NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

TICKARSINGH RAJPAULSINGH and MAHADAYE RAJPAULSINGH,

Plaintiffs,

- against -

HIDDEN POND AT OLD WESTBURY, LLC, HIDDEN POND AT OLD WESTBURY HOMEOWNERS ASSOCIATION, INC., and STEWARD SENTER INC.,

Defendants.

Index No. 703797/16

Motion Date June 29, 2021

Motion Cal. No. 27

Motion Seq. No. 7

The following papers read on this motion by defendant, Stewart Senter, Inc. for summary judgment dismissing the complaint of plaintiffs under Labor Law §§ 240(1), 241(6) and 200 and common-law negligence; and cross motion by plaintiffs for partial summary judgment against defendant, Stewart Senter, Inc. under Labor Law §§ 240(1) and 241(6).

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	EF 103-122
Notice of Cross Motion - Affirmation - Exhibits.....	EF 124-134
Reply Affirmation and Affirmation in Opposition to Cross Motion...	EF 136
Reply Affirmation.....	EF 137

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiffs commenced this action to recover for personal injuries allegedly sustained on January 12, 2016 while plaintiff, Tickarsingh Rajpaulsingh ("plaintiff") was working on the construction site located at Lot 13, Hidden Pond Drive, Old Westbury, New York (the subject premises). Plaintiff was an employee of Roman Iron Works (Roman), the structural steel contractor on the project, at the time of the accident. Defendant, Stewart Senter, Inc. ("defendant") was the developer and builder for the residential community where the subject premises was located. Additionally, defendant was the construction management firm that prepared plans and proposals, and hired the subcontractors working on the construction project.

Until about five months before the accident, defendant was also the owner of the subject premises. All other defendants have since been dismissed from this action.

On plaintiff's first day working as a welder on the project, he and the other workers loaded up a truck with pre-made columns and beams approximately 10 feet tall and weighed 100 to 200 pounds. After the truck, which was not owned or operated by Roman, transported the materials to the job site, the workers manually carried the columns to a cement structure referred to as the "pit" and they would weld the columns into position. After lunchtime on the day of the accident, plaintiff was instructed by his supervisor from Roman, "Craig," to build a makeshift "scaffold" using two wooden planks in order to carry a column over the "pit," to be placed into a 15-inch space between the "pit" and the actual structure of the building. Plaintiff and Craig were carrying the column across the scaffold when the planks broke, causing plaintiff to fall 12 feet into the "pit." The column then fell into the "pit," striking plaintiff.

Under Labor Law §§ 240(1) and 241(6), owners, contractors, and their agents are required to provide proper protection to workers performing certain types of construction work (*see Debennedetto v Chetrit*, 190 AD3d 933, 935 [2021]; *Alvarez v Vingsan L.P.*, 150 AD3d 1177, 1179 [2017]), and to comply with safety regulations set forth in the New York State Industrial Code (*see Keener v Cinalta Constr. Corp.*, 146 AD3d 867, 868 [2017]). To impose liability as a statutory agent, the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition (*see Navarra v Hannon*, 197 AD3d 474, 476 [2021]; *Kavouras v Steel-More Contr. Corp.*, 192 AD3d 782, 784 [2021]; *Linkowski v City of NY*, 33 AD3d 971, 975 [2006]). The determinative factor is whether it had the right to exercise control over the work, not the defendant's title, nor whether it actually exercised control over the work *(see Fiore v Westerman Constr. Co., Inc.*, 186 AD3d 570, 571 [2020]; *Johnsen v City of NY*, 149 AD3d 822, 822 [2017]).

In its motion for summary judgment, defendant contends that it was merely a "construction manager" that did not exercise any control over the job site or the work that caused plaintiff's injury, and was not a general contractor for purposes of the Labor Law. Citing to deposition testimony and an affidavit by its Director of Construction, Scott Kimmel, Stewart avers that it only had general supervisory authority over the work site, insofar as it only performed weekly "drive-by" inspections, and did not have discussions with plaintiff's employer, Roman about the work performed or safety generally, as "the trades ran themselves." Defendant further maintains that it did not direct or supervise the work of the trade contractors present, as plaintiff testified that he received directions on the project from Roman alone.

A general contractor may be held liable under Labor Law §§ 240(1) and 241(6) if it was "responsible for coordinating and supervising the entire construction project and was invested with a concomitant power to enforce safety standards and to hire responsible contractors" (*Valdez v Turner Constr. Co.*, 171 AD3d 836, 839 [2019] [internal quotation marks omitted]; *Caiazzo v Mark Joseph Contr. Inc.*, 119 AD3d 718, 720 [2014]; *Temperino v DRA, Inc.*, 75 AD3d 543, 544-545 [2010]). Stewart (was the entity that) hired the subcontractors, coordinated

and monitored the progress of the trades' work at the subject premises, as well as throughout the entire residential community (as the developer), and served as the "eyes, ears and voice of the owner" (*Valdez*, 171 AD3d at 839, *citing Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]; *see also Cabrera v Arrow Steel Window Corp.*, 163 AD3d 758, 759 [2018]).

Contrary to defendant, Stewart's contentions, it cannot be said as a matter of law that defendant did not have the authority to enforce safety standards at the work site, particularly in the absence of evidence regarding defendant's contractual obligations (*see e.g. Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 697 [2016] [not a statutory agent where defendant's loss control services were advisory only, role at work site was general supervision, and contract specified no responsibility for management or control of safety practices]). Therefore, defendant failed to meet the burden of showing that defendant was not a statutory agent under the Labor Law by eliminating triable issues of fact as to whether defendant possessed the authority and responsibility to correct unsafe conditions at the work site and ensure that plaintiff's employer carried out the work in a safe manner (*see Kavouras*, 192 AD3d at 784-785; *Johnsen*, 149 AD3d 822).

In plaintiff's cross motion for summary judgment against defendant, Stewart, plaintiff satisfied his *prima facie* burden through deposition testimony, stating that he was directed to build a makeshift scaffold of wooden planks which failed to support him and his co-worker for the work performed, causing him to fall and sustain injuries. Therefore, plaintiff has established that defendant failed to furnish or erect a scaffold that would protect him from an elevation-related risk in violation of Section 240(1), and the absence of such protection was the proximate cause of his accident (*see McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 1094 [2018]; *Rapalo v MJRB Kings Highway Realty, LLC*, 163 AD3d 1023, 1024 [2018]). Plaintiff further demonstrated, *prima facie*, that defendant violated certain New York State Industrial Code regulations, to wit, 12 NYCRR 23-1.8[c][2]; 23-1.11[a] through [c]; 23-5.1 [a] through [c], [e] through [h], and [j]; and 23-5.2, but not 23-5.8, which applies only to suspended scaffolds, and that such violations caused his injuries and form a basis for liability under Labor Law § 241(6) (*see Leon-Rodriguez v Roman Catholic Church of Sts. Cyril & Methodius*, 192 AD3d 883, 885 [2021]; *Morocho v Boulevard Gardens Owners Corp.*, 165 AD3d 778 [2018]; *Moran v 200 Varick St. Assoc., LLC*, 80 AD3d 581, 582 [2011]).

In opposition, defendant, Stewart failed to rebut plaintiff's contentions regarding the alleged violations of Labor Law §§ 240(1) and 241(6). Any alleged comparative negligence by plaintiff does not preclude liability under these statutes (*see Debennedetto v Chetrit*, 190 AD3d 933, 935-936 [2021]; *Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 719 [2019]). As no triable issues of fact remain regarding defendant's supervision and control of the work giving rise to plaintiff's injuries, as to whether it violated Labor Law §§ 240(1) or 241(6), and as to whether such violations were a proximate cause of plaintiff's injuries, summary judgment on these causes of action is warranted (*see Leon-Rodriguez*, 192 AD3d 883; *Van Blerkom v America Painting, LLC*, 120 AD3d 660 [2014]; *Bakhtadze v Riddle*, 56 AD3d 589, 591 [2008]).

Finally, with respect to plaintiff's Labor Law § 200 and common-law negligence causes of action, defendant, Stewart likewise failed to meet its *prima facie* burden of demonstrating that it did not have the authority to supervise or control the work at issue, as discussed above, and summary judgment is not warranted (*see King v Villete*, 155 AD3d 619, 622 [2017]; *Klimowicz v Powell Cove Assoc., LLC*, 111 AD3d 605, 608 [2013]; *Gasques v State*, 59 AD3d 666, 668 [2009]).

The court has considered the parties' remaining contentions and finds them to be unavailing.

Accordingly, defendant, Stewart's motion for summary judgment, is denied.

Plaintiffs' cross motion for partial summary judgment under Labor Law §§ 240(1) and 241(6), is granted.

Dated: January 24, 2022

DARRELL L. GAVRIN, J.S.C.