

<b>Boyar v Sapir Group LLC</b>
2015 NY Slip Op 31104(U)
June 25, 2015
Supreme Court, New York County
Docket Number: 156809/2014
Judge: Kelly A. O'Neill Levy
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 19

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ALEX BOYAR,

Plaintiff,

- against -

THE SAPIR GROUP LLC, SAPIR REALTY  
MANAGEMENT CORP., SAPIR ORGANIZATION  
SPRING STREET LLC, ASRR CONSTRUCTION,  
LLC, ASRR MANAGEMENT LLC, ASRR, LLC,  
ASRR CROSBY, LLC, 260-261 MADISON AVENUE,  
LLC, 260-261 MADISON AVENUE MEZZANINE LLC,  
260/261 MADISON EQUITIES CORP., 260/261  
MADISON EQUITIES, LLC, ZUMA NYC LLC, LEGACY  
BUILDERS/DEVELOPERS CORP., LEGACY  
CONSTRUCTION, LLC, LEGACY CONSTRUCTION  
NORTHEAST, LLC, AND LEGACY CONSTRUCTION  
& EIFS LLC,

Defendants.

Index No: 156809/2014

**DECISION/ORDER  
ON MOTION SEQ. 001**

**Present:**

Hon. Kelly O'Neill Levy  
Acting Supreme Court Justice

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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of:  
(i) Defendants 260-261 Madison Avenue LLC, ASRR Management LLC, ASRR LLC, and 260-  
261 Madison Avenue Mezzanine LLC's motion for summary judgment on their contractual  
indemnity cross-claims against Co-Defendant Zuma NYC LLC; and (ii) Defendants the Sapir  
Group, Sapir Realty Management, ASRR Management LLC, ASRR LLC, and 260-261 Madison  
Avenue Mezzanine LLC's motion for summary judgment dismissing all claims and cross claims  
asserted against them:

<b>Papers</b>	<b>Numbered</b>
Defendants' Notice of Motion, Affirmation, Affidavit, and Exhibits	1

By one motion in this Labor Law personal injury case, (i) defendants 260-261 Madison Avenue LLC, ASRR Management LLC, ASRR LLC, and 260-261 Madison Avenue Mezzanine LLC seek summary judgment on their contractual indemnity cross-claims against co-defendant Zuma NYC LLC ("Zuma") and (ii) defendants the Sapir Group, Sapir Realty Management, ASRR Management LLC, ASRR LLC, and 260-261 Madison Avenue Mezzanine LLC (collectively "Sapir/ASRR/Mezzanine Defendants") seek summary judgment dismissing all claims and cross claims asserted against them. No opposition was filed.

The court first considers the Sapir/ASRR/Mezzanine Defendants' motion for summary judgment dismissing all claims and cross-claims against them.

### ***Claims/Cross-Claims Against the Sapir/ASRR/Mezzanine Defendants***

On a motion for summary judgment, the moving party has the burden to offer sufficient evidence making a prima facie showing that there is no triable material issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant makes a prima facie showing of entitlement to judgment as a matter of law, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that there exist material factual issues. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). Even, as here, where the motion is submitted without opposition, the movant must sufficiently demonstrate its right to summary judgment. *Cugini v. System Lbr. Co.*, 111 A.D.2d 114, 115 (1st Dep't 1985).

Here, the moving defendants submit the affidavit of Alex Sapir ("Sapir Affidavit"), president of 260-261 Madison Avenue LLC and director of 260-261 Madison Avenue Mezzanine LLC, and a member of defendants the Sapir Group, Sapir Realty Management, ASRR Management LLC, and ASRR LLC. Mr. Sapir identifies 260-261 Madison Avenue as the property owner and ASRR Management LLC as the property manager for the building. Mr. Sapir states that the Sapir Group "had no connection whatsoever with the building;" Sapir Realty Management was the building's former property manager and ceased being property manager before the incident date; and ASRR LLC and 260-261 Madison Avenue Mezzanine LLC were indirect members of owner 260-261 Madison Avenue LLC.

Plaintiff makes claims of negligence and violation of Labor Law § 200, § 240(1) and § 241(6). The Sapir Group, Sapir Realty Management, ASRR Management LLC, ASRR LLC, and 260-261 Madison Avenue Mezzanine LLC argue that they are not liable on the Labor Law claims because they were not owners, contractors, or agents within the meaning of the statutes. In addition, they claim they played no role in the construction, means, and methods in the Plaintiff's work and are therefore not subject to any liability on the Plaintiff's common law negligence and Labor Law Section 200 claims.

Here, defendants the Sapir Group and Sapir Realty Management have made a prima facie showing of entitlement to judgment as a matter of law on the claims and cross-claims asserted against them by demonstrating, through the Sapir Affidavit and supporting documentation, that they did not have supervisory control over the plaintiff's work or have the authority to insist that proper safety practices be followed. The plaintiff did not present proof refuting the same. Therefore, in the absence of a triable issue of fact, summary judgment is granted as to the Sapir Group and Sapir Realty Management only.

### *Discussion*

Plaintiff's first and second causes of action are for negligence and violation of Labor Law § 200. The statute imposes a duty upon an owner or general contractor to provide construction site workers with a safe work place. *See Comes v. N.Y. State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877 (1993). A precondition to this duty is that the parties charged with the responsibility have the authority to control the activity bringing about the injury. *See id.* As the proof submitted evidences that the Sapir Group and Sapir Realty Management did not hire, control, or have authority to control the activity that brought about the Plaintiff's alleged injury or that they had any duty to plaintiff, there are no triable issues of fact on negligence and the Labor Law § 200 claims and cross-claims against them. *See DaSilva v. Haks Eng'r, Architects and Land Surveyors, P.C.*, 125 A.D.3d 480, 481 (1st Dep't 2015).

Plaintiff also asserts a claim under Labor Law § 240(1). This section of the statute places the responsibility for safety practices at building construction jobs on contractors, owners, and their agents by imposing absolute liability for a breach that proximately causes an injury. *See Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513 (1991), *Blake v. Neighborhood Hous. Servs. of N.Y.C., Inc.*, 1 N.Y.3d 280, 293 (2003), *Kerrigan v. TDX Const. Corp.*, 108 A.D.3d 468, 471 (1st Dep't 2013). Under the statute, an agency relationship "arises only when work is delegated to a third party who obtains the authority to supervise and control the job." *Blake*, 1 N.Y.3d 280, 292-93 (2003). As there is no agency liability under the statute where the responsibility for the activity surrounding an injury was not delegated to the third party, as there is no evidence of here, the Sapir Group and Sapir Realty Management have shown entitlement to summary judgment on those claims. *See id.*, *DaSilva*, 125 A.D. at 482.

The court turns to plaintiff's claim pursuant to Labor Law § 241(6). Labor Law § 241(6) imposes a nondelegable duty upon owners to provide reasonable and adequate protection and safety to persons employed in all areas in which construction work is being performed. *See Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 348 (1998), *Misicki v. Caradonna*, 12 N.Y.3d 511, 515 (2009). As the Sapir Group, Sapir Realty Management, and ASRR Management LLC have shown that they were not owners of the building at the time at issue and did not have authority to control or supervise Plaintiff's work, they have established entitlement to summary judgment as to that claim. *See Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 318 (1981).

While the Sapir Affidavit includes details related to 260-261 Madison Avenue LLC, it contains scant reference to the other moving parties. Therefore, the branches of the motion enumerated below that relate to property manager ASRR Management LLC, ASRR LLC and 260-261 Madison Avenue Mezzanine are denied with leave to renew upon additional proof after discovery is certified complete. Here, ASRR Management admits that it was the property manager for the subject premises on the date in question. In the absence of proof as to whether it had authority to direct Plaintiff's work, the court declines to grant it summary judgment on the Labor Law § 200, § 240(1), and common law negligence claims. *See generally DeJesus v. 888*

*Seventh Ave. LLC*, 114 A.D.3d 587, 588 (1st Dep't 2014). Similarly, the Sapir affidavit states that ASRR LLC and 260-261 Madison Avenue Mezzanine are indirect members of 260-261 Madison Avenue LLC and no further information is given as to their connection with the owner and what, if any, role they had in the control, supervision of the work at issue, thus raising an issue of fact precluding the granting of summary judgment on all of the claims and cross-claims against them.

### ***Contractual Indemnity Cross-Claims against Zuma***

Defendants 260-261 Madison Avenue LLC, ASRR Management LLC, ASRR LLC, and 260-261 Madison Avenue Mezzanine LLC move for summary judgment on their contractual indemnity cross-claims against co-defendant Zuma. In view of the above portion of the decision granting summary judgment in favor of Sapir Group and Sapir Realty Management, the court will not reach the portion of the motion seeking summary judgment on the contractual indemnity cross-claims asserted by those parties against Zuma, the lessee of the portion of the building where the alleged accident occurred.

Defendants 260-261 Madison Avenue LLC, ASRR Management LLC, ASRR LLC and 260-261 Madison Avenue Mezzanine argue that pursuant to their written lease dated February 4, 2013 with co-defendant Zuma, Zuma was to defend and indemnify property owner 260-261 Madison Avenue LLC and the building managing agent, ASRR Management LLC, from all costs, losses, liabilities or causes of action arising out of or relating to any alteration of the premises or “any accident, injury or damage whatsoever caused to any person...and occurring during the Term in or about the Premises.” Article 9, ¶ A(2), C(2); Article 4, ¶ G; Article 7, ¶ G. Finally, Zuma’s lease includes an insurance procurement term that requires it to name 260-261 Madison Avenue LLC and others as additional insureds and that each insurance policy “shall contain a provision that no act or omission of the tenant shall affect or limit the obligation of the insurance company to pay the amount of any loss sustained...” Article 7, ¶ F.

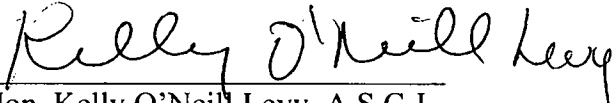
The written lease between Zuma and 260-261 Madison Avenue LLC indeed evidences Zuma’s agreement to defend and indemnify 260-261 Madison Avenue LLC and its building managing agent, ASRR Management LLC. The lease states that “...Tenant shall indemnify and save harmless Landlord as well as the Building’s managing agent...from and against any and all liabilities...or any accident, injury or damage whatsoever caused to any person...caused during the Term in or about the Premises...” Article 9, ¶ A(2). In addition, the lease states that the Tenant shall indemnify and hold Landlord harmless against all liabilities or causes of action arising out of or relating to any alterations the Tenant may perform. Article 4, ¶ G. Even if Tenant fails to place and maintain the insurance specified in the lease, which covers the landlord and managing agent, the Tenant still agrees to indemnify them. Article 7, ¶ G.

Accordingly, defendants 260-261 Madison Avenue LLC, ASRR Management LLC, ASRR LLC, and 260-261 Madison Avenue Mezzanine’s motion for summary judgment on their

contractual indemnity cross-claims against Zuma NYC LLC is granted. *See Great Northern Ins. Co. v. Interior Constr. Corp.*, 7 N.Y.3d 412, 417-419 (2006), *Melito v. ABS Partners Real Estate, LLC*, --- N.Y.S.3d ----, 2015 WL 3497988 at \*1 (1st Dep't 2015).

This opinion constitutes the Decision and Order of the court.

Dated: June 25, 2015  
New York, New York

  
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Hon. Kelly O'Neill Levy, A.S.C.J.  
**HON. KELLY O'NEILL LEVY**