SHORT FORM ORDER

INDEX No. 66559/2014
CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 6/5/18
SUBMIT DATE 9/6/18
Mot. Seq. # 04 - MG

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OLMAN LOPEZ,

Plaintiff,

-against-

LINDA COX,

Defendant.

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DELL & DEAN, PLLC
Attys. for Plaintiff
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GARDEN CITY, NY 11530

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Upon the following papers numbered 1 to 30 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9 ; ~~Notice of Cross Motion and supporting papers~~ ; Answering Affidavits and supporting papers 10 - 19 ; Replying Affidavits and supporting papers 20 - 30 ; ~~Other~~ ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion by defendant Linda Cox for summary judgment dismissing the complaint is granted.

This action was commenced by plaintiff Olman Lopez to recover damages for injuries he allegedly sustained on September 10, 2011, when he fell from a beam while repairing the roof at the premises known as 36 E. 12th Street, Huntington Station, New York. Plaintiff alleges he was injured during the course of his employ on property owned by the defendant and asserts claims against the defendant for violations of the Labor Law and for common law negligence.

Defendant now moves for summary judgment in her favor, arguing that she hired the plaintiff's employer, Olivia a/k/a Renee, and did not control or supervise the plaintiff's work. She argues that the plaintiff's claims under Labor Law §§ 240 (1) and 241 (6) are barred by the single-family homeowner exemption.

At his deposition, Lopez testified that at the time of his accident, he was employed by Olivia and was removing the existing roof to replace it because the existing roof was leaking. He stated that he had already removed the left side of the existing roof before the accident occurred. The plaintiff had been standing on a wet wooden beam underneath the roof in order to remove the shingles and existing roof. The plaintiff testified that he had previously examined the beam

before he stood on them and they did not appear to be rotted. When he began removing the right side of the roof the wooden beam he was standing on cracked causing him to fall to the ground below. He indicated that he was not wearing any type of safety equipment at the time of the accident but had worn safety equipment at other job sites. The plaintiff concedes that the defendant was not home when he was replacing the roof and the accident occurred. The plaintiff testified that Olivia provided all of the materials and tools for replacing the roof.

The defendant testified that she hired Olivia a/k/a Renee to fix the roof in her garage after she noticed it was leaking. She indicates that Renee was in charge of deciding how the roof would be fixed. The defendant testified that she was not present when the accident occurred and had never provided any instructions to the plaintiff on how to perform the job. She indicates the property is a single family home.

A party moving for summary judgment 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 (***Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP***, 26 NY3d 40, 19 NYS3d 488 [2015]; ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (***Nomura***, *supra*; *see also* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (***Daliendo v Johnson***, 147 AD2d 312, 543 NYS2d 987 [2d Dept 1989]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (***Nomura***, *supra*; *see also* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). 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]).

The Court in ***Perri v Gilbert Johnson Enters., Ltd.***, 14 AD3d 681, 683 [2nd Dept 2005], held that

> To establish liability for common-law negligence or violation of Labor Law § 200, the plaintiff must establish that the defendant in issue had "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (***Russin v Picciano & Son***, 54 N.Y.2d 311, 317, 429 N.E.2d 805, 445 N.Y.S.2d 127 [1981]; see ***Rizzuto v Wenger Contr. Co.***, 91 N.Y.2d 343, 352, 693 N.E.2d 1068, 670 N.Y.S.2d 816 [1998]; ***Singleton v Citnalta Constr. Corp.***, 291 A.D.2d 393, 394, 737 N.Y.S.2d 630 [2002]). "General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to

> impose liability for common-law negligence and under Labor Law § 200" (***Dos Santos v STV Engrs., Inc.***, 8 A.D.3d 223, 224, 778 N.Y.S.2d 48 [2004], lv denied, 4 N.Y.3d 702, 824 N.E.2d 49, 790 N.Y.S.2d 648 [2004]). Further, the authority to review safety at the site is insufficient if there is no evidence that the defendant actually controlled the manner in which the work was performed (see ***Loiacono v Lehrer McGovern Bovis***, 270 A.D.2d 464, 465, 704 N.Y.S.2d 658 [2000]).

In order to find liability for common-law negligence or under Labor Law 200 the owner of the premises must have "supervisory control over the injury-producing activity". (***Balbuena v NY Stock Exch., Inc.***, 49 AD3d 374, 376 [1st Dept 2008]. In ***Perri v Gilbert Johnson Enters., Ltd.***, supra, the evidence "established that Gilbert visited the site '[s]ometimes once or twice a week, sometimes once every two weeks' to talk to customers and review the progress of the work... There is no evidence in the record that the owner supervised the manner in which the work was performed" and therefore summary judgment was granted dismissing the common-law negligence and Labor Law 200 violations.

Labor Law § 200 is a codification of the common-law duty imposed upon an owner, contractor, or their agent, to provide construction site workers with a safe place to work (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Haider v Davis***, 35 AD3d 363, 827 NYS2d 179 [2d Dept 2006]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (***Messina v City of New York***, 46 NYS3d 174, 2017 NY Slip Op 00640 [2017], quoting ***Ortega v Puccia***, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]). When the methods or materials of the work are at issue, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged "had the authority to supervise or control the performance of the work" (*id.*). General supervisory authority at a work site is not enough; rather, a defendant must have had the responsibility for the manner in which the plaintiff's work is performed (*see* ***Messina v City of New York***, *supra*).

Labor Law §§ 240 and 241 apply to "[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith." To establish entitlement to the protection of the homeowner's exemption, a defendant must demonstrate that his house was a single- or two-family residence and that he did not "direct or control" the work being performed (***Ortega v Puccia***, *supra* at 58). "The statutory phrase 'direct or control' is construed strictly and refers to situations where the owner supervises the method and manner of the work" (*id.* at 59).

The owner or possessor of real property also has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Milewski v Washington Mut., Inc.***, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]). Thus, "[w]here a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" (***Ortega v Puccia***, *supra* at 61; *see* ***Pacheco v Smith***, 128 AD3d 926, 9 NYS3d 377 [2d Dept 2015]; ***Chowdhury v Rodriguez***, 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]).

The defendant has established prima facie entitlement to summary judgment in that the property was a single family residence and the defendant did not control the manner in which the plaintiff's work was performed or supervise the plaintiff during the replacement of the roof. Here, it is undisputed that the subject premises is a single family dwelling owned by the defendant. Further, there is nothing in the record to indicate that the defendant "directed or controlled" the work being performed by the plaintiff. Significantly, the defendant was absent during the roof replacement process. Thus, the defendant is entitled to the benefit of the homeowner's exemption. Having established prima facie entitlement to summary judgment, the burden shifted to the nonmoving party to raise a triable issue.

Plaintiff opposes defendant's motion, but fails to raise a triable issue. In opposition to the motion, plaintiff argues that the defendant knew the roof was deteriorating because she hired Olivia to replace it and has not proven that she was unaware that the beam was rotted. This argument is unavailing. The plaintiff testified that he had examined the beam before standing on it and could not tell it had rotted. In addition, he had already stood on that beam to remove the left half of the roof and began removing the right half when the beam cracked. Accordingly, the motion for summary judgment dismissing the complaint is granted.

The foregoing constitutes the decision and Order of this Court.

Dated: October 18, 2018

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

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION