To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER, J.S.C.

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THOMAS SCARANO,

Plaintiff,

-against-

DECISION & ORDER
Index No. 55092/2018
Seq. # 4

PELHAM UNION FREE SCHOOL DISTRICT, PELHAM UNION FREE SCHOOL DISTRICT #1, PELHAM PUBLIC SCHOOLS, THE BOARD OF EDUCATION OF THE PELHAM UNION FREE SCHOOL DISTRICT, SAVIN ENGINEERS, P.C., and MACE CONTRACTING CORP.,

Defendants.

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The following papers were read on a motion by the defendant, Savin Engineers, P.C. ("Savin"):

Notice of Motion/Affirmation/Exhibits A-I	1-11
Memorandum of Law in Support	12
Affirmation in Opposition/Exhibit A-B	13-15
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FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff, Thomas Scarano, (the "plaintiff/Scarano") commenced this action by filing a summons and verified complaint on April 9, 2018, seeking to recover for alleged personal injuries sustained on August 9, 2017, during the course of his employment as a journeyman for Clean Air Quality Services ("Clean Air"), while working on a ladder performing duct removal work in connection with demolition and reconstruction of the boys locker room located at Pelham Memorial High School, located at 575 Colonial Avenue, Pelham, Westchester County. The plaintiff alleges that the Pelham Union Free School District ("the District"), Savin, and Mace Contracting Corp. ("Mace") are negligent as a

matter of law and violated New York Labor Law §§ 240[1] and 241[6] and that Savin and Mace violated New York Labor Law § 200.

By Stipulation and Notice of Partial Voluntary Discontinuance Without Prejudice, the parties stipulated to discontinue the action against the defendants, Pelham Union Free#1, Pelham Public Schools, and The Board of Education of the Pelham Union Free School District. The plaintiff asserts that at the time of the incident, the District was the owner of the building, Savin was the construction manager and Mace was the general contractor. Clean Air was hired to perform the HVAC work and provided the A frame ladders the plaintiff was using to work, two of which were 10 or 12 feet and one 8 feet.

Savin now files the instant motion seeking dismissal of the complaint and all cross-claims against it arguing that it owed no duty to the plaintiff; that Savin did not own, operate, maintain, manage nor control the underlying construction project or premises; that Savin was not the general contractor, site safety consultant, nor a trade subcontractor performing any actual construction work at the project; that Savin was retained only to ensure that the various tasks required for completion of the project, were being performed by the various subcontractors, pursuant to the subcontractors' agreements with the owner and/or general contractor of the project; and that Savin did not control nor direct the activities that allegedly produced harm to the plaintiff. Savin also seeks contractual and common law indemnification against Mace.

In opposition, Scarano's attorney argues that Savin's motion should be denied in all respects and that the plaintiff's motion should be granted. The attorney argues that Savin is not entitled to dismissal of the plaintiff's Labor Law §§ 240[1] and 241[6] claims, as the record evidence establishes that Savin was responsible for tasks of the nature that are generally performed by, or delegated to, an agent of the premises owner/general contractor, thereby imposing absolute liability on Savin for failing to provide safety devices necessary for the protection of Scarano to the risks inherent in elevated worksites.

The plaintiff further argues that summary judgment is warranted in the plaintiff's favor with respect to his Labor Law § 200 and common law negligence claims, because, by its own admission, Savin had both actual and constructive notice of the condition which

proximately leg to the plaintiff's incident and resulting injuries, irrespective of whether Savin controlled or supervised the means and methods of the plaintiff's work.

In partial opposition, the District argues that Savin is either a contractor or agent of the District within the meaning of Labor Law §§ 240[1] and 241[6], since Savin's detailed responsibilities under the contract with the District included all services provided; on-site, day-to-day inspection, supervision and observation of all work in process; coordination of all stored material locations and contractor staging and the authority to recommend rejection of work.

Mace also submits a partial opposition to Savin's motion for summary judgment, arguing that it is completely free of negligence and liability under Labor Law §§ 200, 240 and 241[6] and Savin is not entitled to common law or contractual indemnification.

In reply to the plaintiff's opposition, Savin reiterates that it was retained by the District only to render construction management services on the project. Savin states that it was not the owner of the premises, the general contractor, nor an agent of either and the law does not permit a finding of liability by Savin for Labor Law §§ 240[1], 241[6], and 200 claims. Savin states that its scope of work involved ensuring the various contractors were present at the premises at the required times to satisfy their respective agreements with the owner and to protect the interests of the owner through construction.

In reply to the District, Savin argues that the District attempts to shift the responsibility to Savin, in contradiction to its own contract with Savin and confuses authority to stop work with a duty to stop work, when no such duty existed. Savin states once more, that it was retained by the District only to render construction management services on the project.

In reply to Mace's opposition, Savin asserts that Mace's opposition was untimely. Savin also argues that Mace must be found negligent in causing the plaintiff's alleged incident because the plaintiff's claims are entirely grounded in Labor Law §§ 200, 240, and 241, which hold owners and general contractors strictly liable for claimed injuries by plaintiffs who were working in the course of their employment on a project at the time of the alleged injury. Savin asserts that Mace is repeatedly documented to have been the general contractor on the project. Savin states that, in soliciting bids for construction

contracts, the District explicitly sought to enter a general construction contract and the bid proposal submitted by Mace to the District was for a general construction and site work contract.

Savin further argues that Mace also prepared and produced a Health and Safety Plan for the project, which further references Mace's "General Construction Contract"

DISCUSSION

"[T]he 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," (*Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986]). Only when such a showing has been made must the opposing party set forth evidentiary proof in admissible form, establishing the existence of a material issue of fact (*see e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

"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" (*see DiMaggio v Cataletto*, 117 AD3d 984, 986 [2d Dept 2014]). "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'" (*Id.*). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed." (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008].

In order to prevail on such a claim, plaintiff must demonstrate that defendant had the authority to "control the activity bringing about the injury to enable it to avoid or correct an unsafe condition"' (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [2d Dept 2005]). "Accordingly, liability can only be imposed if defendant exercised control or supervision over the work and had actual or constructive notice of the purportedly unsafe condition" (*Id*.).

Here, there is no evidence to demonstrate that Savin had control or supervisory role over the work that the plaintiff was performing, to enable it to prevent or correct any unsafe conditions. The plaintiff did not take orders from Savin and Savin had no responsibility to

oversee the work performed by Scarano or his employer. Although, Savin's construction manager, Robert Dean Sproch ("Sproch'), testified that he performed walk-throughs of the work site two to six times per day to confirm that contractors were performing their jobs according to plan and that he had the authority to address those issues with them if they were not, such is an indication of Savin's general supervision and coordination of the worksite and is insufficient to trigger liability (*Singh v Black Diamonds LLC*, @ 139).

Section 240(1) of the Labor Law, entitled "Scaffolding and other devices for use of employees", states in pertinent part that:

> 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 (NY Labor Law § 240[1]).

"Labor Law § 240(1) imposes upon owners and general contractors a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites" (*see McCoy v Abigail Kirsch at Tappan Hill, Inc.*, 99 AD3d 13, 15 [2d Dept 2015]). "Absolute liability is imposed upon owners and contractors who violate the statute by failing to provide or erect necessary safety devices for the protection of workers exposed to elevation related hazards, and where such failure is a proximate cause of the accident (*Id*.).

"Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*see Lopez v New York City Dept. of Environmental Protection*, 123 AD3d 982, 983 [2d Dept 2014]). "The provision requires owners and contractors to comply with specific safety rules and regulations promulgated by the Commissioner of the Department of Law" (*Id*.). Here, as previously stated, "[t]here can be no recovery since the plaintiff's work constituted maintenance which was unrelated to construction, excavation, or demolition" (*see Deoki v Abner Props. Co.*, 48 AD3d @ 511).

"Although a construction manager of a work site is generally not responsible for injuries under Labor Law § 240[1], one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury" (*Walls v Turner Const. Co.*, 4 NY3d 861, 864 [2005]). However, "[a] construction manager without authority to control the activity which brought about the plaintiff's injury is not considered an agent of the owner under Labor Law §§ 240[1] and 241[6] (*Myles v Claxton*, 115 AD3d 654, 655 [2d Dept 2014]).

Here, it cannot be said that Savin had such supervisory control and authority. Savin provided evidence, such as its contract, which provided that the construction manager would not have control over or charge of construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the work. Savin was to review the safety programs developed by each of the prime contractors, solely and exclusively to coordinate the safety programs and made recommendations to the owner. Further, Savin did not have either actual nor constructive notice of any defect that caused the plaintiff's accident, since its construction manager was not on site in the boys' locker room at the time of the accident and did not observe the work being performed.

Therefore, as to the motion to dismiss the complaint and all cross-claims against Savin, the Court finds that Savin has made 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 opposing parties failed to set forth evidentiary proof in admissible form, establishing the existence of a material issues of fact.

With regard to that part of Savin's motion for common law and contractual indemnification against Mace, the Court denies that request. Even with Mace's late opposition, this Court has already found that Mace was not a general contractor, but instead a prime contractor with no liability for the plaintiff's accident. All contractors were required to prepare a safety plan as part of their contract and the testimony established that Mace was not responsible for the safety of all the workers on the project. Savin's reference to Mace as a general contractor does not mean that Mace was a general

contractor. Mace established that it was simply a prime contractor like the other prime contractors and did not supervise nor control the work of the other contractors. Further, as previously stated, any exposed pipes that the plaintiff may have fallen upon, was not the proximate cause of the plaintiff's accident.

Accordingly, based on the foregoing, it is

ORDERED that the portion of the motion for summary judgment seeking dismissal of the complaint and all cross-claims against Savin, is granted; and it is further

ORDERED that the portion of the motion seeking common law and/or contractual indemnification against Mace, is denied.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
March 19, 2020

HON. SAM D. WALKER, J.S.C.