Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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MARCO TAMAY,

Plaintiff,

-against-

ESTELLA ADAMS and GREEN BAY HOME IMPROVEMENT, INC.,

Defendants.

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GREEN BAY HOME IMPROVEMENT, INC.,

Third-party Plaintiff,

-against-

JIMMY'S BEST CONSTRUCTION, INC.,

Third-party Defendant.

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Index No.: 9015/08
Motion Date: 6/9/10
Motion Cal. No: 17, 22
Motion Seq. No: 1, 2

Third-Party Index No.: 350303/09

The following papers numbered 1 to 16 read on this motion by plaintiff for an order, pursuant to CPLR 3212, granting him partial summary judgment against third-party plaintiff Green Bay Home Improvement, Inc., under Labor Law § 240(1); and on this motion by defendant/third-party plaintiff Green Bay Home Improvement, Inc., for an order granting it a default judgment, pursuant to CPLR § 3215, against third-party defendant Jimmy's Best Construction, Inc.

	PAPERS[1] NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition-Exhibits.....	5 - 8
Reply.....	9 - 11
Order to Show Cause-Affidavits-Exhibits.....	12 - 16

[1]The motion for summary judgment was originally submitted on March 31, 2010, but was administratively advanced to the June 9, 2010 calendar upon this Court's execution of the Order to Show Cause on May 17, 2010. Consequently, the motions will be decided together.

Upon the foregoing papers, it is hereby ordered that the motions are resolved as follows:

This is a Labor Law action to recover damages for personal injuries allegedly sustained by plaintiff Marco Tamay ("plaintiff") on September 20, 2006, while he was performing roofing work in the course of his employment with third-party defendant Jimmy's Best Construction, Inc. ("Jimmy's Best"), on the premises owned by defendant Estella Adams ("defendant"), located at 220-16 100th Drive, Queens Village, New York. The injury allegedly occurred when plaintiff fell off the sloped roof of the premises during the demolition and installation of a new roof, to the concrete driveway below. Plaintiff commenced this action alleging violations of sections 240(1), 241(6) and 200 of the Labor Law, and in common law negligence, and moves for partial summary judgment as to Labor Law § 240(1) against third-party plaintiff Green Bay Home Improvement, Inc. ("Green Bay"), the purported general contractor. Green Bay moves for an order granting it a default judgment, pursuant to CPLR § 3215, against Jimmy's Best.

With regard to plaintiff's motion, summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

Labor Law § 240(1) imposes a nondelegable duty upon owners and contractors to provide or cause to be furnished certain safety devices to protect workers from unique gravity-related hazards, such as falling from a height at an elevated work site or being struck by a falling object where the work site is positioned below the level where materials are being hoisted or secured, and the absence of appropriate safety devices constitutes a violation of the statute as a matter of law. Narducci v Manhasset Bay Assocs., 96 N.Y.2d 259 (2001); Misseritti v Mark IV Constr. Co., Inc., 86 N.Y.2d 487 (1995); Ross v Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494 (1993); Rocovich v Consolidated Edison Co., 78 N.Y.2d 509 (1991); Riccio v. NHT Owners, LLC, 51 A.D.3d 897 (2nd Dept. 2008); Cambry v. Lincoln Gardens, 50 A.D.3d 1081 (2nd Dept. 2008); Natale v. City of New York, 33 A.D.3d 772 (2nd Dept. 2006). Thus, "[t]he extraordinary protections of Labor Law § 240(1) extend only to a narrow class of special hazards, and do 'not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity." Nieves v Five Boro Air Conditioning & Refrig. Corp., 93 N.Y.2d 914, 915-916 (1999); see, Meng Sing Chang v. Homewell Owner's Corp., 38 A.D.3d 625 (2nd Dept. 2007); Natale v. City of New York, 33 A.D.3d 772 (2nd Dept. 2006). "[R]outine maintenance activities in a non-construction, non-renovation context are not protected by Labor Law § 240 (citations omitted)."

Paciente v. MBG Development, Inc., 276 A.D.2d 761 (2nd Dept. 2000); Garcia v. Piazza, 16 A.D.3d 547 (2nd Dept. 2005); see, Jani v. City of New York, 284 A.D.2d 304 (2nd Dept. 2001).

In support of the motion, plaintiff contends that Green Bay, the home improvement general contractor, entered into an agreement with defendant on September 18, 2006 to perform construction work on her house, including the demolition and installation of a new roof. Plaintiff further asserts that Green Bay hired Jimmy's Best as the sub-contractor to perform the roofing work. He proffers his deposition testimony, and the deposition testimonies of defendant and Jay Cholost of Green Bay. Plaintiff testified that on the day of the accident, it was raining and he complained to Jimmy about the lack of safety devices, including a safety belt, ropes, harnesses and a hard hat. He stated that he also expressed his concern regarding working on wet plywood, and fell while holding a piece of plywood as Jimmy was assisting him. Lastly, he contends that he saw a vehicle with lettering on it that said Green Bay at the accident site. Defendant testified that Jay of Green Bay looked at her roof and suggested that she replace it with an entire new roof. She further testified that Jay placed a sign on her property with its name on the sign. Jay Cholost, on behalf of Green Bay, testified that he is a sales representative and he performed a visual inspection of defendant's existing roof and noticed that it was rotted. He stated that he informed defendant that Green Bay would strip the shingles and replace the roofing. Mr. Cholost stated that the contract contains a statement "leave company sign for six months and that sign is placed on the properties of their customers for advertising purposes. He further stated that he hired Jimmy's Best as a subcontractor to replace the roof, as Jimmy's Best is one of the contractors that Green Bay uses to replace roofs. Mr. Cholost testified that he determined what type of roof defendant's house needed and he called the supply to have additional plywood delivered to the job site. Lastly, he testified that he did not know if the workers were provided with safety devices, and did not inquire of Jimmy regarding the safety devices employed by Jimmy's Best.

Here, plaintiff established his prima facie entitlement to partial summary judgment in his favor against Green Bay on his section 240(1) claim. As set forth above, that provision only applies to elevation-related risks, and plaintiff demonstrated that the accident at issue arose under the particular circumstances encompassed in section 240(1) of the Labor Law, as plaintiff was elevated on a roof with the height of the peak of the roof approximating 18 feet. Plaintiff established judgment as a matter of law by submitting proof that Jimmy's Best, the sub-contractor hired by Green Bay to perform the roofing work, failed to provide him with adequate safety devices for the elevation- related risks of his work, and such failure was the proximate cause of his injuries. Once the moving party makes a prima facie showing of entitlement to summary judgment in their favor, it is incumbent upon the opposing party to come forth with evidentiary proof in admissible form sufficient to demonstrate the existence of triable issues of fact. Chalasani v. State Bank of India, New York Branch, 283 A.D.2d 601 (2nd Dept. 2001); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); Pagan v. Advance Storage and Moving, 287 A.D.2d 605 (2nd Dept. 2001); Gardner v. New York City Transit Authority, 282 A.D.2d 430 (2nd Dept. 2001).

Green Bay, in its opposing papers, asserts, inter alia, that it is not a contractor as defined by the Labor Law. It states that it did not supervise or inspect the work performed by Jimmy's Best, and gave no instructions or advice with regard to the performance of the roofing work at defendant's home. Green Bay contends that it did not have the authority to stop the roofing work, or otherwise alter how the work is being performed due to a perceived safety risk. It states that there were two telephone calls between Jimmy's Best and Mr. Cholost regarding the initial job and an order for plywood, and Mr. Cholost has no training or expertise in roofing repairs and construction. Green Bay further stated:

> That the business of Green Bay is limited exclusively to the sale of home improvement jobs to residential customers. It plays no role in determining the manner, timing, materials, tools or safety devices employed by the contractors, in this case- Jimmy's Best, that perform the work. Plaintiff has presented no proof otherwise.
>
> Green Bay acted merely in a sales capacity, or in other words, as an intermediary, to arrange for a contractor to perform the indicated work requested by [defendant]. Green Bay was clearly not acting as a general contractor.

It further states that it did not coordinate or supervise the work, nor did it have the power or authority to control the workers. Green Bay further asserts the following:

> While it made the initial contact with Jimmy's Best for the latter to complete the roof work, Green Bay exercised no supervisory or other role which would color it as a general contractor. Moreover, no Green Bay employee or representative was ever up on the roof or even at the site during the entire time the roof work was being performed by Jimmy's Best. Green Bay was in no sense of the word a 'general contractor' for the roofing work performed by Jimmy's Best at [defendant's] home.

Thus, Green Bay asserts that the motion should be denied as it was not a contractor strictly liable under the purview of the Labor Law.

Notwithstanding these contentions to the contrary, Green Bay, in opposition and in response to plaintiff's prima facie showing, failed to present sufficient evidence to raise a triable issue of fact with regard to its liability."Labor Law § 240(1) imposes a nondelegable duty upon owners, contractors, or their agents to provide proper protection to a worker performing certain types of construction work (citations omitted). 'A general contractor will be held liable under [Labor Law § 240(1)] if it was responsible for coordinating and supervising the entire construction project and was invested with a concomitant power to enforce safety standards and to hire responsible contractors.' (citations omitted)." Kilmetis v. Creative Pool and Spa, Inc., 74 A.D.3d 1289 (2nd Dept. 2010). "The determinative factor is whether the party had "the right to

exercise control over the work, not whether it actually exercised that right." Bakhtadze v. Riddle, 56 A.D.3d 589, 590 (2nd Dept. 2008). "Moreover, a contractor may be held vicariously liable as the agent of a property owner for injuries sustained under Labor Law § 240(1) where the contractor had the ability to supervise and control the activity which brought about the injury (citations omitted)." Kilmetis, supra. "For purposes of establishing liability pursuant to Labor Law § 240(1), an agency relationship arises only when work is delegated to a third party who obtains the authority to supervise and control the work being performed (citation omitted)" Ficano v. Franklin Stucco Supply, Inc., 72 A.D.3d 1018.

Here, although Green Bay asserts that its role was merely administrative, as it served in the capacity of a sales representative, such contentions are not supported by the record. Indeed, the contract between Green Bay and defendant, drafted on an Green Bay invoice/work order, indicates that the home improvement company is licensed throughout New York, and specifically states "the contractor shall be held responsible only for that which is expressly written on the original agreement." The contract further provided with regard to the roofing work that the roof will be stripped and "30 year Owens Corning" will be installed. The contract also stated that the "contractor will provide certificate of workers' compensation prior to starting work." A Certificate of Workers' Compensation Insurance was proffered by plaintiff whereby the policyholder, Jimmy's Best, certified to the certificate holder, Green Bay, that it is "insured with the New York State Insurance Fund [] covering the entire obligation of [Jimmy's Best]." Moreover, defendant entered into contract with Green Bay for the construction work on her home, and but for her relationship with Green Bay, Jimmy's Best, and by extension, plaintiff, would not have been on the premises for the accident to ensue. As was stated by the Appellate Division, Second Department, in Williams v. Dover Home Improvement, Inc., 276 A.D.2d 626 (2nd Dept. 2000), a matter akin to the instant action:

> Dover is clearly a "contractor" under Labor Law § 240(1). Dover hired the parties to actually perform the work, entered into oral contracts with them, and required that each contractor produce a certificate of insurance. A party which has the authority to enforce safety standards and choose responsible subcontractors is considered a contractor under Labor Law § 240(1) (see, Nowak v. Smith & Mahoney, 110 A.D.2d 288, 494 N.Y.S.2d 449). Dover's status as a contractor under Labor Law § 240(1) is dependent upon whether it had the right to exercise control over the work, not whether it actually exercised that right (see, Russin v. Picciano & Son, 54 N.Y.2d 311, 317-318, 445 N.Y.S.2d 127, 429 N.E.2d 805; Copertino v. Ward, 100 A.D.2d 565, 567, 473 N.Y.S.2d 494; Parsolano v. County of Nassau, 93 A.D.2d 815, 817, 460 N.Y.S.2d 823; Kenny v. Fuller Co., 87 A.D.2d 183, 187, 450 N.Y.S.2d 551). Since Dover had the authority to choose the parties who did the work, and directly entered into contracts with them, it had the authority to exercise control over the work, even if it did not actually do so.

Consequently, it is this Court's finding that plaintiff is entitled to summary judgment on his 240(1) claim.

With regard to Green Bay's motion for a default judgment, it has demonstrated its entitlement to a default judgment against Jimmy's Best by submitting proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the default in answering on behalf of Jimmy's Best. See, Mercury Cas. Co. v. Surgical Center at Milburn, LLC, 65 A.D.3d 1102 (2nd Dept. 2009); Matone v. Sycamore Realty Corp., 50 A.D.3d 978 (2nd Dept. 2008); Allstate Ins. Co. v. Austin, 48 A.D.3d 720 (2nd Dept. 2008). As such, the motion is likewise granted.

Accordingly, plaintiff Marco Tamay's motion, pursuant to CPLR 3212, for an order granting him partial summary judgment against third-party plaintiff Green Bay Home Improvement, Inc., under Labor Law § 240(1), is granted. Likewise granted is the motion by defendant/third-party plaintiff Green Bay Home Improvement, Inc., for an order granting it a default judgment, pursuant to CPLR § 3215, against third-party defendant Jimmy's Best Construction, Inc. Defendant/third-party plaintiff Green Bay Home Improvement is granted a default judgment against third-party defendant Jimmy's Best Construction, Inc, for the causes of action set forth in the third-party complaint, the amount thereof to be determined at an inquest to assess damages. The inquest shall be held at the time of the trial of this action.

Dated: September 27, 2010

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J.S.C.