At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 11th day of December, 2018.

P R E S E N T:
HON. CARL J. LANDICINO,
Justice.

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JOSE CASILARI and MAGALI CASILARI,
Plaintiff,

- against -

ZACHARY F. CONDON,
Defendant.

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Index No.:514206/2015

DECISION AND ORDER

Motion Sequence #3

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	1/2,
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This is an action to recover damages for personal injuries allegedly sustained by the Plaintiff Jose Casilari (hereinafter "Plaintiff Casilari") on October 5, 2013, while he was working at a property owned by Defendant Zachary F. Condon (hereinafter "the Defendant"). The property was located at 22 Sharon Street, Brooklyn, N.Y. (hereinafter "the Property").[1] In their complaint, the Plaintiffs allege that on the day of the accident Plaintiff Casilari was working as a painter at the Property when he fell through an exposed and unprotected hole in a wooden deck, to the floor ten feet below. The Plaintiffs allege in their complaint that the Defendant was negligent in his actions. What is more, the Plaintiffs allege that the Defendant failed to comply with the provisions of Sections 200, 240 and 241(6) of the Labor Law of the State of New York.

[1] Plaintiff Magali Casilari, the spouse of Plaintiff Jose Casilari, makes a claim for loss of services (Plaintiffs' Fifth Cause of Action).

The Defendant now moves (motion sequence #3) for an order pursuant to CPLR 3212 granting summary judgment in his favor and dismissing all causes of action as against him. Specifically, the Defendant argues that the Defendant is entitled to summary judgment pursuant to the "homeowner's exemption" to Labor Law §§240(1) and 241(6). What is more, the Defendant argues that Plaintiffs' causes of action pursuant to Labor Law §200 and under common law negligence must be dismissed as the Plaintiffs' work was supervised by his employer, non party Elvis Jonathan Quinn, and the Defendant had no direction or control over the Plaintiff's work.

In opposition to the Defendant's motion, the Plaintiffs argue that the motion should be denied as the Defendant did not meet his *prima facie* burden. First, the Plaintiffs contend that the Defendant is not entitled to a homeowners' exemption under Labor Law §200. Second, the Plaintiffs argue that the Defendant improperly moves for summary judgment on the Plaintiff's Labor Law §200 and common law negligence claims. Plaintiffs contend that the Defendant solely relies upon the "means and method" legal standard rather than the "defective premises" condition legal standard in support of his motion. Specifically, the Plaintiffs contend that for the Defendant to establish his *prima facie* burden, as it relates to Labor Law §200 and common law negligence, the Defendant would have to show that he lacked actual and/or constructive notice of the alleged defect or hazard. Finally, the Plaintiffs argue that, in any event, there is an issue of fact created by the affidavit of non-party Orly Amendano, Plaintiff Jose Casilari's co-worker, relating to whether the Defendant had actual or constructive knowledge of the condition at issue.

As an initial matter, the Plaintiffs do not otherwise oppose the Defendant's motion as it relates to the dismissal of the Plaintiffs' Labor Law §§240(1) and 241(6) claims. Accordingly, the remainder of this Decision and Order will relate to the Plaintiffs' Labor Law §200 and common

law negligence claims. The Defendant's motion is granted as it relates to Labor Law §§240(1) and 241(6) claims. The Plaintiffs did not oppose the motion in relation to these claims. *See Allan v. DHL Exp. (USA), Inc.*, 99 A.D.3d 828, 832, 952 N.Y.S.2d 275, 280 [2nd Dept, 2012].

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Labor Law § 200

Labor Law §200 "is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe construction site." *Rizzuto v. L.A. Wenger Contracting Co.*, 91 N.Y.2d 343, 352, 693 N.E.2d 1068, 1073 [1998]. " Cases involving Labor Law §200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed." *Ortega v. Puccia*, 57 A.D.3d 54, 61, 866 N.Y.S.2d 323, 329 [2nd Dept, 2008]. "Where a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, an owner may be held liable in common-law negligence and under Labor Law § 200 if it had control over the work site and either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident." *Azad v. 270 5th Realty Corp.*, 46 A.D.3d 728, 730, 848 N.Y.S.2d 688, 690–91 [2nd Dept, 2007]. What is more, "[u]nlike Labor Law §§ 240 and 241, § 200 does not contain any single- and two-family homeowners' exemption." *Ortega v. Puccia*, 57 A.D.3d 54, 61, 866 N.Y.S.2d 323, 329 [2nd Dept, 2008].

Turning to the merits of the Defendant's motion in relation to the Plaintiffs' Labor Law §200 claim, the Court finds that the Defendant, as the owner of the building at issue, has not provided sufficient evidence to establish his *prima facie* burden in relation to the dismissal of Plaintiffs' claim. The Defendants argue that they cannot be held liable for the Plaintiff Casilari's injuries pursuant to Labor Law §200, given that they did not supervise or control the work of the Plaintiff. However, the Defendant fails to address Plaintiffs claim in relation to an alleged dangerous condition. "Where, as here, a plaintiff contends that an accident occurred because a dangerous condition existed on the premises where the work was being undertaken, an owner

moving for summary judgment dismissing causes of action alleging common-law negligence and a violation of Labor Law § 200 must make 'a prima facie showing that it neither created the dangerous condition nor had actual or constructive notice of [it].'" *Doto v. Astoria Energy II, LLC*, 129 A.D.3d 660, 663, 11 N.Y.S.3d 201, 205 [2nd Dept, 2015], *quoting Costa v. Sterling Equip., Inc.*, 123 A.D.3d 649, 997 N.Y.S.2d 704 [2nd Dept, 2014].

In the instant proceeding, the Defendant argues that he did not have supervisory authority over the Plaintiff but he does not present any evidence that he did not have actual or constructive notice of the condition at issue. Therefore, the Defendant has failed to meet his *prima facie* burden. *See Rodriguez v. BCRE 230 Riverdale, LLC*, 91 A.D.3d 933, 935, 938 N.Y.S.2d 146, 149 [2nd Dept, 2012].

Even assuming, *arguendo*, that the Defendant had established that he did not have actual or constructive notice of the condition at issue, the affidavit of Orly Amendano, who was also employed at the Premises by non-party Elvis Jonathan Quinn, is sufficient to create an issue of fact as to whether the Defendant had actual or constructive notice of the condition at issue. In his affidavit, Mr. Amendano states that "I complained to my employer, Mr. Quinn, and to the owner, Mr. Condon, about the dangerous condition of the opening in the deck during the one month period before Mr. Casilari's accident. (See Plaintiffs' Affirmation in Opposition, Exhibit A, Paragraph 8).[2] This testimony is sufficient to raise a triable issue of fact as to whether the Defendant had constructive notice of a dangerous premises condition. As a result the instant motion is denied. *Ventimiglia v. Thatch, Ripley & Co., LLC*, 96 A.D.3d 1043, 1047, 947 N.Y.S.2d 566, 571 [2nd Dept, 2012].

[2] The Defendant argues in reply that Orly Amendano's Affidavit should be precluded in that Amendano was not identified as a witness in Plaintiffs' response to Defendant's witness demand. However, Mr. Amendano's name was mentioned by Plaintiff Casilaro a number of times during Plaintiff Casilaro's deposition (November 7, 2016). Further, the affidavit does not directly contradict Plaintiff Casilaro's testimony. For these reasons, the Defendant is not prejudiced by its use.

Based upon the foregoing, it is hereby Ordered that:

Defendant's motion (motion sequence #3) is granted solely to the extent that the Plaintiff's cause of action based upon Labor Law §240(1) and Labor Law §241(6) are dismissed. The Plaintiffs remaining claims shall continue.

The foregoing constitutes the Decision and Order of the Court.

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DEC 24 2018
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Carl J. Landicino
Justice Supreme Court