

**Sledge v S.M.S. Gen. Contrs. Inc.**

2015 NY Slip Op 30035(U)

January 2, 2015

Supreme Court, Suffolk County

Docket Number: 09-11409

Judge: Denise F. Molia

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INDEX No. 09-11409  
CAL No. 14-00328OT

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 39 - SUFFOLK COUNTY

**PRESENT:**

Hon. DENISE F. MOLIA  
Acting Justice of the Supreme Court

MOTION DATE 3-25-14  
ADJ. DATE 8-1-14  
Mot. Seq. # 007 - MotD  
# 008 - MotD  
# 009 - MotD

-----X

JAMES SLEDGE,  
  
Plaintiff,  
  
- against -  
  
S.M.S. GENERAL CONTRACTORS, INC.,  
S.M.S. GENERAL CONTRACTORS INC. d/b/a  
STEVE'S CUSTOM ROCKERS, KRM  
CONSTRUCTION & DESIGN, INC., JMC  
PLUMBING & HEATING CORP., W.  
WARNER HVAC SYSTEMS, INC.,  
ADVANCED ELECTRICAL RESOURCES,  
EUGENE'S FINE HOME IMPROVEMENTS,  
INC., NEW YORK BUILDERS OF STAIRS  
INC., FANTASY HARDWOOD FLOORS, INC.,  
and WHISTLE CLEAN INC.,  
  
Defendants.

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Upon the following papers numbered 1 to 48 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8; 9 - 10; 11 - 22; 33 - 46; Notice of Cross Motion and supporting papers   ; Answering Affidavits and supporting papers 23 - 27; Replying Affidavits and supporting papers 28 - 32; 47 - 48; Other   ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

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

**ORDERED** that the motion by defendant Advanced Electrical Resources for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims asserted against it is granted to the extent of dismissing the complaint and the cross claims asserted against Advanced Electrical Resources by defendants W. Warner HVAC Systems, Inc., JMC Plumbing & Heating Corp.,

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S.M.S. General Contractors, Inc., and Eugene's Fine Home Improvements for common-law indemnification and contribution, and is otherwise denied; and it is further

**ORDERED** that the motion by defendants S.M.S. General Contractors, Inc., S.M.S. General Contractors, Inc. d/b/a Steve's Custom Rockers for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims asserted against it is granted to the extent of dismissing the complaint and the cross claims asserted against S.M.S. General Contractors, Inc., S.M.S. General Contractors, Inc. d/b/a Steve's Custom Rockers by defendants W. Warner HVAC Systems, Inc., JMC Plumbing & Heating Corp., Advanced Electrical Resources, and Eugene's Fine Home Improvements for common-law indemnification and contribution, and is otherwise denied, and it is further

**ORDERED** that the motion by defendant Eugene's Fine Home Improvements for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims asserted against it is granted to the extent of dismissing the complaint and the cross claims asserted against Eugene's Fine Home Improvements by defendants W. Warner HVAC Systems, Inc., JMC Plumbing & Heating Corp., Advanced Electrical Resources, and S.M.S. General Contractors, Inc., S.M.S. General Contractors, Inc. d/b/a Steve's Custom Rockers for common-law indemnification and contribution, and is otherwise denied.

In this action, the plaintiff seeks to recover damages for personal injuries which he purportedly sustained on May 2, 2006 while performing construction on a house located at 121 Piping Rock Road, Locust Valley, New York. Specifically, the plaintiff—who was employed by RBJ Contracting, the general contractor of the project—alleges that while working on a ladder on the second floor of the house, an employee of a subcontractor pulled an extension cord, which then caught onto the leg of the ladder on which he stood, causing the ladder to tip over and him to fall from the second floor to the first floor. The defendants are various sub-contractors who were also working at the house at the time of the accident.

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 defendants were negligent in, *inter alia*, failing to provide him with a safe place to work.

In their answers, defendants W. Warner HVAC Systems, Inc. ("Warner"), JMC Plumbing & Heating Corp. ("JMC"), New York Builders of Stairs, Inc. ("New York"), and Fantasy Hardwood Floors, Inc. ("Fantasy") assert cross claims against, *inter alia*, Advanced Electrical Resources ("Advanced Electrical"), S.M.S. General Contractors, Inc., S.M.S. General Contractors, Inc. d/b/a Steve's Custom Rockers ("SMS"), and Eugene's Fine Home Improvements, Inc. ("EFHI") for contribution, and common-law and contractual indemnification. Fantasy also asserts an additional cross claim against, *inter alia*, SMS, Advanced Electrical and EFHI for failure to procure insurance naming Fantasy as an additional insured. In addition, Advanced Electrical, SMS and EFHI assert cross claims in their answers against, *inter alia*, each other for contribution, and common-law and contractual indemnification. EFHI also asserts an additional cross claim in its answer against, *inter alia*, SMS and Advanced Electrical for failure to procure insurance naming EFHI as an additional insured.

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Defendants Advanced Electrical, SMS, and EFHI now each separately move for summary judgment dismissing the complaint and all cross claims asserted against them. The Court notes that while Advanced, SMS, and EFHI request in their motions that the complaint and all cross claims asserted against them be dismissed, Advanced, SMS, and EFHI have not annexed to their moving papers copies of answers from defendants KRM Contraction & Design, Inc. (“KRM”) and Whistle Clean, Inc. (“Whistle”). As a result, the branches of their motions which seek to have any cross claims asserted against them by KRM and Whistle dismissed, is denied.

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*).

At the outset, the Court notes that the plaintiff has already entered into several stipulations of discontinuance wherein he agreed to discontinue this action against several defendants. On September 24, 2010, plaintiff entered into a stipulation of discontinuance discontinuing the action against New York. On October 19, 2010, the plaintiff entered into another stipulation of discontinuance thereby discontinuing the action against Warner, and on December 1, 2011, plaintiff entered into a stipulation of discontinuance discontinuing the action against Fantasy. On January 20, 2012, plaintiff entered into another stipulation of discontinuance discontinuing the action against Advanced Electrical. In addition, on May 2, 2013, New York and Fantasy entered into a stipulation of discontinuance with Advanced Electrical discontinuing their cross claims against Advanced Electrical. Advanced Electrical asserts that while the action was discontinued against it, in light of outstanding cross claims made by co-defendants, it is moving for summary judgment dismissing the complaint as to its liability as well as for dismissal of the remaining cross claims asserted against it.

Where a defendant is neither the owner of the property nor the general contractor of the project, it cannot be held liable for violations of Labor Law §§ 240 and 241 unless it is a statutory agent of the owner or general contractor (*see Morris v Pepe*, 283 AD2d 558, 725 NYS2d 721 [2d Dept 2001]). A statutory agent is one who has the authority to supervise and control the work being performed which brought about the injury so as to enable it to avoid or correct the unsafe condition (*see Gonzalez v TJM Construction Corp.*, 87 AD3d 610, 928 NYS2d 344 [2d Dept 2011]; *Linkowski v City of New York*, 33 AD3d 971, 824 NYS2d 109 [2d Dept 2006]; *D’Amico v New York Racing Assn.*, 203 AD2d 509, 611 NYS2d 252 [2d Dept 1994]).

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Here, Advanced Electrical established its *prima facie* entitlement to judgment as a matter of law dismissing the plaintiff's causes of action for violations of Labor Law §§ 240 and 241 by demonstrating, through the deposition testimony of the plaintiff and Victor Mazza, the owner and president of Advanced Electrical, that Advanced Electrical was not a statutory agent of the owner or general contractor at the work site since it did not have the authority to supervise or control the work being performed by the plaintiff or any other subcontractors on the property (see *Bell v Bengomo Realty, Inc.*, 36 AD3d 479, 829 NYS2d 42 [2d Dept 2007]; *Linkowski v City of New York*, *supra*). Specifically, Mr. Mazza testified at his deposition that Advanced Electrical was responsible for performing all of the electrical work in the house, and that he supervised his workers. The plaintiff testified at his deposition that Rich Bartumioli, an owner of RBJ Contracting, periodically would check on the plaintiff's work, and that Michael Loper, a partner of RBJ Contracting, supervised and directed the plaintiff's work.

With respect to plaintiff's causes of action for common-law negligence and violation of Labor Law § 200, it is well settled that a cause of action sounding in violation of Labor Law § 200 or 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 manner in which the work was being performed on the premises (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 while he was standing on a ladder nailing wood to the ceiling on the second floor, an extension cord on the floor under his ladder was pulled on by another worker, causing the ladder to tip over and the plaintiff to fall from the second floor to the first floor.

