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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Shlomo S. Hagler *Justice* **PART:** 25

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FRANK RIVERA,

Plaintiff,

- against-

ELITE EVENT PRODUCTIONS, INC., FROST LIGHTING, and IHMS LLC d/b/a PIERRE HOTEL,

Defendants,

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FROST LIGHTING INC. ,

Third-Party Plaintiff,

- against-

SBK ASSOCIATES, INC.,

Third Party Defendant.

Index No.: 105952/2008

Motion Date: _____

Motion Seq. No.: 001

Motion by Defendant IHMS LLC d/b/a Pierre Hotel for summary judgment, cross-motion by Plaintiff for summary judgment and cross-motion Frost Lighting Inc. for summary judgment or indemnification from Third-Party Defendant SBK Associates, Inc.

	Papers Numbered
Defendant IHMS's Notice of Motion with Affirmation in Support & Exhibits A through O ...	1
Plaintiff's Cross-Motion with Plaintiff's Affidavit, Attorney Affirmation & Affidavit of Roseanne Grandinetti-Delgado and Exhibits 1through 4	2
Defendant Frost's Notice of Cross-Motion with Attorney's Affirmation & Exhibits A to I	3
Plaintiff's Affirmation in Opposition to Frost's Cross-Motion with Exhibit 1	4
Third-Party Defendant SBK's Opposition to Frost's Cross-Motion	5
Defendant Elite's Affirmation in Opposition to Plaintiff's Cross-Motion	6
Defendant IHMS's Reply Affirmation in Support of Motion and in Opposition to Plaintiff's Cross-Motion	7
Defendant Frost's Reply Affirmation with Exhibit A	8
Transcript of Oral Argument of March 26, 2012	9

Cross-Motion: ☑ **Yes** ☐ **No** **Number of Cross-Motions:** 2

Upon the foregoing papers, it is hereby Ordered that this Motion and the Cross-Motions are decided in accordance with the attached Decision and Order.

Shlomo Hagler
J.S.C.

Dated: July 20, 2012
New York, New York

Hon. Shlomo S. Hagler, J.S.C.

Check if appropriate: ☐ Do Not Post ☐ Reference

Check one: ☑ **Final Disposition** ☐ **Non-Final Disposition**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. Part 17

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FRANK RIVERA,

Plaintiff,

- against-

ELITE EVENT PRODUCTIONS, INC., FROST LIGHTING, and IHMS LLC d/b/a PIERRE HOTEL,

Defendants.

----------X

FROST LIGHTING INC. ,

Third-Party Plaintiff,

- against-

SBK ASSOCIATES, INC.,

Third-Party Defendant.

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Index No. 105952/08

DECISION/ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

Defendant IHMS LLC d/b/a PIERRE HOTEL ("IHMS" or "Pierre Hotel") moves for an order, pursuant to CPLR § 3212, granting summary judgment in its favor against plaintiff FRANK RIVERA ("Rivera" or "plaintiff") and dismissing the complaint cross-claims against it. Defendant/Third Party Plaintiff FROST LIGHTING, INC., ("Frost") cross-moves for summary judgment in its favor dismissing the complaint or, in the alternative, for contractual indemnification from Third-Party Defendant SBK ASSOCIATES INC. ("SBK"). Plaintiff opposes IHMS's motion and cross-moves for an order (1) pursuant to CPLR § 3212, granting him summary judgment against all defendants and the Third-Party Defendant on the issues of strict liability with respect to its Labor Law § 240(1) cause of action, and (2) pursuant to CPLR § 3126 striking the answer of defendant ELITE EVENT PRODUCTIONS, INC. ("Elite"). Defendants IHMS, Frost, and Elite oppose Rivera's cross-motion, and SBK opposes Frost's cross-motion for indemnification as premature.

