At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 11th day of April, 2023.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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DENNYS MARTILLO,

*Plaintiff,*

-against-

HII COMPANY CORP. and LA VENTA LLC,

*Defendants.*

Index No.: 509854/2020

DECISION AND ORDER

Motion Sequence #2, #3

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HII COMPANY CORP.,

*Third-Party Plaintiff,*

-against-

PROFESSIONAL POWER SOLUTIONS, INC.,

*Third-Party Defendant.*

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

| | Papers Numbered (NYSCEF) |
|---|---|
| Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed | 65-79, 84-86, 88-96, |
| Opposing Affidavits (Affirmations) | 98-100, 104-105, 107-108, |
| Reply and Sur-Reply Affidavits (Affirmations) | 109-110, 112, 113, |
| Memorandum of Law | 80, 87 |

After oral argument and a review of the submissions herein, the Court finds as follows:

This is an action to recover damages for personal injuries allegedly sustained by the Plaintiff Dennys Martillo (hereinafter "the Plaintiff") on May 1, 2020. The Plaintiff alleges that he was injured while he was working at a property owned by Defendant La Venta, LLC (hereinafter "Defendant La Venta"), located at 77 Prospect Place, Brooklyn, N.Y. (hereinafter "the Project" or "Premises"). At the time of the alleged incident, the Plaintiff was apparently at the Property in furtherance of his employment

with non-party Professional Power Solution (hereinafter "PPS") while he was performing electrical renovation work. The Plaintiff alleges in his Verified Bill of Particulars that he "was caused to work at a height upon an unsafe and defective scaffold without adequate harnesses, lifelines and other safety devices and the scaffold failed causing Mr. Martillo to fall from the elevated work location and suffer severe injuries due to the defendants' negligence and defendants' violations of Labor Law 200, 240(1) and 241(6)." (See Plaintiff's Bill of Particulars, Paragraph 3).

The Plaintiff moves (motion sequence #2) pursuant to CPLR 3212 for summary judgment on the issue of liability relating to Plaintiffs' Labor Law 240(1) and 241(6) claims against Defendant HII Company Corp. (hereinafter "Defendant HII"). The Plaintiff argues that his motion relating to his Labor Law 240(1) claim should be granted as Defendant HII did actually supervise the Plaintiff's work and failed to provide him with adequate safety equipment, namely a scaffold with guardrails that would have prevented his fall. The Plaintiff also argues that he is entitled to summary judgment pursuant to Labor Law 241(6) given that Defendant HII violated Industrial Code provision 12 NYCRR 23-5.18 (b) as he fell from a manually propelled Baker scaffold that lacked required safety railings.

Defendant HII opposes the motion. Defendant HII argues that the Plaintiff's motion should be denied as to his Labor Law 240(1) claim as the Plaintiff has provided inconsistent statements regarding the particular circumstances relating to his fall. Specifically, Defendant HII points to Plaintiff's deposition testimony, when Plaintiff purportedly stated that he fell because the scaffold shook, he fell because he tripped over materials and also slipped. Defendant HII further argues that the Plaintiff's motion should be denied as to his Labor Law 241(6) claim as the Plaintiff has failed to properly plead and supplement by testimony that he fell from a manually propelled mobile scaffold. Defendant HII argues that the Plaintiff's complaint, bill of particulars and deposition testimony do not specifically allege facts necessary to find that there was a violation of Industrial Code provision 12 NYCRR 23-5.18 (b) as a matter of law.

Defendant La Venta also moves (motion sequence #3) for an order pursuant to CPLR 3212, granting summary judgment in its favor and dismissing all causes of action against it. Defendant La Venta argues that the Plaintiff's Labor Law 200 claim should be dismissed as against it since the alleged accident related to the means and methods of the work and La Venta did not supervise or control Plaintiffs work. Defendant La Venta also argues that the Plaintiff's Labor Law 240(1) and 241(6) claims should be dismissed given that the Defendants are entitled to a "homeowner's exemption", because the Premises is improved by a single-family residence and the Defendants did not oversee or direct the Plaintiff's work.

The Plaintiff and Defendant HII oppose the motion by Defendant La Venta. The Plaintiff and Defendant HII argue that Defendant La Venta's motion should be denied as to its Labor Law 200 claim as Defendant La Venta has not shown that it did not have actual or constructive notice of the dangerous condition that caused the Plaintiff's injuries. The Plaintiff also argues that Defendant La Venta's motion should be denied as to Plaintiff's Labor Law 240(1) and 241(6) claims as there are issues of fact regarding whether the owner's of the property did reside at the Premises and whether they renovated the Premises with an intent to sell the property.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Motion Sequence #2 (Plaintiff's Motion for Summary Judgment)

***Labor Law § 240(1)***

Labor Law § 240 (1) is designed to protect employees on construction sites from elevation-related risks. This section provides that:

> All contractors and owners and their agents ... who contract for but do not direct or control the work, 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.

"Labor Law 240(1) provides exceptional protection for workers against the special hazards that arise when the work site itself is either elevated or positioned below the level where materials are being hoisted." *Walker v. City of New York*, 72 A.D.3d 936, 937, 899 N.Y.S.2d 322, 323 [2nd Dept, 2010]. In order to prevail on a Labor Law 240 (1) cause of action, "[a] plaintiff must establish that the statute was violated and that the violation was a proximate cause of his [or her] injuries" *Delahaye v Saint Anns School*, 40 AD3d 679, 682, 836 N.Y.S.2d 233 [2d Dept 2007]; *see Berg v. Albany Ladder Co., Inc.,* 10 NY3d 902, 904, 861 N.Y.S.2d 607 [2008]; *Robinson v. East Med. Ctr., L.P.*, 6 NY3d 550, 814 N.Y.S.2d

589 [2006]. "Liability may, therefore, be imposed under the statute only where the "plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." *Nicometi v. Vineyards of Fredonia, LLC*, 25 N.Y.3d 90, 97, 30 N.E.3d 154, 158 [2015].

Plaintiff sat for deposition on October 5, 2021 (NYSCEF Docs. #67). When asked when he began working for PPS, the Plaintiff stated, "[a]pproximately fall of 2019." (Page 25). When asked what his position was with PPS, the Plaintiff stated, "[e]lectrician helper." (Pages 26-27). When asked what type of work he performed for PPS, the Plaintiff stated "[w]e did all day installations, all day the outlets, the lamps, all the switches, all the maintenance and the new cables for the projects." (Page 28). When asked who he reported to at PPS, the Plaintiff stated, "David, my boss." (Page 29). When asked how many other employees worked at PPS, the Plaintiff stated, "[t]he ones that work with me and that I knew, I could say was between eight and ten." The Plaintiff also stated that he had been instructed to ask for a safety harness when working from a height. "Yes, you're supposed to tell the boss to give you." (Page 34). When asked where his accident occurred, the Plaintiff stated "[i]n the living room of the project." (Page 37). When asked what he was doing prior to his accident, the Plaintiff stated "I was lifting some cables on the ceiling." When asked what he was standing on during his work, the Plaintiff stated "I was on a scaffold." When asked to describe the scaffold, the Plaintiff stated "[i]n the upper structure, there were pipes, and it was the also the -- it was the scaffold was shaky." When asked if he knew what a Baker's scaffold was, the Plaintiff stated, "I don't know what a bakers scaffold is." (Page 38). When asked where the scaffold was located, the Plaintiff stated, "[o]n the first floor." (Page 39). When asked how the accident occurred, the Plaintiff stated, "I was working. I was passing some cables on the ceiling. I was on the scaffold, it was shaking. There were materials on the platform. I began to go down, the scaffold shook, I tripped and I fell. There was no mesh underneath; there were no railings. I didn't have any harness, and I fell ten, ten feet to

the floor." (Page 39). When asked if there was anyone else on the scaffold with him, the Plaintiff stated, "I was by myself on the scaffold." (Page 40). After testifying that he had previously utilized the subject scaffold while performing his work duties, when Plaintiff was asked whether it was unstable, shaking, or loose when he used it previously, he stated, "[a]lways." He stated that he sometimes mentioned it to David. When asked what response he received, he stated that he was "[t]o continue working and be careful." He also confirmed that he had not been given a harness while working at the Premises. (Pages 51-52). The Plaintiff stated that he recognized the name of a person Mr. Madzio, who he described as "the one who supervised the whole building." He confirmed Mr. Madzio "in some moments", "[h]e will tell us the position where he wanted the lamps or the lights or the outlets." (Page 53). After a series of questions in relation to Mr. Madzio's direction, the Plaintiff repeatedly indicated that "[h]e will indicate where and then he will check everything." "He will instruct us where to put the light and the electric things." "He never gave instructions of how to do it. He gave instructions of where to put it." The Plaintiff stated that Mr. Madzio never told him to get on to the scaffold. (Pages 57-58). The Plaintiff stated that he could not recall whether the legs of the scaffold had wheels. As to how he reached the top, or second platform, of the scaffold, he stated that he used a ladder. (Page 67). When asked if when he walked the length of the scaffold platform, from the ladder to the other end, the scaffold shook, the Plaintiff stated, "[t]he scaffold moved." He stated that he completed passing cables and was "getting ready to go down." (Page 73). The Plaintiff stated, "yes", when asked, "[s]o, correct me if I am mistaken, are you saying that you fell from the platform while you were in the process of trying to get on to the ladder?" The Plaintiff elaborated that he "was walking on the scaffold, the scaffold shook, I lost my balance, I tripped with the materials and I fell." (Page 74). "The scaffold moved." (Page 75). As to what caused him to fall, the Plaintiff stated, "[t]he movement of the scaffold, the shaking of the scaffold. It didn't have any type of handrails, any rails, that's why I fell." "The movement made me trip with the materials that caused the fall." As to what he

tripped on, he stated, "[c]onstruction materials, they were tubes or pipes, structures and other materials that I don't recall." (Page 127). "I was looking down." (Page 128). When asked which foot tripped on it, the Plaintiff stated, "the right one slipped."

Grzegorz Madzio sat for his deposition on February 23, 2022 and March 25, 2022 (NYSCEF Docs. #95 and #96). When asked what his position was with Defendant HII, Mr. Madzio stated, "I'm the president." (Page 8). When asked how long he had been President, Mr. Madzio stated, "[s]ince the inception of this company." (Page 8). When asked what type of work the company does, Mr. Madzio stated, "[w]e do carpentry, fabrication of millwork, construction." When asked what is involved in managing projects, Mr. Madzio stated, "[t]hat involves discussion with the architects, clients, subcontractors." (Page 9). When asked whether he was familiar with the project at the Premises, Mr. Madzio stated, "[y]es." When asked to explain the project details, Mr. Madzio stated that "the construction was triggered because of a loud noise coming from a subway of Flatbush Avenue, and the client wanted to make this house way less noisy." (Page 25). Mr. Madzio further stated that "it was a partial renovation of the house." (Page 26). When asked what type of property the Premises was, Mr. Madzio stated, "[i]t's a one-family house." (Page 27). When asked when he first learned of the Plaintiff's accident, Mr. Madzio stated, "I got a phone call from Dawid Bzdbluch." (Page 82). When asked how long this was after the accident, Mr. Madzio stated, "[c]ouple of days or a few days after this allegedly happened." (Page 83). When asked if a scaffold was mentioned, Mr. Madzio stated, "I don't remember any scaffold in the discussion." (Page 84).

The Plaintiff contends that the incident at issue was caused by an unsafe and unsteady scaffold that did not have guardrails. In support of his position, the Plaintiff relies on his own deposition testimony during which he stated that as the scaffold moved and was shaky, he tripped and fell off the scaffold when he was unable to steady himself given that the scaffold did not have guardrails. "[T]he plaintiff satisfied

his *prima facie* burden of establishing his entitlement to judgment as a matter of law on his Labor Law § 240(1) cause of action by demonstrating that he was engaged in a statutorily protected activity when he fell off a scaffold that failed to provide proper protection because it lacked safety railings." *Moran v. 200 Varick St. Assocs., LLC,* 80 AD3d 581, 582, 914 N.Y.S.2d 307, 308 [2d Dept 2011]. *See* also *Leon-Rodriguez v. Roman Catholic Church of Sts. Cyril & Methodius*, 192 AD3d 883, 144 N.Y.S.3d 709 [2d Dept 2021] [there were no railings and Plaintiff had "nothing to grab"], *Marulanda v. Vance Assoc., LLC*, 160 AD3d 711, 75 N.Y.S.3d 74 [2d Dept 2018] [no railings, a proximate cause] and more generally and instructive, *Crutch v. 421 Kent Dev., LLC*, 192 AD3d 977, 146 N.Y.S.3d 155 [2d Dept 2021] [liberal construction] and *Hoyos v. NY-1095 Ave. of the Ams., LLC*, 156 AD3d 491, 67 N.Y.S.3d 597 [1st Dept 2017] [common sense approach, realities of the workplace]. Labor Law 240(1) supports the contention that "[w]here the furnished protective devices fail to prevent foreseeable external force from causing a worker to fall from an elevation, that worker is entitled to judgment as a matter of law under the statute." *Cruz v. Turner Constr. Co.,* 279 AD2d 322, 720 N.Y.S.2d 10 [1st Dept 2001]; *see* also *Coque v. Wildflower Ests. Devs., Inc.,* 31 AD3d 484, 818 N.Y.S.2d 546 [2d Dept 2006]; *see* also *Rapalo v. MJRB Kings Highway Realty, LLC*, 163 A.D.3d 1023, 1024, 82 N.Y.S.3d 63 [2d Dept 2018].

In opposition, the Defendant HII has failed to raise a material issue of fact that would prevent this Court from granting the Plaintiff's motion for summary judgment on the Plaintiffs' Labor Law 240(1) claim. Defendant HII argues that the motion should be denied given that the Plaintiff has provided inconsistent statements regarding what caused his fall. Specifically, Defendant HII points to Plaintiff's deposition where he purportedly stated that he fell because the scaffold shook and also stated that he fell because he slipped. Actually, upon a review of the Plaintiff's deposition, when Plaintiff was asked directly about this purported inconsistency, the Plaintiff stated "[i]t slid with the material." (Page 130). Defendant HII relies on *Castronovo v. Doe* for the proposition that Plaintiff's inconsistency should result in the

denial of the Plaintiff's motion for summary judgment. *See Castronovo v. Doe*, 274 AD2d 442, 442, 711 N.Y.S.2d 27, 28 [2d Dept 2000]. While this is generally true, in the instant proceeding, the Plaintiff directly addressed the purported inconsistency. What is more, Defendant HII has have not shown that the necessary safety devices were in place for the task at hand or that the accident occurred as a direct result of the Plaintiff's actions. *See Morocho v. Plainview-Old Bethpage Cent. Sch. Dist.,* 116 A.D.3d 935, 936, 984 N.Y.S.2d 120, 122 [2d Dept 2014]; *Bornschein v. Shuman*, 7 AD3d 476, 478, 776 N.Y.S.2d 307, 309 [2d Dept 2004]; *see also Portillo v. Roby Anne Dev., LLC.,* 32 AD3d 421, 422, 819 N.Y.S.2d 566, 568 [2d Dept 2006]; and *Gikas v. 42-51 Hunter St., LLC*, 134 A.D.3d 987, 988, 24 N.Y.S.3d 87, 89 [2d Dept 2015].

The legislature, as confirmed by Court holding and interpretation, has indicated that the Labor Law of this state serves to, *inter alia*, promote the safety of workers. Specifically related to Labor Law 240(1), the legislature has indicated that injuries as a consequence of working from a height or other gravity-related activity is especially perilous. The law should never entertain the playing of a gotcha game, where the proverbial slip of the tongue, or the difficulty in succinctly articulating a phrase or description, forecloses a party's right to relief. There is no law without reason and the Court must always examine the evidence before it in an objective way in light of the totality of the circumstances upon which it is proffered. While the Court recognizes that summary judgment is a drastic remedy, it is also improper to deny it when it is warranted. There is no need for a litigant, on either side of the caption, to proceed to trial on a matter where no issue exists. The question of whether one slips or trips on a cluttered, unstable scaffold without railings is immaterial. Further, this has nothing to do with a credibility determination. Rather, it is a reasoned review of the evidence and an objective appreciation and understanding of what has been communicated, in order to apply applicable law. As such, Defendant HII has failed to raise a

material issue of fact as to its liability relating to Plaintiff's Labor Law 240(1) claim. *See Escobar v. Safi*, 150 AD3d 1081, 1083, 55 N.Y.S.3d 350, 353 [2d Dept 2017].

***Labor Law § 241(6)***

Labor Law § 241 (6) imposes on owners and contractors a non-delegable duty "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." *Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 [2nd Dept, 2015]; *Lopez v New York City Dept. of Envtl. Protection,* 123 AD3d 982, 983 [2nd Dept, 2014]. To establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision mandating compliance with concrete, or clear, specifications. *See Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 505 [1993]; *La Veglia v St. Francis Hosp.*, 78 AD3d 1123 [2nd Dept, 2010]; *Pereira v Quogue Field Club of Quogue, Long Is.*, 71 AD3d 1104 [2nd Dept, 2010].

Turning to the merits of the Plaintiff's claim made pursuant to Labor Law §241(6), the Court finds that the Plaintiff has met not his *prima facie* burden. The Plaintiff contends that summary judgment should be granted as to his Labor Law 241(6) claim in relation to the violation of Industrial Code provisions 12 NYCRR 23-5.18 (b) Industrial Code provisions 12 NYCRR 23-5.18 (b) is entitled "Manually-propelled mobile scaffolds" and provides as follows:

> (b) Safety railings required. The platform of every manually-propelled mobile scaffold shall be provided with a safety railing constructed and installed in compliance with this Part (rule).

The Plaintiff, when asked about the scaffold at issue, was not aware whether the scaffold was a manually propelled Bakers scaffold, and did not otherwise identify the scaffold as having wheels and being mobile. No mention is made in either the Plaintiff's complaint or Bill of Particulars as to whether the scaffold had wheels or was a Bakers scaffold. When asked if he knew what a Baker scaffold was, the

Plaintiff stated, "I know what is a scaffold. I don't know what a bakers scaffold is." (Page 38). When the Plaintiff was asked whether the scaffold had wheels or if the legs were stationary, the Plaintiff stated, "I don't recall." (Page 66). As a result, the Plaintiff did not present sufficient evidence that the scaffold was within the definition of the subject code and that as a result a violation of 12 NYCRR 23-5.18 (b) was a proximate cause of the accident.

Motion Sequence #3 (Defendant La Venta's Motion for Summary Judgment)

*Labor Law § 200 and Common Law Negligence*

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe construction site." *Rizzuto v. L.A. Wenger Contracting Co.*, 91 N.Y.2d 343, 352, 693 N.E.2d 1068, 1073 [1998]. "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, 866 N.Y.S.2d 323, 329 [2d Dept 2008]. "Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law §200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident." *Id.* "By contrast, when the manner of work is at issue, 'no liability will attach to the owner solely because [he or she] may have had notice of the allegedly unsafe manner in which work was performed.'" *Id., quoting Dennis v. City of New York,* 304 AD2d 611, 611, 758 N.Y.S.2d 661, 663 [2d Dept 2003]. "Rather, when a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work." *Id.* "For an owner to be liable for common-law negligence or pursuant to Labor Law § 200, the plaintiff must show that the owner supervised or controlled the work, or had actual or constructive notice

of the unsafe condition causing the accident." *Saverino v. Reiter*, 1 AD3d 427, 428, 767 N.Y.S.2d 445, 447 [2d Dept 2003]; *Garcia v. Petrakis*, 306 AD2d 315, 316, 760 N.Y.S.2d 551, 553 [2d Dept 2003].

In relation to the Plaintiff's Labor Law 200 and common-law negligence claim (motion sequence #2), Defendant La Venta argues that it cannot be held liable for the Plaintiff's injuries pursuant to Labor Law 200 given that it contends that it did not supervise or control the work of the Plaintiff. As an initial matter, the subject matter of this claim relates to means and methods of the work, not an unsafe construction site. While the Plaintiff and Defendant HII attempt to argue that Defendant La Venta must also show that it did not have actual or constructive notice of the dangerous condition, the facts as alleged do not support the need for this analysis. The Plaintiff claims that his injuries occurred because of an unsafe scaffold he was using and not a defective and/or dangerous condition at the Premises. *See Medina-Arana v. Henry St. Prop. Holdings, LLC,* 186 AD3d 1666, 1667, 131 N.Y.S.3d 110 [2d Dept 2020][scaffold allegation]; and *Roblero v. Bais Ruchel High Sch., Inc.,* 175 AD3d 1446, 1447, 109 N.Y.S.3d 329 [2d Dept 2019][fall from scaffold]. "When the methods or materials of the work are at issue, 'recovery against the owner or general contractor cannot be had... unless it is shown that the party to be charged had the authority to supervise or control the performance of the work.'" *Messina v. City of New York*, 147 A.D.3d 748, 749, 46 N.Y.S.3d 174, 176 [2nd Dept 2017], *quoting Ortega v. Puccia*, 57 A.D.3d 54, 866 N.Y.S.2d 323 [2nd Dept 2008]. Defendant La Venta argues that Plaintiff's claim arises out of the alleged unsafe and dangerous means and methods used by the Plaintiff to perform his work, and, thus, there can be no liability imposed upon the Defendant La Venta as it did not direct, supervise, instruct, or control the work Plaintiff performed. The court finds that, as the Plaintiff's claim is based on the manner in which the work was performed (the use of a scaffold), Defendant La Venta has established, *prima facie,* that it did not supervise or control the means and methods of the work that the Plaintiff was performing. *See Teodoro v. C.W. Brown, Inc.,* 200 A.D.3d 999, 160 N.Y.S.3d 345, 349 [2d Dept 2021].

In opposition, the Plaintiff and Defendant HII have failed to raise a material issue of fact that would prevent the Court from granting La Venta summary judgment dismissing the complaint as against it, pursuant to a common law negligence and Labor Law 200 claim. Accordingly, "the 'supervisory authority' standard governs defendants' liability for worksite injuries under Labor Law § 200, where the dangerous or defective equipment is provided by the plaintiff's employer rather than by the property owner." *Chowdhury v. Rodriguez*, 57 AD3d 121, 129, 867 N.Y.S.2d 123, 130 [2d Dept 2008].

*Homeowner's Exemption of Labor Law 240(1) and 241(6)*

Labor Law 240(1) provides that:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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."

"An owner of a one- or two-family dwelling is exempt from liability under Labor Law §§ 240(1) and 241(6) unless he or she directed or controlled the work being performed." *Ferrero v. Best Modular Homes, Inc.*, 33 A.D.3d 847, 849, 823 N.Y.S.2d 477, 479 [2nd Dept, 2006]; *Ortega v. Puccia*, 57 A.D.3d 54, 59, 866 N.Y.S.2d 323, 328 [2nd Dept, 2008]. "A building's classification as a 'multiple dwelling' does not automatically cause the homeowner to lose the protection of the exemption." *Hossain v. Kurzynowski*, 92 A.D.3d 722, 723–24, 939 N.Y.S.2d 89, 91 [2nd Dept, 2012].

Labor Law § 241(6) also contains a homeowner's exemption and provides that:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
> 6. 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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

Defendant La Venta has met its *prima facie* burden regarding its motion (motion sequence #3) for Summary Judgment as it relates to the Plaintiff's Labor Law §§ 240(1) and 241(6) claims against it. "To receive the protection of the homeowners' exemption, the defendant has the burden, *inter alia*, of showing that 'the work was conducted at a dwelling that is a residence for only one or two families.'" *Rossi v. Flying Horse Farm, Inc.*, 131 A.D.3d 1033, 1035, 16 N.Y.S.3d 316, 318 [2nd Dept, 2015], *quoting Chowdhury v. Rodriguez*, 57 A.D.3d 121, 867 N.Y.S.2d 123 [2nd Dept, 2008].

In support of its position, Defendant La Venta relies on the deposition of Rosemary Corbett. The deposition of Rosemary Corbett was conducted on May 18, 2022 (NYSCEF Docs. # 94). When asked what La Venta, LLC was, Ms. Corbett stated, "[i]t is a company that he [her deceased husband] set up to buy 77 Prospect because he was writing about Exxon Mobil at the time that Rex Tillerson was nominated to be secretary of state and we wanted some privacy." (Page 7). When asked if at the time the Premises were purchased she intended for the property to be her personal home for her and her family, Ms. Corbett stated, "Yes. We had another baby in late 2016." When asked why they wanted to move, Ms. Corbett stated, "[b]ecause we live in a two-bedroom very small bedroom apartment right now and the mezzanine bedrooms for the girls that they share is tiny." When asked what her plan was with her husband for the Premises, Ms. Corbett stated, "[w]e wanted the girls to have space to grow up and be -- we thought David was ready for something new, he had been in Manhattan for years so we thought we would give Brooklyn a try." (Pages 8-9). When asked whether she and her family had resided in the Premises, Ms. Corbett stated, "[w]e didn't officially move in, we were coming and spending weekends to get them acclimated, show them the neighborhood." (Page 10). When asked whether she had moved furniture into the home,

Ms. Corbett stated, "[w]e bought furniture for the girls, moved the beds they picked out into the home, we moved artwork into the home, a grand piano because the girls and I, all three played piano, we moved a lot of stuff into the home." When asked when they began sleeping at the Premises, Ms. Corbett stated, "2018." When asked how often they stayed there, Ms. Corbett stated, "[w]e tried to do weekends." When asked to estimate how many weekends the family stayed there, Ms. Corbett stated, "[w]e spent one weekend with me sleeping very little when we realized we had to do soundproofing, so we would go for day visits after that and started weekend visits again after they were mostly done with construction." (Pages 10-11). When asked how many nights the family spent there prior to renovations, Ms. Corbett stated, "[w]e slept two nights at the house. Upon realizing the noise issue we spend [*sic*] days instead of nights." (Page 12). When asked whether the family had resided there after renovations were completed, Ms. Corbett stated "[w]e spent lots of weekends there when it was in flux because the major renovations were done, the soundproofing was done, so we spent several weekends with the girls bringing more of their stuff in, stuffed animals, clothing, hanging artwork, all sorts of things, and then a pipe burst in February of 2021 in the downstairs, faulty plumbing, and flooded the downstairs and started a whole other raft of issues." (Page 13). When asked if she had any conversation with Defendant HII or any of its employees in May of 2020, when the Plaintiff's accident occurred, Ms. Corbett stated "I do not believe so. My husband was given a die [*sic*] within weeks notice in early May of 2020. This was not on the top of my list. Evacuating him from New York City so we did not end up in a Covid ward was on the top of my list." (Page 54).

The testimony by Ms. Corbett is sufficient to meet La Venta's burden. First, Defendant La Venta has shown that it is the owner of the Premises, it is a one family dwelling and that the Premises were renovated with the intention of moving in after the work was complete. Moreover, the homeowner's exemption applies to estates and the administrators of those estates. *See Diaz v. Trevisani*, 164 A.D.3d

750, 753, 82 N.Y.S.3d 549, 553 [2d Dept 2018]. The fact that a property is being renovated and the owner intends to occupy the premises as their home is sufficient to meet the first prong of the homeowners exemption. In *Khela v. Neiger*, the Court held that the homeowner's exemption applied when an accident occurred during the renovation of a building that the owner had planned to convert from a three rental unit property to a two family home where his family would reside. See *Khela v. Neiger*, 85 N.Y.2d 333, 336, 648 N.E.2d 1329, 1330 [1995]. In *Stejskal v Simons*, the Court held that the homeowner's exemption applied to a property that was being renovated from a rental property to a single family home that would be utilized by the owner's family for their residence. *See Stejskal v. Simons*, 309 AD2d 853, 855, 765 N.Y.S.2d 886, 888 [2d Dept 2003], *aff'd*, 3 N.Y.3d 628, 816 N.E.2d 186 [2004]; *see also Marquez v. Mascioscia*, 165 AD3d 912, 913, 86 N.Y.S.3d 180 [2d Dept 2018]. In the instant proceeding, Ms. Corbett stated that her family had spent weekends at the Premises prior to and subsequent to the renovations.

Defendant La Venta has also shown that its involvement in the work being conducted did not qualify as directing or controlling the means and methods of the work. In *Chowdhury v. Rodriguez*, the Court was clear that monitoring the process of the work "does not constitute the kind of direction or control necessary to overcome the homeowner's exemption from liability." *Chowdhury v. Rodriguez*, 57 AD3d 121, 127, 867 N.Y.S.2d 123, 128 [2d Dept 2008]. In *Ferrero v. Best Modular Homes, Inc.*, the Court held that the property owner benefited from the exemption and specified that "visiting the site on occasion, providing the site plans prepared by their engineers, hiring various subcontractors and scheduling when they would work, reviewing plans and the progress of the work, and making general decisions 'are no more extensive than would be expected of the ordinary homeowner.'" *Ferrero v. Best Modular Homes, Inc.*, 33 AD3d 847, 850, 823 N.Y.S.2d 477, 480 [2d Dept 2006], *quoting Lane v. Karian*, 210 AD2d 549, 550, 619 N.Y.S.2d 796, 797 [3d Dept 1994].

In opposition, an issue of fact has not been raised that would prevent this Court from granting Defendant LaVenta summary judgment in relation to the Plaintiff's Labor Law 240(1) and 241(6) claims. The Plaintiff contends that Defendant La Venta should not receive the benefit of the homeowner's exemption because the family does not currently reside at the Premises. What is more, the Plaintiff contends that the fact that

Ms. Corbett visited the Premises while work was conducted is sufficient to create an issue of fact regarding whether the Defendant owner directed or controlled the work at issue. It is clear that this "participation was limited to discussion of the results the homeowner wished to see, not the method or manner in which the work was then to be performed."*Affri v. Basch*, 13 N.Y.3d 592, 596, 921 N.E.2d 1034, 1036 [2009]. What is more, a homeowner will not be found to have directed or controlled the work at issue if he merely furnishes materials to be used in the construction process. *See Siconolfi v. Crisci*, 11 AD3d 600, 601, 783 N.Y.S.2d 627, 629 [2d Dept 2004]. Accordingly, the Plaintiff's Labor Law 240(1) and 241(6) claims are dismissed as against Defendant La Venta.

Based on the foregoing, it is hereby ORDERED as follows:

The Plaintiff's motion (motion sequence #2) for summary judgment is granted as to the Plaintiffs' Labor Law 240(1) claim and denied as to the Plaintiff's Labor Law 241(6) claims as against Defendant HII Company Corp.

Defendant La Venta's motion (motion sequence #3) for summary judgment is granted and the complaint and any cross-claims against Defendant La Venta are dismissed.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

**Carl J. Landicino, J.S.C.**

KINGS COUNTY CLERK
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