SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER

Acting Supreme Court Justice

TRIAL/IAS PART 33

MAREL DEJESUS VARGAS ROJAS, NASSAU COUNTY

Plaintiff,

Index No.: 609551/18

Motion Seq. No.: 05

-against- Motion Date: 02/07/2020

BARRETT BONACCI & VAN WEELE, P.C., ABOVE ALL EQUITIES, INC., UNIQUE FITNESS CENTER CORP., LS STEEL, INC. and ABOVE ALL STOREFRONTS, INC.,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibit	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant Above All Storefronts, Inc. ("Storefronts") moves, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Second Amended Verified Complaint as against it, and any and all crossclaims and counter claims as against it. Plaintiff opposes the motion.

Plaintiff seeks to recover damages for personal injuries he allegedly sustained on June 26, 2018, at approximately 2:30 p.m., when, in the course of his employment, he fell from an elevated height while working on a construction project at the premises located at 4890 Veterans Memorial Highway, Holbrook, County of Suffolk, State of New York. *See* Defendant Storefronts' Affirmation in Support Exhibits A and C. Plaintiff served a Second Summons and Second Amended Verified Complaint on or about December 10, 2018. *See* Defendant

Storefronts' Affirmation in Support Exhibit A. Defendant Storefronts filed a Verified Answer To Second Amended Verified Complaint And Cross-Claim on or about February 4, 2019. *See* Defendant Storefronts' Affirmation in Support Exhibit B.

In support of the motion, counsel for defendant Storefronts submits, in pertinent part, that, "[p]laintiff has brought suit against a number of defendants asserting both strict liability and negligence causes of action.... Plaintiff alleges each of the defendants 'owned, operated, maintained and/or controlled [the Premises] and its appurtenances and provided and/or served as general contractors and/or manager at [the Premises] and directed and controlled the means, manner and method of all excavation, construction, work, labor and/or services performed thereat.'... At the outset, the Court must note that STOREFRONTS is not the owner or general contractor on this project. Stephen Smith testified that STOREFRONTS was merely one of many contractors that worked on the subject premises at various times during the project. Specifically, the application for the demolition permit made by Stephen Smith on September 14, 2017 lists the property owner as Stephen Smith (Above All Equities, Inc.). Further, STOREFRONTS was listed as a 'contractor' – notably, not a general contractor as Plaintiff alleges – on the application for a demolition permit. In fact, as Mr. Smith testified at several points, there was no 'general contractor' on this particular job. Further, Plaintiff's accident occurred over nine months after this permit was issued and several months after the demolition was completed. Still further and moreover, the only work actually done by STOREFRONTS was installing the glass storefront once the building construction had been completed – several months after the Plaintiff's accident. In sum, there is no indication whatsoever through any of the testimony given or any evidence adduced in this case that STOREFRONTS's (*sic*) work in any way caused plaintiff's

accident or that they (*sic*) were even working on the job at the time of plaintiff's accident." *See* Defendant Storefronts' Affirmation in Support Exhibits A and F.

In further support of the motion, defendant Storefronts submits the transcript from plaintiff's Examination Before Trial ("EBT") testimony. *See* Defendant Storefronts' Affirmation in Support Exhibit E. Counsel for defendant Storefronts asserts that plaintiff testified, in pertinent part, that, "on the day of his accident, he was working for Romco Structural Systems. At the time of his accident, the foundation and the steel vertical girders of the structure had already been erected but the exterior walls of the building had not yet been erected. The Plaintiff was working on the third floor of the structure, installing floor decking. The floor decking (*sic*) already been installed on the first and second floors…. His work was directed by the Romco foreman, Tommy. No one other than Tommy supervised and directed his work at the jobsite…. Plaintiff was pulling a laminate that happened to be the incorrect size from a bulk package, when the accident occurred." *See id*.

Also in support of the motion, defendant Storefronts submits the transcript from the EBT testimony of Stephen Smith ("Smith"), the owner and Vice President of defendant Storefronts. *See* Defendant Storefronts' Affirmation in Support Exhibit F. Counsel for defendant Storefronts asserts that Smith testified, in pertinent part, that, "STOREFRONTS, not surprisingly, is in the business of installing storefronts…. Mr. Smith specifically testified that STOREFRONTS did not act as the contractor as concerns any construction at the property prior to the date of Plaintiff's accident… When questioned regarding a demolition permit applied for on October 3, 2017 by Mr. Smith which named Above All Store Fronts (*sic*) as contractor, Mr. Smith testified that despite anything that might have been noted in the demolition permit, they were merely a subcontractor and their role in the project was to install the glass in the middle…. Mr. Smith is

also the owner and President of co-defendant Above All Equities (hereinafter 'EQUITIES') which is the corporate owner of the subject property which he purchased sometime around 2017. At the time of this purchase, a dilapidated building existed on the property.... Mr. Smith testified multiple times that there was no general contractor on the project. EQUITIES entered into contracts directly with individual subcontractors.... EQUITIES hired LS Steel to perform the steel erection on the project.... EQUITIES paid all of the subcontractors on the project.... He was shown a document marked for identification as Plaintiff's Exhibit 1 entitled Responses and Objections to Plaintiff's Demands for Discovery Inspection and identified the document which was annexed thereto as the Agreement between EQUITIES and LS STEEL for LS STEEL to do the steal work on the project...." *See id*. *See also* Defendant Storefronts' Affirmation in Support Exhibit G.

Also in support of the motion, defendant Storefronts submits the transcript from the EBT testimony of Michael Stanick ("Stanick"), the Vice President of defendant LS Steel Inc. *See* Defendant Storefronts' Affirmation in Support Exhibit H. Counsel for defendant Storefronts asserts that Stanick testified, in pertinent part, that he "is Vice President of LS Steel Incorporated, which is in the business of Structural (*sic*) steel and miscellaneous steel.... LS STEEL, was hired by EQUITIES to do work on the project at issue... They were paid on behalf of EQUITIES... Mr. Stanick was shown the document previously marked for identification as Plaintiff's Exhibit 1 ... and identified the signature of his wife (President of LS STEEL) as representative of LS STEEL on the last page.... After entering into the contract with EQUITIES, LS STEEL in turn, assigned the work or subcontracted the work to Plaintiff's employer, Romco.... Mr. Stanick was shown the document marked for identification as Plaintiff's Exhibit 3 ..., the first page of which is entitled Subcontractor Agreement. The

Agreement was between LS STEEL and Romco for the subject Holbrook Health Club project located at 4880/4890 Veterans Hwy., Holbrook, NY. Mr. Stanick identified the signatures of his wife and the owner of Romco thereon." *See id*. *See also* Defendant Storefronts' Affirmation in Support Exhibits G and I.

Also in support of the motion, defendant Storefronts submits the affidavit of John Cashel ("Cashel"), the Chief Executive Officer of defendant Unique Fitness Center Corp. *See* Defendant Storefronts' Affirmation in Support Exhibit J. Counsel for defendant Storefronts asserts that Cashel confirms, in pertinent part, that "EQUITIES, as Contractor, and LS STEEL, as Subcontractor, entered into an agreement to install a steel deck at the Premises (the 'Subcontractor Agreement'). LS STEEL then subcontracted with Romco, Plaintiff's employer, in connection with installing the steel deck, and under the terms of which Romco expressly agreed, in paragraph 5, to be responsible for 'initiating, maintaining and supervising all safety precautions." *See id*.

Counsel for defendant Storefronts argues, in pertinent part, that, "[l]iability under the Labor Law is expressly limited to owners and contractors, and their agents. It is undisputed that STOREFRONTS was not the owner of the premises or of the project. It is further undisputed that, even assuming *arguendo*, that STOREFRONTS had been the demolition contactor on the project – which it was not – it was clearly not the 'general contractor.' Moreover, such demolition had long since been completed. Further, the work actually done by STOREFRONTS, the installation of the glass storefront, clearly had not even commenced as the steel skeleton of the building was still being constructed at the time of the Plaintiff's accident. Plaintiff's work was not any part of STOREFRONT's (*sic*) work nor was STOREFRONT's (*sic*) work in any way related to Plaintiff's or his employer's work nor indeed with any work being done on the

site at the time of Plaintiff's accident. It is axiomatic that liability for an allegedly 'dangerous condition' on property is generally predicated on ownership, occupancy, control, or a special use of the property. [citations omitted]. If none of these factors are present, liability cannot be imposed. [citation omitted]. In this case, STOREFRONTS was not the owner, possessor, or general contractor charged with premises safety. Because STOREFRONTS was merely another contractor that was at some point involved in the project and was not the general contractor or the owner of an agent of either of these, it owed no duty to Plaintiff under the Labor Law or the Industrial Code. It could not be 'negligent' in failing to provide supervision or control of the work site, as it was merely one of several contractors doing its own work – and not even at the time of Plaintiff's accident."

Counsel for defendant Storefronts adds, in pertinent part, that, "the courts have held that the mere designation of a specific contractor in the building permit is insufficient to raise a triable issue of fact as to whether or not it may be deemed a general contractor in the absence of evidence that (*sic*) contractor named acted as such by, e.g. hiring, firing, supervising and/or paying the subcontractors. [citations omitted]. Clearly, there is no such evidence whatsoever regarding STOREFRONTS in this matter."

Counsel for defendant Storefronts further contends, in pertinent part, that, "[s]imilarly, under the common law, no liability lies absent proof that a defendant created the dangerous condition alleged to have caused a plaintiff's accident or unless the defendant caused, created or has prior actual or constructive notice of the same. [citations omitted]…. The evidence herein shows that STOREFRONTS neither caused, created nor had authority to exercise supervisory control over any unsafe condition related to Plaintiff's accident. Furthermore, there is no evidence that it had prior actual or constructive notice of any such dangerous conditions."

In opposition to the motion, counsel for plaintiff submits, in pertinent part, that, "[d]efendant, STOREFRONTS argues that the Court should dismiss Plaintiff's action as against it contending 'STOREFRONTS is not the owner or general contractor on this project' and accordingly is not liable to Plaintiff via the provisions of the New York State Labor Laws sections 200, 240 and/or 241. Moving Defendant further argues, 'Finally, the courts have held that the mere designation of a specific contractor in the building permit is insufficient to raise a triable issue of fact as to whether or not it may be deemed a general contractor in the absence of evidence that (*sic*) contractor name (*sic*) acted as such by, e.g. hiring, firing, supervising and/or paying the subcontractors.' Defendant, STOREFRONTS' arguments are upended clearly and unambiguously by the evidence discovered herein. The chief and most senior employ (*sic*) of Defendant, STOREFRONTS and (*sic*) namely Smith was the general contractor of the build at the subject premises and had an active role in the ongoing construction on a day-to-day basis as an employee of Defendants, STOREFRONTS and despite this Defendant, STOREFRONTS argues to this Court that it had nothing to (*sic*) with the subject premises on the date of the subject occurrence. Annexed herein as **Exhibit 'A'** is a copy of documents marked as Plaintiff's Exhibit '2' at the examination before trial of Defendant (*sic*), Smith which consist of 4 notarized affidavits submitted to the Town of Islip for the purpose of obtaining a building permit at the subject premises. In all four (4) building permits Smith represents, under oath, that he, Steve Smith, will be the 'contractor' as concerns the subject build. Further, in the demolition permit notarized on September 14, 2017 Smith further represents that Defendant, STOREFRONTS, will act as the 'contractor'. Mrs. Rech, counsel for movant Defendant, STOREFRONTS, argues to the Court that Smith merely identified Defendant, STOREFRONTS as 'a contractor' and not the 'general contractor'. Counsel argues that when the Town of Islip asked applicants to

identified (*sic*) the 'contractor' on the job they simply wanted to know the identity of 'any contractor' that would be appearing at the job site and that the application did not call for the applicant to identify the 'general contractor' that would run the job. Counsel's argument is preposterous. Smith identified himself as the 'contractor' on 3 or 4 notarized building permit application and coincidentally he has a massive construction company and namely, Defendant, STOREFRONTS wherein he employs over 100 construction workers…. Further, once Smith received the building permit, he hired approximately 20 subcontractors who he paid and had the authority to terminate them … to effectuate the build of a 45,000 square foot commercial fitness center … at the subject premises. Additionally, Smith testified that he has been in the construction business for the past 30 years since he graduated from high school in 1983…. His entire life! When putting all the pieces together it would appear that Defendant, AAE owned the property at the time of the subject occurrence and Defendant, STOREFRONTS was the general contractor. At the very least there is a material issue of fact as concerns the same and as such Defendant, STOREFRONTS, would be liable to Plaintiff via the provisions of the New York State Labor Laws sections 200, 240 and/or 241." *See* Plaintiff's Affirmation in Opposition Exhibit A; Defendant Storefronts' Affirmation in Support Exhibit F.

In reply to plaintiff's opposition, counsel for defendant Storefronts asserts, in pertinent part, that, "STOREFRONTS is not the owner or general contractor on this project. Stephen Smith testified that STOREFRONTS was merely one of many contractors that worked on the subject premises at various times during the project. Indeed, Mr. Smith testified multiple times that there was no general contractor on the project…. Specifically, the application for the demolition permit made by Stephen Smith on September 14, 2017 lists the property owner as Stephen Smith (Above All **EQUITIES**, Inc.) [capitalization and emphasis added]. Mr. Smith

specifically testified that STOREFRONTS **did not** act as the contractor as concerns any construction at the property prior to the date of Plaintiff's accident.... Despite anything that might have been noted in the demolition permit, STOREFRONTS was merely a subcontractor whose role in the project was to install the glass in the middle.... Further, despite plaintiff's attempt to minimalize its significance, the fact is that STOREFRONTS was only listed as a 'contractor' – notably, not a general contractor as Plaintiff alleges – on the application for a demolition permit.... At the time of the accident, the foundation and the steel vertical girders of the structure had already been erected – by LS STTEL, INC., **not** STOREFRONTS – but the exterior walls of the building had not yet been erected.... The Plaintiff was working on the third floor of the structure, installing floor decking. The floor decking (*sic*) already been installed on the first and second floors." *See* Defendant Storefronts' Affirmation in Support Exhibits E and G.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film Corp.*, *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v.Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Summary judgment is a drastic remedy which should not be granted when there is any doubt about the existence of a triable issue of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, *supra*. It is nevertheless an appropriate tool to weed out meritless claims. S*ee Lewis v. Desmond*, 187 A.D.2d 797, 589 N.Y.S.2d 678 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N.A.*, 82 A.D.2d 168, 442 N.Y.S.2d 610 (3d Dept. 1981).

Issue finding, rather than issue determination, is the key to summary judgment. *See In re Cuttitto Family Trust*, 10 A.D.3d 656, 781 N.Y.S.2d 696 (2d Dept. 2004); *Greco v. Posillico*, 290 A.D.2d 532, 736 N.Y.S.2d 418 (2d Dept. 2002); *Gniewek v. Consolidated Edison Co.*, 271 A.D.2d 643, 707 N.Y.S.2d 871 (2d Dept. 2000); *Judice v. DeAngelo*, 272 A.D.2d 583, 709 N.Y.S.2d 427 (2d Dept. 2000). The court should refrain from making credibility determinations

(*see S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 357 N.Y.S.2d 478 (1974); *Surdo v. Albany Collision Supply, Inc.*, 8 A.D.3d 655, 779 N.Y.S.2d 544 (2d Dept. 2004); *Greco v. Posillico*, *supra*; *Petri v. Half Off Cards, Inc.*, 284 A.D.2d 444, 727 N.Y.S.2d 455 (2d Dept. 2001)), and the papers should be scrutinized carefully in the light most favorable to the party opposing the motion. *See Glover v. City of New York*, 298 A.D.2d 428, 748 N.Y.S.2d 393 (2d Dept. 2002); *Perez v. Exel Logistics, Inc.*, 278 A.D.2d 213, 717 N.Y.S.2d 278 (2d Dept. 2000).

In the instant matter, the Court finds that defendant Storefronts was neither the owner, possessor, nor general contractor charged with premises safety for the subject construction project. Defendant Storefronts was a contractor that was involved with the installation of the glass storefront for the subject project and was not involved in the work of plaintiff in any manner. Counsel for plaintiff argues that Steven Smith was the owner of defendant Storefronts and, therefore, said entity was involved in the day to day operations of the subject worksite. However, Steven Smith was also the owner and President of defendant Above All Equities, Inc., said entity being the actual owner of the subject premises and the entity that entered into contracts directly with individual subcontractors with respect to the work performed at said worksite.

The Court further finds that there is no evidence that defendant Storefronts was, in any way, involved in the work that caused plaintiff's accident, or that any act or omission by defendant Storefronts caused plaintiff's accident.

Therefore, based upon the above, defendant Storefronts' motion, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Second Amended Verified Complaint as against it, and any and all crossclaims and counter claims as against it, is hereby **GRANTED**.

All parties shall appear for a Certification Conference in IAS Part 33, Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, New York, on **June 23, 2020**, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

_____/S/_____
DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
May 5, 2020

ENTERED
May 07 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE