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SHORT FORM ORDER

INDEX No. 11-24387

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 12-1-11
MOTION DATE 1-4-12
ADJ. DATE 1-4-12
Mot. Seq. # 001 - MG; CASEDISP
002 - XMD

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LUCIO BARROS,
Plaintiff,

- against -

HIRSCH COMPANY, LLC.,

Defendant.

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GORAYEB & ASSOCIATES, P.C.
Attorney for Plaintiff
100 William Street
New York, New York 10038

BORCHERT, GENOVESI, LASPINA & LANDICINO, PC
Attorney for Defendant
19-02 Whitestone Expressway, Suite 302
Whitestone, New York 11357

Upon the following papers numbered 1 to 46 read on this motion and cross-motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 23 ; Notice of Cross Motion and supporting papers 24 - 44 ; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers 45 - 46 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint is granted; and it is further

ORDERED that the cross motion by plaintiff for an order pursuant to CPLR 3212 (e) granting partial summary judgment in his favor on his Labor Law §§ 240 (1) and 241 (6) causes of action is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff on October 16, 2008 at approximately 1 p.m. during the course of his employment as a carpenter/laborer for non-party Perello Building Corp. when he fell from an extension ladder that slid sideways along the facade of a home under construction at 40 Mashomuck Drive, Sag Harbor, Suffolk County, New York.[1] The property is owned by defendant, Hirsch Company, LLC. Vincent Seddio (Mr. Seddio) and his wife are the sole and exclusive owners of defendant. By his amended complaint, plaintiff alleges a first cause of action based

[1]By order dated June 7, 2011 (Weiss, J.), the Supreme Court, Queens County, granted defendant's motion to change the venue of this action from Queens County, were it was improperly commenced, to Suffolk County. The order also denied with leave to renew in Suffolk County the parties' respective motions for summary judgment.

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on common-law negligence and a second cause of action based on violations of Labor Law §§ 200, 240 (1) and 241 (6). Among the affirmative defenses raised in the amended answer is a tenth affirmative defense that plaintiff was the sole proximate cause of his accident by failing to use available equipment, specifically, the mechanical means of securing the top portion of the extension ladder by the use of rope and/or nails to prevent lateral motion.

Defendant now moves for summary judgment dismissing the complaint on the grounds that the homeowner's exemption applies with respect to plaintiff's Labor Law §§ 240 (1) and 241 (6) claims, and that defendant did not supervise or control the method and manner of plaintiff's work and plaintiff was the sole proximate cause of his own accident such that plaintiff's Labor Law § 200 and common-law negligence claim must be dismissed. Defendant's submissions in support of the motion include the pleadings, plaintiff's bill of particulars, the affidavit of Mr. Seddio dated December 9, 2010, and the certified deposition transcripts of plaintiff from June 10, 2010 and August 2, 2010, and the unsigned and uncertified deposition transcripts of plaintiff from November 22, 2010, of Mr. Seddio on behalf of defendant, and of non-party witness Richard Perillo.

Plaintiff cross-moves for partial summary judgment in his favor on his Labor Law §§ 240 (1) and 241 (6) causes of action on the grounds that defendant is the owner of the subject property, is a plumbing contractor, and is the general contractor that supervised, directed and controlled the work at the subject construction project where plaintiff's gravity-related accident occurred. Plaintiff asserts that Mr. Seddio, a principal of defendant, is a sophisticated businessman in construction and real estate matters, regularly buys and sells real estate for commercial gain, owns two homes on Shelter Island, and listed defendant as the contractor on building permit applications dated January 31, 2008 and November 13, 2008. Plaintiff questions whether the Seddios actually intended to reside at the subject property. In support of the cross motion, plaintiff submits, among other things, the amended complaint and answer to amended complaint, his affidavit dated February 1, 2011 with attached affidavit of Spanish interpreter/translator and color photographs of the building under construction that were marked as exhibits during his deposition on August 2, 2010; the affidavit dated May 3, 2011 of a licensed professional engineer, Stuart K. Sokoloff, P.E.; certified copies of building permit applications dated January 31, 2008 for a new building to be used as a residence and dated November 13, 2008 for a roof over the porch and to add a carport, both listing defendant as the contractor; and certified copies of building permits issued by the Incorporated Village of North Haven to defendant, one dated May 29, 2008 to construct a two-story, one-family dwelling, detached garage, covered porches and decks, and one dated December 12, 2008 to construct an attached carport on the subject premises.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "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" (***Alvarez v Prospect Hosp.***, *supra* at 324, 508 NYS2d 923, citing to ***Zuckerman v City of New York***, *supra* at 562, 427 NYS2d 595).

Labor Law § 240 (1) requires that building owners and contractors: "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed." The kind of accident triggering Labor Law § 240 (1) coverage is one that will sustain the allegation that an adequate "scaffold, hoist, stay, ladder or other protective device" would have "shield[ed] the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (***Ross v Curtis-Palmer Hydro–Elec. Co.***, 81 NY2d 494, 501, 601 NYS2d 49 [1993]; ***Salazar v Novalex Contr. Corp.***, 18 NY3d 134, 139, 936 NYS2d 624 [2011]).

Labor Law § 241 (6) provides: "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted 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 of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 348, 670 NYS2d 816 [1998], quoting Labor Law § 241[6]; *see* ***Harrison v State***, 88 AD3d 951, 931 NYS2d 662 [2d Dept 2011]). Inasmuch as the statute is not self-executing, a plaintiff must allege a violation of a specific and applicable provision of the Industrial Code (*see* ***Wilinski v 334 East 92nd Hous. Dev. Fund Corp.***, *supra*; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra*; ***Jara v New York Racing Assn., Inc.***, 85 AD3d 1121, 1123, 927 NYS2d 87 [2d Dept 2011]; ***D'Elia v City of New York***, 81 AD3d 682, 684, 916 NYS2d 196 [2d Dept 2011]).

Labor Law §§ 240 (1) and 241 (6) contain identical language exempting from the statutes "owners of one and two-family dwellings who contract for but do not direct or control the work" (*see* Labor Law §§ 240 [1], 241[6]; ***Chowdhury v Rodriguez***, 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]; *see also* ***Rodriguez v Gany***, 82 AD3d 863, 918 NYS2d 187 [2d Dept 2011]). In order for a defendant to receive the protection of the homeowners' exemption, the defendant must satisfy two prongs required by the statutes (*see* ***Chowdhury v Rodriguez***, *supra*). First, defendant must show that the work was conducted at a dwelling that is a residence for only one or two families; second, defendant must demonstrate that defendant did "not direct or control the work" (Labor Law §§ 240 [1], 241 [6]), that is, did not supervise the methods and manner of the work (*see id.*). The exception was enacted to protect those who, lacking business sophistication, would not know or anticipate the need to obtain insurance to cover them against absolute liability (*see* ***Acosta v Hadjigavriel***, 18 AD3d 406, 794 NYS2d 445 [2d Dept 2005]; *see also* ***Szczepanski v Dandrea Constr. Corp.***, 90 AD3d 642, 934 NYS2d 432 [2d Dept 2011]). Courts have considered several factors in determining whether a homeowner is entitled to the exemption, including the nature and purpose of the work and the commercial versus residential use of the property (*see* ***Bartoo v Buell***, 87 NY2d 362, 639 NYS2d 778 [1996]; ***Castellanos v United Cerebral Palsy Assn. of Greater Suffolk, Inc.***, 77 AD3d 879, 909 NYS2d 757 [2d Dept 2010], *lv denied* 16 NY3d 704, 919 NYS2d 119 [2011]). When the owner of a one- or two-family dwelling contracts for work that directly relates to the residential use of the home, even if the work also serves a commercial purpose, the owner is shielded by the homeowner exemption from the absolute liability of Labor Law §§ 240 and 241 if the owner did not direct or control the work (*see* ***Bartoo v Buell***, *supra*).

Labor Law § 200 is a codification of the common-law duty of landowners and general contractors

to provide workers with a reasonably safe place to work (*see* ***Comes v New York State Elec. and Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Ross v Curtis-Palmer Hydro-Electric Co.***, *supra*; ***Lombardi v Stout***, 80 NY2d 290, 590 NYS2d 55 [1992]; ***Rojas v Schwartz***, 74 AD3d 1046, 903 NYS2d 484 [2d Dept 2010]). Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 or based on common-law negligence if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the condition (*see* ***Ortega v Puccia***, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]). By contrast, when a claim arises out of alleged defects or dangers in the methods or materials of the work, there can be no recovery against the owner or general contractor under Labor Law § 200 or common-law negligence unless it is shown that the party to be charged had the authority to supervise or control the performance of the work (*see id.*). Although property owners often have general authority to oversee the work's progress, mere general supervisory authority at a worksite for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200 or common-law negligence (*see id.*). To succeed on a claim under Labor Law § 200 against a property owner, a plaintiff injured by his or her use of defective equipment provided by his or her own employer must establish that the defendant had the authority to supervise or control the performance of the work (*see* ***Ramos v Baker***, 91 AD3d 930, 937 NYS2d 328 [2d Dept 2012]; ***Ortega v Puccia***, *supra*).

Here, the Court initially notes that the unsigned and uncertified deposition transcripts of Mr. Seddio on behalf of defendant, of non-party witness Richard Perillo, and of plaintiff from November 22, 2010 submitted by defendant are not in admissible form and, thus, cannot be considered on the summary judgment motion (*see* ***In re Delgatto***, 82 AD3d 1230, 919 NYS2d 391 [2d Dept 2011]; *see also* CPLR 3116 [a]; ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]).

Mr. Seddio states in his affidavit dated December 9, 2010 that he and his wife, Annmarie, and son are the sole and exclusive residents of the subject property and that the reason for building and moving into the subject house was so that their son would no longer have to take a ferry to commute to school from their prior residence on Shelter Island. In addition, he states that he and his wife are the sole owners of defendant, which is the owner of their home on the subject property. Mr. Seddio explains that defendant is the owner of the property because their accountant recommended that they use their pension fund money to purchase the property and construct the home. He assures that as soon as he and his wife are able to sell their home on Shelter Island, they will return the money to the pension fund and become title owners of the property. Mr. Seddio informs that he and his wife entered into an agreement on or about April 16, 2008 to hire Richard Perillo of Perillo Building Corp. to build their house on the subject property; that Mr. Seddio had no involvement of any kind in the construction work of Perillo Building Corp.; and that at no time during any phase of the work that was performed did either he or his wife supervise, control or direct Mr. Perillo or any of his employees in any of the work that they performed. In addition, he states that he and his wife did not supervise, direct or control any other person or entity performing work in the construction of their house. Mr. Seddio also states that at all times he, his wife, and their son expressly intended to live in the subject house as their permanent residence.

Plaintiff's deposition testimony from August 2, 2010 reveals that he worked at the construction site of the subject house for approximately six months; he performed trimming and finishing work; and there were two other Perillo employees working with him. In addition, plaintiff testified that on the date of the accident he and a co-worker, Javier, were applying plywood to the front of the house, each had a ladder and a nail gun. Plaintiff also testified that just prior to the accident, his ladder was extended to its

full 24 feet to the second floor of the house and Javier was holding it, perhaps from the second floor window opening, and plaintiff had a hammer in his hand and was hammering a piece of plywood that was already set into place with two nails in its center. Plaintiff stated that the subject ladder was a Perillo ladder, that he learned how to set up and secure the ladder from other employees, and that his employer had a trailer at the job site where plaintiff obtained his tools prior to starting work. The nails that plaintiff was hammering were approximately ten inches above the end of the ladder and he was standing on the third rung from the top of the ladder. As he was placing his hammer back into his belt and grabbing the nail gun to finish nailing the plywood, the ladder began to move to the left and he fell to the right. According to plaintiff, because Javier was holding the ladder, they did not need to secure the ladder with the "nails" on the side of the ladder to keep it from sliding.

By his affidavit dated February 1, 2011, plaintiff states that "My accident happened in the early afternoon, after lunch. At that time, my co-worker, Javier Bloise, and I were working near the front of the building, but on the right side of the front ... Javier and I had been assigned to work in that area by Kevin, who also worked for Perillo. We each had a ladder." In addition plaintiff states that "Before I went up the ladder just before my accident, I asked Javier to hold the ladder from above, through an opening from inside the building, because I had to carry a large piece of plywood up he ladder. I thought the ladder would be more secure if Javier held it because the 10-penny nails that I had were three inches long and the plywood was only 1/2-inch thick ... Putting a nail on the side of the ladder as a method of trying to secure it had additional risks which is why I asked Javier to hold my ladder."

Here, defendant, the owner of the property, demonstrated its entitlement to judgment as a matter of law with respect to the homeowner's exemption by establishing that it did not direct or control the work and that the property was intended to be used solely for residential purposes (*see* ***Holifield v Seraphim, LLC***, 92 AD3d 841, 940 NYS2d 1003 [2d Dept 2012]; *see also* ***Ruiz v Walker***, ___ NYS2d ___, 2012 NY Slip Op 02296 [2d Dept 2012]). The proffered proof reveals that the Seddios did not provide plaintiff with any equipment or work materials, nor were they even present at the time plaintiff was performing his work (*see* ***Affri v Basch***, 13 NY3d 592, 894 NYS2d 370 [2009]). Plaintiff admitted at his deposition on August 2, 2010 that the extension ladder that he was using at the time of his accident was provided by his employer, non-party Perillo Building Corp., and that his employer had a trailer on the site containing tools. Nowhere in plaintiff's admissible deposition testimony or in his affidavit does plaintiff expressly state or indicate that the Seddios or defendant supervised him or directed or controlled his work. In response to defendant's prima facie showing of entitlement to judgment as a matter of law, plaintiff failed to raise a triable issue of fact (*see* ***Holifield v Seraphim, LLC***, *supra*). Plaintiff failed to raise an issue of fact as to whether the home was not a one-or two-family dwelling or that it was used for a commercial purpose (*see* ***Pacheco v Halstead Communications, Ltd.***, 90 AD3d 877, 935 NYS2d 595 [2d Dept 2011]). Evidence that defendant was listed in the applications for construction permits as the contractor, that the construction permits were issued to defendant, and that the Seddios hired Perello Building Corp. are insufficient to raise an issue of fact concerning direction, supervision or control of plaintiff's work (*see id* [Trustee of Trust that owned property hired subcontractors to perform work and Trust was entitled to homeowner's exemption]). Therefore, defendant is entitled to summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) causes of action.

In addition, defendant established its prima facie entitlement to judgment as a matter of law dismissing the causes of action pursuant to Labor Law § 200 and for common-law negligence (*see* ***Ruiz v Walker***, *supra*). Plaintiff's accident did not involve any dangerous or defective condition on defendant's

premises and instead involved the manner in which plaintiff performed his work, which was not supervised by defendant or the Seddios, and which was performed on equipment provided by plaintiff's employer, not by defendant (*see* ***Ortega v Puccia***, *supra*). Defendant demonstrated that the accident arose from the means and methods of plaintiff's work and that neither defendant nor the Seddios had authority to supervise or control the work (*see* ***Affri v Basch***, *supra*; *see also* ***Ruiz v Walker***, *supra*; ***Ramos v Baker***, 91 AD3d 930, 937 NYS2d 328 [2d Dept 2012]; ***Paez v Shah***, 78 AD3d 673, 910 NYS2d 511 [2d Dept 2010]). In opposition, plaintiff failed to raise a triable issue of fact (*see* ***Ruiz v Walker***, *supra*; ***Ramos v Baker***, *supra*; ***Pacheco v Halstead Communications, Ltd.***, *supra*). Therefore, defendant is entitled to summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action.

Accordingly, the instant motion is granted and the complaint is dismissed in its entirety, and the cross motion is denied.

Dated: 12 April 2012

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION