| **Pareja v S.A. Gavish, Inc.** |
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| 2014 NY Slip Op 32968(U) |
| November 17, 2014 |
| Supreme Court, New York County |
| Docket Number: 155401/14 |
| Judge: Cynthia S. Kern |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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PABLO PAREJA,

Plaintiff,

-against-

S.A. GAVISH, INC., BEL AIR DESIGN GROUP, INC., GUTH DECONZO CONSULTING ENGINEERS, P.C., ROBERT SILMAN ASSOCIATES, P.C. and ROBERT SILMAN ASSOCIATES STRUCTURAL ENGINEERS, D.P.C.,

Defendants.

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Index No. 155401/14

**DECISION/ORDER**

**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :________________________________________

| Papers | Numbered |
|---|---|
| Notice of Motion and Affidavits Annexed.................................. | 1,2 |
| Answering Affidavits............................................................... | 3 |
| Replying Affidavits.............................................................. | 4 |
| Exhibits............................................................................... | 5 |

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Plaintiff commenced the instant action to recover for injuries he allegedly sustained while performing construction work at the residential premises located at 727 Washington Street, New York, New York (hereinafter referred to as the "subject premises" or the "job site" or the "project"). Plaintiff now moves for an Order pursuant to CPLR § 3215 for a default judgment against defendant Bel Air Design Group, Inc. ("Bel Air") on the ground that said defendant has failed to answer or otherwise appear in the within action and the time to do so has expired. Defendant Guth DeConzo Consulting Engineers, P.C. ("Guth") separately moves for an Order pursuant to CPLR § 3212 for summary judgment dismissing the complaint and any and all cross-

claims asserted against it. Both motions are consolidated for disposition. For the reasons set forth below, both motions are granted in their entirety.

The relevant facts are as follows. On or about June 8, 2008, Guth, a professional engineering firm, contracted with architect Meyer Davis Studio, Inc. ("Meyer") to provide mechanical, electrical and plumbing engineering services for the project. On or about July 12, 2011, plaintiff, an employee of Lee Construction and Renovation ("Lee Construction"), the general contractor, was working at the project and was instructed by Lee Construction's foreman to plaster and paint the walls at the subject premises' first floor entrance. Plaintiff testified that he climbed onto the second step from the top of a ladder which was unopened and leaning against a wall and sustained injuries after he fell off the ladder when it slipped from under him.

As an initial matter, plaintiff's motion for an Order pursuant to CPLR § 3215 for a default judgment against Bel Air is granted without opposition on the ground that Bel Air has failed to answer or otherwise appear in the action and the time to do so has expired.

The court next turns to Guth's motion for an Order pursuant to CPLR § 3212 for summary judgment dismissing the complaint and any and all cross-claims asserted against it. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Wayburn v. Madison Land Ltd. Partnership*, 282 A.D.2d 301 (1st Dept 2001). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he

rests his claim." *Id.*

This court finds that Guth has established its *prima facie* right to summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims. "Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work." *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877 (1993). "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.'" *Id.*, citing *Russin v. Picciano & Son*, 54 N.Y.2d 311, 317 (1981). "[W]here such a claim arises out of alleged defects or dangers arising from a subcontractor's methods or materials, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation." *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 504 (1993). "This rule is an outgrowth of the basic common-law principle that 'an owner or general contractor [sh]ould not be held responsible for the negligent acts of others over whom [the owner or general contractor] had no direction or control.'" *Id.*, citing *Allen v. Cloutier Constr. Corp.*, 44 N.Y.2d 290, 299 (1978).

In the instant action, Guth has established its *prima facie* right to summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims on the ground that it did not supervise, direct or control plaintiff's activities. As an initial matter, plaintiff testified that he only received instruction from his foreman, an employee of Lee Construction, and that it was Lee Construction that provided him with the ladder on the date of his accident. Additionally, Guth has provided the contract it maintained with Meyer which specified that

> Guth DeConzo does not have control over and is not responsible for

> the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the work; those are solely the contractor's responsibility under the construction documents.

Further, Guth has provided the affidavit of Matthew DeConzo, a principal of Guth, in which Mr. DeConzo affirms that Guth provided its services in accordance with the terms of the contract and that it did not supervise, direct or control plaintiff's work; that Guth did not make continuous on-site observations to check on the quality or quantity of plaintiff's work; that Guth did not supply any equipment to any of the contractors at the project; and that no employee from Guth was present at the project on the date plaintiff's accident occurred.

Additionally, Guth has established its *prima facie* right to summary judgment dismissing plaintiff's Labor Law §§ 240(1) and 241(6) claims. Pursuant to Labor Law § 240(1),

> All contractors and owners and their agents . . . who contract for but do not control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

Additionally, pursuant to Labor Law § 241(6),

> All contractors and owners and their agents...when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> (6) 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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one

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> and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

Further, pursuant to Labor Law § 241(9), "[n]o liability for the non-compliance with any of the provisions of this section shall be imposed on professional engineers..., architects...or landscape architects...who do not direct or control the work for activities other than planning and design."

In the instant action, Guth is entitled to summary judgment dismissing plaintiff's Labor Law §§ 240(1) and 241(6) claims on the grounds that it is not an owner, general contractor or an agent thereof and that it did not control or direct the work being performed. As an initial matter, it is undisputed that Guth was a professional engineering firm and was not the owner, general contractor or agent thereof. Thus, Guth may not be held liable pursuant to Labor Law §§ 240(1) or 241(6). Further, Labor Law § 241(9) specifies that as a professional engineer, Guth may not be held liable for non-compliance with section 241(6) unless it directed or controlled the work being performed other than planning and design. However, Mr. DeConzo has affirmed that no one from Guth directed or controlled the work being performed at the job site. Moreover, plaintiff's own testimony confirms that he received instruction and direction only from his foreman, an employee of Lee Construction.

In response, plaintiff has failed to raise an issue of fact to defeat Guth's motion for summary judgment dismissing plaintiff's complaint. Plaintiff asserts that Guth's motion must be denied on the ground that discovery has not yet been conducted. However, such assertion is insufficient to defeat Guth's motion for summary judgment. "A determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence." *Rutture & Sons Constr. Co. v.*

*Petrocelli Constr.*, 257 A.D.2d 614 (2d Dept 1999). Specifically, plaintiff states that the deposition of Mr. DeConzo is necessary in order to "question [him] as to the nature and extent of his observations to inspect the work." However, Guth has provided the affidavit of Mr. DeConzo in which he details the nature and extent of his observations and affirms that no one from Guth supervised, directed or controlled plaintiff's work. Moreover, plaintiff's own testimony confirms Mr. DeConzo's statement that Guth had no direction or control over plaintiff's work. Indeed, plaintiff provides no evidentiary basis that a deposition of Mr. DeConzo would lead to any further relevant evidence as to Guth's liability.

Finally, that portion of Guth's motion for an Order pursuant to CPLR § 3212 for summary judgment dismissing any and all cross-claims asserted against it is granted without opposition.

Accordingly, it is hereby

ORDERED that plaintiff's motion for a default judgment against Bel Air is granted; and it is further

ORDERED that judgment shall be entered in favor of plaintiff and against defendant Bel Air only. Thereafter, this matter shall be set down for an inquest and assessment of damages as to defendant Bel Air, which shall be held at the time of the trial of the remainder of the action, which necessarily shall be after plaintiff files the note of issue and pay the requisite fee; and it is further

ORDERED that judgment shall thereafter be entered in favor of plaintiff and against defendant Bel Air only for the amount found upon the inquest. The certificate of readiness is waived only as to defendant Bel Air; and it is further

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ORDERED that defendant Guth's motion for summary judgment dismissing the complaint and any and all cross-claims asserted against it is granted. The complaint is hereby dismissed as against defendant Guth only.

This constitutes the decision and order of this court.

Dated: 11/17/14

Enter: ______________ J.S.C.

CYNTHIA S. KERN
J.S.C.