

Palme v CSC Holdings, LLC

2014 NY Slip Op 32712(U)

October 10, 2014

Sup Ct, Suffolk County

Docket Number: 11-21394

Judge: Daniel Martin

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

Palme v CSC Holdings
Index No. 11-21394
Page 2

Upon the following papers numbered 1 to 125 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 23 (004); 26 - 56 (005); 57 - 92 (006); Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 24-25; 93 - 118 ; Replying Affidavits and supporting papers 119 - 121; 122 - 123; 124 - 125 ; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that these motions by defendants Charles Ernst, Donald S. Harris, Jennifer L. Sommermann and CSC Holdings, LLC for summary judgment are consolidated for the purposes of this determination; and it is further

ORDERED that this motion by defendant Charles Ernst for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint and all cross claims as against him is granted; and it is further

ORDERED that this motion by defendants Donald S. Harris and Jennifer L. Sommermann for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint and all cross claims as against them is granted; and it is further

ORDERED that this motion by defendant CSC Holdings, LLC for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and all cross claims as against it is determined herein.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on August 4, 2009 when he was electrocuted during the installation of a cable line. The accident occurred at residential premises known as 67 East 2nd Street, in Freeport, New York. At the time of the accident, the split level ranch house was owned by Charles Ernst (Ernst) and his mother Virginia Ernst,¹ and the lower level of the house was leased by defendants Donald S. Harris (Harris) and Jennifer L. Sommermann (Sommermann).

The tenants, defendants Harris and Sommermann, who were scheduled to purchase the house, had telephoned Cablevision to request an upgrade of the cable service in the house to Optimum's "Triple Play" with the knowledge and consent of defendant Ernst. Defendant CSC Holdings, LLC (CSC), service provider to subscribers of Optimum services, issued a work order for said upgrade to its independent contractor, non-party Vision Pro Communications (Vision Pro), and plaintiff, a cable technician and installer for Vision Pro, received said work order. Plaintiff arrived at the subject residence with a co-worker who worked outside on a pole performing wiring and grounding work. Defendant Ernst was not present at the premises. The tenants were present and showed plaintiff where they wanted the cables to enter the interior walls and floors on the upper level so as to receive service on the lower level. While crouching on top of an oil tank close to a wall in the lower level washroom, with his right arm extended in a hole in the wall near the ceiling and his right shoulder and right side of his face up against the wall, and blindly attempting to grab with his bare right hand a coaxial cable that he

¹ The record reveals that Virginia Ernst died during the pendency of this action, and that the action was discontinued by plaintiff as against Cablevision Systems Long Island Corporation by stipulation dated August 27, 2013.

had let down a hole that he had drilled in the upper level floor, plaintiff was electrocuted. Prior to sticking his arm into the hole in the wall, plaintiff had looked into it with a flashlight and had seen some insulation, what appeared to be his coaxial cable approximately half a foot to 2 feet away from the opening as well as several other wires. His supervisor subsequently arrived and completed the job.

Plaintiff commenced this action on October 12, 2010. By his complaint, plaintiff asserts a first cause of action for common law negligence alleging, among other things, that defendants failed to provide him with a safe place to work, permitted certain wires or cables which contained live electrical current to be exposed or unprotected, failed to de-energize said wires or cables, and failed to warn him of said dangerous and defective condition. For his second, third and fourth causes of action, plaintiff alleges violations of Labor Law §§ 200, 240 and 241 (6), respectively. Regarding his Labor Law § 241(6) claim, plaintiff alleges failure to comply with Industrial Code (12 NYCRR) section 23-1.13 (Electrical hazards).

Defendant Charles Ernst seeks summary judgment dismissing the complaint and all cross claims against him. He seeks dismissal of plaintiff's Labor Law §§ 240 (1) and 241 (6) claims based on the homeowner's exemption, inasmuch as he did not direct or control the manner or method of plaintiff's work, and on the ground that plaintiff's unforeseeable and unnecessary act of climbing onto and crouching on an oil tank to locate the coaxial cable was the sole proximate cause of the accident. In addition, defendant Ernst seeks dismissal of the common-law negligence and Labor Law § 200 claims on the grounds that he did not create the alleged dangerous condition of a live or exposed wire in a space between the two floors of the house nor did he have actual or constructive notice of it inasmuch as he did not do any electrical or wiring work nor did he receive any complaints concerning the wiring or electrical system in the home. His submissions in support of his motion include the pleadings and his own deposition transcript as well as the deposition transcripts of plaintiff, and defendants Sommermann and Harris. The attorney for defendants Harris and Sommermann submits an affirmation in partial support of defendant Ernst's motion asserting that plaintiff's own negligent and unforeseeable conduct, based on his own unilateral decision, of reaching for the coaxial cable without protective gloves and without being able to see inside the opening that he knew contained unidentified wires was the sole proximate cause of the accident.

Defendants Harris and Sommermann request summary judgment dismissing the complaint and all cross claims against them. They assert that they cannot be held liable under Labor Law §§ 240 (1) and 241 (6) inasmuch as they did not own the premises and plaintiff's work was not a covered activity under the Labor Law; they did not create nor have any prior notice of the alleged dangerous condition; the lower level of the house where they resided was finished prior to their entry in 2003 and they did not perform any electrical work therein; and that in any event, plaintiff could not identify the cause of his alleged electric shock. Their submissions include the pleadings, plaintiff's bill of particulars, and their deposition transcripts as well as the deposition transcripts of defendant Ernst and plaintiff.

Defendant CSC seeks summary judgment dismissing the complaint and all cross claims against it. Among its assertions in support are that it was neither owner nor general contractor; it was not involved in the specific work being performed by plaintiff nor did it exercise direct control or supervision of plaintiff's work; it had no notice of the alleged dangerous condition; and plaintiff was the

sole proximate cause of his injuries. Its submissions include the pleadings, plaintiff's bills of particulars, and the deposition transcripts of the parties as well as that of Charles Karwowski on behalf of defendant CSC.

Plaintiff, in opposition, argues, among other things, that plaintiff's work involved an alteration or construction under Labor Law § 240 and that no safety device such as a scaffold with appropriate side rails was available for his use to enable him to access the eight-foot height so as to retrieve the coaxial cable; that a ladder could not have been used given the presence of the oil tank directly underneath the opening in the wall; and that defendant Harris exercised sufficient direction and control over plaintiff's work by giving explicit instructions for at least half an hour on how and what he wanted done so as to preclude the benefit of the homeowner's exemption. In addition, plaintiff argues that defendant CSC was the general contractor for the cable installation, inasmuch as it retained the services of plaintiff's employer, Vision Pro, and thus, was vicariously liable under Labor Law § 240. Plaintiff's submissions include his affidavit and the job referral sheet that he received from his employer for the work at the subject premises.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., 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 this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d at 324, 508 NYS2d 923, citing to *Zuckerman v City of New York*, 49 NY2d at 562, 427 NYS2d 595).

Plaintiff testified at his deposition that at the time of the subject accident, he had been employed by Visionpro, a subcontractor of Cablevision, for approximately six months as a cable technician and installer. In addition, plaintiff testified that he arrived at the subject location with a company van which contained equipment such as cable boxes, modems, phone lines, and two ladders, a 6-foot folding ladder and a 24-foot ladder for accessing telephone poles. Plaintiff also testified that the customer who requested the service, Donald Harris, told him "where to drill in the floor and where to put the cable down," and plaintiff would have preferred a different location but the customer was planning to put a wall in said location. Plaintiff did not recommend another spot to drill. Plaintiff drilled two holes, one into the floor and one in a wall between two bedrooms, passed approximately two feet of coaxial cable through the hole in the floor, then he went downstairs to the lower level to find the coaxial cable and the customer came with him.

Plaintiff explained that at the lower level there was a small hole, approximately two feet by one foot, in the wall between a bedroom and a washroom, that the ceiling was eight or nine feet above the floor in the washroom, and that said hole was located eight and a half feet above the floor. He also explained that he grabbed a metal folding chair in the washroom and stood on it, then got onto the oil tank and looked through the hole using his flashlight and saw the coaxial cable as well as electrical wiring. According to plaintiff, he could not have used his ladder to reach the hole due to the position of the oil tank. The customer did not instruct or direct him to use the chair to get onto the oil tank or as to how to access the hole. He added that the customer(s) at the premises did not provide him with any equipment to use. Plaintiff further explained that he then climbed off the oil tank and went outside to retrieve his staple gun from the van. Plaintiff planned to pull the coaxial cable through the hole and staple it onto the wall. The customer went back upstairs. Plaintiff returned to the lower level, without the customer, and climbed back onto the oil tank, and while crouched down reached into the hole with his right hand, grabbed onto what he believed was the coaxial cable, then “felt pain, saw a huge flash, like a firework” in front of his face and then fell to the floor. Plaintiff’s testimony revealed that he had previously scaled oil tanks to do his job but had never been advised to do so and that he did not have protective gloves for work.

Plaintiff testified at his deposition that no one told him that electrical work had been performed at any time prior to his arrival and that he had not been instructed or advised during his training at Visionpro to turn off any electrical lines while installing cable lines. Plaintiff noted that instead he was instructed not to touch the electric in the house. He added that he never received any training to recognize the difference between various cables and wires in a house. Plaintiff also testified that he noticed construction work on the upper level, painting in the living room and the kitchen area appeared to be gutted, but not in the lower level. Plaintiff stated that the customer only told him where he wanted the cable box, and where he wanted the modem drilled into the floor and the wall, which is a typical direction of most customers.

The deposition testimony of defendant Charles Ernst and defendant Sommermann reveal that the subject premises was like a “mother/daughter” residence in that Charles Ernst lived in the upper level and defendant Sommermann and her husband, defendant Harris, rented by oral agreement the lower finished level. Defendant Ernst denied at his deposition having any electrical work done or running any wires while he owned the premises it, other than changing certain outlets, and informed that defendants Sommermann and Harris were planning to purchase the house from him and had permission to do construction work in the house prior to closing. He noted that most of what they planned to do involved the upper level. Defendant Ernst stated that he works for J.P. Morgan Chase in communications, that he was not present on the day of plaintiff’s accident but had been informed by defendant Sommermann that they had an appointment for a cable installation. He also stated that prior to the accident, no one had made any complaints concerning the wiring in the house, and no summonses or violations or tickets had been issued by any governmental agency with respect to the wiring. Defendant Sommermann testified that she and her husband were scheduled to close on the house on August 3, 2009 but the closing was delayed, that they decided to continue with the planned cable work for the upcoming renovation, and that the closing occurred two days later. The deposition testimony of defendants Sommermann and Harris indicates that defendant Sommermann had contacted Cablevision in July 2009 to move the cable outlet from one wall to another wall and for the installation of an additional cable outlet in one of the

bedrooms. In addition, defendant Sommermann testified that from the time she and her husband began residing at the subject house in 2003 until the date of the accident, no electric work was done in the house, that construction work, gutting the house, began after they purchased the house, and that no construction work was done in the house prior to their purchase. Defendant Harris testified at his deposition that he is a freelance boat captain, that neither he nor his wife directed where plaintiff was to do his work, and that he did not know what plaintiff was doing when the accident occurred.

At his deposition, Charles Karwowski testified that he is Area Operations Manager of CSC and that plaintiff's employer Vision Pro is an independent contractor that provides services for CSC such as installations for new customers or changes of service. In addition, Mr. Karwowski testified that CSC performed monthly quality control checks of approximately three percent of the work orders performed by Vision Pro. He stated that the Vision Pro technician handles grounding at the location through several grounding methods, the most likely being the installation on the conduit at the bottom of the LIPA meter of a strap with a piece of ground wire that goes to a ground block. Mr. Karwowski also testified that CSC did not provide technicians to Vision Pro or any training for Vision Pro employees and did not direct the manner of the performance of their work other than providing a work order.

Labor Law §§ 200, 240, and 241 apply to owners, general contractors, or their "agents" (Labor Law §§ 200 [1], 240 [1]; § 241[6]). A party is deemed to be an agent of an owner or general contractor under the Labor Law when that party has the "ability to control the activity which brought about the injury" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864, 798 NYS2d 351 [2005]; see *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318, 445 NYS2d 127 [1981]). Apartment building landlords whose tenants have contracted for cable television service are considered owners under the statutes (see *Otero v Cablevision of New York*, 297 AD2d 632, 747 NYS2d 46 [2d Dept 2002]). Lessees who hire a contractor and have the right to control the work being done are considered "owners" within the meaning of said statutes (see *Guclu v 900 Eighth Ave. Condominium, LLC*, 81 AD3d 592, 593, 916 NYS2d 147 [2d Dept 2011]; *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 618, 852 NYS2d 138 [2d Dept 2008]; see also *Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320, 880 NYS2d 879 [2009]). In addition, the term owner "may also apply to a lessee, where the lessee has the right or authority to control the work site, even if the lessee did not hire the general contractor" (*Zaher v Shopwell, Inc.*, 18 AD3d 339, 339-340, 795 NYS2d 223 [1st Dept 2005]; see *Bart v Universal Pictures*, 277 AD2d 4, 715 NYS2d 240 [1st Dept 2000]). The key question is whether the defendant had the right to insist that proper safety practices were followed (see *Alfonso v Pacific Classon Realty, LLC*, 101 AD3d 768, 770, 956 NYS2d 111 [2d Dept 2012]; *Grilikhes v International Tile & Stone Show Expos*, 90 AD3d 480, 934 NYS2d 384 [1st Dept 2011]; *Bart v Universal Pictures*, *supra*).

Labor Law § 240 (1) requires that building owners and contractors: "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." The kind of accident triggering Labor Law § 240 (1) coverage is one that will sustain the allegation that an adequate "scaffold, hoist, stay, ladder or other protective device" would have "shield[ed] the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*Ross v Curtis-Palmer*

Hydro-Elec. Co., 81 NY2d 494, 501, 601 NYS2d 49 [1993]; *Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 139, 936 NYS2d 624 [2011]).

Initially, the Court must determine whether the overall work that plaintiff was performing at the premises came under the protections of Labor Law § 240 (1) in that the work involved “ ‘making a significant physical change to the configuration or composition of [a] building or structure’ ” (*Weininger v Hagedorn & Co.*, 91 NY2d 958, 960, 672 NYS2d 840 [1998], quoting *Joblon v Solow*, 91 NY2d 457, 465, 672 NYS2d 286 [1998]), thereby constituting an alteration (*see* Labor Law § 240 [1]; *Belding v Verizon N.Y., Inc.*, 65 AD3d 414, 415, 883 NYS2d 517 [2009], *affd* 14 NY3d 751, 898 NYS2d 539 [2010]) or, alternatively, whether he was engaged in a “simple, routine activity” (*Weininger v Hagedorn & Co.*, 91 NY2d at 960, 672 NYS2d 840; *see Smith v Pergament Enters. of S.I.*, 271 AD2d 870, 871, 706 NYS2d 505 [2000]; *see also Gunderman v Sure Connect Cable Installation, Inc.*, 101 AD3d 1214, 1216-1217, 956 NYS2d 211 [3d Dept 2012]).

Here, plaintiff’s work of installing communication cables constituted a significant physical change and, therefore, falls under the enumerated activity of “altering” within the meaning of Labor Law § 240 (1) (*see Schick v 200 Blydenburgh, LLC*, 88 AD3d 684, 930 NYS2d 604 [2d Dept 2011], *lv to appeal dismissed* 19 NY3d 876, 947 NYS2d 50 [2012]; *Scotti v Federation Dev. Corp.*, 289 AD2d 322, 734 NYS2d 573 [2d Dept 2001]; *Bedassee v 3500 Snyder Ave. Owners, Corp.*, 266 AD2d 250, 698 NYS2d 289 [2d Dept 1999]; *Luthi v Long Is. Resource Corp.*, 251 AD2d 554, 674 NYS2d 747 [2d Dept 1998]; *Zgoba v Easy Shopping Corp.*, 246 AD2d 539, 667 NYS2d 426 [2d Dept 1998]; *see also McLean v 405 Webster Ave. Assoc.*, 98 AD3d 1090, 951 NYS2d 185 [2d Dept 2012]). At the time of the accident, plaintiff was running cable into the floor and through walls in the subject home and drilling holes to accommodate the wiring which made sufficiently significant changes to constitute alteration of the structure (*see Randall v Time Warner Cable, Inc.*, 81 AD3d 1149, 1151, 916 NYS2d 656 [3d Dept 2011]; *see also Weininger v Hagedorn & Co.*, 91 NY2d 958, 672 NYS2d 840 [1998][plaintiff running computer and telephone cable through the ceiling from a computer room to newly leased space which involved standing on a ladder to access a series of holes punched in the ceiling and pulling the wiring through “canals” that had been made in chicken wire in the ceiling]; *compare Rhodes-Evans v. 111 Chelsea LLC*, 44 AD3d 430, 843 NYS2d 237 [1st Dept 2007][splicing a fiber optic cable located in a box did not constitute significant physical change to garage or building]; *Luthi v Long Is. Resource Corp.*, *supra* [borrowed cable laid inside ceiling panels without being attached or affixed to the structure and was to be eventually returned did not constitute significant physical change]). It so follows that Labor Law § 241(6) also applies to this project because it involved alteration of a building or structure, which satisfied the definition of construction work (*see* 12 NYCRR 23-1.4 [b] [13]; *McLean v 405 Webster Ave. Assoc.*, *supra*).