STATEMENT OF FACTS[1]

This is an action for personal injuries sustained on March 4, 2007, when plaintiff was employed by SBK as a floral decorator for a wedding taking place at the Pierre Hotel on Fifth Avenue and 61st Street in Manhattan, New York.[2] Plaintiff and other SBK employees arrived at about 2:00 a.m. that day to begin decorating the hotel ballrooms being used for the wedding with flowers and votive candles. Plaintiff testified that he worked continuously from approximately 2:00 a.m. until approximately 6:00 p.m., with one 15 minute break for breakfast. Plaintiff testified that he was supervised solely by SBK personnel who directed him as to what to do and where to work. While personnel from Frost and the Pierre Hotel may have been in the areas where plaintiff's work was being performed, none of them were involved with SBK's or plaintiff's work activity. Plaintiff's job was to hang flowers and votive candles from the ceilings of the ballrooms for the upcoming wedding and plaintiff had done that throughout the entire time he was working that day. Plaintiff would obtain the flowers from buckets, climb up an A-frame ladder,[3] attach the flowers to

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1. The Statements of Facts are based upon the transcripts of the Deposition of Frank Rivera, on May 12, 2009, attached as Exhibit B to the Motion; the Deposition of Frank Rivera, on January 12, 2010, attached as Exhibit C to the Motion; the Deposition of SBK Associates, Inc. by Stephen Kolins, on February 16, 2011, attached as Exhibit A to the Motion; the Deposition of Arthur Shats of the Pierre Hotel, on May 12, 2010, attached as Exhibit D to the Motion; the Deposition of Roseanne Grandinetti-Delgado, on May 14, 2009, attached as Exhibit E to the Motion; the Deposition of Jose Mario Rivera, on March 1, 2010, attached as Exhibit 3 to Plaintiff's Cross-Motion; the Deposition of Donald Kirkland, on May 5, 2010, attached as Exhibit 1 to Plaintiff's Opposition to the Frost Cross-Motion and as Exhibit B to Elite's Opposition to Plaintiff's Cross-Motion; and upon all the other exhibits submitted by the parties in the initial Motion, the Cross-Motions, the opposition and reply papers.

2. The wedding was coordinated by Norma Cohen, a wedding planner on behalf of the Cayre family. SBK was hired by the Cayres through Norma Cohen.

3. The ladder used by plaintiff at the time of the accident was variously described in the depositions as 16 feet, 17 feet or 20 feet high, while a document submitted as Exhibit 1 to the

the ceiling, climb down the ladder, move the ladder to the next location and repeat the process. When putting up the votive candles, plaintiff would place a number of the votive candles in a crate attached to the side of his ladder, climb up the ladder, light the votive candles and attach them to netting attached to the ceiling, climb down the ladder, reposition the ladder and repeat the process.[4] The ladder plaintiff used was allegedly provided by Frost to SBK.

By approximately 6:00 p.m. on March 4, 2007, plaintiff had been working in one of the ballrooms of the hotel for several hours. In that ballroom a temporary dance floor had been placed over the Pierre Hotel's permanent dance floor and clear 4 mil thick plastic covering had been placed over the temporary dance floor. The plastic was not secured with tape or in any other way. According to plaintiff and plaintiff's father, who was also present at the time of the fall, the plastic covering was loosely placed over the temporary dance floor and was "bunched up." Both of them also stated that the plastic covering was wet due to the splashing of water from the buckets which held the flowers. Plaintiff stated that he informed his SBK supervisors of the loose plastic covering the dance floor and its condition, but the SBK supervisor told him to just go on the ladder and put up the flowers and forget about the plastic. Plaintiff stated that he placed his A-frame ladder onto the plastic covered dance floor and moved it as needed when attaching the flowers or votive candles to the ceiling. Plaintiff also testified that while using the ladder, it did not feel secure and that it

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Plaintiff's Cross-Motion described it as a 17 foot MXZ ladder. Testimony further described it as an adjustable height ladder commonly referred to as a "Giant" or "Little Giant" ladder.

4. While plaintiff testified at his two depositions and in his affidavit in support of his cross-motion that he was attaching flowers to the ceiling at the time of the accident, another SBK worker who witnessed the accident, Roseanne Grandinetti-Delgado, testified that plaintiff was attaching the votive candles to the ceiling netting. However, whether plaintiff was attaching flowers or decorative candles to the ceiling at the time of the accident does not affect the analysis and resulting decision on the Motion and Cross-Motions.

moved a few times. Nevertheless, plaintiff continued using the ladder to attach flowers or votive candles to the ceiling . While on the third step from the top of the ladder, plaintiff was reaching up with one hand to attach some flowers or a votive candle to the ceiling when the ladder tilted and fell over on its side with the plaintiff still on it. The plaintiff fell to the ground with the ladder on top of him.[5] The specific ladder that plaintiff was using at the time of the accident was never positively identified and continued to be used by SBK workers afterwards on the same day and event.

Plaintiff commenced this action on April 28, 2008 by filing a summons and verified complaint against defendants Elite, Frost, and IHMS for common law negligence and for liability under sections 240(1), 241(6), and 200 of the Labor Law and subpart 12 NYCRR 23-1 of the Industrial Code. The parties conducted discovery and took depositions from several parties and non-party witnesses.

DISCUSSION

General Standard for Summary Judgment

A motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." CPLR § 3212(b); Andre v Pomeroy, 35 NY2d 362, 364 (1974). The movant has the initial burden of proving entitlement to summary judgment. Winegrad v N.Y.U. Medical Center, 64 NY2d 851 (1985). Once such proof has been offered, in order to defend the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." CPLR § 3212(b); Zuckerman v City of New York,

5. The ladder also struck another SBK worker who is not involved in this action.

49 NY2d 557 (1980); Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 (1979); Freedman v Chemical Construction Corp., 43 NY2d 260 (1977); Spearmon v Times Square Stores Corp., 96 AD2d 552 (2d Dept 1983). "It is incumbent upon a [litigant] who opposes a motion for summary judgment to assemble, lay bare and reveal [his, her, or its] proof, in order to show that the matters set up in [the complaint] are real and are capable of being established upon a trial." Spearmon, 96 AD2d at 553 (quoting Di Sabato v Soffes, 9 AD2d 297, 301 [1st Dept 1959]). If the opposing party fails to submit evidentiary facts to controvert the facts set forth in the movant's papers, the movant's facts may be deemed admitted and summary judgment granted since no triable issue of fact exists. Kuehne & Nagel, Inc. v F.W. Baiden, 36 NY2d 539 (1975).

In this matter, there are several motions and cross-motions. Thus, on each motion or cross-motion, each movant has the initial burden of proving entitlement to summary judgment. Once such proof has been offered, in order to defend the summary judgment motion, the opposing party must submit evidentiary facts to controvert the facts set forth in the movant's papers or present an issue of fact to preclude the granting of summary judgment.

Use of Attorney Affirmations in Motions for Summary Judgment

An affidavit or affirmation by an attorney who does not have **personal** knowledge of the facts is insufficient **by itself** in support or opposition to the motion for summary judgment as it lacks probative value. Wehringer v Helmsley Spear, Inc., 91 AD2d 585 (1st Dept. 1982) *affd* 59 NY2d 688 (1983). However, an affidavit or affirmation by an attorney without personal knowledge may be used as the vehicle to submit admissible evidence, such as documents or testimony, in support of or opposition to a motion for summary judgment. See, e.g., Zukerman v City of New York, 49

NY2d 557, 563 (1980); Gaeta v New York News, 62 NY2d 340, 350 (1984); 256 East 10th Street Associates v Consolidated Edison Co. of New York, Inc., 282 AD2d 293 (1st Dept 2001).

In opposition to the motion and cross-motions for summary judgment by defendants IHMS and Frost, plaintiff argues that the affirmations submitted by the attorneys for IHMS and Frost fail to meet the meet the aforementioned requirements. Plaintiff makes a conclusory claim that the affirmation of Frost's attorney "failed to submit any evidence in admissible form" yet Frost's affirmation referred to, relied on, and included exhibits containing the pleadings, the answer, the Bill of Particulars, and transcripts of the deposition testimony of plaintiff, SBK principal Stephen Kolins, and non-party witness Roseanne Grandinetti-Delgado. Similarly, the affirmation of defendant IHMS's attorney in support of its motion for summary judgment includes, refers to, and relies upon numerous deposition transcripts and relevant documents. Thus, the attorney affirmations from IHMS and Frost are sufficient to introduce the supporting probative evidence they present.

Plaintiff's Claims under Labor Law § 240(1)

Plaintiff has asserted a cause of action under Labor Law § 240(1) which provides that:

> 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.

Both IHMS and Frost move for summary judgment claiming that plaintiff's job of decorating the Pierre Hotel ballrooms with flowers and other decorations was not an activity covered by Labor Law § 240(1). In opposition to the motions by IHMS and Frost and in his cross-motion, plaintiff

seeks summary judgment on his Labor Law § 240(1) cause of action and argues that his activities involved "altering" and was therefore covered by the statute. Elite opposes granting of summary judgment on plaintiff's Labor Law § 240(1) cause of action and seeks to have that cause of action dismissed.

In 1991, an appellate court ruled in Brice v Lafayette Country Club, Inc., 177 AD2d 957 (4th Dept 1991) that a florist injured in a fall from a stepladder while hanging streamers from a ceiling in country club for a private party was not covered by Labor Law § 240(1) since he was not engaged in an activity within the purview of the statute. The Appellate Division stated that "[w]e cannot agree with plaintiff's argument that hanging streamers for a party is the alteration of a building or structure sufficient to invoke the protection of the Labor Law." Id. at 958.

Plaintiff argues that, notwithstanding the Brice decision, this Court should adopt a more expansive interpretation of Labor Law § 240(1). While over the years courts, including the Court of Appeals, have interpreted the statute's definitions to varying degrees, the most current interpretation of the law is that for an alteration to a building or structure to be covered by Labor Law § 240(1), the alteration must physically change the actual structure and cannot be merely decorative or cosmetic. Thus, in Munoz v DJZ Realty, LLC, 5 NY3d 747 (2005), the Court of Appeals held that a worker who fell from a ladder while installing a new advertising poster on a billboard that sat atop a building did not constitute "altering" for purposes of Labor Law § 240(1) because his activity was more akin to cosmetic or decorative modification. The Court of Appeals stated that while the plaintiff's activity might have changed the outward appearance of the billboard, it did not alter or change its structure. See also, Jablon v Solow, 91 NY2d 457, 465 (1998); Anderson v Schwartz,

24 AD3d 234 (1st Dept 2005); Maes v 408 W. 39 LLC, 24 AD3d 298 (1st Dept 2005); Hatfield v Bridgedale, LLC, 28 AD23 608 (2d Dept 2006).

In the case at bar, while plaintiff's activities may have changed the appearance of the Pierre ballrooms temporarily, he did not change or alter the structure itself and, therefore was not engaged in "altering" as required by Labor Law § 240(1). See also, Allen v City of New York, 89 AD3d 406 (1st Dept 2011) (court held that a worker installing scenery panels as a backdrop to a carnival ride was not engaged in an activity covered by Labor Law § 240[1]) and Perchinsky v State, 232 AD2d 34, 38 (3d Dept 1997) (court held that a worker hanging kites "as part of decorating the interior of a structure in conjunction with an entertainment/commercial enterprise . . . does not fall within the protective shield of Labor Law § 240[1] or § 241[6]").

The three cases cited by plaintiff in support of his argument that his work was covered by Labor Law § 240(1) are clearly distinguishable and inapplicable. In Jablon v Solow, 91 NY2d 457 (1998), the Court of Appeals found that chopping a hole through a concrete block wall with a hammer and chisel so as to route conduit pipe and wiring through the wall and install an electric clock on the other side of the wall constituted "altering" under Labor Law § 240(1). In that case, the act of chiseling a hole through a concrete wall, routing conduit pipe and wiring through the wall and mounting an electric clock on the wall caused a permanent, physical change to the actual building or structure. In Dedario v New York Tel. Co., 162 AD2d 1001 (4th Dept 1990), in a very broad interpretation of Labor Law § 240(1), the Appellate Division found that a worker who was removing a frequency trap attached to a utility pole was covered by the "altering" provision of the statute because the work also involved a non-temporary, physical change to the utility pole itself. Similarly, in Ferrari v Naisher Realty, Inc., 175 AD2d 591 (4th Dept 1991), the majority in a split three to two decision found that the removal of storm windows from a building was sufficient to be considered

"altering" under the statute, while the dissenting two justices[6] disagreed and believed that such an interpretation extended the reach of the statute too far.

Since plaintiff was only engaged in attaching flowers and/or votive candles to the Pierre Hotel ballrooms for a single event, an activity which was purely decorative and temporary and which only changed the cosmetic appearance of the ballrooms but did not actually alter or change the physical structure of the building, this Court holds that Labor Law § 240(1) does not apply.

Plaintiff's Claims under Labor Law § 241(6)

Plaintiff has asserted a cause of action under Labor Law § 241(6) which provides that:

> § 241. 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:
>
> 6. 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.

Defendants IHMS and Frost have moved for summary judgment dismissing the Labor Law § 241(6) cause of action. These defendants argue that plaintiff only alleged a violation of a general Industrial Code provision and failed to allege a violation of concrete, specific regulatory provision of the Industrial Code. They further argue that plaintiff's work decorating the Pierre Hotel ballrooms

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6. Interestingly, the two dissenting justices in the Ferrari case were also on the unanimous panel which decided Dedario.

with flowers and/or votive candles was not an activity covered by Labor Law § 241(6). 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. Ross v Curtis-Palmer Hydro-Electric Company, 81 NY2d 494 (1993); Samuel v A.T.P. Development Corp., 276 AD2d 685 (2d Dept 2000). 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, 81 NY2d at 502-503.

In the case at bar, plaintiff alleges a violation of section 12 NYCRR 23-1 of the Industrial Code in his pleadings and Bill of Particulars. Plaintiff does not refer to any concrete, specific regulatory provision or subsection of the Industrial Code. In fact, section 12 NYCRR 23-1 is entitled "General Provisions" and, as such, is insufficient to provide a basis for a Labor Law § 241(6) cause of action. Dilena v Irving Reisman Irrevocable Trust, 263 AD2d 375 (1st Dept 1999); Charles v City of New York, 227 AD2d 429, 430 (2d Dept 1996) lv. denied 88 NY2d 815 (1996);

Even if plaintiff were to have cited to a concrete, specific provision of subsection of the Industrial Code, his work in decorating the Pierre Hotel ballrooms and the event he was working on did not involve "construction, excavation, or demolition" as required under this provision. Esposito v New York Industrial Development Agency, 1 NY3d 526 (2003); Nagel v D & R Realty Corp., 99 NY2d 98 (2002); Parente v 277 Park Ave. LLC, 63 AD3d 613 (1st Dept 2009). Furthermore, as discussed above, since the plaintiff was only involved in performing cosmetic or decorative work and not engaged in the process of "altering" the building or structure, plaintiff's Labor Law § 241(6) cause of action also fails. Anderson v Schwartz, 24 AD3d at 234; Perchinsky v State, 232 AD2d at 38.

Plaintiff's Claims under Labor Law § 200

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).

When the accident arises from a dangerous condition, to sustain a cause of action for violation of Labor Law § 200, the injured worker must demonstrate that the defendant had actual or constructive knowledge of the unsafe condition that caused the accident and, under such theory, the defendant's supervision and control over the work being performed is irrelevant. See Murphy v Columbia Univ., 4 AD3d 200 (1st Dept 2004). Conversely, if the accident arises from the means and methods employed to perform the work, the injured worker must 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). General supervision over the job site is insufficient to render an owner or general contractor liable under Labor Law § 200. Cahill v Triborough Bridge & Tunnel Authority, 31 AD3d 347 (1st Dept 2006).

In the case at bar, there was no proof presented that the Pierre Hotel, Frost, and Elite exercised any supervision over the work in which plaintiff was engaged. On the contrary, plaintiff testified that the only direction or supervision of his work was by his own SBK supervisors. In addition, Roseanne Grandinetti-Delgado, another SBK employee who was working the same event and witnessed plaintiff's fall, testified that other than the SBK supervisors there were no other

persons directing what SBK and its employees were doing at the hotel setting up for the wedding. (Deposition transcript of Roseanne Grandinetti-Delgado, on May 14, 2009, attached as Exhibit E to the Motion, at pages 23-24 and pages 126-127).

Furthermore, IHMS has argued that the Pierre Hotel did not have actual or constructive notice of the allegedly dangerous condition of the floor prior to the accident. Plaintiff has failed to present any evidence to indicate that the Pierre Hotel or any of its staff caused or were aware of the condition of the floor prior to the accident. As far as Frost is concerned, as a separate company working on a different element of the event, namely the lighting, it had no responsibility or duty to plaintiff regarding the condition of the floor and plaintiff did not identify what defect there was in the ladder of which Frost should have been aware.

Since defendants IHMS and Frost did not supervise the work being done by the plaintiff or the other wedding preparations and plaintiff has failed to present any evidence that the Pierre Hotel, as the owner of the building, had actual or constructive knowledge of the alleged dangerous condition of the floor surface where the plaintiff fell, defendants IHMS' and Frost's motions for summary judgment on the Labor Law § 200 and common-law negligence causes of action are granted in their favor.

Plaintiff's Action Against Frost Regarding the Ladder Involved

Plaintiff's action against Frost is based on the premise that the ladder from which the plaintiff fell was owned or provided by Frost. Frost moves to dismiss the causes of action against it on the grounds that no one has been able to identify which specific ladder was the one involved in the

accident and that even if the ladder involved was a Frost ladder, plaintiff has not shown that the ladder was defective or that Frost had prior actual of constructive notice of any defect in the ladder.[7]

As is clear from all the deposition testimony, the specific ladder which fell while the plaintiff was on it was never clearly identified. However, there is testimony stating that the ladder which fell was marked as belonging to Frost and provided to SBK. Nevertheless, plaintiff has failed to provide any evidence that the Frost ladder on which he fell was defective in any way. Indeed, in his deposition testimony, and in his affidavit in support of his cross-motion and in opposition to IHMS's motion, plaintiff described the accident as having happened when the ladder fell because it was on a wet and slippery plastic which was bunched up, wrinkled, and not properly secured by tape to the temporary dance floor. Since there is no evidence to show that a ladder owned or provided by Frost was defective or that Frost had any notice of a defect in the ladder, that branch of Frost's motion to dismiss the complaint against it is granted.

Plaintiff's Labor Law § 240(1) Cause of Action Against Defendant Elite

In his cross-motion, plaintiff also seeks summary judgment for liability on its Labor Law § 240(1) cause of action against defendant Elite. In its opposition, counsel for Elite alleges that Elite is no longer in business and requests that this Court deny plaintiff's summary judgment motion and dismiss the Labor Law § 240(1) cause of action against it.

Since, as discussed above, this Court has already found that plaintiff can not sustain his Labor Law § 240(1) cause of action because plaintiff was not engaged in the type of work covered by the statute, upon searching the record, the Court also dismisses plaintiff's Labor Law § 240(1) cause of

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7. In the alternative, Frost has also cross-moved for contractual indemnification from SBK if Frost is held liable to plaintiff. Since the Court has dismissed plaintiff's causes of action against Frost, the issue of indemnification is moot.

action against Elite. See CPLR § 3212(b), practice commentary 3212:23; Dunham v Hilco Constr. Co., 89 NY2d 425 (1996). However, since plaintiff has not moved for summary judgment against Elite on any of the other causes of action and Elite has not moved for summary judgment to dismiss the remaining causes of action, those causes of action still stand as regards defendant Elite.

Plaintiff's Request to Strike Defendant Elite's Answer

In his Cross-motion, plaintiff also moves, pursuant to CPLR § 3126, to strike Elite's answer "for willful and contumacious disregard of Court Orders to appear at a deposition." Counsel for Elite opposes this branch of plaintiff's motion on the grounds that it advised plaintiff's counsel that a principal of Elite could not be located to appear for depositions and also presented plaintiff with information and documentation showing that Elite did not supply the temporary floor provided for the March 4, 2007 wedding event at the Pierre Hotel which is the subject of this litigation, but that another company known as Shabang Entertainment provided the temporary floor.

The branch of plaintiff's cross-motion to strike Elite's answer is set down for a further conference and/or hearing to determine whether Elite willfully and contumaciously disregarded court orders to appear at a deposition. Counsel for plaintiff and defendant Elite are directed to contact the Part 17 clerk to schedule such a further conference and/or hearing regarding this issue.

CONCLUSION

For the reasons stated herein, it is

ORDERED that defendant IHMS's motion for summary judgment in its favor dismissing all of plaintiff's causes of action against it is hereby granted in its entirety; and it is further

ORDERED that defendant Frost's cross-motion for summary judgment in its favor dismissing all of plaintiff's causes of action against it is hereby granted in its entirety; and it is further

ORDERED that the branch of plaintiff's cross-motion for summary judgment in its favor on its Labor Law § 240(1) cause of action is hereby denied and that cause of action against defendant Elite is hereby dismissed; and it is further

ORDERED that the branch of plaintiff's cross-motion to strike defendant Elite's answer is held in abeyance pending a further conference and/or hearing before this Court at a date and time to be scheduled.

The foregoing constitutes the decision and order of this Court. Courtesy copies of this decision and order have been mailed to counsel for the parties.

Dated: New York, New York
July 20, 2012

Hon. Shlomo S. Hagler, J.S.C.