ORIGINAL

SHORT FORM ORDER

INDEX No. 603555/2016
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 2-20-2020
SUBMIT DATE 9-3-2020
Mot. Seq. # 11 - MD
Mot. Seq. # 12 - MG
X-Mot. Seq. #13 - MD

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MICHAEL RULAND,

Plaintiff,

-against-

STACY LEIBOWITZ, DJ PLUMBING SUPPLY COMPANY INC., THE BUILDER INC., MICHAEL ALGOZZINO PLUMBING & HEATING, CUSTOM MODULAR HOMES OF LONG ISLAND INC., QUALITY CRAFTED HOMES INC., and QUALITY CRAFTED HOMES OF LONG ISLAND, INC.,

Defendants.

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Upon the following papers numbered 1 to 138 read on this motion to reargue & for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 29 (#11) & 30 - 47 (#12) ; Notice of Cross Motion and supporting papers 96 - 113 (#13) ; Answering Affidavits and supporting papers 48 - 61, 62 - 72 (#12), 114 - 126 & 127 - 138 (#13) ; Replying Affidavits and supporting papers 73 - 80, 81 - 95 (#12), ; ~~Other ; (and after hearing counsel in support and opposed to the motion)~~ it is,

The plaintiff moves for an order granting leave to reargue his motion to add additional party defendants and for summary judgment. Defendant Stacy Leibowitz separately moves for an order granting summary judgment in her favor dismissing the complaint and any cross-claims against her arguing that she hired CMH 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. Defendant Custom Modular Homes of Long Island, Inc., hereinafter referred to as "CMH", cross moves for an order granting summary judgment dismissing all claims and cross-claims against it.

This action was commenced by the plaintiff to recover damages for injuries he allegedly sustained on December 2, 2015, when a nail that was holding a chalk line became dislodged and struck him in the eye while working for Prestige Building of Long Island at the premises known as 9 Bayview Drive, Westhampton, New York. Plaintiff alleges that he was injured during the course of his employment on property owned by defendant Leibowitz wherein CMH was the general contractor and asserts claims against the defendants for violations of the Labor Law and for common law negligence.

Motion to Reargue

By motion filed on February 20, 2020, the plaintiff moves for an order granting leave to reargue his motion to amend the pleadings which was denied by Order dated January 17, 2020, (Rebolini, J.), and upon re-argument issuing an order granting that motion. Based upon a review of the papers before this Court the motion to reargue is in all respects denied. The plaintiff has failed to establish sufficient basis in law or in fact to grant the motion.

Motion for Summary Judgment

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 her house was a single- or two-family residence and that she 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]).

At the plaintiffs's examination before trial the following testimony was elicited:

> Q. In the seven to 12 times that you visited 9 Bayview Drive working for Mr. Kenny's company, did you ever meet Stacey Leibowitz?
> A. No.
> Q. Can you identify Stacey Leibowitz at all?
> A. Not at all.
> Q. Prior to filing the lawsuit, had you ever heard the name Stacy Leibowitz?
> A. Never.
> Q. On the date of the accident, Mr. Kenny gave you instructions on what to do that day; correct?
> A. Prior to him dropping me off?
> Q. Yes.
> A. Yes.

Defendant Leibowitz 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 his use of the chalk line. Here, 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 when the accident occurred and the plaintiff testified that he never met defendant Leibowitz and could not identify her. 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 Leibowitz's motion, but fails to raise a triable issue. In opposition to the motion, plaintiff argues that the defendant "failed to demonstrate that the subject location is a one- or two-family dwelling pursuant to the homeowner exemption of Labor Law... Additionally, Ms. Leibowitz supervised, directed and controlled plaintiff's work at the subject location." This argument is unavailing. The plaintiff testified that he received his instructions on the date of his injury from his immediate supervisor Mr. Kenny. In addition, he testified that he had never met defendant Leibowitz and would not be able to identify her. Accordingly, defendant Leibowitz's motion for summary judgment dismissing the complaint against her is granted.

Based upon a review of the motion papers the Court concludes that the plaintiff and CMH have failed to establish entitlement to judgment as a matter of law and that there are material and triable issues of fact presented as to what level of control and supervision CMH had at this location, if any. Thus the motions for summary judgment must be denied.

The foregoing shall constitute the decision and Order of this Court.

Dated: October 20, 2020

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

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