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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

JOSEPH CASTALDO and MICHELLE CASTALDO.

Plaintiffs.

Sequence No.: 001 & 002
Index No.: 021288/06

- against -

SOLID HOME BUILDERS CORP. And JOHN FRANCIOSO.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	**X**
Notice of Cross-Motion and Affidavits Annexed	**X**
Answering Affidavits	**X**
Replying Affidavits	**X**

Defendant John Francioso moves and defendant Solid Home Builders Corp. (hereinafter "Solid") cross-moves for summary judgment dismissing the complaint and any cross-claims as asserted against these defendants.

The following facts are undisputed. Defendant Francioso is the owner of the real property located at 3159 Elm Place, Wantagh, New York. Said premises is a single family home. In the spring of 2006 defendant Francioso decided to renovate his home by adding a den, half-bath and enlarged living space. Further defendant Francioso decided to replace the roof, windows and to install siding on the structure's exterior. Defendant Solid, a contracting company, was retained to perform part of the project i.e., the repair of the roof, the removal and replacement of the windows on the left side of the exterior wall and the framing of a dormer. Plaintiff's company, J&D Classic Demo, was retained to perform demolition work on the project. The issue of who retained and/or controlled J&D Classic Demo for the project, as will be discussed below, is central to the disposition of these motions.

Plaintiff completed the demolition work he was originally retained to conduct in July, 2006. In mid-July, 2006 defendant Solid commenced the dormer framing and window removal, same being completed on July 31, 2006. On August 8, 2008 or August 9, 2008 Solid performed the roofing work at the project. On or around August 12, 2006, while plaintiff performed

demolition work on the interior walls of the "third bedroom" a vent pipe fell within the wall from an overhead location and cut off part of plaintiff's thumb.

Plaintiffs commenced the instant action against defendants asserting causes of action pursuant to Labor Law §§200, 240(1) and 241(6) as well as common law negligence. Defendants have answered, asserting cross-claims against each other. Defendant Francioso, the homeowner, moves for summary judgment 1) dismissing plaintiffs' labor law §200 and common law negligence claims on the grounds that this defendant did not create the condition or have notice of same prior to the accident and did not control or supervise plaintiff's work; 2) dismissing plaintiffs' Labor Law §§240(1) and 241(6) claims on the basis that this defendant is protected by the exemption afforded by those statutes to owners of one or two-family residences who do not supervise or control the injured plaintiff's work; and 3) dismissing plaintiffs' Labor Law §241(6) claim on the grounds that plaintiffs failed to properly allege a violation of the New York State Industrial Code as required by that section of the statute.

Defendant Solid moves for summary judgment 1) dismissing plaintiffs' Labor Law §§240(1) and 241(6) claims on the grounds that it lacked supervisory control and authority over the work performed by plaintiff at the time of the accident; 2) dismissing plaintiffs' Labor Law §241(6) claim on the basis that plaintiffs failed to properly allege a violation of the New York State Industrial Code; and 3) dismissing the Labor Law §240(1) claim on the grounds that the type of accident suffered by plaintiff herein is not a height or gravity related accident as required by that section.

A party moving for summary judgment must demonstrate that there are no issues of fact which preclude summary judgment by the tender of evidence in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party opposing a motion for summary judgment must demonstrate a triable issue of fact through admissible evidence. Id.

At the outset the court shall determine the motion and cross-motion as they apply to plaintiffs' claims based upon defendants' alleged violations of Labor Law §§240(1) and 241(6). As set forth above, defendant Solid seeks dismissal of the Labor Law §240(1) claims on the grounds that, *inter alia*, the type of accident upon which this matter is based is not one covered by that section. Labor Law §240(1) provides:

> "1. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

In order for this section to apply to plaintiffs' claims, the accident must be one which is

caused by hazards which occur when the work site is elevated or is positioned below the level where materials or loads are hoisted or secured. Cambry v. Lincoln Gardens, 50 A.D.3d 1081 (2008). Where the site at which plaintiff is working is not itself elevated and the condition which causes plaintiff's injuries is not itself being hoisted or secured when it falls and strikes plaintiff, Labor Law §240(1) is inapplicable. Id.

Defendant Solid having *prima facie* demonstrated entitlement to summary judgment on this cause of action, the burden shifts to plaintiffs to demonstrate a triable issue of fact. Zuckerman v. City of New York, supra.

In opposition to this branch of Solid's motion, plaintiffs assert that the mere fact that the pipe was not in the process of being secured or hoisted at the time of the accident does not require dismissal of the cause of action based upon Labor Law §240(1). In support of this position plaintiffs contend that the Cambry court did not address whether the condition which fell on plaintiff was being secured simultaneously when the accident occurred and then cites this court to two State Supreme Court cases in which it was held that the securing/hoisting need not simultaneously occur with accident. In Cambry, the Appellate Division expressly held that "the object must have been in the process of being hoisted or secured when it falls due to inadequate safety devices." Cambry, supra at 1083.

Thus, the court finds that plaintiffs have failed to raise a triable issue of fact on this branch of defendant Solid's motion and same is granted. The court also searches the record and grants defendant Francioso summary judgment dismissing plaintiffs' Labor Law §240(1) cause of action.

Both defendants move for summary judgment dismissing plaintiffs' Labor Law §241(6) cause of action on the basis that plaintiffs fail to allege an applicable violation of the New York State Industrial Code. In their bill of particulars plaintiffs allege that defendants violated "12 NYCRR 23.17(a) (overhead hazards)." It should be noted that there is no such section of the Industrial Code. The parties seem to be in agreement that the proper section to which plaintiffs point is 12 NYCRR 23-1.7(a) which provides:

> "(1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a load of 100 pounds per square foot.
> (2) Where persons are lawfully frequenting areas exposed to falling material or objects but wherein employees are not required to work or pass, such exposed areas shall be provided with barricades, fencing or the equivalent in compliance with this Part (rule) to prevent inadvertent entry into such areas."

Both defendants assert that the section is inapplicable to the facts alleged here as plaintiff's accident did not occur in an area where persons are required to work or pass that is normally exposed to falling material or objects and further that overhead protection would not have served to protect plaintiff.

Where plaintiffs fail to plead a specific, applicable violation of the industrial code the court will dismiss a cause of action based upon Labor Law §241(6). See, Mercado v. TPT Brooklyn Assoc., 38 A.D.3d 732 (2nd Dep't 2007).

Plaintiffs offer no opposition to these branches of the motions. Accordingly, the court grants both the motion and cross-motion to the extent they seek dismissal of plaintiffs' cause of action based on Labor Law §241(6).

The sole remaining issues for determination are defendants' separate motions seeking dismissal of plaintiffs' causes of action pursuant to Labor Law §200 and common law negligence. Same shall be separately considered.

Defendant Francioso's Motion Pertaining to Labor Law §200 and Commom Law Negligence

In support of that branch of his motion which seeks dismissal of plaintiffs' Labor Law §200 and common law negligence cause of action defendant Francioso first relies on plaintiffs' deposition testimony wherein he testified that:

1) at the time of the accident defendant Francioso, the homeowner, was not home, but his wife was; and
2) defendant Francioso did not provide plaintiff with any tools, equipment or materials and did not supervise plaintiff's work; (see, deposition transcript of Joseph Castaldo, pp. 17, 34, 35).

Defendant Francioso also points to his own deposition testimony at which he testified that:

1) he had lived at the subject premises for five and one-half years prior to the date of accident;
2) he called plaintiff and asked if plaintiff would be interested in doing demolition work for him prior to Solid's construction of the extension, but did not instruct plaintiff on what had to come out because he did not know what had to come out;
3) he understood that plaintiff was removing the interior walls and would be given instruction by an individual named Jason who was one of the owners of "Solid"; and
4) he did not provide plaintiff with any tools or equipment to remove the walls. (See, deposition transcript of John Francioso, pp. 5, 23, 33, 38).

Defendant Francioso asserts that this cause of action should be dismissed on the ground

that there is no issue of fact that defendant did not supervise or control plaintiff's work and that he did not have actual or constructive notice of the condition which caused plaintiff's injuries.

Labor Law §200 is a codification of the common law duty to provide workers with a safe work environment. Brown v. Brause Plaza, LLC, 19 A.D.3d 626 (2nd Dep't 2005). Where plaintiff's injuries are allegedly caused by a dangerous condition at the subject premises as opposed to the method of work used, the owner may be held liable when he either supervised or controlled plaintiff's work or he created or had actual or constructive notice of the dangerous condition that caused the accident. See, Kobezko v. Lynden Realty Investors, 289 A.D.2d 535 (2nd Dep't 2001). See, also, Azad v. 270 5th Realty Corp., 46 A.D.3d 728 (2nd Dep't 2007).

While defendant Francioso extensively attempts to demonstrate that he did not control or supervise plaintiff on the date of the accident, nowhere does he attempt to demonstrate that he did not create the condition or had actual or constructive notice of same. Where the owner either created the condition or had actual or constructive notice of same, he may be held liable regardless of whether he supervised or controlled plaintiff's work. See, e.g., Ortega v. Puccia, __ N.Y.S. __; 2008 Slip Op. 08305 (2nd Dep't 2008).

Thus, the court finds that defendant Francioso has failed to meet his burden on this branch of his motion regardless of the sufficiency of the opposition papers. Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

Defendant Solid's Cross-Motion Pertaining to Labor Law §200 and Common Law Negligence

In support of this branch of its motion defendant Solid submits the deposition transcript of its president, Jason Genna, wherein he testified that;

1) the contract between Solid and defendant Francioso excluded demolition work; and
2) he understood that the homeowner provided his own demolition man.
(See, deposition transcript of Jason Genna, pp. 66-67).

Further, plaintiff testified at his deposition that:

1) he was employed by defendant Francioso to perform demolition work in the form of "ripping down the walls";
2) defendant Francioso told plaintiff what to do when plaintiff arrived at the subject premises by pointing out to plaintiff what work he wanted done;
3) other than himself and a fellow employee named Jose, there were no other workers at the time plaintiff was performing his work;
4) Jason Genna did not supervise the work or give instructions to plaintiff;
5) defendant Francioso directed plaintiff to move from the second to the third bedroom in which the accident occurred; and
6) he never saw anyone from Solid work at the premises.

(See, deposition transcript of Jason Genna, pp. 14, 25, 27, 34, 37, 40).

Defendant Solid also points to defendant Francioso's deposition testimony that prior to plaintiff's arrival to work on the interior walls in the bedrooms same were completely intact, that no demolition work had been commenced thereon and no studs or pipes therein were exposed. (See, Castaldo deposition transcript, p. 49, lines 15- p. 50, line 8). Parenthetically, this testimony from defendant Francioso does not satisfy this defendant's burden on the issue of whether the homeowner created the condition or had notice of same because nowhere did the defendant say that he was unaware of the condition of the pipe or say that any other work had been previously done thereon. As set forth above, the court had held that defendant Francioso failed to demonstrate lack of notice. This testimony appears to be limited to the time frame and parties involved in the project which gave rise to plaintiff's injuries.

It is defendant Solid's position that it neither controlled plaintiff's work nor created the condition or had notice of it prior to the accident. Labor Law §200 applies to contractors who either supervise or control plaintiff's work or who create the dangerous condition or have actual or constructive notice of same. See, Peron v. Hendrickson/Scalamandre/Possillico(TV), 22 A.D.3d 731 (2nd Dep't 2005); DeBlase v. Herbert Construction Co., Inc., 5 A.D.3d 624 (2nd Dep't 2004). Where, as here, the contractor demonstrates that it had no control over the plaintiff's work and did not create the condition or have such notice of same, it has met its *prima facie* burden of demonstrating entitlement to summary judgment.

In opposition to this branch of Solid's motion, plaintiff points to an invoice from Solid dated November 13, 2006 which indicates that, *inter alia*, Solid fixed the main roof including the "plumber's vent". Further, Mr. Francioso testified that Solid had been retained to perform demolition work on the interior of the structure including the wall on which plaintiff was working when he suffered his injuries. (See, Francioso transcript, pp. 22-23). Defendant Solid also performed exterior window removal and replacement as well as framing for the dormer which was completed on July 31, 2006 prior to plaintiff's commencement of the subject demolition in August, 2006. (See, Genna transcript, pp. 17-18, 31-32, 37- 47). Same included demolition and exposure of the left interior wall of the premises' first floor (Id, pp. 34-37). Plaintiff contends that any claim by Solid that it performed no demolition work on the second floor where the subject bedroom was located is specious because it removed the windows on that floor (Id, p. 22). Further, defendant Francioso testified that prior to the plaintiff's commencement of work in August, 2006 roofing repair work was performed. (See, Francioso transcript, pp. 20-21). Said roofing work was performed over all bedrooms and required the driving of hundreds of nails into the roof (see, Genna transcript, pp. 45, 51-52).

On the issue of control and supervision plaintiffs point to Mr. Castaldo's deposition testimony wherein he testified that Francioso, Genna and plaintiff walked through the premises and Genna and Francioso both told him which interior walls needed to be demolished. (See, Castaldo transcript, p. 14; Genna transcript, p. 55). Further, plaintiff attempts to demonstrate control over his work by Solid through testimony in which he purports that both Genna and

Francioso directed him to move onto the third bedroom. Same is belied by that transcript which reveals that only Francioso directed plaintiff to change bedrooms. (See, Castaldo transcript, pp. 24-26, 28).

To the court plaintiffs have demonstrated at least a triable issue of fact as to whether defendant Solid created the dangerous condition by the removal and replacement of the windows. It is undisputed that same was performed on the extension wall abutting the interior wall where plaintiff's accident occurred. While defendant Solid in reply states that plaintiff fails to demonstrate how the removal of the windows could cut the vent pipe, same is not plaintiffs' burden. Plaintiffs' burden is to raise an issue of fact, not conclusively prove their case. Zuckerman v. City of New York, supra.

Thus, to the extent defendant Solid seeks dismissal of plaintiffs' claim based upon the Labor Law §200 and common law negligence, the motion is denied.

Based upon the foregoing plaintiffs' complaint and all cross-claims are dismissed to the extent the complaint asserts causes of action pursuant to Labor Law §§240(1) and 241(6). The motion and cross-motion are otherwise denied.

So Ordered.

A.J.S.C.

Dated: November 12, 2008

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE