At a Special Term of the Supreme Court,
held in and for the County of Erie at Buffalo,
New York on the 3rd day of June, 2019.

PRESENT: HON. FRANK A. SEDITA, III, J.S.C.
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

JAMES HEALY,

Plaintiff,

vs.

EST DOWNTOWN, LLC
c/o FIRST AMHERST DEVELOPMENT GROUP,

Defendant.

AMENDED ORDER

Index #: 805232/2017

The defendant, EST Downtown, LLC c/o First Amherst Development Group, by it's attorneys the Law Offices of John Wallace, having moved this Court for an Order dismissing Plaintiff's Complaint; and the plaintiff, James Healy, by his attorneys Dolce Panepinto, P.C., having moved this Court for an Order of Summary Judgment; and said motions duly come on to be heard,

NOW, upon reading defendant's Notice of Motion dated March 27, 2019 together with the Affirmation of James J. Navagh, Esq., dated March 27, 2019, with attached exhibits and Memorandum of Law in support of said motion; and the affidavit of Benjamin Obletz sworn to March 26, 2019 with exhibits A through C in support of defendant's motion; and upon reading Plaintiff's Notice of Motion dated March 28, 2019 together with the supporting Affirmation of Anne M. Wheeler, Esq. dated March 28, 2019, with attached exhibits A through Q and

Memorandum of Law; and upon reading plaintiff's Opposing Affirmation of Anne M. Wheeler, Esq. dated April 26, 2019; and upon reading defendant's Opposing Affirmation of James J. Navagh, Esq. dated April 29, 2019 with exhibits A through C, and upon reading Defendant's Reply Affirmation of James J. Navagh, Esq. dated May 10, 2019; and after hearing Dolce Panepinto, PC., Marc C. Panepinto, Esq., counsel for the plaintiff, and Law Offices of John Wallace, James J. Navagh, Esq., counsel for the defendant; and after due deliberation thereon, and in accordance with the Decision of June 3, 2019, the transcript of which is attached hereto as **Exhibit A** ; it is hereby

ORDERED, that plaintiff's motion is GRANTED to the extent that it seeks a finding of liability against defendant pursuant Labor Law §240(1); and it is further

ORDERED, that plaintiff's motion is GRANTED to the extent that it seeks a finding striking the affirmative defense that the claim is barred by Section 11 of the Workers' Compensation Law based on a theory that the plaintiff's employer is an "alter ego" of the defendant; and it is further

ORDERED, that defendant's motion is DENIED to the extent that it seeks to dismiss the Labor Law §240(1) cause of action and to the extent that it seeks a dismissal of the action based on Section 11 of the Workers' Compensation Law; and it is further

ORDERED, that defendant's motion is GRANTED to the extent that it seeks a dismissal of the Labor Law §§ 200 and 241(6) and common law negligence causes of action;

SO ORDERED.

Hon. Frank A. Sedita, Jr., J.S.C.

GRANTED: July 22, 2019

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STATE OF NEW YORK : SUPREME COURT
COUNTY OF ERIE : PART 30

JAMES HEALY,

Plaintiff,

-vs- Index No. 805232/2017
MOTION

EST DOWNTOWN, LLC
c/o FIRST AMHERST DEVELOPMENT
GROUP,

Defendant.

Erie County Court Building
50 Delaware Avenue
Buffalo, New York 14202
June 3, 2019

B e f o r e:

HONORABLE FRANK A. SEDITA, III.
Supreme Court Justice

A p p e a r a n c e s:

MARC C. PANEPINTO, ESQ.
Appearing for the Plaintiff

JAMES A. NAVAGH, ESQ.
Appearing for the Defendant

ASHLEY OVERHOLT, NYACR, NYRCR
Senior Court Reporter

(Proceedings commenced at 1:59 p.m.)

THE CLERK: This is the matter of Healy versus EST Downtown LLC, Index number 805232/2017. Counselors, please state your appearance for the record.

MR. PANEPINTO: Marc Panepinto, for the plaintiff, James Healy.

MR. NAVAGH: James Navagh, for the defendant.

THE COURT: Good afternoon, Counsel. You can remain seated. I'm going to put some things on the record to sort of frame the record. Then at the appropriate time, I will invite oral argument. If you wish to make oral argument, please stand and address the Court at that moment, and hopefully I can make some rulings today.

Before the Court are several summary judgment motions -- mainly defendant EST Downtown LLC's motions for summary judgment -- as to the plaintiff's claims under Labor Law 240 subdivision 1, 241 subdivision 6, and 200.

There's also plaintiff's motion for partial summary judgment with respect to his claim under Labor Law 240 subdivision 1.

And both parties have made a summary judgment motion regarding the so-called alter ego affirmative defense.

By way of background, this is a so-called scaffold law case involving a falling worker. The essential facts are as follows:

First Amherst Development Group -- First Amherst, I'll refer to them as -- is a property management and maintenance company that manages both commercial and residential properties.

First Amherst was established, approximately, 60 years ago.

In 2014, the company was owned by Benjamin Obletz, O-B-L-E-T-Z, and several Obletz family trust.

EST Downtown LLC -- I'll call that EST, from here on forward -- is a limited liability corporation established in 1999 for the sole purpose of ownership of the Lofts at Elk Terminal, 250 Perry Street, in the City of Buffalo.

The Lofts at Elk Terminal is a commercial property. They have both residential and commercial space.

EST is owned by -- or at least was owned by Benjamin Obletz.

EST contracted with First Amherst for property management and maintenance of the Lofts at Elk Terminal. EST paid maintenance and service fees to First Amherst for the services.

Plaintiff is or was employed as a maintenance

worker for First Amherst.

Plaintiff's job duties included performing daily maintenance tasks at various properties, as well as responding to specific work orders to address specific problems and issues at various properties including the Lofts at Elk Terminal.

The maintenance shop for First Amherst is located in the basement of the Elk Terminal building, and that is where the plaintiff reported to work each day.

On May the 16th, 2014, the plaintiff responded to a work order at the Lofts at Elk Terminal. The work order was submitted by a commercial tenant with a specific complaint.

The tenant complained that a bird had burrowed into the gutter through a hole, about six inches by six inches, and there was an excess of bird excrement soiling the entryway to the tenant's shop.

Plaintiff had an eight-foot stepladder and a work truck and responded to the area of affected gutter. He intended to remove the bird's nest from the gutter, and then repair the hole in the gutter with sheet metal.

The plaintiff set up his ladder on the concrete dock flooring outside of the affected tenant's shop below the affected gutter. Plaintiff testified he used this particular ladder, because it was the proper

elevation for the job.

The plaintiff also testified that he tapped the bottom of the gutter, and the area of the bird's nest multiple times in an effort to dislodge the bird.

After several taps with no result or response, the plaintiff reached his hand into the gutter to pull the bird or the nest out.

Plaintiff describes what happened next as follows -- and I quote from his testimony:

The bird flew out, startled me, and the ladder walked. I lost my balance and fell backwards onto the concrete and landed on my right hip and elbow.

And further in this regard, the plaintiff also testified, quote, when the bird flew out and startled me, my body shifted on the ladder, and the ladder walked from underneath of me from its original position, and I fell backwards, close quote.

The plaintiff's lawsuit sets forth causes of action under Labor Law 240 subdivision 1; Labor Law 200, and general negligence; and Labor Law Section 241 subdivision 6.

As previously noted, defendant EST moves for summary judgment seeking to dismiss the plaintiff's claims under Labor Law 240 subdivision 1, 241 subdivision 6, and 200.

The defendant also moved for summary judgment in favor on its alter ego, affirmative defense.

Defendant EST's principal arguments or contentions are as follows:

One, that plaintiff's Labor Law 240 sub 1 claim should be dismissed because he was merely engaged in routine maintenance at the time of the accident.

Two, that plaintiff's Labor Law 241 sub 6 claim should be dismissed because there was no violation of the New York State Industrial Code.

Three, that plaintiff's Labor Law 200 and/or general negligence claims should be dismissed because there was no dangerous condition, let alone one which the defendant either created or of which it had notice, in other words, no proof of premises liability.

Four, all of the plaintiff's claims under the Labor Law should be dismissed under the Workman's Compensation Law, because defendant EST was merely an alter ego of the defendant -- plaintiff's employer, First Amherst, thus limiting any plaintiff recovery to that of Workman's Compensation.

The plaintiff opposes all the relief requested by the defendant and moves for summary judgment in his favor, on his Labor Law 240 subdivision 1 claim, as well as the question of whether EST is merely or was merely

the alter ego of First Amherst.

Plaintiff's principal contentions are as follows:

One, that he has established liability as a matter of law on his 240 sub -- 240 sub 1 claim, because he was engaged in work covered by the statute and a violation of that statute was a proximate cause of the accident.

Two, that an issue of fact exists regarding whether the New York State Industrial Code was violated, thus barring summary judgment in defendant's favor under Labor Law 241 subdivision 6.

Three, that there exists an issue of fact regarding premises liability, thus barring summary judgment in the defendant's favor under Labor Law Section 200.

And four, EST was not the alter ego of First Amherst.

Defendant EST opposes the affirmative relief requested by the defendant.

I'll invite oral argument. I'll limit it to ten minutes.

Mr. Navagh, you struck first, right?

MR. NAVAGH: That's right, Your Honor.

THE COURT: You get to go first.

MR. NAVAGH: Thank you. Thank you.

Thank you for summarizing the posture accurately.

We have fairly extensive papers. I think

everything was covered pretty well in the papers. I think that the positions and the arguments are fairly simple.

I will review, you know, the highlights of my -- of my argument, and my position, but --

THE COURT: If you can do it in ten minutes you will. Go ahead.

MR. NAVAGH: I may not need it. We'll see. I don't want to jinx myself.

Essentially, the main position is this is routine maintenance, and it's routine maintenance for several reasons. It -- essentially, it's -- the -- it's talking about the scaffolding that the scaffold law -- specifically 240 subdivision 1, it lists several categories, and if it's protected work under one of those categories, then 240 subdivision 1 potentially applies. I think the argument is it's either repair or it's cleaning, and those are two of the categories.

Again, this is addressed in the papers. Our position is it's not -- this is not cleaning. Removing a nest from a gutter is not cleaning.

I cited several cases where the Courts address cleaning a gutter and saying that's not the type of industrial cleaning that's covered by 240 subdivision 1.

Mr. Panepinto has -- in his papers, or papers from

his office by Anne Wheeler, she talks about the fact that this isn't cleaning leaves out of a gutter.

THE COURT: Look, I'm not too worried about cleaning. My focus on 240 subdivision 1 is routine maintenance, not so much cleaning.

MR. NAVAGH: Okay. Well, it seems to me that the heart -- the heart of that argument, is that this is a repair, and there's several issues about this, so I think the -- maybe the biggest issue is that the Second Department seems to have addressed this -- a mirror image of this case, and said, if you've got a gutter that's functional, and an animal is burrowing in it, and you have to patch that, put -- you know, cut out sheet metal and patch it up, that's not routine -- that is routine maintenance; it's not a repair. It's not a repair, because it's not broken. It's a functional gutter. The water is flowing through it, and the Court specifically addressed the question of, if you're putting patches on there, isn't that a repair.

The Court said, well, you're basically just replacing a component part.

And I think I cited some of the cases, but essentially, there's cases that say, if you're replacing something that wears down over time, like a belt or a light bulb or something, that's -- that's replacement of

a component part; it's not a repair.

That's what the Second Department said. Okay?

The question is, what's different about this case.

The answer is, there's nothing different. They were both at a height. They both involved animals making holes or going in holes. The holes were the same size. I think if you -- I think that the clearer answer is that it's routine maintenance, because the Second Department has already addressed this, and for the reasons that they relied on, it's routine maintenance.

Now, I think that the -- there's a wealth of evidence that indicates that he never really intended to patch those holes.

He -- there was a work order, and the work order was something that he had to sign out when he was finished, so a couple months after this incident he signed out; he said, bird's nest removed, completed, so --

We have his -- his accident report, where he says he was taking out a bird's nest, and we have the job order saying job completed, bird's nest removed, and that's inconsistent with his deposition testimony, and there just seems to be no other evidence from anybody.

But the point is, really, that the second -- we don't really need that part, because this Court is --

you know, has to follow the precedence of the Second Department as to whether this is routine maintenance.

Another point --

THE COURT: I was intending to follow the precedence of the Fourth Department on that issue, but --

MR. NAVAGH: If there's a Fourth Department case that conflicts with the Second Department, the -- the appellate -- the rule is that this Court is bound by the Court of Appeals, any decisions by the Fourth Department, and if there's no decisions by the Fourth Department, then -- then precedence --

THE COURT: Counsel, I'm aware of the rules of stare decisis. I understand.

MR. NAVAGH: Correct. That was my point. I never implied that this Court wasn't bound by the Fourth Department.

