

**Cornejo v Freeman Expositions, Inc.**

2020 NY Slip Op 30579(U)

February 27, 2020

Supreme Court, New York County

Docket Number: 152608/2014

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 35EFM

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RONALD CORNEJO, JULISSA CORNEJO,

Plaintiff,

- v -

FREEMAN EXPOSITIONS, INC., GEORGE LITTLE  
MANAGEMENT, LLC, FB INTERNATIONAL, INC.

Defendant.

INDEX NO. 152608/2014

MOTION DATE 01/17/2020,  
01/17/2020,  
01/17/2020

MOTION SEQ. NO. 001 002 003

**DECISION + ORDER ON  
MOTION**

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HON. CAROL R. EDMEAD:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 194, 196, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 275, 279, 288, 289, 292, 297, 298, 299, 300, 315, 316

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 142, 195, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 273, 276, 278, 280, 290, 293, 294, 295, 296, 301, 302, 303, 304, 317, 318

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 274, 277, 281, 282, 283, 284, 285, 286, 287, 291, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 319, 320

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is

ORDERED that the branch of Defendant George Little Management, LLC’s motion for summary judgment (Motion Seq. 001) seeking dismissal of the complaint and all crossclaims as against it is granted, and he branch of the motion that seeks summary judgment regarding its crossclaim against Defendant FB International, Inc. is denied; and it is further

ORDERED that the branch of Defendant Freeman Expositions, Inc.’s motion for summary judgment (Motion Seq. 002) seeking dismissal of the complaint and all crossclaims as against it is granted, and the branch of the motion that seeks summary judgment regarding its crossclaim against FB International, Inc. is denied; and it is further

ORDERED that the branch of Defendant FB International, Inc.’s motion for summary judgment (Motion Seq. 003) seeking dismissal of the complaint as against it is denied, and the branch of the motion that seeks dismissal of Defendant George Little Management, LLC’s crossclaim against it is granted; and it is further

ORDERED that Plaintiffs’ cross-motion for partial summary judgment against all Defendants is denied in its entirety; and it is further

ORDERED that the Clerk of the Court is respectfully requested to enter judgment accordingly and the remaining claims are severed and continue against Defendant FB International, Inc.; and it is further

ORDERED that counsel for Plaintiffs is to serve a copy of this decision, along with notice of entry, on all parties within 15 days of entry.

NON-FINAL DISPOSITION

**MEMORANDUM DECISION**

In this Labor Law action, defendant George Little Management, LLC (“GLM”) moves for summary judgment dismissing the Complaint and all crossclaims against it (Motion Seq. 001). Defendants Freeman Expositions, Inc. (“Freeman”) and FB International, LLC (“FB”) separately move for summary judgment dismissing the Complaint and all crossclaims against them (Motion Seqs. 002, 003). Plaintiffs Ronald J. Cornejo (“Cornejo”) and Julissa M. Cornejo (collectively, “Plaintiffs”) oppose all motions and cross-move for partial summary judgment on the issue of liability under Labor Law ¶ 240(1) against all Defendants. Defendant GLM also moves for summary judgment on its crossclaim of indemnification against FB.

**BACKGROUND FACTS**

The New York Convention Center Development Corp. (“NYCCDC”) is the owner of the Jacob K. Javits Convention Center (“Javits Center”) in Manhattan. Plaintiff Ronald Cornejo is a

union carpenter employed by the New York Convention Center Operating Corp. (“NYCCOC”), which is the employer and exclusive source for carpenter and teamster labor for shows at the Javits Center. Cornejo was assigned to work as a carpenter at a business trade show called NY NOW (referred to herein as the “Gift Show”), which took place at the Javits Center from February 2-6, 2014 (NYSCEF doc No. 175, ¶ 3).

Defendant GLM is the organizer, owner, and promoter of the Gift Show and held the Gift Show at the Javits Center pursuant to an agreement with NYCOOC that permitted GLM to utilize multiple levels of exhibit hall space at the Javits Center where thousands of exhibitors would display their goods at exhibit booths (*id.* at ¶ 7).

Defendant Freeman was hired by GLM to assist exhibitors in connection with the set-up of their exhibit booths at the Gift Show. Union carpenters employed by NYCOOOC would perform the construction work under the supervision of Freeman employees (*id.* at ¶ 9-10). However, exhibitors at the show also had the option of hiring a different “Exhibitor Appointed Contractor” (“EAC”) with GLM’s approval.

Defendant FB served two different functions at the Gift Show. One was as an EAC, whereby it constructed custom booths for multiple exhibitors. It also served as the owner and supplier of goods and materials used at other exhibitors’ booths that were set up by Freeman and various other EACs (*id.* at ¶ 11).

Cornejo testified that on February 7, 2014, after the Gift Show concluded, he arrived at the Javits Center for work and was assigned by Freeman to disassemble a trade show booth. The booth in question was known as the “Palo Alto” booth. It contained FB materials, but FB did not serve as the EAC; it was constructed by Freeman (*id.* at ¶ 39-40). Cornejo alleges that although

he was assigned to a Freeman-operated booth, Freeman employees were not in the vicinity that day and he was instead being supervised by FB representatives (*id.* at ¶ 41).

That afternoon, Cornejo returned from his lunch break and resumed his work of removing materials from the booth and putting them back into FB packaging. Cornejo used a six-foot ladder provided by Freeman that was different from the one he used earlier that morning; Cornejo testified that he examined the ladder and thought it looked to be in working order (*id.* at ¶ 45). Cornejo was standing on the third or fourth step of the ladder disassembling pillars and cross beams at the top of the booth when he alleges that the ladder moved as he was passing a beam to another carpenter on the ground, causing him to lose his balance and fall (*id.* at ¶ 46-47). Two accident reports filed shortly thereafter dispute this account, noting that Cornejo told a supervisor and public safety officer that he lost his balance and slipped while coming down the ladder, and twisted his foot (*id.* at ¶¶ 49-50). Cornejo disavowed the contents of both reports in his deposition, attesting that he fell and did not jump from the ladder, and that he did not speak to any public safety or security officer after the accident (*id.* at ¶ 52).

Plaintiffs commenced this action against GLM, Freeman, and FB, in which Cornejo asserts common law negligence claims and seeks damages under New York Labor Law §§ 200, 240, and 241. His wife has a derivative claim. Defendants have all filed motions for summary judgment pursuant to CPLR 3212 dismissing the complaint and all crossclaims as against them. FB crossclaims against both GLM and Freeman for common-law indemnification. Additionally, GLM crossclaims against FB for a failure to procure contractually obligated insurance and indemnification. Defendants' motions were all timely filed in July and August 2019, in accordance with the Court's extended filing deadline of August 26, 2019.

Plaintiffs have also filed a cross-motion for partial summary judgment on the issue of liability under Labor Law § 240(1) against all Defendants. The cross-motion, first filed September 27, 2019 under Motion Seq. 001, was then filed separately under each Motion Sequence. Defendants all argue that the cross-motion must be denied as it is untimely and procedurally improper. Defendants contend that the cross-motion also lacks merits on the law, as Plaintiffs have not established entitlement to summary judgment given the conflicting narratives regarding the circumstances of his accident.

### DISCUSSION

Summary judgment is granted when “the proponent makes ‘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,’ and the opponent fails to rebut that showing” (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also, *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Here, since each side seeks summary judgment, each side bears the burden of making a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Bellinson Law, LLC v Iannucci*, 35 Misc

3d 1217(A) (Sup. Ct., N.Y. County 2012], aff'd, 102 AD3d 563 [1<sup>st</sup> Dept 2013], *citing Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (*Alvarez, supra, Zuckerman v City of New York*, 49 N.Y.2d 557 [1980] and *Santiago v Filstein*, 35 AD3d 184 [1st Dept 2006]).

The function of a court in reviewing a motion for summary judgment “is issue finding, not issue determination, and if any genuine issue of material fact is found to exist, summary judgment must be denied” (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, [1<sup>st</sup> Dept 2012]). Where “credibility determinations are required, summary judgment must be denied” (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, [1<sup>st</sup> Dept 2012]). Thus, on a motion for summary judgment, the court is not to determine which party presents the more credible argument, but whether there exists a factual issue, or if arguably there is a genuine issue of fact (*DeSario v SL Green Management LLC*, 105 AD3d 421 [1<sup>st</sup> Dept 2013] (holding given the conflicting deposition testimony as to what was said and to whom, issues of credibility should be resolved at trial)).

### ***Labor Law § 200***

Cornejo claims negligence against defendants under both the common law and Labor Law § 200. Labor Law § 200 “is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work” (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, “liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work” (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). “General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed” (*id.*).

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor “is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice” (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; *see also Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]). In the dangerous-condition context, “whether [a defendant] controlled or directed the manner of plaintiff’s work is irrelevant to the Labor Law § 200 and common-law negligence claims . . .” (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

***Labor Law § 240(1)***

Labor Law § 240 (1) provides, in relevant part:

“All contractors and owners and their agents ... 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 Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]). A statutory violation is present where an owner or general contractor fails to provide a worker engaged in section 240 activity with "adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Where a violation has proximately caused a plaintiff's injuries, owners and general contractors are absolutely liable "even if they do not have a continuing duty to supervise the use of safety equipment" (*Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 [1st Dept 2011]).

***Labor Law § 241(6)***

Labor Law § 241 (6) provides, in relevant part:

"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."

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor Law § 241 [6]). While this duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241 (6), plaintiffs must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that “[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace” (*St. Louis*, 16 NY3d at 416).

Cornejo’s Labor Law claims against each Defendant are discussed in turn. While Plaintiffs allege violations of each of the three Labor Law provisions, Defendants do not make discrete arguments related to each provision in their moving papers supporting their respective summary judgment motions. Defendants instead argue that they are not proper Labor Law defendants and therefore not subject to liability under any of the relevant provisions.

### ***GLM***

GLM argues that it is not a proper Labor Law defendant as it is not an owner nor a contractor. Plaintiffs, however, argue that GLM is an owner under the Labor Law as it was a lessee of the Javits Center pursuant to the lease agreement for the operation of the Gift Show. Plaintiffs are correct that the Labor Law statutes may also apply to a lessee. However, such situations are limited to those where the lessee had the right to control the work site (*see Saaverda v East Fordham Rd. Real Estate Corp.*, 233 AD2d 125 [1<sup>st</sup> Dept 1996]). The issue of whether the lessee had the right to control the work site may be proved by a variety of means, such as contractual or statutory provisions granting such a right (*see, e.g., Deloach v City of New York*, 258 AD2d 384, 385 [1<sup>st</sup> Dept 1999]). The key criterion for determining whether lessees can be deemed owners for purposes of Labor Law liability is “the right or authority to control the work site, even if the lessee did not hire the general contractor” (*Zaher v Shopwell, Inc.*, 18 AD3d 339, 340 [1<sup>st</sup> Dept 2005]).

Here, the deposition testimony and documentary evidence indicate that GLM had no authority over Cornejo or any other worker and that Freeman, not GLM, was in control of safety and the manner in which work was performed. There is no evidence that GLM supervised or controlled Cornejo's work. Cornejo testified in deposition that he had no interaction with anyone working for GLM and stated that he did not even know the identity of the Gift Show organizer (NYSCEF doc No. 76 at 41-48). Nothing in the license agreement itself authorized GLM to supervise the workers or charged it with overseeing safety (NYSCEF doc No. 93 at 18). This case stands in contrast to those such as *Bart v Universal Pictures*, (277 AD2d 4, 5-6 [1<sup>st</sup> Dept 2000]), where the defendant, a permittee, was deemed an owner because it "was contractually charged with the right and the obligation to control the work site, and the responsibility of ensuring that the work contemplated by the permit was performed in a safe and proper manner." Under the License Agreement, GLM was prohibited from performing or supervising installation and dismantling of booths. NYCCOC allowed only contractors and exhibitors, not show organizers like GLM, to supervise its carpenter work force. (NYSCEF doc No. 83 at 15).

As Cornejo did not testify that his assignments and supervision came from GLM, and the license provisions in the Gift Show license vested GLM with no right or obligation to control the work site or ensure safety, GLM cannot be deemed an owner for the purposes of Labor Law liability. As the trade show organizer, GLM does not fall under the Labor Law sections which impose strict liability on the owner and general contractor. It is therefore entitled to dismissal from this action.

Regarding Cornejo's common law claims against GLM, "to maintain a negligence cause of action, plaintiff must be able to prove the existence of a duty, breach and proximate cause. One who has not performed or is not responsible for any construction work at an accident site

owes no duty to a plaintiff injured at the site." (*Kenney v City of New York*, 30 AD3d 261, 262 [1st Dep't 2006]). As Plaintiffs have not introduced any evidence suggesting that the alleged negligence here is attributable to GLM, and GLM was not involved with the dismantling of materials, there can be no existence of a duty on GLM's part to Cornejo which would lead to liability. Cornejo's common law negligence claims thus must be dismissed.

GLM is also entitled to dismissal of FB's common law crossclaims for indemnification. "[T]o establish a claim for common law indemnification, the one seeking indemnity must prove both that it was not guilty of negligence beyond the statutory liability and must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident." (*Correia v Professional Data Mgmt.*, 259 AD2d 60, 65 [1st Dept 1999]). As GLM has established a complete lack of negligence on its part, FB's crossclaims must be summarily dismissed. GLM also seeks summary judgment in its crossclaim against FB for a failure to procure insurance.<sup>1</sup> This application is denied for reasons that are discussed further below.

### ***Freeman***

Freeman argues it is entitled to dismissal of the complaint because as Freeman's special employee, Cornejo's admitted receipt of worker's compensation benefits is his exclusive remedy. Freeman also contends it is not a proper Labor Law defendant and that Cornejo cannot establish a genuine issue of negligence. A special employee is one who is transferred for a limited duration to the service of another (*Thompson v Grumman Aerospace Corp.*, 78 AD2d 553 [2d Dep't 1991]). Under the exclusive remedy provision of the Worker's Compensation Law, an employee is barred from bringing a negligence action against the special employer, even though the general employer is responsible for paychecks and benefits (*id.*). Personal injury claims by

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<sup>1</sup> This application for relief is not included in GLM's Notice of Motion but is discussed in GLM's moving papers.  
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such special employees against special employers are barred by the worker's compensation exclusive remedy as a matter of law. (*See Grilikhes v Int'l Tile & Stone Show Expos*, 90 AD3d 480 [1st Dept 2011]). Cornejo has not contested that Freeman defrayed his pay and the cost of his worker's compensation coverage (NYSCEF doc No. 207 at 26-32).

It is undisputed and acknowledged by all parties that at the time of his accident, Cornejo was temporarily assigned by his employer NYCCOC to work on behalf of Freeman disassembling the Gift Show. However, Cornejo disputes that he was working under Freeman's exclusive control and supervision at the time of the accident. Cornejo testified he was not being supervised by Freeman at the time of the accident, and that Freeman solely told him where to go report to work (NYSCEF doc No. 207 at 57-60). Plaintiffs argue that that employees of FB were on site during the accident, and their supervision negates Freeman's position as Cornejo's special employer. Freeman disputes this allegation, but notes that, even assuming FB's employees were on site, supervision by a third party is irrelevant to special employment status, so long as the supervision does not negate the transfer of control from NYCCOC to Freeman, nor does it transfer the assumption by Freeman for Cornejo's work and its outcome (*see Brown v. Bruclcner Plaza Assoc.*, 295 AD2d 207,744 [1<sup>st</sup> Dept 2002]; *Brunetti v. City of New York*, 286 AD2d 253 [1st Dept 2001]).

Here, the alleged involvement of FB employees is insufficient to override Freeman's role as Cornejo's special employer. Cornejo stated that he was working for Freeman, that Freeman gave him all of his work assignments on the date of the accident, that Freeman supplied him with a ladder, and that he was injured performing work that Freeman was contractually required to accomplish. There is no indication that FB's employees ever assumed responsibility or control from Freeman, particularly as FB was not the EAC of the booth Cornejo was assigned to

disassemble. Cornejo was assigned to, and worked for, Freeman at the time of his accident, and was Freeman's special employee. Accordingly, worker's compensation is Cornejo's exclusive remedy against Freeman, and Freeman is entitled to dismissal of Cornejo's claims. Freeman is also entitled to dismissal of FB's common law and contribution claims under the special employment remedy (*See Ferri v. 63 Madison Assocs., L.P.*, 280 AD2d 419, 420, [1st Dep't 2001]).

The Court writes separately to note that while Freeman is entitled to dismissal due to the special employment defense, it is nevertheless a proper Labor Law defendant and would otherwise be subject to potential liability for the alleged negligence and violations of Labor Law §§ 240(1) and 241(6) involved in Cornejo's accident. While the parties agree that Freeman cannot be considered an owner, Freeman argues it also is not a general contractor as various contractors were hired for the Gift Show and Freeman was only in charge of certain worksites. However, "when the work giving rise to the duty to conform to the requirements of Section 240(1) 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." (*Johnson v City of New York*, 120 AD3d 405, 406 [1st Dept 2014]; *Muriqi v Charmer Indus. Inc.*, 96 AD3d 535, 536 [1st Dept 2012]). It is immaterial that other contractors were involved as the relevant consideration is the fact that GLM delegated to Freeman the ability to hire subcontractors, oversee construction progress, and enforce safety standards for the work that it did oversee (*see Szpakowski v Shelby Realty, LLC*, 48 AD3d 268, 269 [1st Dept 2008]). As Freeman oversaw the booth disassembled by Cornejo and allegedly provided him the ladder involved in the subject accident, it is a proper Labor Law contractor defendant and is entitled to dismissal solely due to its special employment defense.

***FB***

FB argues it is entitled to dismissal from this action as Cornejo was being supervised by Freeman employees and was using a Freeman-owned ladder the day of the accident. FB also argues it is not a proper Labor Law defendant as it was not the owner or general contractor at the show. While FB served as a contractor at certain booths throughout the venue, it is undisputed that Cornejo's accident occurred at a booth in which Freeman served as the contractor and FB's official role was that of a supplier of materials to be used in the booth (NYSCEF doc No. 144, ¶ 8). However, Plaintiffs contest FB's position that it is not a proper Labor Law defendant, arguing it may be a statutory agent. Samir Touzami, an FB operations manager, testified in deposition that one of FB's responsibilities was to supervise "the union guys (and) the labor" (NYSCEF doc No. 154 at 26). Cornejo also testified that FB workers were present the day of the accident and gave instructions to carpenters in Italian, which he did not understand (NYSCEF doc No. 287 at 58-60).

FB disputes this characterization, and has introduced testimony from Maria Astorga, a project manager for FB. Astorga testified that FB's responsibilities were limited to monitoring the materials, and that Freeman was responsible for the booth's construction and subsequent dismantling (NYSCEF doc No. 285 at 29-30, 141). FB also points out that Touzami's testimony does not directly conflict with Astorga's, as he testified elsewhere in deposition that Freeman was the "lead guy" on the project, and that if an FB representative saw a safety issue or some sort of other problem on the site, they would report to Freeman and not speak with the carpenters directly (NYSCEF doc No. 154 at 27-28). FB also argues that the mere presence of FB employees on site the date of the accident is insufficient evidence that FB was acting as a statutory agent, as nothing in the evidentiary record suggests they had the ability to control the

worksite and enforce standards. Plaintiffs themselves even attest that Freeman was in complete control of the worksite and responsible for all safety issues (NYSCEF doc No. 198, ¶ 128).

The Court finds that Plaintiffs have at least raised a question of fact regarding whether FB should be considered a statutory agent under Labor Law §§ 240(1) and 241(6) and thus potentially liable. The First Department has held that a "subcontractor can be deemed an 'agent' under this statute, and be held liable, if to it is delegated the supervision and control either over the specific work area involved or the work which gives rise to the injury" (*Headen v Progressive Painting Corp.*, 160 AD2d 319, 320 [1st Dept 1990]). The fact that two contractors may "both possess concomitant or overlapping authority to supervise" the work does not preclude a finding of statutory agency (*Tuccillo v Bovis Lend Lease, Inc.*, 101 AD3d 625, 628 [1st Dept 2012]). Therefore, even if representatives for Freeman and FB were both present the day of the accident, FB may be deemed a statutory agent if its employees gave instructions to the on-site carpenters regarding the disassembly of the booths.

The conflicting accounts from the parties do not paint a clear picture of who was actually overseeing work the day of Cornejo's accident, and render summary judgment to be an improper remedy for FB at this juncture. Touzami testified that Astroga's testimony regarding the scope of FB's duties was accurate but noted that supervision was a part of the service FB provided at the Gift Show (NSYCEF doc No. 154 at 64, 67). The parties also have not produced a written agreement detailing FB's exact duties in regard to the booths overseen by Freeman, and thus, it would be premature to declare as a matter of law that FB did not take on any responsibility to oversee the construction work. Given that FB served as the contractor on various booths at the Gift Show, it is not unreasonable to assume FB may have provided similar duties at booths in which it was only officially serving as a material supplier.

Therefore, FB has not demonstrated entitlement to dismissal of this action.

***GLM's Cross-Claim against FB***

FB is entitled to dismissal of the branch of GLM's summary judgment motion which seeks summary judgment on its "failure to procure insurance" crossclaim against FB. GLM claims it is entitled to insurance coverage pursuant to an EAC form contract FB entered into for a booth at the Gift Show and was improperly denied coverage when a claim it submitted to FB's carrier was denied (NYSCEF doc No. 119 at 2). However, the booth that is the subject of the contractual agreement referenced by GLM in its papers, known as the "UBI France" booth, is not the "Palo Alto" booth where Cornejo's accident took place. The contractual obligations stem from the agreements entered between FB and GLM for work on the booths where FB served as EAC (NYSCEF doc No. 134). FB therefore cannot be liable as the contracts were limited in scope to those booths only; otherwise, FB would be under an obligation to provide insurance coverage to GLM for any incident that occurred at booths owned by any EAC at the Gift Show.

Additionally, FB performed its obligations under the EAC contract by providing a Certificate of Insurance and naming GLM and NYCCOC as additional insureds under the policy for the UBI France booth (*id.* at ¶ 51). The contract also does not obligate FB to defend and indemnify, and the Additional Insured Endorsement specifically notes that the insurance "will be no broader than which you are required by the contract or agreement to provide for such additional insured" (NYSCEF doc No. 138, Section A). GLM's claim was thus properly denied by FB's carrier as it is undisputed that FB was not the EAC at the booth where Cornejo's accident took place. Therefore, GLM's motion for summary judgment on its insurance procurement against FB is denied and FB is granted dismissal of the claim.

*Plaintiff's Cross-Motion against All Defendants*

Defendants argue Plaintiffs' cross-motion is subject to dismissal as it is improper and untimely. On October 9, 2018, this Court ordered that all motions for summary judgment be filed within 120 days of the filing a Note of Issue, which was already an extension of the Court's original 60-day deadline. The Note of Issue was filed April 26, 2019, which resulted in an August 26, 2019 dispositive motion deadline. Defendants timely filed their motions in July and August, but Plaintiffs did not file their partial summary judgment motion until September 27, more than a month after the extended deadline. While Defendants are correct that the cross-motion is untimely, and Plaintiffs have not provided good cause for why the submission is delayed, the Court may still consider it as it seeks relief on the same issues addressed in Defendants' summary judgment motions. It is well established that a late cross motion for dispositive relief may be entertained when the issues raised are "nearly identical" to those raised by a timely a motion (*Gualpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 419 [1st Dept 2014] [internal quotation marks and citation omitted]).

However, Plaintiffs' cross-motion is insufficient on the merits as Plaintiffs have not established entitlement to summary judgment on the issue of liability under Labor Law § 240(1). Cornejo's version of events is far from undisputed and supported mainly by his own testimony. It is well-settled that where, as here, the plaintiff is the sole identified witness to the accident and there are conflicting accounts, summary judgment on a Labor Law claim is not appropriate because "the salient facts are exclusively within the [plaintiff's] knowledge" (*Manna v. New York City Housing Auth.*, 215 A.D.2d 335, 226 (1st Dep't 1995)). Plaintiffs have not established liability under § 240(1) as there is a question of fact regarding whether Cornejo's loss of balance was the sole proximate cause of his accident. To establish summary judgment, Plaintiffs must

demonstrate that the ladder was defective or inadequate, or that Defendants otherwise failed to provide reasonable protection (*see Nazario v 222 Broadway, LLC*, 8 NY3d 1054 [2016]). As Defendants have introduced a triable question of fact regarding whether Cornejo's injury was caused even in part by a § 240(1) violation, summary judgment is improper as it is unclear whether the statute is implicated (*Biaca-Neto v Boston Road II Housing Development Fund Corp.*, 176 AD3d 1 (1<sup>st</sup> Dept 2019)). Therefore, summary judgment for Plaintiffs must be denied.

### ***Julissa Cornejo's Claims Against All Defendants***

Julissa Cornejo's claims are for loss of her husband's society, companionship and services. Under New York law, a claim for loss of consortium is a derivative action which cannot exist independent of the injured spouse's right to maintain an action for injuries (*Liff v Schildkrout*, 49 NY2d 622 (1980)). Julissa Cornejo's claims are thus dismissed with the exception of the claim against FB.

## **CONCLUSION**

Based on the foregoing, it is hereby

ORDERED that the branch of Defendant George Little Management, LLC's motion for summary judgment (Motion Seq. 001) seeking dismissal of the complaint and all crossclaims as against it is granted, and the branch of the motion that seeks summary judgment regarding its crossclaim against Defendant FB International, Inc. is denied; and it is further

ORDERED that the branch of Defendant Freeman Expositions, Inc.'s motion for summary judgment (Motion Seq. 002) seeking dismissal of the complaint and all crossclaims as against it is granted, and the branch of the motion that seeks summary judgment regarding its crossclaim against FB International, Inc. is denied; and it is further

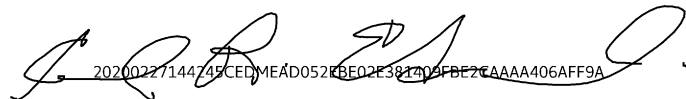
ORDERED that the branch of Defendant FB International, Inc.'s motion for summary judgment (Motion Seq. 003) seeking dismissal of the complaint as against it is denied, and the branch of the motion that seeks dismissal of Defendant George Little Management, LLC's crossclaim against it is granted; and it is further

ORDERED that Plaintiffs' cross-motion for partial summary judgment against all Defendants is denied in its entirety; and it is further

ORDERED that the Clerk of the Court is respectfully requested to enter judgment accordingly and the remaining claims are severed and continue against Defendant FB International, Inc.; and it is further

ORDERED that counsel for Plaintiffs is to serve a copy of this decision, along with notice of entry, on all parties within 15 days of entry.

NON-FINAL DISPOSITION

  
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2/27/2020

DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE