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SHORT FORM ORDER

INDEX No. 11-28872

SUPREME COURT - STATE OF NEW YORK
E I P MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 6-29-17
ADJ. DATE 7-27-17
Mot. Seq. # 002 - MotD

CARLOS CABRERA,

Plaintiff,

- against -

DAVID P. ARMENTI, D. ARMENTI, ARMENTI CONSTRUCTION, INC,

Defendants.

SIBEN & SIBEN, ESQS.
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Upon the following papers numbered 1 to 24 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 13 - 24 ; Replying Affidavits and supporting papers 25 - 26 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant David P. Armenti for summary judgment dismissing the complaint against him is granted to the extent indicated herein, and is otherwise denied.

Plaintiff Carlos Cabrera commenced this action to recover damages for personal injuries he allegedly sustained on November 4, 2008 while performing work on a new single family home owned by Craig Levitz and Susan Levitz. Plaintiff allegedly was injured when the head of a nail broke off and flew into his eye as he was using a nail gun to secure a metal bracket to a wooden beam. At the time of the accident, the plaintiff allegedly was employed by Armenti Construction, Inc., a construction company owned by Armenti that was retained by the Levitzs to build the new residence. By his complaint, plaintiff asserts causes of action based on common law negligence and alleged violations of Labor Law §§ 200, 240 (1) and 241 (6). Armenti joined issue denying plaintiff's claims and asserting cross claims against the Levitzs, who were not named as defendants in the instant action. Thereafter, the court (Gazillo, J.) granted a motion for consolidation to the extent that it directed the instant action be joined for trial with an action commenced by plaintiff assigned index number 09-12122, entitled *Carlos Cabrera v David Armenti, Armenti Construction, Inc., Craig Levitz and Stephani Levitz*. After joining

issue in the earlier action, the Levitzs brought a third-party action against E. Anderson Enterprises Inc., the alleged prime framing contractor for the construction project.

By order dated October 25, 2013, the court (Baisley, J.) granted a motion made by the Levitzs in the related action for summary judgment dismissing the complaint and any cross claims against them. As a result, the Levitzs' third-party action against E. Anderson Enterprises was discontinued, and the related action assigned index number 09-12122 was continued against Armenti. Subsequently, by order dated April 23, 2015, the court (Gazzillo, J.) granted a motion made by Armenti in the instant action for leave to amend his answer to include, as an affirmative defense to the action, that plaintiff's claims against him are barred by the exclusivity provisions of Workers Compensation Law §§ 11 and 29.

Armenti now moves for summary judgment dismissing the complaint in the instant action on the ground the claims against the corporate defendant, Armenti Construction, Inc., should be dismissed, as the named corporate entitiy does not exist. Armenti further asserts that the negligence and Labor Law claims against him personally should be dismissed, because he was neither a general contractor, owner, or agent for the purposes of the construction project, and that he merely served as the project's construction manager without any authority to supervise plaintiff's work, to provide his tools, or to control his safety practices. Plaintiff opposes the motion, arguing that significant triable issues exist as to whether Armenti was the project's general contractor or the Levitzs' agent at the time of the accident and, if so, whether he is liable for plaintiff's injuries under Labor Law §§ 200 and 241 (6). Plaintiff further contends that he was not Armenti's special employee, as the Workers' Compensation Board has already determined that E. Anderson Enterprise, which supervised plaintiff's work and provided his equipment, was his employer at the time of the alleged accident.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*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]). 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 Uni. Med. Ctr.***, *supra*). In determining a motion for summary judgment, the court's function is not to resolve issues of fact or to determine matters of credibility but rather to determine whether issues of fact exist precluding summary judgment (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]). Furthermore, "on a defendant's motion for summary judgment, opposed by plaintiff, a court is required to accept the plaintiff's pleadings as true and its decision must be made on the version of the facts most favorable to the plaintiff" (*see* ***Henderson v New York***, 178 AD2d 129, 124, 576 NYS2d 562 [1st Dept 1991]; ***Bulger v Tri-Town Agency***, 148 AD2d 44, 543 NYS2d 217 [3d Dept 1989]).

Initially, the court notes that the branch of the motion seeking summary judgment dismissing the complaint against Armenti Construction is denied as moot, inasmuch as the defendant has never appeared in the action and plaintiff does not dispute Armenti's contention that no such entity existed at the time of his accident. However, the branch of the motion for summary judgment dismissing the Labor Law § 240 (1) claim against Armenti is granted, as a review of the uncontested facts in this case reveals that plaintiff's accident did not occur as a result of an elevational differential (*see* ***Nicometi v***

Vineyards of Fredonia, LLC, 25 NY3d 90, 7 NYS3d 263 [2015]; ***Guallpa v Canarsie Plaza, LLC***, 144 AD3d 1088, 42 NYS3d 293 [2d Dept 2016]; ***Torres v City of New York***, 127 AD3d 1163,7 NYS3d 539 [2d Dept 2015]). Rather, it is alleged that the accident occurred when the head of a nail broke off and flew into plaintiff's eye while he was using a nail gun to secure a metal bracket to a wooden beam. Liability under Labor Law § 240 (1) may only be imposed where a plaintiff's injuries arise from a physically significant elevation differential (*see* ***Nicometi v Vineyards of Fredonia, LLC***, *supra*). The statute does not encompass any and all perils connected in some tangential way with the effects of gravity (*see* ***Nicometi v Vineyards of Fredonia, LLC***, 25 NY3d 90, 97, 7 NYS3d 263 [2015]), or guard against routine work place risks found at construction sites (*see* ***Runner v New York Stock Exch., Inc.***, 13 NY3d 599, 603, 895 NYS2d 279 [2009]; ***Rodriguez v Margaret Tietz Ctr. for Nursing Care***, 84 NY2d 841, 616 NYS2d 900 [1994]).

As for plaintiff's remaining claims against Armenti, Labor Law § 241 (6) "imposes a nondelegable duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 348, 670 NYS2d 816 [1998], quoting Labor Law § 241 [6]). To recover damages on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish the defendant's violation of an Industrial Code provision which sets forth specific safety standards and that such violation was a proximate cause of the accident (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Hricus v Aurora Contrs., Inc.***, 63 AD3d 1004, 883 NYS2d 61 [2d Dept 2009]). In this case, plaintiff's Labor Law § 241 (6) claim is predicated on, among others, the alleged violation of 12 NYCRR 23-1.8 (a), which mandates the provision of protective eye wear to workers engaged in any activity that may endanger their eyes. Based on the circumstances of this case, the court finds this provision to be sufficiently specific and applicable to support plaintiff's claim (*see* ***Willis v Plaza Constr. Corp.***, 151 AD3d 568, 54 NYS3d 281 [1st Dept 2017]; ***Quiros v Five Star Improvements, Inc.***, 134 AD3d 1493, 22 NYS3d 736 [2d Dept 2015]; ***Montenegro v P12, LLC***, 130 AD3d 695, 13 NYS3d 241 [2d Dept 2015]).

"The label of construction manager versus general contractor is not necessarily determinative" of whether a party will be held liable under Labor Law § 241 [6] (***Walls v Turner Constr. Co.***, 4 NY3d 861, 864, 798 NYS2d 351 [2005]). Rather, the critical question in determining whether a party should be held liable is whether the purported construction manager was delegated supervisory control and authority over the work being done when the plaintiff was injured (*see* ***Walls v Turner Constr. Co.***, *supra* at 863-864). Indeed, a party will be deemed a general contractor if it "had the authority to choose the part[y] who did the work, and directly entered into [a] contract[ ] with th[at party], and had the authority to exercise control over the work, even if it did not actually do so" (***Williams v Dover Home Improvement***, 276 AD2d 626, 626, 714 NYS2d 318 [2d Dept 2000]; *see* ***Johnson v Ebidenergy, Inc.***, 60 AD3d 1419, 875 NYS2d 677 [4th Dept 2009]). Moreover, a construction manager, who is generally not responsible for a plaintiff's injuries, will be held absolutely liable as an agent of the owner where that party retains supervisory control and authority over the work being done and can, therefore, avoid or correct an unsafe condition (***Linkowski v City of New York***, 33 AD3d 971, 974-975, 824 NYS2d 109 [2d Dept 2006]; *see* ***Rodriguez v JMB Architecture, LLC***, 82 AD3d 949, 951, 919 NYS2d 40 [2d Dept 2011]).

Labor Law § 200 codifies the common law duty of contractors, owners, and their agents to ensure workers at a construction site have a safe place to perform their work (*see* ***Comes v N.Y. State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]). Unlike Labor Law § 241 (6), the duty imposed under section 200 of the statute is not absolute (*see* ***Sanatass v Consolidated Investing***, 10 NY3d 333, 858 NYS2d 67 [2008]). However, where, as in this case, the claim arises out of alleged dangers in the method of the work, recovery against an owner, contractor, or agent will be permitted if it is shown that the party to be charged had the authority to supervise and control the performance of the work (*see* ***Rizzuto v L.A. Wenger Contr. Co., Inc.***, *supra*; ***Melendez v 778 Park Ave. Bldg. Corp.***, 153 AD3d 700, 59 NYS3d 762 [2d Dept 2017]; ***Rodriguez v Mendlovits***, 153 AD3d 566, 60 NYS3d 87 [2d Dept 2017]; ***Zupan v Irwin Contr., Inc.***, 145 AD3d 715, 43 NYS3d 113 [2d Dept 2016]; ***Ortega v Puccia***, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]).

Here, Armenti failed to meet his prima facie burden on the motion by eliminating significant triable issues regarding his alleged liability under Labor Law §§ 200 and 241 (6) (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Significantly, Armenti's own submissions, which include, copies of the parties' deposition transcripts and a copy of the Levitzs' home construction contract, raise significant triable issues as to whether Armenti was a statutory agent or general contractor and, if so, whether he possessed the authority to control plaintiff's work and safety practices (*see* ***Caban v Plaza Constr. Corp.***, 153 AD3d 488, NYS3d [2d Dept 2017]; ***Johnsen v City of New York***, 149 AD3d 822, 49 NYS3d 898 [2d Dept 2017]; ***Guanopatin v Flushing Acquisition Holdings, LLC***, 127 AD3d 812, 7 NYS3d 322 [2d Dept 2015] ***Rauls v DirecTV, Inc.***, 113 AD3d 1097, 977 NYS2d 864 [2d Dept 2014]; ***Milanese v Kellerman***, 41 AD3d 1058, 838 NYS2d 256 [2d Dept 2007]; ***Williams v Dover Home Improvement, Inc.***, 276 AD2d 626, 714 NYS2d 318 [2d Dept 2000]). A review of the construction contract reveals that Armenti is listed as the "builder," and that he had the authority to hire subcontractors and oversee their work for the duration of the project. Moreover, the contract requires that Armenti be paid a 20 % fee to oversee the work of other subcontractors not personally hired by him, such as those subcontractors specifically selected by the Levitzs. The contract further requires that Armenti obtain workers' compensation and public liability insurance as a pre-condition for working on the project. Additionally, while Armenti testified that he did not have any employees at the worksite, he stated that he visited the worksite two to three times per week, that he was familiar with the contractors he brought onto the project, and that he worked closely with the owners of the various subcontractors and provided them construction materials. Indeed, plaintiff testified that Armenti was primarily involved in the building of new residences, that he directly hired the subcontractors, including E. Anderson Enterprise, for similar jobs in the past, and that he thought of Armenti as his employer, as Armenti had previously paid his wages in cash.

Furthermore, Armenti failed to submit any evidence or make any representations in support of the newly asserted defense contained in his amended pleading based on the exclusivity of the Workers' Compensation Law, and his purported status as plaintiff's "special employer" at the time of the accident. Armenti, therefore, failed to establish his entitlement to such a defense (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). In any event, where, as in this case, Armenti continues to deny that he possessed the authority to control plaintiff's work, and his own submissions include a proposed order by the Workers Compensation Board that determined E. Anderson Enterprise is plaintiff's employer, triable issues exist which would preclude judgment in his favor based on this

defense (*see* ***Nolan v Irwin Contr., Inc.***, 121 AD3d 1060, 997 NYS2d 138 [2d Dept 2014]; ***Persad v Abreu***, 84 AD3d 1046, 923 NYS2d 656 [2d Dept 2011]; ***Slikas v Cyclone Realty***, 78 AD3d 144, 908 NYS2d 117 2d Dept 2010]; ***Weitz v Anzek Constr. Corp.***, 65 AD3d 678, 885 NYS2d 314 [2d Dept 2009]; ***Singh v Metropolitan Constr. Corp.***, 244 AD2d 328, 663 NYS2d 870 [2d Dept 1997]). Accordingly, the branch of the motion for summary judgment dismissing the complaint against David Armenti is granted to the extent indicated herein, and is otherwise denied.

Dated: NOV 0 2 2017

HON. JOSEPH A. SANTORELLI
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION