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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

JORGE SAGUAY,
Plaintiff,
-against-

INDEX NO. 112783/09

MOTION SEQ. NO. 005

EASTSIDE 77 ASSOCIATES, LLC and ALCHEMY PROPERTIES, INC.,
Defendants.

The following papers were read on this motion by defendants, pursuant to CPLR 3212, for partial summary judgment dismissing plaintiff's common-law negligence and Labor Law §§ 200 and 241(6) claims.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ☐ Yes ■ No

Motion sequence numbers 005 and 006 are hereby consolidated for purposes of disposition.

Jorge Saguay (plaintiff) brings this action to recover damages for personal injuries that he allegedly sustained when, while working as a welder, he fell through an opening in the 16th floor of a construction site located at 303 East 77th Street in Manhattan (the premises). In motion sequence number 005, defendants Eastside 77 Associates, LLC and Alchemy Properties, Inc. move, pursuant to CPLR 3212, for partial summary judgment dismissing plaintiff's common-law negligence and Labor Law §§ 200 and 241(6) claims. In motion sequence number 006, plaintiff moves, pursuant to CPLR 3212, for an order granting him summary judgment as to liability on his Labor Law §§ 200, 240(1), and 241(6) claims. Discovery in this matter is complete and the Note of Issue has been filed.

BACKGROUND

The premises, a 17-story residential building, was under construction at the time of the occurrence. Defendant Eastside 77 Associates, LLC was the owner of the premises (the

Owner). The Owner contracted with defendant Alchemy Properties, Inc. (Alchemy) to act as general contractor on the construction project. Nonparty Horizon Mechanical (Horizon) was retained as a subcontractor to perform certain heating and air-conditioning work at the premises. Plaintiff was employed by Horizon as a welder on the project.

According to plaintiff's deposition testimony, on May 19, 2009, plaintiff was working on the 16th floor of the premises with his colleague, Ramiro Bando (Bando). Plaintiff's task that day was to weld together two sections of an eight-inch water pipe. The water pipe was being threaded and connected through a three-foot square opening in the 16th floor. The opening was designed to accommodate the water pipe, as well as certain duct work for air conditioning that would run the height of the building. Each floor of the multi-story premises contained an identically sized opening through which the piping and air-conditioning duct work were being connected from floor to floor.

The two sections of water pipe that plaintiff was welding that day connected at, or just above, the hole in the 16th floor. One section of the water pipe had been lowered from the 17th to the 16th floor; the other section of the water pipe had come up through the hole in the 16th floor from the 15th floor. At the time, the duct work for the air conditioning reached only about halfway to the 16th floor opening from the 15th floor.

According to plaintiff, when he and his colleague arrived at the 16th floor that day, the opening in the floor for the piping and air-conditioning duct work was not covered. The area around the hole, measuring approximately a six-foot square, was surrounded on three sides by walls. Plaintiff testified that there may have been a barricade blocking access to the space on the open side of the area, but he did not remember exactly. Plaintiff testified that, sometime between 11:00 a.m. and 1:00 p.m. Bando obtained two or three pieces of plywood to place over the opening in the floor. Plaintiff testified that he needed the plywood placed over the hole in order to solder all the way around the eight-inch water pipe. Plaintiff assisted Bando in placing

at least one of the pieces of plywood over the hole. Plaintiff does not remember whether the plywood was secured to the floor in any way other than just by pressure. Plaintiff testified that neither he nor Bando had been instructed to place plywood down in this manner at this location, and that no one instructed or assisted the two in performing this task. Plaintiff testified that he did not notice or see anyone else enter into the six-foot square area in which he was working after 11:00 a.m., or up to the time that his accident occurred.

Plaintiff's accident occurred at approximately 2:30 p.m. Plaintiff has no specific recollection of exactly how the accident occurred. Apparently, plaintiff was working or standing on top of the plywood that he and Bando had placed over the opening, when the plywood slipped or collapsed, causing plaintiff to fall feet first through the opening and into the air-conditioning duct that extended halfway between the 15th and 16th floors. Plaintiff then slid down through the duct to about the 12th floor, where the duct narrowed and plaintiff became stuck. Plaintiff subsequently was removed from the duct by the fire department, and was taken by ambulance to the hospital where he remained for three days.

