NEW YORK SUPREME COURT - COUNTY OF BRONX

L.W!

PART

Case Disposed	☐
Settle Order	☐
Schedule Appearance	☐

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

OMRIE MORRIS- AND ANGELA BOGIE MORRIS X

Index No. 14026/06

-against-

Hon. WILMA GUZMAN

Justice.

THE CITY OF NEWYORK X

The following papers numbered 1 to ____ Read on this motion Summary Judgment Dft.
Noticed on 8/13/2009 and duly submitted as No. ____ on the Motion Calendar of ____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this MOTION BY PLAINTIFF IS DECIDED IN ACCORDANCE WITH THE ATTACHED DECISION AND ORDER.

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SEP - 1 2010

Motion is Respectfully Referred to:
Justice: ____
Dated: ____

Dated: 7/8/10

Hon. ____ J.S.C.
HON. WILMA GUZMAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 7

Index No.14026/06
Motion Calendar No.13
Motion Date: 11/13/09

OMRIE MORRIS AND ANGELA BOGIE MORRIS
Plaintiffs,

-against-

THE CITY OF NEW YORK
Defendants

DECISION/ORDER

Present:
Hon. Wilma Guzman
Justice Supreme Court

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion for summary judgment.

Papers	Numbered
Defendant's Notice of Motion, Affirmation in Support, and Exhibits (A through P).....	1
Memorandum in Support of Plaintiff's Opposition.....	2
Plaintiff's Affirmation in Opposition, and Exhibits (A through N).....	3
Defendant's Reply Affirmation, and Exhibits (A through B).....	4

After due deliberation upon the foregoing papers, the Decision/Order on this motion and cross-motion is as follows:

Plaintiff commenced this cause of action under Labor Law §§ 240(1), 241(6), 200, and common-law negligence, seeking monetary damages for injuries allegedly sustained on January 18, 2005 as the result of two falls at the construction site at the Newtown Creek Water Pollution Control Plant, 481 Kingsland Avenue, Brooklyn, New York, which is owned by the City of New York.

Defendant The City of New York. moves for summary judgment, contending that Plaintiff's cause of action should be dismissed in its entirety because there is no evidence to support Plaintiff's claims under Labor Law §§ 240(1) and 241(6). Defendant also moves for summary judgment on Plaintiff's claims of common law negligence and violation of § 200, contending The City of New York did not direct or control the means and methods of the plaintiff's work, nor was The City of New York aware of a dangerous condition which allegedly caused plaintiff's accident. Defendant argues that the sworn affidavit of plaintiff Omrie Morris is self-serving and should not be regarded. Finally, Defendant moves that Plaintiff's submission of the sworn affidavit of the Jim R. Lapping in its motion to oppose summary judgment should be excluded as expert testimony.

Plaintiff in opposition to Defendant's motion for summary judgment states that it should be denied in its entirety, contending that numerous questions of fact exist in this instant case.

The Law and Standard on Summary Judgment

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. See, Alvarez v. Prospect Hospital, 68N.Y.S.2d 923 (1986). A party moving for summary judgment is required to establish a *prima facie* entitlement to that relief regardless of the merits of the opposing papers. *See*, Winegard v. New York University Medical Center, 64 N.Y.2d 851, 487 N.Y.S.2d 316, 476 N.E.2d 642 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light

most favorable to the non-moving party. See, Assaf v. Ropog Cab Corp., 153 A.D.2d, 544 N.Y.S.2d 834 (1st Dept. 1989). It is well settled that issue finding, not issue determination, is the key to summary judgment. See, Rose v. DaEcib USA, 259 A.D.2d 258, 686 N.Y.S.2d 19 (1st Dept. 1999). Summary judgment will only be granted if there are no material, triable issues of fact. See, Stillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 498 (1957).

In support of the motion for summary judgment, defendant submits, inter alia, a copy of the pleadings, the 50-h hearing of plaintiff, the plaintiff's examinations before trial dated May 17, 2005 and June 12, 2008, and the examinations before trial of Eugene Comerford, Ernest Livingston, and Edward Stradowski.

In his 50-h hearing, conducted on May 17, 2005, the plaintiff, Mr. Omrie Morris, an employee of the Five Star Electric Corp., testified that on Tuesday, January 18, 2005, at 7 A.M., he arrived at the construction site of the Newtown Creek Waste Management plant, a facility owned by the City of New York, located at 431 Kingsland Avenue, Brooklyn, New York. As a journeyman electrician, this was the plaintiff's first day on the job at that site. At approximately 7:30 AM, plaintiff reported to the on-site trailer of general foreman, Eugene Comerford, who is also an employee of Five Star. After a half-hour safety meeting, the general foreman then introduced the plaintiff to the sub-foreman.

The sub-foreman then escorted plaintiff to the digester building, known as "D" building. There the sub-foreman introduced the plaintiff to another employee of Five Star, who like the plaintiff was also a journeyman electrician, Joseph Kelly[1]. The plaintiff had never worked with Mr. Kelly before, and like plaintiff, this was the first day on the job for Mr. Kelly.

The sub-foreman then instructed the two men to bring an air tank from the basement of "D" building to the first floor, where they were to then use the air tank to blow a dragline of cord through pipes that they would later tie to electrical wiring that, in turn, would enable them to drag the wiring through the pipes.

As plaintiff and Mr. Kelly descended a staircase to the basement that the sub-foreman had instructed them to take, plaintiff testified that he noticed that the bottom step, unlike the rest of the

[1] It should be noted that Mr. Kelly still has not been available to be deposed.

concrete staircase, was made out of wood. Choosing not to use this wooden step, Plaintiff instead stepped over it onto the unfinished floor.

Plaintiff then discovered that there was no roof over the basement and was open to the elements. Plaintiff and Mr. Kelly then walked a short distance down a hallway known as the "galley" to a room where the air tanks were stored. Upon entering the room, Plaintiff discovered that the room, although it had walls, was much like the rest of the basement, in that it had no roof, just open sky above. In addition, plaintiff also discovered that the concrete floor of this room was covered in ice, snow, water, and slush. The two men then went to the air tanks, which were stored upright in an open steel cage resting on a wooden skid underneath.

Going to the cage, the plaintiff removed one of the air tanks with the intention of putting it onto the hand truck, which Mr. Kelly held steady. However, as plaintiff lifted the air tank up from the bottom, plaintiff claims that he slipped on ice, and fell onto his left knee, feeling something snap in his lower back. Mr. Kelly asked him if he was all right, and plaintiff replied that he had hurt his back, but would probably be okay. Although feeling pain, the plaintiff testified that nonetheless he put the air tank on the hand truck, and Mr. Kelly then pushed the hand truck back to the staircase, with plaintiff walking along side the hand truck to steady the air tank.

Returning to the base of the staircase with the hand truck, plaintiff testified that Mr. Kelly turned the hand truck around, placing himself on the second concrete step of the staircase (with the addition of the wooden step, Mr. Kelly would have actually been standing three steps up facing the plaintiff on the staircase). With his co-worker holding the handles of the hand truck above, plaintiff then bent down to pick the hand truck up from the bottom. Their plan was for the plaintiff to lift the bottom of the hand truck up, and with Mr. Kelly pulling at the top, the two men would then lift the air tank up the staircase, step by step. But when Plaintiff bent down to pick up the bottom of the hand truck, the plaintiff experienced more pain in the lower part of his back.

The two men then prepared to begin their ascent up the staircase. Placing his left foot on the wooden step, which plaintiff noticed tilted slightly away from the concrete staircase when he did so, and with his right foot planted on the unfinished floor, the plaintiff then bent down to pick up the bottom of the hand truck. As plaintiff did this, he again experienced pain in his lower back.

Plaintiff then picked the bottom of the truck up, and as he did so, Mr. Kelly stepped backwards to ascend to the next step. It was then, according to plaintiff, that Mr. Kelly slipped on the step, and in an effort to regain his balance, Mr. Kelly let go of the hand truck. With the sudden weight of the air tank and the hand truck falling back down on plaintiff, the wooden step beneath his left foot gave way, tilting to the left, causing plaintiff to fall back against the wall and incur further injury

In his examination before trial testimony, conducted on May 8, 2008, Eugene Comerford testified that he was the Five Star foreman in charge of Plaintiff and the other Five Star employees working in the "D" building on January 18, 2005. On that day he instructed his sub-foreman to have the Plaintiff and Mr. Kelly to go into the basement of "D" building to retrieve an air tank so that they could do their work. Mr. Comerford testified that there was no finished roof on "D" building during that time period, just a concrete covering with huge holes in it. The reason for these huge holes was that the digester tanks, which were still in the very early stages of construction, would eventually rise up to the top of the building through these holes when finished. Mr. Comerford testified that the air tanks were stored in a cage in the basement, he thinks somewhere in the "sludge tank area". The air tanks weighed between 100 and 120 pounds each. Mr. Comerford testified that temporary wooden steps had been constructed for the basement staircases in "D" building by Pegno/Tully, the general contractor for the Newtown project. The reason for this temporary wooden step, according to Mr. Comerford, was that concrete had not yet been poured in below to finish the floor, and in order to make up the difference of height (approximately 16 inches) between the unfinished floor and the first concrete step, a temporary wooden step (approximately 8 inches in height) had been constructed and placed there as a safety measure to aid workers in ascending the staircases.

In his deposition, conducted on June 24, 2009, Mr. Edward Stradowski, who, in January 2005 worked as a Five Star journeyman electrician in the basement of "D" building, said that there was snow in the basement during that month because the building for the most part had no roof. According to Mr. Stradowski, a crane would once a week lower a cage containing the air tanks into the basement, where the men would roll the cage through the snow into a hallway, known as the "galley", by the digester tanks to keep it out of the snow. This galley, which was like a path that ran down the middle of the digester tanks, was covered by the first floor of the building, which was like a concrete slab. Mr. Stradowski recalls that there was at times a "dusting" of snow covering the

galley floor, but that not much would be done about cleaning it off. When asked in his deposition to describe the conditions of the basement of "D" building during January 2005, the month in which the Plaintiff's alleged accidents occurred, Mr. Stradowski, then a journeyman electrician for Five Star who had also worked in this basement, said: "I know it snowed sometimes. From the beginning of the job it snowed every day and it snowed and rained everyday." Mr. Stradowski also remembers that in January 2005 the temporary wooden steps were in use at the bottom of the basement staircases in "D" building, but doesn't remember when they were installed. According to Mr. Stradowski, Pegno/Tully constructed the steps.

Mr. Ernest Livingston in his deposition, conducted on September 26, 2008, states that as the City's site project manager for the Newtown project, that he remembers observing that "D" building had not been completed in January 2005. Mr. Livingston doesn't believe the building had walls at that time, or even a roof.

LABOR LAW 240(1)

Labor Law 240(1) imposes non-delegable strict and absolute liability for contractors, owners and their agents to provide proper safety equipment for certain workers facing elevated-related risks. Labor Law 240(1) states in pertinent part that "All contractors and owners and their agents....in the erection, demolition, repairing, altering, 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) has "historically been construed in the context of workers injured as a result of inadequate or missing safety equipment at elevated work sites." *See*, Misseritti v. Mark IV Construction Co., Inc. 86 N.Y.2d 487, 634 N.Y.S.2d 35, 37 (1995).

"In other words, 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. The right of recovery afforded by the statute does not extend to other types of harm, even

if the harm in question was caused by an inadequate, malfunction or defectively designed scaffold, stay or hoist." *See*, Ross v. Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d 494, 501, 601 N.Y.S.2d 49 (1993). "The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the work is positioned and the higher level of the materials or load being hoisted or secured". *See*, Rocovitch v. Consolidated Edison Co., 78 N.Y.2d 509, 513, 577 N.Y.S.2d 219, 221 (1991).

It should again be noted that in this instant action, the plaintiff claims that he fell victim to two accidents on January 18, 2005 at the Newtown Creek Water Pollution Control Plant. According to the plaintiff, the first alleged accident occurred in the room where the air tanks were stored, when he slipped and fell trying to put the air tank on the hand truck. The second alleged accident occurred when the two men, after having returned to the staircase, attempted to lift the air tank and the hand truck up the stairs. It is this second alleged accident at the staircase that the plaintiff claims was a violation of Labor Law § 240(1), because when the temporary wooden step gave way under the plaintiff's foot as the sudden combined weight of hand truck and its load allegedly fell onto the plaintiff, the failure of that temporary wooden step, as a safety device as defined by Labor Law § 240(1), triggered the protection of this Law.

In its motion for summary judgment, defendant admits to the existence of the temporary wooden step in question, maintaining that it was constructed as a safety measure because of the height differential between the last concrete step of the staircase and the unfinished floor. Nonetheless, defendant contends that plaintiff's claim under § 240 (1) must be dismissed inasmuch as plaintiff's accident occurred on a permanent staircase, and as such, was not caused by an elevation-related risk as specifically contemplated by the New York State Legislature, namely, plaintiff did not fall from a height, nor was he struck by a falling object from a higher level.

Defendant further argues that even if plaintiff's alleged accident did actually happen, plaintiff was at the same level, or eye-level, as the air tank and the hand truck when they allegedly fell onto him, and thus his alleged accident at the staircase was not height-related, but instead resulted from the ordinary and usual perils of the workplace. Moreover, defendant contends, plaintiff did not fall to the ground, but allegedly fell into the wall, further strengthening this line of argument.

It is well-settled law that a temporary stairway is the "functional equivalent of a ladder", within the meaning of Labor Law § 240(1). *See*, Wescott v. Shear, 161 A.D.2d 925, (3rd Dept. 1990), appeal dismissed 76 N.Y.2d 846; Cliquennoi v. Michaels Group, 178 A.D.2d 839, 840 (3rd Dept. 1991); Megna v. Tishman Construction Corporation of Manhattan, 306 A.D.2d 163 (1st Dept. 2003); McGarry v. CVP 1 LLC, 55 A.D. 3d 441 (1st Dept. 2008).

Moreover, although the height of the temporary wooden step is approximately 8 inches, the step's height is "irrelevant" because "the temporary stair was being used to facilitate plaintiff's access to a different elevation level, and therefore indisputably an elevation device within the meaning of Labor Law § 240 (1)." *See*, Megna v. Tishman Construction Corporation of Manhattan, 306 A.D.2d 163 (1st Dept. 2003). *See also*, Siago v. Garbade Construction Co., et al., 262 A.D.2d 945; Bowen v. Hallmark Nursing Centre,, 244 A.D.2d 597 (3rd Dept. 1997).

"While it is true that section 240(1) liability requires an elevation differential between the worker and the object being hoisted the extent of the elevation differential is not necessarily determinative of whether an accident falls within the ambit of Labor Law § 240(1)." Brown v. VJB Constr. Corp., 50 A.D.3d 373, 376 (1st Dept. 2008). Moreover, when the plaintiff bent over, lifting up the bottom of the hand truck and its load, he began the process of carrying this load up the staircase with Mr. Kelly. When plaintiff allegedly put his left foot on the wooden step and lifted the bottom of the hand truck and its load up, triable questions of fact exist as to whether the process of carrying this load up the staircase had already been initiated.

"[F]or section 240(1) to apply, a plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute." *See*, Narducci v. Manhasset Bay Assoc., 96 N.Y.2d 259, 268 (2001); Doucoure v. Atlantic Dev. Group, LLC, 18 A.D.3d 337, 338, 339 (1st Dept. 2005). While it might be technically true that plaintiff was approximately at the same level as the hand truck and its load, or at the very least eye-level, with the bottom half of them, which, in the light of such past decisions as Melo v. Consolidated Edison Co. of New York, Inc., 92 N.Y.2d 909 (1998), might have been a cause for dismissal of plaintiff's action. There has been a recent trend by the courts to re-clarify this former stance that in order to trigger the

protection of Labor Law § 240(1), a plaintiff cannot be standing at the same level as the falling object which injures him.

For example, in Outar v. City of New York, 5 N.Y.3d 731 (2005), the Court of Appeals found that even though an unsecured dolly that fell off a subway platform was approximately at eye-level with the plaintiff it injured below, "[t]he elevation differential between the dolly and plaintiff was sufficient to trigger Labor Law § 240(1)'s protection, and the dolly was an object that required securing for the purposes of the undertaking (*See*, Narducci v. Manhasset Bay Assoc., 96 N.Y.2d 259 (2001)." *See also*, Quattrocchi v. F.J. Sciame Constr. Corp., 11 N.Y.3d 757 (2008). "Similarly, in this case, it is of no consequence that the ultimate destination of the slab was the same level where the forklift was positioned, or where plaintiff was standing. The relevant facts are that a slab of granite measuring four by three feet and weighing 1,000 pounds had to be hoisted three feet above grade in order to transport it, and that the accident occurred while it was hoisted in the air due to the effects of gravity and the defective clamp. Undisputed evidence demonstrates that the clamp clearly failed in its core objective of preventing the object from falling because the slab, in fact, fell, injuring plaintiff." Brown v. VJB Constr. Corp., 50 A.D.3d 373, 377, (1st Dept. 2008). (internal citations omitted).

As such, this Court finds that the activity in which plaintiff engaged which caused his injury falls within the ambit of Labor Law 240(1) for which adequate safety devices should have been supplied. Triable question of fact exist as to whether because of the absence, or more specifically in this instant action, the failure of an adequate safety device, namely, the temporary wooden step, to provide the proper support, was the reason plaintiff was injured. *See*, Ross v. Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d 494, 501 (1993); Bowen v. Hallmark Nursing Centre, Inc. et al., 244 A.D.2d 597 (3rd Dept. 1997); Wescott v. Shear, 161 A.D.2d 925 (3rd Dept. 1990), *appeal dismissed* 76 N.Y.2d 846.

While Mr. Comerford testified in his deposition that the temporary wooden step had been constructed as a safety device, there is no evidence presented by the defendant that this step had been rigidly braced or secured, as required by Labor Law § 240(1).

Thus, triable issues of fact exist as to whether, had the temporary wooden step not failed beneath the plaintiff because it was unsecured and not rigidly braced, the plaintiff might then have

been able to maintain his balance, and not have sustained the injuries, which the failed wooden step had proximately caused him when it tilted up under him. *See*, Megna v. Tishman Const. Corp. of Manhattan, 306 A.D.2d 163 (1st Dept. 2003); Dunn v. Consolidated Edison Co. of New York, Inc., 272 A.D.2d 129 (1st Dept. 2000). "In other words, contractors and owners do not comply with the statute by merely providing a safety device (*See*, Skijak v. 330 Madison Ave. Corp., 251 A.D.2d 152, 153 [1st Dept 1998]); rather the device must be "so constructed, placed and operated as to give proper protection." (*See*, Labor Law § 240[1].)" *See*, Johnson v. Pinmark Contracting Co. LLC et al., 23 Misc. 3rd 1131A, 2009 N.Y. Slip Op 51015U, (Kings Co. 2009).

Moreover, although Plaintiff fell against the wall, and not onto the ground, nowhere in Labor Law § 240(1) does it state that a plaintiff has to fall completely to the ground. The courts have struggled with what the concept "to fall" actually means, and what that action entails, and still there is no bright dividing line to define it. However, the one criteria that has been generally accepted to trigger the protection of Labor Law § 240(1) is that "a worker might be injured in a fall," but not in a fall completely to the ground.

Defendant argues that this Court disregard the affidavit of the James Lapping in its decision because it is based on unsupported evidence, and is therefore conclusory and speculative. *See*, Romano v. Stanley, 90 N.Y. 2d 444 (1997); Amatulli v. Delhi Construction Corp., 156 A.D.2d 500 (2nd Dept. 1989). In addition, defendant moves that this affidavit should also be rejected because plaintiff did not identify Mr. Lapping in pre-trial disclosure. *See*, DeLeon v. State of New York, 22 A.D.3d 786 (2nd Dept. 2005); Mankowski v. Two Park Co., 225 A.D.2d 673 (2nd Dept. 1996). This Court agrees, but under CPLR § 4511, reserves the right, as gatekeeper, to possibly allow Mr. Lapping to testify as an expert witness if this case should go to trial. *See also*, Frye v. United States, 293 F. 1013; *See also*, Zito v. Zabarsky, 28 A.D.3d 42, 44 (2nd Dept. 2006).

Defendant has also argues that this Court should disregard the sworn affidavit of plaintiff as insufficient to avoid summary judgment. Defendant contends that it is self-serving because plaintiff's 2009 deposition of how plaintiff's alleged accident at the staircase occurred conflicts with the events alleged in plaintiff's affidavit. "Generally, a self-serving affidavit offered to contradict previous deposition testimony does not raise a bona fide question of fact and will be disregarded." See, Lupinsky v. Windham Construction Corp., 293 A.D.2d 317 (1st Dept. 1993); *See also*, Mayancela

v. Almat Realty Development, LLC., 303 A.D.2d 207 (1st Dept. 2003); Perez v. Bronx Park South Associates, 285 A.D2d 402(1st Dept. 2001). However, in this instant action, three separate testimonies from plaintiff have been presented to this Court in evidence: the first being the 50-h hearing of plaintiff, conducted on May 17, 2005; his first deposition, conducted on June 12, 2008; and his second deposition, conducted on September 25, 2009. Plaintiff's affidavit only contradicts the 2009 deposition in part, regarding the alleged incident at the staircase, but not the first two examinations. It should be noted that the 50-h hearing and the plaintiff's first examination before trial testimony are closer in time and memory to the date of the alleged incident.

It should be noted that defendant offers no evidence that this alleged accident did not occur in the way plaintiff claims it occurred. "Although the plaintiff is 'required to show that the violation of section 240 of the Labor Law was a contributing cause of [his accident]' (Phillips v. Flinkote Co., 89 AD2d 724, 725) (1982), and this issue should be determined by the jury, where there is no view of the evidence at trial to support a finding that the absence of safety devices was not a proximate cause of the injuries, the court may properly direct a verdict in the plaintiff's favor. If proximate cause is established, the responsible parties have failed, as a matter of law, to 'give proper protection.'" *See*, Zimmer v. Chemung County Performing Arts, 65 NY2d 513, 524 (1985). His earlier testimonies are consistent with each other. Any inconsistencies in testimony goes to the weight to the evidence not the admissibility.

Furthermore, although the lack of other witnesses do not render the opposition to a summary judgment motion insufficient, this is not a "blind incident" as plaintiff was not the only witness who had exclusive knowledge as to how this alleged incident occurred. *See generally*, Kapla v. O.Y. Liberty Plaza, Co., 218 A.D.2d 635 (1st Dept. 1995). Joseph Kelly, plaintiff's co-worker was also present with the plaintiff at the time of the accidents. Mr. Kelly's testimony is relevant and material to this matter. However, as noted above, Mr. Kelly has not been deposed.

Again, this Court, when deciding a summary judgment, must determine the existence of bona fide issues of fact, and not resolve or delve into issues of credibility ."Any inconsistencies between the deposition testimony of plaintiffs and the affidavits submitted in opposition to the motion present issues for trial." *See*, Knepka v. Talman, 278 A.D.2d 811 (4th Dept. 2000). *See also*, Amaral v. Metro-North Commuter Railroad Co., 7 Misc. 3d 1006(A) (2005). Moreover, it must also be

remembered that when seeking summary judgment, a defendant has the burden of establishing prima facie entitlement to such relief as a matter of law, and is "required to do so by affirmatively demonstrating the merit of its claim or defense, rather than by pointing to gaps in the plaintiff's proof. *See*, Mondello v. DiStefano, 16 A.D.3d 637 (2nd Dept. 2005).

LABOR LAW § 241(6)

§ 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 building or doing any excavating in connection therewith, shall comply with the following requirements:

2. All areas in which construction, excavation or demolition work is being performed shall be so constructed, 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 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."

"Labor Law § 241(6) imposes a nondelegable duty on owners and general contractors to ensure that '[a]ll areas in which construction.....work is being performed' are maintained in a safe condition. The areas that must be kept in a safe condition include not only the actual construction sites but the passageways the workers must travel through to get to and from those areas". *See*, Bruder v. 979 Corp., 307 A.D.2d 980, 981 (2nd Dept. 2003), *leave denied* 1 NY3d 502 (2003). "[U]nlike a violation of an explicit and definite statutory provision which demonstrates negligence as a matter of law, a violation of section 241 (6) 'is merely some evidence which the jury may consider on the question of defendant's negligence'" (Internal citations omitted). *See*, Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 N.Y.2d 343, 349 (1998). "To support a cause of action under Labor Law § 241(6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the accident." *See*, Rivera v. Santos, 35 AD3d 700, 702 (2nd Dept. 2006); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 502 (1993); Ares v. State of New York, 80 NY2d 959, 960 (1992). "Thus, once it has been alleged that a concrete specification of the Code has been violated, it is for the jury to determine whether the

negligence of some party to, or participant in, the construction project caused plaintiff's injury." Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 N.Y.2d 343, 350 (1998).

Defendant contends that in plaintiff's original bill of Particulars, that plaintiff's claims that defendant had violated Industrial Codes § 23-1.7 (d) (e) (1) and (2) (f); § 23-2.1 (a) and (b); and § 23-2.7 (a) – (e) are without foundation. It should be noted that plaintiff does not argue in his opposition the applicability of Industrial Codes § 23-2.1 (a) and (b); and§ 23-2.7 (a) and (c) - (e). As such, these sections are dismissed as plaintiff has failed to provide facts in opposition to defendant's motion for summary judgment.

Defendant also contends that Plaintiff's claims that certain OSHA regulations had been violated in his original bill of Particulars do not provide a basis for liability under Labor Law § 241(6). *See*, Vernieri v. Empire Realty Co., 219 A.D.2d 593 (2nd Dept. 1995). Plaintiff does not argue in his opposition the applicability of these OSHA regulations. As such, these regulations are dismissed as plaintiff has failed to provide facts in opposition to defendant's motion for summary judgment.

As to the remaining Industrial Code violations, defendant first contends subsections (d) (e) (1) and (2) of § 23-1.7 do not apply to Plaintiff's alleged accident on the staircase because the staircase was not a floor, passageway, walkway, scaffold, platform or other elevated working surface. Further, that the Courts have held that a staircase is not a passageway, nor a working area, within the meaning of § 240(1), if it is an open and common area remote from the work site.

In opposition to defendant's motion for summary judgment, plaintiff contends that is a triable question of fact that there was snow, ice, water, and slush in the basement of "D" building which he claims caused the two accidents. Plaintiff also contends that 12 NYCRR 23-1.7 (d) applies because the staircase was not an open and common area remote from the work site, but was a working area according to subsection (2). In addition, Plaintiff contends there was dirt and debris in the basement that contributed to accidents, making NYCRR 23-1.7 (e) and (2) applicable as well.

12 NYCRR 23-1.7

> (d) *Slipping Hazards*. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any foreign substance which may cause

slippery footing shall be removed, sanded or covered to provide safe footing.

As noted above, Mr. Stradowski, then a journeyman electrician for Five Star who had also worked in the basement of "D" building, testified: "I know it snowed sometimes. From the beginning of the job it snowed every day and it snowed and rained everyday." (Stradowski EBT, pg. 40.) And when it snowed, states Mr. Stradowski, because of the lack of a roof, it would get into the basement.(Stradowski EBT, pg. 42). Moreover, Mr. Stradowski recalls that when it rained, the basement would become flooded, and a pump would have to be used to drain the basement. (Stradowski EBT pg. 62). In addition, when asked in his examination if the galley, which was the hallway between the digester tanks that led to where the air tanks were stored, was ever covered in snow, Mr. Stradowski recalls that there was at times a "dusting" of snow covering the galley floor, but that not much would be done about cleaning it off. (Stradowski EBT pg. 92). Moreover, when asked if substances like rock salt were ever used in the basement to prevent slipping, Mr. Stradowski says that rock salt was available, but he doesn't recall it being used in the basement. (Stradowski EBT pg. 84). Finally, when asked if a temporary roof had ever been constructed to shield the basement from the elements, Mr. Stradowski said no. (Stradowski EBT pg. 56).

Eugene Comerford testified that he saw flooding in the basement prior to plaintiff's accidents, and that it was usually pumped out by the Pegno/Tully, the general contractor for the worksite. Mr. Comerford also testified that it was he who had instructed his sub-foreman to order plaintiff and his Mr. Kelly to go down into the basement to retrieve the air tank. Mr. Comerford didn't remember seeing snow in the sludge tank area where he thinks the air tanks were stored. But Mr. Comerford further testified that his men worked in snow and in all conditions. Mr. Comerford goes on to say that, except for informing the general contractor that the snow needed to be swept away, no precautions were taken when his men had to work in snow and ice. At times, says Mr. Comerford, the men would walk in snow-covered areas even before the general contractor had a chance to clean off steps or an area. According to Mr. Comerford, "The job had to be done." (See, Comerford deposition, page 111.) The reason for this, testified Mr. Comerford, was that they were always behind schedule. Perhaps one-year behind schedule, which was sometimes a topic at meetings with his men.

Based upon the foregoing, defendant failed to meet t he prima facie burden of summary judgment. Questions of fact remain as to since the basement of "D" building lacked a roof, even a temporary one, leaving it open to the elements, such slipping hazards as snow, ice, water, etc., which were not integral to the work itself, were allowed to exist in the basement of "D" building, which in turn proximately caused the plaintiff to allegedly slip on ice and subsequently injure himself at the storage cage. *See*, McCraw v. United Parcel Service, 263 A.D.2d 499 (2nd Dept. 1999). Furthermore, it should be noted that Mr. Comerford through his sub-foreman ordered the plaintiff and Mr. Kelly to go down the staircase into the basement to retrieve the air-tank from its storage cage, the staircase and the galley path were not a remote passageway remote from the worksite, but were indeed part of the worksite itself. Moreover, according to Mr. Comerford, during the month of January 2005, when plaintiff's accidents allegedly occurred, there were about twelve Five Star employees altogether, including plaintiff and Mr. Kelly, working in "D" building. Like the Plaintiff and his co-worker, the job of these other Five Star employees was to install electrical lines. The air tanks, which were part of this electrical installation, were used on a daily basis. Thus, like plaintiff and Mr. Kelly, the other Five Star employees also had to carry air tanks up from the basement, there were usually two men per each air tank. According to Mr. Stradowski, when he went to retrieve an air tank from the basement, three men, not two, were used in carrying an air tank up the stairs. As such, this Court finds that the area in which the plaintiff was injured was a passageway within the meaning of 12 NYCRR 23-1.7. Defendant has failed to submit sufficient proof to eliminate questions of fact so as to warrant summary judgment under Labor Law 241(6) as it applies to 12 NYCRR 23-1.7.

Defendant also contends that 12 NYCRR 23-1.7 subsections (e) and (2) do not apply because it was allegedly ice that caused plaintiff to allegedly slip in his first accident in the storage room, and ice again when Mr. Kelly allegedly slipped on the staircase, causing the hand truck and its load to fall back down onto plaintiff. Defendant contends that there is no evidence that plaintiff or Mr. Kelly tripped on dirt or debris, or that there was any dirt or debris in the area of the two accidents. In addition, the Defendant contends that 12 NYCRR 23-1.7 subsection (f), *Vertical passage* does not apply because stairways had been provided to plaintiff to traverse. Plaintiff also contends in opposition that the staircase was not kept clean, and therefore not safe, making subsection (f)

NYCRR 23-1.7 applicable as well. Plaintiff offers as evidence a National Oceanic and Atmospheric Administration report of his own that there were trace amounts of precipitation measured at LaGuardia Airport for the 18th and 17th. However, plaintiff also contends that their National Oceanic and Atmospheric Administration records show that in the preceding week leading up to the date of the alleged accident, that it had rained, snowed, misted, drizzled, squalled and even ice pellets fell. See, Plaintiff's Exhibit "H".

In Defendant's Reply Affirmation, Defendant presents a report from the National Oceanic and Atmospheric Administration stating that there was no precipitation on the day of Plaintiff's alleged accidents, as well as for the 15th and 16th of January 2005. (*See*, Defendant's Exhibit "B"). 12 NYCRR 23-1.7

> (e) *Tripping and other hazards.*
> (1) *Passageways.* All passageways shall be kept free from accumulations of dirt and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
> (2) *Working areas.* The part of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.
>
> (f) *Vertical passage.* Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.

In his deposition, Mr. Stradowski says that the galley path leading to the storage cage for the air tanks ran in between the eight digester tanks. According to Mr. Stradowski, there was debris in the area under the digester tanks that bordered the galley path.

Plaintiff testified that by the time he and Mr. Kelly returned along the same galley path to the staircase, Plaintiff testified that there was ice on the bottom of their construction shoes. Thus, when the two men began their ascent of the staircase, there is a triable question of fact that not only was ice stuck to the bottom of their construction shoes, but debris and dirt as well, allegedly picked up from their going to and from the storage cage, which contributed and in turn caused both the co-worker to slip, on the staircase, lose his grip on the hand truck and its load, which in turn caused both

objects to fall back down on the plaintiff, where the sudden combined weight caused the temporary wooden step to tilt up, causing the plaintiff to fall back into the wall and sustain his injuries.

"We also find that pieces of wood, sheet rock and snow/ice that allegedly caused the plaintiff to fall were 'debris,' 'scattered.....materials' and 'dirt' within the meaning of the latter regulation and were not integral to plaintiff's work as a bricklayer." Maza v. University Avenue Development Corp.,13 A.D.3d 65, 66 (1st Dept. 2004); *see also*, Sweet v. Packaging Corporation of America et al., 297 A.D.2d 421 (1st Dept. 2002); Singh v. Young Manor, Inc., 23 A.D.3d 249 (1st Dept. 2005) As noted above, several other workers had been using the subject stairway in which the plaintiff alleges there was snow, ice, water and debris. Questions of fact remain as to whether, these men could have also tracked in additional snow, ice, water and debris to be left on the steps of the stairs, which in turn could have contributed to the alleged accident, as Plaintiff claims in his opposition to summary judgment. Indeed, Mr. Comerford says in his deposition that he would sometimes discuss with a representative of Malcolm Pernie, the construction manager for the site, that the stairs needed to be cleaned of debris. (Comerford EBT pg. 41). Mr. Comerford claims that he told his men that if they found a staircase to be dirty, then they were to take another staircase. (Comerford EBT pg. 42). However, in view of Mr. Comerford's testimony that at times the men would walk in snow-covered areas even before the general contractor had a chance to clean off steps or an area because the job was behind schedule, it is a triable question of fact that unsafe conditions were created on the staircase that could have contributed to the Plaintiff's alleged accident. (Comerford EBT pg. 110-111). *See*, Sweet v. Packaging Corporation of America et al., 297 A.D.2d 421.; Singh v. Young Manor, Inc., 23 A.D.3d 249.

Defendant next contends that 12 NYCRR 23-2.7 (b) *Stairway construction* does not apply since the temporary wooden step was constructed by the general contractor as a safety measure because of the height differential between the last concrete step of the staircase and the unfinished floor. In addition, the Defendant contends, the temporary wooden step was properly constructed according to NYCRR 23-2.7 (b). Moreover, Plaintiff contends that it is a triable question of fact that NYCRR 23-2.7 (b) applies because the temporary wooden step was not rigidly braced.

12 NYCRR 23-2.7

> (b) *Stairway construction.* Temporary stairways shall have treads constructed of wood planks not less than two inches by 10 inches in size, or metal not less than two inches in depth of equivalent strength. Such stairways shall be not less than three feet in width and shall be substantially constructed and rigidly braced. Such stairways more than five feet in width shall be provided with intermediate or center stringers. Stairways with steel treads and landings which are to be subsequently filled in with concrete or provided with other permanent tread surfacing shall be provided temporary wooden tread carefully fitted in place and extending to the edges of the metal nosing and over the full width of the treads and landings.

Defendant contends that in its motion for summary judgment that temporary wooden steps had been constructed as a safety measure. However, Defendant offers no proof that any of these temporary wooden steps were rigidly braced, as required by 12 NYCRR 23-2.7 (b). Thus, defendant fails to meet its burden for summary judgment in that questions of fact remain as to whether the temporary wooden step in this instant action was not rigidly braced and whether it tilted up under Plaintiff when the hand truck and its load fell back down on him, causing him to fall back into the wall which in turn caused him injury.

LABOR LAW § 200

Labor Law § 200 is the codification of common-law duty imposed upon an owner or general contractor to provide his employees with a safe place to work. See, Allen v. Clouthier Constr. Corp., 44 N.Y.2d 290, 299; De Blasé v. Herbert Constr. Co., 5 A.D.3d 624 (2nd Dept. 2004); Comes V. New York State Elec. & Gas Corp., 82 NY2d 876, 877 (1993).

In order for a plaintiff to impose liability on a defendant for common-law negligence or a violation of Labor Law § 200, the plaintiff must establish that the defendant exercised some control or supervision over the operation or had actual or constructive notice of such a hazardous condition. *See* Ross v. Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d 494 (1993); Lombardi v. Stout, 80 NY2d 290, 294-295 (1992). "To impose such liability, the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition . . . It is not a defendant's title that is determinative, but the amount of control or supervision exercised." *See*, Delahaye v. Saint Anns School, 40 A.D.3d 679, 683 (2nd Dept. 2007). "General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product

is insufficient to impose liability for common-law negligence and under Labor Law 200; *See,* Dos Santos v. STV Engrs., Inc., 8 A.D.3d 223, 224 (2nd Dept. 2004), *leave denied,* 4 NY3d 702 (2004). Issues of fact may exist where defendant can show it did not have actual or constructive notice of the hazardous condition which caused the plaintiff's injury. *See generally* Caceras v. Ciampa Org., 47 A.D.3d 432 (1st Dept. 2008).

Defendant contends that, as landowner of the Newtown Creek site, it had no supervisory control over the plaintiff's work, nor is there any evidence that defendant was aware of a dangerous condition at the work site, therefore plaintiff's claim of § 200 violation should be dismissed. In support of this branch of its motion submits, inter alia, the examination before trial testimonies of Edward Livingston, Eugene Comerford, and Edward Stradowski.

In his deposition, Ernest Livingston states that he is an employee of the New York City Department of Environmental Protection (DEP), and has been at the site project manager for the Newtown Creek worksite since 2000, including the time period during which Plaintiff's alleged accidents occurred in January 2005.

In the two months leading up to the plaintiff's alleged accidents in January 2005, Mr. Livingston worked every-day, roughly 40 hours a week, at the Newtown Creek worksite in an office in the construction management building, which was located in the southwest corner of the site. There Mr. Livingston shared space with representatives from Hazen and Sawyer, the consultant for the project, and Malcolm Pirnie, the construction manager. All together, says Mr. Livingston, there were 110 employees working in the construction management building, including resident engineers and field engineers. However, Mr. Livingston was the sole city employee there.

Mr. Livingston's responsibilities as site project manager were to be aware of the consultant's activities as well as the activities of the contractors. In addition, Mr. Livingston had such administrative tasks as reviewing change orders, reviewing writing correspondence, evaluating the performance of the contractors and the consultant, and being aware of schedules, correspondence, and dispute resolution sort of items. Among the things Mr. Livingston would evaluate in a contractor's performance, was whether or not a contractor was on-time in their work, the quality of their construction, and the contractor's ability to coordinate with other contractors. According to Mr. Livingston, the contract with the city stated that contractors had to perform a hazard analysis. The

reason for this requirement was to ensure the contractors worked in and maintained a safe working environment. Although Mr. Livingston claims he was never presented with a specific safety plan, he says that he was advised when such plans were given. In addition, says Mr. Livingston, the minutes of all safety meetings held by the contractors were submitted to the City for review to make sure they were abiding by their contractual obligations with the City. During the course of his workday, Mr. Livingston would sometimes go out and observe the status of the work at the site. In January 2005, Mr. Livingston remembers observing that the "D" building had not been completed. Mr. Livingston doesn't believe the building had walls at that time, or even a roof. He does however recall two stairwells in the center of the building at that time. Mr. Livingston states that the construction manager primarily had the authority to stop the work at the site if an unsafe working condition arose. However, Mr. Livingston goes on to say that if necessary, based on his observation, he too had the authority to stop the work. Although, Mr. Livingston doesn't recall ever having personally stopped the work, nonetheless, if Mr. Livingston saw something that needed to be addressed, he would usually go through the construction manager, Malcolm Pirnie, to see that it was corrected.

For example, Mr. Livingston states that in the past he had noticed that work permits had not been posted, which he brought to the attention of the Malcolm Pirnie, the construction manager. According to Mr. Livingston, "The contractors are required to have hot work permits. If the permits aren't posted, they don't have the permits, the work has to stop." (See, Livingston Deposition, page 41.)

Mr. Comerford testified in his deposition that he met daily with Steve Pegno of Pegno/Tully, the general contractor for the site, and Richard Donnelly, the site inspector for Malcolm Pirnie, walking around the site, inspecting the work that was being done by Five Star. Mr. Comerford also met once a week with Paul Romano, who was Mr. Donnelly's boss. According to Mr. Comerford, Mr. Romano had an office on the work site, which he was at daily. In addition, according to Mr. Comerford, Charles Lee, the safety representative for Five Star, was also reporting daily to Pegno/Tully, as well as sending into the Five Star home office daily safety reports documenting the conditions at "D" building that were in turn passed on to Malcolm Pirnie, the construction manager.

Mr. Stradowski testified that he does not remember seeing any representatives from the City of New York inspect "D" building, nor did anyone point them out to him. Mr. Stradowski only remembers dealing with Richard Donnelly of Malcolm Pirnie or representatives from Pegno/Tully.

In the opposition to the summary judgment, Plaintiff argues that defendant, the City of New York, through its resident engineer Ernest Livingston, contractually and in actuality had the authority to control the activities of the worksite, and that defendant in turn created the hazardous conditions that allegedly caused plaintiff's accidents. In addition, defendant, through its resident engineer, had either actual or constructive notice that hazardous conditions had existed for some time, but failed to remedy them.

In opposition, plaintiff further submits, *inter alia*, a copy of Contract NC-31E contract between the City of New York and the Five Star Electric Corporation which indicates in pertinent part:

Article 4. MEANS AND METHODS OF CONSTRUCTION:

"Unless otherwise expressly provided in the Contract, Drawings, Specifications and Addenda, the means and methods of construction shall be such as the Contractor may choose; subject however to the Engineer's right to reject means and methods proposed by the Contract which:

a. Will constitute or create a hazard to the work, or to persons or property; or

b. Will not produce finished work in accordance with the terms of the Contract. The Engineer's approval of the Contractor's means and methods, or his failure to exercise his right to reject such means and methods, shall not relieve the Contractor of his obligation to accomplish the result intended by Contract; nor shall the exercise of such right to reject create a cause of action for damages."

Article 6a. INSPECTION, indicates that :

"Finished or unfinished work found not to be in strict accordance with the Contract shall be replaced as directed by the Engineer, even though such work may have been previously approved and paid for.

Rejected work and materials must be promptly taken down and removed from the site, which must at all times be kept in a reasonably clean and neat condition."

Article 30. THE RESIDENT ENGINEER, indicates :

"The Resident Engineer shall be the representative of the Commissioner at the site, and, subject to review by the Commissioner, shall have the power, in the first instance, to inspect, supervise and control the performance of the work, and to issue change orders for extra work when designated in writing by the Commissioner."

Mr. Livingston's testimony that he was the defendant's official representative at the worksite's, coupled with the contractual obligations between the defendant and Five Star as stated in Articles 4 and 6a which gave the Engineer the right to reject and correct the means and methods of the Contractor in the event a hazard to work had been created, raises triable question of fact that the defendant had authority to direct and correct the hazardous conditions that allegedly caused the Plaintiff's accidents. *See,* Russin v. Picciano, 54 N.Y.2d 311 (1981); Reynolds v. Brady, 38 A.D.2d 746 (1972); Reynolds v. Brady & Co. , 38 A.D.2d 746 (2nd Dept. 1972); Ross v. Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d 494 (1993); McGarry v. CVP 1 LLC, 55 A.D. 3d 441 (1st Dept. 2008).

"While it is 'well settled that the duty to provide a safe place to work is not breached when the injury arises out of a defect in the subcontractor's own plant, tools and methods' (Persichilli v. Triborough Bridge & Tunnel Author., 16NY2d 136, 145), where the owner has assumed control over the safety conditions affecting the contractor's employees, section 200 imposes a duty to protect the employee's health and safety, and factual questions are raised regarding Bethlehem's breach thereof. Additionally, the duty of an owner to provide a safe place to work encompasses the duty to make reasonable inspections to detect unsafe conditions. *See*, Monroe v. City of New York, 67 A.D.2d 89, 96)." *See*, DaBolt v. Bethlehem Steel Corp., 92 A.D. 70, 72, 73 (4th Dept. 1983).

Thus, although the defendant, through its representative Mr. Livingston may not have had any direct contact with the employees of Five Star as he claims in his deposition, it is, however, a triable fact that the defendant did receive safety reports regarding the conditions at the work site. In addition, the defendant's representative Mr. Livingston worked a 40-hour week at the site, sharing the same office space with the same companies who did inspect the work and conditions of "D" building, interacted with representatives of these same companies on a daily basis, had to be aware, as part of his job duties, of contractor activities, read their reports and correspondence, was advised of their safety plans, and during the course of a workday would sometimes personally observe the

status of the worksite, including the fact that "D" building had no roof and was open to the elements, then the defendant, through its representative, Mr. Livingston, had or should have had actual or constructive notice of the hazardous conditions that allegedly caused the Plaintiff's accidents. See, Rizzuto v. L.A. Wenger Cont. Co., Inc., 91 N.Y.2d 343 (1998); Conklin v. Triborough Bridge and Tunnel Auth., 49 A.D.3d 320 (1st Dept. 2008); Mosher v. County of Rensselaer, 232 A.D.2d 952 (3rd Dept. 1996); Hauptner v. Laurel Development, LLC, 65 A.D.3d 900 (1st Dept. 2009).

Accordingly, it is

ORDERED that defendants motion to dismiss Labor Law 240(1) is hereby denied. It is further

ORDERED that defendant's motion to dismiss Labor Law 241(6) is hereby granted to the extent that the plaintiff has failed to raise a triable issue of fact as to violations of Industrial Codes § 23-1.7 (d) (e) (1) and (2) (f); § 23-2.1 (a) and (b); and § 23-2.7 (a) – (e), and OSHA. It is further

ORDERED that defendants motion under Labor Law § 200 is hereby denied. It is further

ORDERED that the Clerk of the Court mark the Court file accordingly.

ORDERED that defendant the City of New York serve a copy of this order with notice of entry upon plaintiff within thirty (30) days of entry of the order.

JUL 08 2010
Date

HON. WILMA GUZMAN
Justice Supreme Court