SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PAUL F. MCGONNELL,

Plaintiff,

-against-

HALSTEAD MANAGEMENT COMPANY, LLC,

Defendant.

Index No.: 152823/2015

DECISION/ORDER

Motion Seq.: 001

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits/Affirmations/ Memos of Law annexed	1
Notice of Cross-Motion and Opposition Affidavits/Affirmations/Memos of Law annexed	2
Reply and Opposition to Cross-Motion Affidavits/ Affirmations/Memos of Law annexed	3
Reply (Cross-Motion) and Affidavits/ Affirmations/Memos of Law annexed	4

ERIKA M. EDWARDS, J.:

Plaintiff Paul F. McGonnell ("Plaintiff") brought this action against Defendant Halstead Management Company, LLC ("Defendant") for personal injuries he sustained when the ladder he was standing on shifted and moved causing Plaintiff to fall 12 feet onto the roof of a building located at 301 East 48th Street, New York, New York. At the time of his accident, Plaintiff was standing on the ladder attempting to screw wood together with a screw gun to build a pergola or trellis. Plaintiff was employed by the building, Marlo Towers Owners ("Marlo"), as a porter and he was directed and supervised by the superintendent of the building, who was also a Marlo employee. Defendant was the property management company for the building. Plaintiff elected to receive Workers' Compensation benefits.

Plaintiff's claims against Defendant are for common-law negligence and for violations of Labor Law §§ 200, 240(1) and 241(6). Defendant moves for summary judgment dismissal of Plaintiff's complaint and Plaintiff cross-moves for partial summary judgment in his favor on liability as to his Labor Law § 240(1) claim against Defendant. Both parties oppose each other's motion. For the reasons set forth herein, the court grants Defendant's motion for summary judgment dismissal of Plaintiff's complaint and denies Plaintiff's cross-motion for partial summary judgment as to his Labor Law § 240(1) claim in his favor as against Defendant.

Defendant argues in substance that Plaintiff's claims should be dismissed against Defendant because Defendant was not the owner or general contractor, nor the owner's statutory agent under the Labor Law. Defendant further argues that Plaintiff was employed by Marlo, he was supervised by the superintendent of the building, who was a Marlo employee, and the superintendent directed Plaintiff to conduct the work on this job. Defendant claims that it did not supervise Plaintiff or control his work at the time of the accident and that its only role in the project was to facilitate the paperwork for payment. Defendant did not pay for the construction materials or workers out of its funds, it did not provide the ladder, tools, material or equipment Additionally, Defendant argues that it owes no duty to Plaintiff as a third-party beneficiary to Defendant's management contract with Marlo under *Espinal* (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). In the alternative, Defendant argues that Plaintiff was a special employee at the time of his accident.

Plaintiff argues in substance that Plaintiff is entitled to summary judgment on its Labor Law 240(1) claim because Defendant is Marlo's statutory agent and it failed to provide Plaintiff with proper safety equipment which would have prevented his injuries. Plaintiff alleges that Defendant is Marlo's statutory agent because Defendant had the authority to stop the work if it's

employee saw that the work was being conducted in an unsafe manner. Additionally, Plaintiff was not Defendant's special employee because Defendant did not demonstrate that it had any comprehensive or exclusive daily control over Plaintiff's work duties and Plaintiff never took direction or orders from Defendant's employees.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]). Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

A. Plaintiff's Claims Under Labor Law §§ 240(1) and 241(6)

Labor Law § 240(1) states that all contractors, 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" (Labor Law § 240[1]). Labor Law § 240(1) imposes absolute liability upon owners and contractors who fail to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). The purpose of the statute is to protect workers from elevation-related risks by placing the ultimate responsibility for construction safety practices on the owner and contractor and it is to be construed as liberally as necessary to accomplish that purpose (*id.*; *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 559 [1993]).

To succeed under Labor Law § 240(1), a plaintiff must demonstrate that the statute was violated and that the violation was the proximate cause of his injury (*Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 39 [2004]). A plaintiff must also demonstrate that the injury sustained is the type of elevation-related hazard to which the statute applies, that there was a failure to use, or an inadequacy of, a safety device of a kind set forth in the statute and that the fall or the application of an external force was a foreseeable risk of the task being performed (*see Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [1st Dept 2001]; *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

An injured employee's comparative negligence does not prevent him from prevailing under the statute, however, an employer is not liable if the employee's own negligence was the

sole proximate cause of his injuries, or if the employer made adequate safety devices available and instructed the employee on how to use them, but the recalcitrant employee failed to use the safety device as instructed (*Cahill,* 4 NY3d at 39-40; *Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, 286-287 [2003]).

A plaintiff has the burden of showing that an elevation-related risk existed, that adequate safety devices of the kind enumerated in Labor Law § 240(1), which could have prevented the accident, were not provided, and that plaintiff was obligated to work at a height to complete the task (*Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]; *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011].

Labor Law § 241(6) imposes a nondelegable duty upon an owner or subcontractor, regardless of who controls or supervises the site, to use reasonable care to provide reasonable and adequate protection and safety to employees working at the site (*St. Louis v N. Elba*, 16 NY3d 411, 413 [2011]). Therefore, Plaintiff's § 241(6) claim is not dependent on the degree of Defendant's control over his work, rather it is dependent on the application of the specific Industrial Code provision and a finding that the violation of the provision was a result of negligence (*Alonzo v Safe Harbors of the Hudson Housing Development Fund Co., Inc.*, 104 AD3d 446, 450 [1st Dept 2013] [citation omitted]).

An owner or general contractor may not avoid liability under Labor Law §§ 240(1) or 241(6) by delegating the work, but if it delegates the work to a third party, then the third party becomes the agent of the owner or general contractor for Labor Law purposes if it has concomitant authority to supervise and control the work delegated (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]; *Walls v Turner Const. Co.*, 4 NY3d 861, 863-864 [2005]). Title alone does not make a third party an owner's agent under the Labor Law statutes unless the

agent was delegated the authority to supervise and control the work that gives rise to the plaintiff's injuries (*see Barreto v Metropolitan Transp. Authority*, 25 NY3d 426, 434 [2015]). To control the work does not mean that the third party furnished the equipment, but it means whether the third party "has control of the work being done and the authority to insist that proper safety practices be followed" (*Lopes v Interstate Concrete, Inc.*, 293 AD2d 579, 580 [2d Dept 2002] [internal citations and quotation marks omitted]). The third-party agent is only responsible for injuries and activities within the scope of the work delegated and it is not liable for injuries sustained because of conduct outside of the scope of its own work (*see McGurk v Turner Const. Co.*, 127 AD2d 526 [1st Dept 1987]).

As an initial matter, the court determines both motions to be timely filed. In applying these legal principles to the facts of the case the court determines that Defendant demonstrated its entitlement to summary judgment dismissal of Plaintiff's claims and Plaintiff failed to raise any material issues of fact in dispute to preclude summary judgment in Defendant's favor. As to Plaintiff's cross-motion, Plaintiff failed to establish his entitlement to summary judgment on his Labor Law § 240(1) claim.

Plaintiff failed to demonstrate that Defendant was the owner's statutory agent because there is no evidence that Defendant supervised Plaintiff or controlled his work on the pergola, nor that Marlo delegated these responsibilities to Defendant. Plaintiff also failed to demonstrate that Defendant had the authority to insist that proper safety practices be followed. It is insufficient for Defendant to have the ability to stop work if it deems it to be unsafe or that Defendant supervises the daily operation of the building. Plaintiff must demonstrate that Defendant supervised Plaintiff's work on this project and there is simply no evidence to support

this claim. Furthermore, the court finds that Plaintiff was not a special employee of Defendant. As such, Defendant is not the owner's statutory agent and is not liable for Plaintiff's injuries.

Therefore, the court grants Defendant's motion for summary judgment dismissal of Plaintiff's claims under Labor Law §§ 240(1) and 241(6) and denies Plaintiff's cross-motion for partial summary judgment on its Labor Law § 240(1) claim.

B. Plaintiff's Claims Under Common-Law Negligence and Labor Law § 200

In an action for negligence, a plaintiff must prove that the defendant owed him a duty to use reasonable care, that the defendant breached that duty and that the plaintiff's injuries were caused by such breach (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]). A court may grant a motion for summary judgment when a defendant demonstrates that it did not create or have actual or constructive notice of an alleged defective condition which allegedly caused plaintiff's injury (*Rodriguez v New York City Tr. Auth.*, 118 AD3d 618 [1st Dept 2014]).

It is well settled that Labor Law § 200 is the codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*Comes v N.Y. State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). To prevail on such a claim, a plaintiff must demonstrate that a defendant has the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]). Accordingly, liability can only be imposed if the defendant has exercised control or supervision over the work and has actual or constructive notice of the alleged unsafe condition (*Espinosa v Azure Holdings II, LP*, 58 AD3d 287, 289 [1st Dept 2008]; *Giovengo v P&L Mech.*, 286 AD2d 306, 307 [1st Dept 2001]).

A contractual obligation alone does not impose a duty of care on Defendant toward Plaintiff as a third-party beneficiary of Defendant's management agreement with Marlo (*Espinal*

v Melville Snow Contrs., 98 NY2d 136, 140 [2002]). A party who enters into a service contract "may be said to have assumed a duty of care—and thus be potentially liable in tort--to third persons (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*id.*, internal citations and quotation marks omitted).

The court granted summary judgment to a construction manager on a plaintiff's common-law negligence and Labor Law § 200 claims and found that the company only had general supervision which was insufficient to trigger liability (*Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [1st Dept 2005] [internal citation omitted]). The court determined that plaintiff never took orders from the company's employees, the company did not direct, manage or oversee the plaintiff's work and although the company's project superintendent conducted regular walk-throughs, had the authority to investigate and stop work for unsafe conditions, discussed covering the hole and inspected the plywood, it was not enough to impose liability (*id.*).

When applying the applicable law to the facts in the instant matter, the court determines that Plaintiff failed to demonstrate any negligence on the part of Defendant, nor any of the *Espinal* factors to impose any liability on Defendant for Plaintiff's injuries. As set forth above, Defendant is not the owner's statutory agent and there is no evidence that Defendant exercised control or supervision over Plaintiff's work on this project. There is also no evidence that Defendant had actual or constructive notice of the alleged unsafe condition. Therefore, the court grants Defendant's motion for summary judgment dismissal of Plaintiff's claims under common-law negligence and Labor Law § 200.

As such, the court grants Defendant's motion for summary judgment, dismisses Plaintiff's complaint against Defendant and denies Plaintiff's cross-motion for partial summary judgment on his Labor Law § 240(1) claim.

Accordingly, it is hereby

ORDERED that the court grants Defendant Halstead Management Company, LLC's motion for summary judgment dismissal of Plaintiff Paul F. McGonnell's complaint, Plaintiff Paul F. McGonnell's complaint is dismissed with prejudice and without costs and the court directs the Clerk to enter judgment in favor of Defendant Halstead Management Company, LLC as against Plaintiff Paul F. McGonnell; and it is further

ORDERED that the court denies Plaintiff Paul F. McGonnell's cross-motion for partial summary judgment on his Labor Law § 240(1) claim as against Defendant Halstead Management Company, LLC with prejudice and without costs.

Date: October 30, 2017

Erika M. Edwards

HON. ERIKA M. EDWARDS