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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HON. ORIN R. KITZES PART 17
Justice

x

CZESLAW KULESZA a/k/a CHESTER KULESZA And URSULA KULESZA

Plaintiffs,

Index No.: 21504/09
Motion Date: 03/14/12
Motion Cal. No.: 28-30
Motion Seq. Nos.: 1-3

- against -

228 SURFSIDE DRIVE, L.L.C. KONNER DEVELOPMENT CORP., G. KONNER CONSTRUCTION CORPORATION, M. LAIETA CONTRACTING, INC., IMPERIAL DRYWALL, LTD., And PAUL BENNETT CONSTRUCTION CORP.

Defendants

x

IMPERIAL DRYWALL, LTD.

Third-Party Plaintiff

- against -

Third Party
Index No.: 350461/11

KENNETH NAUGHTON a/k/a "KEN" NAUGHTON

Third-Party Defendant

x

The following papers numbered 1 to 57 read on these separate motions by defendant/third-party plaintiff Imperial Drywall, Ltd. (Imperial) pursuant to CPLR 3212 for summary judgment in its favor dismissing plaintiffs' complaint and all cross claims against it; by defendant 228 Surfside Drive, LLC s/h/a 228 Surfside Drive, L.L.C. (Surfside) pursuant to CPLR 3212 for summary judgment in its favor dismissing plaintiffs' complaint and all cross claims against it; and by defendant Paul Bennett Construction Corp. (PBC) pursuant to CPLR 3212 for summary judgment in its favor and pursuant to CPLR 3211 to dismiss plaintiffs' complaint and all cross claims asserted against it, and on this cross motion by defendant M. Laieta Contracting, Inc.(Laieta) pursuant to CPLR 3212 for summary judgment in its favor dismissing plaintiffs' complaint and all cross claims against it.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits	1-12
Notice of Cross Motion - Affidavits - Exhibits	13-16
Answering Affidavits - Exhibits	17-42
Reply Affidavits	43-57

Upon the foregoing papers it is ordered that the motions and cross motion are consolidated and determined as follows:

The instant action arises from personal injuries sustained by plaintiff Czeslaw Kulesza a/k/a Chester Kulesza (plaintiff), the owner of Kul Maintenance and Restoration, Inc. (Kul), on January 14, 2009, when he fell through an opening made for a basement stairway, while taking measurements to submit a bid to perform insulation work, on a two-story house under construction, owned by defendant Surfside, located at 228 Surfside Drive, Bridgehampton, New York (the premises or site). Defendant Surfside's principals are Carol Konner and Edward Heskin. Defendant Surfside entered into an agreement with defendant G. Konner Construction to act as construction manager for the project. Carol Konner's son, Greg Konner, is the president of defendant Konner Construction. Konner hired defendant PBC as the roofing and siding subcontractor; defendant Laieta as the framing subcontractor; and defendant Imperial as the subcontractor to do the metal framing in the basement for the project.

Plaintiff testified as follows: On the day of the accident, he went to the site with nonparty Luis Navarro, an acquaintance, who had informed him about the project, to submit a bid for Kul to do the insulation. While there, he spoke to someone on the telephone, who explained the nature and scope of the planned insulation work and asked plaintiff for a price estimate for labor and materials for the installation of insulation. He then went into the basement of the premises through an exterior concrete stairway to begin measuring the premises for his insulation bid. While in the basement, he encountered four or five men installing metal studs and partition walls. After counting the linear footage in the basement, he went up the exterior concrete stairway to the first floor. While looking forward and up, counting the linear footage on the first floor, he stepped backward onto a half inch thick board[1] which covered an opening in the floor. The board broke and he fell into the basement.

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[1]The board was called both Masonite and Homasote by the parties.

Carol Konner testified that her son Greg Konner was the vice president of Surfside and had signed the application for the building permit on Surfside's behalf. She also testified that defendant Konner Construction was hired as the construction manager for the project to be Surfside's on-site representative since Mr. Heskin was in Florida year round and she was in Florida six months of the year. She further testified that although Konner Construction billed under the category of general contractor for supervision, Konner Construction was not the general contractor for the project. She stated that she believed defendant Laieta was the general contractor. She was last at the site on December 26 or 27 of 2008, before returning to Florida. At that time, she saw the hole surrounded by two-by-fours and asked her son Greg if it was secure enough. He told her yes that Mark (Laieta) put up the two-by-fours to prevent anyone from walking into it and falling down.

Greg Konner testified as follows: As construction manager, defendant Konner Construction was the eyes and ears of the owner, defendant Surfside. He also hired subcontractors and ordered some of the materials for the project, that is, windows, stone, shingles and siding. He did not order the Masonite boards. He signed contracts on behalf of Surfside, such as the agreement with defendant Laieta, and had authority to sign checks on Surfside's behalf since he was named on Surfside's checking account. There was no general contractor for the project, but the framing contractor, defendant Laieta, acted as the general contractor and kept an eye on the other contractors when working at the site. He did not know if defendant Laieta was acting as general contractor on the date of the accident because at that time, Laieta's framing work was complete, except for some odds and ends, and Laieta was off the site. Defendant Laieta did not direct the subcontractors. He, however, expected Laieta to stop any unsafe conditions. The subcontractors were responsible for cleaning up their areas. If he saw something that needed to be cleaned up, he would tell the subcontractor to take care of it. He saw left over pieces of Masonite board in the kitchen approximately 15 feet from the subject opening. They were probably there for weeks as he passed them a hundred times. Defendant Laieta had made the subject opening for the basement stairway, and prior to leaving the site in December of 2009, defendant Laieta had constructed a wood railing around that opening. Defendant Laieta did not return to the site until after the January 14 accident, in late January of 2009. The week prior to the accident, the cement subcontractor, Sampogna, removed the wood barrier around the opening to bring pumps into the basement to pour the basement floor. Konner did not know plaintiff or whether defendant Laieta or any of the subcontractors had asked plaintiff to come to the site. On the day after the subject accident, employees of defendant Imperial told Konner that prior to plaintiff's accident, they had placed the Masonite board over the subject opening to keep the cold out while working in the basement.

Mark Laieta testified on behalf of defendant Laieta as follows: Laieta was hired as the framing contractor for the project. Greg Konner was the general contractor for the project. At the time of plaintiff's accident, defendant Laieta had completed its framing work and was not working at the site. Prior to leaving the site, defendant Laieta put up temporary wood railings made up of two-by-four feet boards around the opening in the first floor which it had made for the basement stairway.

Paul Bennett testified on behalf of defendant PBC as follows: PBC was hired by defendant Konner Construction. Greg Konner was at the site a few times per week, and the project manager for Konner, Ray Polito was at the site almost every day to oversee and inspect the work. As part of its work, defendant PBC permanently affixed half-inches thick, four-by-eight Homasote boards underneath the rubber roof. Defendant PBC had finished this roofing work approximately two or three weeks before the date of the subject accident and had placed its left over scraps of the Homasote boards in an on-site garbage container. Photos of the board plaintiff allegedly stepped on appeared to be his Homasote board. PBC only used the Homasote boards on the roof, but he assumed the boards may be used to protect floors and things of that nature on the interior of a building. He did not think it would be appropriate to use Homasote boards to cover a stairwell opening.

Greg Ditroia testified on behalf of defendant/third-party plaintiff Imperial as follows: Imperial was hired to install the metal framing in the basement of the premises. He was Imperial's sole employee and Imperial subcontracted out all of its jobs to others contractors. Imperial subcontracted out the installation of the metal framing for this project to third-party defendant Kenneth Naughton a/k/a "Ken" Naughton (Naughton). Ditroia was in the basement at the site the day before the accident and recalls observing an opening between the first floor and the basement. It was dark in the basement, but the opening appeared to be covered by plywood.

In their opposition papers, plaintiffs submit the affidavit of Leroy Salvador, a former employee of defendant/third-party plaintiff Imperial, who was working at the site on the date of the accident. Leroy Salvador avers that Imperial workers had used particle boards to cover the stairwell opening to prevent the cold air and wind from drifting downstairs in the basement where Imperial's workers were working. He also avers that the area around the stairwell opening was not safeguarded or blocked off with any saw horses, barriers, cones or warning tape, and that there were no warning signs posted. He further avers that they had been working for approximately three hours before the accident occurred.

In the complaint, plaintiff interposes claims for common-law negligence and violations of Labor Law §§ 200, 240(1) and § 241(6). His wife, plaintiff Ursula Kulesza, also has a derivative cause of action for loss of consortium.

As a preliminary matter, although the cross motion of defendant Laieta for summary judgment was untimely made (*see* CPLR 3212[a]), the nearly identical nature of the grounds asserted therein as to those in the other moving defendants' timely motions for summary judgment provides the requisite "good cause" for permitting the late cross motion. (*See* Ellman v Village of Rhinebeck, 41 AD3d 635 [2007].)

On a motion for summary judgment, it is the proponent's burden to 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 [1986]; *see also* 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 a showing requires denial of the motion regardless of the sufficiency of the opposing papers. (*See* Winegrad v New York Univ. Med. Ctr., *supra*.) However, if this showing is made, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a triable issue of fact. (*See* Alvarez v Prospect Hosp., *supra*.)

The branches of the motions of defendant/third-party plaintiff Imperial, defendant Surfside and defendant PBC and the cross motion of defendant Laieta for summary judgment in their favor dismissing plaintiffs' Labor Law §§ 240 (1), 241 (6), and § 200 causes of action and related cross claims against them are granted without opposition.

Plaintiff was neither employed at the site, nor a person lawfully frequenting the premises within the meaning of the Labor Law. Plaintiff's business, Kul, had not been hired by any contractor, owner, or agent to perform work on the site, but instead, was merely on the site as a potential bidder for the insulation work. (*See* Gibson v Worthington Division-of-McGraw-Edison Co., 78 NY2d 1108 [1991]; *see also* Mordkofsky v V.C.V. Dev. Corp., 76 NY2d 573 [1990]; Valinoti v Sandvik Seamco, Inc., 246 AD2d 344 [1998]; Chabot v Baer, 82 AD2d 928 [1981].) Whether plaintiff's business had volunteered or had been invited by defendants to submit an estimate for the insulation work for the project does not alter the status of that business from that of a potential bidder to that of an employee. Accordingly, plaintiff was not within the class of workers that those Labor Law provisions were enacted to protect and he cannot invoke them as a basis for recovery. (*See* Mordkofsky v V.C.V. Dev. Corp., *supra*.)

Plaintiffs' remaining cause of action sounds in common-law negligence.

In order to hold a defendant liable in common-law negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) that the breach constituted a proximate cause of the injury. (*See* Pulka v Edelman, 40 NY2d 781 [1976]; *see also* Ingrassia v Lividikos, 54 AD3d 721 [2008]; Demshick v Community Housing Management Corp., 34 AD3d 518 [2006].)

"[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party." (Espinal v Melville Snow Contractors, Inc., 98 NY2d 136, 138 [2002]; *see also* Church v Callanan Industries, Inc., 99 NY2d 104 [2002].) The Court of Appeals, however, has identified three exceptions to this general rule in which a party who enters into a contract may be held to have assumed a duty of care to noncontracting third parties. These exceptions are as follows: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely. (*See* Church v Callanan Industries, Inc., *supra*; *see also* Espinal v Melville Snow Contractors, Inc., *supra*; H.R. Moch Co., Inc. v Rensselaer Water Co., 247 NY 160 [1928].)

In this case, defendant PBC presented competent evidence demonstrating its prima facie entitlement to judgment as a matter of law dismissing plaintiffs' common-law negligence cause of action and related cross claims against it. This evidence established that defendant PBC owed no duty to plaintiff who was neither a party to, nor an intended third-party beneficiary of its agreement with defendant Konner to do the roofing and siding for the project (*see* Eaves Brooks Costume Co. v Y.B.H. Realty Corp., 76 NY2d 220 [1990]), and that none of the noted exceptions apply to justify imposing tort liability against defendant PBC in favor of plaintiffs. (*See* Espinal v Melville Snow Contractors, Inc., *supra*.)

Plaintiffs, in opposition, failed to raise a triable issue of fact as to whether defendant PBC's alleged negligence created or exacerbated the hazard which was a proximate cause of the injuries allegedly sustained so as to establish PBC's duty to the injured plaintiff. (*See* Espinal v Melville Snow Contractors, Inc., *supra*; *see also* Mathey v Metropolitan Transp. Auth., _AD3D_, 943 NYS2d 578 [2012]; Foster v Herbert Slepoy Corp., 76 AD3d 210 [2010].) Indeed, by merely disposing of the leftover Homasote boards in a garbage container at the site after completion of

its contracted for work, defendant PBC cannot be said to have created a dangerous condition and thereby to have launched a force or instrument of harm. (*See* Fung v Japan Airlines Co., Ltd., 9 NY3d 351 [2007]; *see also* Espinal v Melville Snow Contractors, Inc., *supra*.)

Accordingly, the branch of defendant PBC's motion seeking summary judgment in its favor dismissing plaintiffs' common-law negligence cause of action and related cross claims against it is granted.

Defendant Laieta presented competent evidence demonstrating its prima facie entitlement to judgment as a matter of law dismissing plaintiffs' common-law negligence cause of action and related cross claims against it. This evidence established that defendant Laieta owed no duty to plaintiff who was neither a party to, nor an intended third-party beneficiary of its agreement with defendant Surfside to do the framing for the project (*see* Eaves Brooks Costume Co. v Y.B.H. Realty Corp., 76 NY2d 220 [1990]), and that none of the noted exceptions apply to justify imposing tort liability against defendant Laieta in favor of plaintiffs. (*See* Espinal v Melville Snow Contractors, Inc., *supra*.)

Plaintiffs and defendants Surfside and Konner, in opposition, failed to raise any triable issues of fact as to whether defendant Laieta created or exacerbated the hazard which was a proximate cause of the injuries allegedly sustained so as to establish Laieta's duty to the injured plaintiff. (*See* Espinal v Melville Snow Contractors, Inc., *supra*; *see also* Mathey v Metropolitan Transp. Auth., _AD3D_, 943 NYS2d 578 [2012]; Foster v Herbert Slepoy Corp., 76 AD3d 210 [2010].) Although defendant Laieta made the hole for the basement stairway, the hole was not a danger because Laieta protected it with barriers prior to leaving the site after completion of its contracted for work. Thus, defendant Laieta cannot be said to have created a dangerous condition and thereby to have launched a force or instrument of harm. (*See* Fung v Japan Airlines Co., Ltd., 9 NY3d 351 [2007]; *see also* Espinal v Melville Snow Contractors, Inc., *supra*.) Contrary to the contention of plaintiffs and defendants Surfside and Konner, there is no proof that defendant Laieta was the general contractor of the project. Finally, defendant Laieta did not have sufficient control to be a party who could be held liable for the alleged hazardous condition of the improperly covered hole.

Accordingly, the branch of defendant Laieta's motion seeking summary judgment in its favor dismissing plaintiffs' common-law negligence cause of action and related cross claims against it is granted.

Defendant/third-party plaintiff Imperial also seeks summary judgment dismissing plaintiffs' common-law negligence cause of action and related cross claims against it on the grounds that it owed no duty to plaintiffs and that it did not create the alleged defective condition.

Based on the testimony of defendant Konner and the affidavit of witness Leroy Salvador, triable issues of fact exist concerning whether defendant/third-party plaintiff Imperial created the alleged defective trap-like hazardous condition upon which plaintiff stepped and fell through, by improperly covering the subject hole with the Masonite/Homasote boards, and thereby launched a force or instrument of harm. (*See* Ragone v Spring Scaffolding, Inc., 46 AD3d 652 [2007]; *see also* Bienaime v Reyer, 41 AD3d 400 [2007]; Dugan v Crown Broadway, *LLC*, 33 AD3d 656 [2006].)

Accordingly, the branch of the motion of defendant/third-party plaintiff Imperial for summary judgment in its favor dismissing plaintiffs' common-law negligence cause of action and related cross claims against it is denied.

Defendant Surfside seeks summary judgment dismissing plaintiffs' common-law negligence cause of action and related cross claims against it as a matter of law on the grounds that it did not create the alleged defective condition and cannot be liable for the alleged negligence of its independent contractors.

An owner of property has a duty to maintain his or her premises in a reasonably safe condition. (*See* Kellman v 45 Tiemann Associates, Inc., 87 NY2d 871 [1995]; *see also* Basso v Miller, 40 NY2d 233 [1976].) In order for an owner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, it must be established that a defective condition existed and that the owner affirmatively created the condition or had actual or constructive notice of its existence. (*See* Spindell v Town of Hempstead, 92 AD3d 669 [2012]; *see also* Fontana v R.H.C. Dev., LLC, 69 AD3d 561 [2010]; Bodden v Mayfair Supermarkets, Inc., 6 AD3d 372 [2004].) An owner has constructive notice of a dangerous or defective condition on property when the condition is visible and apparent, and has existed for a length of time sufficient to afford a reasonable opportunity to discover and remedy it. (*See* Gordon v American Museum of Natural History, 67 NY2d 836 [1986].)

Generally, a party who retains an independent contractor is not liable for injury to a third person caused by an act or omission of the independent contractor or its employees. (*See* Chainani v Board of Educ. of City of N.Y., 87 NY2d 370 [1995]; *see also* Kleeman v Rheingold, 81 NY2d

270 [1993].) However, an exception to this general rule is the nondelegable duty exception, which is applicable where the party is under a duty to keep premises safe. (*See* Rosenberg v Equitable Life Assurance Society of the United States, 79 NY2d 663 [1992]; *see also* Brice v Vermeulen, 74 AD3d 858 [2010]; Backiel v Citibank, N.A., 299 AD2d 504 [2002].) Because that duty is nondelegable, an owner may be liable for a dangerous condition created by its agents or contractors. (*See* Richardson v David Schwager Associates, Inc., 249 AD2d 531 [1998].) Further, where an agent or contractor creates a dangerous condition, a plaintiff need not establish notice of the condition to establish liability against the owner. (*See* Richardson v David Schwager Associates, Inc., *supra*.)

Here, since defendant Surfside's contractor, defendant/third-party plaintiff Imperial, allegedly created a dangerous condition, and because defendant Surfside owed a nondelegable duty to keep its premises safe, the branch of defendant Surfside's motion for summary judgment in its favor dismissing plaintiffs' common-law negligence cause of action and related cross claims against it is denied.

Dated: June 7, 2012

J.S.C.