SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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WALDEMAN SZPYRKA,

Plaintiff,

-against-

MENTOR DEVELOPMENT CORP., GAYNOR BUILDING CORP., P&M CARPENTRY, INC., GUIDO PASSARELLI and PRESIDIO CONSTRUCTION CORP.,

Defendants.

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MENTOR DEVELOPMENT CORP., GAYNOR BUILDING CORP., GUIDO PASSARELLI and PRESIDIO CONSTRUCTION CORP.,

Third-Party Plaintiff,

-against-

P&M CARPENTRY, INC.,

Third-Party Defendant.

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DCM Part 4

Present:

HON. JOHN A. FUSCO

DECISION AND ORDER

Index No. 100375/10

Motion Nos. 1844-002
3699-003
3776-004

Index No. A100375/2010

The following papers numbered 1 to 13 were marked fully submitted on the 28th day of February, 2012.

Papers

Notice of Motion For Summary Judgment by Plaintiff Waldeman Szpyrka, with attached Affidavit and Supporting Exhibits (dated July 21, 2011)..... 1

Notice of Cross Motion For Summary Judgment by Defendant/Third-Party Defendant P&M Carpentry, Inc. (dated October 2, 2011)..... 2

ISSUES PRESENTED

In Motion No. 1844-002 plaintiff Waldeman Szpyrka ("plaintiff") moves for summary judgment against the named defendants on his causes of action brought pursuant to Labor Law §§ 200, 240(1) and 241(6). In motion No. 3776-004 defendants/third-party plaintiffs Mentor Development Corp.("Mentor"), Gaynor Building Corp.("Gaynor"), Guido Passarellli (" Passarelli") and Presidio Construction Corp.("Presidio") move for summary judgment and dismissal of plaintiff's complaint and all crossclaims against them, while defendants Gaynor, Passarelli and

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[1] Plaintiff argues that this submission should not be considered because it contains new information and new arguments raised for the first time in a reply affirmation. However, the attached affidavit in reply of non-party Dariusz Polakowski is consistent with the testimony he had given at his deposition, and the arguments made by counsel are responsive to those issues raised by plaintiff in his affirmation in opposition to defendant/third-party defendant P&M's motion for summary judgment. Hence, no procedural irregularity appears.

Presidio also move for summary judgment on their third-party claim for contractual indemnification against P&M Carpentry, Inc. ("P&M"). In Motion No. 3699-003 defendant/third-party defendant P&M moves for summary judgment and dismissal of the complaint and crossclaims, as well as the third-party complaint brought against it.

FACTUAL BACKGROUND

On May 16, 2007, defendant/third-party plaintiff Presidio, the general contractor, entered into a subcontract with defendant/third-party defendant P&M to perform interior finishing woodworking in a development of eight attached two-family homes being built on Gaynor Street on Staten Island. Part of that contract called for P&M to "...indemnify and hold harmless the owner and/or contractor and employee of either of them from and against claims, damages, losses and expenses, including but not limited to attorneys fees, arising out of or resulting from performance of the subcontractors work...". It is undisputed that the contract was signed by defendant Passarelli in his capacity as president of Presidio and was executed on behalf of P&M by one of its principals, non-party Piotr ("Pete") Drapinski.

On May 30, 2007, plaintiff and a coworker at P&M, Dariusz ("Darek") Polakowski, went to 236 Gaynor St. to perform finishing work as required by P&M's subcontract with Presidio. At the time, the house was accessible by an exterior stairway leading to the front door, for which the carpenters had been given a key. To the side of the stairway was a first floor balcony with sliding glass doors providing access from the interior of the house. The property was owned by third-party plaintiff Gaynor.

Apparently, this key did not work. At some point thereafter, the plaintiff attempted to cross from the exterior stairway to the first floor balcony to determine if he could gain access to the

interior through the sliding glass door. Railings had not yet been installed on either the stairway or the balcony. It is uncontroverted that as he attempted to do so, he fell in the space separating the stairway from the balcony and landed on the ground approximately 10 to 12 feet below, where he was injured.

