NEW YORK SUPREME COURT ----- COUNTY OF BRONX

PART 22

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No.: 303325/2009

KRESIMIR SOVULJ,

-against-

Present:
HON. NORMA RUIZ

PROCIDA REALTY AND CONSTRUCTION CORP OF NEW YORK, SDS PROCIDA DEVELOPMENT FUND1 MANAGER, LLC, SDS PROCIDA MANAGERS, LLC, SEVENTEEN DEVELOPMENT, LLC., PROCIDA CONSTRUCTION COPR., F&K PRODUCTIONS LTD. d/b/a LONG ISLAND FABRICATIONS and SITE SAFETY, LLC

Defendants.

SEVENTEEN DEVELOPMENT, LLC and PROCIDA CONSTRUCTION CORP.,

Third-Party Plaintiffs

-against-

F&K PRODUCTIONS LTD d/b/a LONG ISLAND FABRICATIONS,

Third-Party Defendants

The following papers numbered 1 to 10 Read on this motion SUMMARY JUDGMENT
Noticed on 7/10/12 & 11/19/12 and duly submitted as No. 32 &33 on the Motion Calendar of 1/7/13

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to:

| Papers | Numbered |
|---|---|
| Notice of Motions and Affidavits Annexed..... | 1- 4 |
| Answering Affidavits..... | 5-8 |
| Replying Affidavits ..... | 9 |
| Memorandum of Law ..... | 10 |

Other:
*Upon the foregoing papers, the foregoing motion(s) [and/or cross-motions(s), as indicated below, are consolidated for disposition] and decided as follows:*

Defendants Procida Realty and Construction Corp of New York, Procida Construction Corp ("Procida") Seventeen Development, LLC ("Seventeen") and Site Safety, LLC ("Site Safety") move for summary judgment dismissing the plaintiff's action. Upon a review of the moving papers and opposition submitted thereto defendants motions are granted.

In this Labor Law action, the plaintiff seeks damages for injuries he allegedly sustained in a work related accident on June 17, 2008. The project involved the construction of a new luxury condominium building at One Grand Army Plaza in Brooklyn. Defendant Seventeen was the owner of the premises and Procida was the construction manager. Site Safety was the safety consultant. Plaintiff was a carpenter employed by non-party Acorn Furnishing Corp. ("Acorn"). Defendant F&K Productions LTD d/b/a Long Island Fabrications (F&K) was the subcontractor hired by Procida to fabricate and install solid corian surfaces (counter tops). F&K retained Acorn to install the corian. The plaintiff was working in the capacity of foreman and his supervisor was Frank Bozic ("Bozic"). When the units were completed, Acorn's employees would install Corian counter tops in the bathrooms and kitchens.

According to the plaintiff, on the day of the accident, Jimmy (one of Procida's superintendants) approached him and explained that he needed to install tracks in some of the units in order to install glass partitions. The track installation required cuts on the floor which had to be flush with the sheet rock walls. Plaintiff explained that he did not have the authority to accept the additional work and directed Jimmy to speak to Bozic. Later that morning, the plaintiff, Jimmy, and Bozic met in Procida's office to discuss the details of the additional work. Plaintiff alleges that Acorn agreed to perform the cuts on the floors. Conversely, Procida contends that Acorn had not yet accepted the job. Instead, the plaintiff was going to perform a test run to determine if the cuts could actually be made and how much work the cuts entailed so Acorn could draft and submit a proposal for the additional work.

Acorn did not have any wood cutting tools. The plaintiff decided to make the first cut by using a router to make an initial groove as a guide. He explained that since the router only reached so far, an inch or so on each side would remain uncut. The floor was already finished, thus, the cut had to be precise. Either the plaintiff or Frank decided to use the grinder to finish the cut. However, in order to use the grinder for this purpose, the blade had to be changed to a wood cutting blade. Plaintiff contends that during the meeting this method for making the cuts was explained to Jimmy.

After his lunch break, the plaintiff went to a nearby hardware store and purchased the necessary blade. He returned to the jobsite and along with a coworker, changed the grinder's blade. When they attempted to install the wood cutting blade, plaintiff realized that it would not fit properly with the grinder's safety guard in place. As a result, the safety guard was removed. Plaintiff then proceeded to the second floor unit and began to make the cut. As planned, he made the initial cut with the router. When he began to use the grinder, it got caught on a metal track that was located on the bottom of the floor behind the sheet rock. As a result, the grinder bounced back and cut the plaintiff's right wrist and thumb.

Defendants all move for summary judgment on various grounds.

First, defendants argue that the plaintiff was not within the protected class of worker under Labor Law § 241(6) because at the time of the accident he was performing work for the purpose of preparing a proposal. Movants contend that the Acorn was retained by F&K to install Corian countertops. The floor cut work was completely separate and apart from the scope of the work that was set forth in the contract between Acorn and F&K. Acorn had not been hired at the time of the plainitff's accident. Thus, the defendants argue, the plaintiff was merely a "contract vendee" and not a covered person (*citing Fabrizio v. City of New York*, 306 AD2d 87 [1st Dept 2003]).

The court disagrees. The cases cited by the defendants are distinguishable from the case at bar because the plaintiff did not go to the worksite for the sole purpose of inspecting the extent of the necessary work and prepare a proposal. He was already working at the jobsite pursuant to a contract between his employer, Acorn and F&K, a subcontractor. Under these circumstances, the court will not strip the plaintiff of his protected status.

Notwithstanding this court's finding that the plaintiff was a protected person under the Labor Laws, this action must be dismissed.

The plaintiff conceded that he only received instruction from his supervisor Bozic. There is no evidence that Procida, Seventeen or Site Safety knew that the plaintiff was going to use the grinder without the safety guard. Moreover, there were no witnesses to this accident. Thus, no one was aware that the plaintiff was using the grinder without a safety guard. Under these circumstances, the plaintiff's Labor Law § 200 and negligence claims must be dismissed.

Labor Law § 200 is a codification of the common law duty imposed upon an owner or general contractor to maintain a safe construction site. A precondition to this duty "is that the party

charged with that responsibility have the authority to control the activity bringing about the injury *(Comes v. N.Y. State Electric and Gas Corp.*, 82 N.Y.2d 876 [1993]). Here, it was the plaintiff's use of a grinder supplied to him by his employer that caused the accident. When a dangerous condition arises from a subcontractor's methods or materials, 'recovery against . . . the general contractor cannot be had unless it is shown that the party charged exercised some supervisory control over the operation (*Reilly v. Newireen Assoc.*, 303 A.D.2d 214 [1st Dept. 2003]). "General supervisory authority at the work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability" (*Vaneer v. 993 Intervale Ave. Housing Develp. Fund Corp.*, 5 A.D.3d 161 [1st Dept 2003]). Moreover, Labor Law § 200 "is not breached when the injury arises 'out of a defect in the subcontractor's own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work' " (*Lombhardi v. Stout*, 178 AD2d 208, 210 [1st Dept 1991][citations omitted]). Since it has not been shown that defendants were responsible for the manner in which the plaintiff performed his work no cause of action for common law negligence or Labor Law § 200 lies (see *Conforti v. Bovis Lend Lease LMB, Inc.*, 37 AD3d 235, 236 [1st Dept 2007]).

The court also dismisses the plaintiff's claim based on Labor Law § 241(6). This provision "requires owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Misicki v. Caradonna*, 12 NY3d 511, 515 [2009] *citing Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 501–502 [1993] [internal quotation marks omitted] ). In order to state a claim under Labor Law § 241 (6), a plaintiff must identify a specific Industrial Code provision mandating compliance with concrete specifications (see Ross supra). In his third amended complaint and in the bill of particulars the plaintiff alleged that defendants violated 12 NYCRR 23-1.12( c). Plaintiff did not allege that any other Code provisions were violated.

Industrial Code 12 NYCRR 23-1.12( c) provides as follows:

> (c) Power-driven saws.
>
> (1) Every portable, power-driven, hand-operated saw which is not provided with a saw table, except chain saws and circular brush saws, shall be equipped with a fixed guard above the base plate which will completely

protect the operator from contact with the saw blade when the saw is operating and with a movable self-adjusting guard below the base plate which will completely cover the saw blade to the depth of the teeth when such saw blade is removed from the cut.

Note: Electrically-driven portable saws are also subject to the provisions of section 23-1.10 of this Part (rule).

(2) Every power-driven saw, other than a portable saw, shall be equipped with a guard which covers the saw blade to such an extent as will prevent contact with the teeth. In operation, such guard shall rise automatically by pressure from the material being cut or shall be so adjusted that as the saw cuts the material, the distance from the material to the underside of the guard does not exceed one-half inch. The exposed teeth of the saw blade beneath the table shall be effectively guarded. Every such saw shall be provided with a cut-off switch within easy reach of the operator without his leaving the operating position.

Exception: Any arm saw whose upper blade half is enclosed and which is provided with a front blocking bar or rod is not required to be guarded by the automatic rising pressure guard.

(3) Every table circular saw used for ripping shall be provided with a spreader securely fastened in position and with an effective device to prevent material kickback.

Clearly 12 NYCRR 23-1.12 (c) is not applicable to the case at bar since the plaintiff was not using a saw. Instead, he was using a grinder with a wood cutting blade. In *Conforti supra* the Appellate Division, First Department held that this section was not "a catchall provision that includes the type of power tool at issue [grinder]" (*Id* at 236).

Since the plaintiff did not allege any other applicable Code violations, the court must dismiss his Labor Law § 241(6) claim.

The court has considered all of the plaintiff's arguments and finds them unpersuasive.

Accordingly, the defendants' motions are granted. Since the plaintiff voluntarily discontinued its action against the remaining defendants, this action is dismissed.

This constitutes the decision and order of the court.

Dated: 11/20/13
Bronx, New York

HON. NORMA RUIZ, J.S.C.