Garcia v 115 Commerce Dr. LLC
2021 NY Slip Op 33264(U)
January 8, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 609843/2018
Judge: Linda Kevins
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SHORT FORM ORDER

INDEX No. 609843/2018
CAL. No.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

P R E S E N T:

HON. LINDA KEVINS
Justice of the Supreme Court

MOTION DATE 8/7/2020
ADJ. DATE 9/18/2020
Mot. Seq. # 004 - MotD
Mot. Seq. # 005 - MotD
Mot. Seq. # 006 - XMD

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MARVIN L. GARCIA,

Plaintiff,

- against -

115 COMMERCE DRIVE LLC, SUPREME MECHANICAL OF LONG ISLAND INC., MATTITUCK PLUMBING & HEATING CORP., GUARRIELLO & SON INC. D/B/A G&S ELECTRICAL CONTRACTOR, TRACHTE BUILDING SYSTEMS INC., SHIRK POLE BUILDINGS LLC., A&J BUILDERS LLC., M&G BUILDERS LLC, d/b/a JC MOGG

Defendants.

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Upon the following papers e-filed and read on these motions for summary judgment : Notice of Motion and supporting papers (#004) by defendant Guarriello & Son Inc. d/b/a G&S Electrical Contractor, dated July 7, 2020; (#005) by defendant Supreme Mechanical of Long Island, Inc., dated July 24, 2020 ; Answering Affidavits and supporting papers to #004 by defendants A& J Builders, LLC and M & G Builders, LLC, dated September 1, 2020; by defendant Supreme Mechanical, dated July 20, 2020; by defendant 115 Commerce Drive, LLC, dated September 11, 2020; Answering Affidavits and supporting papers to #005, by defendants A&J and M & G, dated September 2, 2020; by defendant Trachhte Building Systems, dated September 2, 2020; by 115 Commerce Drive, dated September 11, 2020; Replying Affidavits and supporting papers to # 004, by Guarriello & Sons, dated September 8, 2020; to # 005, by Supreme Mechanical, dated September 8, 2020, September 16, 2020 ; Notice of Cross Motion (#006) and supporting papers by plaintiff, dated August 5, 2020; Answering Affidavits and supporting papers to cross motion (# 006) by Guarriello & Sons, dated September 3, 2020; by Supreme Mechanical, dated September 8, 2020; Replying Affidavits and supporting papers by plaintiff, dated August 5, 2020; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. # 004) for summary judgment by defendant Guarriello & Son, Inc. d/b/a G&S Electrical Contractor, the motion (seq. # 005) for summary judgment by defendant

Supreme Mechanical of Long Island Inc., and the cross motion (seq. # 006) by plaintiff for disclosure penalties or an order to compel are consolidated for the purposes of this determination; and it is further

ORDERED that the motion (seq. # 004) by defendant Guarriello & Son, Inc. d/b/a G&S Electrical Contractor for an order granting it summary judgment dismissing the complaint against it and for an order dismissing all cross claims against it by the co-defendants is granted to the extent that the complaint is dismissed against it and is otherwise denied; and it is further

ORDERED that the motion (seq. # 005) by defendant Supreme Mechanical of Long Island Inc. for an order granting it summary judgment dismissing the complaint against it and for an order dismissing all cross claims against it by the co-defendants is granted to the extent that the complaint is dismissed against it and is otherwise denied; and it is further

ORDERED that the cross motion (seq. # 006) by plaintiff for an order pursuant to CPLR § 3126 striking the answers of defendants Guarriello & Son, Inc. d/b/a G&S Electrical Contractor and Supreme Mechanical of Long Island, Inc. is denied; and it is further

ORDERED that if this Order has not already been entered, defendant Guarriello & Son, Inc. d/b/a G&S Electrical Contractor is directed to promptly serve a certified copy of this Order, pursuant to CPLR §§8019(c) and 2105, upon the Suffolk County Clerk who is directed to hereby enter such order; and it is further

ORDERED that upon Entry of this Order, defendant Guarriello & Son, Inc. d/b/a G&S Electrical Contractor is directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff commenced this action in May 2018 to recover damages for personal injuries allegedly sustained during the course of his employment on June 2, 2015 at the premises owned by defendant 115 Commerce Drive, LLC, located at 115 Commerce Drive, Cutchogue, New York. The complaint alleges that plaintiff was employed by nonparty North Fork Self Storage, LLC (hereinafter North Fork) performing work, maintenance, repairs, and/or alterations on the premises, and that he was injured when he fell from a hole in an attic while inspecting the building for a water leak. The premises consist of five buildings located on a lot of land, four of which are located at 50 Commerce Drive, and one known as 115 Commerce Drive which is where the subject incident occurred.

