

**Voultepsis v Gumley-Haft Kleier Inc.**

2008 NY Slip Op 31964(U)

July 7, 2008

Supreme Court, New York County

Docket Number: 0103370/2004

Judge: Joan A. Madden

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

PRESENT: HON. JOAN A. MADDEN  
Justice

PART 11

Voultepsis, Gerasimos  
Plaintiff,

- v -

Gumley-Hoff LLC,  
Defendant.

INDEX NO. 103370/04

MOTION DATE: 2-21-08

MOTION SEQ. NO.: 002

MOTION CAL. NO.:

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for partial summary judgment and other relief.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum Decision and Order.

**FILED**  
JUL 14 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: July 7, 2008

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, IAS Part 11

INDEX NO. 103370/04

-----X  
GERASIMOS VOULTEPSIS and HELEN VOULTEPSIS,

Plaintiffs,

-against-

GUMLEY-HAFT KLEIER INC. and GUMLEY-HAFT LLC

Defendants.

-----X  
JOAN MADDEN, J.:

**FILED**  
JUL 14 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

In this action to recover damages for the injuries allegedly sustained by plaintiff Gerasimons Voultepsis (“Voultepsis”), plaintiffs move for an order (1) granting summary judgment as to liability on their Labor Law § 240(1) claim, (2) striking the answer of defendant Gumley-Haft LLC (Gumley-Haft)<sup>1</sup> for spoliation of evidence, and (3) striking Gumley-Haft’s third affirmative defense that the action is barred by the Workers’ Compensation Law (motion seq. no. 002). Gumley-Haft LLC opposes the motion and separately moves for summary judgment dismissing plaintiff’s complaint (motion seq. no. 003).<sup>2</sup>

Background

Voultepsis, who was the superintendent of the building located at 435 East 65<sup>th</sup> Street, New York, NY (“the Building”) was injured on May 11, 2003, when he fell from a ladder while working on a project to replace the rotted floor in the storage room in the Building’s sub-basement. The Building is owned by non-party 435 East 65<sup>th</sup> Street Corp. (hereinafter “the co-

<sup>1</sup>Defendant Gumley-Haft Kleier Inc. is no longer a party to the action.

<sup>2</sup>Motion seq. nos. 002 and 003 are consolidated for disposition.

op"). Gumley-Haft was the Building's managing agent at the time of the occurrence. It assigned its employee, Edith Schickedanz ("Schickedanz"), to act as the property manager of the Building.

At his deposition, Voultepsis testified that at the time of the accident he was employed by the co-op as the Building's superintendent,<sup>3</sup> and that Gumley-Haft was the Building's managing agent, and that Schickedanz was Gumely-Haft's employee in charge of the Building. He testified that Schickedanz did not direct his daily activities, did not tell him how to do his job, and did not have the authority to fire him, as only the Board had this authority. Voultepsis further testified that he was present when the Board told representatives of Gumley-Haft that only the Board had the authority to fire him. He described Schickedanz's duties as "to do the finances of the building, pay bills, collect the maintenance and make sure to provide me with materials and everything necessary ...to perform my work safely and appropriately" (Voultepsis dep at 24). He also testified that if he needed "extra materials for special work [he] would get authorization from the [Board of Directors] for the amount of the materials and then call Edith (i.e. Schickedanz) the manager...for a check" (Id. at 26). When asked who made purchases of equipment or materials needed for a project approved by the Board, Voultepsis responded that "I would talk to management if I needed money to buy materials or if they had a supplier to send the materials," but that "a lot of times" he ordered the materials himself and Gumely-Haft's role was "just to pay" (Id. at 74).

At the time of the accident, Voultepsis was working on a project to remove the rotted plywood floor from the storage room and to install a new one. Voultepsis testified that the Board

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<sup>3</sup>Voultepsis also testified that he had been employed as the Building's superintendent since August 1982.

had discussed the project during a February 2003 meeting that both he and Schickedanz attended, and that the Board told him to investigate and then report to Schickedanz. Voultepsis testified that a week or two after the meeting and following his investigation, he told Schickedanz “about the condition of the floor, how bad it was, how dangerous it was to work down there. How big a job [it] was for one person. And I told her I can’t do the job personally without help because it is dangerous and it’s a lot of work.” (Voultepsis dep at 39, 40). Schickedanz responded “try to see what you can do and I will talk to the Board” (Id. at 40).

Voultepsis subsequently testified that he told Schickedanz about the job that “[i]t is impossible for me to do the work. It is dangerous. The bins can fall, things all over ton the top of the bins, the wood is all gone, the floor is very unhealthy, slippery a lot of materials and heavy...I needed help with labor and I needed help in safety. And then she told me do what you can” (Id. at 133). He also testified that Schickedanz “was authorized by the Board” to get him help with the job, and that he asked her for a helper (Id. at 133, 135). However, according to Voultepsis, he decided to start the work alone when he determined that the floor “had deteriorated so bad” that it was “very dangerous for [shareholders] to walk on [the] floor...” (Id. at 135, 136).

When asked whether Schickedanz was responsible for safety in the Building, Voultepsis responded “yes” and described this responsibility as “[t]o make sure all work we do compl[ies] with safety rules and do it safety for us (sic)” (Id. at 134). He also responded affirmatively when asked whether Schickedanz had the ability or authority to stop work if she thought the work was not safe, and testified that it had happened “many times before” (Id.). He subsequently added that “[m]y understanding was [Schickedanz’s] responsibility was to help me with whatever is

necessary to complete a job safely and to take precautions and safety before we complete or begin any work in the building,” and that with respect to the job in the storage room his request for safety items were for “labor help, extra help” (Id., at 143-144).

Voultepsis started to work on the project on May 4, when he began to remove the plywood floor and the two-by-fours beneath the floor. According to Voultepsis, by the accident date, he had already removed the plywood floor and some of the two-by-fours, and that underneath the plywood was a concrete floor that was covered with sewage which Voultepsis described as “muddy looking and smelly and dark” (Id. at 51). At the time of the accident Voultepsis was trying to retrieve a large piece of plywood from the top of the storage bin using an A-frame step ladder, that he found in the basement and which was owned by the co-op. He testified that the floor where two of the ladder’s feet were placed was “pitched” while the other two feet were on a flat part of the floor; however he did not realized that two of the legs were on a pitched part of the floor until “later.” (Voultepsis dep at 49).

According to Voultepsis, just before he fell, he was on the last step of the ladder and he had one hand on the plywood and was about to grab the plywood with the other hand, when the ladder slid and caused him to fall. At the time of his fall, Voultepsis testified that he was not wearing or using any safety devices. Voultepsis testified that the “condition” of the floor which he described as “bad” caused the ladder to slide, but that he did not place it on a bad condition and the ladder did not move as he was climbing it (Voultepsis dep at 63).

Schickedanz testified that she was Gumely-Haft’s property manager assigned to the Building, that she was assigned to other residential cooperative buildings at the time, and that she made weekly site visits to the Building. She testified that her duties at the buildings she managed

included:

To review invoices that superintendents order—for supplies, for plumbers or services in the building with them. Or if they provided a work order I would approve the invoice once the work had been completed. To attend board meetings when requests by the board. To oversee the hours that are worked in the building, to ensure that any overtime is justified and that the building is covered. Review vacation requests. Walk through the building to see if there's stuff that needs to get done or that the staff should clean, or the orders for repairs to be done in the building. Oversee special construction projects, such as exterior or sidewalk work. Make sure that those contractors have shown up, and that they're doing—attend the construction meetings for them so that engineers, architects sign off on whether they actually did the work according to the specifications...When a Workman's Compensation claim is made, we report it to the building's insurance company—the company reports it.

(Schickedanz dep at 6-8)(emphasis supplied).

With respect to her weekly visits to the Building, Schickedanz testified that, in general, during such visits she would “meet with the superintendent, along with the board president, and we would review any open issues that were happening in the building.” (*Id.*, 16).

When asked if one of her duties was to ensure that the building was safely run and in compliance with the liability policy, or Worker's Compensation policy, Schickedanz responded “[t]hat would have been the supervision of the superintendent, as he is there on a day-to-day basis,” and that her only responsibility was to “ensure the work that was ordered was done” (*Id.*, at 8).

As to special projects performed by the superintendent in the Building, Schickedanz testified that such projects required Board approval, and that she approved the invoices for materials used on such projects. She also testified that she would “occasionally” visit the site of such projects to see how they were progressing, and that the status of a particular project would

be discussed with the Board's president (Schickedanz dep at 38). Schickedanz further testified that Voultepsis informed her and the Board that the storage room floor needed to be replaced, and that after the Board approved the project she would have had discussions with Voultepsis as to the materials needed and the status of the project, but that she could not recall the details of any specific conversation with Voultepsis about the project.

Schickedanz testified that she reviewed the progress of work performed by outside contractors on major projects and that she had the authority to stop the work if it was observed that it was being performed unsafely. She further testified that if she walked through the Building and observed an unsafe condition, she would have the superintendent correct it as soon as possible, and that if she saw an employee in an unsafe position and the superintendent was not there that she "would ask the employee to correct whatever appeared to be wrong." (Schickedanz dep at 85-86).

Gumley-Haft's duties as managing Agent of the Building are memorialized in a Management Contract with the co-op effective as of March 1, 2000. Under the Second Article of the Management Contract, Gumley-Haft was to perform the following services:

(a) Cause to be hired, paid and supervised, all persons necessary to be employed in order to properly maintain and operate the Building who, in each instance, shall be the Owner's and not the Agent's employees, and cause to be discharged all persons unnecessary or undesirable. Having used due care in the selection of such persons the Agent shall not be under any responsibility whatsoever for any act or omission of any such person. The duties so to hire, pay, supervise and discharge, or any thereof, may be delegated by the Agent to one or more persons in the general employ of the Agent...

(b) Cause the Building to be maintained in such a condition as deemed advisable by the Owner, including interior and exterior cleaning, and cause routine repairs (and incidental alterations) to be made, including but not limited to, electrical, plumbing, steamfitting, carpentry...and such other routine repairs (or incidental alterations) as may be required in the course of ordinary maintenance and care of the Building, subject only to the limitations in this agreement. Ordinary repairs or alterations involving an expenditure in excess of One Thousand Dollars (\$1,000) for any one item shall be made only with the prior approval of the Owner, but emergency repairs, i.e. those immediately necessary for the preservation or safety of the Building may be made by the Agent, irrespective of the cost thereof, without prior approval of the Owner...

(c) Recommend and, with the approval of the Owner, cause all such acts and things to be done in or about the Building as shall be necessary or desirable to comply with any and all orders or violations affecting the Building, placed thereon by any federal, state, or municipal authority having jurisdiction thereover,...

(e) Purchase all supplies which shall be necessary to properly maintain and operate the Building...

The Third Article of the Management Contract provides that "Owner authorizes Agent, for the Owner's account and on its behalf, to perform any act or do anything necessary or desirable in order to carry out the Agent's agreements contained in Article Second hereof, and everything done by the Agent under Article Second shall be done as Agent of the Owner..."

#### The Motions

Plaintiffs move for partial summary judgment on their Labor Law § 240 claim, arguing that the record establishes that Voultepsis' injuries were proximately caused by Gumley-Haft's

violation of the statute requiring that it provide safety devices to protect against elevation-related hazards. Plaintiffs also seek to strike Gumley-Haft's third affirmative defense that the action is barred by the Workers' Compensation Law, asserting that Gumley-Haft did not exercise sufficient control over Voultepsis to warrant a finding that Voultepsis was Gumley-Haft's "special employee." In particular, plaintiffs point to Voultepsis' testimony that he was employed by the co-op, that Schickedanz did not direct his daily activities, did not tell him how to do his job, and did not have the authority to fire him.

Plaintiffs also argue that the Gumley-Haft's answer should be stricken for its alleged spoliation of certain evidence relevant to ascertaining the nature of the relationship between Voultepsis and Gumley-Haft and the extent to which Gumley-Haft had the authority to supervise and control the work related to replacing the storage room floors. Plaintiffs assert that defendants had notice of the litigation in September 2003, and have no excuse for not preserving the records at issue which include, inter alia, minutes from Board meetings for five years prior to the accident, and work logs, diaries, invoices and other documents reflecting work, labor and services at the Building for one-year prior to the accident, progress reports prepared and/or maintained by Gumley-Haft in the ordinary course of business reflecting work, labor or services at the Building for the date of occurrence and 90 days prior to the occurrence. In response to discovery requests for these and other records pertaining to work performed at the Building prior to the occurrence, Gumley-Haft primarily produced documents that post-dated the accident, and stated that many of the documents sought did not exist.

Gumley-Haft subsequently provided plaintiffs with Board minutes from 1990-1994 and from December 15, 2003, but none of the other Board minutes were located. By affidavit dated

January 5, 2007, Larry Grunfeld, an Account Executive for Gumley-Haft stated that he had searched his offices for the records, and that his office was not in possession of them. Notably, however, although not produced by Gumley-Haft, plaintiffs were able to obtain the Board minutes from meetings held in January, February, March and April 2003 (Exhibit C to Plaintiffs' Affirmation in Opposition).

Gumley-Haft opposes plaintiffs' motion and moves to dismiss the complaint on the grounds that Voultepsis was its "special employee" for the purposes of Workers' Compensation. Alternatively, if Voultepsis is not found to have been "special employee," Gumley-Haft argues that it did not exercise sufficient authority and control over Voultepsis to qualify as a statutory agent subject to liability under the Labor Law.

In support of its position that Voultepsis was its special employee, Gumley-Haft submits the affidavit of its Chief Executive, Daniel Wollman, who executed the Management Agreement. Mr. Wollman states that the provision in the Management Agreement giving Gumley-Haft the authority to "cause to be hired, paid and supervised all persons necessary to be employed in order to properly maintain and operated the Building, encompassed individuals, like [Voultepsis], who were already working at the Building on the [effective date of the agreement]." (Wollman Affidavit, ¶ 3). Mr. Wollman also attaches correspondence from Gumley-Haft to Voultepsis dated October 23, 2003, December 11, 2003 and March 17, 2004, which relate to the termination of Voultepsis' employment at the Building which he states "evidences the fact that Gumley-Haft did, in fact, have the authority to terminate [Voultepsis]" (Id., ¶ 4).

Gumley-Haft also argues that the complaint must be dismissed since it was not advised

by Voultepsis that he had commenced work in the sub-basement's storage room, that it had no notice of the condition of the floor, and thus could not have anticipated the need for safety devices, and that Voultepsis' conduct was the sole proximate cause of his injuries

With respect to the spoliation issue, Gumley-Haft argues that there is no evidence that it destroyed the documents that it was unable to locate after a diligent search, and that in any event, plaintiffs have not demonstrated that the evidence Gumley-Haft failed to produce is crucial to their case so as to warrant the sanction of striking its answer.

In reply, plaintiffs submit evidence that Voultepsis was terminated by Board and not Gumley-Haft, including a December 15, 2003 memorandum to the shareholders from the Board indicating that during a November 23, 2003 Board meeting the Board voted to serve a letter of termination on Voultepsis, and a fax dated December 11, 2003 from the Building's attorney to Gumley-Haft attaching the discharge letter for Voultepsis and stating that it should be typed on Gumley-Haft letterhead.

#### Spoliation of Evidence

Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them." Kirkland v New York City Housing Authority, 236 AD2d 170, 175 (1<sup>st</sup> Dept 1997). Moreover, under certain circumstances, spoliation sanctions have been held to be appropriate even where the evidence at issue was destroyed prior to the issuance of any discovery order seeking such evidence and where the destruction of evidence has not been shown to be intentional or in bad faith. Id.; See also Squitieri v City of New York, 248 AD2d 201 (1<sup>st</sup> Dept 1998).

On the other hand, spoliation sanctions have been denied where evidence is destroyed in the ordinary course of business, rather than in an effort to impede discovery. See, Smith v New York City Health & Hospitals Corp., 284 AD2d 121 (1<sup>st</sup> Dept), lv. denied, 97 NY2d 607 (2001)(spoliation sanctions properly denied where the defendant hospital disposed of the subject blood donor records in a manner consistent with regulatory requirements, pursuant to business routine and before plaintiffs' negligent screening theory was in issue); Roberts v Consolidated Edison of New York, 273 AD2d 369 (2d Dept 2000)(denying discovery sanctions where there was no evidence that Village's practice of routinely destroying its work records was either spoliation or an effort to frustrate discovery).

Significantly, spoliation sanctions are not warranted unless the party seeking such sanctions meets its burden of establishing that the evidence destroyed is crucial to the moving parties' case, and that the party suffered prejudice as a result of the loss. See Balaskonis v. HRH Constr. Corp., 1 AD3d 120 (1<sup>st</sup> Dept 2003); Riley v. ISS Intern. Service System, Inc., 304 AD2d 637 (2d Dept 2003).

Here, it cannot be said on this record that Gumley-Haft intentionally or negligently destroyed the documents at issue in an attempt to impede or frustrate discovery. Moreover, the reasons surrounding Gumley-Haft's failure to locate the documents at issue need not be resolved since plaintiffs have not met their burden of establishing that these documents are crucial to establishing their case or that they have been prejudiced as a result of Gumley-Haft's failure to produce such documents.

In particular, plaintiffs have not shown that missing documents are crucial to establishing that nature of the relationship between Voultepsis and Gumley-Haft, and the extent

to which Gumley-Haft had the authority or responsibility for controlling and or supervising the injury producing work, especially since the record includes key evidence regarding these issues, such as the Management Agreement and the deposition testimony of Voultepsis and Schickedanz. In addition, although Gumley-Haft did not produce them, plaintiffs are in possession of the Board minutes for the four months in 2003 that directly preceded the accident. Accordingly, plaintiffs' motion to strike Gumley-Haft's answer for its alleged spoliation of evidence is denied.

#### Special Employee

The exclusive remedy of workers' compensation applies when a plaintiff is the general employer of one employer but also the so-called special employee of another employer.

Thompson v. Grumman Aerospace Corp., 78 NY2d 553, 557 (1991). "A special employee is one who is transferred for a limited time of whatever duration to the service of another" (citation omitted). Id.

Whether a person can be fairly categorized as a special employee is "usually a question of fact" Thompson, 78 N.Y.2d at 557 (1991). However, "the determination of special employment status may be made as a matter of law where particular, undisputed critical facts compel that conclusion and present no triable issues of fact." Thompson, 78 NY2d at 558.

"Principal factors in determining the existence of a special employment relationship include who has the right to control the employee's work, who is responsible for the payment of wages and the furnishing of equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer's or general employer's business." Ugijanin v. 2 West 45<sup>th</sup> Street Joint Venture, 43 AD3d 911 (2d Dept

2007). In Thompson, the Court of Appeals wrote that “[w]hile not determinative, a significant and weighty feature has emerged that focuses on who controls and directs the manner, details and ultimate result of the employee’s work.” Id.

“A finding of special employment is justified only where the special employer exerts complete and exclusive control over the purported special employee, as to whom the general employee has relinquished all control.” Fox v. Brozman-Archer Realty Services, Inc., 266 AD2d 97, 98 (1<sup>st</sup> Dept 1999), quoting, Sanfillippo v. City of New York, 239 AD2d 296, 296 (1<sup>st</sup> Dept 1997), citing Thompson v. Grumman Aerospace Corp., *supra*. However, the special relationship is not defeated solely by the fact that the general employer was responsible for paying the employee’s wages and workers’ compensation benefits. Adams v. North-Star Constr. Co., Inc., 249 AD2d 1001, 1002 (4<sup>th</sup> Dept 1998).

Here, even assuming arguendo that the Management Agreement which gave Gumley-Haft the authority to hire, pay and supervise “all persons necessary to be employed in order to properly maintain and operate the Building... [and] to discharge all persons unnecessary or undesirable” together with Wollman’s affidavit are sufficient to make a prima facie showing that Voultepsis was Gumley-Haft’s special employee, plaintiffs have controverted this showing. Specifically, Voultepsis testified that Gumley-Haft, through its agent Schickedanz, did not direct his daily activities, did not tell him how to do his job, and did not have the authority to fire him, as only the Board had this authority. In addition, plaintiffs have submitted documentary evidence showing that although Gumley-Haft notified Voultepsis that he was terminated from his position as the Building’s superintendent, the decision to terminate Voultepsis was made by the Board. Furthermore, the Management Agreement specifically states that those employed in

the Building “shall be the Owner’s and not the Agent’s employees.”

Notably absent from the record is an affidavit from a representative of the co-op with knowledge of the extent to which the work of Voultepsis was supervised and/or controlled by Gumley-Haft. Under these circumstances, it cannot be said as a matter of law whether or not Voultepsis was the Gumley-Haft’s special employee for the purposes of the Workers’ Compensation Law. See Sanfilippo v. City of New York, 239 AD2d at 296 (denying summary judgment where issues of fact existed as to whether general employer or purported special employer supervised and controlled plaintiff’s work and the contract for plaintiff’s services did not settle the question as a matter of law); compare, Gherghinoiu v. ATCO Properties & Management, Inc., 32 AD3d 314 (1<sup>st</sup> Dept), lv denied, 7 NY3d 716 (2006)(holding that worker was defendant’s special employee based on uncontroverted evidence that plaintiff was directly and controlled on a daily basis by defendant’s employees who had the exclusive right to hire and fire them at the relevant job site); Gonzalez v. John B. Lovett Assoc., Ltd., 228 AD2d 342 (1<sup>st</sup> Dept 1996)(striking affirmative defense based on plaintiff’s purported special employee status where affidavit from defendant’s general manager indicted that defendant’s authority over plaintiff was conditioned on the approval of the owner of the Building).

#### Labor Law § 240 Claim

Section 240(1) of the Labor Law imposes absolute liability on building owners, general contractors, and their agents for injuries to workers engaged in “the erection, demolition, repairing...of a building or structure,” which result from falls from ladders, scaffolding, or other similar elevation devices that do not provide “proper protection” against such falls. Melo v. Consolidated Edison of New York, Inc., 92 NY2d 909 (1998).

A threshold issue in this case is whether Gumley-Haft can be considered a statutory agent subject to liability under Labor Law § 240(1). “When the work [giving rise to the duties to conform to the requirements of section 240(1)] has been delegated to a third-party, that third party obtains the concomitant authority to supervise and control the work and becomes a statutory ‘agent’ of the owner or general contractor.” Walls v. Turner Construction Co., 4 NY3d 861, 864 (2005), quoting, Russin v Picciano & Son, 54 NY2d 311, 318 (1981). The existence of statutory agency relationship depends on the agent’s authority to supervise and control the work giving rise to a plaintiff’s injuries. Russin v Picciano & Son, 54 NY2d at 317; see also, Morales v. Spring Scaffolding, 24 AD3d 42, 46 (1<sup>st</sup> Dept 2005). “The determinative factor on the issue of control is not whether [the agent] furnishes the equipment but whether he has control of the work being done and the authority to insist that proper safety practices be followed.” Everitt v. Nozkowski, 285 AD2d 442, 443-444 (2d Dept 2001).

Furthermore, if a third-party is vested with the authority to supervise and control the work, it is irrelevant for the purposes of finding statutory agency whether the party actually exercised such supervision and control.<sup>4</sup> Williams v. Dover Home Improvement, Inc., 276 AD2d 626 (2d Dept 2000); Fox v. Brozman-Archer Realty Services, 266 AD2d at 99.

Under this standard, the record raises triable issues of fact as to whether Gumley-Haft had the authority to supervise and control the Voultepsis work in the storage room that gave rise

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<sup>4</sup>The First Department has noted that whereas “a finding of special employment is justified only where the special employer exerts complete and exclusive control over the purported special employee...in determining statutory agency, it is the right to control that is dispositive.” Fox v. Brozman-Archer Realty Services, 266 AD2d at 99. Thus, contrary to Gumley-Haft’s position, even if Gumley-Haft did not exercise sufficient control to warrant a finding that Voultepsis was its special employee, Gumley-Haft could be found to be a statutory agent for the purposes of the Labor Law.

to his injuries. Thus, while there is evidence that Gumley-Haft was responsible for overseeing special projects in the Building and that its property manager had a role in ensuring that such projects were done safely, other proof suggests that its authority over the day-to-day operations of the Building, including the repair projects at the Building and the activities of the superintendent was limited.

Accordingly, the issue of whether Gumley-Haft is a statutory agent must be resolved by the fact finder. See e.g., Blake v. Neighborhood Housing Services of New York City, Inc., 262 AD2d 244 (1<sup>st</sup> Dept 1999)(holding that the court properly denied summary judgment on the issue of whether defendant was a statutory agent where triable issues of fact existed as to whether defendant directed, supervised or controlled the injury-producing work); Natoli v. City of New York, 32 AD3d 507 (2d Dept 2006)(defendant failed to establish entitlement to summary judgment dismissing Labor Law claims against it where the record raised factual issues as to whether defendant that was hired under a construction management service contract qualified as a general contractor or agent of the owner).

Gumley-Haft also seeks to dismiss the Labor Law § 240 claim on the grounds that Voultepsis' own actions, including placing the ladder on the muddy and pitched floor were the sole proximate cause of his injuries. To establish liability under § 240, a plaintiff must prove that the statute was violated and that the violation was a proximate cause of the injuries sustained. Bland v. Manocherian, 66 NY2d 452 (1985). Proximate cause is demonstrated based on a showing that a "defendant's act or failure to act as the statute requires 'was a substantial cause of the events which produced the injury.'" Gordon v. Eastern Railway Supply, Inc., 82 NY2d 555, 562 (1993)(citation omitted). It is not necessary for plaintiff to demonstrate that the

- precise manner in which the accident occurred, or the extent of the injuries, was foreseeable. Rodriguez v. Forest City Jay Street Associates, 234 AD2d 68 (1<sup>st</sup> Dept. 1996), citing Public Administrator of Bronx County v. Trump Village Construction Corp., 177 AD2d 258 (1<sup>st</sup> Dept 1991). Comparative negligence is not a defense. See Blake v. Neighborhood Housing Services of New York City, Inc., 1 NY3d 280, 289-290 (2003). However, "a defendant is not liable under Labor Law § 240 (1) [when a] plaintiff's own negligence was the sole proximate cause of the accident." Id. at 290.

Any "'sole proximate cause' defense must logically be limited to the situation where a worker has been provided with 'proper protection,' and the worker thereafter, through intentional misuse of the safety device, or via other egregious misconduct, neutralizes the protections afforded by the safety device." Robinson v City of New York, 4 Misc3d 542, 546-547 (Sup Ct, Bronx County 2004); see also, Hernandez v. 151 Sullivan Tenant Corp., 307 AD2d 207, 208 (1<sup>st</sup> Dept 2003).

"Labor Law § 240 (1) requires that safety devices such as ladders be so 'constructed, placed and operated as to give proper protection' to a worker." Klein v City of New York, 89 NY2d 833, 834-835 (1996); see also Montalvo v J. Petrocelli Const., Inc., 8 AD3d 173 (1st Dept 2004). Any failure to properly secure a ladder so that it remains steady and erect constitutes a violation of Labor Law § 240 (1) as a matter of law. Wasilewski v. Museum of Modern Art, 260 AD2d 271 (1st Dept 1999); see also, Klein v City of New York, 89 NY2d at 834-835 (plaintiff established "defendant violated Labor Law § 240 (1) by failing to ensure the proper placement of the ladder due to the condition of the floor" where plaintiff observed film or 'gunk' on the floor where he placed the ladder).

The First Department has held that "[g]iven an unsecured ladder and no other safety devices, plaintiff cannot be held solely to blame for his injuries (citations omitted). Plaintiff's use of the ladder without his co-worker present amounted, at most, to comparative negligence, which is not a defense to a section 240(1) claim." Velasco v Green-Wood Cemetery, 8 AD3d 88, 89 (1st Dept 2004).

Here, as the uncontroverted record shows that Voultepsis was given no safety devices to prevent him from falling from an unsecured ladder or ensure its safe placement on a dangerous condition, Voultepsis' conduct constituted, at most, comparative negligence, and cannot be said to be the sole proximate cause of the accident. Id.

Accordingly, if Gumley-Taft is found at trial to be a statutory agent under Labor Law § 240, it will be subject to absolute liability under Labor Law § 240 (1).<sup>5</sup>

#### Labor Law § 200

The common law duty owed by an owner, general contractor, or employer to maintain a safe workplace is codified in Labor Law § 200. See, Gasper v Ford Motor Co., 13 NY2d 104 (1963). Liability under Labor Law section 200 will be imposed if the defendant exercised supervisory control over the construction site or had actual or constructive notice of the unsafe condition. See Rizzuto, 91 NY2d 343, 352-353 (1998).

To be charged with liability under Labor Law § 200 based on its supervision or control of the work site, a defendant must have more than a "general duty to supervise the work and ensure compliance with safety regulations." De La Rosa v Philip Morris Management Corp.,

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<sup>5</sup>That being said, however, if Voultepsis is found to be Gumley-Haft's special employee for workers' compensation purposes, all of plaintiffs' claims, including his Labor Law section 240 claim will be dismissed as barred by the exclusivity of workers' compensation.

303 AD2d 190, 192 (1st Dept 2003). "[M]onitoring and oversight of the timing and quality of the work is not enough to impose liability under section 200, [n]or is a general duty to ensure compliance with safety regulations or the authority to stop work for safety reasons." Dalanna v City of New York, 308 AD2d 400, 400 (1st Dept 2003). Instead, defendant must have "the authority to control the activity bringing about the injury to enable it to avoid or correct the unsafe condition." Russin v Louis N. Picciano & Son, 54 NY2d 311, 317 (1981).

In this case, the record raises triable issues of fact as to whether Gumley-Haft exercised sufficient control over the activities resulting in Voultepsis' injuries to be held liable under Labor Law § 200. Moreover, contrary to Gumley-Haft's position, it cannot be said as a matter of law that Gumley-Haft did not have actual or constructive notice of the condition of the floor in the sub-basement storage room or of the fact that Voultepsis had begun to work there. Specifically, there is evidence in the record that Voultepsis notified Gumley-Haft and its employee Schickedanz about the dangerous condition of the floor at least several months before the accident, and that he had been authorized to do the work by the Board as early as February 2003 due to flooding the basement. With respect to whether Gumley-Haft knew or should have known that Voultepsis commenced work on the storage room, different inferences can be drawn from the record which includes Voultepsis' testimony that he repeatedly told Schickedanz that it was a dangerous job, and that she responded that he should see what he could do.

Accordingly, as there are triable issues of fact with respect to whether Gumley-Haft is subject to liability under Labor Law § 200, its request to dismiss this claim must be denied.

#### Conclusion

In view of the above, it is

ORDERED the plaintiffs' motion for summary judgment as to liability on their Labor Law § 240(1) claim is denied as there are triable issues of fact as to whether defendant Gumley-Haft, LLC is a statutory agent; and it is further

ORDERED that plaintiffs' motion to striking the answer of defendant Gumley-Haft LLC for spoliation of evidence is denied; and it is further

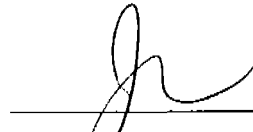
ORDERED that plaintiffs' motion to strike Gumley-Haft's third affirmative defense that the action is barred by the Workers' Compensation Law is denied as there are triable issues of fact as to whether plaintiff Gerasimos Voultepsis is Gumley-Haft's special employee; and it is further

ORDERED that defendant Gumley-Haft's motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that a pre-trial conference shall be held in Part 11, room 351, on July 17, 2008 at 2:30 pm.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

DATED July 7, 2008  
~~June 1, 2008~~

  
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J.S.C.

**FILED**  
JUL 14 2008  
COUNTY CLERK'S OFFICE  
NEW YORK