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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: ROGER N. ROSENGARTEN,
JUSTICE. PART IAS 23

FREDY FIGUEROA,

Plaintiff,

-against-

HLM ELECTRIC, LTD. SYRBESCAPES, INC., IRELAND-GANNON ASSOCIATES, INC., MARYANN CONTI and DANIEL CONTI,

Defendants.

Index No. 24229/08

Motion Date: 2/8/12

Calendar No. 37-38

Motion Seq. # 2 & 3

The following papers numbered 1 to 33 read on these separate motions by defendants Daniel Conti and Maryann Conti for summary judgment in their favor dismissing plaintiff's complaint and all cross claims against them and by defendant Syrbescapes, Inc. (Syrbescapes) pursuant to CPLR 3212 for summary judgement in its favor dismissing plaintiff's complaint and all cross claims interposed against it and on these cross motions by defendant HLM Electric, Ltd. (HLM) pursuant to CPLR 3212 for summary judgment in its favor dismissing plaintiff's complaint and any and all cross claims asserted against it and by defendant Ireland-Gannon Associates, Inc. (Ireland) pursuant to CPLR 3212 for partial summary judgment as to any claims by plaintiff regarding the negligent construction of the dry stack stone wall at issue under Labor Law §200.

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Upon the foregoing papers it is ordered that the motions and cross motions are consolidated and determined as follows:

Plaintiff alleges that he sustained injuries, including a fracture of his left ankle, on August 11, 2008, in the course of his employment as a sprinkler installer with nonparty Professional Irrigation, also known as Franden, Inc., (Professional Irrigation) when, while excavating a two-feet deep trench as part of a landscaping renovation project at 8 Wilderness Road, Nissequogue, New York, an adjacent dry stack[1] retaining wall collapsed and caved into the trench. The Conti defendants are the owners of the property. Defendant Ireland was the general contractor of the project. Defendant Syrbescapes was hired by defendant Ireland as the masonry subcontractor on the project. Defendant Syrbescapes erected the subject retaining wall. Defendant HLM entered into an agreement with the Conti defendants to be the electrical subcontractor on the project. That agreement provides that all direct burial underground wiring to be supplied and installed in a trench to all locations of landscape lighting by nonparty Professional Irrigation and that this part of the job will be billed directly by Professional Irrigation.

Plaintiff, in his complaint, interposes claims for negligence and violations of Labor Law §§ 200, 240(1) and § 241(6).

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing an entitlement to judgment as a matter of law. (*See Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Ayotte v Gervasio*, 81 NY2d 1062 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985].) Once the requisite showing has been made, the burden shifts to the opposing party to produce admissible evidence sufficient to establish the existence of a triable issue of fact. (*See Giuffrida v Citibank Corp., supra*; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr., supra.*)

Labor Law § 200 is a "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 New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993].) It follows that the party charged with responsibility must have the authority to control the activity that caused the injury, or have actual or constructive notice of the alleged unsafe condition to be liable under common-law negligence and/or Labor Law § 200. (*See Comes v New York State Elec. & Gas Corp., supra*; *see also Duarte v State of New York*, 57 AD3d 715 [2008]; *Dennis v City of New York*, 304 AD2d 611 [2003].)

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[1]Dry stack means without any mortar.

Labor § 240(1) provides in relevant part that "[a]ll contractors and owners . . . shall furnish or erect, or cause to be furnished or erected . . . 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 construction workers who are employed on the subject premises. The duty imposed by the statutory provisions is nondelegable in nature, and an owner or contractor who breaches the duty may be held liable in damages caused thereby, irrespective of whether it has actually exercised supervision or control over the work. (*See Rocovich v Consolidated Edison Company*, 78 NY2d 509 [1991]; *see also Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494 [1993].) In opining as to the scope of hazards which fall within the purview of the statute and which are therefore compensable thereunder, the Court of Appeals has held Labor Law §240(1) is applicable to ". . . such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured." (*Ross v Curtis-Palmer Hydro-Electric Company, supra* at 501.)

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners, contractors and their agents, regardless of their control or supervision of the work site, to provide reasonable and adequate protection and safety to all persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. (*See Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]; *see also Ross v Curtis-Palmer Hydro-Electric Co., supra*; *Miranda v City of New York*, 281 AD2d 403 [2001].) In order to support a Labor Law § 241(6) cause of action, a plaintiff must allege a New York Industrial Code violation (12 NYCRR 23-1.1 et seq.) that is both concrete and applicable given the circumstances surrounding the accident. (*See Rizzuto v L.A. Wenger Contracting Co., Inc., supra.*)

In this case, the Conti defendants established, prima facie, their entitlement to the exemption from liability under Labor Law §§ 240(1) and 241(6) for owners of one- or two-family dwellings who do not direct or control the method and manner of the work. (*See Affri v Basch*, 13 NY3d 592 [2009]; *see also Rodriguez v Garry*, 82 AD3d 863 [2011]; *Chowdhury v Rodriguez*, 57 AD3d 121 [2008].) In opposition, plaintiff failed to raise a triable issue of fact. Contrary to plaintiff's assertion, the Conti defendants' involvement was merely a retention of the limited power of general supervision (*see Jumawan v Schnitt*, 35 AD3d 382 [2006]), and was no more extensive than would be expected of the typical homeowner who hired a contractor to renovate his or her home.

Plaintiff's contention that there is an issue of fact concerning whether the Conti defendants were having the work done at their house for commercial purposes, which would render the homeowner exemption inapplicable, is unsupported and without merit. (*See generally Dineen v Rechichi*, 70 AD3d 81 [2009].) It is clear that the work being performed

here, a landscaping project, related directly to the residential use of the home. The mere fact that the Conti defendants owned two companies managing commercial real estate in Florida and New York and conducted some business from their home office, or that they made some payment related to the subject project through their companies' accounts, does not detract from the building's primary use as a residence, with any purported commercial activity being incidental thereto. (*See Bartoo v Buell*, 87 NY2d 362 [1996]; *see also Morocho v Marino Enters. Contr. Corp.*, 65 AD3d 675[2009]; *Putnam v Karaco Indus. Corp.*, 253 AD2d 457 [1998].)

With respect to the causes of action alleging common-law negligence and a violation of Labor Law § 200, since the accident arose from the manner in which the work was performed, the Conti defendants made a prima facie showing of their entitlement to judgment as a matter of law by establishing that they had no authority to supervise or control the performance of plaintiff's work. (*See Lombardi v Stout*, 80 NY2d 290 [1992]; *see also Serrano v Popovic*, 91 AD3d 254 [2012]; *Ferreira v City of New York*, 85 AD3d 1103 [2011].) In opposition, plaintiff failed to raise a triable issue of fact. (*See generally Zuckerman v City of New York*, 49 NY2d 557 [1980]; *see also Serrano v Popovic*, *supra*; *Pacheco v Halstead Communications, Ltd.*, 90 AD3d 877 [2011].)

Accordingly, the Conti defendants' motion for summary judgment is granted and plaintiff's complaint and all cross claims against them are dismissed.

The branches of the motion of defendant Syrbescapes for summary judgment in its favor dismissing plaintiff's Labor Law §240(1) and §241(6) causes of action and related cross claims as against it are granted without opposition.

The branch of the motion of defendant Syrbescapes for summary judgment in its favor dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action and related cross claims as against it is denied.

Triable issues of fact exist concerning whether defendant Syrbescapes was provided with the plans and specs of the retaining wall by defendant Ireland; whether defendant Syrbescapes negligently constructed and erected the subject retaining wall deviating from these plans and specs filed with the Department of Buildings and/or deviating from industry custom & practice; and whether defendant Syrbescapes' created a dangerous or defective condition so as to launch a force or instrument of harm. These issues of fact are based on the conflicting testimony of the witnesses for defendant Ireland and defendant Syrbescapes, as well as, the conflicting expert affidavits of plaintiff and defendant Syrbescapes.

In light of the foregoing denial of the branch of defendant Syrbescapes motion for summary judgment in its favor dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action and related cross claims as against it, defendant Ireland's cross motion seeking partial summary judgment in its favor dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action that are based upon negligent construction of the dry stack stone wall at issue by defendant Syrbescapes is denied.

Defendant HLM's cross motion seeking summary judgment is denied.

A subcontractor may be held liable under sections 240(1) and 241(6) of the Labor Law where the subcontractor is an agent of the owner or general contractor (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311 [1981]), and defendant HLM failed to meet its initial burden of establishing as a matter of law that it was not an agent of owners, the Conti defendants. Indeed, defendant HLM's submissions, including its agreement with the Conti defendants and the testimony of the witnesses of defendant HLM and nonparty Professional Irrigation, as well as, defendant Maryann Conti, raise triable issues of fact whether defendant HLM had the authority "to supervise or control plaintiff or the injury-producing work." (*Millard v Hueber-Breuer Constr. Co.*, 4 AD3d 817, 818 [2004]; *see also Walls v Turner Constr. Co.*, 4 NY3d 861 [2005]; *Tomyuk v Junefield Assoc.*, 57 AD3d 518 [2008].)

Mike Ludin, defendant HLM's owner/president testified that he determined the location of the point of connection (point of entry), that is, where he brings the conduit and electrical wire to, which here was the back recessed corner between the wall and the patio. Dennis Realmuto the principal of nonparty Professional Irrigation, testified that he discussed the plans/blueprints for the electrical wiring work with Mike Ludin of HLM, and where Ludin was going to bring power out of the house, and that was where Realmuto would bring the wire. Realmuto also testified that HLM would let Professional Irrigation know the types of conduit to be placed in the excavation and the depth the conduit would be placed inside the excavation. According to Realmuto, Mike Ludin knew that the trench was going to be excavated by nonparty Professional Irrigation in front of the retaining wall and would lead to the point of connection. In addition, Realmuto testified that Professional Irrigation did not have an electrical license and that Mike Ludin follows the electrical code and wants to see his electrical equipment down where it belongs, which in this case was eighteen inches to two feet. Realmuto further testified that he told his foreman Wayne Doughty this is a Mike Ludin project and he likes to see the trenches two feet deep for inspection, and that he also told defendant Ireland's project manager/foreman Bart Visser, that Professional Irrigation might have to extract some of the plants to get the wire down where HLM wants it. Maryann Conti testified that she thought that defendant HLM was going to excavate the trenches for the electrical conduit.

Defendant HLM also failed to eliminate all triable issues of fact regarding its contention that the retaining wall that struck plaintiff was not an object that required securing for the purposes of the undertaking pursuant to Labor Law § 240 (1). (*See Quattrocchi v F.J. Sciame Constr. Co.*, 11 NY3d 757 [2008]; *see also Outar v City of New York*, 5 NY3d 731 [2005]; *Gonzalez v TJM Constr. Corp.*, 87 AD3d 610 [2011]; *Portillo v Roby Anne Dev., LLC.*, 32 AD3d 421 [2006].) In addition, defendant HLM failed to establish that plaintiff's conduct was the sole proximate cause of his injuries.

With regard to plaintiff's Labor Law § 241(6) cause of action, the provisions of 12 NYCRR 23-4.1 contain concrete specifications (*see Sainato v City of Albany*, 285 AD2d 708 [2001]), and defendant HLM failed to establish its prima facie entitlement to summary judgment dismissing the Labor Law § 241 (6) claim predicated thereon.

Finally, defendant HLM failed to make a prima facie showing that it had no authority to control the activity that brought about the plaintiff's injury, to enable it to avoid or correct the unsafe condition. (*See Bornschein v Shuman*, 7 AD3d 476 [2004]; *see also Singleton v Citnalta Constr. Corp.*, 291 AD2d 393 [2002]; *Braun v Fischbach & Moore*, 280 AD2d 506 [2001].) Thus, defendant HLM is not entitled to dismissal of plaintiff's common-law negligence and Labor Law § 200 causes of action as against it.

Dated: MAR 19 2012

J.S.C.

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