Magill v Common Ground Community II Hous. Dev. Fund Corp.
2012 NY Slip Op 33482(U)
June 14, 2012
Sup Ct, Bronx County
Docket Number: 302379/2010
Judge: Wilma Guzman

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 07

Case Disposed	❑
Settle Order	❑
Schedule Appearance	❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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MAGILL,DANIEL Index No. **0302379/2010**

-against- Hon. **WILMA GUZMAN** ,

COMMON GROUND COMMUNITY Justice.

----------X

The following papers numbered 1 to _____ Read on this motion, **DISMISSAL**
Noticed on **March 12 2012** and duly submitted as No. ____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this Motion is decided in accordance with the attached decision and order.

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: JUN/14 2012

Hon. _____
WILMA GUZMAN, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 7

Index No. 302379/2010
Motion Calendar No. 9
Motion Date 5/7/12

DANIEL MAGILL,

Plaintiff,

-against-

COMMON GROUND COMMUNITY II HOUSING DEVELOPMENT FUND CORPORATION and MARSON CONTRACTING, CO., INC.,

Defendants,

MARSON CONTRACTING, CO., INC.,

Third-Party Plaintiff,

-against-

INTERSTATE INDUSTRIAL CORP.,

Third-Party Defendants,

DECISION/ORDER

Present:

Hon. Wilma Guzman
Justice Supreme Court

Recitation, as required by C.P.L.R. 2219(a), of the paper considered in the review of this motion to dismiss and motion for summary judgment.

Papers	**Numbered**
Defendant Common Ground Community II Notice of Motion, Affirmation in Support, and Exhibits in Support	**1**
Affirmation in Opposition	**2**
Reply Affirmation	**3**

Upon the foregoing papers and after due deliberation, and upon oral argument, the Decision/Order on this motion is as follows:

Defendant Common Ground Community II Housing Development Fund Corporation (hereinafter referred to as "Common Ground Community II") moves for an order pursuant to CPLR § 3211(a)(1) and § 3211(a)(7) dismissing the plaintiff's claims under the New York Labor Law §§

240(1), 241(6), and 200/common law negligence. The Defendant Common Ground Community II also moves for an order pursuant to CPLR § 3212 granting summary judgment dismissing the plaintiff's claims under New York Labor Law § 200/common law negligence. At issue here is whether the Defendant Common Ground Community II is an "owner" within the meaning of the Labor Law, and is thus subject to liability under these laws.

Statement of Fact

Plaintiff, Daniel Magill, commenced this action seeking damages for injuries allegedly sustained as the result of a work related injury on September 27, 2007. On September 27, 2007 Plaintiff was working as a high rise carpenter as an employee of the subcontractor, Interstate Industrial Corp. (hereinafter referred to as "Interstate"), to do work at 160 Schermerhorn Street in Brooklyn, New York (hereinafter referred to as "the Property"). Plaintiff and three other men were in the process of moving a 350 lbs. column by carrying the column over their shoulders. Immediately after hoisting the column onto their shoulders, the plaintiff claims that one of the other three men carrying the column in front of him tripped over debris and let go of the column causing the other men to drop the column in a domino-like fashion, injuring the plaintiff. Plaintiff filed suit against Defendant Common Ground Community II alleging it is an "owner" within the meaning of the Labor Law, and that it violated Labor Laws §§240(1), 241(6), and 200/common law negligence by creating or allowing the creation of a defective, hazardous and dangerous condition upon the premises, and by failing to furnish or erect for the performance of the plaintiff's labor, a device so constructed, placed, and operated as to give plaintiff proper protection. (Defendant Exhibit A).

Defendant Common Ground Community II argues that is it not an "owner" within the meaning of the Labor Law and is thus not subject to liability under these laws. In support of this position Defendant Common Ground Community II offers a nominee agreement they signed with Schermerhorn LP on December 29, 2005, which outlines Defendant Common Ground Community II's business relationship with Schermerhorn LP. Defendant contends that Schermerhorn LP is the true owner of the Property. The Agreement refers to Defendant Common Ground Community II as "HDFC," and notes that HDFC is an affiliate of Common Ground Community Housing Development Fund Corporation, Inc., (Hereinafter referred to as Common Ground Community), a separate entity from Common Ground Community II. Pursuant to the Nominee Agreement, Common

Ground Community and the Actor's Fund of America are the only members of a group named "Schemerhorn HDFC." Schemerhorn HDFC is the sole shareholder of Schemerhorn Housing Corp., who is a general partner of Schemerhorn LP (The Company). (Defendant Exhibit G). The Nominee Agreement states Defendant Common Ground Community II is authorized to acquire legal or record title to the Property solely as nominee on behalf of the Company, with the Company retaining all equitable and beneficial ownership interest in the property and the project. (Defendant Exhibit G). Upon completion of the construction project, the title will revert back to the Company. The Company will also have an unconditional obligation to bear the economic risk of depreciation in the value of the property, to keep the property in good repair, have an unconditional and exclusive right to the possession of the property and the project, and the exclusive right to develop the property. Additionally, Defendant Common Ground Community II shall not have any power, right, and/or authority to employ, and/or agree to employ, any persons and/or entities in connection with the property. (Defendant Exhibit G). The Defendant Common Ground Community II moved for an order granting a motion to dismiss of the plaintiff's Labor Law §§ 240(1), 241(6) and 200/common law negligence claims, and a summary judgment motion dismissing the plaintiff's Labor Law §200/common law negligence claim. The Defendant Common Ground Community II argues the Nominee Agreement serves as documentary evidence contradicting the plaintiff's claim that it is an "owner" within the meaning of the Labor Law and are thus not subject to liability as an "owner" under these laws. The plaintiff submitted an affirmation in opposition, and the Defendant Common Ground Community II submitted a reply affirmation. No other party in this suit opposes Defendant Common Ground Community II's motion.

Motion to Dismiss

A CPLR § 3211 motion should be granted only where "the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted." Biondi v. Beekman Hill House Apartment Corp., 257 A.D.2d 76, 692 N.Y.S.2d 304 (1st Dep't 1999). "Dismissal of a complaint pursuant to CPLR 3211(a)(1) is warranted where 'the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.'" 150 Broadway N.Y. Associates, L.P., v. Bodner et al., 14 A.D.3d 1, 7, 784 N.Y.S.2d 63 (1st Dep't 2004) (quoting Leon v. Martinez, 84 N.Y.2d 83, 88, 638 N.E.2d 511, 614 N.Y.S.2d 972 (1994)). Factual claims either

inherently incredible or flatly contradicted by documentary evidence are not presumed to be true or accorded favorable inference. Biondi v. Beekman Hill House Apartment Corp., 257 A.D.2d 76 (citing Kliebert v. McKoan, 228 A.D.2d 232, 89 N.Y.2d 802 (1st Dep't 1996)). However, unless it has been shown that a claimed material fact as pleaded is not a fact at all and there exists no significant dispute regarding it, dismissal is not warranted. Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 372 N.E.2d 17, N.Y.S.2d 182 (1977).

A motion to dismiss pursuant to C.P.L.R. § 3211(a)(7) requires that the Court favorably view the pleadings to determine whether a valid cause of action exists. Leon v. Martinez, 84 N.Y.2d 83. On a motion to dismiss pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the pleading is to be afforded a liberal construction (*see* CPLR § 3026). The court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *See* Leon v. Martinez,84 N.Y.2d 83, 87-88; Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409, 754 N.E.2d 184, 729 N.Y.S.2d 425, 754 N.E.2d 184 (2001).

Motion of Summary Judgment

In order to succeed on a summary judgment motion, Defendant Common Ground Community II must provide sufficient evidence to show the plaintiffs did not raise any issue of material fact. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986). A party moving for summary judgment is required to establish a prima facie entitlement regardless of the merits of the opposing papers. Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 852, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985). Because summary judgment deprives a litigant of his or her day in court, the court looks at the evidence submitted by both parties in a light most favorable to the non-moving party. Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 521 544 N.Y.S.2d 834 (1st Dep't 1989). The Court's role in summary judgment is issue finding, not issue determination. Rose v. DaEcib USA, 259 A.D.2d 258, 260, 686 N.Y.S.2d 19 (1st Dep't 1999). Courts will grant summary judgment only if there are no material, triable issues of fact. Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 498 (1957).

Labor Law § 240(1) Imposes Absolute Liability and a Nondelegable Duty on Owners

Labor Law § 240(1) states in pertinent part:

> 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.

The purpose of Labor Law § 240(1) "is to protect workers by placing ultimate responsibility for safety practices on owners and contractors instead of workers themselves." Abbatiello v. Lancaster Studio Assoc., 3 N.Y.3d 46, 50, 814 N.E.2d 784, 781 N.Y.S.2d 477 (2004) (quoting Panek v. County of Albany, 99 N.Y.2d 452, 457, 788 N.E.2d 616, 758 N.Y.S.2d 267(2003)). "Accordingly, the statute imposes absolute liability on owners and contractors for any breach of their statutory duty that proximately causes injury." *Id.* Additionally, "[t]he duty imposed is 'nondelegable and...an owner is liable for a violation of the section even though the job was performed by an independent contractor over which it exercised no supervision or control.'" Gordon v. Eastern Railway Supply, Inc., 82 N.Y.2d 555, 560, 626 N.E.2d 912, 606 N.Y.S.2d 127 (1993) (quoting Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509, 513, 583 N.E.2d 932, 577 N.Y.S.2d 219 (1991)). Labor Law § 240(1) "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed." *Id.* Accordingly, "Liability rests upon the fact of ownership." Gordon v. Eastern Railway Supply. Inc., 82 N.Y.2d 555, 560.

Defendant is an Owner Within the Meaning of § 240(1)

Defendant Common Ground Community II argues that it is not an "owner" within the meaning of the Labor Law because it did not experience a "genuine transfer of ownership" through the deed, and cannot be held liable as an owner under Labor Law § 240(1). In support of this position, defendant's main cases are Collins v. County of Monroe and its progeny, where the court held that a sale and lease-back transaction between the fee owner, Midtown, and COMIDA was not a "genuine allocation of ownership." Collins v. County of Monroe Indus. Dev. Agency, 167 A.D.2d 914, 915, 561 N.Y.S.2d 995 (4th Dep't 1990). *See Also* Vigliotti v. Executive Land Corp., 186

A.D.2d 646, 588 N.Y.S.2d 430 (2d Dep't 1992) (court held that a temporary transfer of a deed "clearly constituting nothing more than a financing mechanism" is not a genuine transfer of ownership). COMIDA assumed no risk of loss, no opportunity for gain, and merely served as a conduit for the tax benefits derived from the arrangement. Collins v. County of Monroe Indus. Dev. Agency, 167 A.D.2d 914, 915. Additionally, Midtown retained its ownership ability to control the circumstances of construction. *Id.* For these reasons the court held there was no "genuine allocation of ownership" and the original owner could not escape liability. *Id.*

Defendant Common Ground Community II argues it cannot be considered an owner as it is in the same position as COMIDA. In this case the Nominee Agreement shows Defendant Common Ground Community II assumed no risk of loss or opportunity for gain, they maintain that the transfer of title was merely a financing mechanism, and Schermerhorn LP retained possession and exclusive decision-making power in relation to the project and the property. Therefore, defendant argues, the Nominee Agreement shows the deed was not a genuine transfer of ownership and it is not an "owner" within the meaning of the Labor Law. They conclude that because this Nominee Agreement serves as documentary evidence that contradicts the allegations supporting plaintiff's claim that it is an owner, it is entitled to a dismissal pursuant to CPLR § 3211(a)(1). Defendant Common Ground Community II also contends that the plaintiff's claims should be dismissed pursuant to CPLR § 3211(a)(7) because the plaintiff does not have a cause of action under Labor Law § 240(1) against a party who is not an owner.

The ruling of the Court of Appeals in Adimey v. Erie County Industrial Development Agency, however, is contrary to Defendant Common Ground Community II's argument and establishes that they are owners within the meaning of § 240(1). Adimey v. Erie County Indus. Dev. Agency, 89 N.Y.2d 836, 675 N.E.2d 459, 652 N.Y.S.2d 724 (1996). In Adimey v. Erie County Indus. Dev. Agency the Court of Appeals modified the Appellate Division's ruling by reinstating the plaintiff's § 240(1) claim for the reasons stated in the dissent. *Id.* The majority in the Appellate Division ruled that because the sale and lease-back transaction between Tonawanda Coke Co. and ECIDA was identical to the transaction between Midtown and COMIDA in Collins v. County of Monroe, ECIDA could not be considered an "owner" within the meaning of § 240(1). Adimey v. Erie County Indus. Dev. Agency, 226 A.D.2d 1053, 641 N.Y.S.2d 957 (4th Dep't 1996). However, the dissent, whose reasoning the Court of Appeals affirmed, stated that ECIDA should be considered

an owner because it held title as the owner of the property. *Id* at 1054 (Lawton and Davis, JJ. dissenting). The dissent further stated, "The majority's holding negates the clear wording of Labor Law § 240(1), which states that an owner is absolutely liable for damages for injuries arising out of a violation of the statute...If an exception is to be made for "pass-through" owners like defendant, then such a change must be made by the legislature." *Id.*

In the instant case, the Nominee Agreement itself states that Defendant Common Ground Community II is the legal title holder of the property, thus under the reasoning in Adimey, Defendant Common Ground Community II is considered an "owner" under the Labor Law despite the fact that they are "pass-through" owners similar to ECIDA. *Id.* The Nominee Agreement does not qualify as a "written agreement [which] unambiguously contradicts" plaintiff's allegation that Defendant Common Ground Community II is an owner, and Defendant Common Ground Community II has not established a defense to the asserted claims as a matter of law. 150 Broadway N.Y. Associates, L.P., v. Bodner et al., 14 A.D.3d 1, 7. Therefore, Defendant Common Ground Community II's CPLR § 3211(a)(1) motion to dismiss plaintiff's Labor Law § 240(1) claim must be denied. Additionally, because Defendant Common Ground Community II is an "owner" within the meaning of the Labor Law, plaintiff has properly stated a cause of action against Defendant Common Ground Community II and Defendant's CPLR § 3211(a)(7) motion to dismiss plaintiff's § 240(1) claim must be denied as well.

Defendant is Also an Owner Within the Meaning of Labor Law § 241(6)

Labor Law § 241(6) states in pertinent part:

> 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.

Labor Law § 241(6) uses the same definition of "owner" as § 240(1) and similarly treats their liability. Like Labor Law § 241(1), Labor Law § 241(6) "by its very terms, 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." Rizzuto v. L.A. Wenger Contr. Co., 91 N.Y.2d 343, 348, 693 N.E.2d 1068, 670 N.Y.S.2d 816 (1998). Furthermore, the history behind § 241, as amended, clearly shows the legislative intent to place the ultimate responsibility for safety at building construction jobs on the owner and general contractor. *Id.* While the courts have rejected the notion that a violation of § 241(6) results in absolute liability regardless of the absence of some negligent act which causes injury, once such negligent act has been established, the owner is vicariously liable regardless of his or her fault. *Id* at 350.

Thus the reasoning in Adimey v. Erie County Indus. Dev. Agency applies, and Defendant Common Ground Community II's status as legal titleholder pursuant to the deed and the Nominee Agreement establish that it is an owner within the meaning of Labor Law § 241(6). The Nominee Agreement does not contradict plaintiff's allegation that Defendant Common Ground Community II is an owner and Defendant Common Ground Community II has not established a defense to plaintiff's §241(6) claims as a matter of law. For these reasons Defendant Common Ground Community II's motion to dismiss pursuant to CPLR § 3211(a)(1) with regard to plaintiff's § 241(6) claim, and any Industrial Code violation alleged, must be denied. Additionally, because Defendant Common Ground Community II can be considered an "owner" within the meaning of the Labor Laws, plaintiff has properly stated a cause of action and Defendant Common Ground Community II's CPLR §3211(a)(7) motion must be denied as well.

Plaintiff Must Establish Defendant had Duty to Protect Under Labor Law § 200

Labor Law §200 states:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section."

Labor Law §200 is a codification of the common law duty imposed on an owner or general contractor to provide construction site workers with a safe place to work. Comes v. New York State

Elec. & Gas Corp., 82 N.Y.2d 876, 877, 631 N.E.2d 110, 609 N.Y.S.2d 168 (1993). An implicit precondition to this duty "is that the party charged with that responsibility have the authority to control the activity bringing about the injury. *Id* (citing Russin v. Picciano & Son, 54 N.Y.2d 311, 317, 429 N.E.2d 805, 445 N.Y.S.2d 127 (1981)). "Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under the Labor Law §200." Lombardi v. Stout, 80 N.Y.2d 290, 295, 604 N.E.2d 117, 590 N.Y.S.2d 55 (1st Dep't 1991). Where the injury arises out of a hazardous condition on the site, plaintiff must present evidence sufficient to show that the Defendant Common Ground Community II exercised supervisory control over the construction site where the plaintiff sustained his injury. Rizzuto v. L.A. Wenger Contracting Co., Inc. 91 N.Y.2d 343,344. In order for a plaintiff to succeed on a §200 claim, they must prove the defendant's negligence by demonstrating the party charged had actual or constructive notice of an unsafe condition as well as the authority to control and correct the unsafe condition that caused the injury. Dumoulin v. Oval Wood Dish Corp. 211 A.D.2d 883, 886, 621 N.Y.S.2d 705 (3rd Dep't 1995).

Defendant Did Not Have Any Supervisory Authority Over the Work Site Thus Plaintiff's First Cause of Action Must be Dismissed

With regards to the plaintiff's cause of action citing a hazardous condition on the work site, the Nominee Agreement submitted by the Defendant Common Ground Community II serves as documentary evidence that unambiguously contradicts plaintiff's supporting allegations that Defendant Common Ground Community II had authority to control the construction site. *See* 150 Broadway v. Bodner, 14 A.D.3d 1,7. Additionally, the plaintiff raises no triable issues of fact as to Defendant Common Ground Community II's authority to control and correct the unsafe condition on the work site. Rizzuto v. L.A. Wenger Contracting Co., Inc. 91 N.Y.2d 343,344. The agreement, in pertinent part, states, "So long as the HDFC shall hold legal title to the Property, the Company shall have complete and exclusive possession and control of the Property and the HDFC shall not have any right to possess or control the Property, except as such may accrue to the HDFC as a shareholder of the General Partner of the Company." (Defendant Exhibit G (5)(a)). Additionally, the agreement states "The HDFC shall not have any power, right and/or authority to employ, and/or

agree to employ, any persons and/or entities in connection with and/or with respect to the Property." (Defendant Exhibit G (5)(e)). The Nominee Agreement explicitly states Defendant Common Ground Community II does not have any authority over the employees or any authority to control the property. Even if they had somehow received actual or constructive notice of the dangerous condition, according to the Nominee Agreement they explicitly have no authority to control the property, and thus do not have any supervisory control over the construction site. The Nominee Agreement thus serves as documentary evidence contradicting the allegations that Defendant Common Ground Community II could exercise any supervisory control over the site. *See* 150 Broadway v. Bodner, 14 A.D.3d 1, 7. Furthermore, the plaintiff raises no triable issues of fact as to whether or not Defendant Common Ground Community II had authority to control the conditions on the site, other than to say it was "conceivable" that they had such authority. Therefore, the plaintiff's first cause of action under Labor Law §200 must be dismissed.

Defendant Did Not Have Supervisory Authority Over the Work Causing Injury Thus Plaintiff's Second Cause of Action Must be Dismissed

Plaintiff's own deposition shows that nobody from Common Ground Community II directed him in his work. When the plaintiff was asked if Kevin, the Interstate foreman, was the only person that would direct him in how he did his work at the Property, he stated "he is the only one I listen to."(Defendant Exhibit 1 p. 39). Additionally, plaintiff stated that no one directed him to pick up the columns that day, as no one has to tell them directly what to do (Defendant Exhibit 1 p. 66-68). Furthermore, when asked about who directed the actual lifting of the column, the plaintiff stated that he and the other three co-workers counted in unison themselves to lift up the column (Defendant Exhibit 1 p. 77). Plaintiff further contended that he has never met anyone from Common Ground Community II and has never even heard of a company called Common Ground Community II. (Defendant Exhibit 1 p. 108).

Plaintiff's deposition shows the Defendant Common Ground Community II had no supervisory control over the operation, thus the Defendant Common Ground Community II is not liable as an "owner" under the Labor Law §200 for the work that caused injury. Plaintiff's second cause of action, citing Defendant Common Ground Community II's failure to furnish or erect for the performance of plaintiff's labor, a device so constructed, placed, and operated as to give plaintiff

proper protection, is in regards to the actual method and manner of performance of plaintiff's work. By the plaintiff's own admission no one from Common Ground Community II directed his work. The only argument plaintiff raises supporting their claim that Defendant Common Ground Community II is liable under §200 is that due to Defendant Common Ground Community II holding title, it is conceivable that Defendant Common Ground Community II had the requisite authority to direct and control the activity which brought about the injury. Under the standard for imposing liability under Labor law §200, however, the defendant must not only have the requisite authority to direct and control, but must actually direct and control the activity causing the injury. *See* Garlow v. Chappaqua Cent. School Dist., 38 A.D.3d 712, 713, 832 N.Y.S.2d 627 (2d Dep't 2007) (court held that general supervisory authority at a work site was insufficient to impose liability...Further, the authority to review safety at the site is insufficient if there is no evidence that the defendant actually controlled the manner in which the work was performed). Assuming that Defendant Common Ground Community II had any supervisory authority, which the Nominee Agreement states they did not, plaintiff raises no triable issue of fact as to whether the Defendant Common Ground Community II actually exercised that authority to control the manner in which the work was performed. *See* Lopes v. Interstate Concrete, Inc., 293 A.D.2d 579, 741 N.Y.S.2d 73 (2d Dep't 2002) (court held "[t]he determinative factor on the issue of control is not whether a subcontractor furnishes equipment but whether he has control of the work being done and the authority to insist that proper safety practices be followed"). Thus liability cannot attach to Defendant Common Ground Community II without actual authority to control the activity causing injury. *See* Lombardi v. Stout, 80 N.Y.2d 290, 295. Considering the Defendant Common Ground Community II did not directly control or supervise plaintiff's work, plaintiff's second cause of action under Labor Law §200 must be dismissed. *See Id.*

Accordingly, it is

ORDERED that Defendant Common Ground Community II's C.P.L.R. §3211(a)(1) and §3211(a)(7) motion to dismiss Labor Law §240(1) and §241(6) are hereby denied. It is further

ORDERED that Defendant Common Ground Community II's C.P.L.R. §3212 motion for summary judgment to dismiss Labor Law §200/common law negligence is granted. It is further

ORDERED that Defendant Common Ground Community II serve this Order with Notice of

Entry on all parties within 30 days of entry of this Order

The Clerk of the Court is to mark the Court file accordingly.

This constitutes the decision and Order of the Court.

JUN 14 2012

DATE

HON. WILMA GUZMAN

JUSTICE SUPREME COURT