SHORT FORM ORDER

INDEX No. 00-20522
CAL. No 06-02223-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 1-30-07 (008, 009, 010)
2-13-07 (011, 012)
ADJ. DATE 4-11-07
Mot. Seq. # 008 - MotD
009 - XMotD
010 - XMD
011 - XMotD
012 - XMD

DONALD HASZINGER,

Plaintiff,

- against -

ANDREW SANDLER, LIZ SANDLER, HARVEY SANDLER and ROUND HILL DEVELOPMENT CORP., ROGER SHORE d/b/a SHORE CONSTRUCTION, JAMES MONTIGLIO, INC., ROBERT PRAVER, COPPERFIELD CORP. and STEWART SENTER, INC.,

Defendants.

ROUND HILL DEVELOPMENT CORP.,

Third-Party Plaintiff,

- against -

SHORE CONSTRUCTION and JAMES MONTIGLIO, INC.,

Third-Party Defendants.

ROBERT PRAVER, and COPPERFIELD CORP. ,

Fourth-Party Plaintiff,

- against -

ROUND HILL DEVELOPMENT CORP., SHORE CONSTRUCTION and JAMES Montiglio, INC.,

Fourth-Party Defendants.

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Upon the following papers numbered 1 to 67 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-14 ; Notice of Cross Motion and supporting papers 15-20; 21-25; 26-41; 42-44 ; Answering Affidavits and supporting papers 45-50; 51-53; 54-55; 56-57; 58-59 ; Replying Affidavits and supporting papers 60-61; 62-63; 64-65; 66-67 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#008) by defendant, Stewart Senter, Inc., for an order pursuant to CPLR 3212 granting it summary judgment dismissing plaintiff's complaint and any cross claims against it, is granted to the extent that plaintiff's Labor Law § 241(6) claim based upon an alleged violation of 12 NYCRR §§ 23-1.5 is dismissed, and is otherwise denied; and it is further

ORDERED that the cross motion (#009) by defendant/fourth-party defendant, James Montiglio, Inc., for an order pursuant to CPLR 3212 granting it summary judgment dismissing plaintiff's complaint, all impleader actions and all cross claims against it, is granted to the extent that plaintiff's Labor Law §§ 200, 240(1), and 241(6) claims are dismissed as against it, and is otherwise denied; and it is further

ORDERED that the cross motion (#010) by plaintiff for an order pursuant to CPLR 3212 granting him summary judgment as to defendants' liability relative to his Labor Law §§ 240(1) and 241(6) claims, is denied as untimely; and it is further

ORDERED that the cross motion (#011) by defendant/fourth-party defendant, Round Hill Development Corp., for an order pursuant to CPLR 3212 granting it summary judgment dismissing plaintiff's complaint, the fourth-party complaint, and any cross claims against it, and summary judgment on its claim for common-law indemnity against defendant James Montiglio, Inc., is granted to the extent that plaintiff's Labor Law § 241(6) claim based upon an alleged violation of 12 NYCRR §§ 23-1.5 is dismissed, and is otherwise denied; and it is further

ORDERED that the cross motion (#012) by defendants/fourth-party plaintiffs, Robert Praver and Copperfield Corp., for an order pursuant to CPLR 3212 granting them summary judgment dismissing plaintiff's complaint, is denied as untimely.

Initially, the Court notes that plaintiff's note of issue was filed on September 22, 2006 and that the cross motions for summary judgment by plaintiff (#010) and defendants, Robert Praver and Copperfield (#012), were made on January 22, 2007, and February 1, 2007, respectively, more than 120 days after the filing of the note of issue, which time-frame expired on January 20, 2007. Therefore, the cross motions are procedurally defective because they were not interposed within the time limitation prescribed by the amendment to CPLR 3212(a)(L. 1996 Ch. 492) which states, *inter alia,* "such motion shall be made no later than one hundred twenty (120) days after the filing of the note of issue, except with leave of court on good cause shown." In ***Miceli v State Farm Mut. Auto. Ins. Co.,*** (3 NY3d 725, 786 NYS2d 379 [2004]), the Court of Appeals underscored its holding in ***Brill v City of New York,*** (2 NY3d 648, 781 NYS2d 261 [2004]) and made it clear "that [the] statutory time frames," of CPLR 3212, are "not options, they are requirements, to be taken seriously by the parties." Here, movants offered no good cause for their untimely motions, and the Court is constrained by their lateness (***Long v Children's Vil.,*** 24 AD3d 518, 805 NYS2d 286 [2005]). Accordingly, these cross motion are denied as untimely.

Plaintiff commenced this action to recover damages pursuant to Labor Law §§ 200, 240(1), and 241(6), and for common-law negligence, for the injuries he allegedly suffered in a fall at a construction site. The new home was being constructed by Round Hill Development Corp. (Round Hill) pursuant to a construction management agreement with the owners, Andrew and Liz Sandler. Round Hill was owned by Steward Senter, Inc. Round Hill hired the excavation contractor, James Montiglio, Inc. (Montiglio) and the framing contractor, defaulting defendant Shore Construction. Nonparty CJK Construction also was performing the framing, although it is unclear clear whether it was employed by Round Hill or subcontracted from Shore. Copperfield Corp. acted as the project manager.

Plaintiff is an experienced carpenter and was employed as a framer by nonparty CJK Construction. The framing was being performed by his employer as well as Shore Construction, and plaintiff took directions from both. He had been working at the Round Hill subdivision for about a year. At this particular home, the foundation excavation had not been completely backfilled on the side of the house where plaintiff and his colleagues were working, and someone had placed a flooring beam or plank from the first floor to the dirt at the edge of the excavation. The excavation was 6-12 feet deep[1] underneath the plank, and the plank was 12 inches wide, 2 inches deep and about 20 feet long. Plaintiff testified at his deposition that he and his coworkers were installing a half-round header for an outside second-story balcony. A boom truck had lowered the header into position and he and his coworkers were securing it. One worker was on top, attaching it to the frame, and he and another worker were placing temporary posts underneath, to support it until the permanent posts were installed. His job was to nail together two 2 by 4" boards to act as a post. He fabricated the post inside, on the first floor deck, and would then carry it outside, where his coworker, Dan, would secure it. Dan was standing on a cement pillar underneath the header. Plaintiff utilized the plank to walk to the area where Dan could receive the post from him. They had already placed four of the temporary posts. As plaintiff walked on the plank with the fifth post, the plank gave way and he fell 12 feet, sustaining the injuries complained of herein. The gravamen of defendants' motions for summary judgment is that the Labor Law is inapplicable and, even if applicable, they are not subject to its statutory liability.

Labor Law § 240(1), commonly known as the "scaffold law," creates a duty that is nondelegable, and an owner or general contractor or their agent who breaches that duty may be held liable in damages regardless of whether they had actually exercised supervision or control over the work (***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]). The "exceptional protection" provided for workers by § 240(1) is aimed at "special hazards" and is limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra* at 501; ***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 514, 577 NYS2d 219 [1991]; ***Zimmer v Chemung County Performing Arts***, 65 NY2d 513, 493 NYS2d 102 [1985]). In order to prevail upon a claim pursuant to Labor Law § 240(1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his injuries (***Bland v Manocherian,*** 66 NY2d 452, 497 NYS2d 880 [1985]; ***Sprague v Peckham Materials Corp.***, 240 AD2d 392, 658 NYS2d 97 [1997]).

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[1] Defendants assert that the depth was six feet and plaintiff asserts it was 12 feet.

Clearly, not every fall from an unsecured plank is a violation of Labor Law § 240(1). Where the plank was not used in the performance of the injured plaintiff's work, but was used as a passageway or stairway, section 240(1) is not applicable (***Donohue v CJAM Assocs.,*** 22 AD3d 710, 803 NYS2d 132 [2005]). However, 240(1) protection is applicable where the plank functions as the equivalent of a scaffold, ladder or other safety device for the benefit of the injured plaintiff in his work (***Paul v Ryan Homes***, 5 AD3d 58, 774 NYS2d 225 [2004]; ***Missico v Tops Market,*** 305 AD2d 1052, 758 NYS2d 890 [2003]). Here, plaintiff was preparing the temporary posts inside the first floor of the home and then needed to walk outside the first floor, on the subject plank, to hand them to his coworker, who was standing on a cement pillar. The temporary posts were necessary to hold up the header until permanent supports could be installed. Therefore, the plank was acting as a scaffold to support plaintiff and the post, for placement by his coworker (***Miraglia v H & L Holding Corp.,*** 36 AD3d 456, 828 NYS2d 329 [2007]). Accordingly, the Court finds that defendants did not establish that the strict liability imposed by § 240(1) is inapplicable.

Labor Law § 241(6) requires owners and general contractors 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. As is the duty imposed by Labor Law § 240(1), the duty to comply with the Commissioner's regulations imposed by § 241(6) is nondelegable (***Ross v Curtis-Palmer Hydro-Elec. Co.,*** *supra;* ***Long v Forest-Fehlhaber***, 55 NY2d 154, 448 NYS2d 132 [1982]; ***Allen v Cloutier Constr. Corp.,*** 44 NY2d 290, 405 NYS2d 630 [1978]). Therefore, a plaintiff who asserts a viable claim under § 241(6) wherein the rule or regulation alleged to have been breached is a "specific positive command" and not merely "general safety standards" need not show that defendants exercised supervision or control over the work site or had actual or constructive notice in order to establish a right of recovery (*see*, ***Ross v Curtis-Palmer Hydro-Elec. Co.,*** *supra*; ***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 670 NYS2d 816 [1998]).

Plaintiff's untimely motion, considered in opposition, is confined to defendants' alleged violations of 12 NYCRR §§ 23-1.5, 1.7 (b)(iii) and 1.22(2). Plaintiff did not address the remaining Code violations set forth in his bill of particulars, and in any event they are either too general or not applicable to plaintiff's accident. As to section 23-1.5 (a), this directive is too general to support § 241(6) liability (***Carty v Port Auth. of N.Y. & N.J.,*** 32 AD3d 732, 821 NYS2d 178 [2006]; ***Sajid v Tribeca North Assocs.,*** 20 AD3d 301, 799 NYS2d 33 [2005]), and it is dismissed as to all parties.

As to section 23-1.7(b)(1), entitled, "Hazardous openings," it provides:

> (I) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).
>
> (iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows:
> (it goes on to list applicable safety devices including, planking, life net, safety belt)

Therefore, it is arguable that it is sufficiently specific to form a predicate for defendants' § 241(6) liability

(***Ellis v J.M.G., Inc.,*** 31 AD3d 1220, 1121, 818 NYS2d 724 [2006]).

Section 23-1.22, entitled "Structural runways, ramps and platforms, provides:

> (2) Runways and ramps constructed for the use of persons only shall be at least 18 inches in width and shall be constructed of planking at least two inches thick full size or metal or equivalent strength. Such surface shall be substantially supported and braced to prevent excessive spring or deflection. Where planking is used it shall be laid close, butt jointed and securely nailed.

The Court finds that defendants have not established that this provision is too general or that it is inapplicable as a matter of law (***Carriere v Whiting Turner Contr.,*** 299 AD2d 509, 750 NYS2d 633 [2002]; ***Reisch v Amadori Constr.***, 273 AD2d 855, 709 NYS2d 726 [2000]). However, this violation was not alleged in plaintiff's bill of particulars, and plaintiff did not seek leave to amend. Nevertheless, in the absence of unfair surprise or prejudice to defendant (***Ellis v J.M.G., Inc.,*** *supra*; ***Walker v Metro-North Commuter R.R.,*** 11 AD3d 339, 783 NYS2d 362 [2004]), the Court,, *sua sponte,* deems the opposition as seeking leave and grants plaintiff leave to so amend the bill of particulars (***Latino v Nolan & Taylor-Howe Funeral Home,*** 300 AD2d 631, 754 NYS2d 289 [2002]). Accordingly, summary judgment as to the alleged violation of the Industrial Code at sections 23-1.5, 1.7 (b)(iii) and 1.22(2) is denied to movants. Plaintiff's amended bill of particulars shall be served no later than thirty days after the service upon hm of a copy of the instant order with notice of entry.

It well settled that certain contractual managers may be vicariously liable as an agent of the property owner for injuries sustained under § 240(1) in circumstances where the manager had the ability to control the activity which brought about the injury (*see,* ***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 317-318, 445 NYS2d 127 [1981]; *see also*, ***Comes v New York State Elec. & Gas Corp***., 82 NY2d 876, 878, 609 NYS2d 168 [1993]). "When the work giving rise to [the duty to conform to the requirements of section 240 (1)] 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" (***Russin v Louis N. Picciano & Son***, *supra* at 318).

Here, the parties' deposition transcripts present slightly different theories as to their respective roles in the new home construction. Mr. Robert Praver, the principal of Copperfield, Corp., stated that he, through Copperfield, was an independent contractor employed by Round Hill, although perhaps his checks were issued by Stewart Senter, Inc., as a payroll convenience. He characterized his title as the project manager. He offered that the difference between a general contractor and a construction manager is that a general contractor would give the owner a fixed price for the home, whereas a construction manager acted as an agent of the owner, for example in paying bills for supplies or contractors, and would seek regular reimbursement for goods and services from the owner. He offered that he (or Copperfield) hired the various contractors and subcontractors for the Sandlers' home, sometimes in conjunction with Stewart Senter; and that Round Hill was not the general contractor, there was no general contractor, rather Round Tree was the construction manager or project manager, which employed him. His job entailed coordination between the owners, their architect, the various contractors and subcontractors. He testified that he was present at the site most afternoons and that his superintendent, Scott Kimmel, was present daily He acknowledged several faxed memos to Mr. Kimmel wherein he discussed the need to complete

the backfill under the semicircular porch. Mr. Praver also testified that he discussed the need to backfill the 5-6 foot opening under the porch with Mr. Montiglio and was told by Montiglio that he needed a different machine, not present at the site, to do that.

Mr. Kimmel testified that he was employed by Round Tree as the project supervisor and that Mr. Praver was the project manager who put out the proposals for bid, hired the contractors, collected funds and paid for services and materials. Mr. Kimmel reported to Mr. Praver, and Mr. Praver reported to Mr. Senter. He was at the development daily and managed several home sites, and several employees of Round Hill. Mr. Kimmel stated that his workers would install safety barricades when necessary. His recollection was that the excavation for the foundation had to be back filled to the point where the framers could begin their work and it was Mr. Praver who would determine that it was sufficiently back filled to allow the framers to begin.

A party is deemed to be an agent of an owner under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured (***Walls v Turner Constr. Co.***, 4 NY3d 861, 863-864, 798 NYS2d 351 [2005]; ***Russin v Picciano & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]). To impose the vicarious liability imposed by §§ 240(1) and 241(6), the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition (***Linkowski v City of New York,*** 33 AD3d 971, 824 NYS2d 109 [2006]; ***Natoli v City of New York,*** 32 AD3d 507, 820 NYS2d 313 [2006]). It is not a defendant's title that is determinative, but the amount of control or supervision exercised (***Bagshaw v Network Service Mgt.,*** 4 AD3d 831, 772 NYS2d 161 [2004]; ***Aranda v Park East Constr.,*** 4 AD3d 315, 772 NYS2d 70 [2003]). A "construction manager charged with the duty of coordinating all aspects of a construction project is a contractor with nondelegable duties under sections 240 and 241 of the Labor Law" (***Kenny v Fuller Co.***, 87 AD2d 183, 190, 450 NYS2d 551, *lv denied* 58 NY2d 603, 459 NYS2d 1026 [1982]). Here, Round Tree contracted with the homeowners to act as the construction manager, hired the contractors, and had the authority to make sure that the framers work progressed in a safe manner. Further, Copperfield, as the project manager, had the authority to decide when the excavation was sufficiently back filled for the framers to work and to direct additional back fill. Therefore, there is evidence that each defendant was responsible for coordinating and supervising the project such that it was invested with a concomitant power to enforce safety standards and to hire responsible contractors (***Bagshaw v Network Service Mgt., Inc.,*** 4 AD3d 831, 772 NYS2d 161 [2004]). Accordingly, neither party has established that it cannot be subject to the vicarious liability imposed by Labor Law §§ 240(1) and 241(6), and the cross motions for summary judgment seeking same are denied.

The gravamen of the summary judgment motion by Stewart Senter, Inc., is that plaintiff has not established that it is subject to the vicarious liability imposed by Labor Law §§ 240(1) and 241(6). It argues that the fact that Mr. Senter is a principal for both Stewart Senter, Inc. and Round Hill Development Corp., cannot cast the parent corporation, Stewart Senter, Inc., as liable to plaintiff. While that argument may ultimately prevail, here it was movant's burden to establish its entitlement to summary judgment as a matter of law. In support of its motion Stewart Senter, Inc., offered the parties depositions, which are not conclusive as to this issue, and its attorney's affirmation, clearly insufficient. Accordingly, Senter's motion for summary judgment is denied.

The protection provided by Labor Law § 200 codifies the common-law duty of an owner and its agent to provide employees with a reasonably safe place to work (***Jock v Fien***, 80 NY2d 965, 590 NYS2d

878 [1992]). It applies to owners, contractors, or their agents (***Russin v Louis N. Piccano & Son***, *supra*) who exercised control or supervision over the work, and either created an allegedly dangerous condition or had actual or constructive notice of it (***Lombardi v Stout***, 80 NY2d 290, 590 NYS2d 55 [1992]; ***Yong Ju Kim v Herbert Constr. Co.***, 275 AD2d 709, 713 NYS2d 190 [2000]). Here, defendants do not argue that they did not have notice of the alleged dangerous condition, the partially filled excavation, they argue that the excavation was readily observable and known by plaintiff. However, these circumstances merely "negated any duty that defendants . . . owed plaintiff to warn of potentially dangerous conditions" (***England v Vacri Constr. Corp.,*** 24 AD3d 1122, 807 NYS2d 669 [2005] quoting ***MacDonald v City of Schenectady***, 308 AD2d 125, 126, 761 NYS2d 752 [2003]); they do not, without more, obviate the duty to provide a reasonably safe workplace (***Bilinski v Bank of Richmondville***, 12 AD3d 911, 784 NYS2d 708 [2004]; ***MacDonald v City of Schenectady***, *supra* at 127), subject to any issue of plaintiff's alleged comparative negligence (***Cowan v ADF Constr. Corp.,*** 26 AD3d 802, 809 NYS2d 735 [2006]). Further, the conflicting arguments about whether the partially filled excavation was an avoidable hazard or an integral part of the work, must await the jury's determination (*compare,* ***O'Sullivan v IDI Constr. Co.,*** 7 NY3d 805, 822 NYS2d 745 [2006], *affg* 28 AD3d 225, 813 NYS2d 373). Accordingly, summary judgment as to plaintiff's Labor Law § 200 cause of action is also denied.

However, defendant Montiglio is neither an owner nor a general contractor, and as the excavation subcontractor without the authority to direct or control plaintiff's work, it is not liable to plaintiff under the vicarious liability imposed by Labor Law §§ 240(1) or 241(6) (*see,* ***Aversano v JWH Contr.,*** 37 AD3d 745, 831 NYS2d 222 [2007]; ***Coque v Wildflower Estates Dev., Inc.,*** 31 AD3d 484, 488, 818 NYS2d 546 [2006]; ***Lozado v Felice,*** 8 AD3d 633, 779 NYS2d 540 [2004]). Further, Montiglio did not have the ability to control plaintiff's work, placement of the plank or the timing of either (***Kendle v August Boh! Contr. Co.,*** 242 AD2d 848, 662 NYS2d 606 [1997]) and cannot be liable under Labor Law § 200 (***Kelarakos v Massapequa Water Dist.,*** 38 AD3d 717, 832 NYS2d 625 [2007]). Nevertheless, there is a question of fact as to whether Montiglio negligently performed its work. There is a triable issue as to whether, in failing to completely back fill the area, it was awaiting direction that more fill was available or whether it negligently failed to return with the machine capable of back filling under the balcony, and whether this created an unreasonable risk of harm to plaintiff which was a proximate cause of his injuries (*see,* ***Bell v Bengomo Realty,*** 36 AD3d 479, 829 NYS2d 42 [2007]; ***Ryder v Mount Loretto Nursing Home,*** 290 AD2d 892, 736 NYS2d 792 [2002]). Accordingly, Montiglio is granted summary judgment as to plaintiff's Labor Law §§ 200, 240(1), and 241(6) claims and denied summary judgment as to plaintiff's common-law negligence claim.

Finally, resolution of the claims for common-law indemnification and/or contribution must await findings of fault which cannot be resolved herein (***Rodrigues v N & S Bldg. Contrs.*** 5 NY3d 427, 433, 805 NYS2d 299 [2005]; ***Farduchi v United Artists Theatre Circuit, Inc.,*** 23 AD3d 613, 804 NYS2d 786 [2005]).

Dated: MAY 2 1 2007

J.S.C..

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