Plaintiff testified that he had needed to use the plywood that day to complete the welding, as he would not have been able to solder all the way around the pipe while standing on the concrete floor. Plaintiff testified that, although Horizon had supplied plaintiff with a harness to use while performing work at the site, he does not remember wearing the harness that day, as there was nowhere on the 16th floor on which to hook the harness. Plaintiff testified that he could not have used a ladder to access the pipe from the 15th floor, due to the positioning of the partially constructed air-conditioning duct. Plaintiff testified that, in the past, he had used plywood as a platform for welding pipes on other floors of the premises with no prior problems, and that no one had ever instructed him not to use plywood in this manner.

Plaintiff testified that Horizon's foreman, Joseph Cowen (Cowen), was the sole person that provided plaintiff with instructions as to the work that he was to perform each day. Plaintiff

further testified that his employer supplied all of the equipment, including safety gear, that he was to use at the job site.

Juan Rodriguez (Rodriguez), the assistant supervisor at the site for Alchemy, testified that he was at the site that day but did not witness the accident. According to his deposition testimony, Rodriguez would walk through the site about five times each day to check to see if things were secure, to check whether workers were performing their work in a safe manner, to see that a floor was prepared properly for the installation of water pipe and duct work, and to see that plywood was laid down properly over a hole, among other things.

Rodriguez testified that when work was being done on a water pipe, the hole was to be covered with plywood to prevent someone from falling through the gap. The plywood was to be nailed to the floor and painted with orange so people could see not to walk on it. Rodriguez testified that Alchemy laborers or carpenters were responsible for placing and nailing down the plywood, and that Alchemy's safety manager was responsible for putting up signage and painting the plywood. Rodriguez testified that welders were not responsible for laying down the plywood, and were not supposed to walk on the plywood while they were welding the water pipe. Rodriguez testified that he had the authority to stop workers if he observed them engaging in unsafe work practices.

Rodriguez testified that he knew that work was taking place on the 16th floor on the day of the accident, and that Horizon was working on the floor that day. Rodriguez did not recall whether there was plywood in the area where the accident occurred. Rodriguez testified that, at other times, he had observed Horizon welders using safety harnesses with lanyards provided by Horizon while welding the water pipe. Rodriguez did not know whether there was anyplace on the 16th floor to tie off a lanyard from a safety harness. Rodriguez testified that, if welders were unable to access the pipe from the concrete floor, they could always get a ladder from Horizon to do the welding.

Cowen, plaintiff's foreman, and Jim Kilm, a safety engineer employed by nonparty Safety & Quality Plus, defendants' safety manager, were both at the premises that day but neither witnessed the accident. Although there were other trades working at the premises that day, no one appears to have witnessed the accident. Other than plaintiff's deposition testimony, there is no first-hand account of the events leading up to plaintiff's accident.

On September 9, 2009, plaintiff commenced the instant action against the Owner and Alchemy, asserting causes of action for common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6). The Owner and Alchemy now move for partial summary judgment dismissing plaintiff's common-law negligence and Labor Law §§ 200 and 241(6) claims (motion sequence 005). Plaintiff moves for summary judgment on the issue of liability with respect to his Labor Law §§ 200, 240(1), and 241(6) claims (motion sequence 006).

STANDARD

Summary judgment is a "drastic remedy" (*Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]), and the movant "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 Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once the proponent of the motion meets this requirement, "the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). If there is any doubt as to the existence of triable issues of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]; *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224 [1st Dept 2002]).

When deciding a summary judgment motion, the Court's role is solely to determine if

any triable issues of fact exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders v Ceppos,* 46 NY2d 223, 231 [1978]).

DISCUSSION

I. *Plaintiff's Common-Law Negligence and Labor Law § 200 Claims*

Labor Law § 200 is a codification of the common-law duty of an owner or general contractor to maintain a safe worksite (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311 [1981]). Claims involving Labor Law § 200 generally fall into two broad categories: those where workers are injured as a result of the methods or manner in which the work is performed, and those where workers are injured as a result of a defect or dangerous condition existing on the premises (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]).

Where an accident is the result of a contractor's or worker's means or methods, it must be shown that a defendant exercised actual supervision and control over the activity, rather than possessing merely general supervisory authority (*Mitchell v New York Univ.*, 12 AD3d 200 [1st Dept 2004]); *Reilly v Newireen Assoc.*, 303 AD2d 214 [1st Dept 2003]). Generally, monitoring, coordination, and oversight of the timing and quality of the work, as well as a general duty to supervise the work and ensure compliance with safety regulations, are insufficient to trigger liability under Labor Law § 200 (*see Vasiliades v Lehrer McGovern & Bovis*, 3 AD3d 400 [1st Dept 2004]; *Dalanna v City of New York*, 308 AD2d 400 [1st Dept 2003]).

Where the accident is the result of a dangerous or defective condition at the worksite, it

must be shown that the owner or contractor either caused the dangerous condition, or failed to remedy a dangerous or defective condition of which it had actual or constructive notice (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]). "The notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken" (*Mitchell v New York Univ.*, 12 AD3d at 201). Supervision and control need not be proven where the injury arose from a dangerous condition at the worksite (*see Murphy v Columbia Univ.*, 4 AD3d 200 [1st Dept 2004]).

Defendants argue that plaintiff's common-law negligence and Labor Law § 200 claims should be dismissed because the evidence establishes that (1) defendants did not have direct supervision or control over the means or methods of plaintiff's work, and (2) defendants did not cause, or have actual or constructive knowledge of, the dangerous condition that caused plaintiff's injury, i.e., the placement and use of an unsecured piece of plywood as a work platform atop the hole. In support of their first contention, defendants point to plaintiff's deposition testimony that plaintiff took his work instructions solely from Horizon's foreman, and that Horizon provided all of the tools and safety equipment that plaintiff used on the job. In support of their second contention, defendants point to plaintiff's deposition testimony that he and Bando placed the plywood over the open hole only hours before the accident, and that plaintiff did not observe anyone else entering into the area after such time.

Plaintiff argues that defendants' motion for summary judgment should be denied, and that his motion for summary judgment as to liability on this cause of action should be granted, because there is evidence that Alchemy supervised plaintiff's work, and had actual or constructive knowledge of the dangerous condition at the premises. In support of his contentions, plaintiff points to the deposition testimony of Rodriguez, that Alchemy supervised the construction and work of the subcontractors at the site and conducted weekly safety meetings with the subcontractors' foremen, and that Rodriguez walked through the site

approximately five times each day and had the authority to stop work if he observed unsafe work practices. Plaintiff additionally notes Rodriguez's testimony that it was Alchemy's responsibility to place and secure plywood over any open holes, and to check and make sure that plywood had been placed securely over the holes prior to any work on installing the pipes and air ducts. Plaintiff also proffers certain safety reports, prepared by Alchemy's safety manager, which indicate that uncovered or improperly secured plywood was a recurring problem at the construction site. At the very least, plaintiff argues that this evidence is sufficient to raise a triable issue of fact as to defendants' liability.

To obtain summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claim, the burden is on defendants "to demonstrate, beyond a material issue of fact, that [they] bore no responsibility for plaintiff's accident" (*see Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 493 [1st Dept 2012]). Specifically, defendants must "show that [they] did not exercise any authority over the means and methods of plaintiff's work, or that, to the extent the accident arose out of a dangerous condition on the premises, [they were] not liable for the condition" (*id.*, citing *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d at 148).

Here, although there is evidence that defendants had general supervisory control over the construction site and the authority to stop unsafe work practices, there is no evidence that defendants exercised direct supervision or control over the methods and manner of plaintiff's work. There also is no evidence that defendants knew that plaintiff was working on a piece of unsecured plywood placed over the open hole. There is, however, evidence that Alchemy walked through the premises at least five times a day looking for dangerous conditions, knew that Horizon was working on the 16th floor that day, and knew that uncovered or improperly covered holes were a recurring problem at the premises. There also is evidence that it was Alchemy's responsibility to cover a hole prior to work involving the installation of a pipe, and, that the hole through which plaintiff fell was not covered when plaintiff arrived at the job site that

day. The evidence is sufficient to give rise to an issue of fact whether defendants had the requisite notice of a dangerous condition, i.e., an uncovered opening in the floor, in time to do something about it. Accordingly, defendants' motion for summary judgment to dismiss this cause of action, as well as plaintiff's motion for summary judgment on this cause of action, are both denied.

II. *Plaintiff's Labor Law § 240(1) Claim*

Labor Law § 240(1) imposes absolute liability upon owners and general contractors who fail to fulfill their statutory obligation to furnish or erect safety devices adequate to give proper protection to a worker who sustains gravity-related injuries proximately caused by such failure (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509 [1991]; *Bland v Manocherian*, 66 NY2d 452 [1985]). Specifically, Labor Law § 240(1), also known as the Scaffold Law, provides, in relevant part:

> "All contractors and owners and their agents ... 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" (*id.*).

The statute was enacted 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*'" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], quoting *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 501 [1993]). In order to accomplish its goal, the statute places responsibility for safety practices and safety devices on owners, contractors, and their agents, who are "best situated to bear that responsibility" (*Ross*, 81 NY2d at 500). The statute is to be liberally construed to achieve this purpose (*see Lombardi v Stout*, 80 NY2d 290, 296 [1992]).

For liability to attach under Labor Law § 240(1), "'the owner or contractor must breach

the statutory duty . . . to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries'" (*Kerrigan v TDX Constr. Corp.*, 108 AD3d 468, 471 [1st Dept 2013], quoting *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]). Thus, to prevail on this claim, plaintiff must show (1) a violation of the statute (i.e., that defendants breached their nondelegable duty to furnish or erect, or cause to be furnished or erected, safety devices in a manner that gave him proper protection from gravity-related risks); and (2) that the statutory violation was a contributing or proximate cause of the injuries sustained *(see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287-289 [2003]). Upon making such a showing, "[t]he burden then shifts to defendant[s] to establish that 'there was no statutory violation and that plaintiff's own acts and omissions were the sole cause of the accident'" (*Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [1st Dept 2008], quoting *Blake*, 1 NY3d at 289 n. 8). "If defendant[s'] assertions in response fail to raise a fact question as to these issues, the plaintiff must be accorded summary judgment" (*Blake*, 1 NY3d at 289 n.. 8). Contributory or comparative negligence is not a defense to absolute liability under the statute (*Jamison v GSL Enters.*, 274 AD2d 356 [1st Dept 2000]; *Johnson v Riggio Realty Corp.*, 153 AD2d 485 [1st Dept 1989]).

Plaintiff has met his burden of establishing prima facie entitlement to summary judgment on his Labor Law § 240(1) claim. Here, the gravity-related risk was a sizable hole in the floor that had been made to accommodate the piping and duct work on which plaintiff was working. Our courts repeatedly have held that section 240(1) is violated when workers fall through unprotected floor openings (*see Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446 [1st Dept 2013]). Liability will attach where safety equipment that could have prevented the injury either was not provided or was inadequate to protect the worker *(see Misseritti v Mark IV Constr. Co.*, 86 NY2d 487 [1995]).

In support of his motion, plaintiff has presented evidence that, when he arrived at the

work site that day, the hole was completely uncovered and there was no place to secure the safety harness that his employer had provided for working around such openings. As a result, plaintiff was injured when the unsecured plywood, which he admits to have assisted in placing over the hole as a makeshift platform, collapsed or shifted, causing plaintiff to fall.

Defendants argue that plaintiff's summary judgment motion should be denied, because it was plaintiff's creation and use of the unsecured plywood platform, which then collapsed, that was the proximate cause of his accident. Defendants argue that there was no violation of Labor Law § 240(1), because plaintiff was furnished with all necessary and adequate safety devices, and unreasonably chose not to use them. In support of this contention, defendants point to plaintiff's deposition testimony that he was provided with a safety harness that he used almost daily. Defendants also submit the transcript of an interview with Cowen, that had been conducted by an investigator hired by defendants' attorneys (*see* Ryan Affirm. in Opposition, exhibit 1). In that interview, which defendants characterize as a "sworn statement," Cowen indicates that Horizon used the type of anchors in shafts that required a worker to drill a hole and place the anchor, which would then open up in the wall. Cowen indicates that drills and anchors were available at the premises, and that plaintiff could have obtained a drill and anchor with which to create his own secure anchorage for his harness, but did not do so.

Defendants have failed to establish, through admissible evidence, an issue of material fact whether plaintiff was the sole proximate cause of the accident. To defeat plaintiff's motion for summary judgment on this cause of action, defendant must establish "that plaintiff 'had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured'" (*Kosavick*, 50 AD3d at 288, quoting *Cahill*, 4 NY3d at 40).

