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SCANNED 7/18/2012

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan Justice PART 36

Index Number : 101477/2010
MATTHEWS, PHILLIP
VS.
400 FIFTH REALTY
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for Summary Judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s): 1-2

Answering Affidavits — Exhibits _____ No(s): 5

Replying Affidavits Notice of Cross motion etc _____ No(s): 3-4

Upon the foregoing papers, it is ordered that this motion & cross-motion for Summary Judgment are decided in accordance with the attached memorandum decision.

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

FILED
JUL 18 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/16/12

DORIS LING-COHAN, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS 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: PART 36

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PHILLIP MATTHEWS,

Plaintiff,

Index No.: 101477/10

-against-

Motion Seq. No.: 003

400 FIFTH AVENUE LLC, PAVARINI McGOVERN LLC and G.C. IRONWORKS,

DECISION

Defendants.

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DORIS LING-COHAN, J.:

Defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff cross-moves, pursuant to CPLR 3212, for partial summary judgment on his causes of action based on violations of Labor Law §§ 240 (1) and 241 (6).

BACKGROUND

Plaintiff alleges that, on September 24, 2009, he injured his leg and knee when a metal grate fell on his left thigh while he was painting in an elevator shaft. The complaint alleges causes of action based on common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6).

At the time of the occurrence, plaintiff was employed by nonparty Fugitec, as an apprentice member of the International Union of Elevator Contractors, Local No. 1. Fugitec was engaged to install several elevator banks in the premises owned by

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defendant 400 Fifth Realty LLC (400 Fifth).

At his examination before trial (EBT), plaintiff testified that Fugitec supplied all the tools and equipment that he used, and his work was supervised and directed by a Fugitec foreman named Neil Murphy (Murphy). Plaintiff EBT, at 20.

Plaintiff usually worked with a fellow journeyman, and the only work that he performed alone consisted of preparing T-rails for installation in an elevator shaft, which was done on a floor, and consisted of cleaning and scraping the T-rails and bolting on "fish plates." *Id.* at 24-25. Plaintiff received safety instructions from his union, and Fugitec held safety meetings every Monday. *Id.* at 21.

For the three days prior to the accident, plaintiff had been painting steel in an elevator shaft. *Id.* at 26-27, 29. To paint, plaintiff stood on wood decking that Fugitec installed in the shaft across what would be the 27th floor (*id.* at 29-30, 43) and, when necessary, plaintiff would place a wooden A-frame ladder on the decking to paint. *Id.* at 29-31, 53.

On the day of the accident, when plaintiff was in the elevator shaft on the 27th floor deck, plaintiff stated that there was no work going on above him, across the shaft, at what would be the 28th floor. At the 28th floor level, there was a steel grating floor, and plaintiff never observed anyone working on that grating. *Id.* at 31-33, 44. Plaintiff averred that he

never worked below ironworkers installing grates, and that there were no ironworkers toiling above him. *Id.* at 48-49.

Immediately before the accident occurred, plaintiff had disembarked from a ladder and was standing on the wood decking using a paint brush to paint structural steel. *Id.* at 53. The steel grate fell on him just after he got off the ladder, and he did not hear any noise or other disruption above him before it fell. *Id.* at 51, 53-54, 109. According to plaintiff, the steel grate fell without warning. *Id.* at 109.

Plaintiff stated that he did not know what caused the steel grate to fall, he never asked anyone what caused it to fall, and it did not hit anything on the way down. *Id.* After plaintiff was hit, two ironworkers who were working in the adjacent elevator shaft came to help him up. *Id.* at 59. Although Murphy and his fellow workers advised him to get an ambulance, plaintiff took a taxi to New York University Hospital. *Id.* at 64.

Cosmo Argiro (Argiro), a foreman with defendant G.C. Ironworks (GC), one of the subcontractors for the project, was also deposed in this matter and testified that GC was engaged to install iron grates in the elevator shafts at the premises where the accident occurred. Argiro EBT, at 10-12, 23-24. Argiro stated that Fugitec was the elevator engineer for the project, and that GC did not have the authority to supervise or direct Fugitec employees. *Id.* at 25-26. According to Argiro, when GC

needed to work in an elevator shaft, he would notify Fugitec, and GC would never work in an elevator shaft without letting Fugitec know first. *Id.* at 29, 34.

On the day of the occurrence, Argiro spoke with Murphy to notify him that GC would be working in the shafts on the 27th floor, and Murphy approved GC's access to that shaft. *Id.* at 30, 45, 53-54. The work that GC performed on that day was to weld the grating on top of steel beams that had been welded to the interiors of the elevator shafts. *Id.* at 37-39, 45, 50. Plaintiff was working in the same shaft, directly below the GC workers. *Id.* at 52. Argiro says that, several times that day, he warned plaintiff to watch out because he and other GC employees were working above him. *Id.* at 61, 77. Argiro stated that he did not have any authority to forbid plaintiff from working in the shaft. *Id.* at 61.

Argiro testified that, when the grate fell, plaintiff was directly beneath him. According to Argiro, while the GC workers were welding the metal grating, "one of the pieces just got loose somehow, just fell and went on top of [plaintiff] — his leg." *Id.* at 62. Argiro maintained that there are no devices that would prevent a grate from falling in this situation, and that he was unaware of any procedures or devices that were supposed to be used to prevent a grate from falling during installation. *Id.* at 72.

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Pavarini McGovern LLC (Pavarini), was the general contractor for the project. Edward Lydon (Lydon), Pavarini's project superintendent, was also deposed in this matter and testified that he was responsible for coordinating the work of the subcontractors, but that he did not manage them directly, nor did he have any supervisory authority over the subcontractors' employees. Lydon EBT, at 9, 45. Lydon stated that Pavarini engaged GC to perform all non-structural iron work at the project, including the installation of platforms at the base of the elevator shafts, inspection platforms and work platforms at the top the shafts. *Id.* at 32, 40-41. Lydon said that Pavarini also hired Fugitec to install all components related to the elevators, and that it was Fugitec's responsibility to supply its workers with all safety devices for working in the elevator shafts, including safety lines and harnesses, handrails and safety platforms. *Id.* at 42-43, 89. According to Lydon, Fugitec installed safety platforms in the elevator shaft. *Id.* at 89.

Lydon maintained that subcontractors were not required to seek Pavarini's permission to work in an elevator shaft, but that the subcontractors would coordinate such work directly with Fugitec. *Id.* at 44-45. Lydon said that he did not personally remember Fugitec and GC workers working in the elevator shafts at the same time, but that it was Fugitec's responsibility to make sure that no Fugitec employees were working in an elevator shaft

at the same time that a subcontractor was also working in the shaft. *Id.* at 60, 65.

Defendants argue that, despite the absolute liability imposed on owners and general contractors, pursuant to Labor Law § 240 (1), it is still necessary for an injured worker to prove that a violation of the statute was the proximate cause of the injury and that an accident alone is insufficient to establish liability. Further, to impose liability on the owner and general contractor, the worker must provide evidence that the object that struck the worker fell while being hoisted or secured. Defendants assert that this was not the situation in the case at bar. Defendants also argue that the sections of the Industrial Code cited by plaintiff are inapplicable to the facts of the case and cannot support a claim based on a violation of Labor Law § 241 (6).

Plaintiff alleges violations of Industrial Code sections 23-1.7, 23-2.1 and 23-2.5. Defendants assert that these sections are inapplicable because: (1) section 23-1.7 has been held not to apply to a worker struck by a falling object; (2) section 23-2.1 only applies to situations in which material is being stored; and (3) section 23-2.5 mandates platforms in elevator shafts at least 30 feet or two stories, whichever is less, to protect workers from falling objects, whereas, in the instant matter, the grate fell only eight or nine feet.

Lastly, defendants claim that plaintiff cannot maintain causes of action based on common-law negligence or a violation of Labor Law § 200, because plaintiff only took instructions from Fugitec, and defendants did not direct or control plaintiff's work.

In opposition to defendants' motion, plaintiff maintains that summary judgment in favor of defendants on his Labor Law § 240 (1) cause of action must be denied because owners and general contractors are absolutely liable for injuries to workers resulting from the failure to provide adequate protection at a job site.

Plaintiff also argues that sections 23-1.7 (a) and 23-2.5 (b) (1) of the Industrial Code are sufficiently specific to support his Labor Law § 241 (6) cause of action. Since plaintiff did not argue the applicability of Industrial Code § 23-2.1, such claim is deemed abandoned.

Lastly, plaintiff asserts that his causes of action based on common-law negligence and Labor Law § 200 should not be dismissed because Pavarini had general supervisory control over the construction site. The court notes that plaintiff does not argue whether these claims should be dismissed as asserted against GC and 400 Fifth.

In support of his cross motion for partial summary judgment on his causes of action based on Labor Law §§ 240 (1) and 241

(6), plaintiff, in sum and substance, reiterates his arguments presented in opposition to defendants' motion.

In further support of his cross motion, plaintiff provides the affidavit of Scott Silberman (Silberman), a professional engineer, who opined, with a reasonable degree of site safety engineering certainty, that defendants violated the provisions of the Labor Law by "permitt[ing] plaintiff to work in an area where he was exposed to falling materials or objects without the benefit of overhead protection ... and in failing to place or secure the metal grating in place so as to prevent it from shifting or falling." Silberman's opinion was based on his personal site inspection, made more than one year after the accident, defendants' pleadings, and daily logs prepared at the time of the accident. Silberman goes on to state that a platform should have been constructed underneath the area in which the grating was being installed so as to prevent objects from falling until the grate was properly secured.

In opposition to plaintiff's cross motion, and in reply to plaintiff's opposition to their motion, defendants contend that the cross motion should be denied as untimely, having been filed more than 60 days after the note of issue was filed, in contravention of Part rules. Defendants say that the note of issue was filed on August 31, 2011, making dispositive motions due on October 31, 2011. Defendants' motion was filed on October

31, 2011, and plaintiff's cross motion was filed on January 6, 2012. Thus, plaintiff's motion is untimely, as it was not filed within 60 days of the filing of the note of issue, as required by this Part's Rules. *See Colon v. City of New York*, 15 AD3d 173 (1st Dept 2005); *Thompson v. Leben Home for Adults*, 17 AD3d 347 (2nd Dept 2005). Moreover, the court notes that plaintiff failed to proffer a good faith basis for his delay in moving for summary judgment as required; thus, plaintiff's motion would be denied on such basis. Nevertheless, even if this court were to consider plaintiff's motion on the merits, as detailed below, plaintiff is not entitled to summary judgment.

Defendants also claim that Silberman's affidavit is fatally defective in that this expert was undisclosed and, consequently, his affidavit should not be considered. Moreover, defendants had their own expert, Bernard Lorenz (Lorenz), a professional engineer, present at the site at the same time as Silberman. Lorenz, in his affidavit, stated that he reviewed the same documents as Silberman, plus the deposition testimony of the witnesses, and opined, with a reasonable degree of engineering certainty, that the facts of the case do not support the claim that defendants violated Labor Law § 240 (1), since the work being performed did not require any safety devices and the work being performed by GC was unrelated to plaintiff's tasks.

Lorenz also opined that the facts of the case do not support

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plaintiff's Labor Law § 241 (6) claims, because an elevator shaft is not a place where persons are required to work or pass through that is normally exposed to falling objects, and the evidence indicates that platforms, as required by section 23-2.5 (1) of the Industrial Code were in place, since plaintiff was standing on one and the GC workers were on the one immediately above him.

Further, Lorenz states that Labor Law § 200 is inapplicable since the defendants did not supervise or direct plaintiff's work.

Lastly, Lorenz challenges several of the conclusions reached by Silberman, stating that Silberman fails to indicate any authority for his conclusions.

Defendants argue, in the alternative, that a jury should decide liability under Labor Law §§ 240 (1) and 241 (6).

DISCUSSION

"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 [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v*

City of New York, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Section 240 (1) of the New York Labor Law states, in pertinent part:

> "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."

As stated by the Court in *Rocovich v Consolidated Edison Company* (78 NY2d 509, 513 [1991]),

> "It is settled that section 240 (1) is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed. Thus, we have interpreted the section as *imposing absolute liability* for a breach which has proximately caused an injury. ... In furtherance of this same legislative purpose of protecting workers against the known hazards of the occupation, we have determined that the duty under section 240 (1) *is nondelegable* and that an owner is liable for a violation of the section even though the job was performed by an independent contractor over which it exercised no supervision or control [internal quotation marks and citations omitted]."

Labor Law § 240 (1) was designed to protect workers against elevation-related risks. "In order to prevail upon a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that

the statute was violated, and that this violation was a proximate cause of his injuries." *Zgoba v Easy Shopping Corp.*, 246 AD2d 539, 541 (2d Dept 1998). This section of the Labor Law applies to falling objects as well as to falling workers (*Narducci v Manhasset Bay Associates*, 96 NY2d 259 [2001]), and the critical question is "whether the harm flows directly from the application of the force of gravity to the object." *Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 604 (2009); *see also Wilinski v 334 East 92nd Housing Development Fund Corp.*, 18 NY3d 1 (2011).

In order to prevail on a cause of action based on a violation of Labor Law § 240 (1), a plaintiff must show that the object fell while being hoisted or secured because of the absence of a safety device of the kind enumerated in the statute. *Quattrocchi v F.J. Schiame Construction Corp.*, 44 AD3d 377 (1st Dept 2007), *affd* 11 NY3d 757 (2008).

In the case at bar, "triable questions of fact preclude summary judgment on plaintiff's Labor Law § 240 (1) claim, including whether the [steel grates] were adequately [secured] in preparation for their being welded in place. *Quattrocchi v F.J. Schiame Construction Corp.*, 11 NY3d 757, 759 (2008).

In addition, the parties have provided conflicting expert affidavits, which preclude granting summary judgment on this cause of action. *Gowans v Otis Marshall Farms, Inc.*, 85 AD3d 1704 (4th Dept 2011). The fact that plaintiff's expert was not

previously disclosed is not a bar to the court considering it for the purposes of a summary judgment motion. *Osterhout v Banker,* 27 Misc 3d 1207(A), 2010 NY Slip Op 50608(U) (Sup Ct, Wayne County 2010), *affd* 90 AD3d 1528 4th Dept 2011); *see also Djeddah v Williams,* 89 AD3d 513 (1st Dept 2011).

As a consequence of the foregoing, that portion of defendants' motion seeking summary judgment dismissing plaintiff's Labor Law § 240 (1) cause of action and plaintiff's cross motion seeking partial summary judgment on this claim are both denied.

Labor Law § 241 (6) states:

> "Construction, excavation and demolition work. 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, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> ***
>
> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

To prevail on a cause of action based on Labor Law § 241 (6), a plaintiff must establish a violation of an applicable Industrial Code provision which sets forth a specific standard of

conduct. *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 (1998). However, while proof of a violation of a specific Industrial Code regulation is required to sustain an action under Labor Law § 241 (6), such proof does not establish liability, and is merely evidence of negligence. *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494 (1993).

Plaintiff alleges violations of sections 23-1.7 and 23-2.5 of the Industrial Code as support for his cause of action based on a violation of Labor Law § 241 (6).

In a similar situation, in which a worker was injured by an object falling in an elevator shaft, the Appellate Division held that section 23-1.7 is inapplicable because this regulation only applies to places normally exposed to falling material or objects, and not where an object unexpectedly falls on a worker in an area not normally exposed to such hazards. *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263 (1st Dept 2007); thus, §23-1.7 is inapplicable.

The provisions of section 23-2.5 of the Industrial Code are also inapplicable to the case at bar. Section 23-2.5 of the Industrial Code provides, in pertinent part, that a tight platform planking must be installed not more than two stories or 30 feet, whichever is less, above the level where work is being performed. In the instant matter, Lydon testified that such platform was placed in the shaft by Fugitec, and there is no

evidence that it was insufficient or was the cause of the accident that caused plaintiff's injuries.

With respect to this cause of action, the court notes that plaintiff's expert never says that this section of the Industrial Code was violated, but merely opines that other measures could have been taken to avoid the accident, such as constructing planking immediately beneath the grate being installed, which is not mandated by section 23-2.5 of the Industrial Code. Therefore, with respect to plaintiff's claim based on a violation of Labor Law § 241 (6), there is no conflict between the expert affidavits.

Based on the foregoing, that branch of defendants' motion to dismiss plaintiff's cause of action based on a violation of Labor Law § 241 (6) is granted, and the portion of plaintiff's cross motion seeking partial summary judgment on this cause of action is denied.

Labor Law § 200 is the codification of the common-law duty to provide workers with a safe work environment, and its provisions apply to owners, general contractors, and their agents. *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494 (1993). There are two distinct standards applicable to Labor Law § 200 cases, depending upon whether the accident is the result of a dangerous condition, or whether the accident is the result of the means and methods used by the contractor to perform its work.

See e.g. McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints, 41 AD3d 796 (2d Dept 2007).

In the instant matter, the accident allegedly occurred because of the means and methods of operation, i.e., the way in which the steel grate was being placed in position to be welded, and the fact that plaintiff was permitted to work in the shaft directly beneath workers welding steel grates. In such circumstances, in order to hold the owner and/or general contractor liable under Labor Law § 200, the injured worker must produce evidence that the defendant exercised supervisory control over the injury-producing work. *Comes v New York State Electric & Gas Corp.,* 82 NY2d 876 (1993); *McFadden v Lee,* 62 AD3d 966 (2d Dept 2009).

> "[T]here is no evidence in the record that [defendants] actually directed, controlled or supervised plaintiff's work or were responsible for doing so. ... Rather, the record shows that ... it was plaintiff's employer ... that actually directed [plaintiff's work] [internal citations omitted]."

Torres v Morse Diesel International, Inc., 14 AD3d 401, 403 (1st Dept 2005).

Defendants are entitled to "judgment as a matter of law by demonstrating that the plaintiff's accident arose from the means and methods of his work, that the plaintiff's work was directed and controlled exclusively by his employer, and that they had no authority to exercise supervisory control over his work." *Robinson v County of Nassau,* 84 AD3d 919, 920 (2d Dept 2011);

Persichilli v Triborough Bridge & Tunnel Authority, 16 NY2d 136 (1965); *Cambizaca v New York City Transit Authority*, 57 AD3d 701 (2d Dept 2008).

Furthermore, the "mere retention of contractual inspection privileges or a general right to supervise does not amount to control sufficient to impose liability ... in the absence of proof of ... *actual* control." *Brown v New York City Economic Development Corp.*, 234 AD2d 33, 33 (1st Dept 1996).

In the case at bar, no evidence has been submitted to indicate that defendants exercised any supervision or control over plaintiff's work. Plaintiff's conclusory statement that defendants had significant and close involvement with the work being performed is insufficient to defeat this portion of defendants' motion. *Gilbert Frank Corp. v Federal Insurance Company*, 70 NY2d 966 (1988); *Gusinsky v Genger*, 74 AD3d 539 (1st Dept 2010).

The court notes that the complaint does not distinguish which defendant each cause of action is asserted against; however, since Labor Law § 200 only applies to owners and general contractors, the court concludes that this cause of action is not asserted as against GC, a subcontractor. Further, the same arguments that apply to 400 Fifth and Pavarini's supervision and control over plaintiff's work apply to their supervision and control over GC.

As a consequence, that portion of defendants' motion seeking to dismiss plaintiff's Labor Law § 200 claim is granted.

That portion of defendants' motion seeking to dismiss plaintiff's cause of action based on common-law negligence is granted only with respect to 400 Fifth and Pavarini. That portion of defendants' motion seeking to dismiss plaintiff's cause of action asserted as against GC is denied.

Argiro, GC's employee, was welding the steel grates on the floor immediately above where plaintiff was working when one of the steel grates fell, injuring plaintiff. Neither plaintiff nor Argiro knows what caused the steel grate to fall. Under common-law negligence, a subcontractor may be held liable for negligence where there is an issue of fact as to whether the work it performed, in this instance, welding the steel grates, created the condition that caused plaintiff's injury. *Brownell v Blue Seal Feeds, Inc.*, 89 AD3d 1425 (4th Dept 2011); *Kelarakos v Massapequa Water District*, 38 AD3d 717 (2d Dept 2007). Therefore, plaintiff's cause of action based on common-law negligence cannot be dismissed as asserted against GC.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the portion of defendants' motion seeking summary judgment dismissing plaintiff's causes of action based on violations of Labor Law §§ 200 and 241 (6) is granted and such

causes of action are dismissed; and it is further

ORDERED that the branch of defendants' motion seeking summary judgment dismissing plaintiff's cause of action based on a violation of Labor Law § 240 (1) is denied; and it is further

ORDERED that the portion of defendants' motion seeking to dismiss plaintiff's cause of action based on common-law negligence is granted with respect to 400 Fifth Realty LLC and Pavarini McGovern, LLC, but is denied as asserted against G.C. Ironworks; and it is further

ORDERED that plaintiff's cross motion is denied; and it is further

ORDERED that within 30 days of entry of this order, defendant 400 Fifth Realty LLC shall serve a copy upon all parties, with notice of entry.

Dated: 7/16/12

FILED

JUL 18 2012

NEW YORK
COUNTY CLERK'S OFFICE

Doris Ling-Cohan, J.S.C.

DORIS LING-COHAN
J.S.C.

J:\Summary Judgment\Matthews.400 fifth ave. helewitz.wpd