[* 1]

SHORT FORM ORDER

COPY

INDEX No. 13-26949
CAL. No. 18-00688OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

***PRESENT:***

Hon. DENISE F. MOLIA
Acting Justice Supreme Court

MOTION DATE 5-25-18
ADJ. DATE 3-22-19
Mot. Seq. # 001 - MG
002 - MD; CASEDISP

----------X

MASON E. MARKHAM, III,

Plaintiff,

- against -

MATH HOLDINGS LL, LLC and FRANK CAFONE CONSTRUCTION, INC.,

Defendants.

----------X

DAVIS & FERBER, LLP
Attorney for Plaintiff
1345 Motor Parkway
Islandia, New York 11749

LAW OFFICE OF ANDREA G. SAWYERS
Attorney for Defendants
P.O. Box 2903
Hartford, CT 06104-2903

Upon the following papers numbered 1 to 43 read on these motions for summary judgment and to supplement the Bill of Particulars ; Notice of Motion/Order to Show Cause and supporting papers 1 - 16, 17 - 31 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 32 - 37 ; Replying Affidavits and supporting papers 38 - 41, 42 - 43 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the motion by defendants Math Holdings II, LLC and Frank Cafone Construction, Inc., for summary judgement dismissing the complaint against them is granted; and it is

***ORDERED*** that the cross motion by plaintiff for leave to supplement his bill of particulars and for summary judgment in his favor on the issue of liability is denied, as moot.

Plaintiff Mason Markham commenced this action to recover damages for personal injuries he allegedly sustained on March 22, 2013, while working on the construction of a single-family home located at 250 Ox Pasture Road, Southampton, New York. Plaintiff, who was preparing to paint the ceiling above the staircase leading to the third floor of the premises, allegedly was injured when a makeshift scaffold composed of a wooden plank stretched across two ladders collapsed beneath him. The premises in question

RJT

was owned by defendant Math Holdings II, LLC ("Math Holdings"), which hired defendant Frank Cafone Construction, Inc. ("Cafone Construction") to oversee the construction project. At the time of the accident plaintiff was employed by nonparty LaPolla, Inc., a separate contractor hired by Math Holding to perform painting and finishing services. By way of his complaint, plaintiff alleges causes of action against defendants based on common law negligence and violations of Labor Law §§ 240, 241 (6), and 200. Defendants joined issue denying plaintiff's claims and asserting affirmative defenses. The note of issue was filed on April 12, 2018.

Defendants now move for summary judgment dismissing the complaint on the grounds Math Holdings is exempt from plaintiff's Labor Law §§ 240 (1) and 241 (6) claims and cannot be held liable under the common law or Labor Law § 200, since it did not have the authority to control or supervise plaintiff's work. Defendants further assert that the Labor Law and negligence claims against Cafone Construction should also be dismissed, as it was not an owner, agent, or contractor, and it neither supplied plaintiff's equipment nor possessed the authority to direct his work. In support of the motion defendants submit, inter alia, a copy of the pleadings, the transcripts of the parties' deposition testimony, affidavits by the principals of Math Holding and Cafone Construction, and copies of the underlying agreements and correspondence shared between the parties.

Plaintiff opposes the motion and cross-moves for, inter alia, leave to supplement his bill of particulars by including additional claims against Cafone under Labor Law § 241 (6) based upon the alleged violation of New York Industrial Code §§ 12 NYCRR 23-1.2 (b) (4) (v), 12 NYCRR 23-1.2 (e) (4), and 12 NYCRR 23-5.1 (j). Plaintiff also seeks partial summary judgment on the issue of liability with respect to his Labor Law claims against Cafone Construction, arguing that it possessed contractual authority to determine worksite safety, and that it violated its concontaminant duty to ensure plaintiff be provided with adequate safety devices and not the makeshift scaffold from which he fell. Plaintiff further asserts that Cafone Construction failed to exercise its authority over worksite safety by ensuring that the means and methods of his work were safe. Although plaintiff concedes that the branch of his motion for summary judgment is untimely, plaintiff asserts that the motion should be considered because it is being made on grounds nearly identical to those asserted in defendant's motion.

Defendants only oppose the branch of plaintiff's cross motion seeking summary judgment on the issue of liability, arguing that the motion, made nearly eight months after the filing of the note of issue, is untimely and not made on grounds identical to their motion. Additionally, defendants contend that even if plaintiff's motion is considered it should nonetheless be denied, as it misstates the extent of Caffone's authority and control over worksite safety under its agreement with Math Holdings. According to Cafone Construction, testimony by its principal and contractual correspondence exchanged between him and the principals of Math Holdings, including documents specifically defining the scope of Cafone Construction's work and its budget, make it clear that it was neither responsible for the work of plaintiff's employer nor possessed the authority to determine its safety practices.

Initially, the court notes that by failing to oppose the branch of the motion seeking dismissal of the complaint against defendant Math Holdings, plaintiff is deemed to have abandoned those claims (*see* ***Rodriguez v Dormitory Auth. of the State of N.Y.***, 104 AD3d 529, 962 NYS2d 102 [1st Dept 2013]; ***Kronick v L.P. Thebault Co., Inc.***, 70 AD3d 648, 892 NYS2d 895 [2d Dept 2010]; ***Cardenas v One State St., LLC***,

68 AD3d 436, 890 NYS2d 41 [1st Dept 2009]). Math Holding established, in any event, its entitlement to dismissal of all the claims asserted against it by submitting undisputed that the single- family home in question was being built for exclusive use as a vacation home for its principal, Mary Ann Tighe, and that she neither supervised nor directed plaintiff's work such that she could held liable for his injuries (*see* ***Lombardi v Stout***, 80 NY2d 290, 295, 590 NYS2d 55 [1992]; ***Garcia v Pond Acquisition Corp.***, 131 AD3d 1102, 16 NYS3d 755 [2d Dept 2015]; ***Assevero v Hamilton & Church Props., LLC***, 131 AD3d 553, 15 NYS3d 399 [2d Dept 2015]; ***Parise v Green Chimneys Children's Servs., Inc.***, 106 AD3d 970, 965 NYS2d 608 [2d Dept 2013]). Therefore, the branch of defendants' motion seeking summary judgment dismissing the complaint against Math Holdings is granted.

As to the branch of defendants' motion for summary judgment dismissing the complaint against Cafone Construction, article 2 of the construction contract between Math Holdings and Cafone Construction states that the contractor "shall execute the Work described in the Contract Documents, except as specifically indicated in the Contract Documents to be the responsibility of others." Article 10 of the agreement further provides Cafone Construction with the authority to enter appropriate agreements to hire subcontractors to perform "[t]hose portions of the Work that [Cafone Construction] does not customarily perform with [its] own personnel." Section 1.1.3 of the general conditions of the agreement discretely defines Cafone Construction's work under the agreement as the means and constructions services undertaken by Cafone or its subcontractors to fulfill its obligations under the contract. Section 3.3.2 further narrows Cafone Construction's supervision and construction responsibilities "to those acts and omissions of [Cafone Construction's] employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for, or on behalf of, [Cafone Construction] or any of its Subcontractors." Section 5.1.1 of the general provisions goes on to distinguish what is meant by the term subcontractor under the agreement, explaining that the term subcontractors refers to a "person or entity who has a direct contract with [Cafone Construction] to perform a portion of the Work. . .[however] the term . . . does not include a separate contractor or subcontractors of a separate contractor." The contract correspondence between Cafone Construction and Math Holding submitted by defendants include construction accounting logs tracking the costs of construction and related understandings shared by the parties. Note 2 and 3 on page 2 of the accounting log dated September 27, 2010, specifically excludes the cost for the interior painting of cabinets, noting that such costs are the "responsibility of the owner(s) and or its agents." Note 3 also states that "Frank Cafone Construction assumes no liability or insurance responsibilities for subcontractors that are contracted directly to the Owner(s)."

The separate agreement between Math Holding and La Polla details the scope of the painting and finishing work to be performed by the contractor, stating explicitly that La Polla was responsible for painting all ceiling and wall surfaces. The agreement also states that all work and material will be supplied by La Polla, and sets forth a cost schedule of a down payment of 25%, and the balance to be paid to La Polla as progress payments. The agreement promises that "[a]ll work will be completed in a workmanlike manner according to standard practices" and warrants that the "agreements are contingent upon accidents or delays beyond our control. Our workers are fully covered by Workmen's Compensation Insurance."

Addressing the issue of the control of La Polla's work and the responsibility for its safety practices, an affidavit by Cafone Construction's principal, Frank Cafone, states that it was his understanding that his contract with Math Holding specifically excluded Cafone Construction from responsibility for the painting

work. Rather, Cafone states that the owner contracted directly with La Polla, and because it was not a Cafone Construction subcontractor, he and the owner had a clear understanding that Cafone Construction had no responsibility for La Polla's painting work, no authority over its workers or the methods or means they utilized. The affidavit further states that Cafone Construction never directed or supervised La Polla painters, never supplied them with tools or equipment, and never had any interaction with them, including on the day of the alleged accident. During his deposition testimony, Frank Cafone also testified that Cafone Construction's general responsibility for safety only applied to subcontractors hired by Cafone Construction, and not to subcontractors such as La Polla, hired separately by the owner to perform painting services.

During his deposition testimony, La Polla's principal, John LaPolla, testified that he never met Cafone Construction's principal until he commenced the agreed upon painting work, that Cafone Construction never directed La Polla's painting work or personnel, and that he and his employees performed the painting services on the sections of the premises that were already completed by Cafone Construction and its subcontractors.

Plaintiff similarly testified that his work was exclusively controlled by La Polla, and that he had never heard of Cafone Construction until after his accident. Plaintiff testified that he and his co-worker were responsible for erecting the makeshift scaffold on the day of the accident, and that they did so after retrieving a ladder and a plank from the garage which he presumed belonged to La Polla.

Mary Anne Tighe testified that she was the sole shareholder and officer of Math Holding, that she decided to separately hire La Polla because she was familiar with their work restoring historical homes, and that she did not see the point in paying Cafone Construction a fee for overseeing the painting work La Polla would perform on the premises. Tighe further testified that she made it clear to Cafone Construction and La Polla that Cafone Construction was not responsible for any aspect of the painting, and that she would inspect the work and give her input on aesthetics when she visited the worksite on Fridays.

The 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 eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Center***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). The burden will then shift to the nonmoving party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]).

When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations (*see* ***W.W.W. Assoc., Inc. v Giancontieri***, 77 NY2d 157, 162, 565 NYS2d 440 [1990]; ***Costello v Casale***, 281 AD2d 581, 583, 723 NYS2d 44 [2d Dept 2001], *lv denied* 97 NY2d 604, 737 NYS2d 52 [2001]). Thus, where a question of intent is determinable by written agreements, the question is one of law for the court (*see* ***Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.***, 32 NY2d 285, 344 NYS2d 925 [1973]). "While Labor Law § 240 (1) and § 241 (6) claims have been dismissed on the ground that a plaintiff's work at the time of the accident was outside the scope of the general contractor's contract, this defense inures only to the benefit of the parties who lacked the authority to

supervise or control the work. The rule has its genesis in the concept that Labor Law liability under section 240 (1) and section 241 (6) is premised on an owner's or general contractor's right to control the work, irrespective of whether such control is exercised, and that if the work leading to the accident is outside the scope of what is contracted for, there is no right of control on the part of the contractor and thus no liability under those statutes (***Butt v Bovis Lend Lease LMB, Inc.***, 47 AD3d 338, 341, 847 NYS2d 84 [1st Dept 2007], quoting ***Balthazar v Full Circle Constr. Corp.***, 268 AD2d 96, 98, 707 NYS2d 70 [1st Dept 2000]; *see* ***Ortiz v Igby Huntlaw LLC***, 146 AD3d 682, 49 NYS3d 17 [1st Dept 2017]). Similarly, for a general contractor "'[t]o be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, [it] must have authority to exercise supervision and control over the work'" (***Marquez v L & M Dev. Partners, Inc.***, 141 AD3d 694, 698, 35 NYS3d 700 [2d Dept 2016]; ***Rojas v Schwartz***, 74 AD3d 1046, 1046, 903 NYS2d 484 [2d Dept 2010]).

Here, Cafone Construction met its prima facie burden on the branch of its motion seeking dismissal of the Labor Law §§ 240 (1) and 241 (6) claims against it by submitting evidence that the authority to direct the means and methods of plaintiff's work or to control his safety practices was beyond the scope of its agreement with Math Holding, and that it never sought or exercised any such authority prior to plaintiff's accident (*see* ***Walls v Turner Constr. Co.***, 4 NY3d 861, 864, 798 NYS2d 351 [2005]; ***Ortiz v Igby Huntlaw LLC***, *supra*; ***Haidhaqi v Metropolitan Transp. Auth.***, 153 AD3d 1328, 62 NYS3d 408 [2d Dept 2017]; ***Butt v Bovis Lend Lease LMB, Inc.***, *supra*). As discussed above, the agreement between Cafone Construction and Math Holding, as well as the related correspondence they shared prior to plaintiff's accident, indicates that neither Cafone Construction nor Math Holding contemplated that Cafone Construction would be responsible for directing the work or safety practices of La Polla's workers, including plaintiff. The agreement only required Cafone Construction to exercise such control over the subcontractors it directly hired to perform construction activities, and explicitly excludes control or responsibility for the work performed by separate contractors directly hired by the owners, such as La Polla. Additionally, Frank Cafone, John LaPolla, and Mary Anne Tighe all testified that it was never their understanding or intent that Cafone Construction be conferred the authority to control the work or safety practices of La Polla's employees. Furthermore, to the extent that plaintiff's accident arose out of La Polla's work rather than a defective condition, and Cafone Construction demonstrated that it neither exercised authority over the work or provided plaintiff with any defective equipment, it likewise established its entitlement to dismissal of the common law and Labor Law § 200 claims against it (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 877, 609 NYS2d 168 [1993]; ***Mas v Kohen***, 283 AD2d 616, 725 NYS2d 90 [2d Dept 2001]).

In opposition, plaintiff failed to raise a triable issue warranting denial of the motion (*see* ***Winegrad v New York Univ. Med. Center***, *supra*; ***Zuckerman v City of New York***, *supra*). The designation "construction manager" or "general contractor" is not determinative of liability unless the contractor in question possessed the authority to control the means, methods, and safety of the plaintiff's work (*see* ***Walls v Turner Constr. Co.***, 4 NY3d 861, 798 NYS2d 351 [2005]; ***Lamar v Hill Intl., Inc.***, 153 AD3d 685, 686, 59 NYS3d 756 [2d Dept 2017]; ***Krawiecki v Cerutti***, 218 AD2d 323, 639 NYS2d 554 [3d Dept 1996]). Further, as discussed above, a review of the construction contract between Cafone Construction and Math Holding revealed that Cafone Construction's supervisory authority as general contractor for the project was limited to control over the work and safety practices of the subcontractors it directly hired to perform construction related activities. Conversely, the agreement specifically excluded such supervisory authority over subcontractors such as La Polla, which was directly hired by Math Holding. For the same reasons, the

cases cited by plaintiff in opposition to defendants' motion are distinguishable. The agreements involved in those cases were either ambiguous about whether the work in which the plaintiff was engaged at the time of the accident was within the scope of the work the defendant was hired to perform, or contained language raising a triable issue as to whether the general supervisory authority granted to the defendant was so broad that the contractor was arguably responsible for the safety of anyone who may have been affected by the work it conducted at the worksite. In contrast, the agreement between Cafone Construction and Math Holding excluded the painting and finishing services from the scope of Cafone Construction's work, and conferred it authority only over those subcontractors it hired to perform the construction related activities it was assigned. Accordingly, the branch of defendants' motion seeking dismissal of the Labor Law claims against Cafone Construction is granted.

Having determined that Cafone Construction is entitled to summary judgment dismissing all the claims against it, the cross motion by plaintiff seeking leave to supplement his bill of particulars to include more Labor Law § 241 (6) claims against Cafone Construction, and for summary judgment on the issue of liability with respect to all of his claims against it, is denied, as moot.

Dated: 12-13-19

Hon. Denise F. [illegible]
Hon. Denise R. [illegible]
A.J.S.C.

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**