To commence the 30-day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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NORBERTO GUEVARA MARQUEZ,

Plaintiff,

-against-

INWOOD LAKE LLC and THE TOWNHOMES AT INWOOD LAKE HOMEOWNERS ASSOCIATIONS, INC.,

Defendants.

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DECISION AND ORDER

Index No.: 2017-51118

The following papers numbered 1-24 were considered in connection with Defendant The Townhomes at Inwood Lake Homeowners Associations, Inc.'s (hereinafter "Defendant HOA") motion for an Order pursuant to CPLR 3212 granting summary judgment and dismissal of Plaintiff's Complaint and all cross-claims and for the costs and disbursements incurred with making this motion:

Notice of Motion-Affirmation of Paul J. Wells, Esq.-Exhibits A-O 1-17
Affirmation in Opposition of Andrew J. Smiley, Esq.-Exhibits 1-3 18-21
Reply Affirmation of Paul J. Wells, Esq.-Exhibits A-B. 22-24

This action was commenced by Plaintiff Norberto Guevara Marquez ("Plaintiff") on or about June 15, 2016, in New York County.[1] It is alleged that on or about July 1, 2014, at

[1] This matter was transferred to Dutchess County pursuant to the March 17, 2017 Order of Hon. Lucy Billings, J.S.C.

approximately 8:30 pm, Plaintiff was injured when he fell off the roof of a townhome on which he was working. The townhome was located within a development known as The Townhomes at Inwood Lake, with an address of 53 Halley Ct.,[2] Poughkeepsie, New York. At the time of the accident, Plaintiff was employed by non-party Northeast Remodeling Group Inc.

Plaintiff asserts causes of action against the Defendants sounding in common-law negligence and asserting violations of Labor Law §§200, 240(1) and 241(6). In order to evaluate Defendant HOA's potential liability to Plaintiff under these sections of law, a determination of its status in relation to the premises on which the accident occurred is critical.

"Section 200 of the Labor Law merely codified the common-law duty imposed upon an owner or general contractor to provide construction site workmen with a safe place to work." *Russin v. Louis N. Picciano & Son*, 54 NY2d 311, 316–17 [1981]. Similarly, sections 240(1) and 241(6) of the Labor Law detail the responsibilities of "contractors and owners and their agents." As such, in the instant matter, in order to be liable under these sections, Defendant HOA must necessarily be an owner, general contractor or an agent of one of these entities.

It is uncontested that Defendant HOA is not the owner of the premises. Defendant Inwood Lake LLC (hereinafter "Inwood Lake") answered the Complaint, but thereafter failed to comply with the Court's discovery orders. As a result, by Order dated August 9, 2018, this Court granted Plaintiff's motion for default judgment against said Defendant. However, pursuant to the Answer submitted by Defendant Inwood before its default, said defendant admitted ownership of the premises on which Plaintiff was injured. Accordingly, Defendant

[2] Plaintiff's Complaint and Bill of Particulars identifies the premises as "#53m Erin Court" and "#53m Erin Ct. & Holley Ct.," respectively. However, it appears uncontested that the proper address of the property is 53 Halley Court.

HOA is not the owner. Therefore, Defendant HOA can only be liable under these sections of law if it is a general contractor or an agent of the owner or general contractor.

Defendant HOA moves for summary judgment on the grounds that it did not owe Plaintiff a duty and that it was not a general contractor or statutory agent for either the owner or general contractor of the premises on which Plaintiff was injured. Defendant HOA also seeks summary judgment as to all cross claims that were asserted by defaulting Defendant Inwood Lake.

As a preliminary matter, as the answer of Defendant Inwood Lake has been stricken, the cross claims contained therein have also been stricken. Therefore, Defendant HOA's motion for summary judgment dismissing any cross claims asserted by Defendant Inwood Lake is granted.

Defendant HOA's application to dismiss Plaintiff's claims includes the pleadings, Plaintiff's Verified Bill of Particulars, the deposition transcripts of Plaintiff and Defendant HOA's witness Ronald Coleman, Defendant HOA's 2014 Financial Statement, a sampling of building permits for townhomes in the development at issue and a similar sampling of records of inspections.

It is well settled that on a motion for summary judgment, the proponent "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 852 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]. Once such a showing has been made, the burden of proof shifts such that an opponent to a motion for summary judgment must demonstrate the existence of a genuine triable issue of fact. *Alvarez v.*

Prospect Hosp., 68 NY2d 320 [1986]; *Vermette v. Kenworth Truck Co.*, 68 NY2d 714 [1986]. The papers submitted in support of and in opposition to a summary judgment motion should be scrutinized in a light most favorable to the party opposing the motion. *Dowsey v. Megerlan*, 121 AD2d 497 [2d Dept. 1986]; *Gitlin v. Chirkin*, 98 AD3d 561 [2d Dept. 2012].

Plaintiff herein claims that while he was working on the roof of the subject townhome, he lost his balance and fell off the roof. He further avers that because of the lack of safety protection he fell to the ground two floors below. There is no allegation that Plaintiff fell because of a defective or dangerous condition. As such, when "a claim arises out of the means and methods of the work, a defendant may be held liable for common-law negligence or a violation of Labor Law § 200 'only if he or she had 'the authority to supervise or control the performance of the work' [internal quotations and citations omitted]." *Caban v. Plaza Const. Corp.*, 153 AD3d 488, 490 [2d Dept. 2017]. In other words, Defendant HOA's liability for Plaintiff's injuries arising from the manner in which his work was performed requires that it had authority to exercise supervision or control over the injury-producing work. *Kandatyan v. 400 Fifth Realty, LLC*, 155 AD3d 848, 851 [2d Dept. 2017].

In support of the instant motion, Defendant HOA provides a copy of its Financial Statement for the Year ended December 31, 2014. That document indicates that the Association will ultimately consist of 52 residential units located on Erin Court and Halley Court in Poughkeepsie and that Defendant HOA is responsible for the operation, maintenance and preservation of the common property. The report also indicates that as of December 31, 2014, 47 units had been completed and sold and that "OL Properties LLC" is the Sponsor of the Association. Nothing in the report indicates that Defendant HOA was responsible for, or

involved in, the construction of the residential units.

Defendant HOA also provides copies of building permits for the construction of four (4) of the townhomes in the development, including the building permit for the subject premises, 53 Halley Ct. That building permit, issued on August 1, 2013, identifies "OL Properties LLC" as both the owner[3] and the contractor for the subject premises. The project description contained therein indicates that 53 Halley Ct. will be a new single-family townhouse.

Finally, Defendant HOA's witness, Ronald Coleman, testified that he is currently the president of the Defendant HOA Board and has held the position since May 2017. He purchased his unit from OL Properties and testified that he had never heard of Defendant Inwood Lake. He further testified that the responsibility of the Defendant HOA is to arrange for the upkeep of the property, including snowplowing, landscaping and garbage pickup. There is also a property manager that helps with these duties and, at the time of the accident, it was Asset Properties. He was not aware of any contracts between Defendant HOA and Defendant Inwood Lake.

Through these submissions, Defendant HOA has established *prima facia* that it is entitled to summary judgment on Plaintiff's common law negligence and Labor Law 200 claims. Plaintiff testified that he never took instruction from anyone other than people who worked for his employer and that he was not aware of who hired his employer. In addition, the evidence before this Court is that Defendant HOA is responsible only for the common areas of the development. Plaintiff's accident occurred on the roof of a single-family townhome under construction, which is not a common area for which Defendant HOA is responsible. As such,

[3] The Court notes that this information appears to be contradictory of the answer of Defendant Inwood Lake LLC. However, it remains uncontested that Defendant HOA is not the owner of the premises at issue.

there is no evidence that Defendant HOA had authority to exercise supervision or control over the work in which Plaintiff was engaged and, therefore, Defendant HOA cannot be held liable under a common-law negligence theory or Labor Law §200. *Kandatyan, supra.*

There is also no evidence in the record that Defendant HOA was a general contractor with respect to the premises on which Plaintiff was injured. Defendant HOA submitted a building permit for the premises that identified OL Properties as the contractor. More importantly, Defendant HOA is not in the construction business – it is an association of the homeowners of the townhomes responsible for the upkeep of the common areas of the development. As such, Defendant HOA has demonstrated a *prima facie* case that it is not a general contractor within the meaning of the Labor Law.

The record is also devoid of evidence that Defendant HOA is an agent of the owner or general contractor within the meaning of Labor Law §240(1) or §241(6). "'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' [citation omitted]." *Giannas v. 100 3rd Ave. Corp.*, 166 AD3d 853, 856 [2d Dept. 2018]. As demonstrated above, there is no evidence that Defendant HOA had supervisory control and authority over the work being done on the residential townhome on which Plaintiff was working at the time of his accident.

Finally, even if Defendant HOA was a general contractor or agent within the meaning of the Labor Law, Defendant HOA has established *prima facie* entitlement to summary judgment on Plaintiff's Labor Law §241(6) cause of action. "In order to recover on a cause of action alleging a violation of Labor Law § 241(6), a plaintiff must establish the violation of an

Industrial Code provision which sets forth specific safety standards." *Handlovic v. Bedford Park Dev., Inc.*, 25 AD3d 653, 654 [2d Dept. 2006]. As demonstrated by Defendant HOA, neither Plaintiff's Complaint, nor his Bill of Particulars, contains a reference to any violation of an Industrial Code provision. As such, Defendant HOA established its *prima facie* entitlement to dismissal Plaintiff's Labor Law §241(6) claim on this ground as well.

In opposition, Plaintiff argues that Defendant HOA's motion is premature because there is outstanding discovery. Plaintiff argues that Defendant HOA failed to produce a witness with actual knowledge of the extent of the Townhome's involvement, direction, control and oversight of the construction being performed within the community at the time that Plaintiff was injured. Specifically, Plaintiff argues that a 2014 board member identified in post deposition discovery responses needs to be deposed to determine the nature of Defendant HOA's involvement in the construction. However, this falls far short of raising an issue of fact sufficient to deny Defendant HOA's motion.

Instead, Plaintiff's opposition raises questions regarding his own failure to pursue discovery. There is no mention of attempts to depose a representative of Plaintiff's employer, nor efforts made to obtain copies of any contracts that Plaintiff's employer had with the contractor and/or owner of the subject premises. The Court understands that Defendant Inwood Lake's default hampered Plaintiff's ability to get discovery from that Defendant. However, Plaintiff fails to explain what other attempts were made to obtain relevant documentation or to identify witnesses with knowledge regarding that Defendant. Although Plaintiff complains that it is "inconceivable" that Defendant HOA does not possess any contracts or documents regarding the construction work, Plaintiff fails to present any evidence that would support this assertion.

There is no evidence before this Court that Defendant HOA was involved in the construction of the premises at issue. The mere fact that there were 2014 board members identified as "builder/representatives" in no way demonstrates that Defendant HOA was involved in the oversight of the construction of the premises on which Plaintiff was injured to the level required by the Labor Law.

Notably, it appears that Plaintiff was provided with copies of minutes of the Defendant HOA Board for three (3) months prior to and three (3) months after the date of the accident. *See* Response to Plaintiff's Post EBT Demands, Exhibit 3, Smiley Affirmation. Presumably, if the Board was involved in the construction of the premises at the level necessary to be held liable under the Labor Law, there would have been some mention of the construction in those minutes. As Plaintiff fails to reference or attach said minutes, it can be inferred that no mention is made of the construction therein.

It appears that the crux of Plaintiff's argument is that Defendant HOA is required to disprove its involvement in the construction of the premises at issue. However, that is not the burden of proof required of Defendant HOA. The Labor Law makes clear that in order for Defendant HOA to be liable for Plaintiff's injuries as a general contractor or agent of the owner or general contractor, said defendant must have been involved in the supervision of Plaintiff's work. The only evidence in the record on this issue is Plaintiff's own testimony that he only took direction from individuals who were employed by his employer. It is beyond cavil that Defendant HOA is not in the business of construction or general contracting.[4] The cases on

[4] In fact, Plaintiff does not contest the stated nature of Defendant HOA as listed in its December 31, 2014 financial statement – "The Association is responsible for the operation, maintenance and preservation of the common property." Nothing in this description, nor in the stated financials, indicates that Defendant HOA was responsible for the construction of any of the individual units, or was in any way responsible for overseeing their construction.

which Plaintiff relies in opposition are insufficient to raises triable issues of fact. Plaintiff cites to these cases for their definition of a "contractor" or "construction manager" within the meaning of the Labor Law and argues that issues of fact exist as to whether Defendant HOA is the general contractor and/or managing agent. However, in order for there to be issues of fact, there must be some evidence to show that Defendant HOA did in fact act as a general contractor or agent. As demonstrated above, the record is devoid of such evidence and Plaintiff does not offer any facts to support this argument.[5] Having provided no admissible evidence which raises an issue of fact, Defendant HOA is entitled to summary judgment on all of Plaintiff's causes of action.

The Court has considered the additional contentions of the parties not specifically addressed herein and finds them unavailing. To the extent any relief requested by either party was not addressed by the Court, it is hereby denied. Accordingly, it is hereby

ORDERED that Defendant HOA's motion for summary judgment is GRANTED in its entirety and the Complaint and all cross claims asserted against it are dismissed; and it is further

ORDERED that an inquest on Plaintiff's claim against Defendant Inwood Lake is scheduled for February 28, 2019 at 2:00 ~~a.m.~~/p.m.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
January 23, 2019

Christi J. Acker
HON. CHRISTI J. ACKER, J.S.C.

[5] As cited by Plaintiff, an "entity is a contractor within the meaning of Labor Law §240 (1) and §241 (6) if it had the power to enforce safety standards and choose responsible subcontractors." *Mulcaire v. Buffalo Structural Steel Const. Corp.*, 45 AD3d 1426, 1428 [2d Dept. 2007]. Plaintiff offers no evidence that would allow this Court to conclude that Defendant HOA had any power to enforce safety standards or choose responsible subcontractors for the subject premises.

To: All parties via ECF

Inwood Lake, LLC
600 Sunrise Highway
Patchogue, New York 11772