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SHORT FORM ORDER

INDEX No. 03-22166

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

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 6-18-07 (004)
7-9-07 (005 & 006)
ADJ. DATE 9-12-07
Mot. Seq. # 004 - MotD
005 - MotD
006 - MD

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JERMAINE JACKSON,

Plaintiff,

- against -

TIDE WAY HOMES, INC. and ANGEL ASSOCIATES, INC. d/b/a STAIRBUILDERS BY A & A, INC. a/k/a STAIRBUILDERS BY B & A, INC. and K & B CONTRACTING, INC.,

Defendants.

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TIDEWAY HOMES, INC.,

Third-Party Plaintiff,

- against -

STAIRBUILDERS BY B & A, INC.,

Third-Party Defendant.

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ROSENBERG & GLUCK, L.L.P.
Attorneys for Plaintiff
1176 Portion Road
Holtsville, New York 11742

JOHN P. HUMPHREYS, ESQ.
Atty for Deft/3rd Pty Pltf Tide Way Homes
3 Huntington Quadrangle, P.O. Box 9028
Melville, New York 11747

MILBER MAKRIS PLOUSADIS & SEIDEN, LLP
Attorneys for Defendant Angel Associates
1000 Woodbury Road, Suite 402
Woodbury, New York 11797

Upon the following papers numbered 1 to 74 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 27; 28 - 50 ; Notice of Cross Motion and supporting papers 51 - 62 ; Answering Affidavits and supporting papers 63-64; 65-66; 67-68; 69-70 ; Replying Affidavits and supporting papers 71-72; 73-74 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#004), by defendants/third-party defendants Angel Associates, Inc. d/b/a Stairbuilders by A & A, Inc. a/k/a Stairbuilders by B & A, Inc., for an order pursuant to CPLR

3212 granting summary judgment dismissing plaintiff's complaint and any 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 motion (#005) by defendant/third-party plaintiff Tide Way Homes, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and any cross claims asserted against it, is granted to the extent that plaintiff's Labor Law § 240(1) cause of action and plaintiff's Labor Law § 241(6) cause of action based upon the alleged violation of the Industrial Code at 12 NYCRR § 23-1.11 (a) and 23-2.7 (e) are dismissed, and is otherwise denied; and it is further

ORDERED that the cross motion (#006) by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in his favor as to the liability of defendant Tide Way Homes, Inc., pursuant to Labor Law §§ 240(1) and 241(6), is denied, and it is further

ORDERED that these motions are consolidated for the purpose of this determination.

Plaintiff commenced this action to recover damages pursuant to Labor Law §§ 200, 240(1) and 241(6), and common-law negligence, for injuries he suffered in an accident at a residential development owned by defendant Tide Way Homes, Inc. (Tide Way), for which Tide Way also acted as the general contractor. Tide Way employed defendant Angel Associates, Inc. d/b/a Stairbuilders by A & A, Inc. a/k/a Stairbuilders by B & A, Inc. (Stairbuilders) to manufacture various stairs for the units.

Plaintiff testified at his deposition that he was employed as a tile installer for a nonparty subcontractor. He and a coworker were preparing a floor inside the home for placement of tiles. He was working in the garage, mixing the cement or mud which his coworker was spreading on the floor. He accessed the home via stairs, consisting of three wooden steps, located in the garage near where he was mixing. He carried the cement to his coworker in a five gallon plastic bucket. On the day of his accident, he had gone up and down the stairs with the bucket many times, without incident. On the last time up the stairs, as he stepped onto the top step, the top riser broke, the stairs collapsed, and plaintiff fell backwards, sustaining the injuries alleged herein.

"Where a fall occurs from a permanent stairway, no liability pursuant to Labor Law § 240(1) can attach" (***Gallagher v Andron Constr. Corp.***, 21 AD3d 988, 989, 801 NYS2d 373 [2005]) because the staircase is a normal appurtenance to the building and is not designed as a safety device to protect plaintiff from an elevation-related risk (***Parsuram v I.T.C. Bargain Stores***, 16 AD3d 471, 791 NYS2d 616 [2005]; ***Norton v Park Plaza Owners Corp.***, 263 AD2d 531, 532, 694 NYS2d 411 [1999]). In opposition to defendants' motions plaintiff speculates that the staircase was temporary and therefore it falls within the category of devices requiring the protection mandated by the statute. However, plaintiff offers no support for this theory and it is undisputed that the stairs were attached to the garage wall. Since the accident in dispute did not result from an elevation hazard which the statute seeks to protect against, the absolute liability imposed by Labor Law § 240(1) does not lie (***Gallagher v Andron Constr. Corp.***, *supra*). Accordingly, plaintiff's Labor Law § 240(1) claim is dismissed.

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. It creates a duty that is nondelegable and an owner, general contractor, or agent who breaches that duty may be held liable in damages regardless of whether it had actually exercised supervision or control over the work (***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]; ***Long v Forest-Fehlhaber***, 55 NY2d 154, 448 NYS2d 132 [1982]). 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 (***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 670 NYS2d 816 [1998]; ***Ross v Curtis-Palmer Hydro-Elec. Co.,*** *supra*).

Plaintiff has confined his cross motion to defendants' alleged violations of the Industrial Code at 12 NYCRR §§ 23-1.7 (f), 23-1.11 (a) and (c), and 23-2.7(e). Section 23-1.7 (f), entitled "Vertical passage," provides:

> Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.

Defendants have not established that this section is insufficient, as a matter of law, to support plaintiff's § 241(6) claim (*see*, ***Miano v Skyline New Homes Corp.***, 37 AD3d 563, 656, 830 NYS2d 257 [2007]; ***Gonzalez v Pon Lin realty Corp.***, 34 AD3d 638, 639, 826 NYS2d 94 [2006]). Accordingly, summary judgment dismissing this claim is denied.

Section 23-1.11, entitled "Lumber and nail fastenings," provides:

> (a) The lumber used in the construction of equipment or temporary structures required by this Part (rule) shall be sound and shall not contain any defects such as ring shakes, large or loose knots or other defects which may impair the strength of such lumber for the purpose for which it is to be used.
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> * * *
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> (c) All nails shall be driven full length and shall be of the proper size, type, length and number to provide the required strength at all joints. Only double-headed or screw-type nails shall be used in the construction of scaffolds.

These subsections are arguably specific enough to form a predicate for a § 241(6) claim (***Skudlarek v Bethlehem Steel Corp.***, 251 AD2d 973, 974, 673 NYS2d 344 [1998]). Nevertheless, the stairs were not temporary nor is there an allegation that a defect in the wood was a proximate cause of the accident, therefore (a) is inapplicable. As to (c), while it is clear that the stairs were not being used as a scaffold, defendants have not established that the nails, which plaintiff testified were used to

secure the steps to the frame, were adequate to supply the required strength. Accordingly, summary judgment dismissing the claim that defendants violated section 23-1.11 (c) is denied.

Section 23-2.7, entitled "Stairway requirements during the construction of buildings," provides:

> (e) Protective railings. The stairwells of temporary wooden stairways and of permanent stairways where enclosures or guard rails have not been erected shall be provided with a safety railing constructed and installed in compliance with this Part (rule) on every open side. Every stairway and landing shall be provided with handrails not less than 30 inches nor more than 40 inches in height, measured vertically from the nose of the tread to the top of the rail.

Here, plaintiff's testimony is devoid of any statement that the lack of a railing was a proximate cause of his fall (*compare*, ***Kanarvogel v Tops Appliance City***, 271 AD2d 409, 705 NYS2d 644, *lv dismissed* 95 NY2d 902 [2000]). Rather, he testified that the riser broke and the steps collapsed away from the wall. Accordingly, summary judgment dismissing this claim is granted.

The Court of Appeals has held that a violation of the Industrial Code, while not conclusive as to the question of negligence, would constitute some evidence of negligence and thereby reserve, for resolution by a jury, the issue of whether the operation or conduct at the work site was reasonable and adequate under the particular circumstances (***Rizzuto v L. A. Wenger Contr. Co.***, *supra*; ***Herman v St. John's Episcopal Hosp.***, 242 AD2d 316, 678 NYS2d 635 [1997]). Plaintiff must still establish that the Code 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]). Accordingly, summary judgment based upon defendants' alleged § 241(6) violations is denied to plaintiff.

However, Stairbuilders, as the subcontractor which manufactured the stairs off site and then delivered them to the site, but took no part in their installation, is not subject to the vicarious liability imposed by Labor Law § 241(6). It was not an "agent" of Tide Way and did not have the authority to control the work site or the work in progress (***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]). Accordingly, summary judgment dismissing plaintiff's Labor Law § 241(6) claim, is granted to Stairbuilders.

Labor Law § 200 codifies the common-law duty of an owner or employer to provide employees with a safe place to work (*see*, ***Jock v Fien***, 80 NY2d 965, 590 NYS2d 878 [1992]; ***Mordkofsky v V.C.V. Dev. Corp.***, 76 NY2d 573, 561 NYS2d 892 [1990]). It applies to owners, contractors, or their agents (***Russin v Louis N. Picciano & Son***, 54 NYS2d 311, 318, 445 NYS2d 127 [1981]) who exercise control or supervision over the work, or either created the dangerous condition or had actual or constructive notice of it (***Lombardi v Stout***, 80 NY2d 290, 294-295, 590 NYS2d 55 [1992]; ***Yong Ju Kim v Herbert Constr. Co.***, 275 AD2d 709, 713 NYS2d 190 [2000]). Where a plaintiff's claim is based upon a defect or dangerous condition at the work site, the plaintiff must show that the defendants had actual or constructive notice of the condition that caused the accident and control over the place where the injury occurred (*see*, ***Wolfe v KLR Mech.***, 35 AD3d 916, 918, 826 NYS2d 458 [2006]; ***Jurgens v Whiteface Resort on Lake Placid***, 293 AD2d 924, 926-927, 742 NYS2d 142 [2002]);

Johnson v Packaging Corp. of Am., 274 AD2d 627, 629, 710 NYS2d 699 [2000]). However, a defendant moving for summary judgment dismissing a Labor Law § 200 claim based upon a defect or dangerous condition on the property has the initial burden to establish, *prima facie*, that it did not create nor have actual or constructive notice of the dangerous condition alleged (*see*, ***Wolfe v KLR Mech.***, *supra* at 919; ***Bonse v Katrine Apt. Assoc.***, 28 AD3d 990, 991, 813 NYS2d 578 [2006]).

Tide Way's vice president, Patrick Weber, testified at his deposition that the agreement with Stairbuilders provided that Stairbuilders was to construct the staircase between the first and second floors as well as the steps from the garage to the first floor, and to deliver both stairs, but that it was the framing contractor's job to install the stairs. He also testified that he was present at the worksite, that he saw that the tile workers were mixing cement in the garage, and that he told them not to mix the cement in the garage but he could not recall if the garage steps were attached at the time. Mr. Weber further testified that the steps in the garage were not installed prior to the accident but were repaired and installed after plaintiff's accident.[1]

Conversely, plaintiff testified that the staircase between the first and second floors, as well as the garage steps were installed when he began working at the unit, and on a motion for summary judgment it is not the court's function to assess credibility (*see*, ***Ferrante v American Lung Assn.***, 90 NY2d 623, 665 NYS2d 25 [1997]; ***Glick & Dolleck, Inc. v Tri-Pac Export Corp.***, 22 NY2d 439, 293 NYS2d 93 [1968]). Further, while Tide Way's witness testified that the stairs were not installed until after plaintiff's fall, he could not recall whether the stairs were attached when he asked plaintiff not to mix cement in the garage. Therefore, the Court finds that defendant failed to establish prima facie, that it had no notice of the condition that plaintiff alleges caused the accident (*see*, ***Gadani v Dormitory Auth. State of N.Y.***, __ AD3d __, 841 NYS2d 709, 712 [2007]; ***Wolfe v KLR Mech.***, *supra*; ***Kaczmarski v Ransier Dev. Corp.***, 5 AD3d 1055, 773 NYS2d 685 [2004]; ***Sang Hyun Ban v Sunjin Shipping USA.***, 23 AD3d 452, 453, 805 NYS2d 620 [2005]). Accordingly, summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims is denied to Tide Way. However, defendant Stairbuilders did not have the ability to control plaintiff's work or the

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[1] It would appear that Stairbuilders is arguing that because they were unable to inspect the stairs prior to them being repaired and installed, that plaintiff and/or Tide Way is guilty of spoliation. Spoliation is the destruction of evidence (***Kirkland v New York City Hous. Auth.***, 236 AD2d 170, 666 NYS2d 609 [1997]). Sanctions or dismissal have been found appropriate where there is a clear showing that a litigant willfully, contumaciously, or in bad faith failed to comply with discovery demands or destroyed crucial items of evidence prior to an adversary's inspection (***Fellin v Sahgal***, 268 AD2d 456, 702 NYS2d 338 [2000]; ***Puccia v Farley***, 261 AD2d 83, 699 NYS2d 576 [1999]), or negligently disposed of crucial evidence prior to an adversary's inspection (***Kirkland v New York City Hous. Auth.***, *supra*), or destroyed the evidence before becoming a party, if on notice that the evidence might be needed for future litigation (***DiDomenico v C & S Aeromatik Supplies***, 252 AD2d 41, 682 NYS2d 452 [1998]). Here however, plaintiff was never in control of the stairs and no evidence has been offered to establish that Tide Way knew of plaintiff's action prior to the repairs (*see*, ***O'Reilly v Yavorskiy***. 300 AD2d 456, 755 NYS2d 81 [2002]). Therefore, these arguments are unavailing as to either of the moving defendants and insufficient to support their entitlement to summary judgment as a matter of law (*see*, ***Ifraimov v Phoenix Indus. Gas, LLC***, 4 AD3d 332, 772 NYS2d 78 [2004]).

installation of the steps (***Kendle v August Bohl 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, because plaintiff testified that the first riser of the steps collapsed or broke, there is a question of fact as to whether Stairbuilders was negligent in supplying defective stairs (***Urbina v 26 Court St. Assoc.,*** 12 AD3d 225, 784 NYS2d 524 [2004]) which created an unreasonable risk of harm to plaintiff and were 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, Stairbuilders is granted summary judgment dismissing plaintiff's Labor Law § 200 claim and is denied summary judgment dismissing plaintiff's common-law negligence claim.

Dated: 26 NOV '07

J.S.C.