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SHORT FORM ORDER

INDEX No. ~~04-23847~~ 17748-09
CAL. No. 11-00491OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 8 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 7-29-11
ADJ. DATE 9-8-11
Mot. Seq. # 001 - MG;CASEDISP

MUMIN RAHIEM,	:	KUJAWSKI & DELLICARPINI, ESQ.
	:	Attorney for Plaintiff
Plaintiff,	:	1637 Deer Park Avenue
	:	P.O. Box 661
- against-	:	Deer Park, New York 11729-0661
	:	
	:	ROBERT P. TUSA, ESQ.
KEVIN BURKE,	:	Attorney for Defendant
	:	898 Veterans Memorial Highway, Suite 320
Defendants.	:	Hauppauge, New York 11788

Upon the following papers numbered 1 to 20 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 10 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 11-18; Replying Affidavits and supporting papers 19-20 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by the defendant, Kevin Burke, pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint as asserted against him premised upon the defendant's negligence and violation of Labor Law §200 and §241(6) and 12 NYCRR 23-1.12 is granted and the complaint is dismissed.

This is an action for damages for personal injuries claimed to have been sustained by the plaintiff, Mumin Rahiem, on June 24, 2008, at 63 Blueberry Ridge Drive, Holtsville, New York, while engaged in the erection, repairing, altering, renovating and/or construction of a building or structure and using a table saw without a safety guard. It is claimed, inter alia, that the defendant was negligent in directing the construction site so that the work had to be performed in an area that created a risk, and in failing to warn and instruct plaintiff of the dangerous and defective condition at the work site. It is also claimed that the defendant violated New York State Labor Law Sections 200 and 241(6) and 12 NYCRR 23-1.12 in that the defendant acted with reckless disregard for the safety of the plaintiff.

The defendant seeks summary judgment dismissing the complaint on the bases that he bears no liability for the accident and that there are no triable issues of fact because he is the owner of a one family home, hired the plaintiff to work on stairs inside the house, neither directed nor controlled the manner in which the work was performed, and did not create or have notice of any dangerous condition which the plaintiff claims caused him to suffer injury.

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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of this application, the defendant has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, answer, plaintiff's verified bill of particulars; copies of the transcripts of the examinations before trial of Mumin Rahiem and Kevin Burke, both dated March 24, 2010; and copies of Labor Law §240 and §241(6). In opposing this motion, the plaintiff has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, answer, plaintiff's verified bill of particulars; copies of the transcripts of the examinations before trial of Mumin Rahiem and Kevin Burke, both dated March 24, 2010. The copies of the parties' deposition transcripts are not in admissible form as they are not signed, and are not supported with proof of service pursuant to CPLR 3116 to be considered on a motion for summary judgment. However, while the respective deposition transcripts of the parties are unsigned, they are considered by this court as adopted as accurate by the parties each submitting the same (*see*, ***Ashif v Won Ok Lee,*** 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]).

Mumin Rahiem testified to the extent that he was involved with an incident involving a saw on June 24, 2008 in the garage of the home of Kevin Burke, located at 63 Blueberry Ridge Drive. He is employed full-time by King Kullen in their corporate office in accounts payable. In 2008, he did carpentry, contracting, or subcontracting, only as a hobby. He was, and still is, friends with Kevin Burke. He owned his own power table saw, which he was operating when he sustained the injury claimed in this action. He had been using power saws since age 16, and was 44 years of age at the time of the deposition. He started using a table saw to earn money on side jobs when he was in his mid- twenties.

Rahiem testified that the defendant paid him by the day to remove the carpeting from the stairs and to install hardwood flooring on the stairs in his home. He brought his table saw to the defendant's home about two weeks prior to the accident. At first he set it up in the living room, then he decided to move it to the garage on June 24, 2008 when the painters arrived. He worked for about two weeks on the stairs after he finished his job with King Kullen, and worked one to three hours each day. While he was there working, the defendant was present about half the time, and he came and went. The defendant was not at the house when he cut his fingers on the blade. Initially, he and the defendant had a discussion about which wood to use, as the defendant wanted the stairs to match the wood flooring upstairs. There was no further discussion between them as to what was to be done. He purchased the flooring material from Home Depot. When he

started the job, he knew exactly what to do. He and the defendant talked many days, but he could not recall what they talked about other than how much longer it would take, or how was it coming. The defendant paid for the materials.

The plaintiff further testified that in addition to using his own table saw at the defendant's home, he also used a jigsaw, hammer, pliers, a miter saw, and a rubber mallet, all of which he owned and brought with him. He testified that the defendant did not provide him with any tools and did not direct him as to how to do the job. The defendant did not help him move the table saw into the garage, where he placed it on the floor. He did not know if the placement of the saw had anything to do with his injuries. He did not recall there being any debris on the garage floor, which was made of cement and had no defects. The table saw, which he owned for more than four years, did not have a guard or a guide on it, although it came with a guide. He did not bring the guide with him as, he stated, the guide usually gets in the way when he is cutting wood. Additionally, he stated the guide was broken. He continued that his father taught him how to use the table saw, and that his father never used a guide. He stated the guide was not considered a safety feature, and that the table saw did not come with a safety feature. He experienced no difficulties with the saw during the two weeks he was using it, and it did not malfunction at any time. When the incident occurred, he was kneeling in front of the machine cutting a piece of wood, pushing it through, and the wood got stuck. The machine then jerked up. He backed out of the way, but the blade severed fingers on his left hand.

Kevin Burke testified to the extent that he has owned his home at 163 Blueberry Ridge Drive, Holtsville since January 2001. In 2008, he hired a painting contractor to come in to paint the majority of the interior of his home. He also hired the plaintiff to remove the carpet from the stairs inside his home and to install wood flooring on the staircase, for which he paid the plaintiff by the hour. When the painters started painting the interior of his home, he asked the plaintiff to put the table saw in the garage due to the sawdust. He stated that the plaintiff brought his own tools to do the work. He was not home when the incident occurred.

Based upon the adduced testimonies, it is determined that the defendant has established prima facie entitlement to summary judgment dismissing the complaint as a matter of law, and that the plaintiff has failed to raise a factual issue to preclude summary judgment.

Negligence and Labor Law §200

"In New York, to establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. In order to establish the third element, proximate cause, plaintiff must show that defendant's negligence was a substantial factor in bringing about the injury.

A landowner will be liable for violation of Labor Law §200 and common-law negligence when the injuries complained of fall into one of two broad categories: either a dangerous condition on the premises, or in the manner in which the work was performed.... If the cause of the loss involves a defect in the premises, the owner may be liable where he either created the dangerous condition, or had actual or constructive notice of the condition.... If the issue is the manner of work, no liability will attach to an owner even if he or she had notice of the unsafe manner in which the work was being conducted unless the owner

had the authority to supervise or control the performance of the work.... A defendant has the authority to supervise or control the work for purposes of Labor Law §200 when that defendant bears the responsibility for the manner in which the work is performed.... Having control over the manner in which work is performed includes having control over the provision of, and safety of, the tools necessary to do the work. An owner, therefore, cannot be held liable for defective equipment where it did not provide the equipment or have the authority to supervise or control the provision of the equipment" (***Silva v The City of New York,*** 2009 NY Slip Op 50886U, 23 Misc3d 1122A [Sup Ct, Kings County 2009]. By the plaintiff's own testimony, such is the case herein.

"The common law duty of an owner to provide a safe place to work, as codified by Labor Law §200(1) has been extended to include the tools and appliances without which the work cannot be performed and completed.... A basic, underlying ground for the imposition of any liability under both Labor Law §200 and the common law is the authority of the defendant to remedy the dangerous or defective condition at issue. Accordingly, when a worker's injury results from his or her employer's own tools or methods, it makes sense that a property owner be liable only if possessed of authority to supervise or control the work, since the defendant is vested with the authority to remedy any dangers in the methods or manner of the work. Similarly, if a worker's injury results from a dangerous or defective premises condition, it logically follows that a property owner's liability should be predicated upon evidence of the owner's creation of the condition or actual or constructive notice of it, since the property owner in charge of the site has authority to remedy any dangers or defects existing at its own premises.... Where a property owner provides a worker with a dangerous or defective piece of equipment, having either created the dangerous or defective condition or having actual or constructive notice of it, the owner is possessed of the authority to remedy the condition. Remedial efforts do not involve control over the work per se, but instead involve control over the dangerous or defective device akin to the property owner's authority to remedy dangerous or defective premises condition.... When a defendant property owner lends allegedly dangerous or defective equipment to a worker that causes injury during its use, the defendant moving for summary judgment must establish that it neither created the alleged danger or defect in the instrumentality nor had actual or constructive notice of the dangerous or defective condition" (***Chowdhury v Rodriquez et al,*** 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]; see also ***McFadden v Lee et al,*** 62 AD3d 966, 880 NYS2d 311 [2d Dept 2009]). It is well settled that the duty to provide a safe place to work is not breached when the injury arises out of a defect in the subcontractor's own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work (***Persichilli v Triborough Bridge & Tunnel Auth.,*** 16 NY2d 136, 262 NYS2d 476 [1965]). Here, the plaintiff testified that he supplied his own table saw and other tools, that the defendant did not direct the manner and method of his use of the tools and only discussed with him what type of flooring he wanted, how much longer it would take, and how the work was progressing.

Liability for causes of action sounding in common law negligence and for violations of Labor Law §200 is limited to those who exercise control or supervision over the plaintiff's work, or who have actual or constructive notice of an unsafe condition that causes an accident (***Aranda v Park East Constr.,*** 4 AD3d 315, 772 NYS2d 70 [2004]; ***Akins v Baker,*** 247 AD2d 562, 669 NYS2d 63 [1998])" (***Marin v The City of New York, et al,*** 15 Misc3d 1003A, 798 NYS2d 710 [Sup Ct, Kings County 2004]). An implicit precondition to the common-law duty imposed upon an owner or general contractor to provide construction workers with a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury and have actual or constructive notice of the alleged unsafe condition (***Ramos v HSBC Bank et al,*** 29 AD3d 435, 815 NYS2d 504 [1st Dept 2006]). In order to prevail

on a claim under Labor Law §200, a plaintiff is required to establish that a defendant exercised some supervisory control over the operation (***Mendoza v Cornwall Hill Estates, Inc.,*** 199 AD2d 368, 605 NYS2d 308 [2d Dept 1993]). By the plaintiff's own testimony, the within incident occurred when he was using the table saw, the wood jammed, and the table saw jerked up. Although he backed up, the saw severed some fingers on his left hand. Thus, the plaintiff established that there was not a dangerous condition in the garage, on the floor, or other situation, which caused his injury, other than his use of his own table saw.

It has been established prima facie that defendant Burke did not supervise, direct or control the plaintiff's work, did not provide the table saw which allegedly malfunctioned, and that Burke did not have actual or constructive notice of the alleged danger or defect in the instrumentality. Neither did Burke control the maintenance or operation of the equipment. Additionally, it has been demonstrated that the plaintiff was not supplied with an unsafe work space. Therefore, the plaintiff's claim that Burke was negligent and violated Labor Law §200 is without basis as a matter of law as it has been demonstrated that Burke did not breach any duty to the plaintiff and did not proximately cause his injury. Further, the plaintiff has raised no factual issues to preclude summary judgment.

Accordingly, those claims premised upon the defendant Burkes's alleged negligence and violation of Labor Law §200 are dismissed.

Labor Law § 241(6)

Owners of one and two-family dwellings who do not direct or control the work being performed are statutorily exempt from liability under Labor Law §240(1) and Labor Law §241(6) (***Morocho v Marino Enterprises Contracting Corp. et al,*** 65 AD3d 675, 885 NYS2d 99 [2d Dept 2009]; ***Chowdhury v Rodriquez et al,*** supra). Here, the plaintiff, by his own testimony, has established that the defendant did not direct or control the work being performed. The defendant merely advised the plaintiff of the work to be done, and requested that the table saw be placed in the garage. The facts of this case establish that the placement of the table saw in the garage was not the proximate cause of the accident as the plaintiff was using the table saw without a guide or safety when the wood jammed and the table saw kicked up, causing his injury. The defendant, as the owner of a one family home, who did not direct or control the work being done, is statutorily exempt from liability in this action. The plaintiff has failed to raise a factual issue to preclude summary judgment from being granted on this cause of action.

Accordingly, the cause of action premised upon the defendant's alleged violation of Labor Law §241(6), and premised upon the alleged violation of 12 NYCRR 23-1.12 is dismissed.

Dated: 11/30/11

A.J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**