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SHORT FORM ORDER

INDEX No. 10-41174

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 7-9-13 (002 & 003)
MOTION DATE 11-13-13 (004)
ADJ. DATE 7-9-14
Mot. Seq. # 002 - MG
003 - MG
004 - XMD

SCOTT FORD,

Plaintiff,

- against -

JACOB KARMILY, SHARON KARMILY, J. KARMILY LLC, 5 PINE STREET DRIVE LLC, and ELDORADO CONSTRUCTION CORP,

Defendants.

DELL AND DEAN, PLLC
Attorney for Plaintiff
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Garden City, New York 11530

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Attorney for Defendants Karmily and 5 Pine Street Drive LLC
845 Third Avenue
New York, New York 10022

ELDORADO CONSTRUCTION CORP.,

Third-Party Plaintiff,

- against -

SCOTT SOUCY CONSTRUCTION CORP.,

Third-Party Defendant.

LESTER SCHWAB KATZ & DWYER, LLP
Attorney for Defendant/Third-Party Plaintiff
Eldorado Construction
120 Broadway
New York, New York 10271

Upon the following papers numbered 1 to 55 read on these motions and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; 11 - 34 ; Notice of Cross Motion and supporting papers 35 - 37 ; Answering Affidavits and supporting papers 38 - 40, 41 - 53, 54 - 58 ; Replying Affidavits and supporting papers 59 - 60, 61 - 74, 75 - 78 ; Other The parties memoranda of Law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (002) by plaintiff Scott Ford, the motion (003) by defendants Jacob Karmily, Sharon Karmily, J. Karmily LLC, and 5 Pine Tree Drive, LLC, and the cross motion (004) by plaintiff Scott Ford, are consolidated for the purposes of this determination; and it is

ORDERED that the motion by plaintiff Scott Ford for partial summary judgment on his Labor Law §240(1) claim as against defendant/third-party plaintiff Eldorado Construction Corp. is granted; and it is

ORDERED that the motion by defendants Jacob Karmily, Sharon Karmily, J. Karmily, LLC, and 5 Pine Tree Drive, LLC, for summary judgment in their favor dismissing the complaint and cross claims against them is granted; and it is

ORDERED that the cross motion by plaintiff Scott Ford for partial summary judgment on his Labor Law §240(1) claim against the Karmily defendants is denied, as moot.

Plaintiff Scott Ford commenced this action to recover damages for personal injuries allegedly sustained on January 29, 2009, when he fell from a ladder while working at the construction site of a one-family residence located at 5 Pine Tree Drive, Great Neck, New York. At the time of the accident, plaintiff was attempting to install a french door inside a door frame by pulling on panes of glass located at the top of the door. Plaintiff, who was using a suction cup to pull the pane of glass toward himself, allegedly fell when the suction cup came loose and caused him and the ladder on which he was standing to fall backward to the ground. The residence was allegedly owned by defendants Jacob Karmily, Sharon Karmily, J. Karmily LLC, and 5 Pine Tree Drive, LLC. Defendant/third-party plaintiff Eldorado Construction Corp. ("Eldorado") was hired as the general contractor for the project. Eldorado then hired plaintiff's employer, third-party defendant Scott Soucy Construction Corp. ("Soucy"), to perform carpentry services. By way of an amended complaint, plaintiff alleges causes of action against defendants for common law negligence and premises liability, and for violations of Labor Law §§ 200, 240 (1), and 241(6). Issue was joined and Eldorado brought a third-party action against Soucy for breach of contract and contractual indemnification.

Plaintiff now moves for partial summary judgment on his Labor Law §240(1) claim as against Eldorado, arguing it failed to ensure that he was provided with adequate safety devices to prevent or break his fall at the time of the accident. Eldorado opposes the motion on the grounds triable issues exist as to whether plaintiff's loss of balance, rather than a defect with the ladder, caused him to fall, and whether plaintiff's reluctance to use other safety devices, such as a scaffolding, provided to him on the day of the accident was the sole proximate cause of such accident. Additionally, Eldorado asserts that the motion should be denied as premature, since discovery is incomplete and triable issues remain precluding summary judgment in plaintiff's favor.

By way of a separate motion, defendants Jacob Karmily, Sharon Karmily, J. Karmily LLC and 5 Pine Tree Drive, LLC (herein collectively known as the "Karmilys") move for summary judgment dismissing the complaint on the ground they are exempted from plaintiff's Labor Law §§240(1) and 241(6) claims, as they are the owners of the subject premises. The Karmilys further argue that they cannot be held liable under the common law or Labor Law §200, since they neither controlled nor supervised the means and methods of plaintiff's work at the time of the accident. Plaintiff opposes the motion, arguing, inter alia, that triable issue exist as to whether the subject property, which replaced a demolished rental premises and subsequently was rented to partners of the corporate defendants, was built for commercial purposes. Plaintiff cross-moves for partial summary judgment as against the Karmilys, asserting that they should not be exempted from liability under the Labor Law's homeowners' exception. The Karmilys oppose plaintiff's cross motion, arguing that they are entitled to the homeowners' exemption from liability. Alternatively, the Karmilys assert, should the court deny their initial motion seeking dismissal of plaintiff's complaint,

plaintiff's cross motion should be denied on the ground a triable issue has been raised as to whether the Karmilys are indeed entitled to the homeowners' exemption.

Labor Law § 240(1) requires that safety devices, such as scaffolds, ladders, harnesses, or hoists be so "constructed, placed and operated as to give proper protection to a worker" (***Klein v City of New York***, 89 NY2d 833, 834, 652 NYS2d 723 [1996]). It was designed to prevent those types of accidents in which the protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person (*see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 501, 601 NYS2d 49 [1993]), and will be liberally construed to accomplish the purpose for which it was formed, that is to "protect workers by placing the ultimate responsibility for safety practices . . . on the owner and general contractor or their agent instead of on workers, who are scarcely in a position to protect themselves from accident" (***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 513, 577 NYS2d 219 [1991], *quoting* ***Koenig v Patrick Constr. Corp.***, 298 NY 313, 319, 83 NE 2d 133 [1948]). To prevail on a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*see* ***Bland v Manocherian***, *supra*; ***Sprague v Peckham Materials Corp.***, *supra*). Where an employee has been provided with an elevation-related safety device, it is usually a question of fact as to whether the device provided proper protection (*see* ***Beesimer v Albany Ave/Rte. 9 Realty***, 216 AD2d 853, 629 NYS2d 816 [3d Dept 1995]), "except in those instances where the unrefuted evidence establishes that the device collapsed, slipped or otherwise failed to perform its function of supporting the worker" (***Briggs v Halterman***, 267 AD2d 753, 754-755, 699 NYS2d 795 [3d Dept 1999]; *see* ***Gordon v Eastern Ry. Supply***, 82 NY2d 555, 562, 606 NYS2d 127 [1993]). Thus, "[t]he availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures" (***Conway v New York State Teachers' Retirement Sys.***, 141 AD2d 957, 958-959, 530 NYS2d 300 [3d Dept1988]; *see* ***Whalen v Sciame Constr. Co.***, 198 AD2d 501, 502, 604 NYS2d 174 [2d Dept 1993]). Moreover, a "plaintiff need not demonstrate that the precise manner in which the accident happened or the injuries occurred was foreseeable; it is sufficient that he demonstrate that the risk of some injury from defendants' conduct was foreseeable" (***Gordon v Eastern Ry. Supply***, *supra* at 562).

Here, plaintiff established his prima facie entitlement to summary judgment on his Labor Law §240 (1) claim against Eldorado by submitting evidence that the unsecured ladder he was provided was insufficient to prevent him from falling without the use of additional precautionary devices or measures (*see* ***Gordon v Eastern Ry. Supply***, *supra*; ***Grant v City of New York***, 109 AD3d 961, 972 NYS2d 86 [2d Dept 2013]; ***McGill v Qudsi***, 91 AD3d 1241, 937 NYS2d 460 [3d Dept 2012]; ***Gonzalez v AMCC Corp.***, 88 AD3d 945, 931 NYS2d 415, 931 NYS2d 415 [2d Dept 2011]; ***Riffo-Velozo v Village of Scarsdale***, 68 AD3d 839, 891 NYS2d 418 [2d Dept 2009]; ***Nimirovski v Vornado Realty Trust Co.***, 29 AD3d 762, 818 NYS2d 93 [2d Dept 2006]; ***Conway v New York State Teachers' Retirement Sys.***, *supra*). Significantly, plaintiff testified that he was standing near the top of an unsecured ten-foot A-frame ladder when he was instructed to assist his employer in moving a heavy french door into its frame by using a suction cup to pull on a pane of glass located near the top of the door. Although plaintiff indicated that the braces of the ladder were locked and its feet were flat on the floor, in the absence of some other safety device or precautionary measure, the ladder proved insufficient when the suction cup came loose from the pane of glass and the momentum caused plaintiff and the unsecured ladder to fall the ground. Indeed, plaintiff submitted an affidavit by nonparty witness Michael David, which states, inter alia, that the ladder on which plaintiff was

standing shifted under the momentum of his body when the suction cup failed, and that such momentum caused plaintiff and the ladder to fall to the floor.

In opposition, Eldorado failed to raise a triable issue warranting denial of the motion (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr***, 64 NY2d 851, 487 NYS2d 316 [1985]). Plaintiff's accident is distinguishable from those in cases involving falls from secured ladders where a worker loses his balance (*see* ***Spenard v Gregware Gen. Contr.***, 248 AD2d 868, 669 NYS2d 772 [3d Dept 1998]; ***Gange v Tilles Inv. Co.***, 220 AD2d 556, 632 NYS2d 808 [2d Dept 1995]), or those in which a plaintiff gives two distinct descriptions of how the accident occurred (*see* ***Xirakis v 1115 Fifth Ave. Corp.***, 226 AD2d 452, 641 NYS2d 45 [2d Dept 1996]). Eldorado's assertion that plaintiff failed to utilize a scaffold available elsewhere at the worksite is likewise insufficient to raise a triable issue where, as here, there was no evidence that plaintiff had been instructed to utilize such device (*see* ***Durmiaki v International Bus. Machines Corp.***, 85 AD3d 960, 925 NYS2d 628 [2d Dept 2011]; ***Ortiz v 164 Atl. Ave., LLC***, 77 AD3d 807, 909 NYS2d 745 [2d Dept 2010]; ***Beamon v Agar Truck Sales, Inc.***, 24 AD3d 481, 808 NYS2d 232 [2d Dept 2005]). Furthermore, Eldorado failed to demonstrate that the instant motion was premature, as it did not "offer an evidentiary basis to suggest that [further] discovery may lead to relevant evidence" (***Conte v Frelen Assoc., LLC***, 51 AD3d 620, 621, 858 NYS2d 258 [2d Dept 2008]; *see* ***Dempaire v City of New York***, 61 AD3d 816, 877 NYS2d 224 [2d Dept 2009]). The "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered" by further discovery is an insufficient basis for denying the motion (*see* ***Conte v Frelen Assoc.***, *supra* at 621). Accordingly, plaintiff's motion for partial summary judgment on his Labor Law §240(1) claim against Eldorado Construction Corp. is granted.

As to the branch of the Karmilys' motion for dismissal of plaintiff's claims under Labor Law §§240(1) and 241(6), both sections of the statute contain a homeowner's exemption precluding liability against "owners of one and two-family dwellings who contract for but do not direct or control the work" performed on their premises (*see* ***Castellanos v United Cerebral Palsy Assn. of Greater Suffolk, Inc.***, 77 AD3d 879, 909 NYS2d 757 [2d Dept 2010]; ***Boccio v Bozik***, 41 AD3d 754, 839 NYS2d 525 [2d Dept 2007]). Although the exemption is not available to an owner who uses or intends to use a dwelling solely for commercial purposes (*see* ***Van Amerogen v Donnini***, 78 NY2d 880, 573 NYS2d 443 [1991]), in cases of mixed residential and commercial use, the availability of the exemption is determined by the site and purpose test (***Khela v Neiger***, 85 NY2d 333, 337, 624 NYS2d 566 [1995]; ***Lenda v Breeze Concrete Corp.***, 73 AD3d 987, 989, 903 NYS2d 417 [2d Dept 2010]). The "site and purpose" test is "employed on the basis of the homeowners' intentions at the time of the injury underlying the action and not their hopes for the future" (***Truppi v Busciglio***, 74 AD3d 1624, 1625, 905 NYS2d 291 [3d Dept 2010], *quoting* ***Allen v Fiori***, 277 AD2d 674, 675, 716 NYS2d 414 [3d Dept 2000]; *see* ***Lenda v Breeze Concrete Corp.***, *supra*). Furthermore, where the work performed relates to the residential nature of the premises, the exemption applies, even if the work also serves a commercial purpose, since the commercial benefit will be deemed ancillary to the substantial residential use of such premises (*see* ***Bartoo v Buell***, 87 NY2d 362, 639 NYS2d 778 [1996]; ***Muniz v Church of Our Lady of Mt. Carmel***, 238 AD2d 101, 655 NYS2d 38 [1st Dept 1997]).

Here, the Karmilys established, prima facie, their entitlement to the protection of the homeowners' exemption by submitting evidence that the work performed on the subject property was for residential purposes, and that any commercial benefits that accrued to the defendants were ancillary to the residential

purpose of the property (*see* ***Khela v Neiger***, 85 NY2d 333, 624 NYS2d 566 [1995]; ***Holifield v Seraphim, LLC***, 92 AD3d 841, 940 NYS2d 100 [2d Dept 2012]; ***Castellanos v United Cerebral Palsy Assn. of Greater Suffolk, Inc.***, 77 AD3d 879, 909 NYS2d 757 [2d Dept 2010]; ***Stejskal v Simons***, 309 AD2d 853, 765 NYS2d 886 [2d Dept 2003]; ***Sheehan v Gong***, 2 AD3d 166, 769 NYS2d 507 [1st Dept 2003]). Significantly, it is undisputed that the Karmilys did not control or direct the work performed at the subject premises, and that such work was residential in nature. Although the Karmilys previously owned a rental property at the same location, that dwelling was demolished to accommodate the construction of the subject single-family residence in which they now reside. Indeed, the Karmilys describe the subject premises, which has many luxurious amenities including an elevator and butler's quarters, as their dream home, and aver that they spent several years looking for an ideal location to build such a home for use as their primary residence.

