motion, Two Trees has submitted, inter alia, the deposition transcripts of the parties and non-party Precision, and a copy of the construction management agreement between Two Trees and Corwith.

The branch of Two Trees' motion requesting dismissal of plaintiff's claims against it under Labor Law § 240 (1) is denied. Labor Law § 240 (1) imposes a nondelegable duty upon owners, such as Two Trees, to provide safety devices necessary to protect a worker from risks arising from a "physically significant elevation differential" (*See* ***Nicometi v Vineyards of Fredonia***, 25 NY3d 90, 97, 7 NYS3d 263 [2015]; ***Runner v New York Stock Exch., Inc.***, 13 NY3d 599, 603, 895 NYS2d 279 [2009]). Specifically, Labor Law § 240 (1) requires that safety devices be "constructed, placed and operated as to give proper protection to a worker" (***Klein v City of New York***, 89 NY2d 833, 834, 652 NYS2d 723 [1996]). A violation of this duty will result in strict liability where the violation was the proximate cause of the accident (*see* ***Vasquez v Cohen Bros. Realty Corp.***, 105 AD3d 595, 963 NYS2d 626 [1st Dept 2013]). The evidence submitted in support of Two Trees' motion, including the parties' deposition testimony, fails to eliminate issues of fact regarding whether a violation of Labor Law § 240 (1) proximately caused the alleged accident. In this regard, plaintiff testified that, while working on the installation of the sprinkler system at the premises, he was asked by his employer to move pieces of plywood from the porch of the house under construction to the walkway. After moving several sheets of plywood from the porch, plaintiff fell approximately fifteen feet to the bottom of a concrete window well, which had been covered by the unmarked, unsecured sheets of plywood.

Similarly, Two Trees has failed to establish prima facie entitlement to summary judgment dismissing plaintiff's claims against it under Labor Law § 241 (6). "Labor Law § 241 (6) imposes upon owners and general contractors, and their agents, a nondelegable duty 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 (*see* ***Norero v 99-105 Third Avenue Realty, LLC***, 96 AD3d 727, 727-728, 945 NYS2d 720 [2d Dept 2012]). Two Trees' submissions fail to eliminate issues of fact regarding whether a violation of Industrial Code § 23-1.7 [b] [1] [i] was a proximate cause of the alleged accident. Thus, Two Trees' application for summary judgment dismissing plaintiff's claims under Labor Law § 241 (6) is also denied.

Two Trees' application for summary judgment dismissing plaintiff's claims under Labor Law § 200 and common law negligence is granted. Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide workers with a safe place to work (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Shaughnessy v Huntington Hosp. Assoc.***, 147 AD3d 994, 997, 47 NYS3d 121 [2d Dept 2017]; ***Quituizaca v Tucchiarone***, 115 AD3d 924, 925, 982 NYS2d 524 [2d Dept 2014]). Where a claim arises out of alleged dangers in the method of the work, there can be no recovery unless it is shown that the owner had the authority to control the means and manner of the plaintiff's work (*see* ***Rizzuto v LA. Wenger Contr. Co., Inc.***, 91 NY2d 343, 352, 670 NYS2d 816 [1998]; ***Persichilli v Triborough Bridge & Tunnel Auth.***, 16 NY2d 136, 262 NYS2d 476 [1965]; ***Mitchell v Caton on the Park, LLC***, 167 AD3d 865, 866-867, 90 NYS3d 316 [2d Dept 2018]). By contrast, where the claim arises out of an alleged dangerous condition on the premises, there can be no recovery unless it is shown that the owner possessed actual or constructive

notice of said condition (*see* ***Mitchell v Caton on the Park, LLC***, 167 AD3d 865, 867, 90 NYS3d 316; ***Kuffour v Whitestone Const. Corp.***, 94 AD3d 706, 941 NYS2d 653 [2d Dept 2012]; ***Selak v Clover Mgt., Inc.***, 83 AD3d 1585, 1587, 922 NYS2d 891 [4th Dept. 2011]; ***Azad v 270 Realty Corp.***, 46 AD3d 728, 730, 848 NYS2d 688 [2d Dept 2007]). Here, Two Trees has made a prima facie showing of entitlement to summary judgment with regard to plaintiff's claims under Labor Law § 200 and common law negligence through the deposition testimony establishing that Two Trees did not supervise or direct the work at the site, or have prior notice of the alleged dangerous condition. In opposition to Two Trees' motion, plaintiff failed to present any evidence raising a triable issue of fact in this regard. Accordingly, plaintiff's claims against Two Trees under Labor Law § 200 and common law negligence are dismissed (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316; ***Wejs v Heinbockel***, 142 AD3d 990, 992, 37 NYS3d 569 [2d Dept 2016]).

The branch of Two Trees' motion for summary judgment on its claims against Corwith for contractual indemnification is granted. The agreement between Two Trees and Corwith contains an indemnification clause which required Corwith to, inter alia, defend and indemnify Two Trees from all claims, losses and expenses "arising in whole or in part . . . from the acts, omissions, breach or default of [Corwith], in connection with performance of any work by [Corwith], its officers, directors, agents, employees and subcontractors." The deposition testimony of Corwith's foreman, Bradley Miller, which was submitted in support of Two Trees' motion, establishes that the unmarked, unsecured plywood was placed over the window well by an employee of Corwith, or by Wolper Brothers, the masonry contractor for the construction project. Miller further testified that he was aware of the unsecured plywood covering the window well, and that the condition was present for months prior to the plaintiff's accident. This testimony establishes that the indemnification provision in the construction management agreement was triggered. In opposition to Two Trees' motion, Corwith failed to raise a triable issue of fact (*see* ***Valdez v Turner Constr. Co.***, 171 AD3d 836, 840, 98 NYS3d 79 [2d Dept 2019]).

However, the branch of Two Trees' motion for summary judgment against Corwith on its claims for breach of contract for failure to procure insurance is denied. In support of its claim for breach of contract, Two Trees failed to demonstrate, prima facie, that Corwith failed to comply with the contractual obligations requiring that it procure the requisite insurance coverage for the relevant time period (*see* ***Marquez v L&M Dev. Partners, Inc.***, 141 AD3d 694, 701, 35 NYS3d 700 [2d Dept 2016]).

Plaintiff's cross motion for summary judgment against Two Trees is granted in part and denied in part. Plaintiff has established prima facie entitlement to summary judgment with respect to his claims against Two Trees under Labor Law § 240 (1) and Labor Law §241 (6). Specifically, plaintiff has established, prima facie, that he was not provided with proper protection under Labor Law § 240 (1), that the failure to provide such protection also violated a specific and applicable provision of the Industrial Code, and that this failure was the proximate cause of his alleged injuries (*see* ***Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co.***, 104 AD3d 446, 449-450, 961 NYS2d 91 [1st Dept 2013]; ***Norero v 99-105 Third Avenue Realty, LLC***, 96 AD3d 727, 728, 945 NYS2d 720 [2d Dept 2012]; *see also* ***Valensisi v Greens at Half Hollow***, 33 AD3d 693, 695, 823 NYS2d 416 [2d Dept 2006]; ***Brandl v Ram Builders, Inc.***, 7 AD3d 655, 655-656, 777 NYS2d 511 [2d Dept 2004]). In opposition, Two Trees failed to raise a triable issue of fact (*see* ***Valdez v Turner Constr. Co.***, 171 AD3d 836, 841, 98 NYS3d 79). Contrary to Two Trees' contention, "where, as here, a violation of Labor Law § 240 (1) is a proximate

cause of an accident, the worker's conduct cannot be deemed solely to blame for it" (***Valensisi v Greens at Half Hollow***, 33 AD3d at 696). Thus, plaintiff's application for summary judgment against Two Trees with respect to his claims under Labor Law §§ 240 (1) and 241 (6) is granted. However, as noted above, Two Trees established its entitlement to summary judgment with respect to plaintiff's claims under Labor Law § 200 and common law negligence. Therefore, plaintiff's application for summary judgment against Two Trees with respect to those claims is denied.

The branch of plaintiff's motion against Corwith, improperly denominated as a cross motion (*see* CPLR 2215; ***Gaines v Shell-Mar Foods, Inc.***, 21 AD3d 986, 801 NYS2d 376 [2d Dept 2005]), is denied as untimely. CPLR 3212 (a) provides that if no date for making a summary judgment motion has been set by the court, such a motion "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." Absent a showing of good cause for the delay in filing a summary judgment motion, a court lacks the authority to consider even a meritorious, non-prejudicial application for such relief (*see* ***Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725, 786 NYS2d 379 [2004]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]; *see also* ***Kershaw v Hosp. for Special Surgery***, 114 AD3d 75, 978 NYS2d 13 [1st Dept 2013]).

The Court's computerized records show that the note of issue was filed in this action on February 4, 2019. Although the 120-day statutory period for making a summary judgment motion expired on June 4, 2019, plaintiff's motion against Corwith was not made until July 1, 2019, when it was uploaded into the New York State Courts Electronic Filing System (*see* CPLR 2211; Uniform Rules of Trial Cts [22 NYCRR] § 202.5-b [f]). As there is no explanation in the moving papers for its delay in seeking summary judgment as against Corwith, plaintiff's motion must be denied, as untimely (*see* ***Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725, 786 NYS2d 379; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261; ***Kershaw v Hosp. for Special Surgery***, 114 AD3d 75, 978 NYS2d 13; ***Fuller v Westchester County Health Care Corp.***, 32 AD3d 896, 821 NYS2d 241 [2d Dept 2006]).

Similarly, Corwith's motion for summary judgment dismissing plaintiff's claims under Labor Law §§ 240 (1) and 241 (6), and plaintiff's cross motion against Corwith, are denied as untimely. As noted above, the deadline for dispositive motions in this matter was June 4, 2019. Corwith's motion was not filed until July 2, 2019, and there was no explanation in the moving papers for its delay in seeking summary judgment. The issues raised in Corwith's motion are not nearly identical to the grounds underlying Two Trees' timely motion for summary judgment against Corwith on its claims for contractual indemnification and breach of contract (*see* ***Paredes v 1668 Realty Assoc.***, 110 AD3d 700, 702, 972 NYS2d 304 [2d Dept 2013]). As such, both Corwith's motion, and plaintiff's cross motion filed on July 23, 2019, must be denied, as untimely (*see* ***Miceli v State Farm Mut. Auto. Ins. Co.***, *supra*; ***Brill v City of New York***, *supra*; ***Kershaw v Hosp. for Special Surgery***, *supra*; ***Fuller v Westchester County Health Care Corp.***, *supra*).

Accordingly, the branches of Two Trees' motion for summary judgment dismissing plaintiff's claims against it under Labor Law § 200 and common law negligence, and for summary judgment against Corwith with respect to its claims for contractual indemnfication are granted, and Two Trees' motion for summary judgment is otherwise denied. The branches of plaintiff's cross motion against Two Trees for summary judgment with respect to his claims under Labor Law §§ 240 (1) and 241 (6) are

granted, and plaintiff's cross motion is otherwise denied. Corwith's motion for summary judgment dismissing plaintiff's claims against it under Labor Law §§ 240 (1) and 241 (6), and plaintiff's cross motion against Corwith, are each denied as untimely.

Dated: 5-12-2020

HON. WILLIAM J. CONDON S.C.C.

J.S.C.

FINAL DISPOSITION **X** **NON-FINAL DISPOSITION**