In addition, based on plaintiff’s lack of electrical experience and protective gear, this “is not a case where ‘the plaintiff recognized the danger and chose to disregard it, thus rendering the plaintiff’s conduct the sole proximate cause’ of the injuries sustained” (*see Neissel v Rensselaer Polytechnic Institute*, 54 AD3d 446, 452, 863 NYS2d 128 [3d Dept 2008], *lv denied* 11 NY3d 716, 874 NYS2d 5 [2009] quoting *Skibinski v Salvation Army*, 307 AD2d 427, 428, 761 NYS2d 742 [3d Dept 2003]).

Labor Law §§ 240 (1) and 241, which impose certain nondelegable safety duties upon “contractors[,] owners and their agents,” specifically exempt “owners of one and two-family dwellings who contract for but do not direct or control the work.” (see *Parise v Green Chimneys Children’s Services, Inc.*, 106 AD3d 970, 971, 965 NYS2d 608 [2d Dept 2013]). The homeowner’s exemption was enacted to protect those who, lacking in business sophistication, would not know or anticipate the need to obtain insurance to cover them against liability (see *Miller v Shah*, 3 AD3d 521, 522, 770 NYS2d 739 [2d Dept 2004]; see also *Van Amerogen v Donnini*, 78 NY2d 880, 882, 573 NYS2d 443 [1991]; *Zamora v Frantellizzi*, 45 AD3d 580, 581, 846 NYS2d 196 [2d Dept 2007]).

Here, defendant Ernst is entitled to the statutory dwelling exception to strict liability pursuant to Labor Law § 240 (1) and § 241 (6) for owners of one and two-family dwellings who contract for but do not direct or control the work (see *Milan v Goldman*, 254 AD2d 263, 678 NYS2d 129 [2d Dept 1998][tenants living in coach house where plaintiff performed roof work]). Defendant Ernst made a prima facie showing that he is entitled to the homeowner’s exemption by submitting evidence that the home is a one or two-family private residence and that he was not present when plaintiff was working therein and thus did not direct or control the plaintiff’s work (see *Mora v Nakash*, 2014 NY Slip Op 04744 [2d Dept 2014]; *Rodas v Weissberg*, 261 AD2d 465, 690 NYS2d 116 [2d Dept 1999]). Plaintiff did not submit any evidence in opposition. Therefore, plaintiff’s Labor Law § 240 (1) and § 241 (6) claims as against defendant Ernst are dismissed.

As for the tenants, defendants Harris and Sommermann demonstrated their prima facie entitlement to judgment as a matter of law dismissing the causes of action alleging violations of Labor Law §§ 240 (1) and 241(6) insofar as asserted against them by establishing that they were neither owners, contractors with either Cablevision or CSC, nor statutory agents under those provisions (see *Holifield v Seraphim, LLC*, 92 AD3d 841, 940 NYS2d 100 [2d Dept 2012]). Even if they were considered contractors for the purposes of said installation, defendants Harris and Sommermann demonstrated that they did not direct or control the method or manner of plaintiff’s work, did not have the right to insist that proper safety practices were followed, and that their “involvement was merely a retention of the limited power of general supervision, and was no more extensive than would be expected of the typical homeowner who hired a contractor to renovate his or her home” (*Orellana v Dutcher Ave. Bldrs., Inc.*, 58 AD3d 612, 614, 871 NYS2d 352 [2d Dept 2009][internal quotation marks omitted]; see *DiMaggio v Cataletto*, 117 AD3d 984, 986 NYS2d 536, 538 [2d Dept 2014]; *Nai Ren Jiang v Shane Yeh*, 95 AD3d 970, 971, 944 NYS2d 200 [2d Dept 2012]; *Jumawan v Schnitt*, 35 AD3d 382, 383, 825 NYS2d 728 [2d Dept 2006]; *Decavallas v Pappantoniou*, 300 AD2d 617, 618, 752 NYS2d 712 [2d Dept 2002]; *Valentin v Thirty-Four Square Corp.*, 227 AD2d 467, 643 NYS2d 157 [2d Dept 1996]).

By his affidavit submitted in opposition, plaintiff avers that while he was distributing equipment, consisting of cable boxes, modems, coaxial cables and phone lines, throughout the house where they were to be installed, defendant Harris began giving him:

explicit instructions regarding both what he wanted done and how he wanted me to do it. He told me where he wanted me to run the cable. He told me where he wanted me to drill. He even inquired as to the size of the drill bit which I would

be using! In fact, he accompanied and stood over me while supplying a constant stream of instructions which lasted for at least half an hour. With particular reference to the happening of the accident, it was at approximately 10:15 AM when the defendant Harris showed me precisely where he wanted me to drill a hole in the floor of one of the upstairs bedrooms in order so that we would be able to run a coaxial cable so as to supply service to one of the downstairs bedrooms. ... Upon arriving downstairs Mr. Harris escorted me to his utility room where he directed my attention to a small opening inside of the wall were [sic] he believed the cable would be accessible. ... It was in Harris' presence, consent and indeed implicit insistence that I climbed up onto the oil tank.

However, during his deposition, plaintiff testified that defendant Harris did not instruct or direct him to use the chair to get onto the oil tank or instruct him on how to access the hole in the lower level wall but only told him where he wanted the cable box and where to drill the holes in the floor and the wall. Thus, in opposition, plaintiff failed to show that defendant Harris actually instructed plaintiff as to how to perform his work of installing the cable lines, as opposed to showing where he wanted the lines to enter or exit the rooms, or provided or expressly suggested, as opposed to inquiring about, the use of any particular tools, materials, or safety devices (*see Jumawan v Schnitt, supra*). Plaintiff failed to raise an issue of fact as to whether defendant Harris' involvement extended beyond incidental interactions with plaintiff (*see id.*). Based on the foregoing, plaintiff's Labor Law § 240 (1) and § 241 (6) claims as against defendants Harris and Sommermann are dismissed.

As for defendant CSC, the proffered proof establishes that it was not a general contractor or a statutory agent for purposes of liability under Labor Law § 240 (1) and § 241(6) inasmuch as it's sole involvement was providing a work order to Vision Pro and quality control checks on a portion of said work orders after their completion (*see Temperino v DRA, Inc.*, 75 AD3d 543, 904 NYS2d 767 [2d Dept 2010]). Plaintiff failed to raise a triable issue of fact in opposition. Therefore, plaintiff's Labor Law § 240 (1) and § 241 (6) claims as against defendant CSC are dismissed.

Where, as here, "a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery ... 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" (*Ortega v Puccia*, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]; *Pilato v 866 U.N. Plaza Associates, LLC*, 77 AD3d 644, 646, 909 NYS2d 80 [2d Dept 2010]). "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 62, 866 NYS2d 323 [2d Dept 2008]). "[T]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence" (*Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684, 913 NYS2d 684 [2d Dept 2010][internal quotation marks omitted]; *Klimowicz v Powell Cove Assocs., LLC*, 111 AD3d 605, 975 NYS2d 419, 420-422 [2d Dept 2013]).

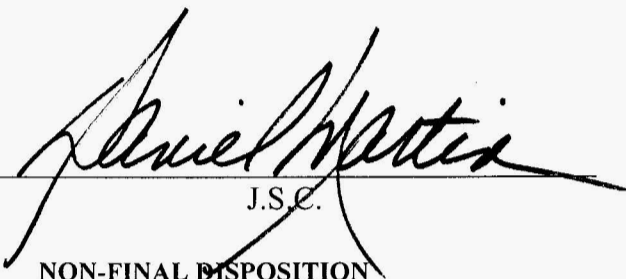
The owner defendant Ernst and the tenants, defendants Harris and Sommermann, established, prima facie, that they did not have the authority to control the means or methods by which plaintiff

Palme v CSC Holdings
Index No. 11-21394
Page 10

performed his work such that they may not be held liable under Labor Law § 200 or common-law negligence (*see La Veglia v St. Francis Hosp.*, 78 AD3d 1123, 912 NYS2d 611 [2d Dept 2010]; *Pilato v 866 U.N. Plaza Associates, LLC*, *supra*). Plaintiff failed to raise a triable issue of fact in opposition (*see id.*). The fact that electricity was flowing into the wires in the wall was not a defective condition, nor was it dangerous until the plaintiff decided to stick his hand into the opening in the wall and grab what he believed was his cable line without turning off the current (*see Pilato v 866 U.N. Plaza Associates, LLC*, *supra*). Moreover, CSC demonstrated that it lacked sufficient authority to supervise or control plaintiff's work, that it primarily monitored work orders for quality control purposes, and plaintiff did not raise a triable issue of fact (*see Harrison v State*, 88 AD3d 951, 931 NYS2d 662 [2d Dept 2011]). It so follows that plaintiff's Labor Law § 200 and common-law negligence claims against defendants Ernst, Harris, Sommermann and CSC are dismissed.

Accordingly, the instant motions are granted and the complaint is dismissed in its entirety.

Dated. October 10, 2014



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION