SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : **HON. ROBERT J. McDONALD** **IAS PART 34**
Justice

- x

JULIO A. ASENCIO and PATRICIA L. ASENCIO,

Plaintiff,

- against -

JPMORGAN CHASE BANK, N.A., JP MORGAN CHASE & CO. and PLAZA CONSTRUCTION CORP.,

Defendants.

- x

Index No.: 24353/08

Motion Date: 10/13/12

Motion No.: 4

Motion Seq.: 3

The following papers numbered 1 to 9 read on this motion by defendants for summary judgment dismissing plaintiffs' claims under Labor Law §§ 240(1), 241(6), and 200 and common-law negligence.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1 - 3
Answering Affidavits - Exhibits	4 - 6
Reply Affidavits	7 - 9

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff Julio Asencio was employed as an asbestos remover by P.A.L. Environmental Safety Corp. (P.A.L. Environmental), which was hired by defendants JP Morgan Chase Bank, N.A. and JP Morgan Chase & Co. (JP Morgan), the owner of the subject premises, to perform demolition and abatement of asbestos. Defendant Plaza Construction Corp. (Plaza) was hired by JP Morgan to act as the construction manager on the demolition and reconstruction project. On October 22, 2007, plaintiff Julio Asencio was allegedly injured when he tripped on debris and/or

tools on the platform of the scaffolding upon which he was performing demolition work. Plaintiff Julio Asencio, and his wife suing derivatively, subsequently commenced this action against defendants under Labor Law §§ 240(1), 241(6), and 200 and common-law negligence. On February 13, 2009, JP Morgan and Plaza instituted a third-party action against P.A.L. Environmental alleging contractual and common-law indemnification and contribution. Thereafter, on January 17, 2010, the parties filed a stipulation discontinuing without prejudice the third-party action against P.A.L. Environmental.

At the outset, the court notes that, irrespective of plaintiffs' objection, the motion by defendants for summary judgment is timely and, therefore, will be considered herein. In the absence of a court order or rule to the contrary, CPLR 3212(a) requires summary judgment motions to be made no later than 120 days after the filing of the note of issue, except with leave of court on good cause shown (*see Brill v City of New York*, 2 NY3d 648, 652 [2004]). In a so-ordered stipulation dated March 3, 2011, the court explicitly directed that "the time for parties to *make* summary judgment motions" was extended to ninety days after the completion of depositions (emphasis added). It is well-settled that a motion is made when a notice of motion or order to show cause is served (CPLR 2211). Service of a motion by mail, where as here, is deemed effective upon mailing (CPLR 2103[b]). The depositions of Plaza and JP Morgan were conducted on April 25, 2011 and May 3, 2011, respectively, and therefore, as directed by the so ordered stipulation, the deadline for the parties to move for summary judgment was August 1, 2011. As such, defendants' summary judgment motion, which was served by mail on August 1, 2011, was timely.

With respect to Plaza, said defendant established its entitlement to judgment as a matter of law that it is not liable to plaintiffs 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 Julio Asencio's accident. In opposition, plaintiffs failed to raise a triable issue of fact. Generally, a construction manager is not considered a contractor responsible for the safety of the workers at a construction site under the Labor Law unless 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 Walls v Turner Constr. Co.*, 4 NY3d 861 [2005]). Only upon obtaining the authority to supervise and control does an entity fall within the class of those having nondelegable liability as an "agent" under Labor Law §§ 240(1) and 241(6) (*see Russin v Picciano & Son*, 54 NY2d 311 [1981]); *Linkowski v City of New York*, 33 AD3d 971 [2006]). Therefore, to

impose such 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 evidence in the record makes clear that Plaza's role was only one of general supervision, which is insufficient to support liability under the Labor Law (*see Rodriguez v JMB Architecture, LLC*, 82 AD3d 949 [2011]; *Armentano v Broadway Mall Props., Inc.*, 30 AD3d 450 [2006]; *Loiacono v Lehrer McGovern Bovis, Inc.*, 270 AD2d 464 [2000]). Specifically, Steven Ruotolo, Plaza's project director, testified at his deposition that Plaza only coordinated the schedule of the renovation project and performed contract document review, estimating, value engineering, logistics, bid solicitation, and work scope analysis. Mr. Ruotolo further stated that Plaza had no involvement in the actual work on the renovation project and, in particular, plaintiff Julio Asencio's work was overseen and directed only by his employer, P.A.L. Environmental.

Defendants established their prima facie entitlement to judgment as a matter of law that plaintiff Julio Asencio's activities did not fall within the special elevation-related risks encompassed by Labor Law § 240(1) (*see Melo v Consolidated Edison Co. of N.Y.*, 246 AD2d 459 [1998], *affd* 92 NY2d 909 [1998]). To prevail on a Labor Law § 240(1) cause of action, a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident (*see Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280 [2003]). Labor Law § 240(1) requires owners, contractors, and their agents to provide workers with appropriate safety devices to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Here, it is uncontroverted that plaintiff Julio Asencio's accident resulted from a trip and fall on accumulated debris on a scaffold platform and, therefore, was not the result of an elevation-related hazard (*see e.g. Scharff v Sachem Cent. School Dist. at Holbrook*, 53 AD3d 538 [2008]; *Georgopulos v Gertz Plaza, Inc.*, 13 AD3d 478 [2004]; *Charles v City of New York*, 227 AD2d 429 [1996]).

To recover under Labor Law § 241(6), a plaintiff must establish the violation of an Industrial Code provision, which sets forth specific, applicable safety standards, in connection with construction, demolition, or excavation work (*see Ross*, 81 NY2d at 502-505). In their bill of particulars, plaintiffs herein allege violations of Industrial Code provisions 12 NYCRR

23-1.2(a) and (d), 23-1.3, 23-1.4, 23-1.5, 23-1.7(a), (b), (e), and (f), 23-1.8(c)(1), 23-1.11, 23-1.15, 23-1.16, 23-1.30, 23-2.1, 23-3.3, and 23-3.4. As a threshold matter, the court finds that, in opposing defendants' summary judgment motion, plaintiffs have abandoned all provisions except 12 NYCRR 23-1.7(d) and (e), 23-1.30, 23-2.1, and 23-3.3. As such, the branch of defendants' motion for summary judgment seeking dismissal of plaintiffs' claim under Labor Law § 241(6) predicated on a violation of Industrial Code sections 12 NYCRR 23-1.2(a) and (d), 23-1.3, 23-1.4, 23-1.5, 23-1.7(a), (b), and (f), 23-1.8(c)(1), 23-1.11, 23-1.15, 23-1.16, and 23-3.4 is hereby granted.

Additionally, defendants established their entitlement to judgment as a matter of law dismissing plaintiffs' Labor Law § 241(6) claim premised on a violation of 12 NYCRR 23-2.1. In opposition, plaintiffs failed to raise a triable issue of fact. Industrial Code provision 12 NYCRR 23-2.1(a)(1), which requires that "building materials" be "stored in a safe and orderly manner" and that "material piles" be stable and "so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare," does not apply to the facts of the instant case because the material that caused plaintiff Julio Asencio to trip and fall was not being stored, the accident did not involve a "material pile" but rather demolition debris and/or tools, and the scaffold where the accident occurred was not a "passageway, walkway, stairway or other thoroughfare." Similarly, 12 NYCRR 23-2.1(a)(2), which directs that material or equipment shall not be stored upon any floor, platform, or scaffold in such quantity or weight so as to exceed the safe carrying capacity of such floor, platform, or scaffold, is inapplicable here because plaintiff Julio Asencio's accident did not involve material or equipment being stored. Furthermore, Industrial Code provision 12 NYCRR 23-2.1(b) has been held to be a general safety standard and, therefore, is insufficiently specific to support liability under Labor Law § 241(6) (*see La Veglia v St. Francis Hosp.*, 78 AD3d 1123 [2010]; *Parrales v Wonder Works Constr. Corp.*, 55 AD3d 579 [2008]; *Madir v 21-23 Maiden Lane Realty, LLC*, 9 AD3d 450 [2004]).

The court further notes that, in support of their motion for summary judgment, defendants did not address plaintiffs' Labor Law § 241(6) claim premised on a violation of Industrial Code provisions 12 NYCRR 23-1.7(d) and (e), 23-1.30, and 23-3.3. Any contention by defendants that they are entitled to summary judgment dismissing the Labor Law § 241(6) cause of action to the extent that liability is based upon the aforementioned Industrial Code provisions was improperly raised for the first time in defendants' reply papers and, therefore, the court declines to

consider it (*see Belcastro v Hewlett-Woodmere Union Free School Dist. No. 14*, 286 AD2d 744 [2001]).

The court will now address that branch of defendants' motion for summary judgment dismissing those claims under Labor Law § 200 and common-law negligence. In opposition, plaintiffs 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*, 81 NY2d at 505; *Cambizaca v New York City Tr. Auth.*, 57 AD3d 701 [2008]). Contrary to plaintiffs' contention, the debris and/or tools which caused plaintiff Julio Asencio's accident did not constitute a defect inherent in the property itself but, rather, was created by the method or manner in which plaintiff Julio Asencio performed his demolition work (*see e.g. McCormick v 257 W. Genesee, LLC*, 78 AD3d 1581 [2010]; *Cooper v Sonwil Distrib. Ctr., Inc.*, 15 AD3d 878 [2005]; *cf. Tighe v Hennegan Constr. Co.*, Inc., 48 AD3d 201 [2008]). In fact, plaintiff Julio Asencio's own deposition testimony indicates that the debris accumulated on the scaffold because of the demolition work he was performing on the wall. Moreover, the evidence in the record shows that JP Morgan and Plaza did not supervise, direct, or control the method or manner in which the injured plaintiff performed his work. As previously discussed, the deposition testimony of Mr. Ruotolo merely demonstrates that Plaza was present at the work site to monitor and coordinate the timing of the renovation work in accordance with contract specifications, and that plaintiff Julio Asencio's work was supervised by his employer, P.A.L. Environmental. Likewise, Edward Stines, JP Morgan's vice president of design and construction, testified that he only conducted regular walk-throughs to check on the status of the renovation project. This conduct demonstrates JP Morgan and Plaza's general supervision of the work site, which does not rise to the level of supervision and control necessary to impose liability under Labor Law § 200 and common-law negligence (*see Kajo v E. W. Howell Co., Inc.*, 52 AD3d 659 [2008]; *Cambizaca*, 57 AD3d at 702; *Dennis v City of New York*, 304 AD2d 611 [2003]; *Warnitz v Liro Group, Ltd.*, 254 AD2d 411 [1998]).

Accordingly, those branches of defendants' motion for summary judgment dismissing the Labor Law §§ 240(1) and 200 and common-law negligence causes of action are granted. That branch of defendants' motion seeking summary dismissal of the Labor Law § 241(6) cause of action insofar as asserted against Plaza is

granted. In addition, the branch of defendants' motion for summary judgment dismissing plaintiffs' claim under Labor Law § 241(6) against JP Morgan is granted only to the extent that it is predicated on a violation of Industrial Code provisions 12 NYCRR 23-1.2(a) and (d), 23-1.3, 23-1.4, 23-1.5, 23-1.7(a), (b), and (f), 23-1.8(c)(1), 23-1.11, 23-1.15, 23-1.16, 23-2.1, and 23-3.4.

Dated: Long Island City, NY
February 9, 2012

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ROBERT J. McDONALD
J.S.C.