

**Lopiccolo v Board of Mgrs. for the N.Y. Resource
Ctr. Condominium**

2019 NY Slip Op 31631(U)

June 10, 2019

Supreme Court, Kings County

Docket Number: 503366/13

Judge: Debra Silber

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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of June, 2019.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

-----X

SALVATORE V. LOPICCOLO AND COSIMO SCALISI,

Plaintiffs,

- against -

THE BOARD OF MANAGERS FOR THE NEW YORK RESOURCE CENTER CONDOMINIUM, CPG 34TH STREET REALTY LLC, CHURCH PENSION GROUP SERVICES CORP., HATZEL AND BUEHLER, INC. AND GEORGE COMFORT & SONS, INC.,

Defendants.

-----X

CPG 34TH STREET REALTY LLC, CHURCH PENSION GROUP SERVICES CORP.,

Third-Party Plaintiff,

- against -

CAULDWELL WINGATE COMPANY LLC,

Third-Party Defendant.

-----X

THE BOARD OF MANAGERS FOR THE NEW YORK RESOURCE CENTER CONDOMINIUM,

Second Third-Party Plaintiff,

- against -

CAULDWELL WINGATE COMPANY LLC,

Second Third-Party Defendant.

-----X

GEORGE COMFORT & SONS, INC.,

Third Third-Party Plaintiff,

- against -

CAULDWELL WINGATE COMPANY LLC,

Third Third-Party Defendant.

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DECISION / ORDER

Index No. 503366/13
Mot. Seq. # 8, 9, 10 & 11

The following papers numbered 1 to 14 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

1-2, 3-4, 5-6, 7-8

Opposing Affidavits (Affirmations) _____

9, 10, 11.

Reply Affidavits (Affirmations) _____

12, 13, 14

_____ Affidavit (Affirmation) _____

Other Papers _____

Upon the foregoing papers, plaintiffs Salvatore V. Lopiccio (Lopiccio) and Cosimo Scalisi (Scalisi) move (Mot. Seq. # 8) for an order, pursuant to CPLR 3212, granting them summary judgment on the issue of liability on their Labor Law § 241 (6) cause of action as premised upon NYCRR 23-1.13 against defendants/third-party plaintiffs CPG 34th Street Realty LLC (CPG), Church Pension Group Services Corp. (Church Pension Group) and defendant Hatzel and Buehler, Inc. (Hatzel). CPG, Church Pension Group and third-party defendant/ second third-party defendant/third third-party defendant Cauldwell Wingate Company, LLC (Cauldwell) cross-move, (Mot. Seq. # 9) pursuant to CPLR 3212, granting them summary judgment dismissing plaintiffs’ common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6) claims. Hatzel cross-moves (Mot. Seq. # 10) for an order, pursuant to CPLR 3212, granting it summary judgment dismissing plaintiffs’ complaint and all cross-claims asserted against it. Defendant/second third-party plaintiff The Board of Managers of the New York Resource Center Condominium (Board of Managers) and defendant/third third-party plaintiff George Comfort & Sons, Inc. (Comfort) cross-move (Mot. Seq. # 11) for an order, pursuant to CPLR 3212, granting them summary judgment dismissing plaintiffs’ complaint as against them as well as any cross claims.

Background

This personal injury action stems from an accident which occurred on March 1,

2013, when the plaintiffs Salvatore V. Lopiccolo (Lopiccolo) and Cosimo Scalisi (Scalisi), (collectively, “plaintiffs”) were performing demolition work at a building located at 365 Fifth Avenue a/k/a 19 East 34th Street a/k/a 16 East 35th Street, in New York County.¹ A portion of the third through seventh floors of the building are the two commercial condominium units owned by CPG, a Limited Liability Company which is wholly owned by Church Pension Group.² The Board of Managers of the Condominium oversees the management of the subject premises, and Comfort was hired as the managing agent for the Board of Managers. Church Pension Group hired Cauldwell as the construction manager/general contractor, shortly after it acquired the units, for the gut renovation of CPG’s two units. Cauldwell hired various subcontractors to work at the site, including Hatzel, an electrical subcontractor. At the time of the accident, both plaintiffs were employed by Cauldwell.

During his deposition, Scalisi testified that he was a Local 79 Mason Tender employed by Cauldwell. Lopiccolo reported to Scalisi, who was the lead laborer on the project, who in turn reported to Cauldwell’s superintendent, Robert Froner. Scalisi testified that, on the date of the accident, he and Lopiccolo were performing demolition work on the third and fourth floors of the building. The demolition work involved chopping out concrete, breaking down sheetrock, and removing doors, door frames and studs. Just before the accident occurred, Scalisi and Lopiccolo had completed their work

¹It is a commercial condominium called The New York Resource Center Condominium. It was established in 1992. The most recent amendment to its Declaration was filed in 2012 and reflects, as applicable here, the subdivision of what was known as the “Library Unit” [Lot 1102] to create “CPG Unit A” [Block 864, Lot 1105] on the third through fifth floors, and “CPG Unit B” [Lot 1106] on the sixth and seventh floor. Part of Lot 1102 was retained by the Library. Amended floor plans were filed as well. There are now six commercial condominium units. CPG purchased the two units, 1105 and 1106, in June of 2012 from the New York Public Library, Astor, Lenox and Tilden Foundations. The building is thirteen stories high and is a landmark. It is a full city block and was previously occupied by The B. Altman Department Store.

²E-file Doc # 35 is signed (incorrectly) by Church Pension Group Services Corp., as “sole shareholder of” CPG. As a limited liability company, CPG does not have shareholders.

on the third floor, and had proceeded to start work on the fourth floor. Scalisi testified that a Hatzel employee, who he had seen about an hour to two hours before the incident, assured him that he would shut off the power on the fourth floor in order for the plaintiffs to do their work. The accident occurred while they were demolishing a doorway in the fourth floor CPG condo unit, the doorway to stairway J.³ Lopiccicolo was standing on an A-frame ladder which was fully open and locked in place, while Scalisi was standing on the floor adjacent to the doorway. Scalisi was assisting Lopiccicolo by holding a junction box that had bx cables coming out of it. After Lopiccicolo removed the junction box from the studs, he handed it to Scalisi. While holding the junction box, Scalisi claimed he heard an explosion and saw sparks and fire shooting out from the ceiling to the right of Lopiccicolo. At that point, he said he felt an electrical shock in both of his hands, which lasted for about 20 seconds, until the electricity was turned off. Scalisi then felt the ladder strike his chest, knocking him into the wall behind him. Scalisi never fell to the ground. When he turned around, he said he saw Lopiccicolo leaning against the ladder and he was pinned against the wall. He also saw sparks coming from the wires in the ceiling of the stairwell, as well as above the area where they were working. Neither of the plaintiffs, nor any other Cauldwell workers, had been provided with any electrical testing devices or any insulated gloves.

Lopiccicolo testified that he was a Local 79 laborer employed by Cauldwell, and was working on the fourth floor of the building at the time of the accident. He was standing on the third or fourth rung from the top of a 10-foot A-frame ladder, a little more than halfway up. Lopiccicolo testified that Scalisi told him that the power (electricity) had been shut off in order for them to work on the fourth floor. Lopiccicolo and Scalisi first removed the sheetrock from around the door frame. There was a junction box for the exit:

³The accident report specifies it was stairway J (E-File Doc # 149).

sign over the door, which was not illuminated at the time. The junction box, which was six to eight inches in size, had wires sticking out of it and was attached to the studs. After Lopiccolo disconnected it from the studs, the junction box hung loose. At that point, Lopiccolo handed the junction box to Scalisi with his left hand, while he was still holding the exit sign in his right hand. According to Lopiccolo, there were bx cables coming out of both the exit sign and the junction box. When he handed the junction box to Scalisi, Scalisi handed him a snip, which is a large scissor for cutting metal studs. Lopiccolo then picked up the exit sign and, while using the snip, attempted to cut the bx cable that was sticking out of it. At that point, Lopiccolo immediately heard an explosion. He did not remember anything else after that. When he “woke up,” he was lying on the floor, on his back, and he did not remember how he got there. Prior to the accident, it was his understanding that the electricity had been shut off. Lopiccolo was not wearing insulated electricity resistant gloves at the time of the incident.

Plaintiffs subsequently commenced a personal injury action, alleging violations of Labor Law §§ 200, 240 (1), 241 (6), as well as common-law negligence. Defendants interposed answers to the complaint and asserted various third party actions. The parties engaged in discovery, and the following summary judgment motion and cross motions ensued.

Hatzel's Cross-Motion for Summary Judgment

Hatzel cross-moves for summary judgment dismissing plaintiffs' Labor Law §§ 240 (1), 241 (6) and 200 claims, as well as their common-law negligence claim.

It is well settled that “the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]);

Zapata v Buitriago, 107 AD3d 977 [2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez v Prospect Hospital*, 68 NY2d at 324; *see also, Smalls v AJI Industries, Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie demonstration has been made, however, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Hatzel maintains that it was neither the owner nor the general contractor at the premises, and cannot be deemed a statutory agent within the meaning of the Labor Law. Hatzel further argues that it lacked the authority to supervise or control the plaintiffs' work at the time of the accident and, therefore, cannot be held liable under plaintiffs' common-law negligence claim. In support of its cross motion, Hatzel has submitted admissible evidence showing that it did not supervise or control the activity/work which led to the plaintiffs' injuries. The record indicates that the plaintiffs' task at the time of the accident was to perform demolition work, which in part included removing the door frame and wall adjacent to the stairwell on the fourth floor of the building. The stairwell, which presumably went from the cellar to the thirteenth floor, was owned/managed by the Board of Managers of the Condominium, as it was a common element of the condominium. The parties seem to agree that the stairwell was not part of CPG's condo unit, but was adjacent to it. Hatzel also points out that the plaintiffs' employer, Cauldwell, was the entity that directed all of their work on the project, including making the determination to have the electricity in certain areas turned off in order for the work to proceed. Hatzel maintains that the record evidence demonstrates that it neither supervised nor controlled the plaintiffs' work, or the work of their employer, Cauldwell.

In opposition, plaintiffs point out that Hatzel was the electrical contractor responsible for ensuring that the doors and door frames scheduled to be removed (as well as the adjacent areas on the fourth floor) were cleared of all electrical hazards and, as such, was responsible as an agent of the unit owner (CPG). In this regard, plaintiffs contend that the activity which specifically produced the plaintiffs' injuries was Hatzel's failure to ensure that all of the wires in the area of the demolition fourth floor as well as (fourth floor stairwell and landing) were de-energized. Since Hatzel controlled the injury producing activity, plaintiffs argue that Hatzel should be deemed an agent of the owner within the meaning of the Labor Law.

Liability for violations of Labor Law §§ 240 (1) and 241 (6) may be imposed against contractors and owners, as well as parties who have been delegated the authority to supervise and control the work such that they become statutory agents of the owners and contractors (*see Russin v Picciano & Son*, 54 NY2d 311 [1981]). "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured" (*Linkowski v City of New York*, 33 AD3d 971, 974–975 [2006]; *see Russin v Louis N. Picciano & Son*, 54 NY2d at 317–318; *Cabrera v Arrow Steel Window Corp.*, 163 AD3d 758, 759, [2018]). Since Hatzel was neither an owner nor a general contractor, liability would attach under the Labor Law only if it is shown that Hatzel was a statutory agent of the owner or general contractor (*see Bopp v A.M. Rizzo Elec. Contractors, Inc.*, 19 AD3d 348, 350 [2005]). To hold Hatzel liable as a statutory agent for violations of Labor Law §§ 240 (1) and 241 (6), there must be a showing that it had the authority to supervise and control the work (*see Bakhtadze v Riddle*, 56 AD3d 589, 590 [2008]; *see also Domino v Professional Consulting, Inc.*, 57 AD3d 713, 714–715 [2008]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 850 [2006]). "The determinative factor is whether the party

had ‘the right to exercise control over the work, not whether it actually exercised that right’” (*Bakhtadze v Riddle*, 56 AD3d at 590, quoting *Williams v Dover Home Improvement*, 276 AD2d 626, 626 [2000]). Where the owner or general contractor delegates to a third party the duty to conform to the requirements of the Labor Law, that third party becomes the statutory agent of the owner or general contractor (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]; *Bakhtadze v Riddle*, 56 AD3d at 590; *see also Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 697 [2016]).

Here, based upon a review of the record, there is no evidence to support a finding that Hatzel was delegated “plenary authority” to control and supervise the work site (including plaintiffs’ demolition work), or that it exercised such broad authority on behalf of CPG, the unit owner, or Cauldwell, as the construction manager/general contractor on the project. Since Hatzel has established, *prima facie*, that it lacked the “ability to control the activity [demolition work] which brought about the injury” (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864), it cannot be charged with the statutory duties imposed by Labor Law §§ 240 (1) and 241 (6) (*see Keenan v Simon Prop. Grp., Inc.*, 106 AD3d 586, 589 [2013]; *Ortiz v I.B.K. Enterprises, Inc.*, 85 AD3d 1139, 1141 [2011]; *Bopp v A.M. Rizzo Elec. Contractors, Inc.*, 19 AD3d 348, 350–51 [2005]). The plaintiffs have failed to raise a triable issue of fact establishing otherwise (*see Zervos v City of New York*, 8 AD3d 477, 481 [2004]). Accordingly, that branch of Hatzel’s cross motion seeking summary judgment dismissing plaintiffs’ Labor Law §§ 240 (1) and 241 (6) claims as against it is granted.

Hatzel, however, has failed to establish its entitlement to judgment as a matter of law dismissing the cause of action alleging common-law negligence/Labor Law § 200. A subcontractor “may be held liable for negligence where the work it performed created the condition that caused the plaintiff’s injury even if it did not possess any authority to

supervise and control the plaintiff's work or work area" (*Poracki v St. Mary's R.C. Church*, 82 AD3d 1192, 1195 [2011] [internal quotation marks omitted]; see *Ortiz v I.B.K. Enterprises, Inc.*, 85 AD3d 1139, 1140 [2011]; *Erickson v Cross Ready Mix, Inc.*, 75 AD3d 519, 523 [2010]). An award of summary judgment in favor of a subcontractor on a negligence claim is improper "where the 'evidence raise[s] a triable issue of fact as to whether [the subcontractor's] employee created an unreasonable risk of harm that was the proximate cause of the injured plaintiff's injuries'" (*Erickson v Cross Ready Mix, Inc.*, 75 AD3d at 523, quoting *Marano v Commander Elec., Inc.*, 12 AD3d 571, 572-573 [2004]).

Based upon a review of the record, the court finds that there are triable issues of fact as to whether Hatzel's employees created the dangerous condition that allegedly caused the plaintiffs' injuries by failing to de-energize the wires for the fourth floor stairwell, which was adjacent to where the plaintiffs were working (see *Lombardo v Tag Court Square, LLC*, 126 AD3d 949, 950 [2015]). During his deposition, Chris Hargrove, the Executive Vice President of Cauldwell, testified that the first phase of the demolition was "safe-ing out" the area, which he explained involved de-energizing the areas to be demolished, and that Hatzel was the company in charge of cutting the power to those areas (Hargrove tr at 27, 32-33). He further testified that prior to the incident, Cauldwell had directed Hatzel to safe-out the area where the plaintiffs were working.

In addition, Felice Morizio, a Hatzel employee, testified that he was aware that Cauldwell employees were going to remove a door buck, and the frame around the door providing access to the fourth floor stairwell (Morizio tr at 45). He admitted that Hatzel received directions from Cauldwell to have the areas around the door frames on the fourth floor landing to be cleared of all electrical hazards (*id.* at 121-122). Morizio further admitted that the demolition work performed by the plaintiffs would have encompassed

both sides of the wall separating the commercial condo unit's space from the stairwell, a common element, and that live bx cables, which were outside of the condo unit, were located nearby and adjacent to where the plaintiffs were dismantling the doorway and electrical exit sign (*id.* at 140-143). Morizio testified that the day after the accident, they investigated and determined that the exit sign, which was inside the condo unit, was de-energized, but that there were live wires nearby, in the common stairwell, which were not marked in any way to distinguish them (*id.* at 54-56). When asked if he would consider the adjacent live wires (located in the stairwell) as wires that needed to be de-energized for plaintiffs' job to be done, Morizio replied, "yes" (*id.* at 140-143). Morizio, however, claimed that Hatzel would have needed instructions from Cauldwell, which would have needed to make arrangements with the management of the condominium, Comfort, in order to turn off the power and de-energize the wires for a common area stairwell (*id.* at 111-113).⁴ Based upon the foregoing evidence, the court finds that issues of fact exist as to whether Hatzel was negligent in failing to de-energize the wiring in the adjacent common area of the fourth floor stairwell, thereby creating the dangerous condition. Even if the stairwell were not a common area of the condominium but was a part of the condo unit, as stairwells usually have auxiliary back-up lighting in office buildings, the stairwell would likely have been on a different electrical circuit than the office space, but this is not clear from the record. In any event, a simple testing tool would have answered the question of whether they had turned off the power. Accordingly, the branch of Hatzel's cross motion seeking to dismiss plaintiffs' common-law negligence/Labor Law § 200 claim is denied.

⁴Presumably, the stairway went from the cellar to the thirteenth floor.

*The Board of Managers and George Comfort & Son, Inc.'s Cross Motion*⁵

The Board of Managers and Comfort (collectively, the Condominium Board) seek summary judgment dismissing plaintiffs' complaint as against them since neither was the owner, general contractor nor their agent on the project, and they did not have any authority to control or supervise the injury-producing work.

As an initial matter, the court notes that the Condominium Board's cross motion is untimely (*see Brill v City of New York*, 2 NY3d 648 [2004]). Additionally, as noted by the plaintiffs, the Condominium Board's motion was improperly designated a "cross motion" since it seeks relief against the plaintiffs, whose motion (Mot. Seq. # 8) does not seek any relief against the Condominium Board (*see Sanchez v Metro Builders Corp.*, 136 AD3d 783, 785 [2016]; *Gaines v Shell-Mar Foods, Inc.*, 21 AD3d 986 [2005]). However, it is well settled that "[a]n untimely motion or cross motion for summary judgment may be

⁵ The court notes that the plaintiffs herein have improperly brought suit against the defendant Board of Managers, an unincorporated association, and has failed to name either the defendant's president or treasurer in his or her representative capacity, as a party to this action, as is required by General Associations Law § 13. Section 13 of the General Associations Law, which is entitled "Action or proceeding against unincorporated association" provides as follows:

"An action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally. Any partnership, or other company of persons, which has a president or treasurer, is deemed an association within the meaning of this section."

However, the court further notes that this error, by itself, is not jurisdictional in nature and, thus, can be corrected by an amendment to the caption (*see Montalvo v Bakery & Confectionary Workers International Union Local No. 3*, 137 AD2d 506, 508 [1988]; *Miller v Student Assn., SUNY at Albany*, 75 AD2d 843 [1980]). *Matter of Motor Haulage Co. [International Bhd. of Teamsters]*, 298 NY 208 [1948]).

considered by the court where a timely motion was made on nearly identical grounds” (*Sikorjak v City of New York*, 168 AD3d 778, 780 [2019]; *see Sheng Hai Tong v K & K 7619, Inc.*, 144 AD3d 887, 890 [2016]; *Wernicki v Knipper*, 119 AD3d 775, 776 [2014]; *Homeland Ins. Co. of N.Y. v National Grange Mut. Ins. Co.*, 84 AD3d 737, 738 [2011]; *Grande v Peteroy*, 39 AD3d 590, 592 [2007]). In such circumstances, the issues raised by the untimely motion are already properly before the court and, thus, the nearly identical nature of the grounds may provide the requisite good cause to review the merits of the untimely motion (*see Wernicki*, 119 AD3d at 776–777; CPLR 3212[a]). “Notably, a court, in deciding the timely motion, may search the record and award summary judgment to a nonmoving party” (*Homeland Ins. Co. of N.Y.*, 84 AD3d at 738–739; *see* CPLR 3212[b]). Here, the Condominium Board’s motion was made on nearly identical grounds as the timely cross motion of co-defendant Hatzel, which also argues that it is not a proper Labor Law defendant (*see Derrick v North Star Orthopedics, PLLC*, 121 AD3d 741, 743 [2014]; *Wernicki*, 119 AD3d at 776–777; *Giambona v Hines*, 104 AD3d 807 [2013]). As such, the court will consider the Condominium Board’s motion.

Turning to the merits, the court finds that the Condominium Board has met its burden in demonstrating prima facie that it is entitled to summary judgment dismissing plaintiffs’ Labor Law §§ 200, 240 (1) and 241 (6), and common-law negligence claims.

In support of its motion, the Condominium Board refers to the deposition testimony of Andrew Conrad. Conrad testified that, on the date of the accident, he was employed by Comfort, which was a real estate investment company which acted as an asset manager for the property at 355/371 Fifth Avenue (a/k/a 16 East 35th Street) for The New York Resource Center Condominium. On the date of the accident, the building was a commercial condominium with its six units owned by four separate entities, CUNY, Oxford University Press, The New York Public Library and CPG. According to Conrad,

CPG, the title holder, which is a Delaware LLC, is a “subsidiary” of Church Pension Group. Presumably he means the LLC (CPG) is wholly owned by Church Pension Group, which is a Delaware Corporation. Conrad claimed that the construction/renovation work at issue was specifically taking place in the fourth floor space owned by CPG, and that the Board of Managers and Comfort did not have any involvement with the project, and did not hire any of the contractors. Rather, Conrad stated that Church Pension Group as the sole owner of CPG, hired Cauldwell, plaintiffs’ employer, as the construction manager/general contractor to supervise the project. Since the work took place in CPG’s space, and the Condominium Board had no involvement with the project, the Condominium Board argues that plaintiffs’ action should be dismissed as against it.

Courts have held that condominium boards of managers and/or homeowners’ associations are proper Labor Law defendants under circumstances where the injury-producing work is being performed in an area that is a common element of the condominium (*see Cañas v Harbour at Blue Point Home Owners Ass’n, Inc.*, 99 AD3d 962, 963 [2012] [homeowners association of the condominium held liable under Labor Law § 240 (1) where plaintiff was injured while painting exterior of building, a common area]; *see also Jerdonek v 41 W. 72 LLC*, 143 AD3d 43 [2016] [plaintiff injured while working in condominium building boiler room, a designated common area]). However, in these cases, the condominium board had hired the contractor to perform work on common elements of the building, such as pointing a facade, and as such, was the “owner” for purposes of the Labor Law.

Here, the court finds that the CPG defendants are the “owner” for purposes of the plaintiffs’ Labor Law claims, as the owner of the condominium units and the party who contracted for the work with plaintiff’s employer. Thus, the Condominium Board has made a prima facie showing, as a matter of law, both that they were not the “owner” and

that they did not supervise or control plaintiffs' work. As this is not a premises condition claim, but an accident which arose from the means and methods of the plaintiff's work, with regard to plaintiff's Labor Law § 200 and common law negligence claims, liability cannot be imposed unless it is shown that the owner exercised supervision and control over the work.

In one case on point, where a condominium unit owner hired a contractor, whose employee was injured while performing his work, the court found the condominium should be dismissed from the action, as "the Condominium defendants were not entities which "ha[d] an interest in the property and who fulfilled the role of owner by contracting to have work performed for [their] benefit. . . . [The owner] is the party who, as a practical matter, has the right to hire or fire subcontractors and to insist that proper safety practices are followed . . . The Condominium defendants did not determine which contractors to hire, and were not in a position to control the renovation work or to insist that proper safety practices were followed (*Guryev v Tomchinsky*, 87 AD3d 612, 614 [2d Dept 2011]) [citations omitted].

Admittedly, the plaintiffs' work involved removing the door frame to the fourth floor stairwell, and CPG owned the space on one side of the door, while the other side of the doorway was the stairwell and was a common element shared by the unit owners of the condominium building, and while it is undisputed that the live wires which the plaintiffs came into contact with were connected to the circuitry that supplied power to the lights in the stairwell, under these circumstances, the plaintiffs' are not entitled to have two "owners" to sue. The general contractor hired by the CPG defendants and the electrical contractor hired by the general contractor were responsible for turning off the electricity where plaintiffs were working at the time of the accident. It is more usual than

not that the electricity in a stairwell of a thirteen-story commercial building is on a different circuit than the interior of an office.

In conclusion, the Condominium Board has made a prima facie case for dismissal, as it has met its burden of proof. The motion seeking summary judgment dismissing plaintiffs' complaint and any cross claims against The Board of Managers and Comfort is granted.

Plaintiffs' Labor Law § 240 (1) Claim

CPG and Church Pension Group (the "CPG defendants") cross-move for summary judgment dismissing, among other claims, plaintiffs' Labor Law § 240 (1) cause of action. In support of their cross motion, defendants argue that neither of the plaintiffs' injuries arose out of the application of the force of gravity. Instead, defendants contend that the plaintiffs were either standing at ground level at the time of the incident, or cannot remember whether they fell from an elevated height. In this regard, defendants note that Scalisi testified that he was standing at ground level next to Lopiccolo when he felt an electric shock (Scalisi tr at 47,147). Additionally, while Lopiccolo recalled he was standing on the ladder attempting to snip a bx cable when he initially felt the shock, he could not remember how he ended up on the floor, lying on his back (Lopiccolo tr at 85). Scalisi also testified that he did not know if Lopiccolo had fallen off of the ladder or if he stepped down, and that he just remembered finding him pinned against the wall (Scalisi tr at 184).

Defendants additionally point to the deposition testimony of Phil Giegengack, Cauldwell's project manager, who claimed he witnessed the incident. Giegengack testified that he was about 15 feet away from where the plaintiffs were working, and that he saw Lopiccolo standing on the ladder while pulling on the exit sign. It was at that point that Giegengack claimed he heard a loud sound and observed a shower of sparks on

the other side of the wall (the stairwell side of the wall) (Giegengack tr at 29). He saw the bx cable connected to the sign. Giegengack further stated that when he looked at Lopiccolo, he saw no indication that he had received an electric shock (*id.* at 37). He claimed that he then saw Lopiccolo walk down the ladder within 15 to 20 seconds after seeing the sparks (*id.* at 39). According to Giegengack, the ladder never slipped, tipped or fell (*id.* at 40). Based upon the forgoing, defendants contend that since Lopiccolo did not fall from the ladder, and Scalisi was not working at a height nor did an object fall from a height on him, neither plaintiff is entitled to the protections offered by Labor Law § 240 (1). Stated differently, defendants argue that the plaintiffs' accident does not fall within the ambit of Labor Law § 240 (1) because they were not injured as a result of a gravity-related incident.

In opposition, plaintiffs argue that issues of fact exist as to whether defendants' failure to properly secure the ladder constitutes a violation of Labor Law § 240 (1). Plaintiffs contend that the ladder was not properly secured and that the inconsistent versions of how the accident occurred raise issues of fact, thereby precluding summary judgment. In this regard, plaintiffs point out that Giegengack's version of the incident, in which he claims that Lopiccolo walked down the ladder, which he also claims neither tipped, slipped nor fell, contradicts Scalisi's testimony that the ladder which Lopiccolo was standing on at the time they were electrocuted, hit him in his chest and knocked him into the adjacent wall (Scalisi tr at 56-57, 184). It also conflicts with Scalisi's testimony that after he felt the shock, he turned and saw Lopiccolo pinned against the wall, halfway off the ladder and near a slop sink (*id.* at 184). Plaintiffs further point to Lopiccolo's testimony that he recalled waking up on the floor, lying on his back.

"The purpose of Labor Law § 240 (1) is to protect workers from elevation-related risks" (*Reinoso v Ornstein Layton Mgmt., Inc.*, 19 AD3d 678,678 [2005]). Labor Law

§ 240 (1) protects workers against hazards “related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured.” (*Rocovich v Consol. Edison Co.*, 78 NY2d 509, 514 [1991]). For a cause of action based on Labor Law § 240 (1), “the single decisive question is whether plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential.” (*Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 603 [2009]; *Wilinski v 334 East 92nd Housing Development Fund*, 18 NY 3d 1 [2011]).

Here, the court finds that, at the very least, there are triable issues of fact as to the manner in which the accident occurred and whether the ladder moved, shifted or otherwise failed to provide proper protection to the plaintiffs (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426 [2015], rearg. denied 25 NY3d 1211 [2015]). Indeed, where credible evidence reveals differing versions of the accident, one under which defendants would be liable and another under which they would not, courts have held that questions of fact existed, making summary judgment inappropriate (*see Santiago v Fred-Doug 117, L.L.C.*, 68 AD3d 555 [2009]; *see also Ellerbe v Port Auth. of New York & New Jersey*, 91 AD3d 441, 442 [2012] [summary judgment motion properly denied given triable issue as to cause of accident, where plaintiff alleged ladder had “reared back” but other employee testified that plaintiff lost his footing]; *Buckley v J.A. Jones/GMO*, 38 AD3d 461 [2007] [plaintiff’s testimony that ladder kicked out from under him raised triable issue as to whether ladder malfunctioned or whether plaintiff simply lost his footing while on secured, non-defective ladder]). Indeed, on this record, defendants have failed to

establish their entitlement to judgment as a matter of law dismissing plaintiffs' Labor Law § 240 (1) claim, especially in light of the evidence that the subject ladder may have moved and/or shifted when the plaintiffs received the electric shocks (*see Nazario v 222 Broadway, LLC*, 28 NY3d 1054 [2016] [where plaintiff fell from ladder after receiving electrical shock, court held questions of fact as to whether ladder failed to provide proper protection and whether plaintiff should have been provided with additional safety devices precluded summary judgment on section 240 (1) claim]; *Cutaia v Bd. of Managers of 160/170 Varick St. Condo.*, ___AD3d___, 2019 WL 1938689, at *2 [2019] [plaintiff laborer granted summary judgment under Labor Law § 240 (1) claim where court found that the unsecured ladder provided, which was not fully open and locked, failed to protect plaintiff from falling after receiving electrical shock]; *Vukovich v 1345 Fee, LLC*, 61 AD3d 533 [2009] [plaintiff who fell off unsecured A-frame ladder after receiving electrical shock was entitled to summary judgment under Labor Law § 240 (1) even though he had no recollection of his fall; court held ladder was inadequate to prevent him from falling after being shocked]; *see also Wolfe v Wayne-Dalton Corp.*, 133 AD3d 1281, 1283 [2015] [triable issue of fact existed as to whether plaintiff fell because the ladder did not afford him proper protection]).

Additionally, the court notes that the alleged hazard posed to Scalisi (being struck by the ladder and knocked into a wall) was "the direct consequence of the application of the force of gravity" to the ladder and, thus, falls within the ambit of Labor Law § 240 (1) (*see Runner v New York Stock Exch., Inc.*, 13 NY3d at 604; *Passantino v Made Realty Corp.*, 121 AD3d 957, 958 [2014] [Labor Law § 240 (1) applicable where plaintiff, who was standing at base of an unsecured extension ladder, was injured when his coworker and the ladder on which he was standing kicked out and fell]; *Salvagno v J.P. Spano & Co., Inc.*, 67 AD3d 986, 987 [2009]; *McCallister v 200 Park, L.P.*, 92 AD3d 927, 928

[2012] [plaintiff's injury was result of an elevation differential within the scope of Labor Law § 240 (1) where scaffold he was moving at ground level fell on him and pinned him up against the wall]; *see also Torres v Perry St. Dev. Corp.*, 104 AD3d 672, 675 [2013]). However, as noted above, issues of fact as to whether the ladder in fact moved or shifted, as well as questions as to the distance of its descent, the combined weight of the device and Lopiccicolo, who was standing on it at the time, and the force it was able to generate all preclude summary judgment dismissing plaintiffs' Labor Law § 240 (1) claim (*see Wilinski*, 18 NY3d at 10; *McCallister*, 92 AD3d at 928-929). Accordingly, that branch of defendants' cross motion seeking summary judgment dismissing plaintiffs' Labor Law § 240 (1) claim is denied.

Plaintiffs' Labor Law § 241 (6) Claim

Plaintiffs seek partial summary judgment as to liability on their Labor Law § 241 (6) claim against Church Pension Group, CPG and Hatzel. Church Pension Group and CPG (defendants) oppose plaintiffs' motion, and cross-move for summary judgment dismissing said claim as against them. For the reasons discussed above, plaintiffs' motion is denied as to Hatzel as it is not a proper Labor Law defendant. Plaintiffs' motion shall be addressed as it pertains to CPG and Church Pension Group.

Labor Law § 241 (6) imposes a non-delegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers without regard to direction and control (*see Romero v J & S Simcha, Inc.*, 39 AD3d 838 [2007]). In order to prevail under this section of the Labor Law, plaintiffs must establish that specific safety rules and regulations of the Industrial Code promulgated by the Commissioner of the Department of Labor were violated (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]; *Ares v State of New York*, 80 NY2d 959 [1992]). The rule or regulation alleged to have been breached must be a specific, positive command and be

applicable to the facts of the case (*see Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 619 [2008]; *Jicheng Liu v Sanford Tower Condominium, Inc.*, 35 AD3d 378, 379 [2006]).

Here, in their bill of particulars, the plaintiffs allege that defendants violated Industrial Code 12 NYCRR 23-1.2 (c), 23-1.5 (a), (b), 23-1.7, 23-1.8, 23-1.13, 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-1.22, 23-1.30 and 23-2.1. In support of their cross motion, defendants argue that all of the cited Industrial Code sections are either not sufficiently specific to support a claim or do not apply to the facts herein. In opposition to defendants' cross motion, and in support of their own motion, the plaintiffs only rely upon section 23-1.13 (b) (4) in support of their Labor Law § 241 (6) cause of action, and do not address any of the other above-referenced Industrial Code provisions. As such, the court will only consider section 23-1.13 (b) (4) as a predicate for plaintiffs' Labor Law § 241 (6) claim, and finds that the plaintiffs have abandoned all of the other Industrial Code sections as predicates for liability under this claim (*see Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 530-531 [2013]; *see also Cardenas v One State St., LLC*, 68 AD3d 436, 438 [2009]).

Industrial Code section 23-1.13 (b) (4), which pertains to electrical hazards, provides, in pertinent part, as follows:

4) Protection of employees. No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means.

This code section, which is clear and specific in its command that the worker not be permitted to come into contact with the circuit without it being de-energized, has been found to be sufficiently specific to support a Labor Law § 241 (6) claim (*see Hernandez v*

Ten Ten Co., 31 AD3d 333 [2006]; *Bardouille v Structure - one, Inc.*, 282 AD2d 635 [2001]; *Lorefice v Reckson Operating Partnership, L.P.*, 269 AD2d 572 [2000]; *Adams v Owens-Corning Fiberglass Corp.*, 260 AD2d 877 [1999]; *Snowden v New York City Transit Authority*, 248 AD2d 235 [1998]).

In support of their motion, the plaintiffs point to record evidence establishing that they were both electrocuted while in the process of working on one of the doors/frames, in close proximity to an energized electrical bx cable/wire in the adjacent area of the fourth floor stairwell landing, and that they were not provided with any insulated gloves or other protection (*see DelRosario v United Nations Fed. Credit Union*, 104 AD3d 515, 516 [2013]). Plaintiffs have also demonstrated that such violation was a proximate cause of their injuries (*see Harris v Arnell Constr. Corp.*, 47 AD3d 768, 768 [2008]).

In opposition, defendants contend that issues of fact as to the plaintiffs' comparative negligence preclude the granting of summary judgment in their favor. Defendants argue that the plaintiffs failed to properly take steps to ascertain that the power had in fact been turned off in the area in which they were working. In this regard, defendants refer to Scalisi's deposition testimony wherein he acknowledged that, on the date of the incident, the area in which he was working was lit, but that he did not recall whether that raised any concerns as to whether the area might still be energized (Scalisi tr at 161). Defendants also note that Scalisi testified that even though Morizio, Hatzel's employee, told him that he was going to "kill the power," on the fourth floor, Scalisi admitted that he did not actually see him shut it off, and that he never did anything to confirm that the area was in fact de-energized (*id.* at 92, 127). Additionally, defendants point out that Lopiccolo also admitted during his deposition that he did not make any efforts on his own to determine whether the wires in the junction box were live prior to trying to remove it (Lopiccolo tr at 89).

The court finds that the plaintiffs have made a prima facie showing that the CPG defendants violated section 23-1.13 (b) (4), and that such violation was a proximate cause of their injuries. In opposition, the defendants have failed to demonstrate the inapplicability of, or their compliance with, section 23-1.13 (b) (4). Moreover, defendants' contention that an issue of fact as to the plaintiffs' comparative negligence precludes summary judgment in plaintiffs' favor is without merit. In *Rodriguez v City of New York* (31 NY3d 312 [2018]), the Court of Appeals recently addressed the question of "[w]hether a plaintiff is entitled to partial summary judgment on the issue of a defendant's liability, when . . . defendant has arguably raised an issue of fact regarding plaintiff's comparative negligence" (*id.* at 315). The Court determined that the existence of an open question as to a plaintiff's comparative fault did not bar the granting of summary judgment to the plaintiff on the issue of the defendant's liability (*id.* at 315, 323-325). The Court held that a plaintiff moving for summary judgment on the issue of defendant's liability is not required to demonstrate the absence of his or her own comparative fault, and that a plaintiff's comparative fault (if any) relates to the issue of damages, not the defendant's liability (*id.* at 318-321; *see O'Leary v S & A Elec. Contracting Corp.*, 149 AD3d 500, 502 [2017]).

Accordingly, the court finds that the plaintiffs are entitled to judgment as a matter of law on the issue of the CPG defendants' liability under Labor Law § 241 (6) predicated on a violation of 12 NYCRR 23-1.13 (b) (4) (*see O'Leary*, 149 AD3d at 502 [court upheld the trial court's grant of partial summary judgment on a Labor Law § 241 (6) claim where a violation of 12 NYCRR 23-1.13 (b) (4) served as the predicate to liability where the fact that plaintiff was electrically shocked "demonstrated that the circuit was not de-energized, grounded, or guarded by effective insulation"]; *see also Quizhpi v S. Queens Boys & Girls Club, Inc.*, 166 AD3d 683, 685 [2018] [Second

Department, citing *Rodriguez*, granted branch of plaintiff's motion for summary judgment on the issue of liability as to Labor Law § 241(6) claim against defendant, regardless of the existence of issues of fact as to the plaintiff's comparative negligence]; *Rubino v 330 Madison Co., LLC*, 150 AD3d 603 [2017] [plaintiff's motion for partial summary judgment on Labor Law § 241 (6) claim was granted where violations of regulations proximately caused the injuries sustained by plaintiff when a metal part of his safety harness contacted a live electrical wire]). The branch of plaintiffs' motion for partial summary judgment as to liability against CPG and Church Pension Group on their Labor Law § 241 (6) claim, as predicated upon section 23-1.13 (b) (4), is granted. The branch of defendants' cross motion seeking to dismiss plaintiffs' section 241 (6) claim is denied only to the extent that said claim is predicated upon Industrial Code section 23-1.13 (b) (4), and granted insofar as the plaintiffs' claims based upon Industrial Code sections 23-1.2 (c), 23-1.5 (a), (b), 23-1.7, 23-1.8, 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-1.22, 23-1.30 and 23-2.1 have been abandoned.

Plaintiffs' Labor Law § 200/Common-Law Negligence Claims

The CPG defendants seek summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims as against them. "Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Pacheco v Smith*, 128 AD3d 926 [2015]; see *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). "To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have 'authority to exercise supervision and control over the work'" (*Rojas v Schwartz*, 74 AD3d 1046, 1046 [2010], quoting *Gallelo v MARJ Distribs., Inc.*, 50 AD3d 734, 735 [2008]; see *Chowdhury v Rodriguez*, 57 AD3d at 127–128 [2008]). "Where a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from

a dangerous condition on the premises, a [defendant] may be liable under Labor Law § 200 if it ‘either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition’” (*Rojas v Schwartz*, 74 AD3d at 1047, quoting *Ortega v Puccia*, 57 AD3d 54, 61 [2008]).

Here, based upon a review of the record, the court finds that the CPG defendants have made a prima facie showing that it did not supervise or control the plaintiffs’ demolition work, and that it had no actual or constructive notice of the alleged defect (live electrical wire) that caused their accident. The plaintiffs have failed to raise a triable issue of fact establishing otherwise (*Lioce v Theatre Row Studios*, 7 AD3d 493, 493–94 [2004]). Accordingly, that branch of defendants’ cross motion seeking to dismiss plaintiffs’ Labor Law § 200 and common-law negligence claims is granted.

Conclusion

For the reasons stated above, plaintiffs’ motion for partial summary judgment on the issue of liability on their Labor Law § 241 (6) cause of action, as based upon NYCRR 23-1.13 (b) (4), is granted as against defendants CPG 34th Street and Church Pension Group. Whether plaintiffs, or either of them, were comparatively at fault for the happening of his accident, shall be determined by the finder of the facts at trial. The branch of plaintiffs’ motion seeking partial summary judgment on their Labor Law § 241(6) claim as against Hatzel is denied.

The branch of the CPG defendants’ cross motion seeking summary judgment dismissing plaintiffs’ Labor Law § 240 (1) claim is denied. The branch of the CPG defendants’ cross motion seeking to dismiss plaintiffs’ Labor Law § 200 and common-law negligence claims is granted. The branch of the CPG defendants’ cross motion seeking to dismiss plaintiffs’ Labor Law § 241 (6) claim is denied to the extent that said claim is predicated upon Industrial Code section 23-1.13 (b) (4), and granted insofar as said claim is

based upon Industrial Code sections 23-1.2 (c), 23-1.5 (a), (b), 23-1.7, 23-1.8, 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-1.22, 23-1.30 and 23-2.1.

Defendant Hatzel's cross motion for summary judgment dismissing plaintiffs' Labor Law §§ 240 (1) and 241 (6) claims on the ground it is not a proper Labor Law defendant is granted. The remainder of Hatzel's cross motion, which seeks to dismiss plaintiffs' Labor Law § 200/common-law negligence claims, as well as all cross-claims asserted against it, is denied.

The motion by the Board of Managers and Comfort for summary judgment dismissing plaintiffs' complaint and any cross claims as against them is granted. This dismissal renders their second and third Third-Party actions against plaintiffs' employer academic, and they are dismissed as well. As the CPG defendants previously discontinued their Third-Party action against the plaintiffs' employer, there are no longer any pending Third-Party actions in this matter.

The foregoing constitutes the decision and order of the court.

E N T E R,



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**