As an initial matter, although defendants have characterized the interview with plaintiff's

foreman as a "sworn statement," there is no indication, within or outside the interview transcript, that the statement was "sworn," and thus should be considered anything other than inadmissible hearsay. In any event, even if the Cowen transcript were properly admissible as evidence, Cowen states merely that equipment to drill and place secure anchors was available. Nowhere does Cowen state that plaintiff ever was directed or instructed to drill and secure his own anchorage for the harness when none was available, that plaintiff knew he was expected to use that equipment, or that plaintiff explicitly refused to use such equipment (*see Tounkara v Fernicola*, 80 AD3d 470 [1st Dept 2011]; *Kosavick*, 50 AD3d at 289; *see also Durmiaki v International Bus. Machs. Corp.*, 85 AD3d 960, 961 [2d Dept 2011]). Our courts have rejected the proposition that generic statements as to the availability of safety devices are sufficient to create an issue of fact that a plaintiff knew he was expected to use that equipment, that he unreasonably chose not to, and, thus, that he was the sole proximate cause of his injury (*see Kosavick* 50 AD3d at 289; *see also Gallagher v New York Post*, 14 NY3d 83, 88-89 [2010]).

Labor Law § 240(1) imposes liability regardless of any contributory or comparative negligence on the part of plaintiff (*see Romanczuk v Metropolitan Ins. & Annuity Co.*, 72 AD3d 592 [1st Dept 2010]). Thus, where a violation of the statute is a contributing cause of an accident, any negligence on the part of the plaintiff cannot be deemed solely to blame for it, and cannot defeat the plaintiff's claim (*Blake*, 1 NY3d 280, 290; *Ernish v City of New York*, 2 AD3d 256, 257 [1st Dept 2003]). Here, plaintiff has established that he was subjected to an elevation-related risk while working, and that the failure to provide him with adequate safety devices was a contributing or proximate cause of his injuries. Accordingly, plaintiff has established that he is entitled to summary judgment as to liability on his Labor Law § 240 claim.

III. *Plaintiff's Labor Law § 241(6) Claim*

Labor Law § 241(6) "imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers" *(Comes v New*

York State Elec. & Gas Corp., 82 NY2d 876, 878 [2003]), and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (*Ross*, 81 NY2d at 501). To sustain a cause of action under section 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable given the circumstances of the accident, and that sets forth a concrete standard of conduct rather than a mere reiteration of common-law principles (*id.*).

In his verified bill of particulars, as supplemented by his amended verified bill of particulars, plaintiff has identified violations of Industrial Code sections 12 NYCRR 23–1.7(b)(1)(i) and (iii), 23–1.15(c), 23–1.16(b), and 23–1.20(c), as the bases for his section 241(6) claim.

Defendants argue that plaintiff's Labor Law § 241(6) claim should be dismissed because the Industrial Code provisions cited by plaintiff provide no basis for liability under this statute, and/or, did not proximately cause plaintiff's accident. Plaintiff in opposition argues that his motion for summary judgment should be granted as to liability with respect to the asserted violations of Industrial Code provisions 12 NYCRR 23-1.7(b)(1)(i) and (iii), and 23-1.16(b). For the following reasons, defendants' motion to dismiss plaintiff's Labor Law § 241(6) cause of action is denied.

Industrial Code provision 12 NYCRR 23-1.7(b)(1), which pertains to hazardous openings, provides:

> (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).
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> ***
>
> (iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows:
>
> (a) Two-inch planking, full size, or material of equivalent strength installed not more than one floor or 15 feet, whichever is less, beneath the opening; or
>
> (b) An approved life net installed not more than five feet beneath the opening; or

> (c) An approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage (*id.*).

Industrial Code provision 12 NYCRR 23-1.16(b), which pertains to safety belts, harnesses, tail lines, and lifelines, provides:

> (b) Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet (*id.*).

Defendants argue that section 23-1.7(b)(1)(i) is inapplicable to the facts of this case, because this section only applies to openings at a surface level into which a plaintiff could step and fall, and not to the duct work into which plaintiff fell, which was located several feet below the surface level. However, as there is evidence that plaintiff fell into the duct work only after falling through the opening over which there was "no substantial cover fastened in place," the Court finds that this Code provision is applicable to the facts of this case.

Defendants argue that section 23-1.7(b)(1)(iii) is inapplicable to the facts of this case, because this section only applies where a worker is working near the edge of an opening. Defendants argue that since plaintiff and his colleague had covered the opening by placing the pieces of unsecured plywood, they were no longer working at the edge of an opening. However, there is evidence that the work that plaintiff was to perform was close to the edge of an opening in the floor, and that none of the protections specified and itemized in this code provision were provided, and as such the provision is applicable to the facts of this case.

Defendants argue that section 23-1.16(b) is inapplicable to the facts of this case, because this section, which sets the standards for safety belts, harnesses, tail lines and lifelines, only applies where no harness or safety belt was provided, or where the harness or safety belt was faulty. Defendants argue that, in this case, the evidence establishes that

plaintiff was provided with a harness which he chose not to use and thus, there was no violation of the statute. The provision at issue, however, also makes reference to the attachment of the harness, and the availability and arrangement of secure anchorage on which to attach the harness or safety line. As plaintiff has presented evidence that his harness was inadequate because there was no place to attach or anchor the harness, the Court finds that this Code provision is applicable to the facts of this case (*see e.g. Bellreng v Sicoli & Massaro, Inc.*, 108 AD3d 1027, 1030 [4th Dept 2013] [12 NYCRR 23–1.16(b) implicated where plaintiff was not attached to the lifeline at the time of his fall when moving to a new work area, inasmuch as plaintiff testified that the safety devices were inadequate for him to complete his work because they did not afford him access to the entire roof]).

However, insofar as plaintiff bases his Labor Law § 241(6) claim on violations of Industrial Code sections 12 NYCRR 23-1.15(c) and 12 NYCRR 23-1.20, the Court agrees that these sections do not provide a basis on which to impose liability under this statute, and as such are dismissed. Industrial Code provision 12 NYCRR 23-1.15(c), which sets the standards by which safety railings and toe boards are to be constructed, is inapplicable to the facts of this case, as no safety railings or toe boards were provided (*see Dzieran v 1800 Boston Rd., LLC*, 25 AD3d 336, 337 [1st Dept 2006]). Industrial Code section 12 NYCRR 23-1.20(c), which pertains to the protection of chute openings, also is inapplicable to the facts of this case, as the courts have held that the "chute" contemplated by this section "is in the nature of a conduit used to remove materials and debris from elevated levels of a structure" (*see Curley v Gateway Comm., Inc.*, 250 AD2d 888, 891-892 [3d Dept 1998]). Thus, this section is inapplicable to the opening or the air duct at issue here.

Finally, plaintiff's motion for summary judgment as to liability on his Labor Law § 241(6) claim, insofar as it is based on defendants' alleged violations of Industrial Code provisions 12 NYCRR 23–1.7(b)(1)(i) and (iii), and 23–1.16(b), is denied. Unlike Labor Law § 240(1),

comparative or contributory negligence is a defense to liability under Labor Law § 241(6) (*Misicki v Caradonna*, 12 NY3d 511 [2009]; *Rizzuto v L.A. Wenger Constr. Co.*, 91 NY2d 343, 350 [1998]). As plaintiff has failed to make a prima facie showing that he was free from contributory or comparative negligence, he is not entitled to summary judgment on this cause of action.

Accordingly, it is

ORDERED that the portion of defendants' motion for summary judgment to dismiss plaintiff's common-law negligence and Labor Law § 200 claims (motion sequence 005) is denied; and it is further,

ORDERED that the portion of defendants' motion for summary judgment to dismiss plaintiff's Labor Law § 241(6) claims for violations of the New York State Industrial Code 12 NYCRR 23–1.7(b)(1) (i) and (iii), 23–1.15(c), 23–1.16(b), and 23–1.20(c) (motion sequence number 005) is granted to the extent that violations of Industrial Code sections 12 NYCRR 23-1.15(c) and 12 NYCRR 23-1.20 are dismissed, but is otherwise denied; and it is further,

ORDERED that plaintiff's motion for summary judgment as to liability on his Labor Law §§ 200, 240(1), and 241(6) claims (motion sequence number 006), is granted solely with respect to plaintiff's Labor Law § 240(1) claim, and the motion is otherwise denied; and it is further,

ORDERED that plaintiff is directed to serve a copy of this Order with Notice of Entry upon the defendants and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: Oct. 21, 2013

Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**