NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

JUAN MAURISACA,
Plaintiff,

- against-

BOWERY AT SPRING, L.P. CONDOMINIUM BOARD OF THE NOLITA PLACE CONDOMINIUM, MIDBORO MANAGEMENT, INC., BAKERS DOZEN ASSOCIATES LLC, EMM GROUP HOLDINGS LLC, and THE WALSH COMPANY, LLC,

Defendants.

Index No. 702405/12

Motion Date March 14, 2016

Motion Cal. No. 67 & 76

Motion Seq. No. 17 & 18

THE WALSH COMPANY, LLC,
Third-Party Plaintiff,

- against -

MISSION DESIGN & MANAGEMENT,

Third-Party Defendant.

THE WALSH COMPANY, LLC,
Second Third-Party Plaintiff,

- against -

SCOTTSDALE INSURANCE COMPANY,

Second Third-Party Defendant.

BAKERS DOZEN ASSOCIATES, LLC and EMM GROUP HOLDING, LLC,
Third Third-Party Plaintiff,

- against -

MISSION DESIGN AND MANAGEMENT, INC, and SCOTTSDALE INSURANCE COMPANY,

Third Third-Party Defendants.

The following papers numbered EF405 to EF452 read on this motion by plaintiff to vacate the court's order dated October 6, 2015, which *inter alia*, granted summary judgment in favor of the Walsh Company, LLC (Walsh); motion by Bakers Dozen Associates LLC and EMM Group Holdings LLC, and separate cross motions by Mission Design & Management, Inc. (Mission), and plaintiff to reargue/renew the same.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	EF405-410, 411-425
Notice of Cross Motion - Affirmation - Exhibits.....	EF411-420
Affirmation in Opposition - Exhibits.....	EF428-427, 453-456
Reply Affirmation.....	EF438-446, 450-452

Upon the foregoing papers, it is ordered that the motions and cross motions are consolidated for disposition and determined as follows:

Plaintiff, in this negligence/labor law action, seeks damages for personal injuries sustained while working at a construction site at 199 Bowery Street in New York City. Plaintiff was working for Mission installing drywall when he fell from a scaffold. The construction project consisted of a major renovation of commercial space for a new restaurant called "The General." The property itself is divided into two lots/parts: the commercial/retail space and the residential tower. The owner of the retail property lot was Bowery. The residential tower was owned and operated by Condominium Board of the Nolita Place Condominium and Midboro Management, Inc., respectively.

Bowery leased the commercial space to Bakers Dozen, which was in the restaurant business and was renovating the commercial space at 199 Bowery for their new restaurant. Bakers Dozen is the alter ego for EMM Group Holdings LLC (EMM). EMM entered into various agreements and contracts on behalf of Bakers Dozen as an agent of the lessee. Bakers Dozen hired Mission as the general contractor for the renovation project. According to Hoon Lee, produced by Walsh as a deposition witness, the Walsh Company, LLC was hired to be the owners' representative.

Plaintiff's accident occurred while he was utilizing a wheeled scaffold know as a baker's scaffold. He was in the process of sheetrocking a wall. In order to accomplish this task, it was necessary for plaintiff and his co-worker to continue to move the scaffold as they were installing the sheetrock. The scaffold was owned by Mission and assembled by its workers. The scaffold had four wheels with each wheel having a locking mechanism. After the sheetrock was installed at a particular location, plaintiff and his co-worker would get off the scaffold, unlock the wheels and move it to a new location. The co-worker would check the two wheels on his side of the scaffold and plaintiff would unlock and then relock the other two wheels after it had been moved to its location. Plaintiff testified that he and his co-worker were standing on the scaffold in the process of installing a piece of sheetrock when the scaffold on plaintiff's side moved away from the wall causing plaintiff to fall and sustain injuries. The parties dispute

whether there was anything wrong with the scaffold, and argue that the sole cause of plaintiff's accident was plaintiff's negligence in not locking the two wheels on his side of the scaffold, which caused the accident. Nonetheless, it is undisputed that the scaffold did not have any guardrails. Plaintiff's complaint contains causes of action based on common law negligence and violations of Labor Law §§§ 200, 240 (1) and 241 (6), against the various defendants.

The record indicates that on or about January 18, 2012, Bowery and Bakers Dozen entered into a lease agreement with regard to the use and occupancy of the premises (the "Lease Agreement). On or about February 10, 2012, Walsh submitted a Project Management Services Proposal to EMM Group Holdings LLC (EMM), wherein Walsh, as Project Manager, was to provide project management services to Bakers Dozen, as client in connection with Bakers Dozen's design and construction of a restaurant and night club at the premises (the "Walsh Proposal"). The Walsh Proposal was executed on behalf of EMM on April 12, 2012, by Adam Landsman, the Director of Operations, but is not executed on behalf of Walsh.

Thereafter, on or about June 21, 2012, Bakers Dozen, as Owner, entered into an AIA A101-2007 Standard Form Agreement between Owner and Contractor, with Mission whereby Mission agreed to perform a variety of tasks related to the renovation of the premises, including demolition, masonry and carpentry (the "Mission Contract").

To date, there has been substantial motion practice on the issues in this case. As related herein, on October 6, 2015, the court granted Walsh's motion for summary judgment in its favor dismissing all claims and cross claims against it. As provided above, plaintiff herein moves to vacate the court's order dated October 6, 2015;[1] and Bakers Dozen & EMM move and Mission and plaintiff cross-move to reargue the court's decision granting summary judgment to Walsh. The motion by plaintiff to vacate and the motions and cross motions to reargue/renew the court's order dated October 6, 2015, are granted. Upon reargument, the motion for summary judgment in favor of Walsh is denied.

"Motions for reargument are addressed to the sound discretion of the court which decided the original motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision" (*see Vaccariello v Meineke Car Care Ctr., Inc.*, 136 AD3d 890, 892 [2d Dept 2016], *citing Ito v 324 E. 9th St. Corp.*, 49 AD3d 816, 817; *see E.W. Howell Co., Inc. v S.A.F. La Sala Corp.*, 36 AD3d 653, 654; *Carillo v PM Realty Group,* 16 AD3d 611; *see also* CPLR 2221[d][2]). Here, it appears that the Court previously overlooked the opposition which was proffered to the motion by Walsh.

On the merits, although a construction manager is generally not considered a "contractor" or "owner" within the meaning of Labor Law §§ 240(1) or 241, it may nonetheless become responsible for the safety of the workers at a construction site if it has been delegated the authority and duties of a general contractor, or if it functions as an agent of the owner of the

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[1]Decision of Justice Braithwaite-Nelson. This action reassigned to the undersigned since Justice Braithwaite-Nelson appointed to Appellate Division, Second Department.

premises (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]; *Lodato v Greyhawk N. Am., LLC*, 39 AD3d 491, 493 [2d Dept 2007]; *Kenny v Fuller Co.*, 87 AD2d 183, 190 [2d Dept 1982]). Thus, a construction manager may be held liable for a worker's injuries under the Labor Law if it "had the ability to control the activity which brought about the injury" (*Walls v Turner Constr. Co.*, 4 NY3d at 863-864; *see Russin v Louis N. Picciano & Son*, 54 NY2d at 318; *Lodato v Greyhawk N. Am., LLC*, 39 AD3d at 493).

The record indicates that Bakers Dozen hired Walsh to assist in the managing of the construction project and everything necessary to build out the leased space at the Premises. Walsh was present at the job site on a daily basis and would approve the work of one trade before another trade would proceed. Walsh attended weekly meetings, where safety was discussed, and they were responsible for insuring satisfactory performance of the trades at the job site. The testimony of the witnesses indicate that the owner was not knowledgeable of construction work and had no ability or desire to get involved in the day to day activities of the work site. Thus, Walsh was hired to be the owner's agent, notwithstanding the title given to Walsh. Furthermore, pursuant to it contract with Bakers Dozen, Walsh assumed the authority and responsibility to demand compliance with applicable safety requirements and to stop the work upon detecting any unsafe practice or condition (*see Lodato v Greyhawk N. Am., LLC*, 39 AD3d at 493).

Walsh contends that the facts of this case differ from those of *Walls v Turner Constr. Co.* (4 NY3d 861 [2005]), in that a general contractor, with its own responsibility to maintain workplace safety, was present at the work site in the instant case. Mission's presence and responsibilities, however, did not negate the owner's independent duties under the Labor Law, or prevent Walsh from assuming those duties and thus become "vicariously liable as an agent of the property owner" (*Walls v Turner Constr. Co.*, 4 NY3d at 863; *see Lodato v Greyhawk N. Am., LLC*, 39 AD3d at 493).

Finally, the court notes that although Bakers Dozen/EMM improperly labeled their motion for summary judgment as a cross motion, since "[a] cross motion is an improper vehicle for seeking affirmative relief from a non-moving party (*see,* CPLR 2215)" (*Mango v Long Is. Jewish-Hillside Med. Ctr.,* 123 AD2d 843, 844 [2d Dept 1986]), this court properly considered the merits of the motion. "Such a technical defect may be disregarded where, as here, there is no prejudice, and [the opposing party] had ample opportunity to be heard on the merits of the relief sought" (*Kleeberg v City of New York*, 305 AD2d 549, 550 [2d Dept 2003], *citing Volpe v Canfield,* 237 AD2d 282, 283 [2d Dept 1997]).

Accordingly, the motions and cross motions to renew/reargue and vacate the prior order of the court are granted. Upon reargument, the motion by Walsh for summary judgment in its favor dismissing all claims and cross claims against it is denied.

Dated: May 16, 2016

DARRELL L. GAVRIN, J.S.C.