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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

Index Number : 108233/2005
BARRETO, RAUL
vs.
METROPOLITAN TRANSPORTATION
SEQUENCE NUMBER : 011
SUMMARY JUDGMENT

INDEX NO. 108233/05
MOTION DATE 11/04/11
MOTION SEQ. NO. 011

The following papers, numbered 1 to 5 were read on this motion for summary judgment

Notice of Motion— Affirmation — Exhibits A-M	No(s). 1-2
Affirmation In Opposition — Exhibits A-E	No(s). 3
Supplemental Affirmation In Further Support	No(s). 4
Affirmation In Opposition and In Further Support	No(s). 5

Upon the foregoing papers, it is ordered that this motion are decided in accordance with the annexed memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 3/30/12
New York, New York

_____, J.S.C.

1. Check one: ..... ■ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ■ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

----------X

RAUL BARRETO and DERLIM BARRETO,

Plaintiffs,

-against-

Index No. 108233/05

METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, THE CITY OF NEW YORK and IMS SAFETY, INC.,

Defendants.

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IMS SAFETY, INC.,

Third-Party Plaintiff,

-against-

Third-Party Index No. 590[illegible]5/06

ANDRES SERVICES CORPORATION,

Third-Party Defendant.

----------X

METROPOLITAN TRANSPORTATION AUTHORITY and NEW YORK CITY TRANSIT AUTHORITY,

Second Third-Party Plaintiffs,

-against-

Second Third-Party Index No. 590440/07

P.A.L. ENVIRONMENTAL SAFETY CORP.,

DECISION AND ORDER

Second Third-Party Defendant.

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Hon. Michael D. Stallman, J.S.C.:

Motions with sequence numbers 011 and 012 are hereby consolidated for disposition.

On January 9, 2005, plaintiff Raul Barreto, then an asbestos laborer employed by second third-party defendant P.A.L.

Environmental-Safety Corp. (PAL), fell through an uncovered manhole in the street in front of the Family Court courthouse at 60 Lafayette Street in Manhattan, and allegedly suffered injuries as a result of his fall. This action for damages for personal injuries ensued.

In motion sequence number 011, defendant/third-party plaintiff IMS Safety, Inc. (IMS) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted as against it.[1] In motion sequence number 012, defendants/second third-party plaintiffs Metropolitan Transportation Authority (MTA) and the New York City Transit Authority (TA; together, defendants) move for summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 200 causes of action, as well as the OSHA and Industrial Code sections that plaintiff alleges defendants violated.[2]

Defendant the City of New York (City) cross-moves for the dismissal of all causes of action as they relate to the City's alleged negligent maintenance of the premises, as well as

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[1]There are no cross claims asserted against IMS.

[2]Because violation of Industrial Code sections is not a proper cause of action, as the regulations only serve as support for Labor Law § 241 (6) causes of action, the court deems this part of defendants' motion to be a motion for the dismissal of plaintiff's section 241 (6) cause of action. Of course, as OSHA regulations do not provide a basis for liability under Labor Law § 241 (6), any "cause of action" grounded in alleged violations of OSHA provisions is dismissed (*see Shaw v RPA Assoc., LLC*, 75 AD3d 634, 636-637 [2d Dept 2010]).

the dismissal of the complaint and cross claims as alleged against it. Plaintiff cross-moves for summary judgment on his complaint.

Plaintiff has discontinued his Labor Law § 200 and common-law negligence causes of action as against the City (Edwards 10/7/11 Affirm. in Opp. to City's Cross Motion, ¶ 3).

THE PLEADINGS

Plaintiff's amended complaint alleges causes of action sounding in common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6). Plaintiff's wife's cause of action for loss of services has been discontinued per this court's Order dated September 20, 2011 (motion sequence number 009). The City's answer to the amended complaint asserts cross claims against defendants for contribution and contractual indemnification. Defendants' answers bring cross claims against the City for contribution or common-law indemnification, and contractual indemnification. IMS has not asserted cross claims against defendants or the City, and defendants and the City have not asserted cross claims against IMS.

Third-party defendant Andres Services Corporation is in default. The second third-party action has been discontinued.

BACKGROUND

The City owns the street in front of 60 Lafayette Street, the New York County Family Court courthouse. By lease

dated June 1, 1953, as amended several times since then, the City leased that area to the TA (Colt 10/3/11 Affirm., Ex. E). On December 16, 2002, the MTA, acting by the TA, entered into an agreement with PAL whereby PAL would perform environmental remediation services within the five boroughs of New York (Bass 6/15/11 Affirm., Ex. L). Pursuant to the agreement, PAL acted as the general contractor for the project of asbestos removal in manholes (Bass 6/15/11 Affirm., ¶ 2; Plaintiff's January 9, 2009 Depo. [Plaintiff's Jan. Depo.], at 72). By subcontract dated June 17, 2003, PAL retained IMS as the site safety consultant (Bass 6/15/11 Affirm., ¶ 2; *id.*, Ex. I). IMS's responsibilities included enforcing safety and making sure that everyone worked in compliance with OSHA rules and regulations. The IMS supervisor also had the authority to stop work if he saw an unsafe or hazardous condition (Mazzurco Depo., at 27-28, 38, 101; Torres 8/8/11 Aff., ¶ 8; Plaintiff's Jan. Depo., at 81-82; *but see* Mazzurco Depo., at 53-54 [if there was a dangerous condition, IMS would tell PAL supervisor]; *id.* at 117-118 [IMS itself directly stopped work only when serious injuries or death could occur]). In addition, it was IMS's responsibility to monitor the levels of carbon dioxide, oxygen and methane in the subterranean work area before and during the asbestos removal (O'Loughlin Depo., at 13-14).

IMS is no longer in business (Mazzurco Depo., at 19).

At one point in his testimony, Mazzurco, who was IMS's president at the time, averred that IMS subcontracted its work on this project to Andres Inc. There is nothing in writing that evidences the subcontract or that PAL or the defendants were apprised of the change in safety contractor. However, Mazzurco identified two men, Manuel Fiallos and Diego Maldonado, who are elsewhere identified as IMS supervisors, as Andres employees, one of which, Diego, was on site at the time of plaintiff's accident (*id.* at 61-65, 98). According to Mazzurco, IMS had no employees on site on the day of plaintiff's accident (*id.* at 62).

Earlier in his deposition, Mazzurco attested that IMS did perform work on this particular project and that one IMS employee would be present at the site every day, performing the duties set forth above (*id.* at 37-38). The PAL supervisor for the project, Rafael Torres, identified the IMS employee that was present on site on the day of plaintiff's accident as Diego (Torres 8/8/11 Aff., ¶¶ 7, 10). Plaintiff identified Manuel as the IMS supervisor that was present on the day of plaintiff's accident (Plaintiff's Jan. Depo., at 79-80).

Defendants were present at the site in the person of Brian O'Loughlin, defendants' asbestos handler supervisor, whose job it was to monitor contractors and consultants on asbestos removal jobs, and to protect the public (O'Loughlin Depo., at 7-8). He showed contractors which hole to work in, but he did not

direct the work of the contractors or consultants (*id.* at 8). If O'Loughlin saw that a contractor was not working properly, he told the consultant, and the consultant would tell the contractor. The consultant acted as a liaison between defendants and the contractors (*id.* at 8-9).

Before asbestos removal could begin, a protective shelter, made of wood and plastic, had to be constructed around the manhole (Bass 6/15/11 Affirm., ¶ 12; Plaintiff's Jan. Depo., at 61-68; Plaintiff's November 22, 2010 Depo. [Plaintiff's Nov. Depo.], at 66-67). After the containment shelter was built, an MTA inspector would check that all electricity was turned off before the asbestos workers were allowed to go underground (Plaintiff's Jan. Depo., at 69-70; O'Loughlin Depo., at 13-14 [MTA checked to make sure there were no high tension positive feeders in the hole, i.e., nothing more than 600 volts]), and IMS checked the air quality in the hole (O'Loughlin Depo., at 18-19). Only after the MTA and IMS inspectors gave permission were PAL workers allowed to remove the manhole cover, which they placed outside the enclosed work area (*id.* at 70-71; *but see* O'Loughlin Depo., at 18-19 [IMS supervisor would give the OK to open and close the hole]; *but also see id.* at 49 [IMS representative did not have to OK closure of manhole]). At the end of the shift, once everyone and all the equipment were out of the hole, the MTA supervisor would give the OK to cover the manhole, after which

the PAL workers would begin to deconstruct the protective containment area (Plaintiff's Nov. Depo., at 26-28; *but see* Plaintiff's Jan. Depo., at 96-97 [PAL, IMS and MTA supervisors were supposed to make sure the manhole was covered[3]]; O'Loughlin Depo., at 73-76 [PAL had to wait for IMS to remove air monitoring equipment; the hole was usually closed immediately thereafter; it was IMS's duty to give the OK to cover the manhole]; *id.* at 22 [at end of the day, IMS went into the containment area, and the hole was closed before the plastic was removed]; *id.* at 48 [IMS made sure manhole was closed before deconstruction began]; *but also see* Mazzurco Depo., at 40 [if containment barriers were up, IMS had no responsibility to ensure that the manhole was covered]).

On the day of his accident, the manhole was not covered before the deconstruction began, and when plaintiff walked toward the left back corner of the containment area to begin its dismantling, he fell into the open manhole (Plaintiff's Nov. Depo., at 62-70).

Plaintiff attested that only his PAL supervisor, Rafael Torres, told him what to do (Plaintiff's Jan. Depo., at 98). At the beginning of the project, Torres specifically told plaintiff not to work around the manhole if it was not covered, and again,

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[3]Only plaintiff has testified that all three inspectors, PAL, IMS and MTA, had this responsibility, but he has not indicated his basis for making this statement.

on the day of the accident, Torres told him that the manhole had to be covered before deconstruction could begin (Torres 8/8/11 Aff., ¶ 9; Plaintiff's Nov. Depo., at 80). However, at the time of the accident, plaintiff "just did not notice" that the manhole was uncovered. "I just started to make the break down. At no time did I really pay attention to see if the cover was on or off, because the supervisor is supposed to do that" (Plaintiff's Jan. Depo., at 128; Plaintiff's Nov. Depo., at 125-127 [plaintiff did not check to see if the manhole was covered]). When asked how long he waited between the time he exited the manhole and the time he began taking down the plastic, plaintiff responded, "I did it right there. You come out and you begin taking it off" (Plaintiff's Nov. Depo., at 41-42). Between the time that plaintiff exited the manhole with his co-workers Charlie and Julio, and the start of their deconstruction work, no one but the shop steward entered the containment area (*id.* at 42-43). Thus, none of the supervisors who had the responsibility to cover the manhole had entered the containment area to cover the manhole before plaintiff's accident.

DISCUSSION

The Summary Judgment Standard

"'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

issues of fact from the case'" (*Shapiro v 350 E. 78th St. Tenants Corp.*, 85 AD3d 601, 608 [1st Dept 2011], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "If this burden is not met, summary judgment must be denied, regardless of the sufficiency of the opposition papers" (*O'Halloran v City of New York*, 78 AD3d 536, 537 [1st Dept 2010]). However, "[o]nce this showing is made, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact" (*Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d 927, 927 [1st Dept 2010]). "The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues" (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010]).

IMS's Motion for Summary Judgment Dismissing the Complaint As Against It (motion sequence number 011)

Labor Law §§ 240 (1)

Labor Law § 240 (1) provides, in pertinent part:

> All contractors and owners and their agents ... 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 statute imposes absolute liability on building owners and contractors whose failure to 'provide proper protection to workers employed on a construction site' proximately causes injury to a worker" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011], quoting *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995]). In order "[t]o establish liability on a Labor Law § 240 (1) cause of action, a plaintiff must demonstrate that the statute was violated and that the violation was a proximate cause of his or her injuries" (*Herrera v Union Mech. of NY Corp.*, 80 AD3d 564, 564-565 [2d Dept 2011]). In addition, "[l]iability under Labor Law § 240 (1) depends on whether the injured worker's 'task creates an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against'" (*Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 139 [2011], quoting *Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]). While the statute "'is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed'" (*Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 339 [2008], quoting *Panek v County of Albany*, 99 NY2d 452, 457 [2003]), it "should be construed with a commonsense approach to the realities of the workplace" (*Salazar v Novalex Contr. Corp.*, 18 NY3d at 140). In considering a section 240 (1) claim, "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to

provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

The first issue to be considered is whether the plaintiff's work at street level, in close proximity to the open manhole, posed an elevation-related risk. The standard in determining this issue appears to be that whenever the work that a plaintiff is doing is related to an elevation-related hazard, it falls within section 240 (1) (*see e.g. Salazar*, 18 NY3d at 139 [liability depends on whether worker's task creates elevation-related risk]).

Each of the Appellate Divisions has weighed in on this issue. In the Second Department, the Court has determined that work does not fall within section 240 (1) when "the work in which the injured plaintiff was involved was wholly unrelated to an elevation-related hazard" (*Masullo v City of New York*, 253 AD2d 541, 542 [2d Dept 1998] [plaintiff fell into a manhole: "While the manhole may have been negligently left uncovered, this is not one of the gravity-related hazards or perils subject to the safeguards prescribed by Labor Law § 240 (1) (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509 [1991]). To the contrary, the fall was the 'type of "ordinary and usual" peril a worker is commonly exposed to at a construction site,'" quoting *Misseritti*, 86 NY2d at 489]).

In *Plotnick v Wok's Kitchen Inc.* (21 AD3d 358 [2d Dept 2005]), the plaintiff was performing roofing work when he was sent inside a restaurant to see whether a space heater that had been installed in the ceiling should be removed. While he was in the restaurant, looking upward at the heater, he fell into an unguarded and uncovered stairwell opening. The Second Department concluded that "[w]hile the staircase may have been negligently left uncovered, this was not a gravity-related hazard or peril subject to the safeguards prescribed by Labor Law § 240 (1) [citing *Rocovich*, 78 NY2d 509, *supra*, and *Masullo*, 253 AD2d at 542] ... . [T]he work in which the plaintiff was involved at the time of the occurrence was wholly unrelated to an elevation-related hazard" (*Plotnick*, 21 AD3d at 359).

In *Edwards v C & D Unlimited* (289 AD2d 370 [2d Dept 2001]), the plaintiff, who was working entirely on the ground outside an excavation and who was not required to travel over or to climb into or out of the excavation, was standing near the edge of the excavation when the ground beneath him gave way, and he fell into the excavation and hit the bottom. The Second Department found that the plaintiff could not recover under section 240 (1) because "plaintiff's work was wholly unrelated to an elevation-related hazard" (*id.* at 372, citing *Masullo*, 253 AD2d 541, *supra*, among other cases).

However, when the work did expose a plaintiff to an

elevation-related risk, the Second Department has found that a claim under section 240 (1) does lie. In *Valensisi v Greens at Half Hollow, LLC* (33 AD3d 693 [2d Dept 2006]), two 36- by 42-inch openings were cut into a grating on the ground floor of a structure which covered an equalization tank. The decedent's supervisor, who did not know that the unsecured plywood sheets covered the openings, told the decedent to use the plywood for another purpose. When the decedent moved the plywood, he fell approximately 22 feet through one of the openings. The Second Department concluded that

> the decedent was performing work at a building under construction in close proximity to two openings covered only with unsecured plywood boards, which had been cut into the grating in order to provide access to an equalization tank more than 20 feet below ground. ... [T]he decedent's work exposed him to an elevation-related risk within the scope of Labor Law § 240 (1)

(*id.* at 695).

In *D'Egidio v Frontier Ins. Co.* (270 AD2d 763 [3d Dept 2000]), the Third Department applied a different test, and decided that the plaintiff's accident was not the result of an elevation-related hazard contemplated by Labor Law § 240 (1). While standing on a raised computer floor and working on wiring in the ceiling, the plaintiff stepped through an opening where floor tiles were missing and fell 15 to 24 inches to the subfloor below. The Third Department concluded that

> as a matter of law, the accident at issue was not the result of an elevation-related hazard contemplated by that statute.
>
> . . .
>
> [A] work site is "elevated" within the meaning of the statute where the required work itself must be performed at an elevation, i.e., at the upper elevation differential, such that one of the devices enumerated in the statute will safely allow the worker to perform the task. Here, plaintiff's work site was the nonelevated permanent floor and there is no evidence in the record indicating that plaintiff's work in proximity to the floor openings warranted the use of the type of safety devices contemplated by Labor Law § 240 (1)

(*id.* at 765-766). The Third Department was "not persuaded" by the First Department's decision in *Carpio v Tishman Constr. Corp.* (240 AD2d 234 [1st Dept 1997]), saying that,

> [i]n our view, ruling that an elevation differential exists on such facts would render owners and contractors liable for virtually any fall by a construction worker into a hole of any measurable elevation, regardless of its location at the work site, a holding which we believe is plainly at odds with the decision in *Rocovich v Consolidated Edison Co.* ([78 NY2d 509 (1991)])

(*id.* at 766).

The Third Department has cited and followed this reasoning in several recent decisions (*see e.g. Coleman v Crumb Rubber Mfrs.*, 92 AD3d 1128, 2012 NY Slip Op 01174 [3d Dept 2012]; *Bonse v Katrine Apt. Assoc.*, 28 AD3d 990, 990 [3d Dept 2006]; *Wells v British Am. Dev. Corp.*, 2 AD3d 1141, 1142-1143 [3d Dept 2003]).

The Fourth Department, in *Ames v Norstar Bldg. Corp.* (19 AD3d 1016, 1017 [4th Dept 2005]), denied summary judgment in a case in which the plaintiff had fallen while entering the threshold of a building under construction. The Fourth Department found that "the first floor of the house is not an elevated work site," using the definition of an "elevated" work site found in *D'Egidio*. However, in *Allen v City of Buffalo* (161 AD2d 1134 [4th Dept 1990]), the Fourth Department found otherwise. There, the decedent, who labored in a subterranean work area, had to traverse a field with approximately 50 manholes until he reached the particular manhole through which he was to descend to perform his work. A heavy snow had fallen, so that the manholes could not be seen from the surface. "Under these circumstances, the uncovered manhole through which decedent fell was an elevated worksite" (*id.* at 1134).

The First Department has concluded that section 240 (1) applies when the task itself is related to an elevation-related peril. In *Carpio v Tishman Constr. Corp. of N.Y.* (240 AD2d 234, *supra*), the plaintiff, while painting a ceiling and looking up, walked backward and fell into an uncovered hole which had been created to allow for piping to extend to the floor below. The First Department concluded that "the plaintiff's work herein subjected him to an elevation-related risk covered by the statute" and that he "was entitled under the statute to

protection 'against the known hazards of the occupation' [citation omitted]" (*id.* at 235). The Court further expounded that,

> [w]hile roof work may appear more elevation-related because a roof is usually the top portion of a structure and is unenclosed, in fact, the risks associated with working on a roof are no greater than those of working on a third floor with large holes in it. This plaintiff ... fell into a hole with a three-foot elevation differential, and such a risk would fall within the statute even if it existed at ground level

(*id.* at 236). More recently, the First Department quoted *Carpio* in saying that "'[the statute] does not apply merely because work is performed at elevated heights, but rather, applies only where the work itself involves risks related to differences in elevation'" (*Jones v 414 Equities LLC*, 57 AD3d 65, 77 [1st Dept 2008], quoting *Carpio*, 240 AD2d at 235).

The standard of whether the work itself was related to an elevation-related hazard was also addressed by this court in *Cunha v City of New York* (18 Misc 3d 1104[A], 2007 NY Slip Op 52404[U] [Sup Ct, NY County 2007]). In *Cunha*, the plaintiff was walking backward, directing a Bobcat in moving material from one area of the site to another, when he fell into a manhole that had been left open to accommodate Con Ed workers. The court concluded that the plaintiff's

> task involved transferring piping materials along the street from one area of the work site to another. Walking along a street does

> not put a worker at risk of falling from an elevated work site, such that safety devices of the type enumerated in Labor Law § 240 (1) are required. ... [C]overed or uncovered, the presence of this particular manhole was unrelated to the performance of plaintiff's work

(*id.* at *4). As a result, the court concluded that the plaintiff's accident "was the result of an ordinary hazard of the workplace, and his injuries are not covered by Labor Law § 240 (1)" (*ibid.*).

The circumstances of the instant case are clearly distinguishable from those in *Cunha*. Here, the manhole was situated within an enclosed work area which had been constructed specifically to contain the asbestos materials which plaintiff and his co-workers removed through the manhole. The manhole was the aperture through which the lights, ladder, tools and air quality monitors were lowered and removed, without which the work could not have been conducted. Covering the manhole was an essential part of the process of deconstructing the containment area, as evidenced by the fact that no deconstruction was to be performed unless the hole was covered. Without the cover on the manhole, the risk of someone falling through the hole while deconstructing the area was apparent. Here, unlike in *Cunha*, "covered or uncovered, the presence of this particular manhole was [very much related] to the performance of plaintiff's work." (*see Cunha*, 18 Misc 3d 1104(A), 2007 NY Slip Op 52404[U], at *4.)

Applying the standard that Labor Law § 240 (1) is applicable when the task "creates an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against [internal quotation marks and citation omitted]" (*Salazar v Novalex Contr. Corp.*, 18 NY3d at 139), the court finds that plaintiff's work was related to an elevation-related hazard, and thus, that his accident falls within Labor Law § 240 (1).

Recalcitrant Worker/Sole Proximate Cause

The court must now consider whether any of the defendants may be exempt from liability under the Labor Law on the basis that plaintiff was a recalcitrant worker or the sole proximate cause of his injuries.

> It is well settled that while Labor Law § 240 (1) imposes nondelegable, absolute liability upon an owner and/or contractor for any breach thereof which was proximately responsible for the plaintiff's injury, liability does not attach where a plaintiff's actions are the sole proximate cause of his injuries. Specifically, if adequate safety devices are provided and the worker either chooses for no good reason not to use them, or misuses them, then liability under section 240 (1) does not attach [internal citations omitted]

(*Paz v City of New York*, 85 AD3d 519, 519 [1st Dept 2011]).

> Under Labor Law § 240 (1) it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff

> cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation

(*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]).

> "[W]here a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability" under Labor Law § 240 (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]). However, to raise an issue of fact regarding plaintiff's recalcitrance, the owners were required to show that: (a) plaintiff had adequate safety devices at his disposal; (b) he both knew about them and that he was expected to use them; (c) for "no good reason" he chose not to use them; and (d) had he used them, he would not have been injured (*see Auriemma [v Biltmore Theatre, LLC]*, 82 AD3d [1], 10 [1st Dept 2011])

(*Tzic v Kasampas*, ___ AD3d ___, 2012 NY Slip Op 01632, *2 [1st Dept 2012]).

Here, it is uncontested that after the containment area was built and the MTA and IMS supervisors gave permission to PAL workers to remove the manhole cover, the cover was placed outside the enclosed work area (O'Loughlin Depo., at 70-71). There were three PAL asbestos removers present that day (plaintiff, Charlie, and Julio [Plaintiff's Jan. Depo., at 89, 114]), and at least two of them removed the cover (*id.* at 68 ["We did it ourselves"; "alone it's impossible, it's very heavy. It has to be done by

[* 21]

several people together"; but plaintiff could not remember if he was one of the men who removed the cover]). According to plaintiff, at the end of the shift, one or more of the supervisors on site were responsible to give permission to cover the manhole, after which the PAL workers would begin to deconstruct the containment area (Plaintiff's Nov. Depo., at 26-28; Plaintiff's Jan. Depo., at 96-97). Thus, plaintiff had an adequate safety device readily available to him, and he knew where it was (*see Cherry v Time Warner, Inc.*, 66 AD3d 233, 237-238 [1st Dept 2009]).

Plaintiff knew that he was expected to deconstruct the containment area only after the manhole was covered because his supervisor, Rafael Torres, specifically told him, both at the beginning of the project and on the day of the accident itself, that the manhole had to be covered before deconstruction could begin (Torres 8/8/11 Aff., ¶ 9; Plaintiff's Nov. Depo., at 80). Thus, he knew that he was expected to wait to begin deconstruction until after the cover was on the manhole.

Plaintiff has alleged "no good reason" for his failure to wait until the manhole was covered. On the contrary, he attests that he was not paying attention, and did not notice that the cover was missing (Plaintiff's Jan. Depo., at 128; Plaintiff's Nov. Depo., at 125-127). Indeed, he began deconstruction as soon as he came out of the hole (Plaintiff's

Nov. Depo., at 41-42), even though he was aware that none of the supervisors who had the authority to direct that the hole be covered had entered the containment area (*id.* at 42-43). In fact, since the supervisors only gave permission to open and close the hole, and it was the PAL workers who muscled the heavy cover on and off (Plaintiff's Jan. Depo., at 68 ["We did it ourselves"]), it appears that plaintiff must have known that the manhole was not covered, because he and his fellow PAL workers had not covered it. Yet, he went ahead and started deconstructing the work area anyway.

Lastly, without a doubt, had plaintiff waited until the manhole was covered, he would not have fallen through it and been injured.

Accordingly, the court finds that plaintiff was the sole proximate cause of his injuries. As such, no claim of violation of Labor Law §§ 200, 240 (1) or 241 (6), or of common-law negligence lies against the defendants, IMS or the City.

The City's Cross Motion

The City does not deny that its cross motion for summary judgment is untimely, and that it does not seek relief "nearly identical" to that sought by the timely summary judgment motions (*see Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006]). However, in light of the court's

determination that plaintiff was the sole proximate cause of his injuries, the court searches the record, and grants the City reverse summary judgment dismissing the complaint as against it.

CONCLUSION

Accordingly, it is

ORDERED that the motion of defendant IMS Safety, Inc. (motion sequence number 011) for summary judgment dismissing the complaint as against it is granted; and it is further

ORDERED that the motion of defendants the Metropolitan Transportation Authority and the New York City Transit Authority (motion sequence number 012) for summary judgment dismissing the complaint and all cross claims asserted as against them is granted; and it is further

ORDERED that the cross motion of defendant the City of New York for summary judgment dismissing the complaint and all cross claims asserted as against it is granted; and it is further

ORDERED that the cross motion of plaintiff for summary judgment on his complaint is denied; and it is further

ORDERED that the complaint is dismissed with costs and disbursements to all defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: March 30 ,2012
New York, NY

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN

FILED

APR 05 2012

NEW YORK
COUNTY CLERK'S OFFICE