Plaintiff failed to raise a triable issue in opposition, as courts have consistently applied the homeowners' exemption for dwellings used for residential purposes, even where such dwelling is owned by a corporation, trust or non-profit entity (*see e.g.* ***Holifield v Seraphim, LLC***, *supra*; ***Castellanos v United Cerebral Palsy Assn. of Greater Suffolk, Inc.***, *supra*), and where, as in this case, the subject premises is partially owned by corporate entities, any commercial, tax, or estate benefits derived from such ownership is ancillary to the property's residential use (*see* ***Bartoo v Buell***, *supra*; ***Holifield v Seraphim, LLC***, *supra*; ***Castellanos v United Cerebral Palsy Assn. of Greater Suffolk, Inc.***, *supra*). Notwithstanding plaintiff's assertion regarding rental losses allegedly declared by the Karmilys' in relation to the subject premises on their tax returns, he failed to adduce any evidence that the work performed at the premises at the time of his accident was for a commercial purpose (*see* ***Truppi v Busciglio***, *supra*; ***Allen v Fiori***, *supra*). The cases cited by plaintiff where courts have found a triable issue because tax certificates labeling a piece of property as commercial were adduced are distinguishable, as those cases involved significant commercial ventures that took place in barns, silos and equipment sheds located away from a defendant's primary residence. Furthermore, the court finds plaintiff's remaining contentions to be without merit. Accordingly, the branch of the Karmilys' motion for summary judgment dismissing plaintiff's Labor Law §§240(1) and 241(6) claims is granted.

The branch of the Karmilys' motion for summary judgment dismissing plaintiff's common law negligence and Labor Law §200 claim is granted. "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (***Ortega v Puccia***, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]; *see* ***Chowdhury v Rodriguez***, 57 AD3d 121, 128, 867 NYS2d 123 [2d Dept 2008]). Where a premises condition is at issue, an owner or contractor may be held liable for a violation of Labor Law § 200 if they either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*see* ***Kuffour v Whitestone Const. Corp.***, 94 AD3d 706, 941 NYS2d 653 [2d Dept 2012]; ***Azad v 270 Realty Corp.***, 46 AD3d 728, 730, 848 NYS2d 688 [2d Dept 2007]). By contrast, when a claim arises out of alleged dangers in the method of the work or the use of defective equipment, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work or the provision of the alleged defective equipment (*see* ***Rizzuto v L.A. Wenger Contr. Co., Inc.***, 91 NY2d 343, 352, 670 NYS2d 816 [1998]; ***Persichilli v Triborough Bridge & Tunnel Auth.***, 16 NY2d 136, 262 NYS2d 476 [1965]; ***Ortega v Puccia***, *supra*).

Here, it is undisputed that the Karmilys did not have the authority to supervise or control plaintiff's work, as plaintiff testified that his employer exclusively controlled his work, and that, on the few occasions he did encounter the Karmilys, they gave him instructions regarding the aesthetic design of the premises (*see* ***Ruiz v Walker***, 93 AD3d 838, 940 NYS2d 896 [2d Dept 2012]; ***Ortega v Puccia***, *supra*; ***Dupkanicova v Vasiloff***, 35 AD3d 650, 829 NYS2d 133 [2d Dept 2006]). Further, even assuming, arguendo, that a dangerous condition existed on the premises, the Karmilys, who were not present on the day of the accident, did not create or have actual or constructive notice of any alleged defect, since they neither supplied the allegedly defective equipment nor received complaints about the same. In opposition, plaintiff's speculatory assertions that the Karmilys may have had notice because another worker had been injured three days before when he fell elsewhere on the worksite is insufficient to defeat the Karmilys prima facie showing (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). Accordingly, the branch of the Karmilys' motion for summary judgment dismissing plaintiff's common law negligence and Labor Law §200 claims against them is granted.

Finally, having dismissed the Labor Law §240 (1) claim against the Karmilys, the cross motion by plaintiff for partial summary judgment on such claim is denied, as moot.

Dated: JUL 14 2014

J.S.C.
HON. JEFFREY ARLEN SPINNER

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION