

**Calix v Fortuna Pheasant Close LLC**

2018 NY Slip Op 34410(U)

April 23, 2018

Supreme Court, Nassau County

Docket Number: Index No. 607923/2015

Judge: Julianne T. Capetola

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This opinion is uncorrected and not selected for official publication.

At a term of the Supreme Court of the State of New York, held in and for the County of Nassau, at 100 Supreme Court Drive Mineola, New York 11501, on the 23<sup>rd</sup> day of April 2018

PRESENT:

HON. JULIANNE T. CAPETOLA  
Justice of the Supreme Court

ERICK CALIX and JORGE BANEGAS,  
Plaintiff,

-against-

FORTUNA PHEASANT CLOSE LLC,  
and CONSTRUCTION MANAGEMENT &  
DESIGN INC.,

Defendants.

**CORRECTED  
DECISION AND  
ORDER ON MOTION**

Index No: 607923/2015  
Motion Sequence: 005, 006, 007,  
008

The following papers have been read on these motions:

Defendant Metro Resources, LLC's Notice of Motion and Supporting Documents (Mo. Seq. 005)

Plaintiff Erick Calix's Notice of Motion and Supporting Documents (Mo. Seq. 006)

Defendant Fortuna Pheasant Close LLC's Notice of Motion and Supporting Documents (Mo. Seq. 007)

Plaintiff Erick Calix's Notice of Cross-Motion and Supporting Documents (Mo. Seq. 008)

Defendant Fortuna Pheasant Close LLC's Reply Affirmation

Plaintiff's Amended Affirmation in Reply to Cross-Motion

Defendant Metro Resources, LLC has moved by notice of motion for an order pursuant to CPLR §3212 granting summary judgment and, accordingly, dismissing the complaint as against them. That motion was not opposed. Plaintiffs have moved for an order compelling Defendant Fortuna Pheasant Close LLC (hereinafter "Defendant Fortuna") to comply with certain outstanding discovery. Defendant Fortuna has moved by notice of motion for an order pursuant to CPLR §3212 granting summary judgment

and, accordingly, dismissing the complaint as against them, and has opposed Plaintiffs' discovery motion therein. Plaintiffs have cross-moved for an order pursuant to CPLR §3212 granting them summary judgment. Defendant Fortuna submitted reply papers, Plaintiffs replied with respect to the cross-motion and the motions were deemed submitted April 17, 2018.

As a threshold matter, inasmuch as the motion by Metro Resources, LLC is sufficiently plead and unopposed, their motion is granted and the complaint is dismissed as against that Defendant.

Though the next filed motion chronologically was Plaintiffs' discovery motion, the summary judgment motions must be addressed first.

The underlying action involves an action for personal injuries sustained by two construction workers who were injured while working on a jobsite at a property owned by Defendant Fortuna on or about May 13, 2014. Defendant Fortuna's principal, Morris Moinian, had purchased the subject property in Southhampton as a vacation home and was demolishing and rebuilding the single-family dwelling. Construction Management & Design, Inc. (hereinafter "Defendant CMD") is a corporate title for Thomas Bucco's construction company. Thomas Bucco contracted with Defendant Fortuna and Morris Moinian to work as what he characterized as an "owner's rep" overseeing the day to day work on the construction of the house. Numerous other contractors were employed to perform the various aspects of the project.

CPLR §3212(b) states, in relevant part, that a motion for summary judgment shall be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party".

"The standards regarding summary judgment motions are familiar and fundamental. The party moving for summary judgment 'bears the initial burden of making a prima facie showing of its entitlement to judgment as a matter of law' (*Holtz v Niagara Mohawk Power Corp.*, 147 A.D.2d 857, 858). Once such a showing has been established, the 'burden is shifted to the opposing party to come forward with proof in evidentiary form to show the existence of genuine triable issues of fact' (*Mahar v Mahar*, 111 A.D.2d 501, 502; *see also, Ferber v Sterndent Corp.*, 51 N.Y.2d 782; *Cusano v*

*General Elec. Corp.*, 111 A.D.2d 557). General conclusory statements, expressions of hope, and repetition of the allegations in the pleadings do not constitute evidentiary proof substantiating the party's claim and, therefore, are insufficient to defeat a summary judgment motion". *Fresh Meadows Country Club v. Lake Success*, 158 A.D.2d 581 (2d. Dept. 1990).

Defendant Fortuna claims an entitlement to summary judgment based upon the homeowner's exception contained in Labor Law §240 and §241.

Labor Law §240 (1) states, "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". (emphasis added)

Labor Law §241 states, "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 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 and two-family dwellings who contract for but do not direct or control the work*, shall comply therewith". (emphasis added)

Defendant Fortuna argues that, based upon the statutory language, which it has been well-settled is to be strictly construed, neither the corporate entity, Defendant Fortuna, nor its principal, Morris Moinian, exerted the level of direction or control of the work performed at the subject jobsite that would bring them outside the scope of the homeowner's exemption.

"In order for an owner of a one- or two-family residential dwelling to be subject

to liability under Labor Law §§ 240 or 241, the plaintiff must prove that the owner ‘direct[ed] or control[led]’ the work being performed (see, Labor Law §§ 240, 241; Kelly v. Bruno & Son, 190 A.D.2d 777, 593 N.Y.S.2d 555). The phrase ‘direct or control’ is construed strictly and refers to the situation where the ‘owner supervises the method and manner of the work’ (Rimoldi v. Schanzer, 147 A.D.2d 541, 545, 537 N.Y.S.2d 839; see also, Duda v. Rouse Constr. Corp., 32 N.Y.2d 405, 345 N.Y.S.2d 524, 298 N.E.2d 667). The premise of the exemption is that strict liability under the Labor Law should not be imposed upon owners ‘ ‘who are not in a position to know about, or provide for the responsibilities of absolute liability’ ‘ (Cannon v. Putnam, 76 N.Y.2d 644, 649, 563 N.Y.S.2d 16, 564 N.E.2d 626, quoting Recommendation of N.Y. Law Rev. Commn., reprinted in 1980 McKinney's Session Laws of N.Y., at 1658)”. *Mayen v. Kalter*, 282 A.D.2d 508 (2d. Dept. 2001).

Plaintiffs rely primarily on the testimony of Thomas Bucco in support of their cross-motion for summary judgment and state that “Thomas Bucco’s testimony made clear that Moinian and his agent, David Duvoisin, directed and controlled each and every aspect of the construction of the home for Moinian”. (Plt. Atty. Aff. ¶10)

Thomas Bucco testified at a deposition on May 22, 2017 and gave the following relevant testimony:

- “A: I became the owner’s rep and just providing information of what was transpiring at the site. If people showed up, I let him know. He sent an e-mail, how people? Six people. Plumbers, how many guys does he have today? Send me pictures. That was what – I was – I was really his information out on the field.
- Q: So you were essentially like a designated representative of Mr. Morris then in the field?
- A: Yes.
- Q: You were?
- A: Owner’s rep.
- Q: Just so we’re clear for the record, your understanding is that you weren’t working now as the general contractor, you were just an owner’s rep doing work on behalf of the owner?
- A: Not only was that my understanding, that’s what happened.
- Q: That’s what it was?

- A: That's what it was.  
He controlled – this came down to dollars. If I was the contractor he would have paid me more money. So – and insurance, to have insurance under this contract was a lot of money so I went – I said, I'm not getting the insurance if I'm not the contractor. So he– so we re-negotiated, kept the 180 and he became the actual contractor.
- Q: Where you were acting on his behalf at the job site?
- A: I would act on his behalf at the job site for providing him information of what was transpiring at the site.
- Q: And the work that was being done at the job site, were you giving any directives of how that work was to be completed?
- A: What do you mean by "completed"?
- Q: To how the work was performed.
- A: Well, the contractors did their work.
- Q: Right.
- A: And they were told what they had to do, put a faucet in, you have to put nine faucets in today, that's as far as it went. As far as how they did it and means and methods, that's not on me. I – you know, the contractor obviously knows, supposed to know what he's doing.”
- (P. 26 ln. 14 - P. 28 ln. 19)
- “Q: While the work that was being performed was going on, were there any type of plans that you had to be familiar with, to follow while the work was being bid?
- A: All contractors had to follow a certain matter of plans.
- Q: And were these plans that you had familiarized yourself with during the course of this job?
- A: Absolutely.
- Q: And it was something that you had to oversee to make sure that the work was being done pursuant to the plans?
- A: Well, with regards to windows being in locations and stuff like that, yeah, absolutely. You know, the house was being built correctly.
- Q: Was David Duvoisin involved in that as well?
- A: 100 percent.
- Q: And what would distinguish between his involvement and your involvement in regards to the individual contractor doing individual work?

- A: Well, David – it’s a very odd situation. But, again, Morris being the contractor, his employee was totally involved in – in the whole entire job as well as other jobs, that’s how he brought in other contractors.
- Q: You’re talking about Morris?
- A: I’m talking about David.
- Q: David.
- A: David worked for Morris.
- Q: Right.
- A: And he was involved in other hotels or whatever it is. So he was totally involved in – in this entire project with regards to changes, picking out colors, all the way down to landscaping.”

(P. 61 ln. 7 - p. 62 ln. 20)

- “Q: And did they tell you how the accident happened?
- A: Not specifically. I never heard how it happened. But from what I understand, they fell off a scaffold. You know, probably weren’t working as safe as they should be but goes without saying.
- Q: Do you know who the contractor was that informed you about the accident?
- A: I don’t remember. There were several but I don’t remember. When I left the project, Metro Resources was hired, painter was on site, the plumber, electrician, the gate company, the low voltage guy. It was at the end of the job where everybody was doing their finishing touches and then Morris started the renovation again for the water leaks”

(P. 65 ln. 16 - p. 66 ln. 8)

- “Q: And correct me if I’m wrong, but, sometimes you and David would overlap in the sense that you would both be there at the same time at the project?
- A: We would be scheduled to be there together, absolutely.
- Q: And when David would come bi-weekly, what things would he do when he was at the project?
- A: He would – he would oversee everything that was done, whether its plumbing, electrical. He would see the progression of the job, what he wanted to get done faster and kind of oversee the contractor’s work, who was doing what. And they were scheduled meetings. He would bring in

contractors specifically to be the day that he would be there. So David wouldn't just come and hang out. It would be a full day of meeting contractors, reviewing their work, paying them, he would bring checks and then, you know, telling them how to go forward with – with the work.

Q: Did David every have any involvement with the way the work was being performed with these contractors?

MR. KAPATOS: What do you mean by way?

MS. POLICANO: Well, he'll tell me if he doesn't understand the way-

A: What do you mean by way? Means and methods?

Q: Yes.

Was David involved in any way with the means and methods of the contractors?

A: No. David wasn't, neither was I. They were – they were told to do it in a certain – they were told to – to do work. How they did it was at their own discretion.

Does that answer that for you?

Q: Yes. Thank you.

I think you mentioned that Morris was actually at the job site five times?

A: Yeah, approximately.”

(P. 90 ln. 9 - p. 92 ln.8)

“Q: And when was the last time you were in the project in any sort of working capacity for Morris?

A: Last time was early April.

Q: 2014?

A: 2014, yeah.”

(P. 97 ln. 5 - 10)

“Q: Do you know if David's role changed at all after you transitioned out and Metro came on to the project or does his role remain the same as when you were there?

A: I don't know.”

(P. 116 ln. 13-18)

At the outset it must be noted that it had been established from Thomas Bucco's testimony that he was no longer employed by Defendant Fortuna at the time of the

accident and does not have any knowledge of the roles played by Mr. Moinian, Defendant Fortuna, or any of their agents at the time of the accident.

Mr. Bucco unequivocally and repeatedly testified that while David Duvoisin as agent of Morris Moinian supervised the overall project and made various decisions and determinations, that he was not involved in the "means and methods" of the work performed and that the individual contractors who performed each job made their own determinations as to how their individual work would be performed.

In their opposition papers, Plaintiffs cite to a number of cases that they claim support their argument that Defendant Fortuna's actions brought them outside of the homeowner exception to Labor Law 241, however their reliance on these cases is misplaced at best as their characterizations of the fact patterns in each case are misleading.

For example, Plaintiffs cite *Chura v. Baruzzi*, and claim that the denial of the defendants' summary judgment in that case was predicated upon defendants having acted as their own general contractor, which they claim Defendant Fortuna did in the instant matter. 192 A.D.2d 918 (3d. Dept. 1993). However, the Appellate Division Third Department made the following findings in that case:

" In analyzing whether a homeowner's actions with respect to a particular construction or renovation project amount to direction and control thereof within the meaning of Labor Law § 240(1), the relevant inquiry is the degree to which he or she supervised or directed the method and manner of the work (see, e.g., *Valentia v. Giusto*, 182 A.D.2d 987, 581 N.Y.S.2d 939; *Reyes v. Silfies*, 168 A.D.2d 979, 564 N.Y.S.2d 925; *Ennis v. Hayes*, 152 A.D.2d 914, 544 N.Y.S.2d 99). Here, there can be no argument but that defendant's actions went well beyond those of an interested homeowner who simply presented ideas and suggestions, made observations and inquiries, and inspected the work (see, *Stephens v. Tucker*, 184 A.D.2d 828, 584 N.Y.S.2d 667). Rather, the record reveals that defendant engineered the entire renovation project acting, in effect, as his own general contractor, receiving bids, negotiating contracts and hiring specialty subcontractors as needed for certain jobs. More significantly, however, during the renovation defendant was at the job site daily, not only doing work on his own but also overseeing the project in its entirety, organizing the subcontractors and telling them where to work. More particularly, defendant told plaintiff which

rooms to tape first, directed him to tape, sand and finish drywall that defendant and others not affiliated with R & J had installed, and on several occasions directed plaintiff to alter his method of taping and to “flat tape” certain areas. In addition, defendant routinely instructed plaintiff and others working at the site to assist him in moving supplies and materials and in unloading deliveries. Finally, while it is unclear whether defendant actually supplied the ladder from which plaintiff fell, it is evident that he did move and reposition ladders frequently to facilitate completion of the job by the subcontractors. In view of this, we, like Supreme Court, perceive numerous factual issues regarding defendant's direction and control which militate against summary judgment (see, *Emmi v. Emmi*, 186 A.D.2d 1025, 588 N.Y.S.2d 481; *Ennis v. Hayes*, supra; *Rimoldi v. Schanzer*, 147 A.D.2d 541, 537 N.Y.S.2d 839). *Id.*

It can hardly be stated that the facts in *Chura* are analogous to the facts in the instant matter when there was possibility in *Chura* that the defendant had actually supplied the ladder from which the plaintiff fell, that defendant often physically moved and repositioned ladders himself, directed plaintiff to alter his methods of “taping”, and instructed plaintiff and other workers to assist him in specific physical activities. In the instant matter, Plaintiffs have demonstrated that the extent of Defendant Fortuna's exercise of control over the work taking place at the subject jobsite was to instruct workers as to which tasks would be completed each day, not as to the manner and methods of the performance of those tasks. In fact, Thomas Bucco explicitly testified to the contrary.

Plaintiffs also cite *Acosta v. Hadjigavriel*, wherein, according to Plaintiffs “the Court held that there is a triable issue of fact as to whether the defendant, who owned a construction business, exercised the requisite degree of direction and control over the painting of his home”. 18 A.D.3d 206 (2d. Dept. 2005) (Plt. Atty. Aff. ¶24). However, the Court in *Acosta* states,

“there is a triable issue of fact as to whether the defendant, who owned a construction business which employed the plaintiff before the accident (on an unrelated job), exercised the requisite degree of direction and control over the painting of his home to impose liability under Labor Law § 240(1) and § 241(6)”, which is clearly distinguishable from the instant matter in that the plaintiff therein was a former employee of defendant's own construction business. *Id.* Neither Defendant Fortuna nor its principal Morris Moinian are alleged to own construction businesses, but rather Morris Moinian is the founder of a real estate company which owns and operates

several hotels, resorts, and commercial properties. Therefore, while Morris Moinian may have, throughout his business dealings, have dealt with a great number of contractors and members of the construction industry, there is no allegation that his areas of expertise or any parts of his businesses deal directly with construction.

In *Ryba v. Almeida*, Plaintiffs note that “the defendants, *who owned several construction and real estate development businesses* failed to establish, *prima facie*, that, as a matter of law they did not control the plaintiff’s work and therefore fell within the scope of the homeowner’s exception to the Labor Law’s absolute liability provisions”. 843 N.Y.S.2d 388 (2d. Dept. 2007) (Plt. Atty. Aff. ¶24). In actuality, the Appellate Division Second Department further stated therein that,

“The defendants, who owned several construction and real estate development businesses, including the business that poured the foundation for the subject construction project, failed to establish, *prima facie*, that, as a matter of law, they did not direct or control the plaintiff’s work and therefore fell within the scope of the homeowner’s exception to the Labor Law’s absolute liability provisions (see Labor Law §§ 240, 241; *Boccio v. Bozik*, 41 A.D.3d 754, 839 N.Y.S.2d 525; *Acosta v. Hadjigavriel*, 18 A.D.3d 406, 794 N.Y.S.2d 445; *Holocek v. Nowak Constr. Co.*, 259 A.D.2d 466, 686 N.Y.S.2d 80; cf. *Reilly v. Loreco Constr.*, 284 A.D.2d 384, 726 N.Y.S.2d 142; *Lang v. Havlicek*, 272 A.D.2d 298, 707 N.Y.S.2d 642).

Similarly, the defendants failed to establish, *prima facie*, that they exercised no supervisory control over the methods and materials used by the plaintiff in his work (see *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 505, 601 N.Y.S.2d 49, 618 N.E.2d 82)”. *Id.*

Again, the Appellate Division Second Department was explicit in their holding in *Ryba* that the defendants failed to establish that they did not exercise supervisory control over the *methods and materials used*, which is wholly contrary to the available facts in the instant matter as testified to by Thomas Bucco. Additionally, the *Ryba* case is distinguishable in that again, the defendants were owners of construction businesses, and in that matter their businesses included that which performed, at least, the pouring of the foundation for the subject job.

In *Ennis v. Hayes*, wherein Plaintiffs claim that a triable issue of fact was found based upon “the issue of direction and control where Hayes had an architect prepare blueprints for the design and construction of the residence and then contracted with

several entitles [sic] for the work; scheduled when each contractor would work, was on site often; frequently took photographs of the progress of the work, and would point out mistakes and request correction”, the Appellate Division Fourth Department actually stated,

“In the subject case, Hayes had an architect prepare blueprints for the design and construction of the residence and he then contracted with several entities for excavation, foundation, plumbing, electrical, septic system, rough flooring and framing work. He scheduled when each contractor would work, was on-site most of the time (including the day of the accident), frequently took photographs of the progress of the work, and would point out mistakes and request correction. With specific reference to the company that employed Ennis, Hayes supplied their materials and some equipment. There is a factual issue whether Hayes supplied the subject ladder. Hayes also instructed Ennis to use more than the usual number of nails. In addition, Hayes performed several of the construction tasks, including backfilling, installing drains and footers, landscaping, siding, roofing, finished flooring and cabinet work. Under the circumstances, we conclude that plaintiffs presented facts adequate to raise an issue concerning direction and control over the work (*Rimoldi v. Schanzer*, supra)”. 152 A.D.2d 914 (4<sup>th</sup> Dept. 1989).

It borders on disingenuous for Plaintiffs to claim that the holding in *Ennis* was based upon scheduling, photographs, and requests for correction when, in fact, the defendant therein actually supplied materials and some equipment – which may have included the ladder from which plaintiff therein fell – and defendant actually performed several construction projects himself as an integral part of the work team, and directed the actions of the other workers down to the number of nails used.

Finally, Plaintiffs’ reference to *Yurkovich v. Kvarner Woodworking, Inc.* which Plaintiffs claim stands for the proposition that triable issues of fact exist as to whether the homeowner’s exception applies based upon close supervisory involvement in the work at issue, actually dealt with a case wherein not only was defendant operating as his own general contractor, but the subject property “was registered as a five-story multiple dwelling, although defendants had intended to convert it to a single-family residence” which renders the exception inapplicable. 289 A.D.2d 183 (1<sup>st</sup> Dept. 2001).

In the instant matter, it is clear that Plaintiffs have failed to sustain their burden of demonstrating that prove that the owner herein, either Morris Moinian or his agent David Duvoisin as agents of owner Defendant Fortuna directed or controlled the work being

performed. Accordingly, they have not demonstrated that Defendant Fortuna's actions brought them outside the scope of the homeowner's exemption to Labor Law §240 and §241.

Plaintiffs also have a cause of action under Labor Law §200 and common law negligence.

“Section 200 of the Labor Law<sup>2</sup> is a codification of the common-law duty of a landowner to provide workers with a reasonably safe place to work (see, *Allen v. Cloutier Constr. Corp.*, 44 N.Y.2d 290, 299, 405 N.Y.S.2d 630, 376 N.E.2d 1276) . . . It is settled law that where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under section 200 of the Labor Law (see, *Allen v. Cloutier Constr. Corp.*, 44 N.Y.2d, at 299, 405 N.Y.S.2d 630, 376 N.E.2d 1276 supra; *Persichilli v. Triborough Bridge & Tunnel Auth.*, 16 N.Y.2d 136, 145, 262 N.Y.S.2d 476, 209 N.E.2d 802)”. *Lombardi v. Stout*, 80 N.Y.2d 290 (1992).

“[W]hen the manner of work is at issue, ‘no liability will attach to the owner solely because [he or she] may have had notice of the allegedly unsafe manner in which work was performed’ (*Dennis v. City of New York*, 304 A.D.2d 611, 612, 758 N.Y.S.2d 661; see *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d at 877, 609 N.Y.S.2d 168, 631 N.E.2d 110; *Ferrero v. Best Modular Homes, Inc.*, 33 A.D.3d at 851, 823 N.Y.S.2d 477; *Colon v. Lehrer, McGovern & Bovis*, 259 A.D.2d 417, 419, 687 N.Y.S.2d 130). Rather, when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work (see *Rizzuto v. L.A. Wenger Contr. Co., Inc.*, 91 N.Y.2d 343, 352, 670 N.Y.S.2d 816, 693 N.E.2d 1068; *Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 317, 445 N.Y.S.2d 127, 429 N.E.2d 805; *Gallelo v. MARJ Distrib., Inc.*, 50 A.D.3d 734, 735, 855 N.Y.S.2d 602; *Dooley v. Peerless Importers, Inc.*, 42 A.D.3d 199, 204–205, 837 N.Y.S.2d 720; *Guerra v. Port Auth. of N.Y. & N.J.*, 35 A.D.3d 810, 811, 828 N.Y.S.2d 440; *Perri v. Gilbert Johnson Enters., Ltd.*, 14 A.D.3d 681, 683, 790 N.Y.S.2d 25; *Everitt v. Nozkowski*, 285 A.D.2d at 443, 728 N.Y.S.2d 58; *Reynolds v. John T. Brady & Co.*, 38 A.D.2d 746, 746–747, 329 N.Y.S.2d 624).<sup>2</sup> Although property owners often have a general authority to oversee the progress of the work, 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 (see *Natale v. City of New York*, 33 A.D.3d 772, 773, 822 N.Y.S.2d 771; *Perri v. Gilbert Johnson Enters., Ltd.*, 14 A.D.3d at 683, 790 N.Y.S.2d 25; *Dos Santos v. STV Engrs., Inc.*, 8 A.D.3d 223, 224, 778 N.Y.S.2d 48). A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed". *Ortega v. Puccia*, 57 A.D. 3d 54 (2d. Dept. 2008).

With respect to the Labor Law §200 claim, Plaintiffs simply argue that, inasmuch as Defendant Fortuna was made aware on various occasions by Thomas Bucco that there were safety concerns, Defendant Fortuna failed to take action to remedy these safety issues, as Plaintiffs claim they were required to based upon their level of control over the construction project.

In the instant matter there is no claim by Plaintiffs that Defendant Fortuna supplied the scaffolding which malfunctioned causing the fall, nor is there any claim that any other condition at the job site contributed to the Plaintiffs' fall. Accordingly, as the fall is clearly attributable to the contractor's methods, which, it has been established, were outside the purview of Defendant Fortuna, Defendant Fortuna as owner is exempt from liability pursuant to Labor Law §200. Accordingly, the complaint must be dismissed as Defendant Fortuna.

In light of the dismissal of the complaint as against Defendant Fortuna, the Plaintiffs' discovery motion is rendered academic.

Accordingly, it is hereby

ORDERED, that the motion by Defendant Metro Resources, LLC is hereby granted in its entirety as unopposed and the complaint filed under Index #607923/2015 is dismissed as against them; and it is further

ORDERED, that the motion by Defendant Fortuna Pheasant Close, LLC is hereby granted in its entirety and the complaint filed under Index #607923/2015 is dismissed as against them; and it is further

ORDERED, that Plaintiffs' cross-motion for summary judgment is hereby denied

in its entirety; and it is further

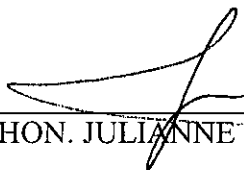
ORDERED, that Plaintiffs' motion seeking to compel discovery is hereby denied as academic; and it is further

ORDERED, that all counsel and any unrepresented parties shall appear for further conference on this matter on **May 16, 2018 at 9:30 a.m.**; and it is further

ORDERED, that Defendant Metro Resources, LLC shall serve a copy of this order on all parties within ten (10 ) days of their receipt hereof.

This constitutes the decision and order of the Court.

**ENTER**



HON. JULIANNE T. CAPETOLA, J.S.C.

**ENTERED**

APR 27 2018

NASSAU COUNTY  
COUNTY CLERK'S OFFICE