[* 1]

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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Index Number : 109194/2006
WILLIAMS, CHRISTOPHER E.
VS.
GARADISE INC.
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE 10/07/09
MOTION SEQ. NO. 003
MOTION CAL. NO.

this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits
Replying Affidavits

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
FEB 22 2010
COUNTY CLERK'S OFFICE
NEW YORK

The instant motion (sequence 003) and cross motions are decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that defendant 307-9 Owners Corp.'s (Owners) motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Christopher E. Williams's complaint and all cross claims as against it is granted, and the action is dismissed as against this defendant, and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that defendant Adam Kincaid d/b/a Kincaid Construction's (Kincaid) cross-motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all cross claims against him is granted, and the action is dismissed as against this defendant, and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk; and it is further

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

Dated:

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

ORDERED that defendant Paul DeGennaro's (DeGennaro) cross motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all cross claims against him is granted, and the action is dismissed as against this defendant, and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk, and the motion is otherwise denied; and it is further

ORDERED that plaintiff's cross motion is denied; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated 2/17/10 ENTER: _____, J.S.C.
HON. CAROL EDMEAD

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 35

----------x

CHRISTOPHER E. WILLIAMS, Index No.: 109194/06

Plaintiff,

-against-

ADAM KINCAID d/b/a KINCAID CONSTRUCTION,
307-9 OWNERS CORP. and PAUL DeGENNARO,

Defendants.

----------x

Edmead, J.:

This is an action to recover for damages for personal injuries sustained by a carpenter as he was operating a portable saw while performing renovation work at a cooperatively owned apartment unit located at 307 West 20th Street in Manhattan (the premises) on January 2, 2006.

Defendant 307-9 Owners Corp. (Owners) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Christopher E. Williams's common-law negligence and Labor Law §§ 200 and 241 (6) claims, as well as all cross claims, as against it.

Defendant Adam Kincaid d/b/a Kincaid Construction (Kincaid) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all cross claims as against him.

Defendant Paul DeGennaro (DeGennaro) cross-moves, pursuant to CPLR 3212, for summary judgement dismissing plaintiff's complaint and all cross claims as against him, as well as for summary judgment in his favor on his cross claims against co-defendant Kincaid for common-law and contractual indemnification and breach of contract for failure to procure insurance.

Plaintiff cross-moves for an order deeming his amended bill of particulars properly

served.

BACKGROUND

Defendant DeGennaro testified that he bought the premises where the accident occurred in November of 2005. Thereafter, DeGennaro hired contractor/defendant Kincaid to perform certain renovations at the premises pursuant to a written proposal. DeGennaro stated that the renovation work, which had been going on for about two weeks before the accident, was always done during the hours that he was either at work or running errands. In addition, DeGennaro maintained that he left the details of the renovation up to Kincaid.

Plaintiff testified that he was employed by Kincaid as a carpenter. On the day of his accident, plaintiff was in the process of installing cabinets for a new kitchen. Plaintiff explained that, in order to perform this work, it was necessary for him to utilize a circular saw. While plaintiff was pushing the saw through some wood, a splinter flew out and hit Kincaid, his "boss," in the eye (Owner's Notice of Motion, Williams' Deposition, Exhibit E, at 17). Thereafter, plaintiff became "distracted" and "startled" (*id.* at 28). At that point, the saw tilted a bit, which caused the saw to pinch the wood, the blade to stop rotating and the saw to kick back up over his thumb. Plaintiff noted that no one was wearing goggles at the time of his accident.

Kincaid testified that he supplied the saw that plaintiff was using at the time of the accident. He asserted that the saw was equipped with a proper guard, and that he had never had any problems with the saw prior to the day of the accident.

John Taylor (Taylor), the superintendent for the premises, testified that he was hired by defendant Owners. He explained that his responsibilities as superintendent included observing the building on a random basis, as well as keeping track of the various construction projects

underway. Taylor stated that he would sometimes help the construction workers locate the main water control valves and occasionally check on the progress of their work. Taylor maintained that he never noticed anything inappropriate or unsafe going on during the three or four occasions that he checked on the progress of the renovations.

Ralph Davis, who was employed by non-party ABC Realty as the managing agent for the premises, testified that Taylor served as the building's superintendent. He explained that Taylor's job responsibilities did not include observing or inspecting the progress of any renovation projects.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224, 226 [1st Dept 2002]).

Initially, it should be noted that, with respect to plaintiff's Labor Law §§ 200 and 241 (6) claims, DeGennaro is entitled to the homeowner's exemption under the facts of this case (*see*

Pesa v Ginsberg, 186 AD2d 521, 521 [1st Dept 1992] [the plaintiff did not have a cause of action under Labor Law §§ 200 or 241 (6) in view of the single-family dwelling exception contained in both]).

"'An owner of a one- or two-family dwelling is exempt from liability under Labor Law §§ 240 and 241 unless he or she directed or controlled the work being performed'" (*Jumawan v Schnitt*, 35 AD3d 382, 382 [2d Dept 2006], quoting *McGlone v Johnson*, 27 AD3d 702, 702 [2d Dept 2006]). In fact, the exemption applies even though DeGennaro hired subcontractors to perform the work (*see McNabb v Oot Brothers, Inc.*, 64 AD3d 1237, 1239 [4th Dept 2009]).

"The purpose of the exemption from Labor Law coverage for one-family and two-family homeowners was to make the law more reflective of the practical realities, since it would be unrealistic to expect such homeowners to realize, understand and insure against the responsibility imposed by the Labor Law" (*Ortiz v Pena*, 227 AD2d 297, 297 [1st Dept 1996]).

Here, DeGennaro demonstrated his entitlement to judgment as a matter of law by establishing that he had no role in directing or controlling the work being performed at the premises. To that effect, there was no evidence that DeGennaro instructed plaintiff or any other workers as to how to perform their work, nor did he provide or suggest what tools, materials or safety devices should be used (*see Jumawan v Schnitt*, 35 AD3d at 383). DeGennaro's involvement was "no more extensive than would be expected of the typical homeowner who hired a contractor to renovate his or her home" (*Orellana v Dutcher Avenue Builders, Inc.*, 58 AD3d 612, 614 [2d Dept 2009]).

Similarly, plaintiff has not established a *prima facie* case of general negligence against DeGennaro. To this effect, it has not been demonstrated that DeGennaro breached any duty of

care owed to plaintiff and that such breach substantially caused his accident (*see Merino v New York City Transit Authority*, 218 AD2d 451 [1st Dept], *affd* 89 NY2d 824 [1996]).

Thus, DeGennaro is entitled to summary judgment dismissing plaintiff's complaint as against him.

PLAINTIFF'S LABOR LAW § 241 (6) CLAIM AGAINST OWNERS AND KINCAID

Initially, it should be noted that plaintiff alleges a violation of Industrial Code 12 NYCRR 23-1.8 (a) which requires eye protection, such as goggles, when engaged in operations which may endanger the eyes, for the first time in his proposed amended bill of particulars dated September 29, 2009. In addition, the amended bill of particulars pleads that defendants violated certain New York City Department of Buildings rules, as well as certain OSHA rules.

"While a plaintiff asserting a cause of action under Labor Law § 241 (6) must allege a violation of a concrete specification of the Industrial Code, his failure to identify the Code provision in his complaint or bill of particulars need not be fatal to his claim [internal citation omitted]" (*Noetzell v Park Avenue Hall Housing Development Fund Corporation*, 271 AD2d 231, 232 [1st Dept 2000]). "A plaintiff may serve a supplemental bill of particulars, even without leave of court, to assert statutory violations which merely amplify his or her theories of liability" (*Balsamo v City of New York*, 287 AD2d 22, 27 [2d Dept 2001]; *Noetzell v Park Avenue Hall Housing Development Fund Corporation*, 271 AD2d at 232 [plaintiff's service, without leave of court, of a supplemental bill of particulars identifying a particular alleged Industrial Code violation was proper, "since allegations of Code violations merely amplify and elaborate upon facts and theories already set forth in the original bill of particulars and raise no new theory of liability"]).

While plaintiff may be entitled to leave to serve a supplemental bill of particulars alleging violations of Industrial Code 12 NYCRR 23-1.8 (a), as plaintiff's belated identification of this proposed Industrial Code violation merely expounds on plaintiff's Labor Law § 241 (6) cause of action, which was pleaded in plaintiff's first bill of particulars, said alleged violation does not apply to the facts of this case. Here, plaintiff suffered a thumb injury, and not an eye injury. As such, the lack of eye protection was not a proximate cause of plaintiff's accident. In addition, the Court of Appeals has held that OSHA violations cannot serve as a predicate for a Labor Law § 241 (6) claim (*see Rizzuto v L.A. Wenger Contracting Company*, 91 NY2d 343, 347-348 [1998]).

"'[L]eave to amend a pleading under CPLR 3025 (b) is freely given in the exercise of the trial court's discretion, provided there is no prejudice to the nonmoving party and the amendment is not plainly lacking in merit'" (*Matter of Miller v Goord*, 1 AD3d 647, 648 [3d Dept 2003], quoting *New York State Health Facilities Association v Axelrod*, 229 AD2d 864, 866 [3d Dept 1996]; *see also Aronov v Regency Gardens Apartment Corp.*, 15 AD3d 513, 514 [2d Dept 2005]).

Because the proposed Industrial Code provision is inapplicable here, leave to amend plaintiff's bill of particulars is denied, and plaintiff is not entitled to an order deeming plaintiff's amended bill of particulars properly served.

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *

> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. ..."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (*see Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494, 501-502 [1993]). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Initially, it should be noted that Industrial Code 12 NYCRR 23-1.12 (c) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Boruch v Morawiec*, 51 AD3d 429, 429 [1st Dept 2008]; *Glab v 110-118 Riverside Tenants Corporation*, 262 AD2d 604, 605 [2d Dept 1999]).

Industrial Code 12 NYCRR 23-1.12 (c) states, in pertinent part:

(c) Power-driven saws.

> (1) Every portable, power-driven, hand-operated saw which is not provided with a saw table, except chain saws and circular brush saws, shall be equipped with fixed guard above the base plate which will completely protect the operator from contract with the saw blade when the saw is operating and with a movable self-adjusting guard below the base plate which will completely cover the saw blade to the depth of the teeth when such saw blade is removed from the cut.
>
> (2) Every power-driven saw, other than a portable saw, shall be equipped with a guard which covers the saw blade to such an

extent as will prevent contact with the teeth.

Here, defendants presented testimonial evidence in admissible form sufficient to show compliance with the provisions of Industrial Code 12 NYCRR 23-1.12 (c), i.e., that the circular saw being operated by plaintiff at the time of his accident was in good working order and equipped with a proper guard. DeGennaro and Kincaid both testified that the saw, which was in good working order, was equipped with a guard. Although plaintiff asserted in his bill of particulars that the saw lacked a proper guard, at his deposition, he testified that the saw possessed a proper guard, and that the guard was in working condition at the time of his accident. In addition, plaintiff testified that he never noticed anything missing from the saw while he was using it, nor did it have any mechanical problems during the two-to-three-month period that he used it before his accident. Further, plaintiff never made any complaints to Kincaid regarding the saw.

Thus, defendants Owners and Kincaid are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim as against them.

PLAINTIFF'S COMMON-LAW NEGLIGENCE AND LABOR LAW § 200 CLAIMS AGAINST OWNERS AND KINCAID

Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work' [citation omitted]" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]). Labor Law § 200 (1) states, in pertinent part, as follows:

> "1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate

> protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, as in the instant case, and when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints*, 41 AD3d 796, 797-798 [2d Dept 2007]).

It is well-settled that in order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Rizzuto v L.A. Wenger Contracting Company*, 91 NY2d 343, 352 [1998]; *Comes v New York State Electric & Gas Corporation*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where plaintiff's injury was caused by lifting a beam and there was no evidence that defendant exercised supervisory control or had any input into how the beam was to be moved]; *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

"'A defendant has the authority to supervise or control the work for the purposes of Labor Law § 200 when the defendant bears responsibility for the manner in which the work is performed'" (*Orellana v Dutcher Avenue Builders, Inc.*, 58 AD3d 612, 614 [2d Dept 2009], quoting *Ortega v Puccia*, 57 AD3d at 62).

As there is no evidence in the record to support a finding that defendant Owners had any actual supervisory control or input as to the work plaintiff was performing at the time of

the accident, Owners is entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims as against it.

In addition, although a review of the record reveals that Kincaid had some general supervisory control over plaintiff's work at the site, this evidence is insufficient to establish that it had any supervisory control or input regarding plaintiff's operation of the circular saw, so as to impose liability pursuant to statute. "[G]eneral supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Construction Corporation*, 40 AD3d 305, 311 [1st Dept 2007]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]; *Natale v City of New York*, 33 AD3d 772, 773 [2d Dept 2006]).

Here, plaintiff testified that Kincaid would "supervise, he would pick an odd job and try to complete it, and he would get the supplies and stuff" (Owner's Notice of Motion, Williams's Deposition, Exhibit E, at 17). Plaintiff stated that he had 18 years of experience operating circular saws, and that he used the subject saw just about every day during the three-four-month period that he worked for Kincaid prior to the accident. In addition, in response to questioning, Kincaid maintained that he provided plaintiff with only "[g]eneral instruction about what went where" (Owners' Notice of Motion, Exhibit H, Adam Kincaid Deposition, at 53).

Thus, Kincaid is also entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims as against him.

DEGENNARO'S COMMON-LAW INDEMNIFICATION CLAIM AGAINST KINCAID

To establish common-law indemnification against a party "actually responsible" for the plaintiff's work, the indemnitee must establish that the party "had direct control over the work giving rise to the injury" (*Mejia v Levenbaum*, 57 AD3d 216, 216 [1st Dept 2008]; *Tighe v Hennegan Construction Company*, 48 AD3d 201, 202 [1st Dept 2008]).

DeGennaro is not entitled to summary judgment in his favor on his claim for common-law indemnfication as against Kincaid, because he has not put forth any evidence whatsoever that Kincaid had direct control over the work giving rise to plaintiff's injury. To that effect, DeGennaro only asserts that Kincaid owes him indemnification on the basis that Kincaid was plaintiff's supervisor. Accordingly, Kincaid is entitled to summary judgment dismissing DeGennaro's cross claim for common-law indemnification as against him.

DEGENNARO'S CONTRACTUAL INDEMNIFICATION CLAIM AGAINST KINCAID

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Company, Inc.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Insurance Company*, 32 NY2d 149, 153 [1973]; *see Torres v Morse Diesel International, Inc.*, 14 AD3d 401, 403 [1st Dept 2005]).

Here, DeGennaro has not put forth any evidence whatsoever to establish that Kincaid owed him indemnification pursuant to a contractual agreement. To that effect, a review of Kincaid's written proposal, which was included in DeGennaro's cross motion papers, reveals only various charges for things such as painting, installing an access door, removing plaster and

exposed brick, building a cabinet over a bathroom door and charges to cover "Insurance costs, truck, overhead" (DeGennaro's cross motion, Exhibit L, Kincaid Proposal).

Thus, DeGennaro is not entitled to summary judgment in his favor on his claim for contractual indemnification as against Kincaid. Accordingly, Kincaid is entitled to summary judgment dismissing DeGennaro's cross claim for contractual indemnification as against him.

DEGENNARO'S BREACH OF CONTRACT CLAIM FOR FAILURE TO PROCURE INSURANCE AGAINST KINCAID

DeGennaro is not entitled to summary judgment in his favor on his breach of contract to procure insurance claim as against Kincaid, because he has not put forth any evidence whatsoever of any express contractual breach of an agreement to procure insurance. Accordingly, Kincaid is entitled to summary judgment dismissing DeGennaro's cross claim for breach of contract for failure to procure insurance as against him.

It should be noted that defendants Owners, Kincaid and DeGennaro also request that all cross claims asserted against them sounding in contribution, common-law and contractual indemnification and breach of contract for failure to procure insurance be dismissed. With the exception of the cross claims asserted by DeGennaro against Kincaid discussed previously, none of these asserted cross claims was specifically addressed by the parties in their motion papers.

However, as plaintiff's complaint was dismissed as against these defendants, these claims are now moot. In addition, the record lacks the testimonial and documentary evidence necessary to support these cross claims. Thus, this court deems that defendants are entitled to dismissal of all cross claims asserted against them.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant 307-9 Owners Corp.'s (Owners) motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Christopher E. Williams's complaint and all cross claims as against it is granted, and the action is dismissed as against this defendant, and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that defendant Adam Kincaid d/b/a Kincaid Construction's (Kincaid) cross-motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all cross claims against him is granted, and the action is dismissed as against this defendant, and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that defendant Paul DeGennaro's (DeGennaro) cross motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all cross claims against him is granted, and the action is dismissed as against this defendant, and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by

the Clerk, and the motion is otherwise denied; and it is further

ORDERED that plaintiff's cross motion is denied; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

DATED: February 17, 2010

ENTER:

Carol Robinson Edmead, J .S.C.

HON. CAROL EDMEAD