ORIGINAL

SHORT FORM ORDER

INDEX No. 616201/2018
CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 11/4/2020
SUBMIT DATE 4/22/2021
Mot. Seq. # 01 - MG

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ALYSSA NICOLE HAMBLIN, Administratrix of the Estate of STEPHEN HAMBLIN, DECEASED,

Plaintiff,

-against-

KEVIN CORCORAN, SR., PATRICIA CORCORAN and ANTHONY PALERMO,

Defendants.

LITE & RUSSELL, PLLC
Attys. for Plaintiff
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WEST ISLIP, NY 11795

MARTYN, MARTYN, SMITH & MURRAY
Attys. for Defendants- CORCORAN
102 MOTOR PKWY, STE 230
HAUPPAUGE, NY 11788

LAW OFFICES OF JAMES BUTLER & ASSOCIATES
Attys. for Defendant- PALERMO
PO BOX 9040
300 JERICHO QUADRANGLE, STE 260
JERICHO, NY 11753

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Upon the following papers numbered 1 to 40 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 26 ; ~~Notice of Cross Motion and supporting papers~~ ; Answering Affidavits and supporting papers 27 - 33 ; Replying Affidavits and supporting papers 34 - 40 ; ~~Other~~ ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

Defendant Anthony Palermo moves for an order dismissing the complaint and all cross-claims against him. The plaintiff opposes this application. The co-defendants did not file opposition to this application.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff, Stephen Hamblin, on November 5, 2017, as a result of an accident which occurred while he was attempting to install a wood burning stove in the den of the single family home owned by defendants, Kevin Corcoran Sr. and Patricia Corcoran, located at 7 Yaphank Avenue, Mastic, New York. It is alleged that at the time of the accident, he was present on the roof, attempting to install a piece of the chimney pipe through the roof, when the pipe "whiplashed" him by pulling him forward and jerking him backward. Defendant, Anthony Palermo, who is the son-in-law of the defendant owners, was inside the house, in the den at the time, assisting the plaintiff. It is undisputed that while assisting the plaintiff, defendant Palermo's foot slipped after taking a step higher on the ladder and the pipe fell toward him. A second attempt was made at

which time the plaintiff was able to successfully install the chimney pipe in the roof. Defendant Palermo does not reside at the home but at the time was visiting the premises with his wife and child.

The plaintiff asserts causes of action against the moving defendant for common law negligence, as well as under Labor Law §§ 200, 240 and 241(b). The defendant claims that "the undisputed evidence on the record establishes that: (a) defendant, Anthony Palermo, did not own, control, manage or occupy the premises upon which the accident took place; (b) the accident occurred due to plaintiff's own negligence; and (c) the moving defendant did not supervise, direct or control the work being performed by the plaintiff, nor did he pay the plaintiff for the work." In opposition, the plaintiff argues that "while it is true that Defendant Palermo may not be liable under the Labor Laws, and that he was not the homeowner, he nonetheless is liable for the injuries caused when he volunteered to assist Plaintiff, and then did so in a negligent fashion."

At his deposition, Stephen Hamblin testified that on November 5, 2017, at approximately 6:00 pm, he was involved in the accident at the premises owned by Kevin Corcoran Sr. and Patricia Corcoran located at 7 Yaphank Road, Mastic Beach, NY. He further testified that he met Kevin Corcoran through his friend, Anthony Palermo, who is the Corcorans' son-in-law. He was hired by the Corcorans to install a wood burning stove in the living room and to connect a vent line chimney. Hamblin indicated that Kevin Corcoran Sr. supplied everything for the job, including the stove and ladder he used to access the roof. He also stated that he and Corcoran Sr. had to go to Home Depot to get additional supplies for the installation and that Corcoran Sr. paid for all the supplies. On the date of the accident, Hamblin testified that Corcoran Sr. picked him up, drove him to Corcoran Sr.'s mother's house to do some work there and then drove him to Corcoran Sr.'s house where he began to do the work. He stated that he worked alone for a few hours before he was involved in the accident. At the time of the accident, Hamblin was on the roof by himself, Corcoran Sr. was on an extension ladder looking onto the roof and Palermo was inside the house. Hamblin claims that he was kneeling on the roof attempting to "balance the pipe, screw it into the flashing that is goes through to get through the roof" when Palermo saw he was struggling a bit and "yelled up and said he would grab the pipe to hold it for me". He testified that Palermo "said he had it and I went to reach for the drill and he let go... I didn't let go and I continued to hold onto it and it pulled me and jerked me so fast it snapped my chest and my back... it was like one straight whip." The plaintiff indicated that Palermo was standing on the ladder in the living room, which was provided by the plaintiff, and fell inside the house. When questioned about how he knew Palermo fell, he stated that

> I heard him. I didn't let go of the pipe. I was yelling down to him, grab the pipe, grab the pipe, cause I was in so much pain holding it through my left hand and you could actually see my head through the ceiling and I saw the ladder was down and he got up and grabbed the pipe. Took it out of my hands.

Hamblin testified that Palermo did not give him any instructions on how to install the stove and that after finishing the job he joined the family for dinner.

Palermo testified that he did not own the premises where this accident occurred and was there visiting his in-laws with his wife and daughter. He indicated that he had known the plaintiff for approximately five years and they had previously worked at construction sites together. He is an electrician and on the date of the accident had installed two new light fixtures in the Corcorans' garage. Palermo testified that at the time of the accident he was in the living room and the plaintiff asked if anyone could hand him a piece of the chimney pipe. He indicated that no one else in the house was able to hand him the pipe, so he grabbed it, walked up the ladder but his right foot slipped and then he and the pipe fell.

Kevin Corcoran Sr. and Patricia Corcoran testified that they were the owners of the premises on the date of the accident. Corcoran Sr. indicated that he spoke to the plaintiff a day or two before the accident about having him install a wood burning stove in his living room. Corcoran Sr. testified that the plaintiff used an extension ladder that was in his yard to gain access to the roof.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (***Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP***, 26 NY3d 40, 19 NYS3d 488 [2015]; ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (***Nomura***, *supra*; *see also* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (***Daliendo v Johnson***, 147 AD2d 312, 543 NYS2d 987 [2d Dept 1989]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (***Nomura***, *supra*; *see also* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

The Court in ***Perri v Gilbert Johnson Enters., Ltd.***, 14 AD3d 681, 683 [2nd Dept 2005], held that

> To establish liability for common-law negligence or violation of Labor Law § 200, the plaintiff must establish that the defendant in issue had "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (***Russin v Picciano & Son***, 54 N.Y.2d 311, 317, 429 N.E.2d 805, 445 N.Y.S.2d 127 [1981]; see ***Rizzuto v Wenger Contr. Co.***, 91 N.Y.2d 343,

352, 693 N.E.2d 1068, 670 N.Y.S.2d 816 [1998]; ***Singleton v Citnalta Constr. Corp.***, 291 A.D.2d 393, 394, 737 N.Y.S.2d 630 [2002]).

In order to find liability for common-law negligence or under Labor Law 200 the owner of the premises must have "supervisory control over the injury-producing activity". (***Balbuena v NY Stock Exch., Inc.***, 49 AD3d 374, 376 [1st Dept 2008]. In ***Perri v Gilbert Johnson Enters., Ltd.***, supra, the evidence "established that Gilbert visited the site '[s]ometimes once or twice a week, sometimes once every two weeks' to talk to customers and review the progress of the work... There is no evidence in the record that the owner supervised the manner in which the work was performed" and therefore summary judgment was granted dismissing the common-law negligence and Labor Law 200 violations.

Labor Law § 200 is a codification of the common-law duty imposed upon an owner, contractor, or their agent, to provide construction site workers with a safe place to work (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Haider v Davis***, 35 AD3d 363, 827 NYS2d 179 [2d Dept 2006]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (***Messina v City of New York***, 46 NYS3d 174, 2017 NY Slip Op 00640 [2017], quoting ***Ortega v Puccia***, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]). When the methods or materials of the work are at issue, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged "had the authority to supervise or control the performance of the work" (*id.*). General supervisory authority at a work site is not enough; rather, a defendant must have had the responsibility for the manner in which the plaintiff's work is performed (*see* ***Messina v City of New York***, *supra*).

Labor Law §§ 240 and 241 apply to "[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith." To establish entitlement to the protection of the homeowner's exemption, a defendant must demonstrate that his house was a single- or two-family residence and that he did not "direct or control" the work being performed (***Ortega v Puccia***, *supra* at 58). "The statutory phrase 'direct or control' is construed strictly and refers to situations where the owner supervises the method and manner of the work" (*id.* at 59).

The owner or possessor of real property also has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Milewski v Washington Mut., Inc.***, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]). Thus, "[w]here a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" (***Ortega v Puccia***, *supra* at 61; *see* ***Pacheco v***

Smith, 128 AD3d 926, 9 NYS3d 377 [2d Dept 2015]; ***Chowdhury v Rodriguez***, 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]).

Defendant Palermo has established prima facie entitlement to summary judgment in that he was not the owner, agent or possessor of the property at issue and he did not control the manner in which the plaintiff's work was performed or supervise the plaintiff during the installation of the woodburning stove. Here, it is undisputed that the subject premises is a single family dwelling owned by the Corcoran defendants. Further, there is nothing in the record to indicate that defendant Palermo "directed or controlled" the work being performed by the plaintiff. Having established prima facie entitlement to summary judgment, the burden shifted to the nonmoving party to raise a triable issue.

Plaintiff opposes defendant's motion, but fails to raise a triable issue. In opposition to the motion, plaintiff argues that "[w]hile it is true that Defendant Palermo may not be liable under the Labor Laws, and that he was not the homeowner, he nonetheless is liable for the injuries caused when he volunteered to assist Plaintiff, and then did so in a negligent fashion." This argument is unavailing. The plaintiff testified that defendant Palermo fell off the ladder while attempting to help him hold the chimney pipe and did not indicate that Palermo's falling was anything other than an accident. Accordingly, the motion for summary judgment dismissing the complaint and any cross-claims is granted as to defendant Anthony Palermo.

The foregoing constitutes the decision and Order of this Court.

Dated: May 20, 2021

HON. JOSEPH A. SANTORELLI
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION