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SHORT FORM ORDER

INDEX No. 035912/07

ORIGINAL WHEN BLUE

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 1-29-14 (#003)
MOTION DATE 2-27-14 (#005)
MOTION DATE 7-29-14 (#006)
MOTION DATE 8-5-14 (#007)
ADJ. DATE 8-18-14
Mot. Seq. # 003 - MG; # 005 - MG;
006 - MotD; # 007 - MotD

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JOHN WEHRHEIM and LYNN WEHRHEIM,

Plaintiffs,

- against -

McGOVERN-BARBASH ASSOCIATES, LLC, BARBASH ASSOCIATES, INC., THE VILLAGES WEST AT HUNTINGTON, THE VILLAGES WEST DEVELOPMENT CORP., VILLAGES AT HUNTINGTON DEVELOPMENT CORP., J. PETERMAN CONSTRUCTION CORP., TRUE MECHANICAL CORP, NESCONSET CONSTRUCTION, CO., INC., ACTIVE DOOR & WINDOW CORP., DEER PARK STAIRBUILDING & MILLWORK CO., INC., ALL SUFFOLK PLUMBING CONTRACTORS, INC., and MACCARONE PLUMBING & HEATING,

Defendants.

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McGOVERN-BARBASH ASSOCIATES, LLC, BARBASH ASSOCIATES, INC., THE VILLAGES WEST AT HUNTINGTON,

Third-Party Plaintiffs,

- against -

NEWBRIDGE ELECTRIC OF L.I. CORP.,

Third-Party Defendant.

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Upon the following papers numbered 1 to 89 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-21, 22-39, 40-46, 47-60; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 61-62, 63-64, 65-66, 69-71, 72-74, 75-78, 79-80, 81-82; Replying Affidavits and supporting papers 83-84, 85-86, 87-89; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (003) by defendant True Mechanical Corp., the motion (005) by defendant J. Peterman Construction Corp., the motion (006) by Nesconset Construction Co. Inc., and the motion (007) by defendants/third-party plaintiffs the Villages West at Huntington, Villages at Huntington Development Corp., Barbash Associates, Inc., and McGovern-Barbash Associates, LLC, are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant True Mechanical Corp. for summary judgment dismissing the complaint and cross claims against it is granted; and it is

ORDERED that the motion by J. Peterman Construction Corp. for summary judgment dismissing the complaint and cross claims against it is granted; and it is

ORDERED that the motion by defendant Nesconset Construction Co. Inc. for, inter alia, summary judgment dismissing the complaint and cross claims against it is granted to extent indicated herein, and is otherwise denied; and it is

ORDERED that the motion by defendants/third-party plaintiffs for, inter alia, summary judgment dismissing the complaint and cross claims, except as to the Villages West Development Corp., and for leave to amend the caption to include Villages West Development Corp., and Villages at Huntington Development Corp. as third-party plaintiffs is granted to the extent indicated herein, and is otherwise denied.

Plaintiff John Wehrheim commenced this action to recover damages for personal injuries he allegedly sustained on August 22, 2007, when he tripped and injured himself while working at the construction site of a new housing development known as "The Villages West," located in Melville, New York. The accident allegedly occurred when plaintiff, who was working as an electrician, tripped over a pile of wooden debris left on the floor of one of the town houses, known as Unit 407. At the time of the accident, plaintiff was employed by third-party defendant Newbridge Electric ("Newbridge"), a subcontractor hired to perform electrical work for the project. The project allegedly was owned and developed by defendants/third-party plaintiffs The Villages West at Huntington, Barbash Associates, Inc., and McGovern-Barbash Associates, LLC (herein collectively known as "McGovern-Barbash"). Other defendants to this action include True Mechanical Corp, J. Peterman Construction Corp., Nesconset Construction Co. Inc. ("Nesconset"), Active Door &Window Corp., Deer Park Stairbuilding & Millwork Co., All Suffolk Plumbing Contractors, Inc., and Maccarone Plumbing and Heating. By way of an amended complaint, plaintiff alleges causes of action against defendants for common law negligence and violations of Labor Law §§ 200, 240 (1), and 241(6). The complaint also includes a derivative claim by plaintiff's wife, Lynn Wehrheim, for damages related to loss of services and the payment of medical expenses.

McGovern-Barbash joined issue denying plaintiff's claim and asserting affirmative defenses. Shortly thereafter, McGovern-Barbash brought a third-party action against Newbridge Electric, and their

insurance broker, Baldon Group, and its principal, Thomas Donahue. McGovern-Barbash also brought a separate action seeking a declaratory judgment compelling their insurers to defend and indemnify them against plaintiffs claims. By order dated April 23, 2010, the court granted a motion by third-party defendants Baldon Group and Thomas Donahue for an order severing the third-party claims against them in this action, and consolidating such claims in the related declaratory judgment action brought by McGovern-Barbash. On July 26, 2010, plaintiff commenced another action which named the Villages West at Huntington, The Villages West Development Corp., Villages at Huntington Development Corp., McGovern-Barbash Associates, LLC, and Barbash Associates Inc. as defendants. Subsequently, the Court (LaSalle J.) so-ordered a stipulation executed by the parties which consolidated both of plaintiffs' actions. Following such consolidation, the parties executed another stipulation agreeing to discontinue the action against Active Door &Window Corp., Deer Park Stairbuilding & Millwork Co., and Maccarone Plumbing and Heating. The remaining defendants joined issued and asserted a number of cross claims against each other.

True Mechanical now moves for summary judgment dismissing the complaint and cross claims against it arguing, inter alia, that it neither controlled nor supervised plaintiff's work, that it did not create the alleged dangerous condition or have notice of its existence, and that the condition was open and obvious. True Mechanical further asserts that the cross claims against it for contribution and indemnification should be dismissed, as it played no role in causing or augmenting plaintiff's injuries, and that it did not enter into any agreement requiring it to indemnify J. Peterman Construction ("J. Peterman") for such injuries. Nesconset and J. Peterman also move for summary judgment dismissing the complaint and cross claims against them arguing, inter alia, that plaintiff's accident did not occur as a result of an elevated hazard, that they did not control or supervise plaintiff's work, and that it was McGovern-Barbash's failure to ensure that its laborers removed the debris from the worksite which was the proximate cause of the accident. Further, Nesconset and J. Peterman seek dismissal of all cross claims asserted against them, and Nesconset requests, pursuant to 22 NYCRR 130-1.1, an award of costs and reasonable attorneys fees.

McGovern-Barbash now moves for an order amending the third-party complaint to correct alleged typographical errors which resulted in the failure to include Villages West Development Corp. and Villages at Huntington Development Corp. as third-party plaintiffs. McGovern-Barbash also seeks summary judgment dismissing the complaint, and an award for costs and attorneys fees it incurred in connection with its motion. McGovern-Barbash asserts that with the exception of Villages West Development Corp., none of the other related entities listed in the complaint, namely McGovern-Barbash Associates, Barbash Associates, Villages West at Huntington, and Villages West, owned or controlled the section of the development where plaintiff was injured, or controlled or supervised his work. Rather, McGovern-Barbash avers that the section of the development where plaintiff was injured was owned and controlled by Villages West Development Corp. ("VWD"), and that VWD's employee, George Dowd, was responsible for supervising plaintiff's work. Additionally, McGovern-Barbash requests, pursuant to 22 NYCRR 130-1.1, an award of costs and attorneys fees it incurred in connection with its motion.

In opposition, plaintiff asserts that True Mechanical's motion should be denied as premature, since VWD has failed to respond to its discovery request for work orders, invoices and records relating to the project, and that Susan Barbash, who testified on behalf of McGovern-Barbash regarding the entities working on the project, failed to review such documentation prior to her deposition. Plaintiff argues that such records are essential to proving what subcontractors were working in the unit where he was injured

prior to the accident.

Plaintiff opposes the motions by McGovern-Barbash and Nesconset only to the extent that they seek an award of costs and attorneys' fees. According to plaintiff's attorney, neither of the defendants took the opportunity to have the action discontinued despite their receipt of communications forwarded to them indicating plaintiff's willingness to discontinue his claims. J. Peterman also opposes the branch of McGovern-Barbash's motion seeking an award of costs and attorneys' fees on a similar basis. Newbridge opposes the branch of the motion by Barbash-McGovern which seeks dismissal of the claims against McGovern-Barbash Associates and Barbash Associates, arguing that deposition testimony by the project's superintendent, George Dowd, that he was employed by Barbash Associates at the time of the subject accident, and that "Barbash" was the owner and general contractor for the project, raises significant triable issues warranting denial of the motion. Newbridge further asserts that a recent affidavit executed by Susan Barbash stating that project hiring and work records previously believed to be in Barbash's storage facility cannot now be located, raises issues of credibility which must be resolved by the trier of fact. Newbridge opposes the motions by J. Peterman and True Mechanical on a similar basis.

Initially, the Court notes that the unopposed branch of True Mechanical's motion seeking dismissal of plaintiff's claims under Labor Law §240(1) is granted, as the accident, which occurred as a result of a ground level tripping hazard, is not among the type of perils Labor Law §240 (1) was designed to prevent (*see* ***Spence v Island Estates at Mt. Sinai II, LLC***, 79 AD3d 936, 914 NYS2d 203 [2d Dept 2010]; ***Ortiz v Varsity Holdings, LLC***, 75 AD3d 538, 906 NYS2d 766 [2d Dept 2010]; ***Plotnick v Wok's Kitchen, Inc.***, 21 AD3d 358, 800 NYS2d 37 [2d Dept 2005]; ***Georgopulos v Gertz Plaza, Inc.***, 13 AD3d 478, 788 NYS2d 121 [2d Dept 2004]). In view of this determination, the court also grants, sua sponte, summary judgment dismissing plaintiff's Labor Law §240(1) claims against all of the defendants in this action.

Labor Law §241(6) generally does not impose liability on subcontractors unless the subcontractor has the authority to supervise and control the plaintiff's work or the area of the worksite where the accident occurred (*see* ***Russin v Picciano & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]; ***Kehoe v Segal***, 272 AD2d 583,709 NYS2d 817 [2d Dept 2000]; ***DaSilva v Jantron Industries, Inc.***, 155 AD2d 510, 547 NYS2d 370 [1989]; ***Rosenbaum v Lefrak Corp.***, 80 AD2d 337, 438 NYS2d 794 [1st Dept 1981]). The determinative factor on the issue of control is not whether a subcontractor furnishes equipment but whether it has control of the work being done and the authority to insist that proper safety practices be followed (*see* ***Kehoe v Segal***, *supra*). Similarly, Labor Law §200 "is directed at owners and general contractors, and the rare case where a subcontractor may be liable under the statute must include a showing that the subcontractor had authority and control over [the] plaintiff's work" (***Frisbee v 156 R.R. Ave. Corp.***, 85 AD3d 1258, 1259, 924 NYS2d 640 [3d Dept 2011]; *see* ***Marshall v Glenman Indus. & Commercial Contr. Corp.***, 117 AD3d 1124, 985 NYS2d 169 [3d Dept 2014]; ***Erickson v Cross Ready Mix, Inc.***,75 AD3d 519, 906 NYS2d 284 [2d Dept 2010]).

Here, True Mechanical established its prima facie entitlement to summary judgment dismissing plaintiff's Labor Law §§241(6) and 200 claims by demonstrating that it did not act as agent of the owner of the worksite or possess the authority to supervise and control plaintiff's work or the area where the accident occurred (*see* ***Marshall v Glenman Indus. & Commercial Contr. Corp.***, *supra*; ***Simon v Granite Bldg. 2,***

LLC, 114 AD3d 749, 980 NYS2d 489 [2d Dept 2014]; ***Frisbee v 156 R.R. Ave. Corp.***, *supra*; ***Erickson v Cross Ready Mix, Inc.***, *supra*; ***Martinez v City of New York***, 73 AD3d 993, 901 NYS2d 339 [2d Dept 2010]). Significantly, plaintiff testified that his work was exclusively controlled by the project superintendent, George Dowd, and that he never had any contact or communications with employees of True Mechanical on the day of the accident. George Dowd testified that laborers hired by his employer were responsible for clearing debris from the worksite, and debris generated by True Mechanical, the HVAC subcontractor, would consist of small pipes and venting material. In addition, True Mechanical's principal testified that the subcontractor did not have the authority to control the safety practices at the worksite, and that its work in unit 407 did not involve the cutting of lumber, and was completed well before the accident. Further, by submitting evidence it neither created nor had actual or constructive notice of the alleged dangerous condition, True Mechanical also met its prima facie burden on the branch of the motion seeking dismissal of plaintiff's common law negligence claim (*see* ***Doxey v Freeport Union Free Sch. Dist.***, 115 AD3d 907, 982 NYS2d 539 [2d Dept 2014]; ***Stier v One Bryant Park LLC***, 113 AD3d 551, 979 NYS2d 65 [1 st Dept 2014]; ***Weinberg v Alpine Improvements, LLC***, 48 AD3d 915, 851 NYS2d 692 [3d Dept 2008]).

Additionally, True Mechanical submitted unrefuted evidence that it was not contractually obligated to insure or indemnify J. Peterman for plaintiff's injuries, as there was no such contractual agreement between the entities (*see* ***Araujo v City of New York***, 84 AD3d 993, 922 NYS2d 806 [2d Dept 2011]; ***O'Berg v MacManus Group, Inc.***, 33 AD3d 599, 822 NYS2d 306 [2d Dept 2006]; ***Lipshultz v K & G Indus.***, 294 AD2d 338, 742 NYS2d 90 [2d Dept 2002]). Likewise, the cross claims by J. Peterman and Suffolk Plumbing for contribution and/or common law indemnification fail as a matter of law, since it has been determined that True Mechanical was not actively at fault in bringing about or augmenting plaintiff's injuries (*see* ***McCarthy v Turner Constr., Inc.***, 17 NY3d 369, 929 NYS2d 556 [2011]; ***Guzman v Haven Plaza Hous. Dev. Fund Co.***, 69 NY2d 559, 516 NYS2d 451 [1987]; ***Nieves-Hoque v 680 Broadway, LLC***, 99 AD3d 536, 951 NYS2d 870 [1 st Dept 2012]; ***Payne v 100 Motor Parkway Assoc., LLC***, 45 AD3d 550, 846 NYS2d 211 [2d Dept 2007]; ***Hoover v International Bus. Machs. Corp.***, 35 AD3d 371, 825 NYS2d 736 [2d Dept 2006]).

In opposition, neither plaintiff nor Newbridge raised any triable issues warranting denial of the motion (*see* ***Alvarez v Porpspect Hosp***., 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Moreover, neither opponent demonstrated that facts essential to opposing the motion are within the exclusive knowledge and control of True Mechanical or McGovern-Barbash (*see* CPLR 3212[f]; ***Martinez v Kreychmar***, 84 AD3d 1037, 923 NYS2d 648 [2d Dept 2011]; ***Cavitch v Mateo***, 58 AD3d 592, 871 NYS2d 372 [2d Dept 2009]), and the "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered by further discovery is an insufficient basis for denying the motion" (***Woodard v Thomas***, 77 AD3d 738, 740, 913 NYS2d 103 [2d Dept 2010]; *see* ***Conte v Frelen Assoc., LL C***, 51 AD3d 620, 858 NYS2d 258 [2d Dept 2008]). Therefore, the motion by True Mechanical for summary judgment dismissing the complaint and cross claims against is granted.

As to the motions by J. Peterman and Nesconset for summary judgment dismissing the complaint and the cross claims against them, the defendant subcontractors established their prima facie entitlement to

dismissal of the Labor Law §§241(6) and 200 claims by demonstrating that they did not act as agents of the owner or possess the authority to supervise and control plaintiff's work or the area where the accident occurred (*see* ***Marshall v Glenman Indus. & Commercial Contr. Corp.***, *supra*; ***Simon v Granite Bldg. 2, LLC***, 114 AD3d 749, 980 NYS2d 489 [2d Dept 2014]; ***Frisbee v 156 R.R. Ave. Corp.***, *supra*; ***Erickson v Cross Ready Mix, Inc.***, *supra*; ***Martinez v City of New York***, 73 AD3d 993, 901 NYS2d 339 [2d Dept 2010]). It is undisputed that plaintiff's work was controlled and supervised by George Dowd, and that laborers hired by Dowd's employer were exclusively responsible for the removal of debris from the worksite. Further, both entities submitted evidence that their work, if any, in unit 407 where the accident occurred was completed almost one month prior to the accident. Specifically, an affidavit by the owner of J. Peterman, Gary Fierro, states that the work performed by J. Peterman or its subcontractor was completed at least one month prior to the accident. As to Nesconset, its submissions include deposition testimony by George Dowd which acknowledges that Nesconset was hired to perform the excavation of the work site, and that its contract did not require it to perform any work within the project's housing units.

Based on the foregoing, J. Peterman and Nesconset met their prima facie burden on the branches of their motion seeking dismissal of plaintiff's common law negligence claim (*see* ***Doxey v Freeport Union Free Sch. Dist.***, *supra*; ***Stier v One Bryant Park LLC***, *supra*) and the cross claims asserted against them for common law indemnification and contribution (*see* ***McCarthy v Turner Constr., Inc.***, *supra*; ***Nieves-Hoque v 680 Broadway, LLC***, *supra*; ***Payne v 100 Motor Parkway Assoc., LLC***, *supra*). As no papers were submitted in opposition to Nesconset's motion, no triable issues were raised warranting its denial. Therefore, the branch of Nesconset's motion for summary judgment dismissing the complaint and cross claims against it are granted. Moreover, inasmuch as Newbridge and Suffolk Plumbing refused to execute a stipulation that was signed by plaintiff and the remaining co-defendants discontinuing the action against Nesconset, and failed to oppose its instant motion for summary judgment, the court finds that the co-defendants engaged in frivolous conduct and grants the branch of Nesconset's motion requesting an award of costs and attorneys' fees incurred in connection with the instant motion (*see* 22 NYCRR 130-1.1; *see also* ***Premier Capital v Damon Realty Corp.***, 299 AD2d 158, 753 NYS2d 43 [1st Dept 2002]; ***J.T. & T Air Conditioning Corp. v BG Nat'l P & H Inc.***, 293 AD2d 429, 740 NYS2d 856 [1st Dept 2002]; ***Matter of Metamorphosis Constr. Corp. v Glekel***, 247 AD2d 231, 668 NYS2d 594 [1st Dept 1998]). However, since Nesconset failed to submit competent proof as to the amount of costs and attorneys' fees it incurred in connection with the making of the instant motion, Nesconset Construction, Newbridge Electric and Suffolk Plumbing are directed to appear before the Court for a hearing to take place at **9:30 a.m. on APRIL 7, 2015 2:00PM , 2015,** at Part 50 of this Court, at the Courthouse located at One Court Street Annex, Riverhead, New York, to determine such costs.

Further, assertions made by plaintiff and Newbridge that J. Peterman may have created the pile of debris over which plaintiff tripped because it performed carpentry in the subject housing unit sometime prior to the subject accident, are conclusory and unsubstantiated and, therefore, fail to raise any genuine triable issue warranting denial of the motion (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v New York***, *supra*). Moreover, neither plaintiff nor Newbridge demonstrated that facts essential to opposing the motion are within the exclusive knowledge and control of J. Peterman (*see* CPLR 3212[f]; ***Martinez v Kreychmar***, *supra*; ***Cavitch v Mateo***, *supra*), and the "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered by further discovery is an insufficient basis for

denying the motion" (***Woodard v Thomas***, *supra* at 740; *see* ***Conte v Frelen Assoc., LL C***, *supra*). Therefore, the motion by J. Peterman for summary judgment dismissing the complaint and cross claims against it is granted.

Turning to the motion by McGovern-Barbash, the Court grants its application for an order permitting the correction of the third-party complaint to include VWD as a third-party plaintiff in the action, and the application is otherwise denied (*see* CPLR 3025 (b); *see also* ***Edenwald Contr. Co. v City of New York***, 60 NY2d 957, 959, 471 NYS2d 55 [1983]; ***Serratore v Vetere***, 137 AD2d 750, 524 NYS2d 829 [2d Dept 1998]). It is noted that VWD, though named in the amended complaint and third-party action, was inadvertently omitted from the third-party caption after the actions brought by plaintiff were consolidated. Further, there is no prejudice to Newbridge, as the third-party complaint already placed it on notice that VWD was a third-party plaintiff. Nevertheless, the court denies McGovern-Barbash's application to amend the caption to include Villages at Huntington Development Corp. as a third-party plaintiff for the reasons stated below.

The branch of the motion seeking summary judgment dismissing the complaint as to all of the McGovern-Barbash defendants, except VWD, is granted to the extent that the action is dismissed as against The Villages West at Huntington and Villages at Huntington Development Corp., and is otherwise denied. Although McGovern-Barbash submitted deposition testimony by Susan Barbash stating, among other things, that McGovern-Barbash Associates and Barbash Associates neither owned the section of the worksite where plaintiff was injured, nor controlled or supervised plaintiff's work, deposition testimony by the worksite superintendent, George Dowd, that he was employed by "Barbash," creates a triable issue warranting denial of the motion as to McGovern-Barbash Associates and Barbash Associates (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 574, 774 NYS2d 792 [2d Dept 2004]; ***Zuckerman v New York***, *supra*). It is noted that affidavits by Susan Barbash and George Dowd, as well as a copy of George Dowd's 2007 W-2 Statement, submitted for the first time in McGovern-Barbash's reply papers, were not considered by the court (CPLR 2214; *see* ***Mohsin v Port Auth. of N.Y. & N.J.***, 83 AD3d 536, 920 NYS2d 664 [1st Dept 2011]; ***Abramson v Hertz***, 19 AD3d 305, 798 NYS2d 20 [1st Dept 2005]). Even assuming, arguendo, that the court was inclined to consider such evidence, the affidavit of George Dowd is still deficient, as it states that he worked for "Villages West Corp.," not VWD.

Finally, the branch of McGovern-Barbash's motion requesting an award of costs and attorneys' fees is denied, as the Court finds that neither plaintiff nor Newbridge engaged in conduct which could be construed as frivolous, as that term is defined in 22 NYCRR 130-1.1 (c) (*see* ***McGee v J. Dunn Constr. Corp.***, 54 AD3d 1009, 864 NYS2d 167 [2d Dept 2008]; *cf.* ***Makan Land Dev. - Three, LLC v Prokopov***, 42 AD3d 439, 839 NYS2d 787 [2d Dept 2007]; ***Mascia v Maresco***, 39 AD3d 504, 833 NYS2d 207 [2d Dept 2007]).

Dated: 1.14.15

A.J.S.C.

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