Pareja v S.A. Gavish, Inc.
2017 NY Slip Op 30210(U)
January 30, 2017
Supreme Court, New York County
Docket Number: 155401/14
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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PABLO PAREJA,

Plaintiff,

- against-

S.A. GAVISH, INC.,

Defendant

----------x

Index No. 155401/14
Motion Sequence 006

PABLO PAREJA,

Plaintiff

- against -

MEYER DAVIS STUDIO, INC.,

Defendant.

----------x

Index No. 155652/14 (CLOSED)
Motion Sequence 001

DECISION & ORDER

HON. SHERRY KLEIN HEITLER

The above-captioned personal injury actions have been consolidated in this court under Index No. 155401/14 and bear the caption: *Pablo Pareja, Plaintiff*, against *S.A. Gavish, Inc. and Meyer Davis Studio, Inc., Defendants* (see "So-Ordered" stipulation dated August 22, 2016).[1]

Defendant S.A. Gavish, Inc. (Gavish) now moves pursuant to CPLR 3212 for summary judgment dismissing plaintiff Pablo Pareja's (Plaintiff) complaint in its entirety on the ground, among others, that Gavish was not the owner or general contractor at the worksite where Plaintiff was injured and therefore cannot be held liable to him pursuant to Labor Law §§ 240(1) and 241(6). Defendant Meyer Davis Studio, Inc. (Meyer Davis) moves for summary judgment on similar grounds. Gavish and Meyer Davis further seek to dismiss Plaintiff's Labor Law § 200 claims against them, arguing that they did not supervise Plaintiff's work or have notice of the condition that

[1] NYSCEF Doc. 147.

allegedly caused his injuries. Plaintiff cross-moves against both defendants for partial summary judgment on the issue of liability under Labor Law §§ 240(1) and 241(6).

BACKGROUND

Plaintiff alleges that he was injured on July 12, 2011 between 2:00 pm and 3:00 pm while working on renovations at the one family residential premises located at 727 Washington Street in Manhattan (727 Washington). At the time he was an employee of non-party Lee Construction + Renovation, Inc. (Lee Construction), identified as the construction site's general contractor. Plaintiff claims that he was climbing a four-foot high ladder that he had leaned against a wall when the ladder slipped out from under him. Plaintiff alleges that as a result of the fall he suffered severe and permanent injuries to his knees and back, requiring surgery to his right knee, among other treatments.

Plaintiff was deposed on August 26, 2013 and December 10, 2015.[2] He testified that he started working at 727 Washington about six months prior to the accident. When he arrived at the construction site on July 12, 2011 he reported to his Lee Construction foreman, Mr. John Louis, who directed the Plaintiff to plaster and paint the interior walls of the entrance to the home. Other Lee Construction employees were assigned to the home's second and third floors. The Plaintiff utilized an A-frame ladder that was stored at the site in order to sand a patch of plaster close to the ceiling. He leaned the ladder against the wall, climbed up to the last step before the top, and immediately fell down (2013 Pareja Deposition pp. 40, 43-44):

> Q. Who leaned it against the wall?
>
> A. I put it against the wall.
>
> Q. Why didn't you open up the ladder to go up it?
>
> A. Because. Because in the wall there was a space that I couldn't open it and there was a space that I couldn't open it so I had to put it like that. . . .
>
> Q. After you leaned the ladder up against the wall, what did you do next?
>
> A. I put it and I started sanding and that is when I fell.

[2] Copies of Plaintiff's deposition transcripts are submitted by Meyer Davis as exhibits G & H (respectively, 2013 Pareja Deposition and 2015 Pareja Deposition). He was deposed through an official Spanish interpreter.

* * * *

Q. The floor that the ladder was placed on, was the ladder placed onto wood; was it placed on a canvas on top of the wood; was it placed on cement or canvas on top of cement or anything else you can describe?

A. Marble. . . .

Q. What was the material that the ladder was made of that was touching the floor, was it rubber on the bottom, aluminum or something else?

A. The ladder had a rag. All of the ladders had rags that they put so that it wouldn't scrape the floor.

Q. Who put the rag on the bottom of the ladder?

A. I don't know.

Q. Was it Lee Construction that put the rag on the bottom?

A. Yes. A worker did it.

During his 2015 deposition, counsel questioned Plaintiff about his supervisors and the ladder he used to reach his work area. He responded that he received instructions exclusively from Mr. Louis and one other Lee Construction employee, and that the ladder was provided by Lee Construction (2015 Pareja Deposition pp. 86-87):

Q. Now, back on the date of your accident you were working for Lee Construction Company?

A. Yes.

Q. And who was your supervisor?

A. John Louis.

Q. Okay. Other than John Louis did anybody else supervise, control, direct your work at the project where your accident occurred?

A. Yes, there was another young man.

Q. From Lee construction?

A. Yes.

Q. So other than that other young man from Lee Construction and John Louis, did anybody else supervise, control or direct your work at this project where your accident occurred?

A. Myself? No.

Q. And nobody else supervised your work; correct? Other than the two people you identified from Lee Construction; correct?

A. Correct.

Q. And the ladder that you were using was provided by your employer, Lee Construction; correct?

A. The ladder was there.

Q. Right. But that ladder was a ladder from Lee Construction; correct?

A. Yes.

At the time of the accident 727 Washington was owned by non-party Anthony Davis.[3] Before construction began, Anthony Davis entered into a contract with Gavish to act as his representative for all work being performed on the premises.[4] Anthony Davis also entered into a contract with Meyer Davis to provide design services.[5]

Mr. Ellis Gray Davis, President of Meyer Davis, was deposed on behalf of his company.[6] Mr. Davis testified that Meyer Davis is in the business of designing residences, commercial businesses, restaurants, and hotels. Once a design is complete Meyer Davis works with the customer to hire contractors, architects, and engineers to actually perform the construction work. According to Mr. Davis, Meyer Davis did not supervise, control, or direct any construction work at 727 Washington (Davis Deposition pp. 91-94):

Q. If you could explain what does it mean to be a design firm, what does that mean?

A. A design firm is that you design -- a client will come to you and ask you to design their residence or project and as a design firm it's to help realize their thoughts and ideas.

Q. So, in other words, let me give you an example. Does your firm choose what paint colors maybe [sic] used?

A. Yes. . . .

Q. Or how the lighting may be able to be visioned and looked, correct?

A. That's correct.

Q. But ultimately the vision is submitted to others, correct?

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[3] Anthony Davis was named as a defendant in this action but was subsequently awarded summary judgment by the First Department under the one or two family dwelling homeowner's exemption set forth in Labor Law 240(1). *See Pareja v Davis*, 138 AD3d 615 (1st Dept 2016).

[4] Gavish motion, Exhibit D (Gavish Agreement)

[5] Meyer Davis motion, Exhibit E (Meyer Davis Agreement)

[6] Ellis Davis was deposed on January 12, 2016 and March 2, 2016. Copies of his deposition transcripts are submitted by Plaintiff as exhibits C1 and C2, respectively (Davis Deposition).

A. That's right. We put together a set of documents that call out what we're trying to achieve in those documents and go to the contractor for the contractor to build from. . . .

Q. So in this case did your company have any role whatsoever in regards to the actual construction of the project as it's happening? . . .

A. No.

Q. So, in other words, if the contractor needed to use a – in this case Lee Construction needed to use a particular scaffold to reach a certain height, would your company have any role whatsoever in what choice would be used by Lee Construction in terms of a scaffold, ladder or anything else to carry out that work?

A. No.

Q. Would your company have any role in the supervision of Lee Construction's work? . . .

A. No.

Mr. Davis testified that the various contractors, engineers, and architects were "brought on board" jointly by Meyer Davis Studio and Gavish. Meyer Davis then reviewed bids from various contractors and presented them to the owner, the architects, the engineers, and Gavish for approval (Davis Deposition pp. 18-19, 38):

Q. I asked a very specific question about whether you would agree that it would be somewhat misleading to say that your company had anything to do with rendering architectural or engineering services. . . .

A. On projects like this, there's consultants that are brought on board and they're all sort of put under one scope of services. There's architecture, engineering, AV, etc., and so that's how this was presented.

Q. Who brought these consultants on board, so to speak?

A. It was, I guess, between the owner's representative . . . Sam Gavish and our office. And that was it.

Q. So the two of you, the two entities, Sam Gavish the entity or the individual, and your company together brought on consultants regarding engineering and architecture.

A. Right, and any other kind of specialties that might be required for the project.

* * * *

Q. "D," it says "Bids review and participation in the award process." What does that mean?

A. It means that we would review all the bids or numbers or estimates for the project, we would review them with everybody, all the parties and present that to the owner.

A. Who would be involved in that?

Q. That would be Meyer Davis, architect, the engineers and S.A. Gavish.

Mr. Shmuel A. Gavish, who is defendant Gavish's principal and sole employee, was deposed on December 17, 2015.[7] Mr. Gavish testified that he represented Anthony Davis in connection with the 727 Washington project by reviewing applications for payment by contractors and vendors and checking in with contractors to make sure that the work was proceeding on schedule (Gavish Deposition pp. 18-19). Mr. Gavish was questioned in detail regarding the agreement between him and Anthony Davis. Notably, it specifically excludes the determination and approval of construction means and methods from the scope of his services (Gavish Agreement, Exhibit A). According to Mr. Gavish his primary responsibility was to help Anthony Davis negotiate a budget for the project and select consultants and contractors. It was not, according to Mr. Gavish, his responsibility to direct the various contractors or approve their construction means or methods (Gavish Deposition pp. 43-45):

Q. Sir, were part of your responsibilities at this project to basically administer the construction activity by the general contractor and the design team?

A. Yes.

Q. If you observed something that you thought was faulty or incorrect what would you do?

A. Let me ask you what faulty, incorrect, in terms of what?

Q. That wasn't being done according to the specifications that Mr. Davis had laid out for the contractor?

A. No, not my role.

Q. If you saw something being done in an unsafe or dangerous manner when you were on the site, would you do anything to stop or correct it?

A. I haven't seen anything like that so I can't tell. . . . Can't answer that.

Q. As the owner's representative on this project, was it part of your responsibility to see to it that the various furnishing, floorings were not damaged during the process?

A. No. . . .

Q. Did you give any instructions or direction toward any of the contractors on-site to make sure that the flooring was not damaged while the workers were doing the work in the vicinity?

A. No, not my role. . . .

Q. What provisions were made at this job site to make sure that the flooring wasn't scratched or damaged by the ladders being used by the workers?

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[7] A copy of his deposition transcript is submitted by Gavish as exhibit J (Gavish Deposition).

A. That is the contractors' absolute responsibility. I don't get involved in it.

In reliance on this testimony, Meyer Davis and Gavish argue that they were mere agents of the owner who had no power to enforce safety standards or control the means and methods of Plaintiff's work. Plaintiff argues that both Defendants should be considered "general contractors" for purposes of Labor Law §§ 240(1) and 241(6) because of the significant control they exercised over construction at 727 Washington.

DISCUSSION

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). "[R]ank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact." *Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 (1st Dept 2010); *see also Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 (1st Dept 2004).

Labor Law § 240(1), commonly known as the scaffold law, creates a duty that is nondelegable, and an owner, general contractor, or agent thereof who breaches that duty may be held liable regardless of whether it had actually exercised supervision or control over the work. *Ross v*

Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 (1993). Specifically, Labor Law 240(1) provides in relevant part:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or 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.

"The purpose of this statute is to protect workers and to impose the responsibility for safety practices on those best suited to bear that responsibility . . . ." *Ross*, 81 NY2d at 500. Labor Law § 240(1) is limited to specific gravity-related accidents such as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. *Id.* at 501. A violation of this duty which proximately causes injuries to a member of the class for whose benefit the statute was enacted renders the owner, general contractor, or an agent thereof strictly liable for such injuries. *See Callan v Structure Tone, Inc.*, 52 AD3d 334, 335 (1st Dept 2008).

Labor Law 241(6) similarly imposes a nondelegable duty on owners, contractors, and their agents to provide reasonable and adequate protection and safety to workers. It provides that:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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 [New York State Commissioner of Labor] 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 and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

To recover damages on a cause of action alleging a violation of Labor Law § 241(6) a plaintiff must establish a violation of an Industrial Code provision which sets forth specific safety standards and

that such violation was a proximate cause of the accident. *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 (1998).

Labor Law § 200[8], which does not impose a nondelegable duty, codifies the common law duty imposed upon owners and general contractors to provide a safe workplace. *See Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 352 (1998). Labor Law § 200 claims are generally predicated upon a showing that the owner or contractor either had the "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition," (*Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]), or that it had actual or constructive notice of the defective condition which caused the plaintiff's injuries (*see Comes v N. Y. State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Philbin v A.C. & S., Inc.*, 25 AD3d 374, 374 [1st Dept 2006]).

Defendants who move for summary judgment in Labor Law actions often are owners or contractors who contend that the Labor Law does not apply to the injured plaintiff's activities, or if Labor Law does apply, that the plaintiff was the sole proximate cause of his or her own injuries. In this case, however, Defendants assert that they exercised such limited control over the construction site and no control whatsoever over the Plaintiff such that they cannot be considered "contractors" for Labor Law purposes.

I. S.A. Gavish

In *Pareja v Davis*, 138 AD3d 615 (1st Dept 2016), the First Department dismissed Plaintiff's case against 727 Washington's owner, Anthony Davis, under the homeowner exemption set forth in the

[8] Labor Law § 200 provides in relevant part that "[a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section."

Labor Law. In doing so, the court also determined that Gavish, as the owner's agent, lacked the authority to direct or control the methods and means of Plaintiff's work (*id.* at 615):

> Defendant established prima facie that he was entitled to the exemption under the Labor Law for "owners of one and two-family dwellings who contract for but do not direct or control the work" . . . . Neither he nor his agent directed or controlled the methods and means of plaintiff's work . . . . Defendant was living in England during the renovations, and visited the site only occasionally. Plaintiff testified that the general contractor, his employer, provided the ladder from which he fell, and placed the cloth under its feet. Plaintiff further testified that he received his work instructions from the general contractor's foreman, not from defendant's agent, who was not at the site when he undertook the work leading to his accident and who never interacted with any of the workers.
>
> Further, defendant's agent lacked the authority to direct or control the methods and means of plaintiff's work. The agency agreement expressly excludes from the agent's duties "[d]etermining, approving or disapproving construction means and methods," and nothing else in the agreement contradicts this express exclusion. Indeed, the agent's contractual powers are targeted to general management of the project schedule and budget. While the agent testified that he might raise safety or quality-of-work issues with the members of the renovation team if he happened to observe any, he was not authorized to do so by defendant, and, even if he were so authorized, he did not say that he would or could direct or control the specific methods and means of plaintiff's work.

Plaintiff seeks to distinguish the First Department's decision by asserting that Gavish was not just the owner's agent but was also a general contractor for Labor Law purposes, and that he is being sued herein in that capacity. But the clear language of the First Department's decision identifies Gavish as Anthony Davis' "agent" and identifies Plaintiff's employer, Lee Construction, as the "general contractor". In drawing this distinction the court specifically emphasized the provision in Gavish's contract with the owner which excludes any determination, approval or disapproval of construction means and methods from the scope of Gavish's duties.

Plaintiff is correct that a defendant's title does not necessarily determine whether liability will be imposed since a party who primarily performs the same duties and functions of the general contractor can be made to bear the same liability. *See Russin v Picciano & Son*, 54 NY2d 311, 317 (1981); *Aranda v Park E. Constr.*, 4 AD3d 315 (2d Dept 2004); *Kenny v Fuller*, 87 AD2d 183 (2d Dept 1982). In *Russin*, the court held that "prime contractors" who lack privity with the general

contractor are not to be held liable under Labor Law §§ 240 and 241(6) unless they have been delegated "the authority to supervise and control" that portion of the project on which the injury occurs. *Russin*, 54 NY2d at 315, 318. Where such a delegation has been made, the prime contractor becomes a statutory agent of the owner or the general contractor (*id.* at 317-318):

> Although sections 240 and 241 now make nondelegable the duty of an owner or general contractor to conform to the requirement of those sections . . . the duties themselves may in fact be delegated . . . . When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an "agent" under sections 240 and 241.

Construction managers are good examples of this exception. In *Aranda*, 4 AD3d at 315, the plaintiff was injured when he fell off of the roof of a building while removing asbestos from an elementary school. One of the defendants, Park East Construction, was the construction manager hired directly by the school district to coordinate the renovation project. In reinstating plaintiff's Labor Law §§ 240(1) and 241(6) causes of action against it, the Second Department held that "[t]he agreement between Park East and the School District gave Park East many of the powers of a general contractor." Similarly, the plaintiff in *Fuller*, 87 AD2d at 183, was injured while helping to construct a new building owned by the Dormitory Authority of the State of New York. The Authority contracted with the defendant, George A. Fuller Co., to be the construction manager for the project. Under their agreement Fuller was required to analyze design programs and costs, review and make recommendations concerning construction detailing, review the contract documents, and recommend the establishment and implementation of a comprehensive safety program for the project. During the construction stage it established procedures for and maintained coordination among the owner, architect, the various contractors and itself concerning all aspects of the project. As further evidence of Fuller's supervisory authority, it was adduced at trial that the plaintiff's safety coordinator complained to Fuller just days before plaintiff's accident about a recurring dangerous condition.

Under those facts and circumstances the court found that Fuller was a general contractor with nondelegable duties under the Labor Law.

Gavish was not given the powers typically associated with a construction manager or general contractor. Its agreement with Anthony Davis requires it to perform administrative duties: creating a project budget, assisting with the selection of consultants, coordinating with the design team, . administering the construction bidding process, ensuring that all required documents and permits were in order, and helping to establish a construction schedule. It had no authority to recommend and implement a comprehensive safety program for the project and no authority to exercise any control over the Plaintiff's work. There is also no evidence that Lee Construction or any of the other contractors ever spoke with Gavish regarding safety or construction issues. To the extent Gavish went to the worksite it was merely to verify the contractors' adherence to the construction schedule, not to coordinate or review their work. There is no evidence to the contrary. It also bears repeating that Gavish's contract explicitly excludes the determination and approval of construction means and methods from its duties. The contract also excludes testing and inspection services; filings and filing fees; investigations, quality control and building code compliance; and architectural and engineering services (Gavish Agreement, Exhibit A). This does not comport with the definition of a statutory agent. *See Russin, supra; Aranda, supra*; *Fuller, supra.*

Lee Construction's contract with the owner[9], on the other hand, provides that it "agrees to fully perform the Work required by the Contract Documents within the time stated therein and in strict accordance with the Contract Documents, including furnishing of any and all labor and materials . . ." (Lee Contract, p. 2). Lee Construction agreed to be paid the lump sum of $4,100,000 for its services, and its contract lists fifteen subcontractors, most of whom were retained to assist Lee Construction in the completion of its work, including the painting subcontractor. Lee Construction

[9] Gavish, Exhibit L (Lee Contract)

was contractually responsible for supervising its subcontractors, any and all construction, and ensuring that all work was performed safely (*id.* at ¶¶ 23, 26):

> We shall supervise and direct the Work, using our best skill and attention. We shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work, unless the Contract Documents give other specific instructions concerning these matters.
>
> * * * *
>
> We shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Work. We shall take reasonable precautions for the safety of, and shall provide reasonable protection to prevent damage, injury or loss to:
>
> (a) Employees and Subcontractors performing the Work and other persons who may be affected thereby. . . .

It is evident that the supervisory duties typically associated with a general contractor or construction manager were not delegated by the owner to Gavish, nor is there any evidence that Gavish exercised such duties on its own volition. This case therefore cannot be distinguished from *Pareja v Davis*, and I find that Gavish is not bound by the provisions of Labor Law §§ 240(1) and 241(6). Inasmuch as Plaintiff's opposition and cross-motion do not oppose the dismissal of its Labor Law § 200 and common law negligence claims against Gavish, and there is no evidence to show that Gavish either controlled Plaintiff's work or knew or should have known about the condition that is alleged to have caused his injuries, Plaintiff's Labor Law § 200 and common law negligence claims against Gavish must also be dismissed.

II. Meyer Davis Studios

Meyer Davis, like Gavish, argues that it cannot be liable to Plaintiff because it was merely the owner's agent and did not actively control the means and methods of Plaintiff's work. Plaintiff argues that Meyer Davis was a general contractor responsible under the Labor Law in its own right. In support Plaintiff points to the language of the Meyer Davis Agreement to show that the scope of its services went far beyond merely designing 727 Washington's interior. Meyer Davis agreed, for example, to participate in weekly construction meetings throughout the construction phase and

conduct field observations to ensure that the contractors responsible for HVAC, electrical, plumbing, and fire protections adhered to drawings and specifications (Meyer Davis Agreement, § B(5), (8)-(11)).

Plaintiff also relies upon a specifications manual provided to all bidding contractors along with the project plans to aid the general contractor in performing its duties.[10] The Specifications Manual elaborates upon Meyer Davis' rights and duties, among other things its right to approve architectural drawings and pieces of hardware as well as cosmetic aspects of the project like tiles and paint colors. It also represents that Meyer Davis is to be notified of structural defects, site inspections, the need for site meetings, the intended removal of trees, and that it must be consulted before subcontractors install HVAC equipment and fireproofing. Based on the foregoing, Plaintiff argues that Meyer Davis coordinated and supervised the entire construction project from start to finish and was the only entity with the absolute authority to oversee the architects, engineers, general construction contractor, and all of its subcontractors.

However, the Specifications Manual is not a contract and it was not signed by Meyer Davis, Gavish, Anthony Davis, or Lee Construction. Nor was Meyer Davis in privity of contract with Lee Construction or the overwhelming majority of the subcontractors who worked on 727 Washington.[11] While the Specifications Manual did specify Meyer Davis' right to be notified of structural defects it went no further than that, and Meyer Davis had no affirmative duty or responsibility thereunder to correct any such defects (§01040):

> The Contractor shall have each Subcontractor examine the conditions where his work is to be applied and shall notify MDSI in writing prior to starting work of any defects which he considers detrimental to the proper installation of his materials. If MDSI is not so informed, the Sub-Contractors shall be fully responsible for defects resulting from defective work of others.

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[10] Plaintiff's exhibit B (Specifications Manual).
[11] It appears that Meyer Davis contracted with the architect, engineer, surveyor, audio-visual contractor, and wallpaper subcontractor directly.

The Specifications Manual also imposed no duty upon Meyer Davis with respect to the condition that allegedly caused Plaintiff's injury (Painting, § 09900):

> All the work of this section and of all adjacent surfaces to be protected by suitable coverings during and after completion to protect all finished work and adjacent surfaces from any possible damage.

Meyer Davis' passive role as 727 Washington's designer is borne out by the testimony. It demonstrates that Meyer Davis was to be notified of structural defects so that it could alter its designs accordingly (Davis Deposition, pp. 93, 162-163):

A: . . . We put together a set of documents that call out what we're trying to achieve in those documents and go to the contractor for the contractor to build from.

Q. For example, if you have a vision of a lighting system, that will be submitted to some other contractor, correct?

A. That is correct.

Q. That contractor could hypothetically say back to you "We can't put the lighting system in the way you envision it because there might be a barrier, there might be something in its way structurally or otherwise," correct?

A. That is correct.

Q. So then you'll go back and hope to come back with another vision for that lighting system in my hypothetical, correct?

A. That's correct.

* * * *

Q. Now, if you turn to page 12, it's entitled "Project Coordination" . . . Can you read that out loud, please?

A. "The contractor shall have each subcontractor examine the conditions where his work is to be applied and notify MDSI in writing prior to starting work of any defects which he considers detrimental to the proper installation of materials. If MDSI is not informed, the subcontractor shall be fully responsible for defects in his work resulting from defective work of others."

Q. What is your understanding of that paragraph?

A. The way I understand that is that if the subcontractor goes to install something and something is not properly – the substructure may not be proper, and they apply something over it, and there's a problem with it, it would be the subcontractor's responsibility to repair it.

* * * *

Q. Your company, to be clear, as you testified here today and your prior testimony, your company is a design company, meaning the aesthetics, furniture, paint color, wallpaper,

floor coverings, how a particular wood floor might be placed in terms of its design; is that correct? . . .

A. That's correct. . . .

Q. Okay. If your company saw any practice that was unsafe, even if it did, in regards to plaintiff's work, would your company have the power to direct the plaintiff to change the way in which he conducted his work? . . .

A. No.

Rather than Meyer Davis retaining responsibility for assuring proper work standards, the Specifications Manual clearly envisions such responsibility belonging to the general contractor (§§ 01010(a), 01040, 01090(2)(a)):

> The Contractor shall perform, subcontract and coordinate all work indicated in the Contract Documents as well as all work as may be necessary to complete the Contract within the requirements set forth in the General Conditions. Contractor shall be responsible for quantities, physical size, field dimension, verification, mechanical characteristics, and all other coordination required to properly execute the work shown.
>
> * * * *
>
> Job Site Supervision of the work shall be by qualified personnel in the employ of the Contractor and the job super shall be named before the Construction Contract is signed. All mechanics shall be skilled and fully qualified in their respective trades.
>
> The Contractor is to familiarize himself with the work of all trades, and assume responsibility for work and coordination of Sub-Contractors.
>
> The Contractor shall have each Subcontractor examine the conditions where his work is to be applied and shall notify MDSI in writing prior to starting work of any defects which he considers detrimental to the proper installation of his materials. If MDSI is not so informed, the Sub-Contractors shall be fully responsible for defects in his work resulting from defective work of others.
>
> * * * *
>
> The Contractor shall comply fully with the provisions of the Occupational Safety and Health Act of 1970, following the effective date thereof, and as amended with regard to all work performed and/or materials supplied and shall establish safe and healthful working conditions for employees in [] connection with such work according to all occupational safety and health standards applicable thereto, which are promulgated and issued by the Secretary of Labor during the time of performance of such work, and shall indemnify and hold the Owner and MDSI harmless of and from any and all penalties, fines, or expenses which may incur by reason of the violation of the Contractor.

There is no indication in any of the papers before me that these requirements were not followed.

From a contractual standpoint, the authority to control the methods and means of the entire construction project and ensure the safety of the workplace was assumed entirely by Lee Construction (Lee Contract, ¶¶ 23, 26, *supra*) and clearly excluded from the scope of Meyer Davis' duties and responsibilities (Meyer Davis Agreement, ¶ H):

> MDSI shall have no control over or be responsible for construction means, methods, techniques, sequences or procedures or for safety precautions and programs in connection with the work, these being solely the contractor's responsibility.

This provision demonstrates that Meyer Davis never assumed the duties that usually rest with a general contractor, i.e, to perform job site supervision and to use reasonable care to furnish a safe place for the employees of all contractors performing work on the job. While it is true that Meyer Davis made site observations during the construction phase and participated in construction meetings, and while Lee Construction was required to notify Meyer Davis of upcoming inspections and when certain work was to commence, this type of general participation does not equate to workplace control for Labor Law purposes.

In this regard, *Delahaye v Saint Anns School*, 40 AD3d 679 (2d Dept 2007) is instructive. In *Delahaye*, the plaintiff was injured on a construction site and commenced suit against the construction manager, Builders Group, among others. Like the matter at bar, the agreement between the Builders Group and the site owner provided that it would have no control over the construction means or methods and would not be responsible for implementing safety precautions in connection with the various subcontractors. The Second Department held that Builders Group's role was "only one of general supervision, which is insufficient to impose liability" under the Labor Law. *Id.* at 683; *see also Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 697 (2d Dept 2016) (Labor Law claims dismissed where appellant demonstrated its role at the work site was "only one of general supervision, and that it did not have the authority to control the work performed or the safety precautions taken by the general contractor . . ."; *Rodriguez v JMB Architecture, LLC*, 82 AD3d 949,

951 (2d Dept 2011); (construction manager's role "was only one of general supervision, which is insufficient to impose liability under the Labor Law . . . .")

Contractual responsibilities aside, Plaintiff cannot raise an issue of fact whether Meyer Davis was a general contractor for Labor Law purposes unless it presents evidence that Meyer Davis exercised some degree of control over the Plaintiff. *See Russin* 54 NY2d 311, 317 (1981); *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 293 (2003) (there is no statutory agency conferring liability under the Labor Law unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured); *Nowak v Smith & Mahoney*, 110 AD2d 288, 290 (3rd Dept 1985) (a party which has the authority to enforce safety standards and choose responsible subcontractors is considered a contractor within the meaning of the Labor Law); *Relyea v Bushneck*, 208 AD2d 1077, 1078 (3rd Dept 1994) (a contractor will be held liable under the Labor Law if it was responsible for coordinating and supervising the entire construction project and was invested with the authority to enforce safety standards and to hire responsible contractors).

In *Walls v Turner Constr. Co.*, 4 NY3d 861 (2005), Turner Construction entered into a contract with a school district to serve as construction manager for a capital improvement project. The school district did not retain a general contractor. The Court found that Turner assumed the role of the general contractor for Labor Law purposes because it had the "broad responsibility" of both a "coordinator and overall supervisor for all the work being performed on the job site." *Id.* at 864. Turner was contractually obligated to cease all construction if it discovered an unsafe condition, and it was responsible for monitoring the work performed by the other trades and for periodically advising the owner and architect of any safety issues. In *Seales v Trident Structural Corp.*, 2016 NY App. Div. LEXIS 6100 (2d Dept Sept. 28 2016), the plaintiff, who was injured from falling debris at a construction project, sued defendant Trident, who was the contractor responsible for carpentry, structural work, framing, roofing, and sheetrock installation at the construction site. In opposition to

Trident's summary judgment motion, the plaintiff submitted testimony by one of the owners of the building that Trident was a "general contractor retained to oversee the entire project, to coordinate the subcontractors, and to instruct the subcontractors, including the plaintiff's employer, as to how the work was to be completed." Such testimony was deemed "sufficient to raise triable issues of fact as to whether Trident was a general contractor . . . subject to liability under the Labor Law." *Id.* at *10.[12]

Similar rulings have come from the Third and Fourth Departments. In *Burnett v Waterford Custom Homes, Inc.*, 41 AD3d 1216 (4th Dept 2007), the plaintiff's employer was hired by the sole shareholder of defendant Waterford Custom Homes. On appeal from an order granting Waterford summary judgment dismissing plaintiff's Labor Law §§ 240(1) and 241(6) claims against it, the Fourth Department noted that the defendant supplied the project's work materials, hired the architect and subcontractors, scheduled the work, and checked in to determine progress on the construction. In reversing the trial court, the Fourth Department was particularly persuaded by the fact that Waterford built 35 homes in the area and was listed as the general contractor on the blueprints for each home as well as various invoices and building permit application. And in *Relyea,* 208 AD2d at 1077, there was evidence that the moving defendant, a concrete business, signed the building permit as contractor, poured the building's foundation, set the steel beams, installed the electrical wiring in the house, hired several subcontractors, and was present at the worksite every day. This was sufficient to raise issue of fact as to whether it was a general contractor under the Labor Law.

[12] *See also Cabrera v Oceanview Villas II Corp.*, 2012 NY Misc. LEXIS 3239, *5-6 (Sup. Ct. Queens Co., June 26, 2012, Lane, J.) (construction manager's summary judgment motion denied where several witnesses testified it was actually the general contractor, and evidence showed that it hired the subcontractors and coordinated their work.)

The degree of responsibility under discussion in *Walls, Seales, Burnett,* and *Relyea* is not present in this case. Nothing in the contracts, Specifications Manual, or testimony shows that Meyer Davis had any actual control over Plaintiff or his work methods.

In sum, Meyer Davis was not a general contractor within the meaning of the Labor Law. Meyer Davis did not supervise and control Plaintiff's work. It was not in privity of contract with Plaintiff's employer or its subcontractors. It bore no responsibility over safety initiatives or the methods and means of construction. These responsibilities were clearly excluded from its contract with the owner and clearly delegated by the owner to Lee Construction, the project's general contractor. There is no question that Plaintiff's accident occurred while working on a ladder provided by Lee Construction and that Plaintiff took directions only from his Lee Construction supervisors. Meyer Davis therefore cannot be deemed a general contractor bound by the provisions of Labor Law §§ 240(1) and 241(6).

Inasmuch as Plaintiff's opposition and cross-motion do not oppose the dismissal of its Labor Law § 200 and common law negligence claims against Meyer Davis, and there is no evidence to show that Meyer Davis either controlled Plaintiff's work or knew or should have known about the condition that is alleged to have caused his injuries, Plaintiff's Labor Law § 200 and common law negligence claims against Meyer Davis must also be dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED that S.A. Gavish, Inc.'s motion for summary judgment is granted in its entirety; and it is further

ORDERED that Meyer Davis Studio, Inc.'s motion for summary judgment is granted in its entirety; and it is further

ORDERED that this action is hereby dismissed as to Gavish and Meyer Davis; and it is hereby

ORDERED that Plaintiff's cross-motion is denied.

The Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

DATE: 1.30.17

SHERRY KLEIN HEITLER, J.S.C.