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ORIGINAL WHEN BLUE

SHORT FORM ORDER

INDEX No. 11-29060
CAL. No. 14-00785OT

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 8-26-14
MOTION DATE 9-23-14
ADJ. DATE 10-7-14
Mot. Seq. # 002 - MG
003 - MG; CASEDISP

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CARLOS CAMPOVERDE,

Plaintiff,

- against -

MICHAEL BASILE, Individually and d/b/a 77 NORTHSIDE DRIVE, INC. and GERALD HERLIHY,

Defendants.

---X

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Upon the following papers numbered 1 to 74 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 43; 49 - 70 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 44 - 45; 71 - 72 ; Replying Affidavits and supporting papers 46 - 48; 73 - 74 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Michael Basile, individually and d/b/a 77 Northside Drive, Inc. for summary judgment and this motion by defendant Gerald Herlihy for summary judgment are consolidated for the purposes of this determination; and it is further

ORDERED that this motion by defendant Michael Basile, individually and d/b/a 77 Northside Drive, Inc., for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint as against them is granted; and it is further

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ORDERED that this motion by defendant Gerald Herlihy for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing the complaint as against him is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff on August 5, 2009 when he fell through a plywood-covered hole in the first floor of a house under construction into the basement. The accident occurred on premises known as 133 North Side Drive in Southampton, New York. At the time of the accident, plaintiff was an employee of non-party EPZ Contracting, Inc. (hereinafter "EPZ") framing the house. The owner of the premises, defendant Michael Basile, individually and d/b/a 77 Northside Drive, Inc. (hereinafter "defendant Basile") contracted with EPZ for the framing of a house on the premises. By his complaint, plaintiff alleges a first cause of action for common-law negligence, a second cause of action for violation of Labor Law § 200, a third cause of action for violation of Labor Law § 240, and a fourth cause of action for violation of Labor Law § 241 (6).

Defendant Basile now seeks summary judgment dismissing the complaint on the grounds that the single-family homeowner's exemption applies as to the Labor Law §§ 240 and 241 claims inasmuch as the construction was for a one-family dwelling and he did not direct, supervise or control plaintiff's work; that in any event, plaintiff has failed to demonstrate a violation of an Industrial Code section; and, that he is entitled to dismissal of the Labor Law § 200 and common-law negligence causes of action as he did not exercise any supervision or control over the means and methods of plaintiff's work and he did not have any actual or constructive notice of the alleged defective or dangerous condition on the property. His submissions in support of his motion include the pleadings, the deposition transcripts of the parties, and the contract between defendant Basile and EPZ.

In opposition to the motion, plaintiff by his attorney argues that defendant Basile failed to submit evidence of the applicability of the homeowner's exemption showing that the house actually had a non-commercial use given his admitted ownership of many commercial properties, and that he failed to submit a copy of plaintiff's bill of particulars alleging violations of Industrial Code sections.

In reply, defendant Basile contends that the opposition is unsupported by an affidavit from plaintiff or anyone with personal knowledge, and that the deposition testimony of defendant Basile that he intended to use the completed house as a vacation home was sufficient for the homeowner's exemption to apply. He attaches his affidavit in which he avers that since the completion of the subject house's construction, he has maintained it exclusively as a vacation home; he never intended to use the property for any commercial purpose; he never rented nor intended to rent the property; and he has never listed the property for sale nor has he ever intended to sell the property.

Plaintiff testified at his deposition that "Eddy," his boss at EPZ, would give him work instructions; that he never received instructions from anyone other than Eddy; that he did not know of anyone named Michael Basile; and that Michael Basile never gave him instructions on how to perform his work. In addition, plaintiff testified that he had been performing framing work at the subject premises for one week prior to the accident; and that neither he nor the seven or eight other laborers on site were provided with gloves or hard helmets. Plaintiff explained that when he first arrived at the site, there was a framed hole in the center of the first floor of the house under construction that was

approximately three feet wide and 10 feet long, and that he and others covered it with plywood but that he does not remember covering it. He stated that after the hole was covered it was difficult to see it but that he knew the hole was there and that the hole was covered for two to three days prior to his accident. According to plaintiff, at approximately 2 p.m. or 3 p.m. on the date of his accident, a worker named Roberto was cutting the plywood covering the hole without telling anyone or marking the three cuts he had made in the plywood. Plaintiff explained that as he was crossing the floor to get materials, he stepped on said plywood which gave way and he fell approximately 12 feet through the hole into the basement. Plaintiff had not looked down at the plywood while he was walking.

At his July 2012 deposition, defendant Basile testified that he is currently employed in the pay phone business; that 77 Northside Drive, Inc., of which he is the corporate head, purchased the subject property as an empty lot on or before 1995; and that he planned to build a single-family vacation home on said property. At the time of his deposition, the house was completed but no certificate of occupancy had been issued and no one resided therein. In addition, defendant Basile testified that defendant Herlihy was hired pursuant to a verbal agreement, that he was supposed to be the general contractor, and that the "scope of the work was to build my house." He added that defendant Herlihy would hire the subcontractors but would not execute contracts with them, that defendant Herlihy introduced him to EPZ, that EPZ was hired to do all of the framing work, and that Eric Zacynski was the owner of EPZ. Defendant Basile stated that he was not present on the job site on the date of the accident. He also testified that he did not work or provide any workers at the work site, and that he did not provide any equipment. Defendant Basile further testified that he did not direct or have discussions with either the owner of EPZ or its workers concerning their framing work.

At his continued deposition in October 2013, defendant Basile testified that this was the first time that he was having a house constructed, that he considered defendant Herlihy to be a project manager rather than a general contractor, and that "he was supposed to be there every day watching the house and watching what everybody was doing." According to defendant Basile, defendant Herlihy agreed "to build my house for a hundred thousand," his job was "to build my house," and to date he had paid $76,000 to defendant Herlihy.

Defendant Herlihy testified at his deposition that he first met defendant Basile at the work site, that defendant Basile requested that he "look over things while he wasn't around," and that he was hired in his individual capacity pursuant to a verbal contract and received $5000 per month. According to defendant Herlihy, defendant Basile had already hired the framing company EPZ prior to hiring Herlihy, and it was not defendant Herlihy's role to hire any subcontractors, rather he suggested names of subcontractors and his understanding of his role was as a part-time physical presence. In addition, he testified that he was present at the work site two to three days a week and that defendant Basile was at the work site once or twice a week observing the progress of the work. However, defendant Herlihy did not know if he was at the premises on the date of the accident and learned of the accident in approximately January 2010. According to defendant Herlihy, he had no discussions with defendant Basile on the need for safety meetings at the property and no safety meetings were held at the property. Defendant Herlihy explained that normally there is plywood over the opening in the first floor for the staircase and that after the opening is cut out then "they [EPZ] put up two by fours or some kind of safety railing around it so nobody falls in it." He stated that he did not tell the subcontractors what to do

and that he merely gave defendant Basile verbal progress reports. Defendant Herlihy further testified that each trade brought their own equipment, that he did not provide any equipment to any of the workers at the site, and that he did not direct any of the subcontractors or their employees. He also stated that prior to the completion of the house, he returned to his job as project manager for Farrell Building in which his job duties involved organizing subcontractors.

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).

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]). It was not intended to insulate from liability owners who use their one- or two-family houses purely for commercial purposes (*see* ***Van Amerogen v Donnini***, 78 NY2d 880, 882, 573 NYS2d 443 [1991]; *see also* ***Lombardi v Stout***, 80 NY2d 290, 296-297, 590 NYS2d 55 [1992]). Use of a portion of a homeowner's premises for commercial purposes does not automatically cause the homeowner to lose the protection of the exemption under this statute (*see* ***Ramirez v Begum***, 35 AD3d 578, 579, 829 NYS2d 117 [2d Dept 2006], *lv denied* 8 NY3d 809, 834 NYS2d 90 [2007]; ***Small v Gutleber***, 299 AD2d 536, 751 NYS2d 49 [2d Dept 2002]). Instead, the exemption depends upon the site and purpose of the work (*see* ***Ramirez v Begum***, *supra*; *see also* ***Bartoo v Buell***, 87 NY2d 362, 367-368, 639 NYS2d 778 [1996]; ***Khela v Neiger***, 85 NY2d 333, 337-338, 624 NYS2d 566 [1995]; ***Cannon v Putnam***, 76 NY2d 644, 650, 563 NYS2d 16 [1990]; ***Stejskal v Simons***, 309 AD2d 853, 855, 765 NYS2d 886 [2d Dept 2003]).

Here, defendant Basile made a prima facie showing that he is entitled to the homeowner's exemption by submitting evidence in the form of his deposition testimony and affidavit that the subject house is a single-family vacation residence with no commercial purpose and that he did not direct or

control plaintiff's work (*see* ***Mora v Nakash***, 118 AD3d 964, 989 NYS2d 484 [2d Dept 2014]; ***Ortega v Puccia***, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]). Plaintiff failed to raise a triable issue of fact as to the applicability of the homeowner's exemption (*see id.*). There is no evidence in the record that, at the time plaintiff sustained his injuries, defendant Basile intended to use the home for business purposes or that the completed home is being used for commercial purposes (*see* ***Moran v Janowski***, 276 AD2d 605, 714 NYS2d 723 [2d Dept 2000]; ***Chowdhury v Rodriguez***, 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]). Therefore, that branch of the motion by defendant Basile for summary judgment dismissing plaintiff's Labor Law §§ 240 and 241 claims based on the homeowner's exemption is granted.

When an accident is alleged to involve defects in both the premises and the equipment used or the manner in which the work was performed at the work site, a defendant moving for summary judgment with respect to causes of action alleging a violation of Labor Law § 200 and common-law negligence is obligated to address the proof applicable to both liability standards (*see* ***DiMaggio v Cataletto***, 117 AD3d 984, 986 NYS2d 536 [2d Dept 2014]; ***Reyes v Arco Wentworth Mgt. Corp.***, 83 AD3d 47, 919 NYS2d 44 [2d Dept 2011]).

Defendant Basile established, prima facie, both that he did not create or have actual or constructive notice of the alleged condition that caused plaintiff's injury, and that he did not have the authority to supervise or control the means and methods of plaintiff's work (*see* ***DiMaggio v Cataletto***, *supra*; ***Chowdhury v Rodriguez***, 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]). Plaintiff failed to raise a triable issue of fact in opposition (*see id.*). Therefore, that branch of the motion by defendant Basile for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims is granted.

Defendant Herlihy now requests summary judgment in his favor dismissing the complaint as against him on the grounds that he had no supervisory control or authority to supervise plaintiff's work and that he had no actual or constructive notice of any unsafe condition that caused plaintiff's accident. His submissions in support include the pleadings, his affidavit, and the deposition transcripts of the parties.

Plaintiff in opposition contends that there are triable issues of fact as to whether defendant Herlihy exercised sufficient control over the construction to be held liable under Labor Law §§ 240 and 241 (6). He notes that there is a difference between the characterization by defendant Basile and that of defendant Herlihy concerning defendant Herlihy's position or job title at the work site and his expected work responsibilities and level of control over the work of the subcontractors. Plaintiff argues that defendant Herlihy minimized his work responsibilities given his admitted remuneration.

In reply, defendant Herlihy contends that no evidence has been proffered demonstrating that he actually retained any of the subcontractors or had any authority to supervise or exercise control over them or to insist on proper safety practices at the work site. His attorney notes that defendant Herlihy did not receive a percentage of the subcontractors' contracts which general contractors typically receive, and asserts that plaintiff's opposition is based merely on conclusory allegations, not on admissible proof.

By his affidavit, defendant Herlihy avers that he was retained by defendant Basile in July 2009 to assist in the construction of a residence, but that he was not retained to act and did not act as general contractor, and that he did not hire any subcontractors nor did he have any authority to direct or control subcontractors. He adds that he did not exercise any actual control over any of the subcontractors, did not provide materials or equipment to the work site, and did not have any authority to enforce safety standards at the work site. Defendant Herlihy further avers that he was unaware of any of the conditions that allegedly caused plaintiff's injury. He explains that his services included project planning assistance, connecting the owner with subcontractors who would provide estimates, consulting with the owner on estimates, providing the owner with progress reports, and accepting deliveries at the work site.

A construction manager without authority to control the activity which brought about the plaintiff's injury is not considered an agent of the owner under Labor Law §§ 240 (1) and 241(6) (*see* ***Walls v Turner Constr. Co.***, 4 NY3d 861, 863, 798 NYS2d 351 [2005]; ***Rodriguez v JMB Architecture, LLC***, 82 AD3d 949, 950-951, 919 NYS2d 40 [2d Dept 2011]; ***Lodato v Greyhawk N. Am., LLC***, 39 AD3d 491, 493, 834 NYS2d 242 [2d Dept 2007]). The label given a defendant, whether "construction manager" or "general contractor," is not determinative (see ***Walls v Turner Constr. Co.***, *supra* at 864; ***Tilford v Sweet Home Real Prop. Trust***, 40 AD3d 966, 966, 834 NYS2d 664 [2d Dept 2007]; ***Aranda v Park E. Constr.***, 4 AD3d 315, 316, 772 NYS2d 70 [2d Dept 2004]). Instead, the core inquiry is whether the defendant had the "authority to supervise or control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition" (***Rodriguez v JMB Architecture, LLC***, *supra* at 951; *see* ***Delahaye v Saint Anns School***, 40 AD3d 679, 683, 836 NYS2d 233 [2d Dept 2007]; *see also* ***Myles v Claxton***, 115 AD3d 654, 655, 981 NYS2d 447 [2d Dept 2014]).

Here, despite the differing job titles given by the defendants to defendant Herlihy's post and differing characterizations of defendant Herlihy's involvement in hiring subcontractors and overseeing their work, there is no evidence that defendant Herlihy had the authority to supervise or control the framing work, specifically the cutting of the opening in the floor for the staircase, which led to plaintiff's fall, and to enforce safety standards at the work site. Plaintiff's own deposition testimony reveals that he received instructions solely from his boss "Eddy." Thus, defendant Herlihy submitted proof establishing prima facie that he lacked the requisite authority to control the activity that brought about plaintiff's injury and cannot be considered an agent of the owner defendant Basile under Labor Law §§ 240 (1) and 241(6) (*see* ***Myles v Claxton***, *supra*). Plaintiff failed to show a triable issue of fact in opposition (*see id.* at 656). The fact that defendant Basile used the word "supervise" to describe defendant Herlihy's job duties and expected that defendant Herlihy would be on the premises daily to make sure that the house got built does not, without more, convey the authority to specifically direct and control how each particular subcontractor and its employees performed every aspect of their work, including in this case how EPZ and its employees constructed the opening in the floor for the staircase. In addition, use of defendant Herlihy's remuneration as a measure of his level of authority to supervise, direct and control the work of the subcontractors constitutes mere speculation. It so follows that the branch of the motion by defendant Herlihy for summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241(6) claims as against him is granted.

Moreover, defendant Herlihy established, prima facie, both that he did not create or have actual or constructive notice of the alleged condition which caused plaintiff's injury, and that he lacked the

authority to supervise or control the means and methods of the plaintiff's work (*see* ***Giovanniello v E.W. Howell, Co., LLC***, 104 AD3d 812, 961 NYS2d 513 [2d Dept 2013]). In opposition, plaintiff failed to raise a triable issue of fact. Therefore, that branch of the motion by defendant Herlihy for summary judgment dismissing the Labor Law § 200 and common-law negligence claims as against him is granted (*see id.*).

Accordingly, the motions by defendant Basile and defendant Herlihy for summary judgment are granted and the complaint is dismissed in its entirety.

Dated: FEB 18 2015

A.J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION