[* 1]

Court/County: _____

Case Title: _____

Docket Number: _____

Judge: Marguerite A. Grays

EXPERT(s): _____

File date:_____ **Type:**_____

Doc Reviewer Kathleen Benavidez

Mark the Correct Category	Doc Label (LBL) or Category		Doc Description
	Motion Order	**_MO**	**LBLX**
	Trial Order	**_TO**	**LBLX**
	Trial Pleading	**_TP**	**LBLX**
	Trial Motion, Memorandum, and Affidavit	**_TM**	**LBLX**
	Interrogatories	**_IN**	Questions only or questions and answers
	Trial Deposition and Discovery	**_TD**	Reports (JV ONLY) Requests for production of documents (JV ONLY) Depositions (FULL) (JV partials OK) Civil deposition affidavits
	Trial Filing	**_TF**	Statements Reports
	Original Transcript	**_OT**	Transcripts of hearings and trials (FULL)
	Verdict, Agreement and Settlement (actuals)	**_VS**	Verdict forms submitted to jury Signed settlement agreements with no attached order Signed stipulations with no attached order Signed plea agreements with no attached order
	Jury Instruction (actual)	**_JI**	Proposed and submitted jury instructions
	Expert Depositions	**_ED**	FULL
	Expert Transcripts	**_ET**	FULL
	Partial Expert Testimony	**_EP**	Partial Depos or Transcripts
	Expert Report and Affidavit	**_ER**	Expert Reports Expert Affidavits
	Proposed Order, Agreement, and Settlement	**_PR**	(ALL are JV ONLY) Proposed trial order Proposed plea agreement Proposed settlement agreement Proposed verdicts Proposed judgments Findings with proposed orders Stipulations with proposed orders Unsigned stipulations; Unsigned findings; Unsigned orders or verdict sheets
	Paper Only	**_PO**	Letters, Correspondence, other docs as instructed (JV and Court Express Archive)
	CV	**_CV**	Curriculum Vitae

\Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4
Justice

EGBERT MYLES,

Plaintiff(s)

-against-

CRAIG CLAXTON and VINTAGE PROJECTS, INC.,

Defendant(s)

Index Number 9563 2010

Motion Date November 1, 2011

Motion Cal. Numbers 27 & 28

Motion Seq. Nos. 4 & 5

VINTAGE PROJECTS, INC.,

Third-Party Plaintiff(s)

-against-

DELFINO INSULATION CO., INC., and BAGATTA ASSOCIATES, INC.

Third-Party Defendant(s)

Index Number 350125 2011

ORIGINAL

QUEENS COUNTY CLERK'S OFFICE FILED 2012 MAR 23 A 11:16

The following papers numbered 1 to 28 read on this motion by defendant Craig Claxton (Claxton) for summary judgment dismissing plaintiff's claims under Labor Law §§ 240(1), 241(6), and 200 and common-law negligence and all cross claims insofar as asserted against him; and on this motion by plaintiff for partial summary judgment on the Labor Law § 240(1) cause of action against defendants; and on this cross motion by defendant/third-party plaintiff Vintage Projects, Inc. (Vintage) for summary judgment dismissing plaintiff's complaint against it.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits.....	1 - 7
Notice of Cross Motion - Affidavits - Exhibits.....	8 - 11

Answering Affidavits - Exhibits.....12 - 18
Reply Affidavits.....19 - 28

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

Plaintiff was employed as an insulation installer by third-party defendant Delfino Insulation Co., Inc. (Delfino), to perform insulation installation work in the construction of a single-family house owned by Claxton. Pursuant to a written contract with Claxton, Vintage served as the construction manager on the project. On February 18, 2009, plaintiff, while installing insulation tiles in the ceiling, was allegedly injured when the ladder upon which he was ascending twisted, causing him to fall. Plaintiff subsequently commenced this action against defendants under Labor Law §§ 240(1), 241(6), and 200 and common-law negligence. On June 16, 2010, Vintage instituted a third-party action against Delfino and Bagatta Associates, Inc., Delfino's insurance broker, alleging contribution and common-law indemnification and breach of contract for failure to procure insurance.

The court first turns to those branches of Claxton's motion for summary judgment dismissing plaintiff's claims alleging a violation of Labor Law §§ 240(1) and 241(6) against him, and that branch of plaintiff's separate motion for partial summary judgment on the Labor Law § 240(1) cause of action insofar as asserted against Claxton. In support of his summary judgment motion, Claxton made a prima facie showing that he is entitled to the protection of the homeowner's exemption by submitting, inter alia, the parties' deposition transcripts (*see Gittins v Barbaria Constr. Corp.*, 74 AD3d 744 [2010]). Notably, plaintiff did not offer any evidence to oppose Claxton's arguments regarding the applicability of the homeowner's exemption. Owners of one or two-family dwellings who do not direct or control the work being performed are exempt from liability under Labor Law §§ 240 and 241 (*see Szczepanski v Dandrea Constr. Corp.*, 90 AD3d 642 [2011]; *Chowdhury v Rodriguez*, 57 AD3d 121 [2008]). Therefore, in order to receive the benefit of this homeowner's exemption, the defendant must demonstrate: (1) that the work was performed at a one or two-family dwelling, and (2) that the defendant did not direct or control the work (*see Chowdhury*, 57 AD3d at 126). The statutory phrase "direct or control" is construed strictly and refers to situations where the owner supervises the method and manner of the work (*see Ortega v Puccia*, 57 AD3d 54, 59 [2008]; *Pascarell v Klubenspies*, 56 AD3d 742 [2008]). Here, the deposition testimony of Claxton and Peter Swerz, the principal and sole shareholder of Vintage, demonstrated that the work at issue was being performed for the purpose of constructing a one-family dwelling, where Claxton currently resides. Moreover, there is no evidence indicating that Claxton had any role in supervising, directing, or controlling plaintiff's work. Instead, Claxton's involvement with the construction project was no more extensive than that of an ordinary homeowner who hired a contractor to build his or her home

(*see Jumawan v Schnitt*, 35 AD3d 382 [2006]; *Mayen v Kalter*, 282 AD2d 508 [2001]). At his deposition, Claxton testified that, although he and his father, who was designated as Claxton's representative, occasionally visited the property to check on the progress of the construction project, neither he nor his father directed any workers on how to perform their work and he did not provide any tools or ladders to the workers. In view of the foregoing, the branches of Claxton's motion for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims against him is granted, and that branch of plaintiff's motion for partial summary judgment on the Labor Law § 240(1) cause of action asserted against Claxton is denied.

As to the liability of Claxton pursuant to Labor Law § 200 and common-law negligence, Claxton established, prima facie, his entitlement to judgment as a matter of law dismissing those claims against him (*see Small v Gutleber*, 299 AD2d 536 [2002]). In opposition, plaintiff failed to raise a triable issue of fact. Where, as here, a claim arises out of alleged defects or dangers in the methods or manner of the work rather than the condition of the premises, recovery against the owner or contractor cannot be had under the common-law or 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 (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501, 505 [1993]; *Cambizaca v New York City Tr. Auth.*, 57 AD3d 701 [2008]). As previously discussed, the evidence in the record makes clear that Claxton did not supervise, direct, or control the method or manner in which the injured plaintiff performed his work.

Inasmuch as Vintage's verified answer (Claxton's exhibit D) does not allege any cross claims against Claxton, the branch of Claxton's motion for summary judgment seeking dismissal of all cross claims asserted against him is denied as moot.

Next, the court will address the branches of the cross motion by Vintage for summary judgment dismissing plaintiff's claims under Labor Law §§ 240(1) and 241(6) asserted against it, and that branch of plaintiff's motion for partial summary judgment on his Labor Law § 240(1) cause of action insofar as asserted against Vintage. On its motion, Vintage established its entitlement to judgment as a matter of law that it is not liable to plaintiff under Labor Law §§ 240(1) and 241(6) because it was not an "owner," "contractor," or "agent" of the owner or general contractor at the time of plaintiff's accident (*see Florez v Conlon*, 82 AD3d 831 [2011]). In opposition, plaintiff failed to raise a triable issue of fact. Although a construction manager is generally not considered a contractor responsible for the safety of the workers at a construction site pursuant to the Labor Law, it may nonetheless become responsible if it has been delegated the authority and duties of a general contractor, or if it functions as an agent of the owner of the premises (*see Rodriguez v JMB Architecture, LLC*, 82 AD3d 949 [2011]). A party is deemed to be an agent of an owner or general contractor

under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured (*see Linkowski v City of New York*, 33 AD3d 971, 974-975 [2006]). Therefore, to impose liability, 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 Damiani v Federated Dept. Stores, Inc.*, 23 AD3d 329, 332 [2005]). In this case, the record demonstrates that Vintage's role was only one of general supervision, which is insufficient to impose liability under Labor Law §§ 240(1) and 241(6) (*see Delahaye v Saint Anns School*, 40 AD3d 679 [2007]; *Armentano v Broadway Mall Props., Inc.*, 30 AD3d 450 [2006]; *Loiacono v Lehrer McGovern Bovis, Inc.*, 270 AD2d 464 [2000]). Specifically, section 2.3.15 of the contract between Claxton and Vintage provided that the construction manager, "shall have no control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connections with the Work of each of the Contractors, since these are solely the Contractor's responsibility under the Contract for Construction." That same section of the construction management contract also indicates that the construction manager, "shall not have control over or charge of acts or omissions of the Contractors, Subcontractor, or their agents or employees . . ." Additionally, Mr. Swerz stated in his affidavit and testified at his deposition that Vintage's duties involved selection of the contractors for each trade, coordination of the various trades, and monitoring the progress of the overall construction project. Mr. Swerz further stated that plaintiff's insulation work was overseen and directed only by his employer, Delfino. Likewise, plaintiff testified at his own deposition that no one other than Delfino employees gave him instructions on how to perform his work at the site.

Vintage also demonstrated its entitlement to summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action asserted against it. In opposition, plaintiff failed to raise a triable issue of fact. As discussed above, the evidence submitted by Vintage shows that Vintage had no authority to supervise, direct, or control the method or manner in which plaintiff performed his insulation work, and Vintage's general supervision and coordination of the construction project is insufficient to trigger liability (*see Delahaye*, 40 AD3d at 684).

Accordingly, Claxton's motion for summary judgment dismissing plaintiff's claims under Labor Law §§ 240(1), 241(6), and 200 and common-law negligence insofar as asserted against him is granted. In all other respects, Claxton's summary judgment motion is denied. Plaintiff's motion for partial summary judgment on the Labor Law § 240(1) cause of action against defendants is denied in its entirety. The cross motion by Vintage for summary judgment dismissing plaintiff's complaint against it is granted.

Dated: March 6, 2012

J.S.C.