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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN Justice PART 57

Index Number : 112304/2004
DOWNEY, STEVEN
VS
LOCAL 46 2ND HOLDING CO.
Sequence Number : 003
RENEWAL

INDEX NO. 112304/04
MOTION DATE
MOTION SEQ. NO. 003
MOTION CAL. NO.

This motion is for renewal

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause — Affidavits — Exhibits~~ ... and cross-motion	1, 2, 3
Answering Affidavits — Exhibits	4 — 6
Replying Affidavits	7 - 8

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motion are

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER dated 4-11-08

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/14/08

MARCY S. FRIEDMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

STEVEN DOWNEY,

Plaintiff(s),

- against -

Index No.: 1[illegible]304/06

LOCAL 46 2ND HOLDING COMPANY et al.

DECISION/ORDER

Defendant(s).

In this Labor Law action, plaintiff sues for injuries sustained when he fell off a scaffold on May 4, 2002. Defendant Local 46 2nd Holding Corporation ("Holding Corp.") moves for summary judgment dismissing the complaint against it and, in the alternative, for summary judgment on its cross-claims against defendant Local 46 Joint Apprenticeship Committee ("Training Center"). Defendant Training Center moves for summary judgment dismissing the complaint and all cross-claims against it. Plaintiff cross-moves for summary judgment.[1]

The circumstances surrounding plaintiff's accident are undisputed: At the time of his accident, plaintiff was a member of Metal Lathers Trust Fund Local 46 ("Local 46"), and was attending an apprentice training program operated by defendant Training Center in a building owned by defendant Holding Corp. Defendant Holding Corp. is an entity that was created by the union, Local 46, to buy and lease property. (Dep. of Robert Ledwith [Holding Corp.'s trustee] at 6.) Training Center is a non-profit organization that provides education programs for apprentices in the union. (Id. at 8-9.) Plaintiff and the other apprentices were directed by Training Center's

[1]By order dated February 6, 2006, this Court (Beeler, J.) denied prior motions by plaintiff and Training Center for summary judgment on plaintiff's Labor Law § 240(1) claim, based on the existence of triable issues of fact as to whether plaintiff was employed within the meaning of this statute. The order also granted a motion by Local 46 for summary judgment dismissing the complaint against it, and granted a motion by Holding Corp. for summary judgment only to the extent of dismissing the Labor Law § 241(6) claim against it. This order was affirmed by order of the Appellate Division, First Department, entered on November 16, 2006.

instructor, Nathaniel Wilson, to demolish a wall between two classrooms. Plaintiff was standing on a scaffold and using a sledgehammer to demolish the wall. As he did so, the wall collapsed, striking plaintiff and the scaffold, and causing the scaffold to be knocked out from underneath plaintiff and plaintiff to fall to the ground. (See P.'s Dep. at 28-32.)

Plaintiff's Claims

While the complaint pleads claims against both defendants under Labor Law §§ 240(1), 241(6) and 200, on these motions, plaintiff asserts the section 240(1) claim only against defendant Holding Corp., and the section 200 claim only against defendant Training Center. (See P.'s Aff. In Support Of Cross-Motion, ¶ 4.) Plaintiff's claims against Holding Corp. under Labor Law § 200 and for common law negligence, and his claim against Training Center under Labor Law §§ 240(1) and 241(6) will be dismissed without opposition and for good cause shown.

In seeking dismissal of the section 240(1) claim, defendant Holding Corp. does not dispute that plaintiff's accident involved an elevation-related hazard within the meaning of this section. Rather, defendant moves for summary judgment on the ground that plaintiff was a volunteer attending a class and thus was not an "employee" covered by the Labor Law. In opposition, plaintiff argues that he was an employee because he was required to attend the class by his union, and was employed and paid for his employment by non-party Northside Structures ("Northside").

Labor Law § 2(5) defines an employee as "a mechanic, workingman or laborer working for another for hire." It is thus well settled that in order "[t]o come within the special class for whose benefit absolute liability is imposed, a plaintiff must demonstrate that 'he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it [the] owner, contractor or their agent.' " (Abbatiello v Lancaster Studio Assocs., 3 NY3d 46, 50-

51 [2004], quoting Whelen v Warwick Val. Civic & Social Club, 47 NY2d 970, 971 [1979]. See also Mordkofsky v V.C.V. Dev. Corp., 76 NY2d 573 [1990]; Ahmed v Momart Discount Store, Ltd., 31 AD3d 307 [1st Dept 2006].) There is substantial authority that uncompensated volunteers are not "employed" as defined by the Labor Law. (See e.g. Whelen, 47 NY2d at 971; Cheung v G & M Hardware & Elec., Inc., 249 AD2d 28 [1st Dept 1998]; Benamati v McSkimming, 8 AD3d 815 [3d Dept 2004].)

On the undisputed facts, the court finds that plaintiff was not a volunteer, gratuitously providing his services to Training Center. Rather, plaintiff was required to attend the class as a condition of his union membership. (Wilson Dep. at 28.) However, plaintiff was paid by his employer, Northside, for his work at an on-going job site known as the Trump Building, at which he had been employed for almost two years prior to the accident. (See P.'s Dep. at 13.) Plaintiff attended the training session on his own time and was not paid to attend the class by either the union or his employer. (See Wilson Dep. at 28; P.'s Dep. at 44.) In fact, plaintiff himself had to pay $75 to attend the class. (P.'s Dep. at 9.) Moreover, the non-monetary benefit that plaintiff obtained as a result of his attendance at the class – ie., membership in the union – is insufficient to raise a triable issue of fact as to whether he was hired by the owner, a contractor or their agent, and thus whether he was an employee under the Labor Law. (See Stringer v Musacchia, 46 AD3d 1274 [3d Dept 2007].)

Daniello v Holy Name Church (286 AD2d 268 [1st Dept 2001]), on which plaintiff relies, is not applicable to the facts of the instant case. There, the plaintiff was found to be an employee of the owner of a site for purposes of Labor Law § 240(1), where the plaintiff's employer donated construction services to the owner but directed the plaintiff to perform work at the owner's premises and compensated the plaintiff in his usual manner for the work performed. Here, in contrast, as found above, the plaintiff was not directed or paid by Northside to attend the training

session or to work at Holding Corp.'s premises.

While noting the irony of the position taken by defendant Holding Corp., an arm of plaintiff's union, that its member is not covered by the Labor Law, the court accordingly holds that plaintiff's section 240(1) claim against Holding Corp. is not maintainable.

Plaintiff's Labor Law § 200 claim against defendant Training Center must also be dismissed for the reasons stated above, as plaintiff was not an employee of Training Center. However, plaintiff's common law negligence claim against Training Center should not be dismissed, as triable issues of fact exist as to whether it was negligent. It is undisputed that Training Center instructed plaintiff and other students to demolish the wall and supervised its removal. (See Wilson Dep. at 10-14; 29-30.) Contrary to Training Center's meritless contention, the fact that its instructor left the room after instructing the apprentices to demolish the wall does not absolve Training Center of its duty to supervise the demolition or of any negligence.

The court has considered the parties' remaining claims and finds them without merit.

Holding Corp.'s Cross-Claims

Holding Corp. moves for summary judgment on its indemnification cross-claims against Training Center only in the event any of plaintiff's claims against it survive. (See Holding Corp.'s Aff. In Support, ¶ 58.) In light of the fact that of all of plaintiff's claims against Holding Corp. have now been dismissed, the court need not address this branch of Holding Corp.'s motion.

It is accordingly hereby ORDERED that defendant Local 46 2nd Holding Corporation's motion for summary judgment is granted to the extent that the complaint against it is dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant Local 46 Joint Apprenticeship Committee's motion for summary judgment is granted to the extent that plaintiff's claims under Labor Law §§ 240(1),

241(6) and 200, and Holding Corporation's cross-claims against it are dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's common law negligence claim against defendant Local 46 Joint Apprenticeship Committee is severed and shall continue; and it is further

ORDERED that plaintiff's cross-motion is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
April 11, 2008

MARCY FRIEDMAN, J.S.C.