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SHORT FORM ORDER

INDEX No. 09-43129
CAL. No. 11-02505OT

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 5-8-12 (#003 & #004)
MOTION DATE 5-8-12 (#005)
ADJ. DATE 7-16-12
Mot. Seq. # 003 - MotD
004 - XMotD
005 - XMD

RONALD CAIAZZO,

Plaintiff,

- against -

MARK JOSEPH CONTRACTING, INC., JULIE COEN and ANA REYES,

Defendants.

GREGORY VOLPE, ESQ.
Attorney for Plaintiff
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Mineola, New York 11501
ABAMONT & ASSOCIATES
Attorney for Defendants Coen and Reyes
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Garden City, New York 11530

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Attorney for Defendant Mark Joseph Contracting
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Hauppauge, New York 11788

Upon the following papers numbered 1 to 46 read on this motion and cross motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16 ; Notice of Cross Motion and supporting papers 17 - 20; 21 - 38 ; Answering Affidavits and supporting papers 39 - 40 ; Replying Affidavits and supporting papers 41- 42; 43 - 46 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (003) by defendant Mark Joseph Contracting, Inc. for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint and all cross claims as against it is determined herein; and it is further

ORDERED that the cross motion (004) by defendants Julia Coen and Ana Reyes for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint and all cross claims as against them is determined herein; and it is further

ORDERED that cross motion (005) by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in his favor on the issue of liability is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff on September 3, 2008 at approximately 10:15 a.m., during the course of his employment as an HVAC installer for non-party Advanced, that occurred after he exited a doorway of an extension of a home's accessory apartment that was under construction and stepped onto a makeshift step consisting of an empty wooden spool approximately 12 to 18 inches high and then fell. The accident occurred at premises located at 420 Commack Road, in Commack, Town of Huntington, New York owned by defendant Julia Coen. The subject doorway was allegedly located at the rear, Laurinda Avenue, side of the property.

Defendant Coen had contracted with defendant Mark Joseph Contracting, Inc. (Mark Joseph Contracting) on June 30, 2008 for the extension and renovation of the home's attached accessory apartment. The work proposed under the contract included framing and sheathing, concrete work, siding, roof work, windows, an interior staircase and railings, electrical work, plumbing and heating, insulation, sheetrock, bathroom tile, flooring, trim and moldings, and interior doors. The contract expressly excluded priming, tiles, plumbing and electric fixtures, driveway and walkways, and landscaping. Defendant Coen had separately contracted with plaintiff's employer, Advanced, by agreement dated August 29, 2008 for the installation of a central air conditioning system.

Plaintiff commenced this action against Mark Joseph Contracting, the homeowner Coen and her daughter Ana Reyes. By his complaint, plaintiff alleges causes of action for common-law negligence and violations of Labor Law §§ 200, 240 and 241 (6). By his bill of particulars and amended bill of particulars, plaintiff alleges violations of the following sections of the Industrial Code, 12 NYCRR § 23-1.5 (a-c), § 23-1.7 (a,e,f), § 23-1.15 (a-e), § 23-1.16 (a-f), § 23-1.17 (a-e), § 23-1.21 (a-d), § 23-1.22 (a-c), and § 23-2.7 (a-e). In his amended bill of particulars, plaintiff alleges that defendants were negligent in, among other things, failing to provide a safe ingress/egress to the work site, failing to properly construct a temporary, safe stairway and/or steps for entry into the work site, and using a makeshift step consisting of a large, empty wooden spool. The answer of defendant Mark Joseph Contracting, Inc. and the answer of defendants Coen and Reyes contain cross claims for contribution and indemnification.

Plaintiff's deposition testimony of August 17, 2010 reveals that he was lead mechanic for Advanced supervising a crew of workers, he reported to the job two days prior to the accident, and he learned of the job to install air conditioning equipment from his boss, Joseph Massaro. Plaintiff testified that there were blueprints, that no one told him how to do his work on the project, and that he did not know who hired his employer. In addition, plaintiff testified that he did not know defendant Mark Joseph Contracting or its owner, he had no personal dealings with them and no one from Mark Joseph Contracting told him what to do at this project or how to do his work or provided him with tools or equipment for his work.

Plaintiff stated that on September 2, 2008 and September 3, 2008 there were no other trades other than his own working on the project. He recalled that there was only one doorway, at the rear of the extension, that it had no door attached and it was the only entry and exit that he used. Plaintiff explained that the height from the base of the doorway to ground level was approximately two-and-a-half feet, that the ground surface outside of the doorway was flat and composed of dirt, and that to enter the extension, he stepped on what he believed to be an empty wooden spool of wire lying on its side, approximately 15 to 18 inches wide and approximately a foot or foot-and-a-half in height. One day prior to the accident he went in and out of said doorway approximately five or six times without any difficulty. He did not know who

owned the spool or how it came to be at the project, and he did not observe anyone else other than he and his co-workers using it to enter or exit the extension.

Plaintiff also testified that the accident occurred on his second day at the job, the weather was sunny and dry, he was wearing work boots, and he went in and out of the extension using the spool without incident approximately four times. He recalled that it appeared to be stable, and he did not try to find something else to use as a step. Plaintiff further testified that the accident occurred when he was exiting the extension, he was not carrying anything in his hands, he was looking at the spool, and he stepped on the middle of the spool with his right foot and the spool "gave way." Plaintiff did not know what specifically occurred or what he meant by "gave way" but he did fall and land on his right knee.[1] He did not look at the spool at any time after he fell, he did not return to the site after his accident, but he did fill out an accident report. According to plaintiff, he had spoken to a man and woman whom he believed to be the homeowners on the day of his accident, prior to its occurrence, having specific conversations, the specifics of which plaintiff could not recall. He also spoke to the woman after his fall regarding the spool but did not recall what he specifically said. Plaintiff further stated that he was not given any instructions from the homeowners or anyone identifying themselves as the homeowners concerning how to do his work and they did not direct or control his work in any way. He specifically stated that he was not given instructions on how to enter or exit the house from defendant Mark Joseph Contracting.

Defendant Coen testified at her deposition on November 12, 2010 that she last had a tenant living in the accessory apartment extension to the home in approximately 2006 when the construction began and that the purpose of the construction on the extension was to enable her to move in next to her daughter and grandchildren who were living in the house. Defendant Coen specified that the tenant who had lived ten or twelve years in the extension to the house moved out approximately three months before the construction began and that her daughter and grandchildren lived in the house during the construction. According to defendant Coen, prior to the construction there was a separate entrance to the house and a separate entrance to the apartment, both located at the front of the premises. At her continued deposition on June 17, 2011, defendant Coen testified that at the beginning of the construction defendant Mark Joseph Contracting installed the door at the rear entry of the extension, the door was left open so that the contractors could work, she did not know anything about said doorway because she usually did not use it, and she never saw anyone using said entrance. She did state that her nephew installed the new masonry steps to the subject doorway. Defendant Coen did not recall a wooden spool located at or near said doorway. She maintained that the air conditioning work was performed in the middle of the job, that she was at the premises on the first day of the air conditioning work, that she was at the premises three times when the air conditioning employees were there, and that she observed the employees installing ducts. According to defendant Coen, no one from Advanced told her that someone had an accident on her property, had fallen by the doorway at the rear of the extension or made any complaints about the condition of the property or about the lack of a step or the existence of a wooden spool at the rear doorway of the extension.

The deposition testimony of Mark Hamilton on August 17, 2010 indicates that he is the owner of defendant Mark Joseph Contracting, that on September 3, 2008, he had approximately three employees, and that their work involved the foundation, demolition, framing, installing windows, carpentry work, sheetrock

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[1] On the correction page to his deposition transcript plaintiff added that the spool toppled over. In his affidavit plaintiff stated, "I stepped down onto the wooden spool. It gave way and it toppled over."

and insulation. Mark Hamilton testified that subcontractors that he hired did the roofing, siding, electrical work, and plumbing pursuant to the contract. In addition, he testified that the homeowner family did their own masonry work, installing their own exterior stairs and exterior patio, and that his contract did not provide for the installation of masonry stairs for the entrance that he constructed on the side of the extension. He had no independent recollection of making a rear entrance to the extension or of there being a doorway at the rear of the extension or of the homeowner asking him to install a door at said location. Mr. Hamilton stated that during the time that he worked on this project he and his employees gained access to the premises from the front door and that he did not observe any of the subcontractors use any other entrance. He also testified that Mark Joseph Contracting first did the foundation and demolition work, the roof, and then the framing during which all the doors were installed. According to Mr. Hamilton, the last time he was at the premises was August 25 or August 28, 2008 and the doorway that he constructed on the side of the extension had no steps outside leading up to it, the door was locked, and he did not use said door at all because the homeowner took the keys to the door after it was installed and told him not to use it. Mr. Hamilton described the height of the foundation as 12 to 18 inches. He maintained that he never knew that the homeowner had hired someone to install air conditioning. Mr. Hamilton further testified that he never saw wooden spools on the premises and that although plaintiff alleged that the spool was used for wire, the wire that the electrical contractors used were 250 foot roles wrapped in plastic.

Defendant Mark Joseph Contracting now moves for summary judgment dismissing the complaint and all cross claims as against it on the grounds that its involvement with the premises had concluded prior to plaintiff's accident, that it did not supervise, direct or control plaintiff's work, and that it did not own the spool, did not place it on the premises, and had no prior notice of a spool being used as a step. Defendant Mark Joseph Contracting asserts that it was not a general contractor for the project, that it was hired to perform only a portion of the work, that its contract with defendant Coen did not provide for air-conditioning work or give it any authority to supervise, direct or control plaintiff's work, and that defendant Coen directly hired plaintiff's employer. It emphasizes that plaintiff's deposition testimony shows that he does not know who owned or placed the spool at that location nor does plaintiff know defendant Mark Joseph Contracting or its owner and that plaintiff admitted that no one from defendant Mark Joseph Contracting told plaintiff how to perform his work or supplied him with tools or equipment. The submissions in support of the motion include the pleadings, plaintiff's original and amended bill of particulars, the deed to the premises dated February 21, 1996, the aforementioned contracts, and the deposition transcripts of plaintiff, defendant Coen and Mark Hamilton.

Defendants Coen and Reyes cross-move for summary judgment dismissing the complaint and all cross claims as against them on the grounds that defendant Reyes did not own the premises, was not present at the time of plaintiff's accident and did not control the worksite or owe any duty to plaintiff, that plaintiff admitted that none of the defendants directed and controlled his work, and that defendant Coen is not liable under the homeowners' exemption. Their attorney indicates that defendants Coen and Reyes adopt and incorporate by reference the facts, legal arguments and exhibits submitted by co-defendant Mark Joseph Contracting. They submit plaintiff's bill of particulars in support of their cross motion.

Plaintiff cross-moves for summary judgment in his favor on the issue of liability. He asserts that defendant Mark Joseph Contracting was the general contractor of this project, that defendant Coen was the general contractor for plaintiff's work, and that Labor Law § 240 (1) applies because the spool was a temporary device used to access the first floor of the extension from ground level and that 12 NYCRR § 27-

1.7 specifically applies to these circumstances. In addition, plaintiff asserts that viewing the evidence in a light favorable to plaintiff, it must be assumed that defendant Mark Joseph Contracting created the doorway and failed to install a temporary stair or step and that defendants would be responsible to all invitees including non-contractors/laborers for the defective condition. As for defendant Coen, plaintiff argues that she cannot benefit from the homeowners' exemption inasmuch as she and her husband were in the business of real estate development and the extension was last used as an accessory apartment for tenants. In support of his cross motion, plaintiff's submissions include his bills of particulars, his affidavit dated June 5, 2012, the deposition transcripts of plaintiff, defendant Coen, and Mark Hamilton, records from the Town of Huntington based on a FOIL request, blueprints of the proposed construction, and the subject contracts.

In opposition to plaintiff's cross motion, defendants Coen and Reyes emphasize that plaintiff's own deposition testimony shows that none of the defendants directed or controlled his work such that plaintiff's Labor Law § 240 (1) cause of action must be dismissed, that defendant Coen is entitled to the homeowners' exemption inasmuch as the construction was for the express purpose of moving into the completed extension, and the home was never more than a two-family dwelling, and that defendant Coen had no notice of any empty wooden spool on her property. They also contend that plaintiff's varying statements from his deposition to his affidavit as to what happened to the spool when he stepped on it are an attempt to create an issue of fact in response to defendants' motions.

In reply, defendant Mark Joseph Contracting maintains that defendants are in agreement that it was not a general contractor, that it was not hired to construct exterior stairways, that it had no contact with plaintiff or his employer, and that it was not actively involved in the project as of the date of the accident. Defendant Mark Joseph Contracting argues that although the blueprints appear to indicate two new exterior doorways, one on the side of the extension and one at the rear, its owner Mark Hamilton did not recall the rear doorway and even if defendant Mark Joseph Contracting did construct the rear doorway, there is no evidence that the doorway was improperly constructed or caused plaintiff to fall. It also argues lack of notice by noting that its employees never used a rear doorway for ingress or egress, that plaintiff's accident does not fall within the scope of Labor Law § 240 (1), and that the sections of the Industrial Code alleged by plaintiff are inapplicable.

Plaintiff, in his reply, contends that defendant Mark Joseph Contracting was a general contractor as evidenced by the sign that it placed on the property and its being listed as a general contractor by the Town and that it was an agent of defendant Coen. Plaintiff argues that his deposition, corrections and affidavit are consistent as to how the accident occurred.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, *supra* at 324, 508 NYS2d 923, citing to ***Zuckerman v City of New York***, *supra* at 562, 427 NYS2d 595).

Labor Law §§ 200, 240, and 241 apply to owners, general contractors, or their "agents" (Labor Law §§ 200 [1], 240 [1], 241). A party is deemed to be an agent of an owner or general contractor under the Labor Law when the party has supervisory control and authority over the work being done and can avoid or correct the unsafe condition (***Linkowski v City of New York***, 33 AD3d 971, 974-975, 824 NYS2d 109 [2d Dept 2006]; *see* ***Walls v Turner Constr. Co.***, 4 NY3d 861, 863-864, 798 NYS2d 351 [2005]; ***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 317-318, 445 NYS2d 127 [1981]; ***Rodriguez v JMB Architecture, LLC***, 82 AD3d 949, 951, 919 NYS2d 40 [2d Dept 2011]; ***Damiani v Federated Dept. Stores, Inc.***, 23 AD3d 329, 331-332, 804 NYS2d 103 [2d Dept 2005]). The determinative factor is whether the party had "the right to exercise control over the work, not whether it actually exercised that right" (***Williams v Dover Home Improvement***, 276 AD2d 626, 626, 714 NYS2d 318 [2d Dept 2000]; *see* ***Bakhtadze v Riddle***, 56 AD3d 589, 590, 868 NYS2d 684 [2d Dept 2008]).

Labor Law § 240 (1) requires that building owners and contractors: "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed." The kind of accident triggering Labor Law § 240 (1) coverage is one that will sustain the allegation that an adequate "scaffold, hoist, stay, ladder or other protective device" would have "shield[ed] the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (***Ross v Curtis-Palmer Hydro–Elec. Co.***, 81 NY2d 494, 501, 601 NYS2d 49 [1993]; ***Salazar v Novalex Contr. Corp.***, 18 NY3d 134, 139, 936 NYS2d 624 [2011]).

Labor Law § 241 (6) provides: "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places." Labor Law § 241(6) "imposes a nondelegable duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 348, 670 NYS2d 816 [1998], quoting Labor Law § 241[6]; *see* ***Harrison v State***, 88 AD3d 951, 931 NYS2d 662 [2d Dept 2011]). Inasmuch as the statute is not self-executing, a plaintiff must allege a violation of a specific and applicable provision of the Industrial Code (*see* ***Wilinski v 334 East 92nd Hous. Dev. Fund Corp.***, *supra*; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra*; ***Jara v New York Racing Assn., Inc.***, 85 AD3d 1121, 1123, 927 NYS2d 87 [2d Dept 2011]; ***D'Elia v City of New York***, 81 AD3d 682, 684, 916 NYS2d 196 [2d Dept 2011]).

Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work (*see* ***Comes v New York State Elec. and Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Ross v Curtis-Palmer Hydro-Electric Co.***, *supra*; ***Lombardi v Stout***, 80 NY2d 290, 590 NYS2d 55 [1992]; ***Rojas v Schwartz***, 74 AD3d 1046, 903 NYS2d 484 [2d Dept 2010]). Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 or based on common-law negligence if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the condition (*see* ***Ortega v Puccia***, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]). By contrast, when a claim arises out of alleged defects or dangers in the methods or materials of the work, there can be no recovery against the owner or general contractor under

Labor Law § 200 or common-law negligence unless it is shown that the party to be charged had the authority to supervise or control the performance of the work (*see id.*). Although property owners often have general authority to oversee the work's progress, mere general supervisory authority at a worksite for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200 or common-law negligence (*see id.*).

Initially, the Court notes that no evidence has been adduced demonstrating that defendant Reyes was an owner of the property or a general contractor or a statutory agent or that she supervised or controlled plaintiff's work. Therefore, plaintiff's complaint is dismissed as against defendant Reyes.

Defendant Mark Joseph Contracting established, as a matter of law, that it did not have the authority to supervise and control plaintiff's work and that it was neither a general contractor nor the agent of the owner (*see* ***Herrel v West***, 82 AD3d 933, 919 NYS2d 83 [2d Dept 2011]; ***Kilmetis v Creative Pool and Spa, Inc.***, 74 AD3d 1289, 904 NYS2d 495 [2d Dept 2010]; *see also* ***Temperino v DRA, Inc.***, 75 AD3d 543, 904 NYS2d 767 [2d Dept 2010]). Defendant Coen, not defendant Mark Joseph Contracting, selected plaintiff's employer Advanced and paid Advanced directly. Defendant Mark Joseph Contracting and Advanced each had separate contracts with defendant Coen, and the contract of defendant Mark Joseph Contracting did not give it the authority to insist that proper safety practices be followed by other contractors (*see* ***Aversano v JWH Contr., LLC***, 37 AD3d 745, 831 NYS2d 222 [2d Dept 2007]; *cf.* ***Relyea v Bushneck***, 208 AD2d 1077, 617 NYS2d 558 [3d Dept 1994]). Plaintiff failed to raise a triable issue of fact in opposition (*see* ***Herrel v West***, *supra*; ***Temperino v DRA, Inc.***, *supra*; ***Kilmetis v Creative Pool and Spa, Inc.***, *supra*). Therefore, that portion of the motion of defendant Mark Joseph Contracting for summary judgment dismissing the causes of action alleging violations of Labor Law § 200, § 240 (1) and § 241 (6) is granted and that portion of plaintiff's cross motion for summary judgment on the causes of action alleging violations of Labor Law § 200, § 240 (1) and § 241 (6) insofar as asserted against defendant Mark Joseph Contracting is denied.

As for the homeowner defendant Coen, Labor Law §§ 240 (1) and 241 (6) contain identical language exempting from the statutes "owners of one and two-family dwellings who contract for but do not direct or control the work" (*see* Labor Law §§ 240 [1], 241[6]; ***Chowdhury v Rodriguez***, 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]; *see also* ***Rodriguez v Gany***, 82 AD3d 863, 918 NYS2d 187 [2d Dept 2011]). In order for a defendant to receive the protection of the homeowners' exemption, the defendant must satisfy two prongs required by the statutes (*see* ***Chowdhury v Rodriguez***, *supra*). First, defendant must show that the work was conducted at a dwelling that is a residence for only one or two families; second, defendant must demonstrate that defendant did "not direct or control the work" (Labor Law §§ 240 [1], 241 [6]), that is, did not supervise the methods and manner of the work (*see id.*). 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 absolute liability (*see* ***Acosta v Hadjigavriel***, 18 AD3d 406, 794 NYS2d 445 [2d Dept 2005]; *see also* ***Szczepanski v Dandrea Constr. Corp.***, 90 AD3d 642, 934 NYS2d 432 [2d Dept 2011]). Use of a portion of a homeowners' premises for commercial purposes-as here, where part of the two-family dwelling was rented-does not automatically cause the homeowner to lose the protection of the exemption under this statute (*see* ***Ramirez v Begum***, 35 AD3d 578, 829 NYS2d 117 [2d Dept 2006], *lv denied* 8 NY3d 809, 834 NYS2d 90 [2007]; ***Small v Gutleber***, 299 AD2d 536, 751 NYS2d 49 [2d Dept 2002], *lv denied* 2 NY3d 702, 778 NYS2d 461 [2004]). Where there is mixed use, "the determination whether the exemption is available to an owner in a particular case turns on the site and purpose of the work" (***Khela v Neiger***, 85

NY2d 333, 337, 624 NYS2d 566 [1995]; *see* ***Lenda v Breeze Concrete Corp.***, 73 AD3d 987, 989, 903 NYS2d 417 [2d Dept 2010]; ***Morocho v Marino Enters. Contr. Corp.***, 65 AD3d 675, 675-676, 885 NYS2d 99 [2d Dept2009]; ***Umanzor v Charles Hofer Painting & Wallpapering, Inc.***, 48 AD3d 552, 553, 852 NYS2d 205 [2d Dept 2008]; ***Ramirez v Begum***, *supra*). The "site and purpose" test is "employed on the basis of the homeowners' intentions at the time of the injury underlying the action and not their hopes for the future" (***Allen v Fiori***, 277 AD2d 674, 675, 716 NYS2d 414 [3d Dept 2000]; *see* ***Lenda v Breeze Concrete Corp.***, *supra*; ***Dineen v Rechichi***, 70 AD3d 81, 888 NYS2d 834 [4th Dept 2009], *lv denied* 14 NY3d 703, 898 NYS2d 98 [2010]; ***Morgan v Rosselli***, 23 AD3d 356, 804 NYS2d 763 [2d Dept 2005], *lv denied* 6 NY3d 705, 812 NYS2d 34 [2006]).

Here, defendant Coen demonstrated her entitlement to the benefit of the homeowners' exemption for owners of one- or two-family dwellings who contract for but do not direct or control the work, and dismissal of the causes of action asserted pursuant to Labor Law §§ 240 (1) and 241 (6) by showing that the site and purpose of the construction was solely connected with remodeling the extension into a residential space for herself and her husband, not creating or enhancing a commercial usage (*see* ***Bartoo v Buell***, 87 NY2d 362, 639 NYS2d 778 [1996]; ***Khela v Neiger***, *supra*; ***Roach v Hernandez***, 38 AD3d 743, 833 NYS2d 525 [2d Dept 2007], *lv denied* 9 NY3d 804, 840 NYS2d 764 [2007]; ***Small v Gutleber***, *supra*).

Plaintiff failed to raise an issue of fact as to whether the aim of the construction was to further a commercial enterprise by renting the extension and whether defendant Coen directed or controlled the work (*see* ***Piedra v Matos***, 40 AD3d 610, 835 NYS2d 407 [2d Dept 2007]; ***Roach v Hernandez***, *supra*; *compare* ***Lenda v Breeze Concrete Corp.***, *supra*; ***Morgan v Rosselli***, *supra*). Defendant Coen testified at her deposition that the extension had been rented prior to the construction but that the tenant had moved out prior to the subject construction and that the purpose of the construction was to enlarge the extension so that she and her husband could live there next to their daughter and grandchildren. Thus the site and purpose of the construction had nothing to do with the prior tenancy (*see* ***Stejskal v Simons***, 309 AD2d 853, 765 NYS2d 886 [2d Dept 2003], *affd* 3 NY3d 628, 782 NYS2d 397 [2004]). Plaintiff merely speculates that based on their other rental properties, defendant Coen and her husband plan to rent the subject extension. "Where the moving party has established prima facie that it is entitled to summary judgment, the party opposing the motion must demonstrate the existence of a factual issue requiring a trial of the action by admissible evidence, not mere conjecture, suspicion, or speculation" (***Leggio v Gearhart***, 294 AD2d 543, 544, 743 NYS2d 135 [2d Dept 2002]; *see* ***Zuckerman v City of New York***, *supra*; ***Fotiatis v Cambridge Hall Tenants Corp.***, 70 AD3d 631, 895 NYS2d 456 [2d Dept 2010]). In addition, the activities of defendant Coen in visiting the site on occasion, providing the site plans prepared by her architect, hiring contractors, reviewing plans and the progress of the work, and making general decisions "are no more extensive than would be expected of the ordinary homeowner" (***Lane v Karian***, 210 AD2d 549, 550, 619 NYS2d 796 [2d Dept 2006]; *see* ***Ferrero v Best Modular Homes, Inc.***, 33 AD3d 847, 850, 823 NYS2d 477 [2d Dept 2006], *lv to appeal dismissed* 8 NY3d 841, 830 NYS2d 693 [2007]; ***Garcia v Petrakis***, 306 AD2d 315, 760 NYS2d 551[2d Dept 2003]; ***Tilton v Gould***, 303 AD2d 491, 756 NYS2d 757 [2d Dept 2003]; *see also* ***Nai Ren Jiang v Yeh***, 95 AD3d 970, 944 NYS2d 200 [2d Dept 2012]). Moreover, defendant Coen did not become a general contractor, responsible for supervising the entire construction project and enforcing safety standards, by virtue of the fact that she hired separate contractors to perform different aspects of the project (*see* ***Ferrero v Best Modular Homes, Inc.***, *supra*; ***Holifield v Seraphim, LLC***, 92 AD3d 841, 940 NYS2d 100 [2d Dept 2012]; ***Rodas v Weissberg***, 261 AD2d 465, 466, 690 NYS2d 116 [2d Dept 1999]; *see also* ***Nai Ren Jiang v Yeh***, *supra*). Therefore, that portion of the

cross-motion by defendants Coen and Reyes for summary judgment dismissing the causes of action alleging violations of Labor Law §§ 240 (1) and 241 as against them is granted and plaintiff's cross motion for summary judgment on his Labor Law §§ 240 (1) and 241 causes of action against defendants Coen and Reyes is denied.

However, defendant Mark Joseph Contracting may be held liable for common-law negligence where the work it performed created the condition that caused plaintiff's injury even if it did not possess any authority to supervise and control plaintiff's work or the work area (*see* ***Tabickman v Batchelder Street Condominiums By the Bay, LLC***, 52 AD3d 593, 859 NYS2d 721 [2d Dept 2008]; *see also* ***Poracki v St. Mary's Roman Catholic Church***, 82 AD3d 1192, 920 NYS2d 233 [2d Dept 2011]). In addition, "[w]hen a premises condition is at issue, a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice" (*see* ***Chowdhury v Rodriguez***, *supra* at 128 [internal citations omitted]; ***Ortega v Puccia***, *supra*; ***Azad v 270 5th Realty Corp.***, 46 AD3d 728, 848 NYS2d 688 [2d Dept 2007]; ***Keating v Nanuet Bd. of Educ.***, 40 AD3d 706, 835 NYS2d 705 [2d Dept 2007]; ***Kerins v Vassar Coll.***, 15 AD3d 623, 790 NYS2d 697 [2d Dept 2005]).

Deposition testimony by Mark Hamilton that when his company left the project, the doorway that he constructed at the side of the extension had no outside steps leading to it, and deposition testimony by defendant Coen that the doorway was left open for workers raise questions of fact as to, among other things, whether the doorways that they testified to were in fact the same doorway that plaintiff used and if so, whether defendant Mark Joseph Contracting created a dangerous condition of a doorway without access steps or stairs and whether defendant Coen had actual or constructive notice of the dangerous condition (*see* ***Reilly-Geiger v Dougherty***, 85 AD3d 1000, 925 NYS2d 619 [2d Dept 2011]; ***Tabickman v Batchelder Street Condominiums By the Bay, LLC***, *supra*). In addition, neither the correction to the deposition transcript nor plaintiff's affidavit directly contradict his deposition testimony that the spool "gave way" and thus cannot be characterized as raising feigned issues of fact (*compare* ***Sherman-Schiffman v Costco Wholesale, Inc.***, 63 AD3d 1031, 884 NYS2d 760 [2d Dept 2009]; ***Shpizel v Reo Realty, Constr. Co.***, 288 AD2d 291, 733 NYS2d 196 [2d Dept 2001]). Thus, the adduced evidence fails to establish that defendant Mark Joseph Contracting did not create a defective condition such that it is not entitled to dismissal of plaintiff's common-law negligence claims as against it (*see* ***Tabickman v Batchelder Street Condominiums By the Bay, LLC***, *supra*), and defendant Coen failed to demonstrate her prima facie entitlement to dismissal of plaintiff's causes of action alleging violations of Labor Law § 200 and common-law negligence (*see* ***Reilly-Geiger v Dougherty***, *supra*). Therefore, the portions of the motion of defendant Mark Joseph Contracting for summary judgment dismissing the causes of action alleging violations of common-law negligence as against it and the cross motion by defendants Coen and Reyes for summary judgment dismissing the causes of action alleging violations of Labor Law § 200 and common-law negligence as against defendant Coen are denied. The portions of plaintiff's cross motion for summary judgment on his causes of action for common-law negligence as against defendant Mark Joseph Contracting and for summary judgment on his causes of action for violations of Labor Law § 200 and common-law negligence as against defendant Coen are denied.

Accordingly, the motion of defendant Mark Joseph Contracting for summary judgment is granted solely to the extent that plaintiff's causes of action for violations of Labor Law §§ 200, 240 (1) and 241 (6) are dismissed as against it; the cross motion of defendants Coen and Reyes for summary judgment is

granted solely to the extent that the complaint is dismissed as against defendant Reyes and plaintiff's causes of action for violations of Labor Law §§ 240 (1) and 241 (6) are dismissed as against defendant Coen; and plaintiff's cross-motion for summary judgment is denied. The action is severed and continued as against the remaining defendants, Mark Joseph Contracting and Coen.

Dated: 10/1/12

THOMAS F. WHELAN, J.S.C.