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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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RAMON REYES-GARCIA,	TRIAL PART: 7
Plaintiff,	NASSAU COUNTY
-against-	INDEX NO: 7247/2015
SIENA VILLAGE, INC	MOTION SEQ #: 1, 2
Defendant.	SUBMIT DATE : 8/7/17

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The following papers having been read on this motion:

Notice of Motion (1) 1
Opposition 2
Reply 3
Notice of (Cross-) Motion (2) 4
Opposition 5
Reply 6

In this labor law action, Defendant has moved for summary judgment pursuant to CPLR §3212 to dismiss Plaintiff's complaint in its entirety. Plaintiff has cross-moved for an order granting him summary judgment on the issue of liability for its labor Law §240(1) claim only. Both motion and cross-motion have been fully briefed before the Court. After review, Defendant's motion is granted to the following extent and Plaintiff's cross-motion is hereby denied in its entirety.

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 demonstrate the absence of any material issues of fact. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 508 NYS2d 923 (1968). To make a prima facie showing, the motion must be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. Id. Once a prima facie showing has been made, 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. Id.; *see also* Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 (1980).

To established a prima facie case under the scaffold law, a plaintiff must demonstrate that the risk of injury from an elevation-related hazard was foreseeable and that an absent or defective protective device of the type enumerated in the statute was a proximate cause of the injuries alleged. Shipkoski v. Watch Case Factory Associates, 292 AD2d 587, 741 NYS2d 55 (2nd Dept., 2002); *see also* Labor Law §240(1). Where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under the scaffold law. Corchado v. 5030 Broadway Properties, LLC, 103 AD3d 768, 962 NYS2d 185 (2nd Dept., 2013). In order for a plaintiff to be considered the sole proximate cause of his injuries, it must be shown that an appropriate safety device was available, but that plaintiff chose not to use the device or misused the device. Robinson v. East Medical Center, LP, 6 NY3d 550, 814 NYS2d 589 (2006).

In the instant case, Defendant has failed to establish its entitlement to judgment as a matter of law based upon the papers submitted. Plaintiff's deposition indicates that non-party J.P. Painting supplied all of the tools needed to complete the job, including a ladder. Non-party Pusateri's deposition indicates that he specifically told Plaintiff not to use the ladder while using the extension pole to stain the wall. These competing depositions create an issue of fact as to whether or not Plaintiff was given the A-frame ladder to use while performing his job but misused the ladder itself or the extension pole in conjunction with it and whether as a result of the accident, Defendant as owner of the building may be held vicariously liable. Therefore, Defendant's request to dismiss Plaintiff's third cause of action under Labor Law §240(1) is hereby denied, as well as Plaintiff's request for summary judgment as to liability on this cause of action only.

Pursuant to Labor Law §200(1), in order to establish liability, it must be established that the owner or contractor defendant had the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition. Biafora v. City of New York, 27 Ad3d 506, 811 NYS2d 764 (2nd Dept., 2006). If an owner does not have authority to supervise or control the manner by which a worker performed his work, he cannot be found liable. Georgakopoulos v. Shifrin, 83 AD3d 659, 920 NYS2d 383 (2nd Dept., 2011).

Here, the deposition testimony submitted by Defendant clearly establishes that Defendant did not have the authority to control the work performed by J.P. Painting whatsoever. Both the testimony of non-party Pusateri as well as that of Mr. Junior on behalf of Defendant make clear

that all work performed by Plaintiff and his employer at the job site was under the exclusive control of J.P. Painting, including the methods to be used when performing such tasks. Plaintiff's deposition testimony offers no insight into any control on behalf of Defendant for the work that was performed. Thus, Defendant has established its prima facie entitlement to judgment as a matter of law on Plaintiff's second cause of action and it is hereby dismissed.

A plaintiff asserting a violation of Labor Law § 241(6) must allege that a specific and concrete provision of the Industrial Code was violated and that the violation proximately caused his injuries. Keener v. Cinalta Construction Corp., 146 AD3d 867, 45 NYS3d 179 (2nd Dept., 2017). To the extent that plaintiff has asserted a viable claim under this section, he need not show that defendant exercised supervision or control over his worksite in order to establish his right of recovery. Ross v. Curtis-Palmer Hydro-Electric Co., 81 NY2d 494, 601 NYS2d 49 (1993).

Plaintiff's bill of particulars allege violations by Defendant of 12 NYCRR §23-1.21(b)(4)(ii), (iv), and (v) and 12 NYCRR §23-1.21(e)(3). Once again, similar to this Court's findings for Plaintiff's Labor Law §240(1), Defendant has failed to establish its entitlement to dismissal of Plaintiff's claims under Labor Law §241(6) as asserted in its fourth and fifth causes of action. While deponent Pasuteri testified that he instructed Plaintiff not to use the ladder and the extension pole simultaneously, given that Plaintiff's co-worker supplied his own ladder to use for the task he was assigned, there remains a triable issue of fact as to whether or not Plaintiff was supplied the A-frame ladder and permitted to use it when using the extension pole. If J.P. Painting supplied all the tools necessary to complete the job, and the job did not require Plaintiff to use a ladder, a questions remains as to why the ladder was provided in the first instance at the start of this part of the job or why did it remain on the job site if it was no longer needed. Under these circumstances, Defendant cannot establish its entitlement to summary judgment, and the portions of its motion to this extent are properly denied.

Finally, turning to Defendant's request to dismiss Plaintiff's first cause of action for common law negligence, Defendant has also properly presented its entitlement to judgment as a matter of law, similar to its assertions under Labor Law §200. The injuries caused herein were not caused by a condition on property while work was being performed; rather, the injuries alleged herein were caused by the manner in which such work was performed. As such,

Defendant's lack of control or authority over the work being performed that led to the accident is sufficient reason to dismiss Plaintiff's first cause of action. Ortega v. Puccia, 57 AD3d 54, 86 NYS2d 323 (2nd Dept., 2008). Thus, Plaintiff's first cause of action for common-law negligence is also properly dismissed.

Defendant shall serve a copy of the within order with notice of entry upon Plaintiff within thirty (30) days from the date of this order. The parties shall appear as scheduled in the Central Jury Part of Supreme Court, Nassau County, on September 27, 2017, at 9:30am.

This hereby constitutes the decision and order of this Court.

ENTER

DATED: August 17, 2017

HON. ARTHUR M. DIAMOND
J.S.C.