

Paljevic v 998 Fifth Ave. Corp.

2008 NY Slip Op 33132(U)

November 18, 2008

Supreme Court, New York County

Docket Number: 106625/02

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Index Number : 106625/2002
PALJEVIC, BECIR
vs.
LICO CONSTRUCTION
SEQUENCE NUMBER : 003
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

1 this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

be denied

*and cross motion are
denied*

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

FILED
NOV 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/18/08

[Signature]
EMILY JANE GOODMAN
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X
BECIR PALJEVIC,

Plaintiff,

-against-

Index No. 106625/02

998 FIFTH AVENUE CORP., LICO CONSTRUCTION
CO., MARC HAMPTON, INC., ROBERT STANTON
AND "JANE" STANTON,

Defendants.

-----X

Emily Jane Goodman, J.S.C.:

FILED
NOV 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

Motions with sequence numbers 003, 004 and 005 are
hereby consolidated for disposition.

On November 20, 2001, plaintiff [redacted] a painter in the
employ of nonparty Pat Cutaneo Painting Co. (Cutaneo), was
standing on a ladder in the kitchen of a co-op apartment located
within 998 Fifth Avenue, New York, New York, when he fell and was
injured. This action ensued.

In motion sequence number 003, plaintiff moves,
pursuant to CPLR 3212, for partial summary judgment on the issue
of defendants' liability under Labor Law § 240 (1). Defendants
998 Fifth Avenue Corp. (998 Fifth Ave. Corp.) and Ronald Stanton
(sued herein as Robert Stanton) (Stanton)¹ cross-move: (1) for

¹Although the caption and pleadings in this matter include
"Jane" Stanton as a defendant, the papers on these motions are
devoid of any reference to her. It is not even clear whether she
has been served with process. Thus, the motions and cross motion
must be denied as to her, because none of the moving parties has

summary judgment dismissing the complaint; (2) for summary judgment against defendants Lico Construction Co. (Lico) and Marc Hampton, Inc. (Marc Hampton) on 998 Fifth Ave. Corp. and Stanton's claims sounding in common-law and contractual indemnification, and as against Lico on their claim for breach of contract; (3) for summary judgment on Stanton's behalf, dismissing plaintiff's Labor Law claims based on the one- or two-family dwelling exception in Labor Law §§ 240 (1) and 241 (6); or, in the alternative, (4) for the conversion of 998 Fifth Ave. Corp. and Stanton's cross claims to third-party claims if either Lico or Marc Hampton are awarded summary judgment.

In motion sequence number 004, Marc Hampton, pursuant to CPLR 3212, moves for summary judgment dismissing the complaint and all cross claims asserted as against it.

In motion sequence number 005, Lico moves for summary judgment dismissing the complaint and all cross claims asserted as against it.

BACKGROUND

At the time of plaintiff's accident, 998 Fifth Ave. Corp. operated a residential co-op building located at 998 Fifth Avenue in Manhattan. Stanton owned the sixth-floor apartment wherein plaintiff fell. Stanton desired to renovate his home, so

met its prima facie burden on summary judgment with respect to her.

he contracted with Marc Hampton for Marc Hampton to provide "design, consultation and supervision" of the renovation. Marc Hampton recommended Lico as general contractor, and Stanton retained Lico in that capacity (Lico disputes this assertion, maintaining that it was hired as a prime contractor for general construction). Marc Hampton hired plaintiff's employer, Cutaneo, to paint the apartment.

On the day of the accident, plaintiff was assigned to plaster and compound the kitchen ceiling. The work would ordinarily require a scaffold, but none was available, so plaintiff used the A-frame ladder that was already set up there. Plaintiff climbed the ladder, but when he put his hand up to apply compound, the ladder started shaking, and he fell.

THE PLEADINGS

The complaint in this matter alleges five causes of action, sounding in common-law negligence, and violations of Labor Law §§ 200, 240, 241, and "241 (g)." There is no such statute as Labor Law § 241 (g), but the context of the claim appears to be a repetition of his section 241 (6) cause of action, and the court will treat it as such. Marc Hampton's answer asserts five cross claims against its co-defendants, for contribution, common-law and contractual indemnification, and for breach of contract. Lico asserts one cross claim against its co-defendants, for contribution or common-law indemnification.

Stanton and 998 Fifth Ave. Corp., which are now represented by the same counsel, answered separately, 998 Fifth Ave. Corp. alleging four cross claims against its co-defendants, including Stanton, for contribution or common-law indemnification, contractual indemnification, and breach of contract. Although Stanton's answer contains five sections which are denominated cross claims against its co-defendants, including 998 Fifth Ave. Corp., only one cross claim actually seeks any relief, that of contribution or common-law indemnification.

Plaintiff's bill of particulars cites violations of Industrial Code (12 NYCRR Part 23) sections 23-1.5, 23-1.7, 23-1.16, and 23-1.21 as bases for his Labor Law § 241 (6) claim.

DISCUSSION

Untimeliness of 998 Fifth Ave. Corp. and Stanton's Cross Motion

It is uncontested that defendants 998 Fifth Ave. Corp. and Stanton's cross motion for summary judgment is untimely, and that they failed to seek an extension of time to file their cross motion. They also fail to state any reason for their untimeliness, merely urging the court to consider the cross motion on its merits because it seeks "nearly identical relief" as that sought by the other parties in their timely motions for summary judgment.

CPLR 3212 (a) provides, in relevant part:

Any party may move for summary judgment in any action, after issue has been joined;

provided however, that the court may set a date after which no such motion may be made, ... except with leave of court on good cause shown.

In 2004, the Court of Appeals decided the case of *Brill v City of New York* (2 NY3d 648 [2004]), which determined that "'good cause' in CPLR 3212 (a) requires a showing of good cause for the delay in making the [summary judgment] motion - a satisfactory explanation for the untimeliness - rather than simply permitting meritorious, nonprejudicial filings, however tardy" (*Brill*, 2 NY3d at 652; see also *Miceli v State Farm Mutual Automobile Insurance Co.*, 3 NY3d 725, 726 [2004] ["statutory time frames ... are not options, they are requirements, to be taken seriously by the parties" (quoting *Brill*)]). "No excuse at all, or a perfunctory excuse, cannot be 'good cause'" (*Brill*, 2 NY3d at 652).

Brill and *Miceli* did not deal with untimely cross motions; however, the Appellate Division, First Department, has ruled on the issue. The First Department has determined that an "untimely cross motion was not improperly considered, since it sought relief on the same issues as were raised in defendants' timely motion" (*Conklin v Triborough Bridge and Tunnel Authority*, 49 AD3d 320, 321 [1st Dept 2008], citing *Altschuler v Gramatan Management*, 27 AD3d 304, 304-305 [1st Dept 2006]; see also *Lapin v Atlantic Realty Apts. Co., LLC*, 48 AD3d 337, 337 [1st Dept

2008] [cross motion properly considered "because it raised nearly identical issues ... as asserted in (the) timely motion"]; *Altschuler v Gramatan Management*, 27 AD3d at 304-305 [cross motion was "largely based on the same argument raised in (the) timely motion, and the same findings that mandated judgment for (the movant) also require judgment for (the cross movant)"]).

Looking at it from a different angle, the Court in *Filannino v Triborough Bridge and Tunnel Authority* (34 AD3d 280 [1st Dept 2006]) refused to consider the untimely cross motion because it did not seek relief "nearly identical" to that sought in the timely motion. The motion was addressed to Labor Law §§ 200 and 241 (6), but the cross motion was addressed to Labor Law § 240 (1).

The court will consider 998 Fifth Ave. Corp. and Stanton's untimely cross motion only to the following extent: (1) on plaintiff's complaint, only with respect to plaintiff's Labor Law § 240 (1) claim; (2) on 998 Fifth Ave. Corp. and Stanton's cross claims against Lico and Marc Hampton; (3) with respect to Stanton's assertion that he is entitled to the one- or two-family homeowner exception in the Labor Law, only with respect to plaintiff's Labor Law § 240 (1) claim; and (4) the court will not consider conversion of 998 Fifth Ave. Corp. and Stanton's cross claims. Any part of the untimely cross motion that is not considered on the merits will be considered only as opposition to

the other motions.

Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; see also *Smalls v AJI Industries*, 10 NY3d 733, 735 [2008] [proponent must tender "sufficient evidence to demonstrate the absence of any material issues of fact"], quoting *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Santiago v Filstein*, 35 AD3d 184, 186 [1st Dept 2006], quoting *Winegrad*, 64 NY2d at 853; see also *Johnson v CAC Business Ventures*, 52 AD3d 327, 328 [1st Dept 2008], quoting *Alvarez*, 68 NY2d at 324). However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson*, 39 AD3d at 306, citing *Alvarez*, 68 NY2d at 324). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso*, 50 AD3d 535, 544 [1st Dept 2008]). "The

court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues" (*Sheehan v Gong*, 2 AD3d 166, 168 [1st Dept 2003], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Plaintiff's Motion (Motion Sequence Number 003)

Amendment of the Bill of Particulars

Plaintiff informally seeks to amend his bill of particulars to add Industrial Code (12 NYCRR Part 23) § 23-2.1 (b) as a basis for his Labor Law § 241 (6) claim. "CPLR 3025 (b) provides that leave to amend pleadings shall be freely given, and this rule has been applied to the amendment of bills of particulars as well, in the absence of prejudice or surprise" (*Katechis v Our Lady of Mercy Medical Center*, 36 AD3d 514, 516 [1st Dept 2007]). No defendant has shown that it would be prejudiced or surprised by the proposed amendment. Thus, the court grants the amendment, and will include this section of the Industrial Code when it considers defendants' motions to dismiss plaintiff's Labor Law § 241 (6) claim.

Labor Law § 240 (1)

Labor Law § 240 (1) provides, in relevant part:

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 ... [or] altering ... of a building or structure shall furnish

or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, ... ladders, ... 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) provides special protection to those engaged in the 'erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure'" (*Prats v Port Authority of New York and New Jersey*, 100 NY2d 878, 880 [2003]). The statute imposes absolute liability upon owners, contractors, and their agents for injuries to workers that were proximately caused by the failure to provide safety devices necessary to protect the workers from elevation-related risks and hazards, such 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 Co.*, 81 NY2d 494, 501 [1993]). "The duty imposed is 'nondelegable and ... an owner is liable for a violation of the section even though the job was performed by an independent contractor over which it exercised no supervision or control' [citation omitted]" (*Gordon v Eastern Railway Supply*, 82 NY2d 555, 559 [1993]). "In enacting this statute, the legislative intent was to protect workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident [internal quotation

[* 11]

marks and citations omitted]" (*Morales v Spring Scaffolding*, 24 AD3d 42, 45 [1st Dept 2005]).

In order to state a prima facie claim for entitlement to the protections of section 240 (1), a plaintiff must show that there was a violation of the statute and that the violation was a proximate cause of his injuries (see *Guaman v New Sprout Presbyterian Church of New York*, 33 AD3d 758, 759 [2d Dept 2006]; see also *Potter v NYC Partnership Housing Development Fund Co.*, 13 AD3d 83, 84 [1st Dept 2004]; *Ernish v City of New York*, 2 AD3d 256, 257 [1st Dept 2003]).

Plaintiff has met his burden of stating a prima facie case under section 240 (1), in that he has established that (1) he was not provided with a scaffold, (2) the ladder on which he was standing was unsecured, (3) the ladder shook, and (4) the shaking caused him to fall and be injured. Thus, he has established both a violation of the statute, and that the violation was a proximate cause of his injuries.

Defendants' unsupported contention that plaintiff was the sole proximate cause of his injuries is unpersuasive.

Where a "plaintiff's actions [are] the sole proximate cause of his injuries, ... liability under Labor Law § 240 (1) [does] not attach" [citations omitted]. Instead, the owner or contractor must breach the statutory duty under section 240 (1) to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries. These prerequisites do not exist if adequate safety

devices are available at the job site, but the worker either does not use or misuses them

(*Robinson v East Medical Center, LP*, 6 NY3d 550, 554 [2006]; see also *Blake v Neighborhood Housing Services of New York City*, 1 NY3d 280, 290 [2003] ["if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation"])).

Even if plaintiff's prima facie case had not been established, defendants have failed to raise a triable issue of fact in opposition to plaintiff's motion for summary judgment. There is no evidence that any other safety device was made available for plaintiff's use, such as a scaffold, which he testified was the "ordinary" device for the work. Nor is there any evidence that plaintiff in any way abused or misused the ladder he was standing on. Nor is there any basis, other than defendants' speculation, for finding that plaintiff's holding a bucket and tool while he was on the ladder caused the ladder to shake and throw him to the floor (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] ["mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (to raise a question of fact)"]; see also *Beamud v Gray*, 45 AD3d 257, 257 [1st Dept 2007] ["unsupported speculation

... was insufficient to raise an issue of fact"]; *Abramowitz v City of New York*, 44 AD3d 558, 558 [1st Dept 2007] ["pure speculation ... did not raise an issue of fact"]. Thus, summary judgment on the issue of liability under Labor Law § 240 (1) is granted.

The court must next determine against whom that liability may be imposed.

998 Fifth Ave. Corp.

Under section 240 (1), the term "owner" includes owners in fee (*Gordon v Eastern Railway Supply*, 82 NY2d at 560), as well as "a 'person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit' [citation omitted]" (*Zaher v Shopwell, Inc.*, 18 AD3d 339, 339 [1st Dept 2005]; see also *Lynch v City of New York*, 209 AD2d 590, 591 [2d Dept 1994] ["owner" includes "those entities with interests in the property which have the right, as a practical matter, to hire and fire the subcontractors and to insist that proper safety practices are followed"]; *Frierson v Concourse Plaza Associates*, 189 AD2d 609 [1st Dept 1993] [same]).

In this matter, it is undisputed that 998 Fifth Ave. Corp. is the owner in fee of the building which includes Stanton's co-op apartment. Thus, 998 Fifth Ave. Corp. is absolutely liable to plaintiff under Labor Law § 240 (1), and plaintiff's motion is granted as to 998 Fifth Ave. Corp. (see,

e.g., Pineda v 79 Barrow St. Owners Corp., 297 AD2d 634 [2d Dept 2002] [cooperative corporation was liable under Labor Law § 240 (1) when a painter fell of a ladder in an apartment owned by the corporation]).

Stanton

Stanton falls within the definition of "owner" because he has an interest in the property and fulfilled the role of owner by contracting to have work performed for his benefit. There is no question that he hired both Marc Hampton and Lico. However, in opposition to plaintiff's motion, Stanton contends that he is not liable to plaintiff because he is an owner of a one-family dwelling, did not direct plaintiff's work, and thus, falls within the exception of Labor Law § 240 (1).

As set forth above, Labor Law § 240 (1) provides, in pertinent part, that

[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 ...* [emphasis added]

have obligations under the statute. "The exception was enacted to protect those who, lacking business sophistication, would not know or anticipate the need to obtain insurance to cover them against [section 240 (1)'s] liability" (*Boccio v Bozik*, 41 AD3d 754, 755 [2d Dept 2007], citing *Van Amerogen v Donnini*, 78 NY2d 880, 882 [1991] ["(i)t is unrealistic to expect the owner of a one or two family dwelling to realize, understand and insure

against the responsibility sections 240 and 241 now place upon him' (citations omitted). . . . These owners were perceived as lacking in sophistication or business acumen and 'not in a position to know about, or provide for the responsibilities of absolute liability' (citation omitted)"]. "[V]icarious liability under the Labor Law depends upon the degree of supervision and control exercised by the defendant" (*Garcia v Martin*, 285 AD2d 391, 391-392 [1st Dept 2001]; see also *Boccio*, 41 AD3d at 755 ["The phrase "direct and control" as used in (Labor Law §§ 240 [1] and 241 [6]) is construed strictly and refers to the situation where the owner supervises the method and manner of the work' (citation omitted)"]; *Edgar v Montechiari*, 271 AD2d 396, 397 [2d Dept 2000] ["A homeowner will be found to have directed and controlled the work where he or she supervises the method or manner of the work"]).

It is uncontested that Stanton did not hire plaintiff's employer, Cutaneo, that he was rarely at the worksite, and that he did not supervise, direct or control the way that plaintiff did his work. As such, he is entitled to the protections of the exemption within section 240 (1) (see *Wright v Bedevian*, 6 AD3d 258, 259 [1st Dept 2004]; *Valencia v Calero*, 5 AD3d 254, 254 [1st Dept 2004]). Plaintiff's motion with respect to Stanton is denied.

Lico

Lico maintains that it was only a "prime contractor for general construction," rather than the general contractor or an agent of either 998 Fifth Ave. Corp. or Stanton for the renovation of Stanton's co-op. In large part, Lico bases its contention on the fact that the contract between Stanton and Lico specifically excludes painting from Lico's responsibilities (under "Article 2 - The Work of This Contract," the contract provides that "The Contractor shall execute the entire Work described in the Contract Documents, except ... Painting and decorating trades to be contracted by Mark Hampton Inc."). "Painting and decorating trades" alone were excepted from Lico's obligations under Article 2, but pursuant to Rider ¶ 9.1.7, asbestos abatement, polishing or refurbishing of existing marble, AV and telephone systems, fireplace work, window work, and "[a]ny work that may be requested by the building during the review of our drawings" were also "not ... included."

John Sorrentino, Lico's supervisor at the site, testified that Lico was a prime contractor for the project (Sorrentino Depo., at 6). According to Sorrentino, a prime contractor "is when a company like Lico will have so many subs work for them and then other subs are hired by the decorator, the owner, whatever, working the same apartment" (*id.* at 6-7). Sorrentino stated that Lico hired the electricians, plumbers,

masons, "tile guys," demolition company, and laborers (*id.* at 7). According to its contract with Stanton, Lico was also responsible for hiring subcontractors to do air-conditioning and humidification, heating, electrical, lighting, appliances, security system, plastering, insulation and soundproofing, wood flooring, doors and frames, hardware, millwork, wood finishing and restoration, bath accessories, mirrors, and grilles (see Stanton/Lico Contract, Rider ¶ 9.1.7).

In contrast, at his deposition, Stanton testified:

Q. What did you hire Lico to do, if you could tell us?

A. Lico is the general contractor, what they didn't do themselves they had to sub out, they had to supervise.

Q. Was it your intention to have Lico sub out the subcontractors?

A. Yes.

Q. Lico would hire the various trades if they needed to?

A. Yes.

Q. They had your authority to hire subcontractors?

A. Yes.

Q. They had your authority to coordinate the subcontractors?

A. Yes.

Q. Schedule the contractors?

A. Yes

(Stanton Depo., at 9-10). Plaintiff testified that Lico was the general contractor for the job (Plaintiff's Depo., at 26-27). In addition, despite the contractual language, according to plaintiff, Lico told him where to work (*id.* at 30-31 ["Most of the time, we were told what to do from the managers of Lico"]; 34). According to Alexa Hampton, who "runs" Marc Hampton (Hampton Depo., at 4), she recommended that Stanton hire Lico as the general contractor (*id.* at 15 ["Q. What job did you recommend Lico to perform? A. General contracting"]; 45, 51-52), and Stanton did (Stanton Depo., at 9). Alfred Amerino, who was Lico's foreman at the project, testified that Lico was the general contractor for the project (Amerino Depo., at 7). Rrustem Ibraj, 998 Fifth Ave. Corp.'s building manager at the time of the accident, testified that he thought Lico was the general contractor for the project because "Ron ["the supervisor of the construction going on there" (Ibraj Depo., at 18)] was from Lico and he was the only person I was dealing with" (*id.* at 25).

Lico argues that a general contractor has to be responsible for coordination and supervision of an *entire* project and for hiring of responsible contractors (Freedman undated Affirm. in Partial Opposition to Plaintiff's and Hampton's

Motions, ¶ 24). "Here, Lico was not a general contractor because they did not retain Cutaneo. The Lico contract *specifically excludes painting*, ... [t]herefore, in regards to the Stanton apartment, Lico was a prime contractor" (*id.*, ¶ 25).

There is a distinction between a general contractor and a prime contractor for general construction. ... "Generally speaking, the prime contractor for general construction ... has no authority over the other prime contractors (see *Nowak v Smith & Mahoney*, 110 AD2d 288 [3d Dept 1985]) unless the prime contractor is delegated work in such a manner that it stands in the shoes of the owner or general contractor with the authority to supervise and control the work" (*Walsh v Sweet Associates*, [172 AD2d 111], 113 [3d Dept 1991])

(*Kulaszewski v Clinton Disposal Services*, 272 AD2d 855, 856 [4th Dept 2000] [action dismissed as against prime contractor for general construction who had no control over plaintiff's work]; see also *Chavez v Jordan-Elbridge Central School District*, 309 AD2d 1289, 1289 [4th Dept 2003] [prime contractor for general construction was not de facto general contractor, citing *Kulaszewski*]).

"[L]iability under Labor Law §§ 240 and 241 does not attach 'to prime contractors having no authority to supervise or control the work being performed at the time of injury'" (*Soskin v Scharff*, 309 AD2d 1102, 1104 [3d Dept 2003], quoting *Hornicek v William H. Lane, Inc.*, 265 AD2d 631, 632 [3d Dept 1999]; *Wright v Nichter Construction Co.*, 213 AD2d 995, 995 [4th Dept 1995]

[prime contractor for general construction did not exercise supervisory control over plaintiff's activity]).

In this case, it is clear that, while Lico contracted to hire and supervise almost all of the contractors at the site, painting was expressly excluded from its responsibilities. Thus, Lico was a prime contractor for general construction, with no authority to supervise or control plaintiff's work. The facts that Lico employees told plaintiff to work in the kitchen on the day of his accident, and that various people testified as set forth above, claiming that Lico was a general contractor, do not change this conclusion. Moreover, Lico's actions at the site do not rise to the level of supervision or control of plaintiff's work required to make Lico something other than a prime contractor.

In addition, Lico also avoids liability because it was not an agent of the owner or general contractor.

"When the work giving rise to [the duty to conform to the requirements of section 240 (1)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor" [citation omitted]. Thus, unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law

(*Walls v Turner Construction Co.*, 4 NY3d 861, 864 [2005]; see also *Wright v Nichter Construction Co.*, 213 AD2d at 995).

"A prime contractor hired for a specific project is subject to liability under Labor Law § 240 as a statutory agent of the owner or general contractor only if it has been 'delegated the ... work in which plaintiff was engaged at the time of his injury,' and is therefore 'responsible for the work giving rise to the duties referred to in and imposed by [the statute]'" (*Coque v Wildflower Estates Developers*, 31 AD3d 484, 488 [2d Dept 2006]). "[T]he nondelegable liability imposed by Labor Law § 240 (1) attaches only to a contractor that has the authority to supervise or control the particular work in which the plaintiff was engaged at the time of his injury" (*Coque v Wildflower Estates Developers*, 31 AD3d at 488)

(*Nasuro v PI Associates, LLC*, 49 AD3d 829, 830 [2d Dept 2008]; see also *Coque v Wildflower Estates Developers*, 31 AD3d 484, 488 [2d Dept 2006] [roofing contractor not liable to employee of carpentry contractor]; see also *Musselman v Charles A. Gaetano Construction Corp.*, 285 AD2d 868, 869 [3d Dept 2001] [prime contractors are liable only if acting as agents of owner or general contractor]; *Hojohn v Beltrone Construction Co.*, 255 AD2d 658, 660 [3d Dept 1998] ["(t)he key criterion is 'the right to insist that proper safety practices were followed and it is the right to control the work that is significant, not the actual exercise or nonexercise of control' (citations omitted)"]; *Nowak v Smith & Mahoney, P.C.*, 110 AD2d 288, 290 [3d Dept 1985] ["That standard has been applied to exclude from Labor Law liability a prime contractor not in privity with the contractor/employer of an injured worker"]).

As is clear from the Stanton/Lico contract, painting was specifically excluded from Lico's contractual duties. It is also established that Cutaneo was hired by Marc Hampton; thus, there was no privity between Lico and Cutaneo.

Accordingly, plaintiff's motion must be denied with respect to Lico.

Marc Hampton

Marc Hampton asserts that it is not liable to plaintiff because it was not an owner, contractor, or agent of the owner or general contractor, and that it did not direct or supervise plaintiff's work.

Marc Hampton was hired by Stanton. According to Alexa Hampton, Marc Hampton is "an interior design firm" (Hampton Depo., at 5), which means "selecting paint colors, it means designing curtains, choosing fabrics, it also means picking stone for bathrooms or furniture plans, electrical plans, stuff like that" (*id.* at 6). Although the Stanton/Lico contract indicates that Marc Hampton is the "Architectural Designer," Hampton testified that Marc Hampton is "not an architectural firm" (*id.* at 11). Rather, Marc Hampton was hired as "the decorator and the designer" (*id.* at 23), whose "goal number one" was to make the apartment "look pretty" (*id.* at 9-10). The Stanton/Marc Hampton contract set forth the various charges that would be incurred, including a fee for "our design, consultation and supervision"

(Budner 10/30/07 Affirm., Ex. F). According to Hampton, that "supervision" entailed supervising "[t]he design" and "[t]hat it's a nice job" (*id.* at 17). Specifically, with respect to painting, Hampton was asked:

Q. The 25 percent you charged the Stantons was for supervision of the painting, correct?

A. Or in most cases quality control, design, mixing colors. I mixed the colors, looked at the quality of the paint.

A. It's aesthetic.

Q. You were paid to make sure that the painter did a good job?

A. Yes

(*id.* at 21). With respect to the issue of safety at the site, Hampton was asked:

Q. Do you know who is responsible for the safety of the workers on the job site for the work performed in the Stanton residence?

A. No.

Q. Did your company have any responsibility to ensure the safety of any of the workers on the job site in the Stanton residence?

A. No

(*id.* at 51).

It is uncontested that Marc Hampton was neither the owner of the co-op, nor the general contractor for the project. Thus, the question is whether it was the agent of Stanton.

An agency relationship for purposes of section 240 (1) arises only when work is delegated to a third party who obtains the authority to supervise and control the job. Where responsibility for the activity surrounding an injury was not delegated to the third party, there is no agency liability under the statute

(*Blake v Neighborhood Housing Services of New York City*, 1 NY3d at 293; *see also Walls v Turner Construction Co.*, 4 NY3d at 864; *Morales v Spring Scaffolding*, 24 AD3d 42, 46 [1st Dept 2005], citing *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]). Further, the issue is not whether supervision and control is actually exercised, but whether it was delegated in the first place (*see Fisher v Hart*, 27 AD3d 998 [3d Dept 2006] [in order to be deemed the owner's statutory agent, the issue was whether the homeowner vested her brother with the duty to oversee safety practices, despite the fact that neither she nor her brother actually supervised the injured painter]).

Article 2 of the Stanton/Lico contract ("Painting and decorating trades to be contracted by Mark Hampton Inc.") makes it clear that Stanton intended that Marc Hampton would contract out the painting work to a subcontractor. While the letter portion of the February 13, 2001 Stanton/Marc Hampton contract

makes no mention of painting, six attached pages, of the same date, list in detail the painting to be done in the apartment. The sixth page of the painting specifications is, like the letter portion of the Stanton/Marc Hampton contract, signed by Stanton (Budner 10/30/07 Affirm., Ex. F).

Alexa Hampton testified that there was no specific document whereby Marc Hampton retained Cutaneo to do the painting in the apartment (Hampton Depo., at 18). Rather, there was a series of estimates given by Cutaneo to Marc Hampton (*id.* at 18-20). Hampton testified that she regularly went to the job site, and when she was asked what the purpose of those visits was, she answered:

To see if it had exploded overnight, to see if workers were there, to see if certain things that were meant to be accomplished by a certain date had been accomplished by a certain date, to see if it looks good, to see if, as an example, the glass that you order when it's a sample this big (indicating) when it was installed in tons of windows if it looked right, if the paint color was what you wanted it to be, if the curtains once installed were hanging properly, if the button that closed all of the curtains closed all the curtains when you pressed it, to meet with the clients, to discuss issues that might have come up like taking a long time

(*id.* at 22).

As discussed above, Hampton's fee was for "design, consultation and supervision." The term supervision is not defined, although Hampton testified that the supervision was only

concerning aesthetics, not safety. On the other hand, the evidence indicates that Stanton intended that Marc Hampton would contract out the painting work, and there is no evidence that Stanton retained any authority or control with respect to any aspect of the painting. Thus, the jury must decided whether Stanton delegated to Marc Hampton the authority to supervise and control all aspects of the painting, including the duty to oversee safety practices, or, whether Stanton retained that responsibility.

Accordingly, plaintiff's motion is denied as against Marc Hampton.

Marc Hampton's Motion (Motion Sequence Number 004)

Marc Hampton seeks summary judgment dismissing the complaint and all cross claims asserted as against it.

Labor Law § 200 and Common-Law Negligence

Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction workers with a safe work site [citation omitted]. "An implicit precondition to this duty ... is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981])

(*Perrino v Entergy Nuclear Indian Point 3, LLC*, 48 AD3d 229, 230 [1st Dept 2008]; see also *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 272 [1st Dept 2007] [same]; *Gonzalez v*

Glenwood Mason Supply Co., 41 AD3d 338, 339 [1st Dept 2007] ["The statute also applies to agents of the owner or general contractor, who are in a position to exercise supervision and control over the work, thus enabling them to avoid or correct an unsafe condition"]).

Where a claim under Labor Law § 200 is based upon alleged defects or dangers arising from a subcontractor's methods or materials, liability cannot be imposed on an owner or general contractor unless it is shown that it exercised some supervisory control over the work [citation omitted]. . . . General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed [citations omitted]

(*Hughes v Tishman Construction Corp.*, 40 AD3d 305, 306 [1st Dept 2007]; see also *Buckley*, 44 AD3d at 272 [same]; *Fischetto v LB 745 LLC, York*, 43 AD3d 810, 810 [1st Dept 2007] [section 200 claim dismissed because dangerous condition "arose from plaintiff's employer's methods over which defendant property owner exercised no supervisory control"]).

There is no evidence that Marc Hampton supervised or controlled the manner in which plaintiff performed his work. However, because there is an issue of fact as to whether the company was delegated that responsibility and acted negligently in preventing the injury, the part of Marc Hampton's motion which seeks dismissal of plaintiff's Labor Law § 200 and common-law

negligence claims is denied.

Labor Law § 240 (1)

This court has determined that there are issues of fact as to whether plaintiff is entitled to summary judgment as against Marc Hampton on his Labor Law § 240 (1) claim. Therefore, the part of Marc Hampton's motion which seeks summary judgment dismissing plaintiff's section 240 (1) claim is denied.

Labor Law § 241 (6)

Section 241 (6), which imposes a nondelegable duty upon an owner or general contractor to see to it that the construction, demolition and excavation operations at the workplace are conducted so as to provide for the reasonable and adequate protection of the workers, is not self-executing. To establish liability under the statute, a plaintiff must specifically plead and prove the violation of an applicable Industrial Code regulation. The Code regulation must constitute a specific, positive command, not one that merely reiterates the common-law standard of negligence. The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury [internal citations omitted]

(*Buckley*, 44 AD3d at 271; see also *Padilla v Frances Schervier Housing Development Fund Corp.*, 303 AD2d 194, 196 [1st Dept 2003]; *Keegan v Swissotel New York*, 262 AD2d 111, 113 [1st Dept 1999] [violation of Code, "while not imposing per se liability, nevertheless may be considered in evaluating negligence"]). Liability under the statute "may attach regardless of ... control, direction or supervision of the work site" (*Giacomazzo v*

Exxon Corp., 185 AD2d 145, 146 [1st Dept 1992]; *Miller v Perillo*, 71 AD2d 389, 391 [1st Dept 1979]; see also *Haider v Davis*, 35 AD3d 363, 364 [2d Dept 2006] [section 241 (6) also "governs equipment which is brought onto a work site"]).

In his complaint and first bill of particulars, plaintiff alleged violations of Industrial Code §§ 23-1.5, 23-1.7, 23-1.16, and 23-1.21. The only sections which plaintiff actually argues on these motions are sections 23-1.7 (e) (2) and 23-2.1 (b). The other sections are deemed abandoned, and Marc Hampton is entitled to summary judgment dismissing plaintiff's section 241 (6) claim based on these abandoned Industrial Code sections.

Plaintiff's reliance on section 23-1.7 (e) (2) (tripping and other hazards in working areas) is ill-advised, because no one has alleged that plaintiff tripped on anything. Rather, the ladder he was standing on shook, and he fell. Section 23-1.7 (e) (2) is inapplicable here. Section 23-2.1 (b) is also inapplicable, as well as lacking in the specificity required to support a section 241 (6) claim (see *Gonzalez*, 41 AD3d at 339). Section 23-2.1 (b) governs methods of disposal of debris. No one has alleged that anyone was using an unsafe or improper method of disposing of debris in the kitchen, or that such was a proximate cause of his injuries.

That part of Marc Hampton's motion which seeks summary

judgment dismissing plaintiff's Labor Law § 241 (6) claim is granted.

The Cross Claims

Marc Hampton's co-defendants bring cross claims against it sounding in contribution or common-law indemnification, breach of contract to procure insurance, contractual indemnification, and breach of contract by failing to "maintain[] and repair[] the area where plaintiff was allegedly injured and/or the condition that allegedly caused the accident" (998 Fifth Ave. Corp.'s Answer, ¶ 65).

Contribution

"Contribution is available where 'two or more tortfeasors combine to cause an injury' and is determined 'in accordance with the relative culpability of each such person' [citation omitted]" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003]; see also *Mas v Two Bridges Associates*, 75 NY2d 680, 689-690 [1990] ["in contribution, the tort-feasors responsible for plaintiff's loss share liability for it. Since they are in pari delicto, their common liability to plaintiff is apportioned and each tort-feasor pays his ratable part of the loss"]).

Lico, 998 Fifth Ave. Corp. and Stanton all assert cross claims against Marc Hampton for contribution, and the part of Marc Hampton's motion which seeks dismissal of these claims is

granted. With respect to contribution to fault, "[g]enerally, apportionment among tort-feasors, rather than a shifting of the entire loss through indemnification, is the proper rule when two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owe[] to the injured person" (*Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 568 [1987] [citations and internal quotation marks omitted]; *D'Ambrosio v City of New York*, 55 NY2d 454, 462 [1982]).

Lico has been dismissed from the action, Stanton is not liable under Labor Law §240 (1), 200 and 241 (6), and 998 Fifth Ave. Corp. is only statutorily liable. Accordingly, contribution is not applicable.

Therefore, the part of Marc Hampton's motion which seeks summary judgment dismissing its co-defendants' cross claims for contribution is granted.

Common-Law Indemnification

Each of Marc Hampton's co-defendants alleges a cross claim for common-law indemnification against it.

"It is well settled that 'an owner or general contractor who is held strictly liable under Labor Law § 240 (1) is entitled to full indemnification from the party actually responsible for the incident' [citation omitted]. The principles of common-law indemnification allow the party held vicariously liable to shift the entire burden of the loss to the actual wrongdoer" [citations omitted]

(*Frank v Meadowlakes Development Corp.*, 6 NY3d 687, 691 [2006];

see also [in a non-Labor Law setting] *Edge Management Consulting v Blank*, 25 AD3d 364, 367 [1st Dept 2006] ["Common-law indemnification is predicated on 'vicarious liability without actual fault,' which necessitates that 'a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine' (citation omitted)]; see also *Storms v Dominican College of Blauvelt*, 308 AD2d 575, 577 [2d Dept 2003] ["Common-law indemnification is warranted where a defendant's role in causing the plaintiff's injury is solely passive, and thus its liability is purely vicarious"]).

Accordingly, the part of Marc Hampton's motion which seeks summary judgment dismissing its co-defendants' cross claims for common-law indemnification is denied as to 998 Fifth Ave. Corp. because it is only statutorily liable and may be entitled to indemnification from Marc Hampton, if the jury determines that the company was delegated the authority to supervise and control the work and acted negligently in preventing the injury. However, the motion is granted as to Lico and Stanton, as they have been dismissed from this action.

Contractual Indemnification and Breach of Contract

998 Fifth Ave. Corp. alleges claims for contractual indemnification and breach of contract against Marc Hampton. It is undisputed that Stanton, not 998 Fifth Ave. Corp., hired Marc Hampton. There is no evidence of any contract entered into

between 998 Fifth Ave. Corp. and Marc Hampton. Therefore, the part of Marc Hampton's motion which seeks summary judgment dismissing the contractual indemnification and breach of contract cross claims against it is granted.

Lico's Motion (Motion Sequence Number 005)

Labor Law §§ 240 (1) and 241 (6)

As set forth above, "liability under Labor Law §§ 240 and 241 does not attach 'to prime contractors having no authority to supervise or control the work being performed at the time of injury' [citation omitted]" (*Soskin v Scharff*, 309 AD2d at 1104). Accordingly, the part of Lico's motion which seeks summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims is granted.

Common-Law Negligence and Labor Law § 200

This court has found that Lico's actions at the site do not rise to the level of supervision or control of plaintiff's work required to make Lico liable as something other than a prime contractor, and that Lico was not an agent of the owner or general contractor. Therefore, the part of Lico's motion which seeks summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims is granted.

The Cross Claims

Because the complaint as against Lico has been dismissed, the cross claims for contribution and common-law

indemnification must also be dismissed, and the part of Lico's motion which seeks summary judgment dismissing these cross claims is granted.

Both Marc Hampton and 998 Fifth Ave. Corp. bring cross claims sounding in contractual indemnification and breach of contract. The evidence is clear that Stanton, not Lico, entered into a contract with Marc Hampton, and that 998 Fifth Ave. Corp. did not enter into a contract with Lico. Accordingly, the part of Lico's motion which seeks summary judgment dismissing these cross claims is granted.

998 Fifth Ave. Corp. and Stanton's Cross Motion (Motion Sequence Number 003)

Only the following portions of 998 Fifth Ave. Corp. and Stanton's untimely cross motion are being considered, other than as opposition to the other motions.

To Dismiss Plaintiff's Labor Law § 240 (1) Claim

This part of the cross motion is denied as to 998 Fifth Ave. Corp., but is granted as to Stanton, for the reasons set forth above.

For Summary Judgment Against Lico and Marc Hampton on 998 Fifth Ave. Corp. and Stanton's Claims Sounding in Common-Law and Contractual Indemnification

This court has already found that no claim for common-law indemnification may lie as against Lico and an issue of fact exists as to Marc Hampton. Thus, the part of 998 Fifth Ave. Corp. and Stanton's cross motion which seeks summary judgment on

their common-law indemnification cross claims is denied.

With respect to contractual indemnification, there was no contract between 998 Fifth Ave. Corp. and Marc Hampton or Lico. Thus, the part of the cross motion which seeks summary judgment in 998 Fifth Ave. Corp.'s favor on this claim is denied.

The contract between Stanton and Marc Hampton contains no indemnification provision. Summary judgment in Stanton's favor on its contractual indemnification claim as against Marc Hampton must be denied.

The contract between Stanton and Lico which was submitted to the court appears to be incomplete, and contains no indemnification clause. Thus, summary judgment in Stanton's favor as against Lico must also be denied.

**For Summary Judgment Against Lico on 998 Fifth Ave. Corp.
and Stanton's Claims Sounding in Breach of Contract**

As set forth above, Stanton's answer contains only one actual cross claim, for contribution or common-law indemnification, which has already been considered.

As stated before, there is no contract between 998 Fifth Ave. Corp. and Lico. Therefore, no summary judgment in 998 Fifth Ave. Corp.'s favor against Lico for any breach of contract can be granted.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion (motion sequence number

003) which seeks partial summary judgment on the issue of defendants' liability under Labor Law § 240 (1) is granted as against 998 Fifth Avenue Corp., but is denied as against Ronald Stanton, "Jane" Stanton, Marc Hampton, and Lico Construction Co.; and it is further

ORDERED that plaintiff's informal request to amend his bill of particulars is granted; and it is further

ORDERED that the part of Marc Hampton, Inc.'s motion (motion sequence number 004) which seeks summary judgment dismissing the complaint is denied as to plaintiff's Labor Law § 240 (1) claim and common-law negligence and Labor Law § 200 claims, but is granted as to the 241 (6) claim; and it is further

ORDERED that the part of Marc Hampton, Inc.'s motion (motion sequence number 004) which seeks summary judgment dismissing its co-defendants' cross claims is granted as to the cross claims for contribution; and it is further

ORDERED that the part of Marc Hampton, Inc.'s motion (motion sequence number 004) which seeks summary judgment dismissing its co-defendants' cross claims for common law indemnification is granted as to Lico and Stanton, but is denied as to 998 Fifth Ave Corp.; and it is further

ORDERED that the part of Marc Hampton, Inc.'s motion (motion sequence number 004) which seeks summary judgment dismissing its co-defendants' cross claims for breach of contract

[* 37]
and contractual indemnification is granted; and it is further

ORDERED that Lico Construction Co.'s motion (motion sequence number 005) is granted, and the complaint is severed and dismissed as against defendant Lico Construction Co., and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the part of 998 Fifth Avenue Corp. and Ronald Stanton's cross motion (motion sequence number 003) which seeks summary judgment dismissing plaintiff's Labor Law § 240 (1) claim is denied as to 998 Fifth Avenue Corp., but granted as to Ronald Stanton; and it is further

ORDERED that the remainder of 998 Fifth Avenue Corp. and Ronald Stanton's cross motion is denied.

This Constitutes the Decision and Order of the Court.

Dated: November 18, 2008

ENTER:

FILED
NOV 21 2008
COUNTY CLERK'S OFFICE
NEW YORK
J.S.
EMILY JANE GOODMAN