The complaint contains causes of action in common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6). Initially, the Court notes that a previous action was brought by plaintiff against Kos, LLC, under index number 621169/2016, and it was discontinued by stipulation dated September 18, 2018. Further, the instant action was discontinued against defendants Shirk Pole Buildings, LLC and Mattituck Plumbing & Heating, Corp. by stipulation of discontinuances filed on October 4, 2018 and July 8, 2020, respectively.

Defendant Guarriello & Son, Inc. d/b/a G&S Electrical Contractor (hereinafter G&S) now moves (seq. # 004) for an order awarding it summary judgment dismissing the complaint and cross claims against it on the grounds that plaintiff was not engaged in construction related activities at the time of the incident, and it, thus, did not violate the Labor Law statute or any industrial codes. G&S further argues

that the negligence claim should be dismissed, as it did not owe plaintiff a duty of care, as it was a third-party contractor. In support of the motion, G&S submits copies of the pleadings, the bill of particulars, transcripts of the plaintiff's deposition testimony, the transcript of deposition testimony by Martin Kosmynka, copies of estimates and invoices, and an affidavit by Robert Guarriello, Jr.

At his deposition, plaintiff Garcia testified that he started working with North Fork approximately 15 years ago. He testified that prior to working at North Fork, he worked for Martin Kosmynka, who he met while working as a landscaper with a company named Trimbles. He testified that Martin started North Fork and offered him a position with the company, and that he also worked for Unit2Go, as a driver, which was also owned by Martin. Plaintiff testified that he began working at the property, located at 115 Commerce Drive, by installing fences around the property while warehouses were being constructed, and after the first group of buildings were completed, another storage facility was constructed between 2013 and 2014. He testified that after the last building was completed, he worked full time as a truck driver for Unit2Go and as a maintenance man for North Fork.

Plaintiff testified that the building where the incident occurred is a two-story building utilized as self-storage, and that it contained several storage units, and that while the building was under construction, his responsibilities involved maintenance which included, checking the units for cleanliness, and changing lightbulbs. Plaintiff testified that a few weeks prior to the incident, Martin told him to check the second floor for a leak in the attic, as he observed water in the hallway, and plaintiff testified that he gained access by climbing a ladder near the elevator. He testified that he had checked it a second time prior to the date of the incident.

Plaintiff testified that on the date of the incident, June 2, 2015, the subject building was completed and open to the public, and that less than 50 percent of the units were rented. He testified that there was no construction work being conducted at the time, no demolition was being performed, no renovations were being conducted, and no painting, alterations or cleaning were conducted on the date of the incident, and that on the date of the incident he arrived at work at 8:30 a.m., and his supervisor Tom told him "remember to check the leak." Plaintiff testified that he began the day by inspecting the exterior of the storage units to ensure the doors were closed and locked properly, and that he picked up a ladder and a flashlight from a garage on the premises where tools are stored, went to the building to check for leaks took the elevator to the second floor, climbed the ladder, and moved the ceiling tiles to enter the attic. He testified that Martin told him to walk through the entire length of the attic, which is approximately 100 feet, and that he stopped every five feet and looked up at the ceiling to check for any leaks.

Plaintiff testified that yellow insulation covered the floor which was constructed of "metal like deck" and on top of the insulation were metal beams that ran perpendicular. He testified that as he walked towards the front of the attic, he was looking up to observe any leaks and that he suddenly fell through a hole. He testified that a piece of "metal strap" prevented him from falling to the ground, and that his legs dangled through the hole into the storage unit below. He testified that he held on to the metal strap and pulled himself up by leaning on his elbows, and that he cut his hand. He testified that after the incident he went to the storage unit and took photographs before going to the office to inform Tom what had happened, and that Tom contacted Martin, who told him to go to a doctor. Plaintiff testified that he drove

himself to a doctor's office, and they told him to go to the hospital, so he drove 25 minutes to Peconic Hospital in Riverhead.

Martin Kosmynka testified that he has known plaintiff for 20 years, and that plaintiff worked for him doing odd jobs around his house for many years before he created Kos, LLC, North Fork and Unit2 Go. He testified that plaintiff was employed by North Fork as a maintenance man and that he also was a driver for Unit2Go. Martin testified further that he employed approximately four other persons, including Tom Giersbach, who is a manager, and that the employees are employed by North Fork. He testified that in 2006, he purchased vacant land at 50 Commerce Drive, and that he built four storage facilities on the land, located at 50 Commerce Drive, and that the newest building, a fifth one, is located at 115 Commerce Drive, across the street from the other four storage facilities.

Martin testified that the subject storage facility, the fifth building located at 115 Commerce Drive, was constructed by M&G Builders, LLC d/b/a JC Mogg (Hereinafter M&G Builders) and it installed the insulation in the attic, that the materials were supplied by Trachte Building Systems, Inc. (hereinafter Trachte), that Supreme Mechanical of Long Island, Inc. (hereinafter Supreme Mechanical) installed the air-conditioning and heating, that G&S performed the electrical work at the facility, and Mattituck Plumbing and Heating Corp. performed the plumbing work in two apartments, which are included within the storage facility at 115 Commerce Drive. He testified that the subject building was completed in September 2014, and that there was no construction work being performed on the premises at the time of the incident.

Martin testified that plaintiff's job duties included cleaning, inspecting the premises, and making minor repairs when needed. He testified that he did not instruct plaintiff to check for a leak, that plaintiff knew the subject building inside and out, and that he relied on him to maintain the building. He testified that plaintiff received directions from his manager, Tom Giersbach, and that he heard of plaintiff's incident through Tom who told him that plaintiff cut his hand while coming down from the access point. He testified that there were three access hatches at the building located at 115 Commerce Drive; one in the stairwell; one in the hallway and one in the self-storage unit below the attic where the incident occurred. He testified that he was unaware of how or when the access points were created, but after the incident he instructed another employee, Joe, to fill the access point with steel wool.

The affidavit of Robert Guarriello, Jr. is submitted. In his affidavit Guarriello states that he is a licensed electrician and has worked at G&S for 37 years. He testified that G&S was hired by North Fork to complete certain electrical work at 115 Commerce Drive, and that the work was completed in November 2014. Guarriello states that G&S did not perform any construction work in the attic, nor did it install any insulation at the building, and that it was not on the premises on the date of the subject incident. He states that G&S had no authority over any employees of North Fork, and it did not supervise or control any employees of any subcontractors.

An invoice and an estimate are submitted with the motion. The estimate for various electrical work is dated April 9, 2014, and the invoice for such services is dated November 28, 2014.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of

any material issues of fact (*see* ***Alvarez v Prospect Hosp***., 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (***Alvarez v Prospect Hosp***., 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595).

Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor 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]; ***Lazo v Ricci***, 178 AD3d 811, 115 NYS3d 424 [2d Dept 2019]). "[A]n implicit precondition to this duty is that the party to be charged with that obligation have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 352, 670 NYS2d 816 [1998]; *see also* (***Brasch v Yonkers Constr. Co.***, 306 AD2d 508, 762 NYS2d 626 [2d Dept 2003]).

Liability under Labor Law § 200 is predicated in two types of situations. Liability may be premised upon a defective or dangerous condition on the property where the work is being conducted, and it may be based upon injuries that are caused by defective or dangerous equipment provided to the plaintiff (***Reyes v Arco Wentworth Mgt. Corp.***, 83 AD3d 47, 119 NYS2d 44 [2d Dept 2011]). A property owner or general contractor will only be liable under Labor Law § 200 for dangerous or defective equipment that it did not supply, if it possessed the authority to supervise or control the means and methods of the work (see ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]; ***Davies v Simon Prop. Group, Inc***., 174 AD3d 850, 107 NYS3d 341 [2d Dept 2019]; ***Ortega v Puccia***, 57 AD3d 54, 866 NYS2d 323 [2008]).

Labor Law § 240 (1) requires owners, general contractors, and their agents to provide safety devices necessary to protect workers from risks inherent in elevated work sites (***Nicometi v Vineyards of Fredonia, LLC***, 25 NY3d 90 [2015]; ***McCarthy v Turner Constr., Inc***., 17 NY3d 369, 929 NYS2d 556 [2011]; ***Xiaoen Xie v Park Place Estate, LLC***, 181 AD3d 627, 171 NYS3d 75 [2d Dept 2020]; ***Vicuna v Vista Woods, LLC***, 168 AD3d 1124, 92 NYS3d 402 [2d Dept 2019]). The statute imposes 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]). Liability is absolute where the failure to provide the safety device is a proximate cause of the injury (***Nicometi v Vineyards of Fredonia***, *LLC*, 25 NY3d 90, 7 NYS3d 263; ***Eddy v John Hummel Custom Bldrs., Inc.***, 147 AD3d 16, 43 NYS3d 507 [2d Dept 2016]).

To recover under the statute, plaintiff must have been engaged in one of the activities covered under the statute: "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (***Soto v J. Crew Inc***., 21 NY3d 562, 976 NYS2d 421 [2013]).

In addition to the protections afforded by Labor Law § 240 (1), 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" (***Carlton v City of NY***, 161 AD3d 930, 934, 77 NYS3d 445 [2d Dept 2018], quoting ***Norero v 99-105 Third Avenue Realty, LLC***, 96 AD3d 727, 945 NYS2d 720 [2d Dept 2012]; *see also* ***Rizzuto v L.A. Wenger Constr. Co***, 91 NY2d 343, 670 NYS2d 816 [1998]; ***Ross v Curtis-Palmer Hydro-Electric Co.***, 81 NY2d 494, 601 NYS2d 49). To sustain a cause of action under Labor Law § 241 (6), the work must involve a danger targeted by the statute and be sufficiently related to construction, demolition, or excavation for the statute to apply (***Nagel v D & R Realty Corp.***, 99 NY2d 98, 752 NYS2d 581 [2002]).

Here, G&S established its prima facie entitlement to judgment as a matter of law dismissing the causes of action alleging violations of Labor Law §§ 200, 240 and 241(6), as its submissions demonstrate that no work of the protected type under the statute was being performed at the time of plaintiff's incident, that it had no authority to supervise or control plaintiff's work, that its work was completed seven months prior to the subject incident, and that it was not on the premises on the date of plaintiff's incident. Accordingly, G&S's established its prima facie case for summary judgment dismissing the causes of action for Labor Law violations, the second, third and fourth causes of action.

G&S also established its prima facie entitlement to judgment as a matter of law dismissing the first cause of action for negligence. To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]). Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (*see* ***Rodriguez v 5432-50 Myrtle Ave., LLC***, 148 AD3d 947, 50 NYS2d 99 [2d Dept 2017]; ***Russo v Frankels Garden City Realty Co.***, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]; ***Ellers v Horwitz Family Ltd. Partnership***, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]).

Here, by demonstrating that it did not own, occupy, control, or make special use of the property where the accident occurred (*see* ***Reeves v Welcome Parking Ltd. Liab. Co.***, 175 AD3d 633, 107 NYS3d 371 [2d Dept 2019]; ***Tilford v Greenburgh Housing Authority***, 170 AD3d 1233, 97 NYS3d 278 [2d Dept 2019]; ***Leibovici v Imperial Parking Mgt. Corp***.,139 AD3d 909, 33 NYS3d 312 [2d Dept 2016]), G&S established its prima facie entitlement to judgment as a matter of law on plaintiff's negligence cause of action. Furthermore, G&S established that it did not owe plaintiff a duty of care, as it was a third-party contractor.

Generally, a third-party contractor is not liable in tort to an injured plaintiff (*see* ***Espinal v Melville Snow Contrs***., 98 NY2d 136, 141-142, 746 NYS2d 120 [2002]; ***Nachamie v County of Nassau***, 147 AD3d 770, 47 NYS3d 58 [2d Dept 2017]). However, the Court of Appeals has identified three situations in which a party who enters into a contract may be held to have assumed a duty of care to non-contracting third persons. Liability may be imposed on a contractor under the following circumstances: (1) "where the contracting party, in failing to exercise reasonable care in the performance of its duties, 'launched a force or instrument of harm'" (***Espinal v Melville Snow Contrs.***, *id, quoting* ***H.R. Moch Co. v Rensselaer Water Co.***, 247 NY 160, 168, 159 NE 896 [1928]), thereby creating an unreasonable risk of harm to others or increasing the existing risk; (2) where a plaintiff suffered injury as a result of his or her reasonable reliance on the continued performance of the contracting party's obligations (*see* ***Eaves Brooks Costume Co. v Y.B.H. Realty Corp***., 76 NY2d 220, 226, 557 NYS2d 286 [1990]); and (3) where

the contracting party undertook a comprehensive and exclusive property maintenance obligation intended to displace the landowner's duty to safely maintain the property (*see* ***Palka v Servicemaster Mgt. Servs. Corp***., 83 NY2d 579, 611 NYS2d 817 [1994]).

Here, G&S established its prima facie entitlement to summary judgment dismissing the cause of action contained in the complaint sounding in negligence by demonstrating that plaintiff was not a party to the contract and, therefore, it did not owe him a duty of care (***Bryan v CLK-HP 225 Rabro, LLC***, 136 AD3d 955, 26 NYS3d 207 [2d Dept 2016]; ***Diaz v Port Auth. of NY & NJ***, 120 AD3d 611, 990 NYS2d 882 [2d Dept 2014]). As plaintiff did not plead any of the ***Espinal*** exceptions in the complaint or in the bill of particulars, defendant is not required to demonstrate that none of the exceptions apply in order to establish its prima facie case (*see* ***Hsu v City of New York***, 145 AD3d 759, 43 NYS3d 139 [2d Dept 2016]; ***Barone v Nickerson***, 140 AD3d 1100, 32 NYS3d 663 [2d Dept 2016]; ***Diaz v Port Auth. of NY & NJ***, 120 AD3d 611, 990 NYS2d 882 [2d Dept 2014]). Having established its prima facie entitlement to summary judgment on the cause of action alleging negligence, and the causes of action alleging violations of Labor Law § § 200, 240 (1) and 241(6), the burden shifts to plaintiff to submit sufficient proof to raise a triable issue of fact regarding the applicability of one or more of the ***Espinal*** exceptions (***Bryan v CLK-HP 225 Rabro, LLC***, 136 AD3d 955, 26 NYS3d 207; ***Foster v Herbert Slepoy Corp.***, 76 AD3d 210, 905 NYS2d 226 [2d Dept 2010]) and to submit competent proof sufficient to raise a triable issue of fact regarding the applicability and alleged violations of the Labor Law claims (***Alvarez v Prospect Hosp***., 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595).

Plaintiff opposes the motion on the grounds that it is premature, as he has not conducted discovery. However, plaintiff fails to demonstrate that additional discovery may lead to relevant evidence or that facts essential to oppose the motion are exclusively within the knowledge and control of defendants (*see* CPLR 3212 [f]; ***Skura v Wojtlowski***, 165 AD3d 1196, 87 NYS3d 100 [2d Dept 2018]; ***Richards v Burch***, 132 AD3d 752, 18 NYS3d 87 [2d Dept 2015]; ***Suero-Sosa v Cardona***, 112 AD3d 706, 977 NYS2d 61 [2d Dept 2013]). The "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process" is an insufficient basis for denying the motion (***Gasis v City of New York***, 35 AD3d 533, 534-535, 828 NYS2d 407, 409 [2d Dept 2006]; *see also* ***Dyer Trust 2012-1 v Global World Realty, Inc.***, 140 AD3d 827, 33 NYS3d 14 [2d Dept 2016]; ***Savage v Quinn***, 91 AD3d 748, 937 NYS2d 265 [2d Dept 2012]).

To defeat G&S's motion, plaintiff is required to demonstrate that one of the ***Espinal*** exceptions apply in order to hold G&S, a third-party contractor, liable in negligence. To defeat defendant's motion on the Labor Law violations, plaintiff is required to raise a triable issue of fact as to whether construction, demolition, etc. was being conducted at the time of plaintiff's incident, whether the failure to provide equipment was a cause of plaintiff's injuries, or whether G&S had the authority to supervise and control plaintiff. Here, plaintiff has failed to proffer any evidence sufficient to raise a triable issue of fact as to whether any of the ***Espinal*** exceptions apply in order to hold G&S liable, and plaintiff has failed to address the Labor Law violations in its opposition. Accordingly, the motion by G&S for summary judgment dismissing the complaint against it is granted.

However, with respect to the branch of the motion for summary judgment dismissing the cross claims by co-defendants for indemnification and contribution, however, G&S has failed to establish its prima facie entitlement to summary judgment, as it has failed to eliminate triable issues of fact as to whether it performed its services in a reasonable manner and was not responsible for creating the alleged

dangerous condition. While Guarriello states in his affidavit that G&S did not perform any construction in the attic, that it did not install any insulation in the attic, that it was not involved in building or constructing the access opening to the attic or crawl space, he does not state who in his company performed the electrical work, how it was performed, whether the attic was utilized and how he obtained his knowledge for the statements that he made in his affidavit. Therefore, G&S failed to satisfy its burden with respect to the cross claims. The failure to meet such burden requires denial of the motion regardless of the sufficiency of the papers in opposition (*see* ***JMD Holding Corp. v Congress Fin. Corp.***, 4 NY3d 373, 384, 795 NYS2d 502 [2005]; ***Winegrad v New York Univ. Med. Ctr***., 64 NY2d 851,487 NYS2d 316 [1985]). As such, the sufficiency of the partial opposition by co-defendants Supreme Mechanical, A&J Builders, LLC, M&G Builders, Trachte, and 115 Commerce Drive, LLC, need not be established. Accordingly, G&S's motion for summary judgment dismissing the cross claims by co-defendants for indemnification and contribution is denied.

Supreme Mechanical also moves (seq. # 005) for summary judgment dismissing the complaint and cross claims against it on the grounds that the Labor Law claims are inapplicable to plaintiff who was not performing construction or repair work; rather, plaintiff was conducting maintenance work when the incident occurred. Supreme Mechanical also argues that its work at the subject premises was completed on March 2015, it was not at the premises on the date of the incident and it had no authority to supervise or control plaintiff's work. Additionally, Supreme Mechanical argues that it did not create the alleged dangerous condition. In support of the motion, Supreme Mechanical submits, among other things, an affidavit by David Alazraki.

In his affidavit, Alazraki states that he is president of Supreme Mechanical which was hired by North Fork to install air conditioning and heating units at 115 Commerce Drive. He states that the heating and air conditioning units were installed between the first and second floors of the building, and that it did not install any equipment in the attic, nor did it perform any work in the attic. Alazraki states that Supreme Mechanical finished the work on March 20, 2015, and that it did not perform any further work at the premises nor did any of its employees go to the site after March 2015.

Alazraki also states that Supreme Mechanical did not install or run any wiring, ducts, fans, or any other equipment or accessories in the attic of the premises, and it did not install any insulation in the attic or move any insulation that had been in the attic of the premises. Further, Alazraki states that Supreme Mechanical did not drill, cut or otherwise create any hole in the attic, nor did it need to access the attic to perform its work.

Here, Supreme Mechanical established its prima facie entitlement to summary judgment dismissing the complaint and the cross claims against it, and thus, the burden shifts to the opposing parties to submit competent proof sufficient to raise a triable issue of fact (***Alvarez v Prospect Hosp***., 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595).

In opposition, plaintiff has failed to raise a triable issue of fact regarding the Labor Law causes of action. Further, plaintiff has failed to raise a triable issue of fact as to whether any of the ***Espinal*** exceptions apply in order to hold Supreme Mechanical, a third-party contractor, liable. Accordingly, the motion by Supreme Mechanical for summary judgment dismissing the complaint against it is granted.

With respect to the cross claims, in opposition, defendants A&J Builders LLC and M&G Builders LLC, d/b/a JC Mogg and defendant Trachte submit partial opposition to Supreme Mechanical's motion. Such defendants do not oppose the dismissal of the Labor Law causes of action, but they do oppose Supreme Mechanical's motion to dismiss the cross claims for indemnification and contribution. Both motions are supported by submission of an invoice prepared by Supreme Mechanical and addressed to North Fork, dated March 20, 2020. In relevant part, the invoice states: "Attic exhaust fan with ductwork, fire dampers and exterior grilles $2000." It is evident that triable issues of fact have been raised by defendants regarding Supreme Mechanical's presence, work in the attic and the manner in which it was conducted. Accordingly, the branch of Supreme Mechanical's motion for summary judgment dismissing the cross claims seeking indemnification and contribution by co-defendants is denied.

Plaintiff cross moves (seq. # 006) for an order pursuant to CPLR § 3126 and 3124 compelling defendants G&S and Supreme Mechanical to each produce a witness with knowledge of the scope of work performed at the subject premises by appearing for an Examination Before Trial on a date certain or, alternatively, for an order striking their answers.

The Uniform Rules for Trial Courts (22 NYCRR) § 202.7 (a) provides that a motion relating to disclosure must be supported by an affirmation that counsel "has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." The affirmation of good-faith effort "shall indicate the time, place, and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (Uniform Rules for Trial Courts [22 NYCRR] § 202.7 [c]).

Here, no affirmation of good faith is submitted, and therefore the cross motion is denied. Furthermore, pursuant to CPLR 3214(b) "[s]ervice of a notice of motion under rule 3211, 3212, or section 3213 stays disclosure until determination of the motion unless the court orders otherwise. . ." Accordingly, plaintiff's cross motion for an order to compel or impose disclosure sanctions against defendants G&S and Supreme Mechanical is denied.

Anything not specifically granted herein is hereby denied.

This constitutes the decision and Order of the Court.

LINDA KEVINS, JSC

Dated: 1/8/21

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION