Morocho v Sunwood Dev. Corp.
2012 NY Slip Op 30877(U)
March 29, 2012
Sup Ct, Suffolk County
Docket Number: 07-32555
Judge: Joseph C. Pastoressa
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SHORT FORM ORDER

INDEX No. 07-32555
CAL. No. 11-00673OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 8-24-11
ADJ. DATE 11-9-11
Mot. Seq. # 004 - MotD
005 - XMotD

ALCIVAR A. MOROCHO,

Plaintiff,

- against -

SUNWOOD DEVELOPMENT CORP., NICHOLAS MASEM CONSTRUCTION & CONTRACTING, INC.,

Defendants.

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Upon the following papers numbered 1 to 39 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19 ; Notice of Cross Motion and supporting papers 20 - 23 ; Answering Affidavits and supporting papers 24 - 26; 27 - 28; 29 - 30 ; Replying Affidavits and supporting papers 31 - 32; 33 - 37; 38 - 39 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the plaintiff for partial summary judgment on the issue of defendants' liability pursuant to Labor Law 240 (1) and 241 (6) is granted to the extent that the plaintiff seeks summary judgment on the issue of the defendants' liability pursuant to Labor Law § 240 (1), and is otherwise denied; and it is further,

ORDERED that the cross motion by defendant Sunwood Development Corp. for summary judgment (1) dismissing the plaintiff's causes of action based on Labor Law § 200 and common law negligence as asserted against it, and (2) in its favor on its cross claim for common law indemnification

against defendant Nicholas Masem Construction & Contracting, Inc., is granted to the extent that it seeks dismissal of the Labor Law § 200 and common law negligence causes of action and is otherwise denied.

In this action, the plaintiff seeks to recover damages for personal injuries which he purportedly sustained on December 15, 2005 while performing construction work at premises located in Sag Harbor, New York. The premises were owned by defendant Sunwood Development Corp. (hereinafter Sunwood). Defendant Nicholas Masem Construction & Contracting, Inc. (hereinafter Masem Construction) was contracted by Sunwood to perform certain carpentry and framing work at the premises. Masem Construction sub-contracted a portion of this carpentry work to non-party Pollos Construction (hereinafter Pollos). At the time of his accident, the plaintiff was employed by, and performing work on behalf of, Pollos. The accident purportedly occurred when the plaintiff, who was standing on top of a wall approximately eight to nine feet in height in order to install fascia board, slipped and fell to the ground below. The plaintiff commenced separate actions against each of the defendants alleging that they were liable for his injuries pursuant to Labor Law §§ 200, 240, and 241, and common-law negligence. Each of the defendants claim that, if they are held to be liable, they are entitled to indemnification and/or contribution from the other. By order dated May 15, 2008, the separate actions were fully consolidated into the instant action.

The plaintiff now moves for summary judgment on the issue of liability on the grounds that the defendants are statutorily liable for his injuries pursuant to Labor Law §§ 240 (1) and 241 (6). Defendant Sunwood cross-moves for summary judgment (1) dismissing the plaintiff's claims for recovery pursuant to Labor Law § 200 and common law negligence, and (2) in its favor on its cross claim against defendant Masem Construction for common law indemnification.

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 demonstrate the absence of any material issues of fact (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v New York Univ. Med. Ctr, 64 NY2d 851 [1985]; Zuckerman v City of New York, 49 NY2d 557 [1980]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr, supra). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (see Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, supra).

In support of his motion, the plaintiff submits, *inter alia*, his own affidavit and deposition testimony, the deposition testimony of Arnold Infanzon on behalf of Sunwood, the deposition testimony of Nicholas Matthew Masem on behalf of Masem Construction, and a purported written agreement between Sunwood and Masem Construction outlining the work to be performed by Masem Construction at the subject premises. As is relevant to this motion, the plaintiff's deposition testimony and affidavit are substantially similar. He avers that, on the date of the incident, he was employed by Pollos Construction and was performing framing work at the subject premises for approximately one and one half weeks. The only instructions he received as to what work to do, or how to do his work, was from his employer or co-workers at Pollos. Shortly prior to the incident, his boss told him to install a fascia

board on top of a rafter on the second floor of the premises. During his deposition, he testified that his boss did not instruct him how to do this, but in his affidavit he avers that his boss told him that he should climb and stand on top of the recently constructed framing for a wall in order to perform this task. At the time of the incident, plywood had not yet been installed to the framing of the premises. The wall on which the plaintiff was standing was approximately eight and a half feet high and three and a half to five inches wide. The plaintiff was required to bend down in order to install the fascia board. While he was in the process of standing back up, he slipped and fell off of the wall to the ground below. The plaintiff testified that he slipped because the top of the wall was either humid or a little wet, and that it had rained a few days prior. The plaintiff testified that no one ever told him not to stand on top of the wall or instructed him to use a ladder to perform this task. Although Pollos had different size ladders available at the job site, none of these ladders would have been high enough to utilize in installing the fascia board. The plaintiff testified that Pollos did not provide him with scaffolding and that there was no scaffolding available at the job site. He was also not provided with, or instructed to use, any other type of safety device to prevent him from falling off of the wall including a safety line, rope, harness or net. There were no such safety devices provided at the job site.

Arnold Infanzon testified that he owns Sunwood, a company which is in the business of building and selling homes. Sunwood bought the subject premises, which was a vacant lot, for the purpose of building a home and selling it. Sunwood did not perform any of the labor at the job site, but subcontracted out the construction work, by both verbal and written agreements, to numerous entities. Sunwood did not retain a general contractor for the job site. Infanzon would visit the job site on a daily basis to check the progress and quality of the job. Infanzon testified that Sunwood retained Masem Construction to perform work at the premises which included framing, sheathing, trim, installation of windows and interior stairs, and building a front deck and porch. This work encompassed Masem Construction's entire duties at the job site. According to Infanzon, Sunwood had a written agreement with Masem Construction with respect to the performance of this work and also had a separate written hold harmless agreement with Masem Construction. It was his understanding, when Sunwood contracted with Masem Construction, that Masem Construction would be performing the work directly, although he did not recall Sunwood advising Masem Construction not to hire any subcontractors. Infanzon was unaware that Masem Construction had hired Pollos to perform a portion of the work until he was served with the papers in the instant action.

Infanzon testified that Sunwood, at no time, provided any safety devices to workers at the job site including any ladders or scaffolding. Sunwood bought all of the materials and supplies for Masem Construction to perform the framing work but did not provide any of the equipment. Infanzon testified that Sunwood discussed general safety measures with Masem Construction, but not the particular safety measures they should be utilizing in performing their work. Infanzon testified that on his visits to the job site he would watch the framers to make sure they were working carefully and not too rapidly, but did not observe the type of safety equipment they were utilizing. According to Infanzon, he did not observe the framing work being done in an unsafe or dangerous manner, but if he had he would have notified one of the owners of Masem Construction.

Nicholas Matthew Masem, testified that he is president of Masem Construction and that his father, Nicholas Matthew Masem III, is vice president. His father was not involved with the work at the

subject job site. He testified that Masem Construction was hired by Sunwood pursuant to a verbal agreement to provide carpentry work at the subject job site. Masem did not enter a written contract with Sunwood for the performance of the work and the written agreement that Sunwood purports was signed on behalf of Masem Construction was not signed by either him or his father. Although he sometimes goes by Matt, he did not believe that he ever signed a document using such name, and the signature appearing on the document purporting to be a written agreement between Masem Construction and Sunwood was not his signature. Masem further testified that Sunwood did not require Masem Construction to sign a hold harmless agreement, that he never signed a hold harmless agreement on behalf of Masem Construction in favor of Sunwood, and that the purported hold harmless agreement provided by Sunwood was not signed by either him or his father.

Masem testified that Masem Construction was hired by Sunwood to perform carpentry work including the framing, installation of the exterior windows and interior stairs, and installation of fascia board and plywood. Masem Construction performed the framing work itself, and subcontracted out some of the minor carpentry work, such as installation of the fascia board and plywood, to Pollos. According to Masem, there was no agreement in place by which Masem Construction was required to obtain approval of subcontractors and Sunwood was aware that Masem would be hiring subcontractors to perform work.

Masem testified that Sunwood held itself out as both the owner and the general contractor at the job site. It was his understanding that Sunwood was ultimately responsible for safety and cleanliness at the job site, because it was the general contractor. According to Masem, Sunwood was at the job site daily to check on the work. Masem testified that Masem Construction employed approximately two or three employees at the subject work site on a daily basis. Sunwood provided the materials Masem Construction used in connection with the framing, but Masem Construction provided its own tools and equipment. Masem inspected the premises before commencing work each day to make sure the premises was clean and ready for Masem Construction's workers to perform their work.

Masem testified that Pollos began working at the subject job site approximately one or two weeks prior to the subject accident. According to Masem, Pollos provided its own tools and equipment at the job site. He observed Pollos employees using ladders and presumed Pollos brought these ladders to the job site. Masem was introduced to the people that worked for Pollos at the site as a group, but was never introduced personally to the plaintiff and did not know exactly how many employees Pollos had at the job site. Masem never spoke to the plaintiff directly. Masem testified that if Pollos workers were performing work at a height, they should have been required to use safety harnesses. He did not recall specific conversations with Pollos regarding the safety measures that needed to be implemented and equipment that needed to be used, but testified that it was common practice for Masem Construction to engage in safety discussions with its subcontractors at the commencement of a job. Masem did not recall if he observed work being performed in an unsafe or dangerous manner at any of his visits to the subject job site, but testified that he would have stopped the work immediately if he had. Masem testified that he was not present at the job site at the time the subject accident occurred, and never spoke to anyone about how it happened. Masem did not recall whether there was any water or moisture present on the ground where the construction was being done on the date of the accident.

The evidence submitted establishes the plaintiff's *prima facie* entitlement to summary judgment on the issue of the defendants liability pursuant to Labor Law § 240 (1). Labor Law § 240 (1), commonly known as the "scaffold law," creates a duty that is nondelegable and an owner, general contractor, or agent thereof, who breaches that duty may be held liable in damages regardless of whether it had actually exercised supervision or control over the work (see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]). The "exceptional protection" provided for workers by § 240 (1) is aimed at "special hazards" and is limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (Ross v Curtis-Palmer Hydro-Elec. Co., supra at 501; Rocovich v Consolidated Edison Co., 78 NY2d 509, 514 [1991]; Zimmer v Chemung County Performing Arts, 65 NY2d 513 [1985]). Specifically, Labor Law § 240 (1) requires that safety devices be "constructed, placed and operated as to give proper protection to a worker" (Klein v City of New York, 89 NY2d 833, 834 [1996]). A violation of this duty which proximately causes injuries to a member of the class for whose benefit the statute was enacted renders an owner, general contractor or agent thereof, strictly liable (*see* Crespo v Triad, Inc., 294 AD2d 145 [2002]; Crawford v Leimzider, 100 AD2d 568 [2d Dept 1984]). It is not a defense to liability pursuant to Labor Law § 240 (1) that the plaintiff's fault contributed to the accident, unless it can be said that the plaintiff's conduct was the sole proximate cause of the accident as a matter of law (see Balzer v City of New York, supra; see also Gallagher v New York Post, 14 NY3d 83 [2010]; Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 290-291 [2003]).

To prevail on a claim under Labor Law § 240 (1), a plaintiff must prove that the statute was violated and that such violation was a proximate cause of the resulting injuries (see Treu v Cappelletti, 71 AD3d 994 [2010]; Caballero v Benjamin Beechwood, LLC, 67 AD3d 849 [2009]; see also Blake v Neighborhood Hous. Servs. of N.Y. City, supra). At the outset, the evidence submitted demonstrates that both Sunwood and Masem Construction are parties responsible for compliance with the statutory mandate of Labor Law § 240 (1). In this regard, it is undisputed that Labor Law § 240 (1) is applicable to Sunwood by virtue of its role as "owner" and/or "general contractor" at the subject work site. Contrary to Masem Construction's contention, the evidence submitted also established that the statute was applicable to it, under the circumstances of this case, by virtue of its position as an "agent" of the general contractor. "A prime contractor hired for a specific project is subject to liability under Labor Law § 240 as a statutory agent of the owner or general contractor only if it has been delegated the . . . work in which plaintiff was engaged at the time of his injury, and is therefore responsible for the work giving rise to the duties referred to in and imposed by [the statute]" (Nasuro v PI Assoc., 49 AD3d 829 [2d Dept 2008]; Coque v Wildflower Estates Dev., 31 AD3d 484, 488 [2d Dept 2006]; see Russin v Louis N. Picciano & Son, 54 NY2d 311, 318 [1981]; cf. Pino v Irvington Union Free School Dist., 43 AD3d 1130 [2d Dept 2007]). In this case, it is undisputed that the carpentry work in which the plaintiff was engaged at the time of his accident was contracted to Masem Construction, and that Masem Construction in turn subcontracted this work out to the plaintiff's employer. Since Masem Construction was the prime contractor for the carpentry work on the project, and was thereby delegated the authority to supervise and control the particular work in which the decedent was engaged at the time of the incident, it is liable under Labor Law § 240 (1) as a statutory agent of the general contractor (see Weber v Baccarat, Inc., 70 AD3d 487 [1st Dept 2010]; Inga v EBS N. Hills, 69 AD3d 568 [2d Dept 2010]; Pacheco v Kew Garden Hills Apt. Owners, 73 AD3d 578 [1st Dept 2010]; Tomyuk v Junefield Assoc., 57 AD3d 518 [2d Dept 2008]; see also Barrios v City of New York, 75 AD3d 517 [2d Dept 2010];

Kilmetis v Creative Pool & Spa, 74 AD3d 1289 [2d Dept 2010]; Domino v Professional Consulting, Inc., 57 AD3d 713 [2d Dept 2008]; cf. Perez v 347 Lorimer, LLC, 84 AD3d 911 [2d Dept 2011]). Once an entity becomes an agent under the Labor Law it cannot escape liability to an injured plaintiff by delegating the work to another entity (McGlynn v Brooklyn Hosp.-Caledonian Hosp., 209 AD2d 486 [2d Dept 1994]; see Tomyuk v Junefield Assoc., supra; Nasuro v PI Assoc., supra). Thus, Masem Construction remains statutorily liable despite the fact that it had contracted a portion of the carpentry work in which the decedent was engaged at the time of the incident to the plaintiff's employer Pollos.

The evidence submitted further demonstrates that the defendants violated Labor Law § 240 (1) and that such violation was a proximate cause of the plaintiff's injuries (see Ortiz v 164 Atl. Ave., 77 AD3d 807 [2d Dept 2010]; Treu v Cappelletti, supra; Caballero v Benjamin Beechwood, LLC, supra; see also Tapia v Mario Genovesi & Sons, 72 AD3d 800 [2010]). In this regard, the evidence shows that the plaintiff was not provided with the appropriate safety equipment required under Labor Law § 240 (1) for the work he was instructed to perform at the time of his accident (see Perez v Spring Creek Assocs., L.P., 265 AD2d 314 [2d Dept 1999]; see also Siedlecki v City of Buffalo, 61 AD3d 1414 [4th Dept 2009]; compare Fernicola v Benenson Capital Co., 252 AD2d 567 [2d Dept 1998]). Indeed, the evidence indicates that the defendant was not provided with any safety equipment to utilize in the performance of this work (see Melchor v Singh, 90 AD3d 866 [2d Dept 2011]). The evidence also shows that the failure to provide such safety equipment was a proximate cause of the accident (see Perez v Spring Creek Assocs., L.P., supra).

Contrary to the defendants' contentions, evidence that ladders were present at the job site does not raise an issue of fact as to whether conduct on the part of the plaintiff was the sole proximate cause of his accident (see Treu v Cappelletti, supra). The failure to use available safety equipment will not be deemed the sole proximate cause of a worker's injuries unless there were adequate safety devices available, the worker knew both that they were available and that he was expected to use them, and he chose for no good reason not to do so (see Gallagher v New York Post, supra; Ortiz v 164 Atl. Ave., LLC, supra; Ritzer v 6 E. 43rd St. Corp., 57 AD3d 412 [1st Dept 2008]). Here, the evidence indicates that the ladders present at the job site were not adequate to perform the work in which the plaintiff was engaged at the time of his accident. Moreover, the defendants neither instructed the plaintiff to use the ladders nor instructed him to avoid standing on top of the wall (see Gallagher v New York Post, supra; Handville v MJP Contrs., Inc., 77 AD3d 1471 [4th Dept 2010]; Ortiz v 164 Atl. Ave., LLC, supra; Ritzer v 6 E. 43rd St. Corp., supra). Indeed, according to the plaintiff's testimony, he was performing the work as instructed by his employer.

The burden thus shifts to the defendants to raise a triable issue of fact as to whether there was a statutory violation or as to whether the plaintiff's own acts or omissions were the sole proximate cause of the accident (Blake v Neighborhood Hous. Servs. of N.Y. City, supra; Squires v Robert Marini Bldrs., 293 AD2d 808, 809, lv denied 99 NY2d 502 [2002]). The defendants' opposition to the motion failed to meet this burden (see Melchor v Singh, supra). Accordingly, the plaintiff's motion is granted to the extent that it seeks summary judgment on the issue of liability pursuant to Labor Law § 240 (1) against the defendants.

Labor Law § 241 (6) imposes a nondelegable duty of reasonable care upon an owner, general contractor, or agent to provide reasonable and adequate protection to workers. Pursuant to this provision, a violation of an explicit and concrete provision of the Industrial Code by a participant in the construction project constitutes some evidence of negligence for which the owner or general contractor may be held vicariously liable (see Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 348 [1998]; Melchor v Singh, 90 AD3d 866 [2d Dept 2011]; Fusca v A & S Constr., LLC, 84 AD3d 1155 [2d Dept 2011]; Forschner v Jucca Co., 63 AD3d 996 [2d Dept 2009]; Cun-En Lin v Holy Family Monuments, 18 AD3d 800 [2d Dept 2005]). In order to recover damages on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish the defendant's violation of an Industrial Code provision which sets forth specific safety standards and that such violation was a proximate cause of the accident (see Rizzuto v L.A. Wenger Contr. Co., supra; Ross v Curtis-Palmer Hydro-Elec. Co., supra; Ramos v Patchogue-Medford School Dist., 73 AD3d 1010 [2d Dept 2010]; Hricus v Aurora Contrs., 63 AD3d 1004 [2d Dept 2009]; Seaman v Bellmore Fire Dist., 59 AD3d 515 [2d Dept 2009]; Fitzgerald v New York City School Constr. Auth., 18 AD3d 807, 808 [2d Dept 2005]). The rule or regulation alleged to have been breached must be a specific, positive command and must be applicable to the facts of the case (see Forschner v Jucca Co., supra; Cun-En Lin v Holy Family Monuments, supra). Once it has been alleged that a concrete specification of the Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused plaintiff's injury (Rizzuto v L.A. Wenger Contr. Co., supra). If proven, the general contractor, owner, or agent thereof, is vicariously liable without regard to his or her fault (see Rizzuto v L.A. Wenger Contr. Co., supra). An owner or general contractor may, of course, raise any valid defense to the imposition of vicarious liability under section 241 (6), including contributory and comparative negligence (Fusca v A & S Constr., LLC, 84 AD3d 1155 [2d Dept 2011]; Misicki v Caradonna, 12 NY3d 511 [2009]; compare Treu v Cappelletti, 71 AD3d 994 [2d Dept 2010]).

The evidence submitted by the plaintiff was insufficient to establish, as a matter of law, that he is entitled to summary judgment on the issue of the defendants' liability pursuant to Labor Law § 241 (6) (see Fusca v A & S Constr., LLC, 84 AD3d 1155 [2d Dept 2011]). In his bill of particulars, the plaintiff alleges numerous Industrial Code provision violations in support of his claim pursuant to Labor Law § 241 (6). On the instant motion, he alleges that he is entitled to summary judgment on the issue of the defendants' liability pursuant to Labor Law § 241 (6) based on the violations of 12 NYCRR §§ 1.7 (d), 23-1.22 (c) (2) and 23-5.1 (j) (1). 12 NYCRR § 23-1.7 (d) provides, in pertinent part, that no employee shall be permitted "to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition" and requires the removal of any "[i]ce, snow, water, grease and any other foreign substance which may cause slippery footing" (see Cooper v State of New York, 72 AD3d 633 [2d Dept 2010]; Fassett v Wegmans Food Mkts., Inc., 66 AD3d 1274 [3d Dept 2009]). Here, the evidence submitted raises triable issues of fact as to whether the defendants violated the statute by permitting the defendant to use an "elevated working surface" that was in a slippery condition (cf. Cooper v State of New York, 72 AD3d 633 [2d Dept 2010]; Kwang Ho Kim v D & W Shin Realty Corp., 47 AD3d 616 [2d Dept 2008]; Linkowski v City of New York, 33 AD3d 971 [2d Dept 2006]; compare Wrighten v ZHN Contr. Corp., 32 AD3d 1019 [2d Dept 2006]; Bradley v Morgan Stanley & Co., Inc., 21 AD3d 866 [2d Dept 2005]). Moreover, upon finding a violation of this regulation, under the circumstances of this case, it remains for the jury to determine whether the negligence of some party

to, or participant in, the construction project caused plaintiff's injury (see Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343 [1998]).

The plaintiff, likewise, failed to demonstrate a prima facie entitlement to summary judgment on the issue of the defendants' liability pursuant to Labor Law 241 (6) based on violations of 12 NYCRR §§ 23-1.22 (c) (2) and 23-5.1 (j) (1). The evidence submitted fails to establish, as a matter of law, that these provisions are applicable to the facts of this case (see Canosa v Holy Name of Mary R.C. Church, supra; Gittleson v Cool Wind Ventilation Corp., supra; Egan v Monadnock Constr., Inc., 43 AD3d 692 [1st Dept 2007]). In this regard, 12 NYCRR § 23-1.22 (c) (2) provides, inter alia, that platforms more than seven feet above the ground shall be provided with a safety railing on all sides. However, the evidence submitted fails to demonstrate that the plaintiff was working on a "platform" at the time of his accident (see Kaminski v One, 51 AD3d 473 [1st Dept 2008]; compare Silvas v Bridgeview Invs., LLC, 79 AD3d 727 [2d Dept 2010]). Likewise, 12 NYCRR § 23-5.1 (j) (1) provides, in pertinent part, that the open sides of all scaffold platforms shall be provided with safety railings, however, the evidence submitted fails to demonstrate that the plaintiff was working on a "scaffold" at the time of his accident (see Cassidy v Highrise Hoisting & Scaffolding, Inc., 89 AD3d 510 [1st Dept 2011]; Kaminski v One, 51 AD3d 473 [1st Dept 2008]).

In light of the plaintiff's failure to establish a *prima facie* entitlement to summary judgment on the issue of the defendants' liability pursuant to Labor Law § 241 (6), the sufficiency of the opposition papers need not be considered. Accordingly, the branch of the plaintiff's motion which seeks summary judgment on the issue of the defendants' liability pursuant to Labor Law § 241 (6) is denied.

Turning next to Sunwood's cross-motion for summary judgment, this Court rejects the plaintiff's contention that such cross-motion should not be considered on the grounds that it is untimely. CPLR 212 (a) provides, in pertinent part, that a motion for summary judgment shall be made no later than 120 days after the filing of the note of issue, except with leave of court on good cause shown. The Court's computerized records indicate that the note of issue was filed on April 1, 2011. Thus, the 120 days would run on July 30, 2011. However, July 30, 2011 was a Saturday. As Sunwood's summary judgment motion was served on Monday, August 1, 2011, the next succeeding business day, it was timely (see Rodriguez v Bd. of Educ., 301 AD2d 641 [2d Dept 2003]; see also General Construction Law § 25-a [1]).

In support of its cross motion for summary judgment, Sunwood relies on the same evidence submitted by the plaintiff in support of the motion in chief. This evidence establishes Sunwood's entitlement to summary judgment dismissing so much of the plaintiff's complaint as alleges a cause of action based on Labor Law § 200 and/or common law negligence. Labor Law § 200 merely codifies the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (see Rizzuto v L.A. Wenger Contr. Co., supra at 352; Gasques v State of New York, 59 AD3d 666 [2d Dept 2009]; Dooley v Peerless Importers, 42 AD3d 199 [2d Dept 2007]). When a worker's injuries result from an unsafe or dangerous condition existing at a work site, the liability of a party will depend upon whether the party had control of the place where the injury occurred, and whether it either created, or had actual or constructive notice of, the dangerous condition (see Cook v Orchard Park Estates, Inc., 73 AD3d 1263 [3d Dept 2010]; Harsch v City of New York, 78 AD3d 781 [2d Dept

2010]; Martinez v City of New York, 73 AD3d 993 [2d Dept 2010]). To be held liable under Labor Law § 200 and for common-law negligence when the method and manner of the work is at issue, it must be shown that "the party to be charged had the authority to supervise or control the performance of the work" (Ortega v Puccia, 57 AD3d 54, 61[2d Dept 2008]; see La Veglia v St. Francis Hosp., 78 AD3d 1123 [2d Dept 2010]; Chowdhury v Rodriguez, 57 AD3d 121 [2d Dept 2008]; Gasques v State of New York, supra; Orellana v Dutcher Ave. Bldrs., 58 AD3d 612 [2d Dept 2009]; Dooley v Peerless Importers, supra). General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under the statute (see La Veglia v St. Francis Hosp., supra; Orellana v Dutcher Ave. Bldrs., supra; Perri v Gilbert Johnson Enters., 14 AD3d 681 [2d Dept 2005]). The authority to review safety at the site, ensure compliance with safety regulations and contract specifications, and to stop work for observed safety violations is also insufficient to impose liability (see Austin v Consolidated Edison, 79 AD3d 682 [2d Dept 2010]; Capolino v Judlau Contr., 46 AD3d 733 [2d Dept 2007]; McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts., 41 AD3d 796 [2d Dept 2007]; Garlow v Chappaqua Cent. School Dist., 38 AD3d 712 [2d Dept 2007]; Perri v Gilbert Johnson Enters., supra). Rather, it must be demonstrated that the defendant controlled the manner in which the work is performed (see La Veglia v St. Francis Hosp., supra; cf. Rizzuto v L.A. Wenger Contr. Co., supra; Dooley v Peerless Importers, supra; Hughes v Tishman Constr. Corp., 40 AD3d 305 [1st Dept 2007]).

The evidence submitted in this matter established, as a matter of law, Sunwood's *prima facie* entitlement to summary judgment dismissing so much of the complaint as seeks to recover damages for a violation of Labor Law § 200 and common law negligence. In this regard, the evidence submitted establishes that Sunwood did not exercise any direct supervision or actual control over the means or methods by which the plaintiff performed his work (see Canosa v Holy Name of Mary R.C. Church, supra; Wnetrzak v V.C. Vitanza Sons, Inc., supra; La Veglia v St. Francis Hosp., supra; Rivera v 15 Broad St., 76 AD3d 621 [2d Dept 2010]; Ramos v Patchogue-Medford School Dist., supra; Gittleson v Cool Wind Ventilation Corp., supra; Dooley v Peerless Importers, supra; Blessinger v Estee Lauder Cos., 271 AD2d 343 [1st Dept 2000]). Indeed, the plaintiff testified that he only received instructions on what work to perform and/or how to perform his work from his employer, Pollos (see Wade v Atlantic Cooling Tower Servs., 56 AD3d 547 [2d Dept 2008]; Capolino v Judlau Contr., supra; Hughes v Tishman Constr. Corp., supra; Mohammed v Islip Food Corp., 24 AD3d 634 [2d Dept 2005]; compare Fassett v Wegmans Food Mkts., 66 AD3d 1274 [3d Dept 2009]). Moreover, the evidence submitted establishes that Sunwood did not have actual or constructive notice of the unsafe manner in which the plaintiff was performing his work and of the dangerous condition purportedly posed by the top of the wall (see Fassett v Wegmans Food Mkts., Inc., 66 AD3d 1274 [3d Dept 2009]; Loreto v 376 St. Johns Condo., Inc., 15 AD3d 454 [2d Dept 2005]; compare Linkowski v City of New York, 33 AD3d 971 [2d Dept 2006]).

In opposition, the plaintiff failed to raise a triable issue of fact as to Sunwood's liability under Labor Law § 200 or common law negligence (see Wnetrzak v V.C. Vitanza Sons, Inc., supra; Gittleson v Cool Wind Ventilation Corp., supra; see also Maloney v J.W. Pfeil & Co., Inc., supra). Accordingly, the branch of Sunwood's motion seeking summary judgment dismissing so much of the plaintiff's complaint as seeks to recover damages pursuant to Labor Law § 200 and common law negligence are granted.

Lastly, the branch of Sunwood's motion which seeks summary judgment in its favor and against defendant Masem Construction on its cross claim for common law indemnification is denied. In order to establish a claim for common law indemnification, a party is required to prove not only that it was not negligent (see Coque v Wildflower Estates Devs., supra), but also that the proposed indemnitor was responsible for negligence that contributed to the accident or, in the absence of any negligence, exercised actual supervision over the work giving rise to the injury (see McCarthy v Turner Constr., Inc., 17 NY3d 369 [2011]; Benedetto v Carrera Realty Corp., 32 AD3d 874 [2d Dept 2006]; Mid-Valley Oil Co. v Hughes Network Sys., supra; see also Nelson v Chelsea GCA Realty, 18 AD3d 838 [2d Dept 2005]). "Thus, if a party with contractual authority to direct and supervise the work at a job site never exercises that authority because it subcontracted its contractual duties to an entity that actually directed and supervised the work, a common law indemnification claim will not lie against that party on the basis of its contractual authority alone" (McCarthy v Turner Constr., Inc., supra). Here, Sunwood failed to establish a prima facie entitlement to judgment, as a matter of law, on its cross claim for common law indemnification against Masem Construction because the evidence submitted fails to establish that the plaintiff's accident was caused by the negligence of Masem Construction or that Masem Construction exercised actual supervision and control of the plaintiff's work (see McCarthy v Turner Constr., Inc., supra; Linkowski v City of New York, 33 AD3d 971 [2d Dept 2006]). In light of Sunwood's failure to establish a prima facie entitlement to summary judgment on the issue of Masem Construction's liability on its cross claim for common law indemnification, the branch of its motion seeking summary judgment on such cross claim must be denied.

Dated: March 29, 2012

HON. JOSEPH C. PASTORESSA, J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**