[* 1]

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

PRESENT: PAUL G. FEINMAN Justice

PART 52

DOMINICK CELENTANO

- v -

CITY OF NEW YORK, et al.

INDEX NO. 110439/04

MOTION DATE 1-30-08

MOTION SEQ. NO. 003

MOTION CAL. NO. 16

The following papers, numbered 1 to _____ were read on this motion to/for PSJ

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 2A-3
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION AND ORDER.

FILED
APR 07 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 4/2/08

Paul G. Feinman
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52
----------X
DOMINICK CELENTANO,

Plaintiff,

against

THE CITY OF NEW YORK, CORP., THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and PIRNIE-BAKER, A JOINT VENTURE OF MALCOLM PIRNIE, INC., and BAKER ENGINEERING, NY, INC.,

Defendants.
----------X

Index Number	110439/2004
Submission Date	1-30-08
Mot. Seq. No.	003
Cal. No.	16

DECISION AND ORDER

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Papers considered in review of this motion for summary judgment:

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Affirmation in Opposition, Exhibits, Memo of Law	2, 2A, 3

PAUL G. FEINMAN, J.:

Plaintiff moves for partial summary judgment on his Labor Law § 240(1) claim. Defendants City of New York and New York City Department of Environmental Protection did not oppose plaintiff's motion and by interim decision and order dated January 30, 2008, partial summary judgment was granted as to these two defendants.[1] The branch of the motion which

[1] By decision and order dated February 15, 2006, this Court granted defendant Gottlieb Skanska's motion to dismiss the complaint and any cross claims as against it.

concerned defendant Pirnie-Baker was held in abeyance pending settlement negotiations. For the reasons set forth below, this branch of plaintiff's motion is denied.

Facts and Procedural History

Plaintiff Dominick Celentano is employed with Gilston Electric, Inc. as a MIJ; a position he describes as a transitional period between an apprentice and a journeyman (Not. of Mot. Ex. H, EBT of Dominick Celentano [hereinafter Celentano EBT] 8-9). On November 14, 2003, the date of the incident, Celentano was in his third month of employment at Gilston Electric. He and another journeyman were engaged in pulling strings through pipes for the purpose of installing wires for possible lighting or control. Celentano was standing on the third rung of a 8-foot ladder pulling the string, and then remembers being on the floor, hurt (Celentano EBT 14-15). Celentano did not notice anything wrong with the ladder prior to the accident, but at the time of the accident he heard the ladder crack, and after the accident he could tell that the ladder was broken (Celentano EBT 17).

Plaintiff alleges that on February 27, 2001, defendant Pirnie-Baker, a joint-venture company (hereinafter referred to as "Pirnie-Baker") contracted with defendants City of New York (hereinafter referred to as "the City") and the Department of Environmental Protection (hereinafter referred to as "DEP") to perform construction work at Riverbank Sewage Treatment Plant, located west of the West Side Highway between 137th and 145th Streets, New York, New York (hereinafter referred to as "the premises") (Not. of Mot. ¶5).

Plaintiff alleges that, Pirnie-Baker was hired by the City and DEP as the construction manager to perform the construction work at the premises (Not. of Mot. ¶6). Pirnie-Baker produced Mr. Schiele for deposition testimony. Mr. Schiele is the resident engineer at North

River Water Pollution Control Plant (Schiele EBT 8). Subsequent to its contract with the City and DEP, Pirnie-Baker entered into a contract (33E) with Gilston Electric Inc., located in New York, New York, for work to be done at the premises (Not. of Mot. Ex. O, EBT of Walter Schiele [hereinafter "Schiele EBT"] 12). Plaintiff further alleges that, at all relevant times, defendants, the City, DEP, and Pirnie-Baker owned, and/or either operated, managed, controlled, repaired, leased, and/or used the premises. known as Riverbank Sewage Treatment Plant, located in New York, New York. (Not. of Mot. Ex. C, ¶¶11-35).

Defendant Pirnie-Baker does not seek summary judgment; however, it opposes plaintiff's motion, arguing that it is not a proper defendant under Lab. Law § 240(1) and that its contract with the City does not make it an agent of the City. Pirnie-Baker further contends that it was not hired as a general contractor, and as such, did not have the duty or responsibility to oversee the construction site and trade contractors, or the ability to stop the work.

Legal Analysis

Summary judgment is a drastic remedy that should only be granted when there is no genuine issue of material fact upon which the court could find for the non-moving party (*Di Menna & Sons, Inc., v New York*, 301 NY 118, 121 [1950]). It is not to be granted if the issue is arguable or if there is doubt as to whether a triable issue exists (*Braun v Carey*, 280 AD 1019, 1020 [3rd Dept. 1952]). Issue finding as opposed to issue determination is essential to summary judgment (*Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The moving party must produce evidence to conclude that summary judgment should be granted in her favor (*Shaw v Time-Life Records*, 38 NY2d 201, 207 [1975]). The evidence will be construed in the light most favorable to the moving party (*Wessel v Krop*, 30 AD2d 764, 765 [4th Dept. 1968]).

Once the moving party has met its burden, and demonstrates its entitlement to summary judgment, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring trial (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). A party's bare allegations are insufficient to create a genuine issue of fact, and thus, defeat summary judgment (*S.J. Capelin Associates, Inc. v Globe Manufacturing Corp.*, NY2d 338, 342 [1974]). A party will not succeed in defeating summary judgment where it offers only surmises, suspicions or conjectures that are unsupported by evidence (*Shapiro v Health Ins. Plans of Greater* N.Y., 7 NY2d 56, 63 [1959]).

To establish liability under Lab. Law § 240(1), a plaintiff must demonstrate a violation of the statute, and that the violation was the proximate cause of plaintiff's injuries (*Blake v Neighborhood Hous. Servs of N.Y. City, Inc.*, 1 NY3d 280, 287 [2003]). Labor Law § 240(1) provides that,

> All 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, 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 purpose of the statute is for the protection of workers from elevation-associated risks of injury (*Reinoso v Ornstein Layton Mgt.*, 19 AD3d 678 [2d Dept. 2005], citing *Blake v Neighborhood Hous. Servs of N.Y. City, Inc.*, 1 NY3d at 284-285).

The scope of a construction manager's liability under the Labor Law has been frequently litigated in the courts (*see e.g., Aranda v Park E. Constr.*, 4 AD3d 315 [2d Dept. 2004]; *Walls v*

Turner Constr. Co. 4 NY2d 861, 863 [2005]); *Mulcaire v Buffalo Structural Steel Constr. Corp.*, 45 AD3d 1426 [4th Dept. 2007]). Courts will generally impose liability for violations of Lab. Law § 240(1) against owners, contractors, and any others who have been delegated the duties to supervise and control the workplace to the degree that they become agents of the owners and contractors (*see*, *Russin v Picciano & Sons*, 54 NY2d 329, 411 [1981].

Plaintiff first argues that defendant Pirnie-Baker's agreement with the City to provide contract management services for construction on the premises makes Pirnie-Baker an appropriate defendant within the meaning of the statute. Plaintiff asserts that as contract manager of the construction site, defendant Pirnie-Baker was authorized to inspect, supervise, and control the performance of the work. "A construction manager charged with coordinating all aspects of the construction job is a contractor" under Lab. Law § 240(1) (*Kenny v Fuller Co.,* 87 AD2d 183, 190 [2d Dept. 1982]; *Nienajadlo v. Infomart, N.Y.*, LLC., 19 AD3d 384, [2d Dept. 2005] [finding that, the agreement between the owner and the construction manager gave the latter "many of the powers of a general contractor"]).

Defendant Pirnie-Baker first argues that it is not a proper defendant under Lab. Law §240(1) because its contract with the City did not make it a general contractor, but rather a construction manager. The title of the defendant does not determine whether liability will be imposed, since a party who performs primarily the same duties and functions of a contractor or agent will be made to bear the same liability as a contractor or owner (*Aranda v Park E. Constr.*, 4 AD3d at 316). It is significant, however, to note that, the terms "general contractor" and "construction manager" are not synonymous (*Balthazar v Full Circle Constr. Corp.* 268 AD2d 96, 98 [1st Dept. 2000] [finding that the construction manager's contract did not authorize it to

direct control over the acts of employees other than its own]).

Defendant Pirnie-Baker further contends that its agreement with the City to provide contract management services did not make it an agent of the City. While construction managers of a work site are generally not liable for injuries under Lab. Law § 240(1), liability may be imposed where the construction manager is found to be an agent of the property owner (*Walls v Turner Constr. Co.* 4 NY2d at 863). Whether a third party is an agent of the owner for purposes of liability under Lab. Law § 240(1), depends on whether the third party has "the right to insist that proper safety practices are followed and it is the right to control the work that is significant, not the actual exercise or non-exercise of control" (*Norwak v Smith & Mahoney*, 110 AD2d 288, 290 [1985]). Pirnie-Baker asserts that it was not given authorization to stop performance of the work at the site, and therefore, its role in connection with Lab. Law §240(1) should be carefully analyzed. *See, Borbeck v Hercules Constr. Co.*, __AD3d__, 2008 NY Slip Op. (2d Dept. 2008) (holding that the construction manager was not the statutory agent of the owner because it lacked the authority to stop the work in the event an unsafe condition or work practice was discovered).

If the contract between defendants Pirnie-Baker and the City is one of general supervision, it is insufficient to impose liability on this defendant (*see, Damiani v Federated Dept. Stores, Inc.*, 23 AD3d 329, 332 [2d Dept. 2005]). In *Aranda v Park E. Constr.*, 4 AD3d at 316, the Court held that because of the many powers given to the construction manager by the owner in their agreement, there was an issue of fact as to whether the construction manager was a general contractor or agent of the owner for purposes of liability under Lab. Law §240(1)). *See also, Sheridan v Albion Cent. Sch. Dist.*, 41 AD3d 1277, 1278-1279 (4th Dept. 2007) (holding that summary judgment was improper since triable issues of fact existed as to whether the

construction manager had the authority to control the activity that caused the injury, and therefore, was the general contractor or agent of the owner). Similarly, there are issues of fact presented in this case as to the role of defendant Pirnie-Baker in the construction project at the time of the incident. Specifically, an issue of fact exists as to whether Pirnie-Baker's role in managing the work site rose to the level of a general contractor or agent of the owner in order to impose liability under Lab. Law §240(1). Accordingly, it is

ORDERED that the branch of the plaintiff's motion seeking summary judgment as against defendant Pirnie-Baker is denied; and it is further

ORDERED that this decision and order incorporates the interim decision and order of January 30, 2008 which granted the branch of the plaintiff's motion which sough partial summary judgment as against the municipal defendants on the issue of liability pursuant to Labor Law § 240 (1) under the third cause of action and directed an assessment of damages as against these defendants to be held at the time of trial of the remainder of the action.

This constitutes the decision and order of the court.

Dated: April 2 2008
New York, New York

J.S.C.