In order to be held liable under Labor Law § 200 and 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 Advanced Electrical did not exercise any supervision or control over the plaintiff's work or any of the other defendants' work at the premises which may have caused plaintiff's accident (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]). Furthermore, Advanced Electrical established that it was not responsible for the accident since Mr. Mazza testified that neither he nor any of his workers were present in the house on the day of the plaintiff's accident. Thus, Advanced Electrical established its *prima facie* entitlement to summary judgment dismissing these causes of action as well.

In response, the plaintiff submitted an affirmation in support of Advanced Electrical's motion and none of the other defendants submitted opposition papers to Advanced Electrical's motion. As a result, no triable issue of fact has been raised as to whether Advanced Electrical had the authority to supervise and control the work being performed by the plaintiff or any other defendant which could have brought about the plaintiff's injury (see *Linkowski v City of New York*, *supra*). Accordingly, the

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plaintiff's complaint is dismissed as against Advanced Electrical. Since this finding defeats any cross claims for common-law indemnification and contribution against Advanced Electrical, they are dismissed as well (*see Stone v Williams*, 64 NY2d 639, 485 NYS2d 42 [1984]). The Court notes that New York and Fantasy previously entered into a stipulation discontinuing their cross claims against Advanced Electrical. With respect to an additional cross claim made by EFHI against Advanced Electrical for its alleged failure to procure insurance naming EFHI as an additional insured, since Advanced Electrical has not addressed this cross claim in its moving papers, insofar as its motion seeks dismissal of this cross claim, it is denied. Furthermore, to the extent that Advanced Electrical's motion seeks to dismiss the remaining cross claims for contractual indemnification made by Warner, JMC, SMS, and EFHI, its motion is denied as it also does not address these cross claims in its moving papers. In addition, since Advanced Electrical failed to annex to its moving papers copies of answers from defendants KRM and Whistle, the branch of its motion which seeks to have any cross claims asserted against it by KRM and Whistle dismissed, is denied.

Turning to the motion for summary judgment made by SMS, SMS established its *prima facie* entitlement to judgment as a matter of law dismissing the plaintiff's causes of action for violations of Labor Law §§ 240 and 241 by demonstrating, through the deposition testimony of the plaintiff and Scott Saulino, an employee of SMS, that SMS was not a statutory agent of the owner or general contractor at the work site since it did not have the authority to supervise or control the work being performed by the plaintiff or any other subcontractors on the property (*see Bell v Bengomo Realty, Inc.*, 36 AD3d 479, 829 NYS2d 42 [2d Dept 2007]; *Linkowski v City of New York*, *supra*). Specifically, Mr. Saulino testified at his deposition that SMS was hired by RBJ and was responsible for installing sheet rock in the premises. While SMS was installing sheet rock on the second floor of the premises, there were other workers present who were working for different contractors. The plaintiff testified at his deposition that Rich Bartumioli, an owner of RBJ Contracting, periodically would check on the plaintiff's work, and that Michael Loper, a partner of RBJ Contracting, supervised and directed the plaintiff's work.

In addition, SMS established its *prima facie* entitlement to judgment as a matter of law dismissing the plaintiff's causes of action for negligence and the violation of Labor Law § 200 since the evidence established that SMS did not exercise any supervision or control over the plaintiff's work or any of the other defendants' work at the premises which may have caused plaintiff's accident (*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]). Furthermore, Mr. Saulino testified that SMS used light blue extension cords and the plaintiff testified that the extension cords on the floor in between the front and back feet of the ladder he was using were orange, green, and yellow. The plaintiff further testified that the orange extension cord was the cord that was being tugged at and caused his ladder to tip over. Mr. Saulino testified that the light blue extension cords used by SMS were never lying on the ground but were nailed against the wall from the first floor to the second floor, and that none of the employees from SMS used any extension cords from other contractors. Thus, SMS established its *prima facie* entitlement to summary judgment dismissing these causes of action as well.

In opposition, the plaintiff failed to establish a triable issue of fact. While a subcontractor may be held liable for common-law negligence even where it had no authority to supervise and control the

plaintiff's work or work area but created the condition that caused the plaintiff's injury (*see Thomas v Benton*, 112 AD3d 812, 977 NYS2d 336 [2d Dept 2013]), the plaintiff failed to raise a triable issue of fact as to whether SMS created the dangerous condition which caused the plaintiff's injury (*id*). Accordingly, the plaintiff's complaint is dismissed as against SMS. Since this finding defeats any cross claims for common-law indemnification and contribution against SMS, they are dismissed as well (*see Stone v Williams, supra*). With respect to the additional cross claims made by Fantasy and EFHI against SMS for its alleged failure to procure insurance naming Fantasy and EFHI as additional insureds, since SMS has not addressed this cross claim in its moving papers, insofar as its motion seeks dismissal of these cross claims, it is denied. Furthermore, to the extent that the motion by SMS seeks to dismiss the remaining cross claims for contractual indemnification made by Warner, JMC, New York, Fantasy, Advanced Electrical and EFHI, its motion is denied as it also does not address these cross claims in its moving papers. In addition, since SMS failed to annex to its moving papers copies of answers from defendants KRM and Whistle, the branch of its motion which seeks to have any cross claims asserted against it by KRM and Whistle dismissed, is denied.

With respect to EFHI's motion for summary judgment, EFHI established its *prima facie* entitlement to judgment as a matter of law dismissing the plaintiff's causes of action for violations of Labor Law §§ 240 and 241 by demonstrating, through the deposition testimony of the plaintiff and Eugene Azevedo, the president of EFHI, that EFHI was not a statutory agent of the owner or general contractor at the work site since it did not have the authority to supervise or control the work being performed by the plaintiff or any other subcontractors on the property (*see Bell v Bengomo Realty, Inc., supra; Linkowski v City of New York, supra*). Specifically, Mr. Azevedo testified at his deposition and states in his affidavit that EFHI was hired by Mr. Beckhard, the owner of the premises, and was responsible for installing finish carpentry such as moldings, door casings, panels, etc. Mr. Azevedo testified that EFHI did not provide any equipment to RBJ or the plaintiff, and that EFHI was not using any extension cords at the time of the accident. He further testified that he was in the garage when the accident happened. The plaintiff testified at his deposition that Rich Bartumioli, an owner of RBJ Contracting, periodically would check on the plaintiff's work, and that Michael Loper, a partner of RBJ Contracting, supervised and directed the plaintiff's work.

In addition, EFHI established its *prima facie* entitlement to judgment as a matter of law dismissing the plaintiff's causes of action for negligence and the violation of Labor Law § 200 since the evidence established that EFHI did not exercise any supervision or control over the plaintiff's work or any of the other defendants' work at the premises which may have caused plaintiff's accident (*see Paez v Shah, supra; Castellanos v United Cerebral Palsy Assn. of Greater Suffolk, Inc., supra; Harper v Holland Addison, LLC, supra*). Furthermore, as noted above, Mr. Azevedo testified that at the time of the accident, EFHI was not using any extension cords. Thus, EFHI established its *prima facie* entitlement to summary judgment dismissing these causes of action as well.

In opposition, plaintiff failed to raise a triable issue of fact as plaintiff's attorney merely argues that since EFHI was present at the premises on the day of the accident, it may have created the dangerous condition. It is well settled that speculation is insufficient to raise a triable issue of fact (*see Carroll-Batista v Bennett*, 122 AD3d 661, 995 NYS2d 718 [2d Dept 2014]). Accordingly, the plaintiff's complaint is dismissed as against EFHI. Since this finding defeats any cross claims for common-law

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indemnification and contribution against EFHI, they are dismissed as well (*see Stone v Williams, supra*). With respect to the additional cross claim made by Fantasy against EFHI for its alleged failure to procure insurance naming Fantasy as an additional insured, since EFHI has not addressed this cross claim in its moving papers, insofar as its motion seeks dismissal of this cross claim, it is denied. Furthermore, to the extent that the motion by EFHI seeks to dismiss the remaining cross claims for contractual indemnification made by Warner, JMC, New York, Fantasy, Advanced Electrical and SMS, its motion is denied as it also does not address these cross claims in its moving papers. In addition, since EFHI failed to annex to its moving papers copies of answers from defendants KRM and Whistle, the branch of its motion which seeks to have any cross claims asserted against it by KRM and Whistle dismissed, is denied.

Accordingly, the motions by defendants Advanced Electrical, SMS, and EFHI are granted to the extent of dismissing the plaintiff's complaint as asserted against them and dismissing certain cross claims asserted against them as stated herein.

Dated: January 2, 2015

  
A.J.S.C.

         FINAL DISPOSITION      X   NON-FINAL DISPOSITION