SUPREME COURT: STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

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CARLOS BUENABAD,

Plaintiff,

-against-

CRP SANITATION, INC., CALLAHEAD CORPORATION, FINER FIRE & RESTORATION CORP., 4 SEASONS FIRE RESTORATION, FOUR SEASONS RESTORATION, LLC, and ANTONIO RODRIGUEZ d/b/a ANTONIO RODRIGUEZ HOME IMPROVEMENT INC. and PRISM GENERAL SERVICES CORP.,

Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

DECISION & ORDER

Index No: 52578/2019

Motion Sequence No. 03

The following papers (NYSCEF document nos. 62-84; 91-99; 104) were read on the motion by the defendants, Finer Fire & Restoration Corp. and Four Seasons Restoration, LLC, for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint insofar as asserts a cause of action against them.

Motion Sequence No. 03
Notice of Motion-Affirmation-Exhibits (A-S)-Statement of Facts-Memorandum of Law
Affirmation in Opposition-Exhibits (1-7)-Response to Statement of Facts
Reply Affirmation

Upon reading the foregoing papers, this motion is determined as follows:

Plaintiff sues for injuries allegedly sustained in a construction accident that occurred on November 7, 2018. Plaintiff was employed by the defendant, Antonio Rodriguez d/b/a Antonio Rodriguez Home Improvement Inc., who was retained by the defendant, Finer Fire & Restoration Corp. (Finer Fire), to perform roofing work in connection with repair of a residence located at 1 Cobb Lane, Tarrytown, New York. The residence, which was owned by non-party, James McMurtry (McMurtry), had sustained damages as a result of a fallen tree.

At deposition, Mark Fein (Fein), the owner of Finer Fire and Four Seasons Restoration, LLC (Four Seasons), testified that McMurtry agreed to have Finer Fire "fulfill the scope of work" needed on his residence and Fein testified that McMurtry agreed to have his homeowner's insurance company (Allstate) pay Finer Fire for its work (*see* Fein deposition tr at 17-18).

Fein further testified that Finer Fire was retained by Allstate to generate a "scope of work"—i.e., to identify what work needed to be done to repair the residence—and to act as the project management company to fulfill that scope of work (*see* Fein deposition tr at 5). Fein further testified that Finer Fire provided materials (trim) to Rodriguez at the premises on one occasion (*see id.* at 12-13), that he (Fein) never visited the premises but that his project manager, Paul Cancilleri, visited the premises "as needed" (*id.* at 12). The accident allegedly occurred when the plaintiff, who was securing an extension ladder for Rodriguez, was struck by the ladder when it "fell apart and...came down" (plaintiff deposition tr dated September 24, 2020, at 13) onto plaintiff causing him to fall from the pitched porch roof of the McMurtry's residence.

Plaintiff commenced this action against, *inter alia*, the moving defendants herein, Finer Fire and Four Seasons, asserting causes of action for violations of Labor Law §§ 200, 240 (1) and 241 (6). Following the completion of discovery, Finer Fire and Four Seasons now move for an order, pursuant to CPLR 3212, granting summary judgment dismissing so much of the complaint as asserts a cause of action against them. Plaintiff opposes the motion.

In support of their motion, movants proffer, among other things, the relevant pleadings, the deposition testimony of the plaintiff and of Mark Fein, and the master vendor services agreement entered into between Rodriguez and Finer Fire. Based thereon, movants contend that the evidence demonstrates that neither Finer Fire nor Four Seasons are proper Labor Law defendants and, as such, dismissal of the complaint against each of them is warranted. Four Seasons submits that because it had no connection to the subject construction work insofar as it was not hired to perform any work at the subject premises, did not perform any work at the premises, and did not subcontract or hire any other party to perform any work, it cannot be subject to any liability under the common law or the Labor Law. Finer Fire similarly submits that it cannot be subject to liability under the common law or the Labor Law. Although Finer Fire concedes that it had a relationship to the subject construction work, it submits that its relationship to the work was not of the type that can serve as a basis for liability. More specifically, Finer Fire argues that it did not supervise or control the plaintiff's work. As such, it submits that dismissal of the complaint against it is warranted. Finer Fire asserts that Rodriguez, the plaintiff's employer, was the general contractor and was the only entity that supervised, directed or controlled the plaintiff's work. Based thereon, Four Seasons and Finer Fire each assert that dismissal of the complaint against each of them is warranted.

In opposition, plaintiff argues, among other things, that the characterization of Rodriguez as a general contractor on the job site is incorrect. Plaintiff asserts that the master vendor services agreement proffered by the defendants is silent as to Rodriguez's role as a general contractor. Plaintiff proffers an affidavit in opposition to the motion wherein he attests, among other things, that during the three weeks plaintiff worked at the work site, there was a supervisor named Paul, who, he assumes, was employed by Four Seasons because he provided Rodriguez with shirts that contained the name "4 Seasons" printed thereon. Plaintiff further avers that he observed Paul at the work site on three or four separate occasions and would observe Paul talking to Rodriguez and telling Rodriguez "what to do" (*see* plaintiff deposition tr dated September 17, 2020, at 50; *see also* plaintiff aff. in opp. at ¶ 20). Plaintiff concedes that he does not know what Paul and Rodriguez specifically discussed. However, he attests that he would observe Paul supervising Rodriguez, pointing to various portions of the roof, and inspecting plaintiff and his co-workers work during each time Paul was on site (*see* plaintiff aff. in opp. at ¶¶ 20-21). Plaintiff also contends that defendants were acting as agents of McMurtry and/or Allstate and, as such, are proper Labor Law defendants. In support of this contention, plaintiff points to an exhibit entitled, "Authorization To Repair /Direction To Pay", which plaintiff submits demonstrates that McMurtry authorized Finer Fire to be his (McMurtry's) agent to do the repair work and that Finer Fire hired Rodriguez to be the roofing subcontractor.

In reply, defendants contend, among other things, that because plaintiff's affidavit submitted in opposition to the motion was tailored to avoid the consequences of his deposition testimony, defendants assert that the court should disregard the affidavit as it raises only feigned issues of fact. Defendants further submit that the evidence establishes that Finer Fire was, in essence, a construction manager with no authority to control the work or to stop unsafe working conditions. Based thereon, defendants submit that there are no questions of fact as to their liability under the common law or the Labor Law and, as such, their motion should be granted.

On a motion for summary judgment the court's function is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see* CPLR 3212 [b]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). In determining the motion, the court must view the evidence in a light most favorable to the nonmovant and is obliged to draw all reasonable inferences in the nonmovant's favor (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]; *Stukas v Streiter*, 83 AD3d 18, 22 [2d Dept 2011]). Such a motion may be granted only if the movant tenders sufficient evidence in admissible form demonstrating, prima facie, the absence of triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make a prima facie showing requires denial of the motion regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the prima facie burden is met, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form establishing the existence of material issues of fact requiring a trial (*see Zuckerman*, 49 NY2d at 562). "Summary

judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should only be employed when there is no doubt as to the absence of triable issues" (*Owens v City of New York*, 183 AD3d 903, 906 [2d Dept 2020] [internal quotation marks omitted]).

The court first addresses that branch of the defendants' motion seeking dismissal of the claims asserted against Finer Fire. As outlined above, Finer Fire's principal argument is premised upon the assertion that it is not a proper Labor Law defendant since it's role was limited to that of a "project manager" and it did not supervise plaintiff's work.

"The meaning of 'owners' under Labor Law §§ 240(1) and 241(6) has not been limited to titleholders but has 'been held to encompass 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' " (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 618 [2d Dept 2008], quoting *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]; *see also Walkow v MJ Peterson/Tucker Homes, LLC*, 185 AD3d 1463, 1466 [4th Dept 2020] ["[a]lthough the term owner generally refers to the titleholder of the property, it may also encompass one who has an interest in the property and who contracted for or otherwise had the right to control the work"] [internal quotation marks, brackets and ellipses omitted]). Indeed, "[t]he 'owners' contemplated by the Legislature are those parties with a property interest who hire the general contractor to undertake the construction work on their behalf. It is the party who, as a practical matter, has the right to hire or fire subcontractors and to insist that proper safety practices are followed" (*Sweeting v Board of Coop. Educ. Servs.*, 83 AD2d 103, 114 [4th Dept 1981], *lv denied* 56 NY2d 503 [1982]). "A party which has the authority to enforce safety standards and choose responsible subcontractors is considered a contractor under Labor Law § 240(1)" (*Williams v Dover Home Improvement*, 276 AD2d 626, 626 [2d Dept 2000], citing *Nowak v Smith & Mahoney*, 110 AD2d 288 [3d Dept 1985]). "The label given a defendant, whether 'construction manager' or 'general contractor,' is not determinative" (*Myles v Claxton*, 115 AD3d 654, 655 [2d Dept 2014]; *Rodriguez v JMB Architecture, LLC*, 82 AD3d 949, 951 [2d Dept 2011]). Rather, the determinative factor is whether the party "had the authority to exercise control over the work, not whether it actually exercised that right" (*Guanopatin v Flushing Acquisition Holdings, LLC*, 127 AD3d 812, 814 [2d Dept 2015]; *see Bakhtadze v Riddle*, 56 AD3d 589, 590 [2d Dept 2008]; *Mulcaire v Buffalo Structural Steel Constr. Corp.*, 45 AD3d 1426, 1428 [4th Dept 2007]; *Williams*, 276 AD2d at 626; *Sweeting*, 83 AD2d at 114 ["[i]t is the *right* to control the work that is significant, *not* the actual exercise or nonexercise of control"] [emphasis in original]). "Although a construction manager is generally not responsible for injuries under Labor Law § 240(1), it may be held vicariously liable as an agent of the property owner if it had the ability to control the activity which brought about the injury" (*Tomyuk v Junefield Assoc.*, 57 AD3d 518, 520 [2d Dept 2008]).

Here, viewing the evidence in a light most favorable to the plaintiff, as the non-moving party, the defendant, Finer Fire, failed to establish its prima facie entitlement to judgment as a matter of law dismissing so much of the complaint that asserts a cause of

action against it pursuant to Labor Law §§ 240 (1) and 241 (6). The moving papers fail to eliminate all triable issues of fact as to whether Finer Fire was either an agent of the homeowner, McMurtry, or an agent of Rodriguez for Labor Law purposes and whether Finer Fire had the authority to supervise and control the work site (*see Reyes v Bruckner Plaza Shopping Ctr. LLC*, 173 AD3d 570, 571 [1st Dept 2019]; *Stiegman v Barden & Robeson Corp.*, 162 AD3d 1694, 1697 [4th Dept 2018]; *Voultepsis v Gumley-Haft-Klierer, Inc.*, 60 AD3d 524, 525 [1st Dept 2009]; *Corona v Metropolitan 298-308 Assoc.*, 281 AD2d 447, 447-448 [2d Dept 2001]). Thus, those portions of the motion by Finer Fire seeking dismissal of the Labor Law §§ 240(1) and 241(6) claims are denied without regard to the sufficiency of the plaintiff's opposing papers (*see Alvarez*, 68 NY2d at 324). Specifically, the evidence proffered by Finer Fire in support of its motion including, what Finer Fire refers to as the "scope of work" for the project (*see* exhibit "O", at NYSCEF Doc No. 79), identifies "Finer Fire Restoration" as the contracting company and the document makes no reference to Rodriguez or his (Rodriguez's) company. Further, the exhibit entitled "*Authorization to Repair*/Direction to Pay" (*see* exhibit "Q", NYSCEF Doc No. 81) (emphasis added), which appears to be printed on Finer Fire's letterhead and which is purportedly signed by McMurtry, lists "Finer Fire Restoration" as the entity authorized "to perform restoration service" at the residence of McMurtry. Moreover, the plaintiff's deposition testimony, which defendants tendered in support of their motion, was insufficient to eliminate all triable issues of material fact. Plaintiff testified that "[b]efore the accident, there was a man that would come to the site and tell Anthony [Antonio Rodriguez] what to do (plaintiff deposition tr dated September 17, 2020, at 50). Plaintiff subsequently identified the man as Paul (*see id.*). Plaintiff further testified that Paul came to the residence "about once a week" to "check out the job" and that he witnessed Paul "talk to Antonio Rodriguez" (*id.* at 52-53). Last, the deposition testimony by Fein that his project manager, Paul, would visit the site "as needed" without any further explanation or detail as to Paul's involvement is similarly insufficient to affirmatively establish prima facie entitlement to judgment as a matter of law dismissing the claims premised upon a violation of Labor Law §§ 240 (1) and 241 (6) (*see Reyes*, 173 AD3d at 571).

With respect to the plaintiff's claim predicated upon a violation of Labor Law § 200, Finer Fire failed to establish its prima facie entitlement to judgment as a matter of law dismissing this claim. Since the accident arose from the means and methods of the work, and Finer Fire has failed to eliminate all triable issues of material fact as to whether it had the authority to supervise or control the work, that portion of the motion seeking dismissal of the Labor Law § 200 claim is also denied without regard to the sufficiency of the opposing papers (*see Alvarez*, 68 NY2d at 324; *Tomyuk*, 57 AD3d at 521).

The court next addresses that branch of the motion by the defendants seeking summary judgment dismissing so much of the complaint that asserts a cause of action against the defendant, Four Seasons. Four Seasons established its prima facie entitlement

to judgment as a matter of law dismissing so much of the complaint that asserts a cause of action against it by tendering competent evidence demonstrating that it had no connection to the subject repair work project. Accordingly, the burden of going forward shifted to the plaintiff to raise a triable issue of material fact (*see Zuckerman*, 49 NY2d at 562).

In opposition, plaintiff failed to raise a triable issue of material fact (*see* CPLR 3212 [b]). Plaintiff does not offer substantive opposition to that branch of the defendants' motion seeking dismissal of the claims asserted against Four Seasons. In any event, the plaintiff's submissions in opposition fail to raise a triable issue of material fact as to the alleged liability of Four Seasons. Accordingly, that branch of the motion by the defendants seeking dismissal of the claims asserted against Four Seasons is granted, and all claims asserted against Four Seasons are dismissed.

All other arguments raised on the motion and evidence submitted by the parties in connection thereto have been considered by the court, notwithstanding the specific absence of reference thereto. Based on the foregoing, it is:

ORDERED the motion by the defendants is granted to the extent that the complaint is hereby dismissed and severed as to the defendant, Four Seasons Restoration, LLC, and the motion is otherwise denied as to the defendant, Finer Fire & Restoration Corp.; and it is further

ORDERED the parties to the severed action shall appear for a settlement conference on a date and time which shall be set by the clerk.

ENTER,

Dated: White Plains, New York
March 28, 2022

HON. JOAN B. LEFKOWITZ, J.S.C.