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SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 43 NASSAU COUNTY

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

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CARLOS MEJIA,

Plaintiff(s),

Index No. 2228-2010

-against-

JIL-CREST COLOR LABS, INC.,

Defendant(s).

Motion Seq. No.: 001, 002 & 003
Motion Submitted: 3/29/12

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JIL-CREST COLOR LABS, INC.

Plaintiff(s),

-against-

ROBERT TAUBER,

Defendant(s).

---x

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition.....X
Reply Affirmation.....X

Motion by the third-party defendants, Robert and Martha Tauber[1] for an Order of this Court, pursuant to CPLR §3212, granting summary judgment as a matter of law, is granted, and its motion pursuant to CPLR §3211(a)(7), dismissing the third party plaintiff's, Jil-Crest Color

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[1]The parties, pursuant to a January 9, 2012, stipulation, have discontinued the third party action against Martha Tauber with prejudice and have agreed to amend the caption accordingly.

Labs, Inc.'s ("Jil-Crest") summons and complaint, is rendered moot.

Motion by plaintiff, Carlos Mejia, for an Order of this Court, pursuant to CPLR §3212, granting him summary judgment as a matter of law against defendant, Jil-Crest, is denied.

Cross Motion by defendant, Jil-Crest, for an Order of this Court, pursuant to CPLR §3212, granting summary judgment dismissing the plaintiff's, Carlos Mejia's complaint against it, is granted.

The instant motions arise from the underlying personal injury cause of action, setting forth claims under Labor Law §§240 and 241, and common law negligence. Plaintiff alleges that he was injured while he was performing work on the roof of commercial real property owned by Jil-Crest.

PROCEDURE

Plaintiffs commenced the underlying action by filing a summons and complaint against Jil-Crest in February, 2010. In July, 2011, Jil-Crest filed a third-party action against Robert Tauber and Martha Tauber, seeking indeminifcation and contribution.

FACTS

On October 10, 2009, Carlos Mejia, employed at that time by Olsen Brothers Tree Surgeons ("Olsen Bros."), was assigned to clean up the debris from a tree limb that had fallen from a tree on the premises owned by Robert and Martha Tauber and onto the neighboring property, owned by Jil-Crest. Mejia was situated on the roof of Jil-Crest's propety while attempting to cut the tree limb with a chain saw, when a mishap with the saw's chain caused him to lose his balance and fall to the ground, sustaining injuries.

ARGUMENTS

Plaintiff, Mejia, argues that he was not provided with any safety equipment, such as a harness. As such, Jil-Crest is strictly liable under the relevant sections of the Labor Law. In addition to the pleadings, Mejia submits as supporting evidence, transcripts of the Examination Before Trial testimony of Robert Tauber, Carlos Mejia, and Robert Larson, President of Jul-Crest.

Third party defendant, Tauber, argues that he neither directed or controlled the work performed by Mejia. Further, the cited Labor Law sections only apply to work performed on structures, and not tree limb removal .

Defendant and third-party plaintiff, Jil-Crest, argues that it did not hire Olsen Bros., nor did it supervise and/or control the work performed by Mejia or any of Olsen Bros.' employees. Further, if the injury arises from the contractor's methods and the owner of the premises exercised no control over the project, no liability under common law negligence or Labor Law, can attach. In addition, Jil-Crest was not an "owner" for the purposes of the cited Labor Law statutes, and the foregoing statutes only apply to work being performed on a building or structure.

DISCUSSION

A Court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is; therefore, entitled to summary judgment as a matter of law (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v. Journal-News*, 211 AD2d 626[2nd Dept. 1995]).

The proponent of a motion for summary judgment must establish, *prima facie,* its

entitlement to judgment as a matter of law, and must provide sufficient evidence demonstrating the absence of triable and material factual issues (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]; *Walden Woods Homeowners Assn. v. Friedman,* 36 AD3d 691 [2d Dept 2007]). Failure to do so requires that the motion be denied regardless of the sufficiency of the opposing papers. The burden of proof then shifts to the opposing party to produce admissible evidence demonstrating the existence of triable and material issues of fact on which its claim rests (*Zuckerman v. New York,* 49 NY2d 557 [1980]).

MEJIA'S MOTION FOR SUMMARY JUDGMENT

To hold a defendant liable in common-law negligence, a plaintiff must demonstrate: a duty owed by the defendant to the plaintiff; a breach of that duty; and that the breach constituted a proximate cause of the injury (see *Ingrassia v. Lividikos,* 54 AD.3d 721 [2nd Dept 2008]). Generally, the existence of a defendant's duty is a legal question to be determined by the court in the first instance. In making such a determination, courts look to whether the relationship of the parties is such as to give rise to a duty of care, whether the plaintiff was within the zone of foreseeable harm, and whether the accident was reasonably foreseeable (see *Lynfatt v. Escobar,* 71 AD3d 743[2nd Dept 2010]).

After defendant's duty to the plaintiff has been established, the defendant is required to show that its alleged breach of duty was not a substantial cause of the events which produced the injury (see *Cruz v. City of New York,* 6 AD3d 644 [2nd Dept. 2004]). Ordinarily, it is for the trier of fact to determine the issue of proximate cause.

The other prevailing issue is whether the cited Labor Law provisions apply and if so, whether any of the defendants controlled, supervised or directed construction work on the

project. Any liability must be premised upon the duty to safeguard the construction area. Without control over the construction project, defendants would then have no duty with respect to the condition that resulted in plaintiff's accident. In sum, in the absence of duty, there can be no liability (see *Miano v. State University Const. Fund*, 291 AD2d 830 [4th Dept 2002], *Giordano v. Seeyle, Stevenson & Knight, Inc.*, 216 AD2d 439 [2nd Dept 1995]).

Generally, the Labor Law statutes imposing a duty on owner or general contractor to provide construction site workers with a safe place to work applies to owners and contractors who actually exercise control or supervision over the work and had actual or constructive notice of the unsafe condition (see *Cahill v. Triborough Bridge & Tunnel Authority*, 31 AD3d 347 [1st Dept 2006]).

Subdivision 1 of section 200 of the Labor Law is merely a codification of the common-law duty of owners and contractors to furnish a safe work place . It requires that the work site " ... be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein ... "(see *DaBolt v. Bethlehem Steel Corp.*, 92 AD2d 70[4th Dept 1983]).

Under Labor Law § 240(1), owners, general contractors and their agents who fail to provide or erect the safety devices necessary to give proper protection to a worker involved in the *erection, demolition, repair, alteration, painting, cleaning or pointing of a building or structure are absolutely liable when that*

worker sustains injuries proximately caused by that failure.

Labor Law § 241(6) provides that "*...[a]ll 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..."

Generally, Labor Law §240 provides in relevant part;

> "... all contractors and owners and their agents, *except owners of one and two-family dwellings who contract for but do not direct or control the work*, 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..."

Labor Law § 241 sets forth specific safety requirements for contractors and owners and their agents regarding such work, with the same exceptions.

In reviewing the record setting forth the facts of the instant case, there is no evidence to support that the defendants directed or controlled plaintiff's work. As to Jil-Crest, it did not hire the Olsen Brothers; however, under certain conditions, it may be deemed an "owner" under the statute.

Section 241 of the Labor Law imposes liability upon "owners" but does not define the term. Looking to the legislative history for guidance, it is immediately apparent that the owner was the party who had the prime contract with the general contractor and who, as titleholder, would receive the benefit of the work and who thus had an interest in completing it. The owner, jointly with the general contractor, would have the right to choose the subcontractor and to coordinate and supervise the work. Since the goal of the statute was to protect workmen, vicarious liability was imposed on owners in the hope that they would enforce their right to choose responsible and safety-conscious subcontractors as well as their right to impose safety

measures on those subcontractors (see generally, N.Y. Legis. Ann., 1969, pp. 407–408).

The "owners" contemplated by the Legislature are those parties with a property interest who hire the general contractor to undertake the construction work on their behalf (see N.Y. Legis. Ann., 1969, pp. 407–408). It is the party who, as a practical matter, has the right to hire or fire subcontractors and to insist that proper safety practices are followed. It is the *right* to control the work that is significant, *not* the actual exercise or non exercise of control. The Legislature could not have intended to impose vicarious liability on parties who had no power to choose responsible subcontractors or to influence their safety practices, when the primary purpose of the statute was to protect workers by encouraging owners and general contractors to insist on adherence to safety rules

In the referenced case, Tauber contracted with the general contractor to have the work performed on his behalf. Despite the fact that Jil-Crest was the legal titleholder, it had no contractual relationship with the general contractor or the subcontractors and thus had no power to insist that safety measures be followed.. Tauber was the only party with the right to insist on safety practices and was, therefore, the "owner" for purposes of section 241 of the Labor Law (see *Buonassisi v. Sears, Roebuck & Co.*, 43 AD2d 701 [2nd Dept 1973]).

The court notes the plaintiff's citation of the case *Sanatass v. Consolidated Investing Company, Inc. et al.*, 10 NY3d 33, to support its argument of strict liability under Labor Law § 240 (1) and his attempt to extend liability to Jil-Crest. However, this Court finds that it is distinguishable from the case at bar. There, the court addressed the issue of liability of out of possession owners of the affected property where the work was performed.

It is established law that "[t]o come within the special class for whose benefit absolute

liability is imposed upon contractors, owners and their agents to furnish safe equipment for employees under section 240 of the Labor Law, *a plaintiff must demonstrate that he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it owner, contractor or their agent* ". All that is required is that there be "some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest" (*Abbatiello v. Lancaster Studio Assoc.*, 3 NY3d 46, 51 [2004]).

Here, no such nexus exists between Jil-Crest and the contractor.

In addition to the foregoing, the removal of a tree limb from the roof of a building, which did not involve construction or repair to the roof, does not fall within the purview of the cited Labor Law statutes. Although not limited to building sites, the work in which plaintiff was engaged must have affected the structural integrity of the building or structure and/ or an integral part of the construction of a building or structure. Here, the plaintiff testified that his purpose for being on the roof, was for the "cleaning" the tree limbs from the subject premises and Jil-Crest testified that there was no structural damage to the roof.

Similarly, in *Crossett v. Wing Farm, Inc.*, 79 AD3d 1334 (3rd Dept 2010), the court dismissed plaintiff's cause of action alleging a violation of Labor Law § 241(6), as his accident during tree removal did not arise from construction, excavation or demolition work. As such, plaintiff was not engaged in any activity covered by this statute.

To establish any duty owed by Jil-Crest to Mejia, this Court must establish the nature of the relationship between Jil-Crest and the plaintiff. As it is undisputed that Jil-Crest did not hire Olsen Bros., or instruct any of its employees to enter its premises, Mejia could be classified as a trespasser or a licensee.

A 'trespasser' is a person who enters upon premises of another without invitation, express or implied, and does so out of curiosity or for his own purpose or convenience and not in the performance of any duty to the owner. A 'licensee' is a person who is neither a passenger, servant or trespasser and does not stand in any contractual relationship with owner of premises and who is permitted to go thereon for his own interest, convenience and gratification (see *Mendez v. Goroff*

25 Misc 2d 1013[NY Sup Ct 1960]).

Using the analysis in *Platnick v. Feldman,* 285 AD 1086 (2nd Dept 1955), where a photographer obtained permission from landlord and tenant of building to go upon roof of building to take photographs, this Court determines that Mejia is a licensee. Although Jil-Crest did not give him express permission to enter onto the roof, there was implied consent to perform his duties in that Jil-Crest's principal, Larson, did not order plaintiff to get off the roof and he even watched Mejia as he performed his duties. Even if there some benefit to Larson, as he was concerned about the removal of the tree branch, there was more of a benefit to Mejia and the Olsen Bros. in that they were paid to perform a job on behalf of Tauber, and they could only accomplish or best accomplish the task by being on Jil-Crest's roof.

The common law duty of care owed by an occupier of land to a licensee is to refrain from intentional, wanton or willful infliction of injuries, and to warn of traps and dangerous defects not likely to be discovered by the licensee (see *LeRoux v. State of New York,* 307 NY 397 [1954]). In *Platnick*, the court determined that the injured plaintiff photographer who fell through a skylight while on the roof, was not entitled to recover from landlord and tenant for injuries sustained as the skylight was open, obvious, and unobstructed (see *Platnick v. Feldman*,

supra). Here, the plaintiff's evidence does not sufficiently support that Jil-Crest breached any such duty owed under common law negligence.

According to the record, notwithstanding the plaintiff's allegations in his complaint, there is nothing to support that any defective and/or dangerous condition existed on the property. Rather, the accident occurred as a result of a mishap with the chain saw: "...When I cut one one [of] the limb broke and something–my–the motorized saw got stuck and threw me down..." (see Notice of Cross Motion, Exhibit F, Tr. Carlos Mejia, ln. 19-22).

Accordingly, Jil-Crest has met its prima facie burden for Summary Judgment as a matter of law. The Court has considered plaintiff's arguments in opposition, and as already discussed herein, it has determined such arguments to be unavailing.

TAUBERS MOTION FOR SUMMARY JUDGMENT

The law is clear that an owner's liability under Sections 240 and 241 of the Labor Law is independent of the owner's actual control or supervision of the workplace. *In Sweeting v. Board of Coop*, 83 AD2d 103 (4th Dept.1981), the court defined an owner for Labor Law purposes as the party with a property interest, who receives the benefit of work being done on the premises and who has the right to insist on adherence to safety rules. "It is the *right* to control the work that is significant, *not* the actual exercise or nonexercise of control." at 114, 443 N.Y.S.2d 910.

The prevailing issue, as to Tauber, whether, as an owner, any exceptions apply. It is undisputed that the Tauber property is a two-family dwelling and therefore falls under the homeowner exception. It also relevant to set forth the essential purpose of the homeowner exemption, which was added to Labor Law § 240 (1) and § 241 in 1980. The exemption was intended by the Legislature to shield homeowners from the harsh consequences of strict liability

under the provisions of the Labor Law and to reflect the legislative determination that the typical homeowner is no better situated than the hired worker to furnish appropriate safety devices and to procure suitable insurance protection (see *Bartoo v Buell*, 87 NY2d 362, 367 [1996], *Dineen v Rechichi*, 70 AD3d 81 [2009]).

Since the enactment of this amendment, the courts have repeatedly granted an exemption from the liability imposed by the Labor Law upon homeowners who contract for repair work, where it is clear that the property is used solely as a one- or two-family dwelling and where the homeowner does not direct or control the work (*see, Schwartz v. Foley,* 142 AD2d 635[1998], *Rimoldi v. Schanzer,* 147 AD2d 541[1989]).

The facts in this record are insufficient to demonstrate direction and control within the meaning of Labor Law § 240 (1) (see *Mayen v. Kalter* 282 AD2d 508 [2nd Dept 2001]).

Notwithstanding the foregoing, and as already discussed herein, the cited Labor Law statutes do not apply to the instant case. Additionally, there is no duty owed to plaintiff for his injuries which occurred while performing his duties on Jil-Crest's property.

Accordingly, Tauber's motion for Summary Judgment is granted and its motion to dismiss under CPLR §3211 (a) (7) is rendered moot in that Jil-Crest's third-party complaint sought contribution and/or indemnification from Tauber, if Jil-Crest was found to be liable for Mejia's injuries.

MEJIA"S MOTION FOR SUMMARY JUDGMENT

For all the foregoing reasons, plaintiff's motion for summary judgment against Jil-Crest is denied.

CONCLUSION

Accordingly, Robert and Martha Tauber's motion for summary judgment as a matter of law, is granted, and its motion to dismiss the Jil-Crest's third-party summons and complaint, is rendered moot, plaintiff's motion for summary judgment against defendant, Jil-Crest, is denied, and Jil-Crest's motion for summary judgment dismissing the plaintiff's, complaint against it, is granted.

Plaintiff's complaint is therefore **dismissed** in its entirety.

This constitutes the Decision and Order of the Court.

Dated: June 13, 2012
Mineola, N.Y.

Hon. James P. McCormack, A.J. S. C.

ENTERED
JUN 25 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE