SHORT FORM ORDER

INDEX No. 617428/2016
CAL. No. 202100200OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 55 - SUFFOLK COUNTY

PRESENT:

Hon. GEORGE M. NOLAN
Justice of the Supreme Court

MOTION DATE 3/23/20 (008)
MOTION DATE 4/9/21 (009)
ADJ. DATE 6/3/21
Mot. Seq. # 008 MG
Mot. Seq. # 009 MG; CASEDISP

---X

JOSEPH PAUL,

Plaintiff,

- against -

PSEG LONG ISLAND, LLC and VERIZON COMMUNICATIONS INC.,

Defendants.

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Upon the following papers read on these e-filed motions for summary judgment : Notice of Motions/ Order to Show Cause and supporting papers by defendant PSEG Long Island dated March 23, 2021, and the motion by defendant Verizon Communications dated April 9, 2021 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers by plaintiff dated May 24, 2021 ; Replying Affidavits and supporting papers by defendant PSEG Long Island dated May 28, 2021 ; Other Memoranda of Law ; it is

ORDERED that the motion (008) by defendant PSEG Long Island, LLC, and the motion (009) by defendant Verizon Communications, Inc., are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant PSEG Long Island, LLC, for summary judgment dismissing the complaint against it is granted; and it is

ORDERED that the motion by defendant Verizon Communications, Inc. for summary judgment dismissing the complaint against it is granted.

Plaintiff Joseph Paul commenced this action to recover damages for personal injuries allegedly sustained on February 9, 2016, when he fell from a ladder while performing work on a Wi-Fi unit on a utility pole on or near a property located at 172 Dune Road in the Village of Quogue. After allegedly determining that leaning his ladder against the utility pole was not a "good work spot," plaintiff wrapped a leather safety device on his ladder around the metal strand wire used to anchor and support the utility pole. Plaintiff then leaned his ladder against some other wires already hanging on the utility pole and began performing his work. Plaintiff alleges that the utility pole's wire strand broke as he was climbing down the ladder, causing both himself and the ladder to fall to the ground. At the time of the accident, plaintiff was employed by nonparty CSC Holdings, LLC (hereinafter referred to as "Cablevision"). By way of his complaint, plaintiff alleges that defendants Village of Quogue, Town of Southampton, Village of Westhampton, and PSEG Long Island, LLC ("PSEG"), all owned, operated, maintained, and controlled the utility pole in question. According to the complaint, plaintiff asserts that defendants' violation of Labor Law §§ 200, 240, and 241 (6) was the cause of his injuries.

Defendants joined issue denying plaintiff's claims and all moved for summary judgment dismissing the complaint against them. By order dated January 22, 2018, this court granted summary judgment dismissing the claims against the municipal defendants, including the Village of Quogue, the Town of Southampton, and the Village of Westhampton. However, as the court could not determine whether PSEG owned the allegedly defective wire strand, PSEG's motion was denied, without prejudice, to renew after the completion of discovery. A subsequent motion by PSEG to reargue its motion for summary judgment, which was made prior to the filing of the note of issue, was denied by order of this court dated August 1, 2018. On January 2, 2019, plaintiff commenced a second action, under index number 600088/2019, asserting Labor Law §§ 200, 240, and 241 (6) claims against National Grid USA and Verizon Communications, Inc. ("Verizon"). Shortly thereafter, the parties executed a stipulation discontinuing the action against National Grid. Further, the court granted a motion by PSEG seeking to consolidate both actions. Following a period of acrimonious discovery, the note of issue was filed on February 26, 2021.

PSEG now moves for summary judgment dismissing the complaint against it, arguing that it did not own the utility pole or wire strand which snapped and caused the accident, that said wire strand was owned by plaintiff's employer, Cablevision, and that PSEG had no right to control and was unaware of plaintiff's work at the time of the accident. PSEG further argues that Labor Law § 240 (1) is inapplicable under the circumstances of this case, because the work in which plaintiff was engaged, the replacement of a worn non-working Wi-Fi unit, constitutes the mere replacement of components due to normal wear and tear. By way of a separate motion, Verizon moves for summary judgment dismissing the complaint against it. Verizon asserts, among other things, that the complaint incorrectly names "Verizon Communications, Inc.," a holding company that merely files financial reports with the SEC, as a party to the action. Additionally, Verizon asserts that it cannot be held liable for plaintiff's injuries because it did not own the premises, utility pole, or wire strand involved in the accident, and it did not contract for, supervise, or otherwise possess the authority to control plaintiff's work. Plaintiff opposes the motion by PSEG on the bases that triable issues exist as to whether PSEG agreed to oversee the

operations of electrical transmission systems owned by LILCO/LIPA, including the subject utility pole and its attachments, when it entered a contract agreeing to be named as the utility's designated agent and, if so, whether PSEG bears common law and Labor Law liability for his injuries. Plaintiff submitted no papers in opposition to Verizon's motion.

Initially, the court grants the unopposed motion by Verizon seeking summary judgment dismissing the complaint against it, as plaintiff, by failing to oppose the motion, is deemed to have abandoned his claims against Verizon (*see* ***Rodriguez v Dormitory Auth. of the State of N.Y.***, 104 AD3d 529, 962 NYS2d 102 [1st Dept 2013]; ***Kronick v L.P. Thebault Co., Inc.***, 70 AD3d 648, 892 NYS2d 895 [2d Dept 2010]; ***McNamee Constr. Corp. v City of New Rochelle***, 29 AD3d 544, 817 NYS2d 295 [2d Dept 2006]). In any event, Verizon met its burden on the motion by submitting undisputed evidence that it did not own the utility pole, wire strand, or the premises on which they were located, and that it did not contract for, supervise, or otherwise possess the authority to control plaintiff's work. Additionally, by failing to oppose the branch of PSEG's motion requesting dismissal of the Labor Law § 241 (6) claim, plaintiff also is deemed to have abandoned such claim (*see* ***Rodriguez v Dormitory Auth. of the State of N.Y.***, 104 AD3d 529, 962 NYS2d 102; ***Kronick v L.P. Thebault Co., Inc.***, 70 AD3d 648, 892 NYS2d 895). Therefore, the court grants the branch of PSEG's motion seeking dismissal of plaintiff's Labor Law § 241 (6) claim against it.

Labor Law § 240 (1) imposes a nondelegable duty upon owners, contractors, and their agents, to provide safety devices for workers at an elevated work site, including the provision of safety equipment to protect workers against falling from a height, and the absence of appropriate safety devices constitutes a violation of the statute as a matter of law (*see* ***McCarthy v Turner Constr., Inc.***, 17 NY3d 369, 374, 929 NYS2d 556 [2011]; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]). The reach of Labor Law § 240 (1) extends to injuries sustained during the repair and alteration of utility poles and its attached hardware, including cables, support systems, and Wi-Fi units (*see* ***Paul v Village of Quogue***, 178 AD3d 942, 115 NYS3d 450 [2d Dept 2019]; ***Gunderman v Sure Connect Cable Installation, Inc.***, 101 AD3d 1214, 956 NYS2d 211 [3d Dept 2012]; *see also* ***Lewis-Moors v Contel of New York, Inc.***, 78 NY2d 942, 573 NYS2d 636 [1991]). "The term 'owner' within the meaning of article 10 of the Labor Law encompasses a 'person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit'"(***Zaher v Shopwell, Inc.***, 18 AD3d 339, 339-340, 795 NYS2d 223 [1st Dept 2005], quoting ***Copertino v Ward***, 100 AD2d 565, 567, 566, 473 NYS2d 494 [1984]). "'A non-contracting owner, one who does not hire contractors or agents to accomplish the work, will be liable under the Labor Law only where there exists 'some nexus between the owner and the worker, whether by a lease agreement or grant of an easement or other property interest'" (***Paul v Village of Quogue***, 178 AD3d 942, 943 - 944, 115 NYS3d 450, quoting ***Morton v State of New York***, 15 NY3d 50, 56, 904 NYS2d 350 [2010]; *see* ***Scaparo v Village of Ilion***, 13 NY3d 864, 866, 893 NYS2d 823 [2009]). Further, a party will be deemed to be an agent of an owner and, therefore liable, under the Labor Law when it has the "ability to control the activity which brought about the injury" (***Walls v Turner Constr. Co.***, 4 NY3d 861, 863-864, 798 NYS2d 351 [2005]; *see* ***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]). However, "[t]he key in determining whether a nontitleholder is an 'owner' is the 'right to insist that proper safety practices were followed and it is the right to control the work that is significant, not the actual exercise or nonexercise of

control'" (***Lacey v Long Island Lighting Co.***, 293 AD2d 718, 719, 741 NYS2d 558 [2d Dept 2002]; quoting ***Copertino v Ward***, 100 AD2d 565, 473 NYS2d 494 [2d Dept 1984]).

"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" (***Ortega v Puccia***, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]; *see* ***Chowdhury v Rodriguez***, 57 AD3d 121, 128, 867 NYS2d 123 [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 they either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (*see* ***Kuffour v Whitestone Const. Corp.***, 94 AD3d 706, 941 NYS2d 653 [2d Dept 2012]; ***Azad v 270 Realty Corp.***, 46 AD3d 728, 730, 848 NYS2d 688 [2d Dept 2007]; ***Chowdhury v Rodriguez***, *supra*; ***Kehoe v Segal***, 272 AD2d 583, 709 NYS2d 817 [2d Dept 2000]). To constitute constructive notice, the defect must be visible and apparent and it must exist for a sufficient length of time before the accident to permit the defendant an opportunity to discover and remedy it" (***Gordon v American Museum of Natural History***, 67 NY2d 836, 837, 501 NYS2d 646 [1986]). "[C]onstructive notice will not be imputed where a defect is latent and would not be discoverable upon reasonable inspection" (***Curiale v Sharrotts Woods, Inc.***, 9 AD3d 473, 475, 781 NYS2d 47 [2d Dept 2004]; *see* ***Lal v Ching Po Ng***, 33 AD3d 668, 823 NYS2d 429 [2d Dept 2006]). By contrast, when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work (*see* ***Rizzuto v L.A. Wenger Contr. Co., Inc.***, 91 NY2d 343, 352, 670 NYS2d 816 [1998]; ***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 317, 445 NYS2d 127 [1981]; ***Ortega v Puccia***, *supra*).

Here, PSEG established it prima facie entitlement to dismissal of the Labor Law § 240 claim against it by submitting evidence that it did not own the defective wire strand in question, and that it did not possess the authority to control the activity which brought about the injury, or the right to insist that proper safety practices were followed (*see* ***Scaparo v Village of Ilion***, 13 NY3d 864, 893 NYS2d 823; ***Paul v Village of Quogue***, 178 AD3d 942, 115 NYS3d 450; ***Wheeler v Citizens Telecom. Co. of N.Y., Inc.***, 74 AD3d 1622, 905 NYS2d 293 [3d Dept 2010]; ***Ackley v New York State Elec. & Gas Corp.***, 8 AD3d 941, 779 NYS2d 279 [3d Dept 2004]; ***Sarigul v New York Tel. Co.***, 4 AD3d 168, 772 NYS2d 653 [1st Dept 2004]; ***Lacey v Long Island Lighting Co.***, 293 AD2d 718, 741 NYS2d 558). Significantly, plaintiff testified that the accident occurred as a result of the strand wire snapping rather than a pole or premises defect. Although plaintiff could not identify who owned the strand wire, he testified that he was aware that Cablevision had installed its own wires on the utility poles, that he had no reason to believe that the wire in question belonged to PSEG, and that as his employer, Cablevision, exclusively controlled and supervised his work. In addition, PSEG submitted deposition testimony by its division manager, William Hewlett, stating that he was able to identify the broken strand wire as Cablevision's equipment due to its location on the pole and, consistent with Article VIII of the pole attachment agreement, Cablevision was responsible for maintaining and repairing its own attachments, including the strand wire, to the pole. Hewlett further testified that PSEG was not notified of plaintiff's work, and that no one from PSEG were either present or had any idea that plaintiff was working on the pole that day. PSEG further established its prima facie entitlement to summary judgment dismissing the common law negligence and Labor Law § 200 claims against it (*see* ***Rizzuto v L.A. Wenger Contr. Co.,***

Inc., 91 NY2d 343, 352, 670 NYS2d 816; ***Paul v Village of Quogue***, 178 AD3d 942, 115 NYS3d 450; ***Wheeler v Citizens Telecom. Co. of N.Y., Inc.***, 74 AD3d 1622, 905 NYS2d 293; ***Lal v Ching Po Ng***, 33 AD3d 668, 823 NYS2d 429). As discussed above, PSEG adduced evidence that it did not own the defective strand wire, that the alleged defect was latent and not discoverable before the accident, and that it did not possess the authority to control plaintiff's work or determine his safety practices.

Plaintiff failed to raise any significant triable issues in opposition (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v New York***, 497 NY2d 557, 427 NYS2d 595[1980]). PSEG's mere contractual designation as LIPA's agent for the purpose of overseeing the electrical transmissions systems and poles is insufficient to defeat PSEG's prima facie showing. As discussed above, plaintiff did not identify any defect with the utility pole in question, and specifically testified that the accident occurred when the strand wire – which exhibited no visible signs of defect – unexpectedly snapped and caused the ladder on which he was standing to fall. Moreover, PSEG submitted unrefuted evidence that the strand wire in question was owned by Cablevision rather than PSEG or LIPA, and that, despite its designation as LIPA's agent, the pole attachment agreement indicates that Cablevision was still contractually responsible for maintaining and repairing the device. In any event, it is undisputed that PSEG did not contract for plaintiff's work, that there was no nexus between PSEG and the work, and that PSEG did not have the right to control such work or insist that proper safety practices were followed (*see* ***Paul v Village of Quogue***, 178 AD3d 942,115 NYS3d 450; ***Zaher v Shopwell, Inc.***, 18 AD3d 339, 795 NYS2d 223; ***Sarigul v New York Tel. Co.***, 4 AD3d 168, 772 NYS2d 653; ***Lacey v Long Island Lighting Co.***, 293 AD2d 718, 719, 741 NYS2d 558). Accordingly, the motion by defendant PSEG Long Island, LLC, for summary judgment dismissing the complaint against it is granted.

Dated: September 30, 2021

J.S.C.

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**