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SHORT FORM ORDER

COPY

INDEX No. 16-5337
CAL No. 19-00614OT

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 8-8-19 (003)
MOTION DATE 9-5-19 (004)
MOTION DATE 10-24-19 (005)
ADJ. DATE 11-14-19
Mot. Seq. # 003 - MG
004 - MG
005 - Mot D

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JAIME FLORES,

Plaintiff,

- against -

DENSITY H. CONTRACTING CORP., SHERMAN LEWIS, ALICIA CARTER, and LONG ISLAND MOBILE HOME LEASING CORP.,

Defendants.

---X

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Upon the following papers read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by defendants Density H. Contracting Corp. and Sherman Lewis, dated July 15, 2019; Notice of Motion/ Order to Show Cause and supporting papers by defendant Long Island Mobile Home Leasing Corp., dated July 29, 2019; Notice of Cross Motion and supporting papers by defendant Alicia Carter, dated September 24, 2019; Answering Affidavits and supporting papers by plaintiff, dated October 23, 2019; Answering Affidavits and supporting papers by

defendants Density H. Contracting Corp. and Sherman Lewis, dated October 16, 2019; Replying Affidavit and supporting papers by defendants Density H. Contracting Corp. and Sherman Lewis, dated November 11, 2019; Replying Affidavit and supporting papers by defendant Long Island Mobile Home Leasing Corp., dated November 11, 2019; Replying Affidavits and supporting papers by defendant Alicia Carter, dated November 13, 2019; Other Memorandum of Law ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (003) by defendants Density H. Contracting Corp. and Sherman Lewis, the motion (004) by defendant Long Island Mobile Home Leasing Corp., and the cross motion (005) by defendant Alicia Carter, are consolidated for the purpose of this determination; and it is further

ORDERED that the motion (003) by defendants Density H. Contracting Corp. and Sherman Lewis for summary judgment dismissing the complaint and cross claims against them is granted; and it is

ORDERED that the motion (004) by defendant Long Island Mobile Home Leasing Corp. for summary judgment dismissing the complaint and cross claims against it is granted; and it is

ORDERED that the motion (005) by defendant Alicia Carter for summary judgment is granted in part and denied in part.

The plaintiff commenced this action against the defendants for alleged injuries arising from an accident which occurred on February 18, 2016 at 48 East Rogues Path, Huntington, New York. At the time of the alleged accident, plaintiff, an employee of nonparty Diaz Transportation, was using a forklift to deliver sheet rock which had been purchased from Home Depot to the subject premises. Defendant Alicia Carter, the owner of the premises, had contracted with defendant Density H. Contracting Corp. to perform interior renovations of the home following a fire. Defendant Long Island Mobile Home Leasing Corp. ("Long Island Mobile") delivered a mobile home to the property prior to the date of the accident, where Carter resided during the renovation work on her home. The plaintiff alleges that he sustained injury when, while using the forklift to place the sheet rock near the entrance to the home, a portion of the driveway collapsed, causing the front wheel of the forklift to go into the depression. In his amended complaint, the plaintiff asserts claims against the defendants for, *inter alia*, violations of Labor Law §§ 240, 241, 200, and common law negligence.

Density H. Contracting Corp. and Sherman Lewis, its owner (hereinafter collectively referred to as "Density"), move for summary judgment requesting dismissal of the plaintiff's claims and the cross claims against them. With respect to the plaintiff's claims under Labor Law §§ 240 (1), 241 (6) and 200, Density argues that the plaintiff was not a subcontractor engaged to perform construction work at the house, and that the driveway where the accident occurred was not an "area" for purposes of the Labor Law. Density further argues that dismissal of the plaintiff's claims under Labor Law § 240 (1) is warranted because the plaintiff was not injured as the result of an elevation related risk of the kind that the safety devices enumerated in the statute protect against. With respect to the plaintiff's claims under Labor Law § 241 (6), Density argues that the Industrial Code violations alleged by the plaintiff are inapplicable or too general to be actionable. With respect to the plaintiff's claims under Labor Law § 200 and common law negligence, Density argues that it did not breach a duty of care to the plaintiff, and that it did not supervise or direct the plaintiff's work, or have actual or constructive notice of the allegedly dangerous condition.

