SHORT FORM ORDER

INDEX No. 619896/2016
CAL. No. 201902243OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 55 - SUFFOLK COUNTY

PRESENT:

Hon. GEORGE M. NOLAN
Justice of the Supreme Court

MOTION DATE 3/26/20 (004)
MOTION DATE 4/9/20 (005)
ADJ. DATE 7/2/20
Mot. Seq. # 004 MD
005 MD

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ISAI ARRIAZA,

Plaintiff,

- against -

PROGRESSIVE HOME SERVICES, INC., AVR-YAPHANK CONSTRUCTION CORP., EXTERIORS BY BRADY, INC., AVR YAPHANK MEADOW'S APARTMENTS LLC., THE RESERVE AT THE BOULEVARD,

Defendants.

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MAJESTIC 7 HOME IMPROVEMENT CORP.
c/o Marvin F. Guardado
6 Biel Drive
Amityville, New York 11701

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EXTERIORS BY BRADY, INC.,

Third-Party Plaintiff,

- against -

MAJESTIC 7 HOME IMPROVEMENT CORP.,

Third-Party Defendant.

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AVR-YAPHANK CONSTRUCTION CORP., AVR YAPHANK MEADOW'S APARTMENTS LLC., THE RESERVE AT THE BOULEVARD,

Second-Third Party Plaintiffs,

- against -

MAJESTIC 7 HOME IMPROVEMENT CORP.,

Second-Third Party Defendant.

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Upon the following e-filed papers read on these motions for summary judgment : Notices of Motion and supporting papers, including memorandum of law, by defendant/second third-party plaintiffs, dated March 4, 2020, and by defendant Exteriors by Brady, Inc., dated March 12, 2020; Answering Affidavits and supporting papers by plaintiff dated March 12, 2020 and April 2, 2020, and by defendant/second third-party plaintiffs, dated April 20, 2020; Replying Affidavits and supporting papers by ___; Other ___; it is

ORDERED that these motions hereby are consolidated for the purposes of this determination; and it is

ORDERED that motion by defendants/second third-party plaintiffs AVR-Yaphank Construction Corp., AVR Yaphank Meadow's Apartments LLC and the Reserve at the Boulevard for summary judgment dismissing plaintiff's amended verified complaint and, alternatively, for summary judgment against second-third-party defendant Majestic 7 Home Improvement Corp. for common-law and contractual indemnification is denied; and it is further

ORDERED that the motion by defendant Exteriors by Brady, Inc. for summary judgment dismissing plaintiff's amended verified complaint and any cross claims asserted against it is denied.

Plaintiff commenced this action seeking to recover damages for personal injuries he sustained on August 11, 2016 while working on the construction of an apartment complex in Yapank, New York. Defendant AVR-Yaphank Apartments, LLC ("AVR-Yaphank") owned the property and AVR-Yaphank Construction Corp. ("AVR-Yaphank Construction") was the general contractor for the project. Pursuant to a written agreement dated July 10, 2016, AVR-Yaphank subcontracted the roofing, siding and stone work to defendant Exteriors by Brady, Inc. ("Brady"), which, in turn, pursuant to a written agreement, subcontracted the roofing and siding to third-party defendant Majestic 7 Home Improvement, Inc. ("Majestic"). At the time of the accident, plaintiff was employed by Majestic as a laborer.

In the amended verified complaint, as amplified by the bill of particulars, it is alleged, among other things, that defendants were negligent in allowing plaintiff to use a defective, dangerous and unsafe miter saw on an uneven surface, and in failing to provide him with a safe saw with a proper blade equipped with a safety guard. Plaintiff alleges causes of action for violations of Labor Law §§ 241 (6) and 200, and for common-law negligence. In their combined amended answer, AVR-Yapank, AVR-Yapank Construction and the Reserve at the Boulevard (hereinafter the "AVR defendants" when referred to collectively), and Brady, in its answer, denied liability and interposed several affirmative defenses. Thereafter, Brady commenced a third-party action against Majestic, prompting the AVR defendants to commence a second third-party action against Majestic seeking contribution, common-law and contractual indemnification and damages for breach of contract for failing to procure insurance.

Discovery has been completed and the note of issue filed. The AVR defendants now move to summarily dismiss plaintiff's complaint as asserted against them on the grounds that the Industrial Code (12 NYCRR) violations alleged are inapplicable or were not violated and, thus, may not serve to support the Labor Law § 241 (6) cause of action, and that they cannot be held liable under Labor Law § 200 or for common-law negligence as they did not direct, control or supervise the injury-producing work. Brady moves for summary judgment dismissing plaintiff's complaint on the grounds that it did not own, control or maintain the property, was not a general contractor on the project, and did not have an obligation to supervise, control or direct plaintiff's work.

Plaintiff testified that at the time of the incident, he was cutting Azek, a siding material, with a miter saw provided by his employer that was defective and in dangerous condition. He explained that when the trigger is disengaged the miter saw should shut off, but intermittently it would not and the blade would continue to rotate. He also testified that the miter saw was missing a safety guard, the blade was missing teeth and that it was not appropriate for the type of material he was cutting. Plaintiff testified that as a result of the condition of the miter saw, the Azek became stuck in the blade, the blade lifted up and his hand was pulled into the blade, cutting his finger.

Labor Law § 241 (6) imposes a nondelegable duty upon an owner and general contractor or its agent to provide protective equipment, devices and other adequate and reasonable protection to persons employed in the construction or alteration of a building (*see* ***Rizzuto v L.A. Wenger Constr. Co***, 91 NY2d 343, 670 NYS2d 816 [1998]; ***Ross v Curtis-Palmer Hydro Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]). Nevertheless, the duties may in fact be delegated to a third party (***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]). "When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise

and control that work and becomes a statutory 'agent' of the owner or general contractor...fall[ing] within the class of those having nondelegable liability..." (id. at 318; *see* ***White v Village of Port Chester***, 92 AD3d 872, 940 NYS2d 94 [2d Dept 2012]).

An owner, general contractor or agent will be held absolutely liable in damages regardless of whether it has actually exercised supervision or control over the work where a violation of Labor Law § 241(6) is a proximate cause of a plaintiff's injuries (***Ross v Curtis-Palmer Hydro Elec. Co.***, *supra*; ***Zimmer v Chemung County Perf. Arts, Inc.***, 65 NY2d 513, 493 NYS2d 102 [1985]). In addition to providing adequate protection for workers, this section of the statute requires compliance with the safety rules and regulations promulgated by the Commissioner of the Labor Department and found in the Industrial Code (*see* ***Rizzuto v L.A. Wenger Constr. Co***, 91 NY2d 343, 670 NYS2d 816 [1998]; ***Ross v Curtis-Palmer Hydro-Electric Co.***, *supra*). To sustain a cause of action under Labor Law § 241(6), a plaintiff must allege a breach of an Industrial Code regulation which sets forth specific, concrete safety standards applicable to the circumstances of the accident (*see* ***Ross v Curtis–Palmer Hydro–Elec. Co.***, *supra*; ***Keener v Cinalta Constr. Corp.***, 146 AD3d 867, 45 NYS3d 179 [2d Dept 2017]).

Here, plaintiff's Labor Law § 241(6) claim is premised upon violations of 12 NYCRR §§ 23-1.5(a), (b), (c)(1, 3), 23-1.10(b), 23-1.12(a), (b), (c)(1)(2)(3), and 29 CFR §§ 1926.20, 1926.21 and 1926.28. The Code of Federal Regulations (CFR) sections relied upon pertain to OSHA standards which cannot provide a basis for liability under Labor Law § 241 (6) (*see* ***Wetter v Northville Indus. Corp.***, 185 AD3d 874, ___NYS3d ___ [2d Dept 2020]; ***Cun-En Lin v Holy Family Monuments***, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]; ***Vernieri v Empire Realty Co.***, 219 AD2d 593, 631 NYS2d 378 [2d Dept 1995]). However, 12 NYCRR § 23-1.5 (c) (3), which requires that all equipment be kept in good repair, is sufficiently specific and concrete (*see* ***Tuapante v LG-39, LLC***, 151 AD3d 999, 58 NYS3d 421 [2d Dept 2017]; ***Perez v 286 Scholes St. Corp.***, 134 AD3d 1085, 22 NYS3d 345 [2d Dept 2015]) and applicable to plaintiff's accident. Thus, as one of the Industrial Code regulations cited by plaintiff is both sufficiently specific and applicable, the Labor Law § 241(6) claim remains viable. Therefore, the AVR defendants are not entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim.

The written subcontract agreement between AVR-Yaphank and Brady requires the latter to provide all materials, tools and equipment, as well as all labor, including proper supervision, required for the satisfactory completion of the subcontracted work. Plaintiff testified that he was cutting a type of siding material, Azek, using a defective miter saw when his injury occurred. Thus, Brady has failed to establish, prima facie, that it lacked authority to supervise and control the work in which plaintiff was engaged and cannot be held absolutely liable as a subcontractor/agent under Labor Law § 241(6) (*see* ***White v Village of Port Chester***, *supra*). Therefore, its motion to dismiss plaintiff's amended complaint is denied.

Assuming, arguendo, the AVR defendants and Brady are entitled to summary dismissal of other claims in the complaint, it would not change the extent of their ultimate liability or plaintiff's damages (*see* ***Torino v KLM Constr., Inc.***, 257 AD2d 541, 685 NYS2d 24 [1st Dept 1999]; ***Covey v Iroquois Gas Transmission Sys.***, 218 AD2d 197, 637 NYS2d 992 [3d Dept 1996], *affd* 89 NY2d 952, 655

NYS2d 854 [1997]). Thus, to the extent they seek summary judgment dismissing other theories of liability, those portions of the motion and cross motion are denied as academic.

Although the AVR defendants' notice of motion seeks alternative relief, they have not made any arguments in support thereof and, thus, that portion of the motion is denied. Therefore, having failed to satisfy their initial burden, the AVR defendants and Brady are not entitled to summary judgment dismissing the complaint regardless of the sufficiency of the opposing papers (*see* ***Ayotte v Gervasio***, 81 NY2d 1062, 601 NYS2d 463 [1993]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Accordingly, the motions are denied.

Dated: August 31, 2020

J.S.C.

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