CONTENTIONS OF THE PARTIES

Plaintiff Waldeman Szpyrka

Plaintiff claims that when he and his co-worker were unable to gain entrance through the front door, his co-worker tried unsuccessfully to gain access through a basement door. When this failed, "Darek" instructed plaintiff to attempt to gain access through the sliding glass door leading to the balcony. This necessitated that plaintiff climb to the top of the aforementioned exterior staircase and then step or jump across an opening of several feet onto the deck of the balcony in expectation that the doors may have been left unlocked. As he attempted to do so, he fell and landed on the ground 10 to 12 feet below.

In arguing that he is entitled to summary judgment on his cause of action brought under Labor Law §240 (1), plaintiff claims that he was not provided with a ladder or any other appropriate safety device when he was instructed to try to cross onto the balcony in an attempt to enter the house. Under these circumstances, plaintiff argues that rather than constituting a normal "appurtenance" to the premises, the balcony had taken on the character of an inadequate safety device, e.g., a scaffold, and that he had not been provided with appropriate safety equipment. Moreover, plaintiff denies that his actions could be held to constitute the "sole proximate cause" of his injury since he was directed to take the action which resulted in his fall by a co-worker with supervisory authority over him. In addressing defendants' reliance on his supposed statement that he "jumped" between

the balcony and the stairs (which was ostensibly made as he was laying on the ground after falling), plaintiff maintains that his statement to this effect constitutes, at best, a self-serving and hearsay statement which is insufficient to raise a triable issue of fact and thereby defeat his *prima facie* entitlement to summary judgment under section 240(1).

Plaintiff also argues that he is entitled to summary judgment under Labor Law §241 (6) based on defendants' alleged violation of the following sections of the Industrial Code: §§ 23-1.7 (f) [requiring that plaintiff be supplied with a safe means to access his work area]; 23-1.7 (b) [that plaintiff had been directed to traverse a "hazardous opening" without having any planking, a safety net or safety belt at his disposal]; 23-2.7 (e) [requiring handrails and safety rails on permanent stairways and balconies]; and 1.22 © (2) [failure to provide plaintiff with a safety railing on his work platform].

Finally, plaintiff claims he is entitled to summary judgment under Labor Law §200, a codification of the common-law duty of owners and contractors to provide workers with a safe place to work. In this case, no supervisor was present on behalf of the contractor or the owner at the time of the accident, and the only other person present at the worksite being his coworker/supervisor, who provided plaintiff with no instruction other than to attempt to gain entry through the balcony doors.

Defendants/Third-Party Plaintiffs Mentor Development Corp./ Gaynor Building Corp./Guido Passarelli /Presidio Construction Corp.

Defendants Mentor and Passarelli argue that any claims brought against them under the Labor Law must be dismissed because neither was the owner of the premises; further, Mentor argues that it had no role whatsoever in the construction of these homes. For his part, defendant Passarelli states that while he was the president of the general contractor (Presidio), he may not be held personally

liable since plaintiff has failed to claim that "the corporate veil" of Presidio should be pierced[2].

As to the claims brought pursuant to Labor Law §240 (1), the remaining defendants argue that the statute is inapplicable because plaintiff was not injured due to a fall from an elevated work platform, nor was he subjected to an elevation-related risk. The work which plaintiff was assigned to do was that of interior finish carpentry within the home to which he had been provided with a safe means of access, to wit, a key to the front door. When it was discovered that the key did not work, it is alleged that he chose, on his own, and with no instruction to do so by anyone other than a co-worker, to attempt to reach the balcony from the exterior stairway to, both of which, as permanent parts of the home, were normal appurtenances, as opposed to safety devices, and therefore do not fall under Labor Law §240 (1). In this way, plaintiff's actions constituted the "sole proximate cause" of his own injury, thereby shielding defendants from liability.

As to plaintiff's claims under Labor Law §241(6), these defendants contend that plaintiff has failed to identify or establish the breach of any rule or regulation which would warrant the imposition of absolute liability under this statute. In this regard, each of the sections claimed by plaintiff to have been violated are alleged to be either irrelevant to the facts of this case, represent unnecessary safeguards under the circumstances present here, or are not specific enough to furnish a basis for liability.

As to plaintiffs claim under Labor Law §200, each of the defendants argue that the cause of action should be dismissed since there was no proof that either the owner or general contractor was exercising any supervisory control over the means or methods of plaintiff's work at the time of the

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[2] Insofar as it appears, since these portions of defendants' motion have not been opposed by any of the other parties to the action, they must be granted.

accident.

Finally, third-party plaintiffs Presidio, Gaynor and Passarelli submit that they are entitled to contractual indemnity from P&M pursuant to the contract entered into on May 16, 2007. It is undisputed that plaintiff was employed by P&M at the time of the accident, and was present to perform work well within the scope of P&M's subcontract. Since there is no allegation of any negligence on the part of any of these defendants, then their liability, if any, could only be vicarious, thereby "triggering" the terms of the indemnification clause.

Defendant/Third-Party Defendant P&M Carpentry, Inc.

P&M argues that, since plaintiff was one of their employees, its liability to him is limited by the exclusivity provisions of the Workers Compensation Law. Hence, it bears no additional liability to plaintiff or its cross-claiming codefendants in the main action. Consequently, all such claims must be dismissed.

As to the third-party complaint brought against it for indemnification, P&M contends that common-law indemnification or contribution cannot be had against it since plaintiff did not sustain a "grave injury" as defined in Workers Compensation Law §11. P&M admits that there is a contractual indemnification provision in its agreement with Presidio, the general contractor but notes that none of the other third-party plaintiffs are a party to that contract. As to Presidio, P&M further argues that any duty it might have to provide indemnification to that entity would not be triggered until there has been an actual finding of negligence against it. Moreover, it is claimed that their indemnification claims are foreclosed since the third-party plaintiffs have simultaneously interposed a "culpable conduct" defense against plaintiff, individually.

As to any prospective liability for violating Labor Law §240 (1), P&M argues, *inter alia*, that

at no time was plaintiff compelled to undertake any elevation related risk within the contemplation of the statute. Furthermore, the exterior stairway which plaintiff claims to have utilized in an unsuccessful attempt to obtain access to the balcony, as well as the balcony itself, were normal appurtenances and not safety devices. Therefore, they do not come within the ambit of the statute. Additionally, P&M claims that plaintiff's statement to his coworker immediately after the fall, that he had "jumped" from the stairway to the balcony, constitutes a binding admission that his act was not at the direction of any supervisor, and thus the injury was the sole proximate result of plaintiff's own actions. Finally, it is claimed that none of the sections of the Industrial Code cited by the plaintiff provide a basis for recovery under Labor Law §241 (6).

DISCUSSION

Summary Judgment

The proponent of a motion for summary judgment must make a *prima facie* showing of its entitlement to judgment as a matter of law, advancing sufficient evidence to demonstrate the absence of any material issues of fact (see Silverman v. Perlbinder, 307 AD2d 230 [1st Dept 2003]).

Thus, the proponent of the motion carries the initial burden of both proof and persuasion as to its right to judgment (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]), which must be carried by the tender of admissible evidence sufficient to demonstrate as a matter of law the absence of any material issue of fact. Once that initial burden has been satisfied, the "burden of production" (but not that of persuasion) shifts to the opposing party, which then must bare its proofs and go forward and produce sufficient evidence to establish the existence of a triable issue of fact. However, since the burden of persuasion always remains with the proponent of the motion, "if the evidence on the [presence of an] issue [of fact] is evenly balanced, the [moving] party ... must lose"

(Director, Office of Workers Compensation Programs v. Greenwich Collieries, 512 US 267, 272 [1994]; 300 East 34th Street Co. v. Habeeb, 248 AD2d 50, [1st Dept 1997]).

Traditionally, therefore, the court's function on a motion for summary judgment is issue finding rather than issue determination. (Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]). Moreover, since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (Rotuba Extruders v. Ceppos, 46 NY2d 223 [1978]). Thus, where the existence of an issue of fact is arguable or debatable, summary judgment must be denied (Stone v. Goodson, 8 NY2d 8 [1960]; Sillman v. Twentieth Century Fox Film Corp., supra).

Plaintiff's Direct Claim Against P&M Carpentry, Inc.

Section 11 of the Worker's Compensation Law states, in pertinent part:

> The liability of an employer prescribed [herein] *shall be exclusive* and in place of any other liability whatsoever, to such employee, his or her personal representatives, spouse, parents, dependents, distributees, or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom (emphasis added).

Here, at the time of the subject accident plaintiff was a P&M employee and had been provided with the appropriate workers compensation coverage, under which he received benefits following the accident. This much is not disputed by any of the other parties in the case.

Accordingly, plaintiff cannot maintain a direct action against his employer, and his cause of action against same must be dismissed, as must the cross claims for other than indemnification brought against it by its codefendants[3].

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[3] The motions related to the third-party indemnification claims brought against P&M will be dealt

Labor Law § 240(1)

Section 240 (1) of the Labor Law states:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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.

Accordingly, when it is shown that a violation of Section 240(1) was a contributing cause to a worker's accident or injury absolute liability will be imposed vicariously on all "contractors and owners and their agents" (Zimmer v. Chemung County Performing Arts, Inc., 65 NY2d 513, 524 [1985]; Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 NY2d 343, supra). Equally "well settled [is the principle] that the injured's contributory negligence is not a defense to a claim based on Labor Law § 240 (1) and that the injured's culpability, if any, does not operate to reduce the owner/contractor's liability for failing to provide adequate safety devices" (Stalt v. General Foods Corp., 81 NY2d 918 [1993]). Therefore, in order to establish liability, a plaintiff worker must only show that the statute was violated (i.e., that he was not provided with the necessary equipment to provide him with proper protection), and that said violation was a proximate cause of his injury (Blake v. Neighborhood Houses, 1 NY3d 280 [2003]). As previously indicated, once these elements has been established, contributory negligence on the part of the injured worker is no defense (Id. at 287; Mullen v. Zoebe, 86 NY2d 135 [1995]).

In support of their motion for summary judgment and dismissal of the complaint, defendants claim that the exterior stairway and balcony were not "safety devices" as envisioned by the statute, while plaintiff contends that since the stairway and balcony were still lacking in railings and were

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with subsequently (see, infra.).

being utilized by him in an effort to get to his work area, they had taken on the function of scaffolds and, as such, failed to provide proper protection.

It is well settled that a permanent staircase, being a normal appurtenance to a building, is not the type of safety device envisioned under Labor Law §240(1) (see, e.g. Parsuram v. I.T.C. Bargain Stores, Inc., 16 AD3d 471, 472 [2d Dept 2005] ["staircase upon which the plaintiff was injured was a normal appurtenance to the building and was not designed as a safety device to protect him from an elevation-related risk"]; Norton v. Park Plaza Owners Corp., 263 AD2d 531, 531-532 [2d Dept 1999][injured worker's cause of action to recover damages under Labor Law § 240 (1) held properly dismissed in a case where the injury occurred when a stairway, constituting a normal appurtenance to the building partially collapsed under plaintiff as he was exiting the worksite on the ground; that the staircase in question was not designed as a safety device intended to protect the worker from any elevation-related risk]). Similarly, although the planned railings had not yet been installed, there is no question that the stairway utilized by plaintiff as the platform for his allegedly self-described "jump" to the balcony were both permanently affixed to the building and as such, cannot be considered the equivalent of safety devices for the purposes of Labor Law §240 (1) (cf. Pennacchio v. Tednick Corp., 200 AD2d 809, 810 [3d Dept 1994]["an important distinction must be made between a stairway that is temporary for the purposes of Labor Law § 240 (1) ...and one that is permanent but nonetheless defective ... The permanent nature of the stairway at issue here precludes its consideration as the functional equivalent of a ladder"]). In the opinion of this Court, the fact that the stairway and balcony had not yet been completed by the addition of railings does not change the permanent character of these structures, nor transform them into the types of safety devices required by Labor Law §240 (1) (see Dombrowski v. Schwartz, 217 AD2d 914 [4th Dept 1999] [Labor Law

§240 (1) held inapplicable to a stairway that had been put in its permanent location, although not yet secured or anchored prior to its collapse]; accord Ryan v. Morse Diesel, 98 AD2d 615 [1st Dept. 1983]).

The cases cited by plaintiff in his Memorandum of Law are factually distinguishable, and do not compel a contrary result. Thus, in Beharry et al v. Public Storage Inc., (36 AD3d 574 [2d Dept 2007]) plaintiff fell due to the collapse of a metal platform which was anticipated, *but had not yet become* part of a permanent staircase, while in Wescott v. Shear (161 AD2d 925 [3d Dept 1990]), plaintiff fell due to a defect in the planking of a temporary, as opposed to permanent, staircase. Also readily distinguishable is the recent case of Cordeiro v. TS Midtown Holdings, LLC, (87 AD3d 904, 905 [1st Dept 2011]) where the court made the following observations as to whether a hatchway door should be considered a normal appurtenance:

> Although the doors through which plaintiff fell were a permanent fixture of the building, they were not a "normal appurtenance," but rather, an access opening *specifically built for the purpose of allowing workers to perform their work on the building elevators by hoisting materials to the building's motor rooms* ...Accordingly, we find that the hatch in this case was a "device" within the meaning of § 240 (1).... Further, plaintiff [at bar] did not [simply] step onto hatchway doors that opened accidentally...Rather, plaintiff *was required to open the doors in order to hoist up the governor from the 19th floor hallway below*. This [requirement clearly] exposed plaintiff to a gravity-related risk of falling into the hallway from the motor room...(emphasis added; citations omitted).

Here, since neither the stairway nor balcony were constructed to allow the plaintiff or any other worker to perform his or her work and were constructed as a permanent part of the house being built, they constituted normal, albeit incomplete, appurtenances to the building , and were not the type of safety devices designed to be covered under section 240 (1) of the Labor Law. Consequently, defendants' motion for summary judgment and dismissal of plaintiff's cause of action under Labor Law § 240(1) must be granted, and said causes of action severed and dismissed.

Labor Law § 241(6)

Labor Law § 241(6) imposes a nondelegable duty upon owners, contractors and their agents to provide reasonable and adequate protection and safety to construction workers. (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 502, [1993]). As the resultant duty to comply has been held to be nondelegable, it is not necessary for a plaintiff to show that a defendant exercised supervision or control over the worksite in order to establish a claim under this section (see Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 NY2d 343 [1998]). As the Court of Appeals stated in Ross v. Curtis-Palmer Hydro-Elec. Co., (81 NY2d at 502) "to the extent that a plaintiff has asserted a viable claim under Labor Law § 241 (6), he need not show that defendants exercised supervision or control over his worksite in order to establish his right of recovery".

However, in order to impose liability under this section of the Labor Law, a plaintiff must demonstrate that his injury was the result of a violation of a *specific* regulatory provision of the Industrial Code which was designed to avoid the injury sustained. Where such a regulation has been breached, the general contractor, the owner and their respective agents will be held vicariously liable for the resulting injury without regard to fault (Armer v. General Elec. Co., 241 AD2d 581 [3d Dept 1997], *lv denied*, 90 NY2d 812 [1997]; Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 NY2d 343 supra. [absence of actual or constructive notice to the owner or general contractor is irrelevant to the imposition of liability under Labor Law § 241[6]). Nevertheless, it is not every regulation whose violation will support such a cause of action. A regulation which merely sets forth a general safety standard analogous to that required by the common law will not suffice to impose liability under this section, where greater regulatory specificity is required (see Abreu v. Manhattan Plaza Assocs., 214 AD2d 526 [2d Dept 1995]).

In response to plaintiff's motion for summary judgment under section 241(6), each of the defendants has moved for the summary dismissal of same, contesting plaintiff's right to recovery under each of the sections of the Industrial Code which plaintiff claims has been violated. In his responsive papers, however, plaintiff has altered his position to rely on the purported violation of only certain of the previously cited sections of the Code. Each of these sections will be addressed separately below, while the other claimed violations will be deemed withdrawn.

12 NYCRR §23-1.7 (f)

This section, appearing under the title of "Protection from General Hazards", states:

> (f) Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.

In support of his motion, plaintiff argues that this section of the code was violated because he was unable to gain access to the building (as instructed by his employer) simply by climbing the unfinished staircase and unlocking the door, and was forced to attempt to obtain access through the balcony doors instead. In response, defendants argue that the cited section is inapplicable because (1) plaintiff was not attempting to reach an elevated worksite, and, (2) more importantly, he had been provided with a safe passage to reach his area of work via the exterior stairs and front door key; he only became injured when the key allegedly did not work and he chose to attempt a jump from the stairs to the unfinished balcony, whose doors may or may not have afforded access to the interior of the premises.

It is well settled that the cited regulation is specific enough to furnish a basis for liability under Labor Law § 241(6).(see Betke v. Archwood Estates, 261 AD2d 427 [2d Dept 1999]; Baker

v. City of Buffalo, 90 AD3d 1684 [4th Dept 2011]). Here, even though the staircase in question was concededly a permanent part of the structure, the fact that it was unfinished (due to the absence of railings) presents a question of fact as to whether or not it constituted a *safe* means of access to the worksite (see Leonard v. Davis Homes, ___ Misc 3d___, 2008 NY Slip OP 32368U [Sup Ct Suffolk Co 2008][plaintiff injured when a permanent, but unfinished, staircase became detached and shifted]). As a consequence, neither defendants' cross motion to dismiss nor plaintiff's motion for summary judgment can be granted.

12 NYCRR §23-1.7 (b)

This section, appearing under the same general provision cited above, but subtitled "Falling Hazards", provides as follows:

> (1) Hazardous openings.
>
> > (I) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).

Plaintiff alleges that this section was violated at bar because he was caused to fall from a height into an unguarded opening between the stairway and balcony. Nevertheless, not every uncovered space has been held to constitute a "hazardous opening" within the meaning of the regulation and this is particularly true of "gaps" between appurtenances where no one would normally be expected to "step" (see generally Rookwood v. Hyde Park Owners Corp., 48 AD3d 779 [2d Dept 2008]; Garlow v Chappaqua Cent. School Dist., 38 AD3d 712, 714 [2d Dept 2007]; Smith v McClier Corp., 38 AD3d 322, 323[1st Dept 2007]). Rather, the "opening" here constituted a permanent part of the building's structure to which no worker would ordinarily have been exposed. Hence, the

violation cited is per se inapplicable to the facts of this case.

12 NYCRR §§ 1.15, 1.16 and 1.17

These sections deal with the specifications for the installation, use and maintenance of various types of equipment designed to prevent falling. Thus, section 1.15, relates to "Safety Railing", section 1.16 to "Safety Belts, Harnesses, Tail Lines and Lifelines", and section 1.17 to "Life Nets". While plaintiff alleges that each of these sections must be read in conjunction with the foregoing section 23-1.7 (b) (1), defendants allege that they are equally inapplicable to the circumstances in the present case.

Plainly, each of the above sections is scrupulously specific, supplying the parameters, dimensions and other specifications for the various types of safety equipment described. Nevertheless, they do not address when each is required, e.g., the circumstances under which they must be employed. Presumably, this is why the plaintiff argues that they must be read in conjunction with section 1.7 (b)(1). However, as discussed above, section 1.7 (b)(1) has been held to be factually and legally inapplicable to the present case. As a result, the absence of these various safety devices cannot serve as the basis for liability under Labor Law §241(6).

12 NYCRR § 23-2.7(e)

Entitled "Stairway Requirements During the Construction of Buildings", subdivision (e) of this section states as follows:

> (e) Protective railings. The stairwells of temporary wooden stairways and of permanent stairways where enclosures or guard rails have not been erected shall be provided with a safety railing constructed and installed in compliance with this Part (rule) on every open side. Every stairway and landing shall be provided with handrails not less than 30 inches nor more than 40 inches in height, measured vertically from the nose of the tread to the top of the rail.

Here, plaintiff argues that this section was clearly violated because, neither the stairway nor

the balcony processed safety railing as herein above required. Defendants reply that this regulation was improperly pled by plaintiff in a supplemental bill of particulars. In any event, defendants maintain that the presence of safety railings would not have prevented plaintiff from attempting to jump from the stairway on to the balcony in an attempt to obtain access to the rear of the premises. Indeed, P&M goes so far as to claim "if there had been a railing, plaintiff would have climbed over the railing so that he could then get over to the balcony. The presence of a railing would have only resulted in the plaintiff first climbing over the railing before he tried to get to the balcony".

In this instance there can be no question of a violation, as no railings were in place at the time of the plaintiff's accident. Moreover, it is but a mere conjecture to suggest, e.g., that the presence of a safety railing would have had no bearing on the outcome. To the contrary, questions of fact exist as to whether or not there was supervisory authority by plaintiff's co-employee "Darek", whether "Darek" effectively exercised such authority by instructing plaintiff to attempt to enter the house from the balcony, or whether plaintiff opted to do so on his own. Further, there is a question of fact as to whether any such instruction could or would have been given if safety railings had been in place, whether plaintiff would have complied, and/or whether their presence would have had any effect on the success of plaintiff's attempt. In any event, on the evidence presently before the court, it cannot be found that either plaintiff or defendants have sustained their burden of proving their right to judgment as a matter of law as to the causal relationship between the violation of this regulation and plaintiff's injury.

Therefore, neither party is entitled to summary judgment on this aspect of plaintiff's claim under Labor Law §241 (6).

12 NYCRR § 23-1.22(c)(2)

This section appearing under the general heading of "Structural Runways, Ramps and

Platforms", provides the following:

> (2) Every platform more than seven feet above the ground, grade, floor or equivalent surface shall be provided with a safety railing constructed and installed in compliance with this Part (rule) on all sides except those used for loading and unloading. Such sides when used for the loading or unloading of motor trucks or heavier vehicles shall be protected by timber curbs at least 10 inches by 10 inches full size and when used for the loading or unloading of wheelbarrows, power buggies, hand carts or hand trucks such sides shall be protected by timber curbs at least two inches by eight inches full size set on edge and secured to platform

In support of summary judgment, plaintiff argues that defendants' failure to erect a safety railing along the balcony, which he refers to as a "platform", constituted a clear violation of this provision which would have prevented his fall. Defendants respond that the balcony was not a platform, and indeed was not an area that plaintiff would have utilized to perform his work which related solely to carpentry to be performed inside the building, rather than on the balcony itself. Defendants are correct.

Here, it is clear that the balcony, however it was attempted to be used by plaintiff, would not constitute a "platform" as envisioned under this section of the Industrial Code, but rather was an appurtenance to the home. Therefore, this section cannot form the basis for a viable claim under Labor Law §241 (6). As was succinctly related by the Third Department in Olson v. Pyramid Crossgates Co., (291 AD2d 706, 708 [3d Dept 2002]),"Whether the structure is a scaffold or a platform, one of its purposes must be to facilitate the work to be done by supporting the workers and their materials ... [Here, n]either plaintiff nor his expert contends that the plywood structure [at the center of plaintiff's injury] was designed and intended to support workers and their materials, leading us to conclude that plaintiff has wholly failed to establish a cause of action under Labor Law § 241 (6)"]).

Labor Law § 200

Labor Law §200(1) states, in pertinent part**:**

> All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons...

It is a familiar tenet that Labor Law § 200 is a codification of the common-law duty of an owner or employer to provide their employees with a safe place to work (see Jock v. Fien, 80 NY2d 965 [1992]). As such, liability under Labor Law § 200 cannot be imposed unless plaintiff is able to establish that the owner or general contractor supervised or controlled the work being performed or had actual or constructive notice of the unsafe condition which precipitated plaintiff's injury (see Comes v. New York State Elec. & Gas Corp., 82 NY2d 876 [1993]; Murray v. South End Improvement Corp., 263 AD2d 577 [3d Dept. 1999]; Butigian v. Port Authority of New York and New Jersey, 266 AD2d 133 [1st Dept 1999] [liability denied in the absence of evidence that owner or tenant exercised supervisory control over plaintiff's work]).

Under this theory, plaintiff argues that the owner and general contractor failed to provide him with a safe place to work because the lack of a working key compelled him to cross from the unfinished stairway to the unfinished balcony in an attempt to reach his worksite. However, neither was present at the worksite, and he was not provided with any specific instruction by either to do so. Rather, the key appears to have been supplied by his employer, and the attempt was made upon the instruction of a coworker who allegedly had supervisory authority over him. In response, defendants Gaynor and Presidio argue that since this claim arises solely out of the actions of the subcontractor's

personnel, a recovery against either is barred by their absence of supervisory control over plaintiff's work.

The requirements for holding an owner or general contractor liable for the actions of a subcontractor were succinctly stated in Hughes v. Tishman Construction Corp., (40 AD3d 305 [1st Dept 2007]), where the court stated the following :

> "Where a claim under Labor Law § 200 is based upon alleged defects or dangers arising from a subcontractor's methods or materials, liability cannot be imposed on an owner or general contractor unless it is shown that it exercised some supervisory control over the work.... General supervisory authority is insufficient...; it must be demonstrated that the contractor controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed [citations omitted]".

In the instant case, there is no indication that the owner or general contractor directed the manner of plaintiff's work in any respect. Rather, the evidence indicates that plaintiff and Dariusz Polakowski, his fellow employee at P&M , were the only persons present at the job site at the time of his fall, and that any additional instruction which may or may not have been communicated to either by a third employee of P&M, Piotr Drapinski, would not alter the responsibility of the owner and general contractor.

Therefore, plaintiff's cause of action pursuant to Labor Law §200 must be dismissed.

Indemnification

Defendants Gaynor, Passarelli and Presidio argue they are each entitled to indemnification from P&M under the terms of the contract for any damages which may be assessed against them. Specifically, they state that the effect of the "hold harmless" clause, which is clearly drafted to run to the benefit of the "owner and/or contractor and employees of either of them", is not altered by the fact that Gaynor never signed the agreement. In any event, P&M argues that the indemnification requirement can not be triggered until there has been an actual finding that plaintiff's accident was

solely attributable to the negligence of P&M, and that the third-party plaintiffs bear no responsibility based upon their alleged violation of Labor Law §241 (6). In addition, P&M claims that the third-party plaintiffs are inappropriately seeking contractual indemnification against it while simultaneously asserting a defense of culpable conduct against the plaintiff[4].

An indemnification agreement is a promise by which one party, the indemnitor, promises another party to the contract, the indemnitee, that the former will reimburse the latter for specified damages arising out of certain accidents or activities. It must be noted that General Obligation Law § 5-322.1 provides that any such agreement which purports to indemnify the indemnitee against liability for damages caused or resulting, in whole or part, from the indemnitee's own negligence, "is against public policy and is void and unenforceable" (but see Dutton v.Charles Pankow Builders, Ltd., 296 AD2d 321 [1st Dept 2002][exploring the doctrine of partial indemnification]). However, the third-party complaint alleges that the third-party plaintiffs are entitled to indemnification for any damages assessed against them as a result of P&M's negligence. Hence, the language of the third-party complaint is not limited to the terms of the indemnification agreement with Presidio. Neither are any of the third-party plaintiffs seeking to be indemnified for their own negligence. The operative language of the contract at bar is clearly limited to the receipt of indemnification for any claims "arising out of or resulting from the performance of the subcontractors work", i.e., P&M.

In any event, the motion is premature to the extent that ultimate fault has yet to be established.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on the causes of action predicated

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[4] The contributory negligence of an injured worker may be asserted in mitigation of damages under Labor Law §241 (6).(Lorefice v. Reckson Operating Partnership, L.P., 269 AD2d 572 [2d Dept 2000]).

upon the alleged violation of Labor Law §§ 200, 240 (1), and 241 (6) is denied, and it is further

ORDERED that defendant P&M's motion for summary judgment and dismissal of the complaint and any crossclaims brought against it is granted, and it is further ordered, that said claims are severed and dismissed except as to the claims for indemnification asserted in the third-party complaint; and it is further

ORDERED that defendants Mentor Development Corporation and Guido Passarelli's motion for summary judgment and dismissal of the complaint as against them is granted as unopposed, and said causes of action and any cross-claims against them are hereby severed and dismissed, and it is further

ORDERED that defendants, Gaynor Building Corporation and Presidio Construction Corporation, motion for summary judgment and dismissal of the complaint and any cross-claims brought against them pursuant to Labor Law §§ 200, 240 (1), and 241 (6) are granted *except* as to these claims brought by plaintiff under Labor Law §241 (6) as are premised upon the alleged violation of Industrial Code §§ 23-1.7 (f) and 23-2.7(e); and it is further

ORDERED that the third-party plaintiff's motion for summary judgment against the third-party defendant based on their claims for indemnification is denied as premature.

This constitutes the Decision and Order of the Court.

Dated: April 30, 2012

Enter,

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Hon. John A. Fusco
Justice of the Supreme Court