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SHORT FORM ORDER

INDEX No. 09-613
CAL No. 13-00141OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 4-9-13 (#002)
MOTION DATE 5-7-13 (#003)
MOTION DATE 6-6-13 (#004)
ADJ. DATE 7-2-13
Mot. Seq. # 002 - MG
003 - MotD
004 - MG

MICHAEL AGNELLO,

Plaintiff,

- against -

WHALEN CONTRACTING CORPORATION a/k/a WHALEN HOMES,

Defendant.

WHALEN CONTRACTING CORPORATION a/k/a WHALEN HOMES,

Plaintiffs,

- against -

KT CUSTOM HOMES, INC., KYLE C. LEITCH, GENOA SOSA and BERNARD O'CONNOR,

Defendants.

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Upon the following papers numbered 1 to 54 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; 20 - 34; 37 - 48; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 16 - 17; 49 - 50; Replying Affidavits and supporting papers 18 - 19; 35 - 36; 51 -52; 53 - 54; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

2-19-14

ORDERED that these motions are consolidated for purposes of this determination; and it is further

ORDERED that the motion by third-party defendants KT Custom Homes, Inc. and Kyle C. Leitch for an order pursuant to CPLR 3212 granting summary judgment dismissing the third-party complaint and all cross claims asserted against them is granted, and it is further

ORDERED that the motion (incorrectly denominated as a cross motion) by third-party defendants Genoa Sosa and Bernard O'Connor for an order pursuant to CPLR 3212 granting summary judgment dismissing the third-party complaint and all cross claims asserted against them is granted to the extent of granting summary judgment dismissing the third-party complaint as asserted against them, and is otherwise denied, and it is further

ORDERED that the motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in his favor on the issue of liability against the defendant on his cause of action for violation of Labor Law § 240 (1) is granted.

In this action, the plaintiff seeks to recover damages for personal injuries which he purportedly sustained on May 23, 2007 while constructing an addition and performing renovation work on a home owned by third-party defendants, Genoa Sosa and Bernard O'Connor. The plaintiff was injured when he fell off of an extension ladder while attempting to install tar paper on the roof of the addition to the house. Whalen Contracting Corporation a/k/a Whalen Homes ("Whalen") was the general contractor hired by Ms. Sosa and Mr. O'Connor. KT Custom Homes, Inc. ("KT") was a subcontractor hired by Whalen to perform the rough framing. The plaintiff was an employee of KT, and Kyle Leitch was the owner of KT.

In his complaint and bill of particulars, the plaintiff asserts causes of action for common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6). The plaintiff alleges that the defendant was negligent in, *inter alia*, failing to provide him with a safe place to work.

A third-party action was commenced by Whalen against KT, Kyle Leitch, Ms. Sosa, and Mr. O'Connor for contribution and common-law indemnification.

In their answer, KT and Mr. Leitch do not assert any cross claims against Ms. Sosa and Mr. O'Connor. However, in their answer, Ms. Sosa and Mr. O'Connor assert cross claims against KT and Mr. Leitch for contribution and common-law indemnification.

KT and Kyle Leitch, and Genoa Sosa and Bernard O'Connor now separately move for summary judgment dismissing the third-party complaint and all cross claims asserted against them, and the plaintiff moves for summary judgment in his favor against Whalen on his cause of action for violation of Labor Law § 240 (1).

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141 [1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary

judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once a *prima facie* showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

Turning first to the plaintiff's motion for summary judgment, the plaintiff made a *prima facie* showing of his entitlement to judgment as a matter of law on the issue of liability on his cause of action for violation of Labor Law § 240 (1) against Whalen by demonstrating, through his own deposition testimony, that he fell from an unsecured extension ladder when it slid out from underneath him, and that the failure to secure the ladder was the proximate cause of his injuries (*see* ***Grant v City of New York***, 109 AD3d 961, 972 NYS2d 86 [2d Dept 2013]; ***Ordonez v C.G. Plumbing Supply Corp.***, 83 AD3d 1021, 922 NYS2d 156 [2d Dept 2011]). Specifically, the plaintiff testified that at the time of the accident, he was working for KT, a subcontractor hired by Whalen, the general contractor. The plaintiff testified that he was never provided with any safety devices, and that there was no scaffolding set up at the job site. He used an extension ladder provided by KT to perform his work; and while he met the homeowners, they never instructed him on how to perform his work. On the day of the accident, he climbed the extension ladder while holding a piece of tar paper which he was going to apply to the roof. Before he climbed up the extension ladder, he made sure that the feet of the ladder were properly set on the cement and he leaned the ladder against the fascia of the roof. He was not secured to the ladder and the ladder was not secured to the roof. He went up and down the ladder twice, and each time tacked a piece of tar paper onto the roof while standing on the ladder. After he climbed the ladder a third time, and while he was tacking a third piece of tar paper onto the roof, the ladder moved and slipped out from underneath him, causing him to fall to the ground. He later learned that he shattered his left heel bone.

Whalen has not submitted opposition papers and, as a result, has failed to establish the existence of a triable issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*). Thus, the plaintiff's motion for summary judgment in his favor on his cause of action for violation of Labor Law § 240 (1) is granted.

With respect to the motion by KT and Kyle Leitch for summary judgment dismissing the third-party complaint and cross-claims asserted against them, it is well settled that "[a]n employer's liability for an employee's on-the-job injury is ordinarily limited to workers' compensation benefits . . . However, when an employee sustains a grave injury, as enumerated in Workers' Compensation Law § 11, a primary defendant may commence a third-party action against the injured plaintiff's employer for common-law indemnification and/or contribution" (***Maxwell v Rockland County Community Coll.***, 78 AD3d 793, 794, 911 NYS2d 130, 132 [2d Dept 2010] [internal citations and quotation marks omitted]). A grave injury is defined as "death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial

disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability (Workers' Compensation Law § 11).

Here, KT and Kyle Leitch established their *prima facie* entitlement to judgment as a matter of law dismissing the third-party complaint, in which Whelan seeks to recover for contribution and common-law indemnification against them, since the evidence demonstrates that the plaintiff did not suffer a "grave injury" as defined in Workers' Compensation Law § 11 (*see* ***Maxwell v Rockland County Community Coll.***, *supra*; ***Spiegler v Gerken Bldg. Corp.***, 35 AD3d 715, 826 NYS2d 674 [2d Dept 2006]). Specifically, the plaintiff testified at his deposition that he suffered a shattered heel bone as a result of the accident but he was able to return to work shortly following the accident.

Whalen has not submitted opposition papers and, as a result, has failed to establish the existence of a triable issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*). Accordingly, the motion for summary judgment by KT and Kyle Leitch is granted. Since this finding defeats any cross claims for common-law indemnification and contribution against KT and Kyle Leitch, they are dismissed (*see* ***Stone v Williams***, 64 NY2d 639, 485 NYS2d 42 [1984]).

As to the motion by Genoa Sosa and Bernard O'Connor for summary judgment dismissing the third-party complaint and cross-claims asserted against them, in the third-party complaint, Whalen only asserts a cause of action based on common-law negligence against Ms. Sosa and Mr. O'Connor. It is well settled that a cause of action sounding in common-law negligence may arise from either a dangerous or defective condition at a work site or the manner in which the work is performed (*see* ***Ortega v Puccia***, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]). Here, the injury did not arise from a defective condition inherent on the property but, rather, from the means utilized by the plaintiff to perform his work (*see* ***Cody v State of New York***, 82 AD3d 925, 919 NYS2d 55 [2d Dept 2011]; ***Pilato v 866 U.N. Plaza Assoc., LLC***, 77 AD3d 644, 909 NYS2d 80 [2d Dept 2010]). According to the plaintiff's deposition testimony, he was tacking a piece of tar paper onto the roof of the premises while standing on a ladder when the ladder moved and slipped out from underneath him, causing him to fall to the ground. The ladder was provided to him by his employer, KT.

In order to be held liable for common-law negligence where, as here, 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***, *supra* at 61, 866 NYS2d at 330; *see* ***La Veglia v St. Francis Hosp.***, 78 AD3d 1123, 912 NYS2d 611 [2d Dept 2010]; ***Orellana v Dutcher Ave. Bldrs., Inc.***, 58 AD3d 612, 871 NYS2d 352 [2d Dept 2009]; ***Chowdhury v Rodriguez***, 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]). Here, the evidence established that Ms. Sosa and Mr. O'Connor, the owners of the premises, did not exercise any supervision or control over the plaintiff's work (*see* ***Paez v Shah***, 78 AD3d 673, 910 NYS2d 511 [2d Dept 2010]; ***Castellanos v United Cerebral Palsy Assn. of Greater Suffolk, Inc.***, 77 AD3d 879, 909 NYS2d 757 [2d Dept 2010]; ***Harper v Holland Addison, LLC***, 75 AD3d 495, 903 NYS2d 753 [2d Dept 2010]). Thus, Ms. Sosa and Mr. O'Connor established their *prima facie* entitlement to summary judgment dismissing the third-party complaint.

Whalen has not submitted opposition papers and, as a result, failed to raise a triable issue of fact as to the liability of Ms. Sosa and Mr. O'Connor (*see* ***Alvarez v Prospect Hosp.***, *supra*). Thus, Ms. Sosa and Mr. O'Connor are entitled to summary judgment dismissing the third-party complaint as

asserted against them. The Court notes that while Ms. Sosa and Mr. O'Connor also move to dismiss the cross claims asserted against them, there were no cross claims asserted against them by KT and Mr. Leitch. Therefore, that branch of the motion which seeks dismissal of the cross claims is denied.

The Court directs that the Labor Law § 240 (1) claim as to which summary judgment was granted is hereby severed and that the remaining claims shall continue (*see* CPLR 3212 [e] [1]).

Dated: Feb. 18, 2014

W. Gerard Asher
J.S.C.

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