SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE TRIAL/IAS PART 20

X

MICHAEL HOLIFIELD,

Plaintiff,

-against-

Index No.: 020625/06
Motion Sequence...04, 05, 06, 07
Motion Date...03/23/10

SERAPHIM LLC, HADDOCK CONTRACTING INCORPORATED, ALBERT KALIMIAN, MANDA KALIMIAN, MANDA KALIMIAN 2003 IRREVOCABLE TRUST, NASSAU SUFFOLK LUMBER & SUPPLY CORPORATION,

Defendants.

X

Papers Submitted:
Notice of Motion (Mot. Seq. 04).....x
Notice of Motion (Mot. Seq. 05).....x
Notice of Motion (Mot. Seq. 06).....x
Notice of Cross-motion (Mot. Seq. 07).....x
Reply Affirmation.....x
Reply Affirmation x
Reply Affirmation.....x
Reply Affirmation.....x
Affirmation in Partial Opposition.....x
Affirmation in Partial Opposition.....x

Upon the foregoing papers, the motion (Mot. Seq. 04) by the Defendants, Seraphim LLC, Manda Kalimian 2003 Irrevocable Trust, Albert Kalimian and Manda Kalimian, individually (referred to herein as "Kalimian"), seeking an Order of this Court

awarding them summary judgment, pursuant to CPLR § 3212, is decided as provided herein.

The motion (Mot. Seq. 05) by the Defendant, Haddock Contracting, Inc. (referred to herein as "Haddock") and the motion (Mot. Seq. 06) by the Defendant, Nassau Suffolk Lumber Supply (referred to herein as "Nassau Suffolk"), seeking summary judgment, pursuant to CPLR § 3212, are decided as provided herein.

The branch of the Plaintiff's cross-motion (Mot. Seq. 07) seeking summary judgment and the branch of his cross-motion seeking to dismiss various affirmative defenses of the Defendants are decided as provided herein.

The branch of the Plaintiff's cross-motion seeking an Order granting him summary judgment and the Defendant, Kalimians' motion for summary judgment may be considered by the Court. Although the Plaintiff's cross-motion was filed beyond the deadline set by this court for summary judgment motions (*see* Exhibit D annexed to the Defendant, Kalimians' motion), an untimely cross-motion may be considered by the court where, as is the situation here, a timely motion for summary judgment was made by the Defendants on nearly identical grounds. *Perfito v. Einhorn*, 62 A.D.3d 846 (2nd Dept. 2009).

The Plaintiff commenced this action seeking monetary damages for injuries allegedly sustained when he fell some 20 feet from a plank that he was standing on in a barn that was under construction. The incident occurred on December 19, 2003 at 6150 Northern Boulevard, Muttontown, New York. The Plaintiff was an employee of non-party Ron Saulnier (referred to hereinafter as "Saulnier") who provided carpentry work at the residence and barn. *See* Exhibit F annexed to the Defendant, Kalimians' motion at pp. 31, 33. The

Plaintiff was installing rafters near the ceiling of the barn when the perch, consisting of a wooden plank, that he was using as a scaffold, broke. *See id.* at pp. 63, 66. The Plaintiff's injury resulted from work that was required to be performed at an upper elevation differential. *See D'Egidio v. Frontier Ins. Co.*, 270 A.D.2d 763 (3rd Dept. 2000), *lv denied* 95 N.Y.2d 765 (2000).

The Defendant, Albert Kalimian, had purchased the premises in trust for his children to build a horse farm and residence; the property was zoned as a single family home. *See* Exhibit G annexed to the Defendant, Kalimians' motion at pp. 7-8. Albert Kalimian is the president and only officer of Seraphim LLC. *Id.* at p. 44. Seraphim leased the entire property from the Manda Kalimian Irrevocable Trust under a long-term lease. *Id.*

To establish liability under Labor Law § 240 (1) (the "Scaffold Law") a plaintiff must demonstrate a violation of the statute and show that such violation was the proximate cause of his or her injuries. *Reinoso v. Ornstein Layton Management, Inc.* 19 A.D.3d 678 (2nd Dept. 2005).

To establish liability under Labor Law § 241 (6), a plaintiff must establish the violation of specific safety rules, as promulgated by the Commissioner of the Department of Labor. *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494 (1993). Here, the Plaintiff has alleged both specific violations of the Industrial Code of the State of New York and violations of specific safety standards. *See* the Affirmation of David S. Dender annexed to the Plaintiff's cross-motion at ¶ 45.

The legislative purpose of Labor Law § 240 (1) is to protect workers by placing

the ultimate and absolute responsibility for safety practices on the owner and the general contractor. *Rocovich v. Consol. Edison Co.*, 78 N.Y.2d 509 (1991). The duty is nondelegable and a violation imposes absolute liability upon the owners and general contractors, irrespective of whether they exercised supervision or control over the work. *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494 (1993), *supra*. Absolute liability is further imposed without regard to the negligence, if any, of the injured worker, so long as the breach or violation was the proximate cause of the worker's injury. *Zimmer v. Chemung County Performing Arts, Inc.*, 65 N.Y.2d 513 (1985).

While the Scaffold Law is to be construed as liberally as may be to accomplish its purpose, this Law imposes absolute liability only after a violation of the statute has been established. *Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259 (2001). Strict liability under the Scaffold Law is contingent on finding that the law was violated and that such violation was the proximate cause of the worker's injury. *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d 280 (2003).

The goal of Labor Law § 240 (1) is to compel contractors and owners to comply with the law, not to penalize them when they have so complied. *Id.* at 286. Therefore, where a plaintiff's actions are the sole proximate cause of the injuries, liability under Labor Law § 240 (1) does not attach. *Robinson v. East Med. Ctr., L.P.*, 6 N.Y.3d 550 (2006); *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d 280 (2003), *supra; Weininger v. Hagedorn & Co.*, 91 N.Y.2d 958 (1998). Further, liability will not attach where adequate safety devices are available at the job site, but the worker either does not use or

misuses the devices. *Robinson v. East Med. Ctr., L.P.,* 6 N.Y.3d 550 (2006), *supra.*

Where there is no violation of Labor Law § 240 (1) and the worker's actions are the sole proximate cause of the accident, there is no liability on the owner or contractor. *See Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d 280 (2003); *Heffernan v. Bais Corp.*, 294 A.D.2d 401 (2nd Dept. 2002). However, absolute liability, for injuries sustained by a worker, is imposed upon an owner or contractor who has failed to provide any safety devices for workers at a building work site, where the absence of such devices was the proximate cause of injury to the worker. *Zimmer v. Chemung County Performing Arts, Inc.*, 65 N.Y.2d 513 (1985). Liability is mandated without regard to external considerations, such as rules and regulations, contracts or custom and usage. *Id.* at 523.

Labor Law § 240 (1) requires owners and contractors to construct, place and operate elevation-related safety devices to afford the worker proper protection from the risks inherent in working at an elevated work site. *Ball v. Cascade Tissue Group-New York, Inc.*, 36 A.D.3d 1187 (3rd Dept. 2007). This Section further requires that safety devices, such as ladders, be constructed, placed, and operated as to give proper protection to a worker. *Klein v. City of N.Y.,* 89 N.Y.2d 833 (1996). The ultimate responsibility for safety practices at building construction sites belongs to the owner and general contractor. *Zimmer v. Chemung County Performing Arts, Inc.*, 65 N.Y.2d 513 (1985), *supra.*

The Plaintiff alleges that neither safety devices nor safety netting were provided by the Defendant, Kalimian. In support of this allegation, the Plaintiff notes that Saulnier, the Plaintiff's employer, stated that there were no safety belts or safety harnesses

at the barn on the day of the incident; no safety belts were provided for any workers at the site. *See* Exhibit H annexed to the Defendant, Kalimians' motion at pp. 54, 90. Arthur Leudesdorf, one of Haddock's loaned out employees, stated that no safety meeting was held at the work site. *See* Exhibit I annexed to the Defendant, Kalimians' motion at p. 33. Haddock did not supply any safety equipment or devices to the loaned out employees and the Haddock employees had no safety devices or equipment in the barn. *See* Exhibit J annexed to the Defendant, Kalimans' motion at pp. 40-41.

Although Saulnier offered masks, goggles, and gloves as safety equipment, no safety belts were provided to the Plaintiff. Saulnier stated that if the Plaintiff wanted safety equipment, the Plaintiff would get the equipment. He further contends the Plaintiff never asked for any safety equipment, such as a belt or harness. *See* Exhibit H annexed to the Defendant, Kalimians' motion at pp. 77-78.

There are exemptions to the strict liability standard under the Labor Law. An owner of a one or two family house is exempt from liability where the owner does not direct or control the work; but, the exemption is not intended to insulate from liability the owners who use their one or two family houses purely for commercial purposes. *Lombardi v. Stout*, 80 N.Y.2d 290 (1992). The key circumstance in applying the exemption is not an owner's residential status, but the residential nature of the site and the purpose of the work. *See Castro v. Mamaes*, 51 A.D.3d 522 (1st Dept. 2008). An owner's use of their property is considered "commercial" in nature, and as such the exemption does not apply, when the property is held out as a business asset such that it is used by the owner in furtherance of an

enterprise whose purpose is derivation of financial and business gain. *Pigott v. Church of the Holy Infancy*, 179 A.D.2d 161 (3rd Dept. 1992). Therefore, when a defendant owner uses the subject premises as income-producing rental property, this deprives them of the statutory exception. *See Van Amerogen v. Donnini*, 78 N.Y.2d 880 (1991); *see also Lombardi v. Stout*, 80 N.Y.2d 290 (1992).

The Court of Appeals has declined to apply the homeowner exception where an owner used a building, though structurally a one-family dwelling, exclusively for commercial purposes. *Bartoo v. Buell*, 87 N.Y.2d 362 (1996). Thus, the homeowner exception to liability under the Scaffolding Law, requiring adequate worker protection, did not apply to a property owner who, at the time of the injury to the plaintiff/worker, was renting the property to his son. *See Nudi v. Schmidt,* 63 A.D.3d 1474 (3rd Dept. 2009).

The Defendant, Kalimian, stated that no business was conducted out of the premises at 6150 Northern Boulevard. Exhibit G annexed to the Defendant, Kalimians' motion at p. 57. However, as previously noted, the Defendant, Kalimian, as president of Seraphim LLC, leased the property from the Manda Kalimian Irrevocable Trust as per a long-term lease. This at least raises an issue of fact as to the applicability of the homeowner exemption, which would not apply to the premises at issue if the goal of the construction was to further a commercial enterprise. *See Morgan v. Rosselli*, 9 A.D.3d 417 (2nd Dept. 2004).

While it is well settled that an injured worker's contributory negligence is not a defense to a claim under Labor Law § 240 (1), the "recalcitrant worker" defense may allow a defendant to refute liability under this Section. *See Cahill v. Triborough Bridge and Tunnel*

Auth., 4 N.Y.3d 35 (2004); *Stolt v. Gen. Foods Corp.*, 81 N.Y.2d 918 (1993). To utilize this defense, a defendant must show that the injured plaintiff deliberately refused an order to use the safety devices that the owner or contractor made available and put into place. *Salotti v. Wellco*, 273 A.D.2d 862 (4th Dept. 2000). The mere instruction to avoid using unsafe equipment or the presence of safety devices elsewhere at the job site are not sufficient to employ the recalcitrant worker defense. *Id.* at 862; *see Stolt v. General Foods Corp.*, 81 N.Y.2d 918 (1993), *supra*.

Here, there is no history of recalcitrance on the Plaintiff's part because the job site was not supplied with safety devices, i.e., safety belt, ropes, scaffolding. Allegedly, the Plaintiff was required to "request" safety items from Saulnier; safety items were not provided on the job site. *See* Exhibit H annexed to the Defendant, Kalimians' motion at pp. 77-78.

The Plaintiff also alleges that the Defendant, Kalimian was the "construction manager" for the construction job on the premises and should be liable for common law negligence under Labor Law § 200. According to the Plaintiff, liability arises because the Defendant, Kalimian exercised supervision and control over the work or had notice of the condition—an unsafe work site with a defective plank. *See* Plaintiff's cross-motion at ¶¶ 27-33.

When the alleged defect or dangerous condition at the construction site arises from a contractor's mistakes and the owner exercises no supervisory control over the operations, no liability attaches to the owner under the common law or under Labor Law § 200. *Comes v. New York State Elec. and Gas Corp.*, 82 N.Y.2d 876 (1993). For liability to

be imposed on a landowner for injuries caused by a dangerous condition at the work site, the landowner must direct and control the manner in which the work is performed, or have actual or constructive notice of the alleged defective condition which caused the accident. *Umanzor v. Charles Hofer Painting & Wallpapering, Inc.*, 48 A.D.3d 552 (2nd Dept. 2008); *LaRose v. Resinick Eighth Ave. Assocs., LLC*, 26 A.D.3d 470 (2nd Dept. 2006). It is not sufficient to establish liability if the landowner merely possesses general supervisory authority. *Cuartas v. Kourkoumelis*, 265 A.D.2d 293 (2nd Dept. 1999). A party that has the authority to enforce safety standards or to choose subcontractors is considered a "contractor" within the meaning of the Scaffold Law. *Williams v. Dover Home Improvement, Inc.*, 276 A.D.2d 626 (2nd Dept. 2000).

The Defendant, Kalimian stated he was the "construction manager" for the barn. *See* Exhibit G annexed to the Defendant, Kalimians' motion at p. 31. While the Defendant, Kalimian had input, he would not tell the contractors or engineers to put up a plank. *See* Exhibit H annexed to the Defendant, Kalimians' motion at p. 84. The Defendant, Kalimian did not "direct" Saulnier. *See* Exhibit G annexed to the Defendant, Kalimians' motion at p. 58. Nor did the Defendant, Kalimian direct Leudesdorf, one of Haddock's "loaned" employees. *See* Exhibit I annexed to the Defendant, Kalimians' motion at p. 17.

The Defendant, Kalimian stated that he never directed any of the contractors' employees. *See* Exhibit G annexed to the Defendant, Kalimians' motion at p. 58. Ronald Saulnier also stated that Mrs. Kalimian did not direct the work. *See* Exhibit H annexed to the Defendant, Kalimians' motion at p. 57. The Defendant, Kalimian gave checks to Saulnier,

but, the Defendant, Kalimian did not tell Saulnier how to perform his job. *Id.* at pp. 56-57, 82-83. Nor did the Defendant, Kalimian tell other contractors how to perform their jobs. *Id.* at pp. 82-83.

Further, both Arthur Leudesdorf, an employee of Haddock, and Wayne Haddock, the president of Haddock, testified at pre-trial examinations, that the Defendant, Kalimian did not engage in supervising activities. Exhibit I annexed to the Defendant, Kalimians' motion at p. 17; *see* Exhibit J annexed to the Defendant, Kalimians' motion at p. 43. The Defendant, Kalimian also alleges that he never advised the Plaintiff what tasks the Plaintiff was to perform, or how the Plaintiff was to perform them. *See* Exhibit F annexed to the Defendant, Kalimians' motion at pp. 144-145.

However, the Defendant, Kalimian's status as a potential contractor is dependent upon whether he had the authority to supervise and control the work, not whether he actually exercised that authority. *See Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311 (1981). If the Defendant, Kalimian had the authority to choose the parties who did the work and directly enter into contracts with them, then the Defendant, Kalimian had the authority to exercise control over the work, even if he did not actually do so.

Issues of fact remain unresolved in the instant case. For example, did Albert Kalimian's frequent trips to the work site and his alleged micro-managing of the construction project cause him to know, or should he have known, that the Plaintiff was working at an elevated height with allegedly no proper safety devices; was the Defendant, Kalimian the general contractor; did he have supervisory control over the operator, i.e., construction of the

barn. *See Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494 (1993) (refusing to dismiss case where further discovery may show that appellant did supervise the worksite).

Additionally, the credibility of witnesses, the reconciliation of conflicting statements, a determination of which should be accepted and which rejected, the truthfulness and accuracy of the testimony, whether contradictory or not, are issues for the trier of the fact. *Lelekakis v. Kamamis*, 41 A.D.3d 662 (2nd Dept. 2007); *Pedone v. B & B Equip. Co., Inc.*, 239 A.D.2d 397 (2nd Dept. 1997).

In this instant case, there remain issues of fact as to the exact status of the Kalimian Defendants. These issues of fact need to be resolved by a trier of fact. For the aforementioned reasons, that branch of the Plaintiff's cross-motion (Mot. Seq. 07) seeking summary judgment, pursuant to CPLR § 3212, is **DENIED**.

For the aforementioned reasons, the Defendant, Kalimians' motion (Mot. Seq. 04) for summary judgment, pursuant to CPLR § 3212, is **DENIED**.

The Court will now consider the Defendant, Haddock's motion (Mot. Seq. 05). The Defendant, Haddock contends that it was hired to work exclusively on the main house of the premises, not on the barn where the alleged incident occurred. The Defendant, Haddock "loaned out" two employees to Saulnier to expedite the construction of the barn. The Defendant, Haddock, in order to insulate itself from any liability, has classified the "loaned out" employees as "special employees".

A person's status as a special employee may be determined as a matter of law only where the undisputed facts establish surrender of complete control by the general

employer and assumption of control by the special employer. *Short v. Durez Division-Hooker Chems. & Plastic Corp.*, 280 A.D.2d 972 (4th Dept. 2001). When an employer was solely responsible for the temporary worker's job assignments and the site and hours of his work, provided all the training, instructions, monitoring and supervision, and supplied the worker with all the necessary tools and equipment, the worker was a special employee of the employer. *Gadway v. Tri-City Manpower, Inc.*, 270 A.D.2d 616 (3rd Dept. 2000).

Other factors considered in the determination of a special employee are the method of payment, the furnishing of equipment, and the right to discharge. *Kramer v. NAB Const. Corp.*, 282 A.D.2d 714 (2nd Dept. 2001). The key to the determination is who controls and directs the manner, details, and ultimate result of the employee's work. *Id.* at 715.

No Haddock employee placed the planks in the barn before the Plaintiff fell. *See* Exhibit I annexed to the Defendant, Haddock's motion at pp. 31-32. Nor did Saulnier see Haddock's employees put the planks in the barn. *See* Exhibit K annexed to the Defendant, Haddock's motion at pp. 22-23. The "Haddockers" were not involved with purchasing the supplies for work on the barn. *See* Exhibit J annexed to the Defendant, Haddock's motion at p. 18. Arthur Leudesdorf, a loaned out Haddock employee, was not sure who ordered the planks. *Id.* at pp. 51, 52.

The "on loan" employees of Haddock were under the sole direction of Saulnier. *See* Exhibit H, pp. 30, 40, 58, 59; Exhibit J, pp. 15, 16, 43; Exhibit I, pp. 32, 33; Exhibit K, pp. 15, 16, 17, all annexed to the Defendant, Haddock's motion. The "Haddockers" used

either their own tools or Saulnier's equipment. Exhibit I annexed to the Defendant, Haddock's motion at p. 40. While the Defendant, Haddock paid the loaned out employees' salaries, their salary was based on the hours they worked for Saulnier in the barn. *See* Exhibit H annexed to the Defendant, Kalimians' motion at pp. 31-34.

The Defendant, Kalimian testified that Seraphim LLC had a contract with Haddock to do rough carpentry only at the residence and to finish the extension only of the residence. Exhibit G annexed to the Defendant, Kalimians' motion at pp. 47, 58.

Haddock stated that his "on loan" employees were not supplied with safety equipment. Exhibit J annexed to the Defendant, Kalimians' motion at pp. 40-41. Specifically, no safety harnesses or belts were provided to workers in the barn. *Id.* at p. 41.

Based upon the record, it is clear that the two Haddock employees were "loaned out" to Saulnier, and, as such, are "special employees". They worked under the supervision of Saulnier in the barn area only. Nothing in the record indicates that Haddock "supervised" the Plaintiff or Saulnier's regular employees. The record further indicates that neither of the "loaned out" employee had anything to do with the plank scaffolding. Using the "special employee" standards, the "on loan" Haddock employees were completely under the control of Saulnier in the barn area.

For the aforementioned reasons, the Defendant, Haddock's motion (Mot. Seq. 05) seeking an Order granting it summary judgment, pursuant to CPLR § 3212, is **GRANTED**.

The Court will now consider the Defendant, Nassau Suffolk's motion (Mot.

Seq. 06). Saulnier never informed Nassau Suffolk that the planks would be used as scaffolding; these planks can also be used for rough framing. *See* Exhibit G annexed to the Defendant, Nassau Suffolk's motion at pp. 48, 74. The employees of Nassau Suffolk were never asked if the planks were suitable for use as scaffolding. *See* Exhibit F annexed to the Defendant, Nassau Suffolk's motion at p. 15. Additionally, Nassau Suffolk received no complaints regarding the planks. *Id.* at p. 31. The Defendant, Nassau Suffolk contends there was no negligence on its part.

No party has offered or raised viable, material issues of fact that would require Nassau Suffolk to be a viable Defendant herein.

Accordingly, the motion (Mot. Seq. 06) of the Defendant, Nassau Suffolk seeking an Order granting it summary judgment, pursuant to CPLR § 3212, is **GRANTED**.

That branch of the Plaintiff's cross-motion seeking to strike the second affirmative defense of the Defendant, Nassau Suffolk is now moot.

The standards for summary judgment are well settled. A court may grant summary judgment where the moving party has made a prima facie showing that there are no genuine issues of material fact, and the moving party is, therefore, entitled to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). The burden is on the moving party to tender sufficient evidence to demonstrate the absence of any material issue of fact. *Id.* Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; the court's task is to determine whether or not there exists a genuine issue for trial. *See Miller*

v. Journal News, 211 A.D.2d 626 (1995).

The Defendants, Haddock and Nassau Suffolk, have met their respective burdens, demonstrating the absence of a material issue of fact. The Defendants, Kalimian and the Plaintiff have not met this burden.

The branch of the Plaintiff's cross-motion (Mot. Seq. 07) seeking to dismiss the Defendant, Kalimians' first affirmative defense (*see* Exhibit B annexed to the Defendant, Kalimians' motion at p. 13) is **GRANTED** since the Court granted the summary judgment motions of co-Defendants, Haddock and Nassau Suffolk.

Accordingly, it is hereby

ORDERED, that the Defendant, Kalimians' motion (Mot. Seq. 04) seeking an Order granting it summary judgment as against the Plaintiff, is **DENIED**; and it is further

ORDERED, that the Defendant, Haddock's motion (Mot. Seq. 05) seeking an Order granting it summary judgment as against the Plaintiff, is **GRANTED**; and it is further

ORDERED, that the Defendant, Nassau Suffolk's motion (Mot. Seq. 06) seeking an Order granting it summary judgment as against the Plaintiff, is **GRANTED**; and it is further

ORDERED, that the branch of the Plaintiff's cross-motion (Mot. Seq. 07) seeking an Order granting it summary judgment as against the Defendants, is **DENIED**; and it is further

ORDERED, that the branch Plaintiff's cross-motion (Mot. Seq. 07) seeking dismissal of the Defendant, Kalimians' first affirmative defense, is **GRANTED**.

All applications not specifically addressed herein are **DENIED**.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
June 29, 2010

Hon. Randy Sue Marber, J.S.C.