SHORT FORM ORDER

INDEX No. 616162/2016
CAL. No. 202100322OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY

***PRESENT:***

Hon. VINCENT J. MARTORANA
Justice of the Supreme Court

MOTION DATE 7/15/21 (004)
MOTION DATE 7/1/21 (005)
ADJ. DATE 12/23/21
Mot. Seq. # 004 MotD
Mot. Seq. # 005 MD

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GINA NOBRE, as Administratrix of the Estate of VICTOR NOBRE,

Plaintiff,

- against -

BULGIN & ASSOCIATES INC., 62 FL LLC, and 199 MARINER, LLC,

Defendants.

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BULGIN & ASSOCIATES, INC.,

Third-Party Plaintiff,

- against -

N & D MASONRY CORP.,

Third-Party Defendant.

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199 MARINER LLC,

Second Third-Party Plaintiff,

- against -

N & D MASONRY CORP.,

Second Third-Party Defendant.

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BULGIN & ASSOCIATES INC.,

Third Third-Party Plaintiff,

- against -

N & D MASONRY CORP.,

Third Third-Party Defendant.

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Upon the following e-filed papers read on these motions for summary judgment and partial summary judgment: Notice of Motion and supporting papers by defendant/third-party plaintiff/third third-party plaintiff Bulgin & Associates Inc., and defendant/second third-party plaintiff 199 Mariner LLC, dated June 1, 2021; Notice of Motion and supporting papers by plaintiff, dated June 1, 2021; Answering Affidavits and supporting papers by plaintiff, dated November 4, 2021; Answering Affidavits and supporting papers by defendant/third-party plaintiff/third third-party plaintiff Bulgin & Associates Inc., and defendant/second third-party plaintiff 199 Mariner LLC, dated November 4, 2021; Replying Affidavits and supporting papers by plaintiff, dated December 20, 2021; Replying Affidavits and supporting papers by defendant/third-party plaintiff/third third-party plaintiff Bulgin & Associates Inc., and defendant/second third-party plaintiff 199 Mariner LLC, dated December 20, 2021; it is

***ORDERED*** that the motion (seq. 004) by defendant/third-party plaintiff/third third-party plaintiff Bulgin & Associates Inc., and defendant/second third-party plaintiff 199 Mariner LLC, and the motion (seq. 005) by plaintiff are consolidated for purposes of this determination; and it is

***ORDERED*** that the motion by defendant/third-party plaintiff/third third-party plaintiff Bulgin & Associates Inc., and defendant/second third-party plaintiff 199 Mariner LLC, for summary judgment dismissing the complaint and cross claims against them is granted to the extent provided herein, and is otherwise denied; and it is further

***ORDERED*** that the motion by plaintiff for partial summary judgment on the issue of defendant/third-party plaintiff/third third-party plaintiff Bulgin & Associates Inc.'s liability under Labor Law § 240 (1) is denied.

This action was commenced by plaintiff Gina Nobre, as administratrix of the estate of Victor Nobre, deceased, to recover damages for injuries decedent allegedly sustained on May 31, 2016, when, while in the employ of third-party defendant N & D Masonry Corp. (N & D), he was killed after falling from a roof during the construction of a 30,000-square-foot mansion at a location known as 62 Further Lane, East Hampton, New York. By her bill of particulars, in addition to claims of wrongful death and common law negligence, plaintiff alleges defendants violated Labor Law §§ 200, 240 (1), and 241 (6), as well as Industrial Code §§ 23-1.7, 23-1.15, 23-1.16, 23-1.17, 23-1.24, and 23-1.32. At the time of decedent's incident, the subject property was owned by defendant 62 FL LLC. By a stipulation dated January 17, 2019, the parties consented to the action against that entity being discontinued without prejudice.

Defendant/third-party plaintiff/third third-party plaintiff Bulgin & Associates Inc. (Bulgin) and defendant/second third-party plaintiff 199 Mariner LLC (Mariner) (collectively, defendants) now move for summary judgment dismissing plaintiff's complaint, arguing that decedent's own negligence was the sole proximate cause of his alleged injuries and that N & D was contractually responsible for providing all safety equipment to decedent, who was also N & D's vice-president. In support of their motion, defendants submit their counsel's affirmation.

Plaintiff also moves for partial summary judgment against Bulgin on her Labor Law § 240 (1) claim, arguing that decedent's fall was caused by Bulgin's "failure to provide him with adequate safety devices to protect him from height/gravity related risks," and that such duty was nondelegable. In support of her motion, plaintiff submits, among other things, a transcript of Duane Miller's deposition testimony, copies of contracts and subcontracts, six color photographs and an expert affidavit of Kathleen Hopkins.

Duane Miller testified that he has been employed by Bulgin for 28 years, and for the last 10 of those years his title has been "site supervisor." He indicated that Bulgin is a general contractor involved in residential home construction, and that it was constructing the edifice at the subject premises at the time of decedent's incident. Asked to describe his typical duties at a construction site, Mr. Miller stated that he would be present on-site every day and that he "run[s] the job," "supervis[ing] the activities of the day," and "conduct[ing] the guys, the laborers and subcontractors, as to what they are supposed to do to follow the plan." He testified that he also hired numerous subcontractors to perform work at Bulgin's various construction sites and that Mariner was "one of [its] main sources of labor." As to the subject work site, Mr. Miller indicated that he and the foremen were responsible for site safety and had the authority to halt any work they deemed unsafe. He explained that since no foreman was present on the incident date, he was solely responsible for site safety that day.

Mr. Miller testified that on the date in question he arrived at the subject premises at 8:00 a.m. He stated that three companies were on-site at such time: Mariner, which had been hired to perform labor and carpentry; N & D, which was hired to construct the cement block walls of the house; and Peconic Ironworks, which was hired to install the steel structure of the home. Mr. Miller indicated that when he arrived, N & D was at work on the home's attached garage, using scaffolding. Upon questioning, he explained that while N & D provided scaffolding to protect its workers from falls, he never observed any N & D workers wearing harnesses or lifelines, and did not believe such items were on-site. He stated

that the scaffolding did not, and "could not," have guardrails surrounding its top, due to the nature of the work being performed. Asked whether Bulgin provided any scaffolding, harnesses, or fall protection to N & D's employees, he replied in the negative. Mr. Miller testified that shortly before his accident, decedent– who was "in charge" of the approximately six other N & D workers on site– appeared to be preparing to lay the final two courses of cement block on the perimeter of the flat roof above a mudroom, forming its parapet, while standing on the roof. The scaffolding erected during the laying of the cement blocks for this portion of the building had been earlier dismantled, removed from this side of the structure, and placed at another area of construction. He indicated that N & D's workers would generally work from a scaffold when building a parapet, which is "how it's supposed to be done," but was not on this occasion.

Mr. Miller testified that after having a brief conversation with the decedent on the roof about ordering certain construction materials, he left the roof by walking down a set of temporary wooden stairs, then proceeded to the construction site's office trailer. He stated that decedent was not wearing any type of lifeline or harness as he worked, and that there was no guardrail around the roof "because [decedent] was working on the block work." He explained that a guardrail would be constructed only after the parapet was complete. Approximately 10 minutes after Mr. Miller entered the office trailer, a "frantic" man knocked on the door, informing him that decedent had fallen off of the roof and was hurt. Mr. Miller stated that he then called an ambulance and reported to the scene of the accident, which was approximately 500 feet away. He indicated that it appeared decedent had fallen 12 feet to the concrete below. Asked if he "ever discuss[ed] safety devices with anybody at N & D," Mr. Miller stated, "Sure. We always have a discussion about safety on jobs," and that the last occasion was approximately one week earlier. However, he denied speaking to decedent about safety issues on the incident date. Prompted to elaborate on the safety discussions he conducted with N & D workers, Mr. Miller explained that he told them to "use scaffolding, and that was generally it."

Submitting an affidavit at plaintiff's request, Kathleen Hopkins states that she is a certified safety manager with over 42 years of experience in "safety, health and environmental management and site experience in the construction industry." She indicates that "[a]s demonstrated by [her] Curriculum Vitae," which plaintiff failed to provide to the Court, she has served as a "Safety and Health Consultant, Project Site Safety Manager, and Corporate Director of Safety for several national companies in the construction industry." Ms. Hopkins further states that by virtue of her professional education, training, certifications, and experience, as well as her knowledge of New York Labor Laws and Industrial Codes, she has expertise in construction industry standards and practices. She avers that, in preparation for rendering an opinion in this matter, she reviewed plaintiff's bills of particulars, the relevant subcontractor agreements, the photographs marked at Mr. Miller's deposition, the transcript of Mr. Miller's deposition testimony, and a transcript of Gina Nobre's deposition testimony, which was not supplied to the Court. Based upon the materials she reviewed, she opines that "[h]ad safety railings been extended to and erected on the mudroom wall, the Decedent's 12 feet fall, injuries and death would not have occurred." She further opines that "[i]n lieu of safety railings, the Decedent should have been provided with a safety harness with a lanyard and a life line anchored to a structural element on the mud room's roof."

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" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). 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 (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient to raise a triable issue (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157, 159 [2011]).

Labor Law § 200 is a codification of the common-law duty imposed upon an owner, contractor, or their agent, 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]; ***Haider v Davis***, 35 AD3d 363, 827 NYS2d 179 [2d Dept 2006]). A cause of action sounding in violation of Labor Law § 200 or common-law negligence "may arise from either dangerous or defective premises conditions at a work site or the manner in which the work is performed" (***Pilato v 866 U.N. Plaza Assoc., LLC***, 77 AD3d 644, 645, 909 NYS2d 80 [2d Dept 2010]). "Where a plaintiff's injuries arise from a dangerous condition on the premises, an owner may be liable under Labor Law § 200 if it either created or had actual or constructive notice of the dangerous condition" (***Leon-Rodriguez v Roman Catholic Church of Sts. Cyril & Methodius***, 192 AD3d 883, 886, 144 NYS3d 709 [2d Dept 2021]). Where a plaintiff's claims "implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work" (***Sullivan v New York Athletic Club of City of New York***, 162 AD3d 955, 958, 80 NYS3d 93 [2d Dept 2018]).

Labor Law § 240 (1) provides, in relevant part, that "[a]ll contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed." The law "imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks" (***Saint v Syracuse Supply Co.***, 25 NY3d 117, 124, 8 NYS3d 229 [2015]). "A building owner may be held liable for a violation of Labor Law § 240 (1) even if it did not exercise supervision or control over the work" (***Jara v Costco Wholesale Corp.***, 178 AD3d 687, 690, 115 NYS3d 49 [2d Dept 2019]; *see* ***Rocovich v Consol. Edison Co.***, 78 NY2d 509, 577 NYS2d 219 [1991]). "A worker's comparative negligence is not a defense to a claim under Labor Law § 240 (1) and does not effect a reduction in liability" (***Roblero v Bais Ruchel High Sch., Inc.***, 175 AD3d 1446, 1447, 109 NYS3d 329 [2d Dept 2019]). However, "[a] defendant has no liability under Labor Law § 240 (1) when plaintiffs: (1) had adequate safety devices available, (2) knew both that the safety devices were available and that they were expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had they not made that choice" (***Biaca-Neto v Boston Rd. II***

***Hous. Dev. Fund Corp.***, 34 NY3d 1166, 1167-1168, 121 NYS3d 753 [2020] [internal quotation marks omitted], quoting ***Cahill v. Triborough Bridge & Tunnel Auth.***, 4 NY3d 35, 40, 790 NYS2d 74 [2004]). A plaintiff may also "be the sole proximate cause of his or her own injuries when, acting as a 'recalcitrant worker,' he or she misuses an otherwise proper safety device, chooses to use an inadequate safety device when proper devices were readily available, or fails to use any device when proper devices were available" (***Lojano v Soiefer Bros. Realty Corp.***, 187 AD3d 1160, 1162, 134 NYS3d 363 [2d Dept 2020] [internal citation omitted]).

Labor Law § 241 (6) imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed (***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 670 NYS2d 816 [1998]). Labor Law § 241 (6) provides, in relevant part, that "[a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places." To support a claim under this section, a plaintiff "must demonstrate a violation of a rule or regulation of the Industrial Code which gives a specific, positive command, and is applicable to the facts of the case" (***Bianchi v New York City Tr. Auth.***, 192 AD3d 745, 748, 144 NYS3d 101 [2d Dept 2021]).

Addressing plaintiff's motion first, the Court finds she has established a prima facie case of entitlement to summary judgment in her favor (*see* ***Roblero v Bais Ruchel High Sch., Inc.***, *supra*; ***Gallagher v Resnick***, 107 AD3d 942, 968 NYS2d 151 [2d Dept 2013]; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). "To succeed on a cause of action under Labor Law § 240 (1), a plaintiff must establish that the defendant violated its duty and that the violation proximately caused the plaintiff's injuries" (***Roblero v Bais Ruchel High Sch., Inc.***, *supra* at 1447). Despite the apparent lack of any witnesses thereto, it is undisputed that decedent was killed by a fall from a roof at the subject premises. Through the deposition testimony of Mr. Miller, plaintiff demonstrated that Bulgin, as general contractor, was responsible for safety at the subject construction site, and that decedent was working at a height without scaffolding or a harness to prevent his fall. Further, three paragraphs of plaintiff's statement of material facts, which were not appropriately contested by defendants pursuant to 22 NYCRR § 202.8-g, and are now deemed admitted, are of particular importance to the Court's finding herein. First, plaintiff states that "[t]he decedent was employed by N&D Masonry Corp." Second, plaintiff states that "[o]n May 31, 2016, the decedent was doing brick work on the roof of the mudroom when he was caused to fall off the roof from a height of twelve feet to the ground below." Finally, plaintiff states that "Bulgin did not provide the decedent with fall protection while he was working on the roof." Therefore, plaintiff demonstrated, prima facie, that decedent was a worker covered by the protections of Labor Law § 240 (1), that decedent fell from a height at the subject premises, that decedent was not "provided" fall protection from Bulgin, that Bulgin had a nondelegable duty to provide such protection, and that such failure was a proximate cause of decedent's alleged injuries (*see* ***Saint v Syracuse Supply Co.***, *supra*). The burden then shifted to defendants to raise a triable issue (*see* ***Vega v Restani Constr. Corp.***, *supra*).

Bulgin successfully raises a triable issue (*see* ***Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.***, *supra*). In opposition, it does not argue that decedent did not fall from the subject roof, or that he engaged in some extraordinary behavior that rendered him the sole proximate cause of his injuries and

death. Nor does Bulgin argue that decedent was a "recalcitrant worker," that a physical barrier was present to prevent decedent's fall, or that decedent was wearing any manner of protective harness. Rather, it argues that pursuant to the relevant contracts, N & D was required to supply its own safety devices, that decedent failed to use such safety devices, and that such failure was the sole proximate cause of his alleged injuries. An agreement dated February 8, 2016, between Bulgin, as contractor, and N & D, as subcontractor, provides

> The Subcontractor shall take all possible safety precautions with respect to performance of this Agreement, shall comply with safety measures initiated by the Contractor, OSHA, and with applicable laws, ordinances, rules, regulations and orders of public authorities for the safety of persons and property in accordance with the requirements of the Contract Documents.

It further states, "The Subcontractor shall be responsible for educating their employees regarding proper fall safety procedures and for providing fall safety equipment for any employee working on any elevated surface."

Bulgin does not cite any authority finding that a general contractor can avoid its duties under Labor Law § 240 (1) through contract. "The purpose of [Labor Law § 240 (1)] is to protect workers by placing the 'ultimate responsibility' for worksite safety on the owner and general contractor, instead of the workers themselves" (***Gordon v. Eastern Ry. Supply***, 82 NY2d 555, 559, 606 NYS2d 127 [1993]; *see* ***Zimmer v Chemung County Performing Arts, Inc.***, 65 NY2d 513, 493 NYS2d 102 [1985]). Nevertheless, Bulgin raises triable issues as to whether decedent knew that appropriate scaffolding was available, knew he was expected to use it, failed to use it for no good reason, and would not have been injured had he not made that choice (*see* ***Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.***, *supra*; *see also* ***Kosinski v Brendan Moran Custom Carpentry, Inc.***, 138 AD3d 935, 30 NYS3d 237 [2d Dept 2016]). Accordingly, plaintiff's motion for partial summary judgment against Bulgin on the her Labor Law § 240 (1) claim is denied.

Turning to defendants' motion, initially the Court finds Mariner has established a prima facie case of entitlement to summary judgment in its favor on each of plaintiff's claims. It demonstrated, through reference to evidence submitted by plaintiff in support of her motion, that it possessed no duty to decedent under the Labor Law, as it was merely a subcontractor of Bulgin (*see* ***Navarra v Hannon***, 197 AD3d 474, 152 NYS3d 489 [2d Dept 2021]). Plaintiff submits no opposition to Mariner's arguments. Accordingly, that branch of defendants' motion seeking dismissal of plaintiff's claims against Mariner is granted.

As to Bulgin, it failed to establish a prima facie case of entitlement to summary judgment in its favor as to plaintiff's Labor Law § 200 and common law claims (*see* ***Roblero v Bais Ruchel High Sch., Inc.***, *supra*; ***Caban v Plaza Constr. Corp.***, 153 AD3d 488, 61 NYS3d 47 [2d Dept 2017]; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). It has not demonstrated that it did not have the authority to control the means and methods decedent used to perform his work, nor did it demonstrate that the incident in

question was not due to a dangerous condition at the work site, namely an unguarded edge of a roof. Accordingly, that branch of defendants' motion is denied as to Bulgin.

As to that branch of defendants' motion seeking dismissal of plaintiff's Labor Law § 246 (1) claim against Bulgin, they argue that Industrial Code §§ 23-1.7, 23-1.15, 23-1.16, 23-1.17, 23-1.24, and 23-1.32 are inapplicable to the circumstances. The Court agrees as to Industrial Code §§ 23-1.24 and 23-1.32 only. Through Mr. Miller's testimony, Bulgin demonstrated, prima facie, that the roof in question did not require scaffolding pursuant to Industrial Code § 23-1.24, because such roof was not "more than 20 feet in height measured from the ground or grade level to the exterior edge of the eaves," nor was "the slope of such roof is greater than one in four." Further, Industrial Code § 23-1.32 applies only in scenarios where "noncompliance with a provision of this Part (rule) causes or tends to cause imminent danger to a person employed in construction, demolition or excavation work and written notice thereof is given by the commissioner to the appropriate employer, owner, contractor or his agent." Such is not the circumstance here. Plaintiff offers no argument in opposition. As to the remaining Industrial Code sections alleged by plaintiff to have been violated, Bulgin has not established a prima facie case of their inapplicability to the circumstances herein. Accordingly, that portion of defendants' motion seeking dismissal of plaintiff's cause of action alleging violations of Industrial Code §§ 23-1.24 and 23-1.32 is granted, and denied as to the remaining provisions.

Finally, in light of the Court's findings above, Bulgin's motion for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim is denied.

Dated: March 14, 2022

VINCENT J. MARTORANA, J.S.C.

**____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION**