Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

JORGE AYALA,

Plaintiff,

-against-

191-193 AVENUE A OWNER LLC, WESTBROOK PARTNERS, LLC and DOMINICK DASARO,

Defendants.

Index No: 18042/09

Motion Date: 3/21/12

Motion Cal. No.: 5

Motion Seq. No.: 2

191-193 AVENUE A OWNER LLC, WESTBROOK PARTNERS, LLC

Third-Party Plaintiffs,

-against-

CVS CONSTRUCTION & DEVELOPMENT, CORP.

Third-Part Defendants.

The following papers numbered 1 to 9 read on this motion by plaintiff for summary judgment on his causes of action based upon violations of Labor Law §§ 200, 240(1) and 241(6)

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits	1 - 4
Answering Affidavits-Exhibits.....	5 - 6
Replying Affidavits.....	7 - 9

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

This is an action to recover for personal injuries plaintiff allegedly sustained on May 28, 2008, while replacing/repairing the facade of the building owned by the defendants and located at 444 East 12th Street, New York, N.Y. a/k/a 191-193 Avenue A

(hereinafter the building) The plaintiff was the employee of the third-party defendant, CVS Construction & Development Corp.(CVS), hired by the defendants to perform renovations at the premises. Plaintiff alleges that he was injured when the makeshift scaffold on which he was standing failed, causing him to fall approximately eight feet to the sidewalk.

Plaintiff commenced this action against the owners of the property alleging violations of Labor Law §240(1), §241(6) and §200, and now moves for summary judgment in his favor on all causes of action asserted in his complaint. In support of his motion, plaintiff submitted his own deposition testimony, the deposition of Josh Krat, the property manager of the building and the affidavit of Kathleene Hopkins plaintiff's expert Safety Engineer.

As the movant, the plaintiff bears the initial burden of establishing, prima facie, entitlement to judgment as a matter of law, offering sufficient evidence, in admissible form, to demonstrate the absence of any material issues of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]).

The branch of plaintiff's motion for summary judgment in his favor on his Labor Law § 240(1) is granted.

Labor Law § 240 imposes a non-delegable duty upon owners and contractors, and their agents engaged in, inter alia, the alteration, renovation construction or repair of a building or structure, to provide workers with appropriate safety devices to protect them against such specific gravity-related accidents as falling from a height (see Blake v. Neighborhood Housing Services of New York City, Inc., 1 NY3d 280 [2003]; Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500 [1993]; Novak v. Del Savio, 64 AD3d 636, 637-638 [2009]). A violation of this duty results in absolute liability (see Bland v. Manocherian, 66 NY2d 452 [1985]). To prevail on a cause of action under Labor Law 240(1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of the injuries sustained. (see , Bland v. Manocherian, supra; Tylman v. School Constr. Auth., 3 AD3d 488 [2004].)

The plaintiff has established, prima facie, his entitlement to summary judgment on his Labor Law § 240(1) claim through his deposition testimony which demonstrated that the planks of wood

forming the platform of the structure from which he was working, moved and/or buckled causing him to fall and sustain injuries. The plaintiff testified that when he attempted to use the pipe scaffold he had been using before his fall, the building superintendent directed him to remove it as it was blocking the doors to the basement. Plaintiff called Voulgarakis, his "boss" and a principal of CVS informing him of the situation. Voulgarakis called back, spoke to plaintiff's co-worker asking whether something could be set up so that the workers could continue doing their job. Plaintiff testified that after his co-worker spoke to Voulgarakis, his co-worker assembled the structure by using four planks of wood, approximately 12 feet long and about 2 1/2 feet total width, placed on top of the blue plywood fence which someone else previously erected on the sidewalk in front of the windows of the commercial premises at the building. Plaintiff testified that he was injured when the planks moved and/or buckled causing him to fall over the side on to the sidewalk. Where, as here, a device collapses, moves, slips or otherwise fails to perform its function of supporting the worker, a prima facie entitlement to partial summary judgment is established (see Saldivar v. Lawrence Development Realty, LLC, ___ AD3d ___ [2010], 2012 WL 1698984 ; Campbell v. 111 Chelsea Commerce, L.P., 80 AD3d 721, 722 [2011]; Norwood v. Whiting-Turner Contracting Co., 40 AD3d 718 [2007]). In opposition the defendants' conclusory allegations that the statute was not violated and that, at least, issues of fact exist, are unsupported by any evidence and insufficient to raise a triable issue of fact (see Norwood v. Whiting-Turner Contracting Co., supra).

Labor Law § 241(6) imposes a non-delegable duty upon owners and general contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (Ross v. Curtis Palmer Hydro-Electric Co., 81 NY2d 491, 501 [1993]; Rizzuto v. L.A. Wenger Construction Co., 91 NY2d 343, 348 [1998]). Unlike the violation Labor Law § 240(1), however, a violation of Labor Law § 241(6) does not result in absolute liability and the plaintiff's comparative negligence may be raised in defense to such claim (see St. Louis v. Town of North Elba, supra at 414; Long v. Forest Fehlhaber, 55 NY2d 154 [1982]). Thus, to prevail on a Labor Law § 241(6) claim, a plaintiff must establish a violation of a New York State Industrial Code which contains a specific, positive command applicable to the circumstances of the accident and that such violation was a proximate cause of his injuries (see St. Louis v. Town of North Elba, 16 NY3d 411 (2011); Gasques v. State, 15

NY3d 869 (2010); Fusca v. A & S Const., LLC, 84 AD3d 1155 [2011]; Forschner v. Jucca Co., 63 AD3d 996 [2009]) and plaintiff's lack of comparative negligence (see Roman v. A1 Limousine, Inc., 76 AD3d 552, 553 [2010]).

In support of his Labor Law § 241(6) claim plaintiff alleged in his bill of particulars the violation of various OSHA regulations and numerous provisions of the Industrial Code.

To the extent that plaintiff asserts violations of OSHA regulations, such violations cannot serve as a predicate to liability under Labor Law § 241(6)(Rizzuto v L.A. Wenger Contracting Co., Inc., supra at 351).

With respect to the alleged Industrial Code violations, plaintiff addressed, in support of his motion, only violations of Industrial Codes 12 NYCRR 23-1.7(b)(1)(i) & (iii)(c), 23-1.7(f), 23-5.1(a),(b),(f),(h), & (j) and has apparently abandoned his claims with respect to the remaining alleged violations (see Kronick v. L.P. Thebault Co., Inc., 70 AD3d 648, 649 [2010]). Plaintiff also relied upon 12 NYCRR 23-1.11 [lumber and nail fastenings], which section was not set forth in his bill of particulars, or the three subsequent supplemental bills of particulars nor has plaintiff moved to amend so as to include this provision. However, inasmuch as the defendants have not raised any objection to this section on this basis, and because plaintiff testified that the wood planks either "moved or buckled" the defendants are neither surprised nor prejudiced by the court considering this section (see Kelleir v. Supreme Industrial Park, LLC, 293 AD2d 513 [2002]).

The plaintiff's motion for summary judgment on his Labor Law § 241(6) claim is denied.

Initially, the court rejects defendants' contention that the plaintiffs' expert affidavit cannot be considered as it was not submitted in admissible form due to the lack of a certificate of conformity in compliance with CPLR 2309(c). Such non compliance is not fatal as it may be cured, *nunc pro tunc*,(see U.S. Bank Nat. Ass'n v. Dellarmo, 94 AD3d 746, ___ [2012]; Betz v. Daniel Conti, Inc., 69 AD3d 545 [2010]). Plaintiff has submitted the required certificate of conformity in his reply papers.

Never the less, the plaintiff's expert opinion as to the applicability of the Industrial Codes to the circumstances of this case was not considered by the court. Although an expert may testify as to the meaning of specialized terms in regulations at issue, and sometimes even whether a particular condition or

omission violated a rule or statute, Franco v. Jay Cee of New York Corp., 36 AD3d 445, an expert may not testify about the meaning and applicability of the law (see Rodriquez v. NYC Housing Authority, 209 AD2d 260 [1994]; Ross v. Manhattan Chelsea Assoc., 194 AD2d 332 [1993]). The interpretation of an Industrial Code regulation and whether a regulation applies to a particular condition or circumstance is a question of law for the court (see Harrison v. State, 88 AD3d 951, 953 [2011]; Spence v. Island Estates at Mt. Sinai II, LLC, 79 AD3d 936, 938 [2010]).

Plaintiff's reliance on Industrial Code §§ 23-1.7(b)(1)(i) & (iii), §23-1.7(f), 23-5.1(a) and 23-5.1(h) is misplaced. Industrial Code § 23-1.7(b)(1)[falling hazards: hazardous openings], which mandates that holes or "hazardous openings" at construction sites into which a person may step or fall be guarded by a substantial cover or by a safety railing is inapplicable to the facts of this case since plaintiff did not fall into a hole or through a hazardous opening (see Ortiz v. 164 Atlantic Avenue, LLC, 77 AD3d 807 [2010]; Pope v. Safety and Quality Plus, Inc., 74 AD3d 1040 ; Garlow v. Chappaqua Central School Dist., 38 AD3d 712). Similarly, section 23-1.7(f) [vertical passage] which requires that stairways, ramps or runways be provided as a means of access to elevated work sites is inapplicable since the plaintiff was not injured while trying to ascend or descend from structure. Section 23-5.1(f)which requires that scaffolds be kept in good repair and section 23-5.1(a) [scope of this part] sets forth general rather than specific standards of conduct and insufficient to support a Labor Law § 241(6) claim (see Holly v. Chautauqua, 63 AD3d 1558, rev'd on other grnds 13 NY3d 931 [2007]). Section 23-5.1(h)[scaffold erection and removal] which requires that every scaffold be erected and removed under the supervision of a designated person is inapplicable here, since the plaintiff was not injured during the erection or dismantling of the scaffold (see Lavore v. Kir Munsey Park 020, LLC, 40 AD3d 711, 713 [2007]).

With respect to the remaining Industrial Codes, to wit, §23-1.11(a), §23.5-1(b) and §23.5-1(j), plaintiff has failed to demonstrate, prima facie, his entitlement to summary judgment on his Labor Law § 241(6) claim by demonstrating, the absence of any material issues of fact as to whether a particular Industrial Code was violated, or that such violation, if any, was a proximate cause of the plaintiff's fall and plaintiff's lack of comparative negligence.

Section 23-1.11(a) [lumber and nail fastenings] requires that lumber used for the construction of equipment be sound and not contain certain enumerated defects which impair its strength.

The plaintiff's testimony that the makeshift scaffold moved and/or buckled, is insufficient to demonstrate as a matter of law, that the lumber was unsound since he also testified that the four planks of wood did not break, separate or fall to the sidewalk. His testimony in this regard was unclear.

Section 23-5.1(b)[scaffold footing or anchorage] requires that the footing or anchorage of every scaffold erected on the ground or grade be sound, rigid and capable of supporting the maximum intended weight and be secured against movement. Plaintiff was not asked at his deposition and he did not submit any evidence to demonstrate that the blue fence, which supported the four planks and served as the functional equivalent of a footing either moved or was not secured to demonstrate that inadequate footing or anchorage.

Section 23.5-1(j)[safety railings] requires that the open sides of a scaffold elevated more than seven feet be provided with safety railings. Plaintiff first testified that the fence was 8, 10, 12 feet high, but later stated that he believed that the blue fence was 8 feet high because the dimensions of a standard plywood boards is generally 4 by 8 feet. Since plaintiff testified that neither he nor CVS erected the fence, the plaintiff belief apparently based on his assumption that the fence was comprised of standard plywood boards is insufficient to demonstrate as a matter of law that the height was over 7 feet requiring that safety rails to be provided.

The plaintiff's testimony rather than resolving all issues of fact raises numerous issues of fact, inter alia, as to the height of the platform, whether the wood planks comprising the structure were sound, rigid and capable of supporting him and whether they were secured. Although plaintiff's attorney and expert claim the planks were "unsecured", the plaintiff's deposition testimony was ambiguous in this regard.

Finally, the plaintiff failed to submit any evidence to demonstrate his freedom from comparative negligence (see Roman v. A1 Limousine, Inc., supra). The plaintiff's deposition testimony that when Mr. Voulgarakis, his boss, was not present at the work site, he was in charge, is sufficient to raise issues of fact as to whether he was negligent and whether his negligence, if any, contributed to the accident.

Accordingly, the branch of plaintiff's motion for summary judgment on his Labor Law § 241(6) claim must be denied, regardless of the sufficiency of the defendants' opposition.

The branch of the plaintiff's motion seeking summary judgment on his Labor Law §200 claim is also denied.

Labor Law § 200 is a codification of the common-law duty imposed upon an owner and general contractor to maintain a safe construction site (see Rizzuto v. L.A. Wenger Contr. Co., supra at 352; Comes v. New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]). Where, as here, the claim arises out of the means, and methods of the work, the owner may be held liable only if the owner had the authority to supervise or control the performance of the work, even where the owner does not actually exercise this authority (see Cody v. State, 82 AD3d 925, 927 [2011] citing Ortega v. Puccia, 57 AD3d 54, 62 n. 2 [2008]; Clavijo v. Universal Baptist Church, 76 AD3d 990 [2010]). However, general supervisory authority, including the authority to review or stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 (see Harrison v. State, 88 AD3d 951, 953 [2011]). "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" (Cody v. State, supra at 927 quoting Ortega v. Puccia, supra at 62).

The plaintiff has failed to demonstrate, prima facie, that the defendants had the authority to "supervise or control" the means and manner of the performance of the plaintiff's work. In this regard the only evidence plaintiff submitted was the deposition testimony of Josh Krat, the property manager of the building. Krat testified that he was hired by Magnum Real Estate Group (hereinafter Magnum RE Group) to work for its subsidiary PVE Associates (hereinafter PVE) as the property manager. His duties as property manager was to deal with tenants and landlord & tenant issues and tenant related repairs. He further testified that the defendant, 191-193 Avenue A Owners, LLC (hereinafter 191-193) is the owner of the property where plaintiff was working (hereinafter the subject property); and that PVE is associated with Magnum Management (Magnum), an entity that has a part ownership interest in 191-193 together with co-defendant Westbrook Partners, LLC, and another person or entity. He further testified that the project in which CVS was involved, i.e. the preparation of the retail space at the building for a prospective tenant, was handled by the construction department of Magnum RE Group under the supervision of Joe Hamilton and Steve Breiman, employees of Magnum RE Group. Krat testified that he believes that Hamilton was running the project at the subject premises and hired CVS to perform the stucco work on the facade of the

building. He further testified that he believed that Hamilton supervised CVS. However, Krat did not know when, how often Hamilton went to the work site or what he did there or any other actions on the part of Hamilton to demonstrate that Hamilton, as the defendants' agent "supervised or controlled" CVS' work.

Although Krat also produced some documentary evidence he found in the files including an estimate of the costs of CVS' work from CVS addressed to Magnum, it appears that there was no written with CVS and no other evidence was submitted from which it may be reasonably inferred that Hamilton had the authority to supervise or control the means and manner of plaintiff's work. Contrary to plaintiff's claim, the fact that the superintendent forced the plaintiff and his co-worker to move the scaffold so as not to block the basement entrance, even if true, does not alone demonstrate defendants' authority to supervise or control the means and manner of the work. Thus, issues of fact exist as to whether defendants had the authority to supervise or control the plaintiff's work such that they may be held liable under Labor Law § 200.

Accordingly, the branch of plaintiff's motion for summary judgment in his favor as to liability based upon the violation of Labor Law § 240(1) is granted. The branches of the plaintiff's motion for summary judgment as to liability on his claims based upon violation of Labor Law § 241(6) and §200 are denied.

Dated: July 9, 2012
D# 47

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J.S.C.