[* 1]

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

PRESENT: Hon. Shlomo S. Hagler Justice — PART: 17

CECIL McKENZIE,

Plaintiff,

- against -

CAPPELLI ENTERPRISES, INC., LC MAIN, LLC and GEORGE A. FULLER COMPANY, INC.

Defendants.

INDEX NO.: 100153/2009
MOTION DATE: _____
MOTION SEQ. NO.: 002
MOTION CAL. NO.: _____

Motion by defendants for summary judgment dismissing plaintiff's Supplemental Summons and Amended Complaint. Cross-motion by plaintiff for partial summary judgment on liability.

	Papers Numbered
Defendants' Notice of Motion and Affirmation of Counsel in Support with Exhibits A through L	1, 2, 3
Defendants' Memorandum of Law in Support of Defendants' Motion for Summary Judgment	4
Affidavit of Plaintiff's Counsel in Opposition to Defendants' Motion with Exhibits A through D	5, 6
Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment	7
Defendants' Counsel's Affirmation in Reply to Plaintiff's Opposition to Defendants' Motion	8
Plaintiff's Notice of Cross-Motion for Partial Summary Judgment and Affidavits of Counsel in Support with Exhibits A through L	9, 10, 11
Plaintiff's Memorandum of Law in Support of Cross-Motion for Partial Summary Judgment	12
Affirmation of Defendants' Counsel in Opposition to Plaintiffs' Cross-Motion	13
Plaintiff's Counsel's Reply Affirmation	14
Plaintiff's Reply Memorandum of Law in Support of Cross-Motion for Partial Summary Judgment	15
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Cross-Motion: ☐ No ☑ Yes **Number of Cross-Motions:** 1

Upon the foregoing papers, it is hereby ordered that the defendant's Motion for Summary Judgment dismissing plaintiff's Supplemental Summons and Amended Complaint and plaintiff's Cross-Motion for partial summary judgment on liability is decided as set forth in the attached written Decision and Order.

FILED

DEC 06 2012

COUNTY CLERK'S OFFICE NEW YORK

Dated: November 30, 2012
New York, New York

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

Check one: ☐ Final Disposition ☑ Non-Final Disposition

Motion & Cross-Motion are: ☐ Granted ☐ Denied ☑ Granted in Part ☐ Other

Check if Appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

----------X

CECIL McKENZIE,

Plaintiff,

-against-

CAPPELLI ENTERPRISES, INC., LC MAIN, LLC, and GEORGE A. FULLER COMPANY, INC.,

Defendants.

----------X

Index No. 100153/09

Motion Sequence: 002

DECISION & ORDER

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

In this action, plaintiff Cecil McKenzie ("McKenzie" or "plaintiff"), a roofer, seeks to recover monetary damages for personal injuries he suffered on August 1, 2007, when, while standing on a ladder, he was burned by hot asphalt which splashed on him after he set it down on the roof of a building under construction.

Defendants Cappelli Enterprises, Inc. ("Cappelli"), LC Main, LLC ("LC Main"), and George A. Fuller Company, Inc. ("GAFCO") move for summary judgment, pursuant to CPLR § 3212, dismissing the amended complaint. Plaintiff cross-moves, pursuant to CPLR § 3212, for partial summary judgment on the issue of liability under Labor Law §§ 240(1) and 241(6).

BACKGROUND

LC Main is the owner of the premises located at 221 Main Street, White Plains, New York ("subject premises"). LC Main hired GAFCO as the general contractor and project manager for the construction of two high-rise towers on the Renaissance Square project at the subject premises. Cappelli was the developer of the project and parent company of GAFCO. GAFCO retained KJC Waterproofing, Inc. ("KJC") to perform the roofing and waterproofing work on the project. Plaintiff was an employee of KJC.

Plaintiff testified at his deposition ("Plaintiff's EBT") that, on the date of his accident, he was bringing supplies to the workers who were doing waterproofing on the roof (Plaintiff's EBT, Exhibit "C" to the Motion, at 19). Plaintiff was wearing gloves that did not extend over his wrists (*id.* at 24). Plaintiff was unsure whether the gloves were his own or whether they were supplied by his employer (*id.* at 23). Plaintiff was transporting hot asphalt from the kettle, which was located on the roof, to a smaller roof above (*id.* at 28, 30). Plaintiff was using a 15-foot extension ladder (*id.* at 30). Plaintiff testified that the bucket that he was carrying was filled higher than it was normally supposed to be filled (*id.* at 37). Plaintiff stated that he did not complain to the kettle operator because it was not a "big thing" to him (*id.* at 39). According to plaintiff, he carried the bucket up the ladder, stayed on the ladder and set the bucket down "normally" on the ledge of the roof, and the asphalt splashed on his wrist (*id.* at 43, 46, 47). Plaintiff then took his gloves off and descended the ladder to find help (*id.* at 48). Plaintiff stated that the temperature of the asphalt was 500 degrees Fahrenheit, and that the temperature should not have been over 350 degrees Fahrenheit (*id.* at 45). Plaintiff was required to have a skin graft as a result of his accident (*id.* at 64).

Bob Pitiger ("Pitiger"), a project manager for KJC, avers that it used Hydrotech's Monolithic Membrane 6125/6125-EV (MM6125/MM6125-EV) to perform roofing work on the project (Pitiger Aff., ¶ 4). Pitiger states that MM6125/MM6125-EV is not a corrosive product (*id.*, ¶ 5). According to Pitiger, the Material Safety Data Sheet for this product indicates that the two major ingredients in MM6125/MM6125-EV are asphalt and polymer rubber (*id.*). Pitiger further states that, in his experience with these ingredients and with these products in particular, he has never known them to cause any chemical interactions or have any corrosive effect when handled by workers (*id.*, ¶ 6).

In an affidavit, Albert Mueller, P.E. ("Mueller"), a professional chemical engineer, states that the accepted definition of a "corrosive" substance is a "chemical that causes visible destruction of, or irreversible alterations in, living tissue or inorganic materials by chemical action at the site of contact" (Mueller Aff., ¶ 4). Mueller indicates that he reviewed the Material Safety Data Sheet and Technical Data from American Hydrotech, Inc. for its waterproofing product, MM6125/MM6125-EV (*id.*, ¶ 5). The Material Safety Data Sheet states that the products contained within this material are composed of two primary ingredients, asphalt and synthetic rubber filler, and a third minor ingredient, inert clay (*id.*, ¶ 6). Mueller explains that asphalt is composed of a class of complex hydrocarbons derived primarily from crude petroleum during fractional distillation or other natural sources, and that synthetic rubber is also made from organic compounds derived from petroleum (*id.*, ¶ 7). Mueller concludes that neither of those substances is corrosive (*id.*, ¶ 7). In addition, Mueller states that, as an inert ingredient, clay is also not corrosive (*id.*).

DISCUSSION

It is well settled that 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'" (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the proponent has made a prima facie showing, the burden shifts to the opposing party to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Casper v Cushman & Wakefield*, 74 AD3d 669 [1st Dept 2010], *lv dismissed* 16 NY3d 766 [2011] [internal quotation marks and citation omitted]). If there is any doubt as to the existence of

a triable issue of fact, summary judgment must be denied *(Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Labor Law § 200/Common-Law Negligence

Initially, this Court notes that plaintiff withdrew his Labor Law § 200 and common-law negligence claims at oral argument on the motions (Oral Argument Tr., at 2). Accordingly, this Court need not address the part of defendants' motion seeking dismissal of these claims.

Cappelli

Defendants argue that Cappelli cannot be liable under the Labor Law because it was neither the owner nor the general contractor, and because GAFCO hired all subcontractors on the site, including KJC. Plaintiff argues that there is an issue of fact as to whether Cappelli may be liable because it is the owner of GAFCO, and because Cappelli was the developer of the project.

Cappelli is clearly neither an owner nor general contractor, and thus may be liable solely as an agent under the Labor Law.

> "An agency relationship for purposes of section[s] 240 (1) [and 241 (6)] arises only when work is delegated to a third party who obtains the authority to supervise and control the job. Where responsibility for the activity surrounding an injury was not delegated to the third party, there is no agency liability under the statute[s]"

(*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 293 [2003]). It is undisputed that GAFCO, not Cappelli, retained all subcontractors on the site, including KJC, and that all subcontracts for the work on the site were between GAFCO and the subcontractors (Dannenbaum EBT, at 26-27, 33; Hellberg Affirm., Exhibit K). Moreover, there is no evidence that Cappelli was delegated the authority to supervise and control the work.

In addition, plaintiff has failed to demonstrate a basis to pierce Cappelli's corporate veil. Steven Feinstein, a senior project manager employed by GAFCO, testified that Cappelli owns GAFCO (Feinstein EBT, at 8, 10). Generally, a party seeking to pierce the corporate veil must show: (1) complete domination and control of the subsidiary by the parent with respect to the transaction at issue, and (2) that such domination was used to commit a fraud or wrong against the plaintiff that resulted in the plaintiff's injury (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]; *Do Gooder Prods., Inc. v American Jewish Theatre, Inc.*, 66 AD3d 527, 528 [1st Dept 2009]). "Factors to be considered in determining whether the [parent company] has 'abused [that] privilege . . .' include whether there was a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use" (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 127 [2d Dept 2009], *affd* 16 NY3d 775 [2011] [internal quotation marks and citations omitted]). Notably, "[e]vidence of domination alone does not suffice without an additional showing that it led to inequity, fraud, or malfeasance" (*TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]). Here, plaintiff has failed to submit any evidence that Cappelli, the parent company, exercised any domination or control over GAFCO, its subsidiary. Accordingly, Cappelli is entitled to summary judgment dismissing the complaint as against it.

Labor Law § 240(1)

Labor Law § 240(1) provides, in relevant part, that contractors and owners:

> [I]n 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.

Labor Law § 240(1) imposes absolute liability on owners, contractors, and their agents for any breach of the statutory duty which proximately causes an injury (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]; *Haimes v New York Tel. Co.*, 46 NY2d 132, 136-137 [1978]). The duty imposed is "nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). The statute applies to extraordinary elevation risks, and not the "usual and ordinary dangers of a construction site" (*Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 843 [1994]; *see also Toefer v Long Is. R.R. Co.*, 4 NY3d 399, 408 [2005]). To impose liability under Labor Law § 240(1), the plaintiff must prove: (1) a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices), and (2) that the violation of the statute was a proximate cause of the injuries sustained (*Blake*, 1 NY3d at 289-290).

Defendants argue that plaintiff's injury was not the result of the application of gravity: plaintiff did not fall, and an object did not fall or strike him. Rather, plaintiff's forearm was burned when he set down a bucket of hot roofing material, and the material splashed out of the bucket and onto his arm. Defendants further contend that the safety devices enumerated in the statute would not have prevented the hot roofing material from splashing out of the bucket. Plaintiff contends that he was injured because he was required to climb a ladder to a section of the roof that was approximately 15 feet higher than the main area of the roof. According to plaintiff, the 500-degree liquid rubberized asphalt was an object that should have been secured, in that it was inherently dangerous

if spilled, regardless of what height it fell from, and should not have been moved by hand in an uncovered, unsecured bucket.

" '[F]alling object' liability under Labor Law § 240(1) is not limited to cases in which the falling object is in the process of being hoisted or secured" (*Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758-759 [2008], quoting *Outar v City of New York*, 5 NY3d 731, 732 [2005]). Rather, liability may be imposed where an object or material fell, causing injury, was a "load that required securing for the purposes of the undertaking at the time it fell" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]). Moreover, whether an object requires securing "turns on the foreseeable risks of harm presented by the nature of the work being performed" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 268 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]). In addition, the plaintiff must show that the object fell "*because of* the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci*, 96 NY2d at 268).

In *Runner v New York Stock Exch., Inc.* (13 NY3d 599 [2009]), the plaintiff was injured when he served as a counterweight of a makeshift pulley to move an 800-pound reel of wire down a small set of stairs and was dragged into the pulley mechanism after the reel rapidly descended the stairs. The Court of Appeals explained that the dispositive inquiry does not depend upon whether the injury resulted from a "falling worker" or "falling object" (*id.* at 604). According to the Court, "the governing rule is . . . that 'Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*'" (*id.*, quoting *Ross*, 81 NY2d at 501). In other words, "the relevant inquiry" is whether "the harm flows directly from the application of the force of gravity to the object" (*id.*). The Court

found that the plaintiff sustained an elevation-related injury, since the harm to the plaintiff was the direct consequence of the application of the force of gravity to the reel (*id.*). The Court also noted that "[t]he elevation differential involved cannot be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent" (*id.* at 605).

Subsequently, in *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* (18 NY3d 1, 9 [2011]), the Court of Appeals held that a Labor Law § 240(1) claim is not necessarily precluded by the fact that the falling object and the plaintiff were on the same level. In that case, the plaintiff was struck by pipes whose base stood at the same level as the plaintiff. Applying *Runner*, the Court held that plaintiff suffered harm that flowed directly from the application of the force of gravity to the pipes, given that the pipes stood at approximately 10 feet and toppled over at least four feet before striking the plaintiff, and that the height differential was not de minimis considering the amount of force the pipes were able to generate over their descent (*id.* at 10). However, the Court ruled that there were issues of fact as to whether plaintiff's injury was the direct consequence of defendants' failure to provide adequate protection against that risk (*id.*).

In *Suwareh v State of New York* (24 AD3d 380 [1st Dept 2005]), a case relied upon by plaintiff, the claimant was injured while hauling an open bucket of hot tar up to a roof with a rope. On the way up, the bucket became stuck on a ledge. While attempting to free the bucket, the claimant lost his balance, causing him to lean back to prevent himself from falling off the roof. The claimant burned his feet when he lost control of the bucket. The First Department held that plaintiff's accident was gravity-related, explaining that:

> Here, claimant was both working at an elevated height and was involved in hoisting dangerous materials from one level to another. In attempting to free the bucket from the building ledge, claimant lost his balance and almost fell from the roof. In addition, while attempting to free the bucket, it tipped over and spilled hot tar on his foot. In both instances, the risk of injury was the direct result of the application of gravity to either claimant himself or the materials being hoisted. Had claimant been supplied with a proper hoist to lift the tar, and a proper brace to prevent him from losing his balance on the elevated roof, the accident may not have occurred.
>
> That claimant did not fall completely off the roof, or that the tar did not fall from a position high above claimant's head, but rather spilled when it was being dislodged while being hoisted, does not negate the fact that claimant's injuries were the direct result of a gravity-related risk."

(*id.* at 381).

Defendants rely on *Moore v Elmwood-Franklin School* (249 AD2d 923 [4th Dept 1998], *lv denied* 92 NY2d 1001 [1998]). In *Moore*, the plaintiff was straddling the peak of a roof when his foot slipped and he slid several feet down the roof, sustaining severe burns when the hot tar that he had poured spilled on him. Although the trial court granted the worker's motion for summary judgment on liability, the appellate court reversed and held that plaintiff's slide several feet down the roof was not the type of hazard contemplated by Labor Law § 240(1) (*id.*). Furthermore, in *Striegel v Hillcrest Heights Development Corp.* 266 AD2d 809, 810 (4th Dept 1999), where the court sustained the granting of plaintiff's motion for partial summary judgment under § 240(1) when the plaintiff was injured when he slid 25 to 30 feet down a roof and was saved from falling off the roof when nails on the roof snagged his pants, the appellate court clarified that *Moore* was distinguishable because the plaintiff's injury there was caused by the contact with the hot tar and not the fall or the elevation hazard.

In this case, plaintiff's accident was not the result of the extraordinary elevation risks contemplated by the statute, but rather was caused by the "usual and ordinary dangers of a construction site" (*Rodriguez*, 84 NY2d at 843). Plaintiff testified that after he set the bucket down on the roof, the hot asphalt splashed on his wrist (Plaintiff EBT, at 46, 47). After the asphalt splashed on his wrist, plaintiff descended the ladder and went to get help (*id.* at 48). Thus, plaintiff's injuries did not directly flow from the application of the force of gravity to an object (*see Runner*, 13 NY3d at 604). Unlike the claimant in *Suwareh*, plaintiff did not sustain his injuries in an effort to avoid falling off the ladder, and plaintiff's bucket did not tip over while being hoisted or secured. Moreover, it cannot be said that the hot asphalt spilled on plaintiff "*because of* the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci*, 96 NY2d at 268). Accordingly, plaintiff's Labor Law § 240(1) claim is dismissed.

Labor Law § 241(6)

Labor Law § 241(6) provides, in pertinent part, as follows:

> All contractors and owners and their agents . . . 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 . . . shall comply therewith.

Labor Law § 241(6) places a nondelegable duty on owners, general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code (*Ross*, 81 NY2d at 501-502). To prevail under Labor Law § 241(6), the plaintiff must demonstrate a violation of a rule or regulation of the Industrial Code which gives a "specific, positive command," and which was a proximate cause of the accident (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349 [1998] [internal quotation marks and citations omitted]; *Ross*, 81 NY2d at 503-505).

Plaintiff's verified bill of particulars alleges that defendants violated the following Industrial Code provisions: 12 NYCRR 23-1.5(a); 12 NYCRR 23-1.5(b); 12 NYCRR 23-1.5(c)(1); 12 NYCRR 23-1.5(c)(2); 12 NYCRR 23-1.5(c)(3); 12 NYCRR 23-1.7(h); 12 NYCRR 23-1.8(c)(4); 12 NYCRR 23-1.24(d)(1); and 12 NYCRR 23-1.24(d)(2) (Verified Bill of Particulars, ¶ 15). Defendants move for summary judgment dismissing plaintiff's Labor Law § 241(6) claim, arguing that the cited Industrial Code regulations are either inapplicable or were not violated. With respect to sections 23-1.7(h) and 23-1.8(c)(4), defendants maintain that the hot asphalt was not a "corrosive substance," relying on the affidavits from Pitiger and Mueller, which claim that a "corrosive substance" is a "chemical that causes visible destruction of, or irreversible alterations in, living tissue or inorganic materials by chemical action at the site of contact" (Mueller Aff., ¶ 4). Plaintiff moves for summary judgment in his favor based on violations of 12 NYCRR 23-1.7(h) and 12 NYCRR 23-1.8(c)(4). Plaintiff also opposes dismissal of his claim based on violations of sections 23-1.5(a) and 23-1.24(d).

12 NYCRR 23-1.7 and 12 NYCRR 23-1.8

12 NYCRR 23-1.7, entitled "Protection from general hazards," states in subsection (h) that "Corrosive substances. All corrosive substances and chemicals shall be so stored and used as not

to endanger any person. Protective equipment for the use of such corrosive substances and chemicals shall be provided by the employer" (12 NYCRR 23-1.7[h]). 12 NYCRR 23-1.8(c)(4) provides that "Protection from corrosive substances. Every employee required to use or handle corrosive substances or chemicals shall be provided with and shall be required to wear appropriate protective apparel as well as approved eye protection" (12 NYCRR 23-1.8[c][4]).

The Industrial Code does not define the term "corrosive" (12 NYCRR 23-1.4). "The interpretation of [an Industrial Code provision] presents a question of law, but the meaning of specialized terms in such a regulation is a question on which a court must sometimes hear evidence before making its determination" (*Morris v Pavarini Constr.*, 9 NY3d 47, 51 [2007]; *see also Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002]).

In *Creamer v Amsterdam High School* (241 AD2d 589, 590 [3d Dept 1997]) ("*Creamer I*"), the plaintiff, a roofer, was burned when he fell into a bucket of heated asphalt while installing temporary roofing on an asbestos abatement project. The plaintiff commenced an action against the general contractor and owner for negligence and violations of Labor Law §§ 200, 240, and 241 (*id.*). The plaintiff's employer, a subcontractor, moved for summary judgment dismissing the complaint (*id.*). In opposition, plaintiff submitted an expert's affidavit asserting that the heated asphalt being used was a "corrosive substance" as defined in 12 NYCRR 23-1.89(c)(4) which required appropriate protective equipment.

The trial court did not grant either party summary judgment, despite plaintiff's expert's affidavit but instead submitted the issue of whether the heated asphalt was a "corrosive substance" as defined in 12 NYCRR 23-1.89(c)(4) and which required appropriate protective equipment to the jury as the trier of fact.

On subsequent appeal after a jury verdict in plaintiff's favor (*Creamer v Amsterdam High School*, 277 AD2d 647, 650 [3d Dept 2000]) ("*Creamer II*"), the Appellate Division affirmed the trial court's decision to submit the issue of whether the heated asphalt was a "corrosive substance" pursuant to 12 NYCRR 23-1.8 (c)(4) to the jury and for the expert to testify at the trial.

Defendants in the instant case have submitted an affidavit from a professional chemical engineer, Albert Mueller, who states, within a high degree of engineering certainty, that the waterproofing product which caused plaintiff's burn was not a corrosive substance (Mueller Aff., ¶ 4). Mueller bases his conclusion on the Material Safety Data Sheet and Technical Data for the product, which indicate that none of the product's ingredients is corrosive, and the OSHA definition of a "corrosive substance" in 29 CFR 1910.1200, Appendix A (*id.*, ¶¶ 6, 9).

Plaintiff alleges an issue of fact as to whether there were violations of 12 NYCRR 23-1.7(h) and 12 NYCRR 23-1.8(c)(4). Plaintiff maintains, contrary to Mueller's opinion, that the hot asphalt caused "visible destruction and irreversible alterations" to the living tissue of his arm.

In light of *Creamer I* and *II*, the Court finds that the issue of whether the hot asphalt constitutes a "corrosive substance" is one best left for the jury. The Court further notes that the Pattern Jury Instructions, interpreting *Creamer I*, state that section 23-1.8(c)(4) is sufficiently specific and applies to a plaintiff injured while handling heated asphalt (NY PJI 2:216A). Accordingly, the court denies both plaintiff's and defendants' motions seeking summary judgment with respect to Labor Law § 241(6) as to the alleged violations of 12 NYCRR 23-1.7(h) and 12 NYCRR 23-1.8(c)(4).

12 NYCRR 23-1.5 and 12 NYCRR 23-1.24

Contrary to plaintiff's contention, section 23-1.5 is insufficiently specific to serve as a predicate for liability under Labor Law § 241 (6) (*see Cordeiro v TS Midtown Holdings, LLC*, 87 AD3d 904, 906 [1st Dept 2011]; *Carty v Port Auth. of N.Y. & N.J.*, 32 AD3d 732, 733 [1st Dept 2006], *lv denied* 8 NY3d 814 [2007]; *Maldonado v Townsend Ave. Enters., Ltd. Partnership*, 294 AD2d 207, 208 [1st Dept 2002]).

12 NYCRR 23-1.24(d) regulates "Hot roofing material transporters, also known as hot luggers." "Although carrying hot tar in an open bucket may be an inherently dangerous activity, it is not prohibited by 12 NYCRR 23-1.24(d)" (*Stasierowski v Conbow Corp.*, 258 AD2d 914, 915 [4th Dept 1999]; *see also Castillo v Starrett City*, 4 AD3d 320, 322 [2d Dept 2004]).

Therefore, defendants are entitled to dismissal of plaintiff's section 241(6) claim to the extent it is predicated on these two Industrial Code sections.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 002) of defendants Cappelli Enterprises, Inc., LC Main, LLC, and George A. Fuller Company, Inc. for summary judgment is granted only to the extent of:

(1) severing and dismissing the complaint as against defendant Cappelli Enterprises, Inc. only, and the Clerk of the Court is directed to enter judgment accordingly;

(2) dismissing plaintiff's Labor Law § 240 (1) claim and plaintiff's Labor Law § 241 (6) claim based on violations of 12 NYCRR 23-1.5 and 12 NYCRR 23-1.24, and is otherwise denied; and it is further

ORDERED that plaintiff's claims based on violations of 12 NYCRR 23-1.7(h) and 12 NYCRR 23-1.8(c)(4) remain, and it is further

ORDERED that the cross-motion of plaintiff for partial summary judgment is denied.

The foregoing constitutes the decision and Order of this Court. Courtesy copies of this Decision and Order have been sent to counsel for the parties

ENTER:

Dated: November 30, 2012
New York, New York

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