Density established its prima facie entitlement to judgment as a matter of law dismissing the plaintiff's claims under Labor Law §§ 240 (1) and 241 (6). The evidence submitted in support of Density's motion, including the deposition testimony of the parties, established that at the time of the accident the plaintiff was not engaged in construction work within the meaning of Labor Law § 240 (1), and was not working in a construction area within the meaning of Labor Law § 241 (6) (*see* ***Kusayev v Sussex Apartments Assoc., LLC***, 163 AD3d 943, 944, 83 NYS3d 262 [2d Dept 2018]; ***O'Gara v Humphreys & Harding, Inc.***, 282 AD2d 209, 723 NYS2d 25 [1st Dept 2001]). In addition, Density is entitled to summary judgment dismissing the plaintiff's claims under Labor Law § 240 (1) because the plaintiff was working at ground level when he was injured, and he was not exposed to any risk that the safety devices referenced in the statute would have protected against (*see* ***Wynne v B. Anthony Constr. Corp.***, 53 AD3d 654, 655, 862 NYS2d 379 [2d Dept 2008]). With respect to the plaintiff's claims against Density under Labor Law § 241 (6), Density's submissions further established that the alleged accident did not occur as the result of a violation of any specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. In opposition to Density's prima facie showing of entitlement to summary judgment with respect to the plaintiff's claims under Labor Law §§ 240 (1) and 241 (6), the plaintiff failed to raise an issue of fact (*see* ***Wynne v B. Anthony Constr. Corp.***, *supra*).

Density also established prima facie entitlement to summary judgment with respect to the plaintiff's claims under Labor Law § 200 and common law negligence. Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide workers with a safe place to work (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Kusayev v Sussex Apartments Assoc., LLC***, *supra*). Where a claim arises out of alleged dangers in the method of the work, there can be no recovery unless it is shown that the owner or general contractor had the authority to control the means and manner of the plaintiff's work (*see* ***Rizzuto v LA. Wenger Contr. Co., Inc.***, 91 NY2d 343, 352, 670 NYS2d 816 [1998]; ***Persichilli v Triborough Bridge & Tunnel Auth.***, 16 NY2d 136, 262 NYS2d 476 [1965]; ***Mitchell v Caton on the Park, LLC***, 167 AD3d 865, 866-867, 90 NYS3d 316 [2d Dept 2018]). By contrast, where the claim arises out of an alleged dangerous condition on the premises, there can be no recovery unless it is shown that the owner or general contractor possessed actual or constructive notice of said condition (*see* ***Mitchell v Caton on the Park, LLC***, 167 AD3d 865, 867, 90 NYS3d 316; ***Kuffour v Whitestone Const. Corp.***, 94 AD3d 706, 941 NYS2d 653 [2d Dept 2012]; ***Selak v Clover Mgt., Inc.***, 83 AD3d 1585, 1587, 922 NYS2d 891 [4th Dept. 2011]; ***Azad v 270 Realty Corp.***, 46 AD3d 728, 730, 848 NYS2d 688 [2d Dept 2007]). Here, Density has made a prima facie showing of entitlement to summary judgment with regard to the plaintiff's claims under Labor Law § 200 and common law negligence through the deposition testimony establishing that it did not supervise or direct the plaintiff's work, or have prior notice of any alleged dangerous condition with regard to the driveway or cesspool at the premises. In opposition to Density's motion, the plaintiff failed to present any evidence raising a triable issue of fact. Accordingly, the plaintiff's claims against Density under Labor Law §§ 240 (1), 241 (6), 200 and common law negligence are dismissed (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316; ***Wynne v B. Anthony Constr. Corp.***, *supra*).

Defendant Long Island Mobile has also established prima facie entitlement to summary judgment dismissing the plaintiff's claims against it in this matter. Labor Law § 240 (1) imposes a nondelegable duty upon owners, contractors, or their agents to provide proper protection to a worker performing

certain types of construction work (*see* ***Kilmetis v Creative Pool & Spa, Inc.***, 74 AD3d 1289, 904 NYS2d 495 [2d Dept 2010]; ***Aversano v JWH Contracting, LLC***, 37 AD3d 745, 831 NYS2d 222 [2d Dept 2007]). Labor Law § 241 (6) imposes a nondelegable duty on owners and general contractors to provide reasonable and adequate protection to workers, and makes them liable for injuries proximately caused by a violation of the statutory duty (*see* ***Root v County of Onondaga***, 174 AD2d 1014, 1015, 572 NYS2d 174, 176 [4th Dept 1991], *lv denied* 78 NY2d 858, 575 NYS2d 454 [1991]). Labor Law § 200 codifies the common-law duty of an owner or contractor to provide employees with a safe place to work (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 877, 609 NYS2d 168 [1993]). The evidence submitted in support of Long Island Mobile's motion, including the deposition testimony of the parties, establishes that Long Island Mobile is not subject to liability under the Labor Law because it was not a contractor, and did not exercise any supervisory control over any work at the subject premises. Rather, Long Island Mobile provided a mobile home for Carter's use, which was delivered to the subject premises prior to the commencement of the renovation work on the house. In opposition to Long Island Mobile's prima facie showing of entitlement to judgment as a matter of law with respect to the claims under Labor Law §§ 200, 240 (1) and 241 (6), the plaintiff failed to raise a triable issue of fact (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316; ***Kusayev v Sussex Apartments Assoc.***, *supra*).

With respect to the plaintiff's claims under common law negligence, Long Island Mobile established that it did not owe a duty to the plaintiff, and that it did not have actual or constructive notice of the alleged dangerous condition (*see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 140, 746 NYS2d 120, 123 [2002]). The deposition testimony of Carter and the witnesses produced by Long Island Mobile establishes that the mobile home was provided months prior to the accident, and was positioned on or near a different area of the driveway than the location where the accident occurred. The deposition testimony further establishes that no one from Long Island Mobile had notice of any dangerous condition in the area of the driveway where the accident later occurred. In opposition to Long Island Mobile's motion, the plaintiff failed to offer any evidence creating an issue of fact with regard to whether Long Island Mobile created the alleged dangerous condition, thereby "launching a force of harm" which proximately caused the accident, or otherwise owed a duty of care to the plaintiff (*see* ***Espinal v Melville Snow Contrs.***, *supra*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Notably, the expert affidavit of Bradley Korth, PE submitted by the plaintiff is speculative and conclusory, fails to state the manner in which he came to his conclusions, and assumes facts not supported by the evidence. As such, the affidavit lacks probative value and is insufficient to defeat Long Island Mobile's motion for summary judgment (*see* ***Haberman v Cheesecake Factory Restaurants, Inc.***, 43 AD3d 392, 842 NYS2d 450 [2d Dept 2007]; ***Ioffe v Hampshire House Apt. Corp.***, 21 AD3d 930, 931, 800 NYS2d 757 [2d Dept 2005]). As the plaintiff has failed to raise a triable issue of fact in opposition to Long Island Mobile's motion for summary judgment, the complaint against Long Island Mobile is dismissed (*see* ***Espinal v Melville Snow Contrs.***, *supra*).

Defendant Carter moves for summary judgment dismissing the plaintiff's claims against her based on the homeowner's exemption under Labor Law §§ 240 (1) and 241 (6), as the subject premises was a single-family residence, and she did not supervise or control the plaintiff's work. Carter further argues that she is entitled to summary judgment with respect to the plaintiff's claims under Labor Law §

200 and common law negligence because she did not control the work of the plaintiff, and because she did not have prior notice of the alleged dangerous condition.

Initially, the Court notes that while a movant's failure to include a complete copy of the pleadings is ordinarily grounds for denial of a summary judgment motion (*see* ***Wider v Heller***, 24 AD3d 433, 805 NYS2d 130 [2005]), such a procedural defect may be overlooked if the record is sufficiently complete and the opposing party has not been prejudiced (*see* CPLR 2001; ***Sensible Choice Contr., LLC v Rodgers***, 164 AD3d 705, 83 NYS3d 298 [2d Dept 2018]; ***Wade v Knight Transp., Inc.***, 151 AD3d 1107, 58 NYS3d 458 [2d Dept 2017]; ***Long Is. Pine Barrens Socy., Inc. v County of Suffolk***, 122 AD3d 688, 996 NYS2d 162 [2d Dept 2014]; ***Welch v Hauck***, 18 AD3d 1096, 795 NYS2d 789 [2d Dept 2005]). Therefore, notwithstanding the failure of Carter to include a copy of the complete set of the pleadings with her moving papers, where, as in this case, more than one movant has submitted a copy of the complete set of pleadings with their moving papers, the record is sufficiently complete and the motions may be decided on their merits (*see* ***Sensible Choice Contr., LLC v Rodgers***, *supra*).

Labor Law §§ 240 and 241 specifically exempt from liability the owners of one and two-family dwellings who contract for, but do not direct or control the work on the premises (*see* ***Nicholas v Phillips***, 151 AD3d 731, 54 NYS3d 675 [2d Dept 2017]; ***Dasilva v Nussdorf***, 146 AD3d 859, 45 NYS3d 531 [2d Dept 2017]; ***Youseff v Malik***, 112 AD3d 617, 977 NYS2d 53 [2d Dept 2013]; ***Castellanos v United Cerebral Palsy Assn. of Greater Suffolk, Inc.***, 77 AD3d 879, 909 NYS2d 757 [2d Dept 2010]; ***Ferrero v Best Modular Homes, Inc.***, 33 AD3d 847, 823 NYS2d 477 [2d Dept 2006]). The phrase "direct or control" is construed strictly to apply only where the home owner supervises the method and manner of the injury-producing work (*see* ***Hicks v Aibani***, 157 AD3d 870, 67 NYS3d 476 [2d Dept 2018]; ***Arama v Fruchter***, 39 AD3d 678, 833 NYS2d 665 [2d Dept 2007]; ***Mayen v Kalter***, 282 AD2d 508, 722 NYS2d 760 [2d Dept 2001]; ***Rimoldi v Schanzer***, 147 AD2d 541, 537 NYS2d 839 [2d Dept 1989]). Here, Carter established, prima facie, the applicability of the homeowner's exemption to liability under Labor Law §§ 240 and 241 by demonstrating that the subject premises was a one-family dwelling used exclusively for residential purposes, and that she did not exercise direction or control over the plaintiff's work (*see* ***Tomecek v Westchester Additions & Renovations, Inc.,*** 97 AD3d 737, 738, 948 NYS2d 671 [2d Dept 2012]; ***Devodier v Haas***, 173 AD2d 437, 438, 570 NYS2d 63 [2d Dept 1991]). In opposition, the plaintiff failed to raise a material issue warranting denial of the motion (*see* ***Zuckerman v City of New York***, *supra*). Accordingly, the plaintiff's claims against Carter under Labor Law §§ 240 and 241 are dismissed.

As to the branch of Carter's cross motion seeking dismissal of the plaintiff's Labor Law § 200 and common-law negligence causes of action, "[c]ases 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" (***Ortega v Puccia***, 57 AD3d 54, 61, 866 NYS2d 323, 329 [2d Dept 2008]; *see also* ***Chowdhury v Rodriguez***, 57 AD3d 121, 128, 867 NYS2d 123, 129 [2d Dept 2008]). Where a premises condition is at issue, an owner or contractor may be held liable for a violation of Labor Law § 200 if the owner or contractor either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*see* ***Azad v 270 5th Realty Corp.***, 46 AD3d 728, 730, 848 NYS2d 688, 690-691 [2d Dept 2007]). The evidence submitted in support of Carter's motion fails to

establish, prima facie, that Carter did not have actual or constructive notice of the alleged dangerous condition with regard to the portion of the driveway located above the septic tank. Accordingly, the branch of Carter's motion for summary judgment dismissing the plaintiff's claims against her under Labor Law § 200 and common-law negligence is denied (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Accordingly, the motion of Density H. Contracting Corp. and Sherman Lewis for summary judgment dismissing the plaintiff's complaint and all cross claims against them is granted. The motion of Long Island Mobile Home Leasing Corp. for summary judgment dismissing the plaintiff's complaint and all cross claims against it is also granted. The branches of Carter's cross motion for summary judgment dismissing the plaintiff's claims against her under Labor Law §§ 240 (1) and 241 (6) is granted, and Carter's cross motion is otherwise denied.

Dated: May 21, 2020

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