SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

THOMAS KRUKOWSKI and ELYSA KRUKOWSKI,

Plaintiffs,

- against -

LARRY KEFER, REBECCA KEFER and N.J. MARTIN & SON, INC.,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 17589/08
Motion Seq. Nos.: 01, 02
Motion Dates: 04/27/10
08/19/10

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The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 01), Affirmation and Exhibits	1
Notice of Motion (Seq. No. 02), Affirmation and Exhibits	2
Affirmation in Opposition to Defendants' Motions (Seq. Nos. 01 & 02) and Exhibits	3
Reply Affirmation	4
Reply Affirmation	5

Defendants Larry Kefer and Rebecca Kefer move (Motion Seq. No. 01), pursuant to CPLR §§ 3211 and 3212, for an order granting summary judgment and dismissing plaintiffs' complaint. Defendant N.J. Martin & Sons, Inc. ("Martin") moves (Motion Seq. No. 02), pursuant to CPLR §§ 3211 and 3212, for an order granting summary judgment to it under Labor Law §§ 200, 240(1) and 241(6) and for plaintiff failing to make out a *prima facie* case of negligence against defendant Martin. Plaintiffs oppose both motions.

BACKGROUND

Plaintiff Thomas Krukowski is a licensed plumber, who works under the name Plumbing Kru. On December 17, 2007, he was performing plumbing work at a one-family dwelling at 3510 Riverside Drive, Oceanside, New York, when he fell and sustained injuries. He was standing on his 8-foot fiberglass ladder in the garage of the premises attempting to connect a bathtub drain, which was located above the drop ceiling in the garage, when the ladder toppled. According to plaintiff Thomas Krukowski, the cause of his fall was due to defendants' "failure to provide a level or flat flooring surface and permitting and allowing said flooring to be strewn with tools, debris, refuse, and pieces of wood and other similar construction material." *See* Defendants Kefers' Affirmation in Support Exhibit C - Plaintiffs' Verified Bill of Particulars, par. 6.

Plaintiff Thomas Krukowski was alone at the time of his fall. He testifies that he "'footed the ladder' to check to make sure it was properly extended and level. I did not see a problem with it." *See* Plaintiffs' Affirmation in Opposition Exhibit E - Thomas Krukowski affidavit, par. 8. When he landed on the floor he "noticed that the ground was uneven, heavily sloped." *See id.* He never made a prior complaint about the pitch of the cement floor (*see* Defendants Kefers' Affirmation in Support Exhibit E- Krukowski transcript, p. 174), which had been poured by a cement contractor. *See* Plaintiffs' Affirmation in Opposition Exhibit F -Kefer transcript, p. 20.

Plaintiff Thomas Krukowski testified that he had not met or spoken to defendant Larry Kefer until the inspection that took place after the work was complete (*see* Defendants Kefers' Affirmation in Support Exhibit E - Krukowski transcript, p. 106), and that he never had any kind of contact, written, verbal or otherwise, prior to that inspection. *See* Defendants Kefers' Affirmation in Support Exhibit E - Krukowski transcript, p. 138. Later in his deposition he testified that he met defendant Larry Kefer only once but not at the inspection. *See* Defendants Kefers' Affirmation in Support Exhibit E - Krukowski transcript, p. 138. According to defendant Larry Kefer, he met plaintiff Thomas Krukowski once before the job was started, to discuss the price and use of copper piping and insulation. *See* Plaintiffs' Affirmation in Opposition Exhibit F -Kefer transcript, pp. 24-25.

Defendant Martin is in the business of framing and contracting. It was hired by defendant Larry Kefer in early 2007, and its work included framing, sheeting, installation of windows and two pillars, and trim work. It started work on the subject house in June 2007, and ended sometime in October, 2007, more than a month before plaintiff Thomas Krukowski's accident. Plaintiff Thomas Krukowski testified that defendant Martin did not supervise or control his work. *See* Defendants Kefers' Affirmation in Support Exhibit E -Krukowski transcript, pp.170-171.

Plaintiff Thomas Krukowski believed that Kam Ghazvini, the person who hired him, was the general contractor on the job (*see* Defendants Kefers' Affirmation in Support Exhibit E-(Krukowski transcript, p. 29), although plaintiff Thomas Krukowski's paychecks did have a corporate name on them. *See* Defendants Kefers' Affirmation in Support Exhibit E -Krukowski transcript, p. 169. He based his understanding on "previous workings" with Mr. Ghazvini. *See* Defendants Kefers' Affirmation in Support Exhibit E- Krukowski transcript, p. 197. Plaintiff Thomas Krukowski states that he had previously performed work for Mr. Ghazvini and defendant Larry Kefer under the corporate name of G&K Realty Group LLC ("G&K"), and plaintiffs submit copies of checks payable to Plumbing Kru for plaintiff Thomas Krukowski's work herein that are drawn on the account of G&K. However G&K is not a defendant herein.

Plaintiffs commenced this action, alleging claims against the defendants Kefers/owners and defendant Martin, the framing contractor, for common-law negligence, loss of services, and violations of Labor Law §§ 200, 240, and 241. At this times defendants seek summary judgment dismissing the claims against them.

SUMMARY JUDGMENT STANDARD

Summary judgment is the procedural equivalent of a trial. *See S.J. Capelin Associates, Inc. v. Globe Mfg. Corp*, 34 N.Y.2d 338, 357 N.Y.S.2d 478 (1974). The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. *See Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). Once a *prima facie* case has been made, the

burden shifts to the opponent, who must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial. *See Alvarez v. Prospect Hospital, supra*; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient. *See Zuckerman v. City of New York, supra.*

LABOR LAW CLAIMS

Labor Law §240(1) is known as the "scaffold law." *See Misseritti v. Mark IV Construction Co., Inc.*, 86 N.Y.2d 487, 634 N.Y.S.2d 35 (1995). It imposes a non-delegable duty on owners, general contractors, and their agents to provide safety devices to protect workers from elevation-related risks. *See Temperino v. DRA, Inc.*, 75 A.D.3d 543, 904 N.Y.S.2d 767 (2d Dept. 2010); *Kilmetis v. Creative Pool and Spa, Inc.*, 74 A.D.3d 1289, 904 N.Y.S.2d 495 (2d Dept. 2010). A contractor will be liable under Labor Law §240(1) if it had the control over the work being done and the authority to insist that proper safety standards be followed. *See Temperino v. DRA, Inc., supra*; *Kilmetis v. Creative Pool and Spa, Inc., supra.* In order to establish liability under Labor Law §241(6) a plaintiff must establish a breach of a rule or regulation under the Industrial Code which gives a specific positive command. *See Rizzuto v. LA Wenger Contracting Co., Inc.*, 91 N.Y.2d 343, 670 N.Y.S.2d 816 (1998); *Mugavero v. Windows by Hart, Inc.*, 69 A.D.3d 694, 894 N.Y.S.2d 448 (2d Dept. 2010).

Labor Law §§ 240 and 241 expressly exempt from coverage "owners of one and two-family dwellings who contract for but do not direct or control the work." The phrase "direct or control" is strictly construed and refers to the situation where the owner supervises the method and manner of the work. *See Parnell v. Mareddy*, 69 A.D.3d 915, 897 N.Y.S.2d 108 (2d Dept. 2010); *Torres v. Levy,* 32 A.D.3d 845, 821 N.Y.S.2d 127 (2d Dept. 2006); *McGlone v. Johnson*, 27 A.D.3d 702, 810 N.Y.S.2d 915 (2d Dept. 2006).

As a general rule, a separate prime contractor will not be liable under Labor Law §§240 or 241 for injuries caused to employees of other contractors with whom they are not in privity, so long as the contractor has not been delegated the authority to oversee and control the activities of the injured worker. *See Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 445 N.Y.S.2d 127 (1981); *Barrios v. City of New York*, 75 A.D.3d 517, 905 N.Y.S.2d 255 (2d Dept. 2010).

Labor Law §200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work. *See Rojas v. Schwartz*, 74 A.D.3d 1046, 903 N.Y.S.2d 484 (2d Dept. 2010); *Cambizaca v. New York City Transit Authority*, 57 A.D.3d 701, 871 N.Y.S.2d 220 (2d Dept. 2008), *lv app den* 12 N.Y.3d 715, 884 N.Y.S.2d 690 (2009). To be held liable under Labor Law §200 for injuries stemming from a dangerous condition on the premises, a landowner may be held liable if it had control over the work site and either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition. *See Rojas v. Schwartz, supra*; *Ortega v. Puccia*, 57 A.D.3d 54, 866 N.Y.S.2d 323 (2d Dept. 2008). Similarly a general contractor may be liable under Labor Law §200 for a dangerous condition on the premises where it had control over the work site, and either created the condition or had actual or constructive notice of it. *See Martinez v. City of New York,* 73 A.D.3d 993, 901 N.Y.S.2d 339 (2d Dept. 2010); *Wynne v. B. Anthony Construction Corp.*, 53 A.D.3d 654, 862 N.Y.S.2d 379 (2d Dept. 2008).

AGENCY LAW

Agency law generally holds a principal responsible for the acts of an agent that are taken with actual or apparent authority. *See Kirschner v. KPMG LLP*, __ NY3d __, 2010 WL 4116609, at FN 3 (2010). Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction; the agent cannot by his own acts imbue himself with apparent authority. *See Hallock v. State of New York*, 64 N.Y.2d 224, 485 N.Y.S.2d 510 (1984); *Marshall v. Marshall,* 73 A.D.3d 870. 905 N.Y.S.2d 182 (2d Dept. 2010); *ER Holdings LLC v. 122 W.P.R. Corp.*, 65 A.D.3d 1275, 887 N.Y.S.2d 138 (2d Dept. 2009); *150 Beach 120th Street Inc. v. Washington Brooklyn Ltd. Partnership*, 39 A.D.3d 722, 833 N.Y.S.2d 667 (2d Dept. 2007).

PRELIMINARY MATTER

At the outset, the Court notes that plaintiffs allege dual defective conditions on the premises, namely, unevenness of the garage floor and the accumulation of debris thereon. However at his deposition, plaintiff Thomas Krukowski testified that on the day of the accident he "swept the ground with his foot trying to remove the smaller items out of the way," and

"spent a minute or so trying to clear the area enough to be able to put up the ladder." *See* Plaintiffs' Affirmation in Opposition Exhibit E - Krukowski affidavit, par. 7. Based on his testimony that prior to placing the ladder, he ensured that the area where he placed the ladder was free from debris (*see* Defendants Kefers' Affirmation in Support Exhibit E - Krukowski transcript, p. 176), plaintiff Thomas Krukowski admitted that debris on the garage floor did not cause his accident. *See* Defendants Kefers' Affirmation in Support Exhibit E - Krukowski transcript, pp. 190-191. Under these circumstances, the sole defective condition that is at issue on these motions is the alleged sloping or unevenness of the garage floor.

DISCUSSION OF OWNERS' MOTION

Defendants Larry and Rebecca Kefer move for summary judgment dismissing the complaint in its entirety. With respect to the claims pursuant to Labor Law §§240 and 241, it is undisputed that the work at issue was being performed on a one-family dwelling, and that defendants Kefers owned the subject dwelling during the relevant time period and resided there after construction was finished. Defendants Kefers both deny any supervision or control of the project, and there is no evidence to the contrary. Consequently defendants Larry and Rebecca Kefer have presented a *prima facie* case for summary judgment dismissing the claims against them pursuant to Labor Law §§ 240 and 241.

With respect to the claims for negligence and violation of Labor Law §200, there is no evidence that defendant Rebecca Kefer was in the garage prior to the plaintiff Thomas Krukowski's fall, and defendant Larry Kefer testified that he had no knowledge of any unevenness or sloping of the garage floor. Defendant Larry Kefer also noted that the garage floor passed the inspection for the certificate of occupancy for the house. On this record, defendants Kefers have presented a *prima facie* case that neither of them had actual or constructive notice of any sloping or unevenness of the garage floor.

Nobody seriously argues that defendant Rebecca Kefer played any role in the construction of the subject dwelling. Plaintiffs do attempt to raise a triable issue of fact regarding defendant Larry Kefer's involvement, by alleging that Mr. Ghazvini acted as the general contractor on the job who coordinated all trades, and also as the agent for and business partner of defendant Larry Kefer. However, an agent cannot by his own acts imbue himself with apparent authority, and plaintiff Thomas Krukowski admits that all contact was with Mr.

Ghazvini. Plaintiffs have failed to raise a triable issue of fact as to either apparent or actual authority of Mr. Ghazvini to act as agent of defendant Larry Kefer.

Plaintiffs' reliance upon *Marsh v. Marsh,* 45 A.D.3d 1100, 845 N.Y.S.2d 551 (3d. Dept. 2007) is misplaced. In that case the plaintiff and the defendant together placed the ladder on the "slick" asphalt driveway near the picket fence on which the plaintiff fell when the ladder "slipped."

Finally, as plaintiff Elysa Krukowski's claim for loss of services is derivative, and dependent on plaintiff Thomas Krukowski's claims, this cause of action must fail. *See Shaw v. RPA Associates, LLC*, 75 A.D.3d 634, 906 N.Y.S.2d 574 (2d Dept. 2010).

Based on the foregoing, the motion by defendants Larry and Rebecca Kefer for summary judgment dismissing all claims against them in the complaint is hereby granted.

DISCUSSION OF MOTION BY DEFENDANT MARTIN

Defendant Martin moves for summary judgment dismissing the complaint on the grounds that it was not the general contractor on the job site, it did not supervise or control plaintiff Thomas Krukowski's work on the day of the accident, and it did not create the condition that caused plaintiff Thomas Krukowski's injury, namely the garage floor at the premises. Review of the record supports all of these contentions. Plaintiff Thomas Krukowski testified that the general contractor on the job was Mr. Ghazvini, and that defendant Martin did not supervise or control any of his work on the job site. The concrete floor was poured by a concrete contractor, and the Court notes that defendant Martin had been gone from the work site for more than a month when the accident occurred. Overall, defendant Martin has established that it did not have control over the work site, nor had it ever been delegated the authority to supervise and control the plumbing work on the construction site. Defendant Martin has made a *prima facie* case for summary judgment dismissing all of the Labor Law claims, and the common-law negligence claim against it.

In opposition, plaintiffs fail to raise any triable issue of fact as to defendant Martin's involvement in plaintiff Thomas Krukowski's injury. The fact that its name may have been listed on an application for a permit as the general contractor (*see* Plaintiffs' Affirmation in Opposition Exhibit F -Kefer transcript, pp.16, 37), without more, does not raise a triable issue of fact as to whether defendant Martin was the general contractor for the purposes of the Labor

Law. *See Kilmetis v. Creative Pool and Spa, Inc.*, *supra*; *Huerta v. Three Star Construction Co., Inc.*, 56 A.D.3d 613, 868 N.Y.S.2d 679 (2d Dept. 2008), *lv app den* 12 N.Y.3d 702, 876 N.Y.S.2d 350 (2009).

Accordingly, the motion by defendant Martin for summary judgment dismissing all claims in the complaint against it is hereby granted.

This constitutes the decision and order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
December 1, 2010