So in any event, I think there's a question about whether there's a violation, or whether there's any proof of a violation of Labor Law 240 subdivision 1, because every fall from a height is not covered by 240 subdivision 1.

There has to be -- plaintiff has to establish that the fall was caused by a violation of the statute, which would be a failure to provide an adequate safety device.

The plaintiff's testimony is that he had an eight-foot ladder to do this job -- it was an adequate device -- and that he fell, because a bird startled him, and as a result, his body moved; the ladder fell, and so there was no failure to provide an adequate safety device. Again, that's the plaintiff's own testimony.

So I think for those reasons -- I think there's some subtleties to those arguments, but I think they've been addressed in detail in the papers. I don't --

As far as the alter ego argument, my position is that the case law, essentially, lists a number of criteria that the Courts will look at, and it's something of a sui generis decision. It's not necessary to establish to -- a checkmark after each one, and my position is that there's enough of a similarity that the alter ego applies, but I don't have anything more to say about alter ego.

I think I'm done. I don't know if I finished with time to spare.

THE COURT: You've got time to spare, Mr. Navagh.

MR. NAVAGH: Good.

THE COURT: Mr. Panepinto is not getting it.

MR. PANEPINTO: All right, Judge.

THE COURT: It's 2:16, Mr. Panepinto.

MR. PANEPINTO: I will be briefer than that.

I'm going to take the arguments in reverse order that Mr. Navagh dealt with.

The alter ego defense, the Buchwald case, which is a Fourth Department case, 2018, is very clear. If we have companies that have separate purposes, separate tax ID numbers, separate bank accounts, file separate tax returns, they're separate companies. If we follow the Buchwald decision, the alter ego defense won't apply.

As to the violation, I think Your Honor captured the violation when he talked about in his recitation of the facts, that -- the testimony is, the ladder walked. And in the Fourth Department, a walking ladder case is prima facie evidence that the ladder did not achieve its core function, and so it was not properly operated or placed, so the ladder walking deals with the 240 decision.

I would agree with Mr. Navagh, that the most difficult thing for the Court to deal with is the covered-work issue. And the covered-work issue, we relied primarily on the theory of -- that the work that Mr. Healy was doing was ancillary to a larger alteration and repair project.

And I rely on Mr. Navagh's papers, when he basically admits in paragraph I of his affirmation, he

says, sometime before the accident the area of the gutter around the downspout had rotted out, and water leaked out of the gutter.

To correct this problem, a roofing contractor was hired to line the original gutter with a water-tight membrane on top of the gutter. The membrane made the gutter functional; however, the holes in the gutter below the membrane were never repaired.

Mr. Healy goes out there that day to fix the holes in the gutter that the roofing contractor did not repair, and that's how the bird infiltrated the bottom of the gutter, and the functionality of the gutter is really not dispositive, and if we look at the Azad case, which is a Second Department case, which Mr. Navagh relies on, the Azad Court cites a standard that's different than the Fourth Department.

They say that for this to be routine maintenance, only that the gutter needs to be inoperable.

Well, if we look at the Court of Appeals -- or the Bissell decision from the Fourth Department, the Bissell decision in 2006 lays out -- operability, malfunction, or not working properly are the three standards for repair, and a gutter is not working properly if there's a hole in the bottom of it that a bird can get up into, but more than that, it's not -- it's an alteration to

the structure of the building by putting the rubber membrane in that Mr. Healy was there to complete that day.

I think there's a distinction from Azad. They cite a wrong premise.

We provided the Court with the briefs on that last Friday. We apologize for that late submission, but we wanted to get those briefs, and we really --

THE COURT: So it's your contention it's an improperly working gutter?

MR. PANEPINTO: Correct, and that it's answering an order. Your Honor, the Azad case is really an outlier that would not have been decided the same way in the Fourth Department, and with that, I'll sit down, Your Honor.

THE COURT: Thank you, Mr. Panepinto.

So we'll start with the general, and then move to the specific claims and issues that are before the Court. We'll spend a little bit of time. There's a lot to unpack here.

Summary judgment permits a party to show by affidavit or other evidence that there is no material issue of fact to be tried, and that judgment may be directed as a matter of law, Brill versus City of New York, 2 NY3d 648. The proponent of summary judgment

motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any genuine, material issues of fact.

Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment, to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact, which require a trial of the action, Alvarez versus Prospect Hospital, 68 NY2d 320; however, summary judgment can neither be awarded nor defeated on the basis of conclusory assertions. In contrast, of course, to evidentiary facts, Lopez versus Senatore, S-E-N-A-T-O-R-E, 65 NY2d 1017.

So starting with the parties' motions and contentions regarding Labor Law Section 240 subdivision 1, that statute imposes a nondelegable duty upon contractors and owners to furnish or erect suitable devices to protect workers who are engaged in, quote, the erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure, close quote.

In order to be entitled to summary judgment in his favor, the plaintiff must, therefore, demonstrate that the work he was performing was, one, covered by the

statue, and two, that a statutory violation was a proximate cause of the accident.

Regarding the former, the critical inquiry in determining coverage under the statute is what type of work the worker was performing at the time of the injury.

Buckmann, B-U-C-K-M-A-N-N, versus State, 64 AD3d 137, Fourth Department 2009, it is well settled that the statute does not however apply to routine maintenance in a nonconstruction, nonrenovation context. Ozimek, O-Z-I-M-E-K, versus Holiday Valley Inc, 83 AD3d 1414, Fourth Department case in 2011, quote, delineating between routine maintenance and repairs is frequently a close, fact-driven issue, and the distinction depends on whether the item being worked on was inoperable or malfunctioning prior to the commencement of the work. Pieri, P-I-E-R-I, versus B&B Welch Associates, 74 AD3d 1727, Fourth Department case from 2010, that case also held that when the plaintiff is troubleshooting an uncommon malfunction, that activity is also protected under Labor Law Section 240 subdivision 1.

So it is uncontroverted that the plaintiff was dispatched to address the issue of a bird burrowed in a gutter causing excrement falling in the gutter. As opposed to routine gutter cleaning or routine gutter

repair occasioned by normal wear and tear, the plaintiff's task to rid the gutter of a foul fowl and to repair the hole and the improperly working gutter was akin, in the Court's opinion, to troubleshooting an uncommon malfunction. Accordingly, the Court finds that the plaintiff has demonstrated that he was engaged in covered work under Labor Law 240 subdivision 1.

The Court also finds that the violation of Labor Law 240 subdivision 1 was, at least, a proximate cause of the injury. Accordingly, plaintiff has made a requisite prima facie showing for summary judgment in its favor on the issue of liability.

Now the burden shifts.

It is well settled that once the plaintiff establishes both elements -- statutory violation and proximate cause -- a claim of contributory negligence cannot defeat the plaintiff's claim under Labor Law 240 sub 1; however, the defendant may still defeat plaintiff's entitlement to summary judgment by raising an issue of fact about whether the plaintiff's own conduct was the sole proximate cause of the accident. See Weitzel, W-E-I-T-Z-E-L, versus State, 160 AD3d 1394, Fourth Department case from 2018. More specifically, the defendant must establish that the ladder utilized by the plaintiff was the improper device or was misused or

misplaced by the plaintiff. See Kipp versus Marinus, M-A-R-I-N-U-S, Homes, Inc, 162 AD3d 1673, Fourth Department case from 2018.

The defendant contends because the plaintiff was startled by a bird, he must be the sole proximate cause of the fall. Such an argument is merely a non sequitur fallacy. It's a nonsec. One does not flow from the other, logically.

Additionally, this argument fails to take into account the plaintiff's testimony regarding the movement of the ladder.

The defendant has thus failed to demonstrate that there is a genuine issue of fact as to whether plaintiff's own conduct was the sole proximate cause of the fall.

Accordingly, summary judgment is granted in plaintiff's favor on the issue of liability under his Labor Law 240 subdivision 1 claim.

Next, let's consider the claim under -- motions under Labor Law 241 subdivision 1. Regarding plaintiff's claims under this statute, this statute imposes a nondelegable duty of care upon owners and contractors to provide reasonable and adequate protection to workers under various provisions of the New York State Industrial Code.

A plaintiff must be able to prove a specific violation of the Industrial Code, that the violation was a failure to use reasonable care, and that it was a proximate cause of the plaintiff's injury.

The plaintiff seeks summary judgment --

The defendant contends that the plaintiff has failed to offer any proof of an Industrial Code violation. In other words, the plaintiff's allegations in his complaint, and I guess amplified in his Bill of Particulars, are completely and entirely devoid of any factual support, whatsoever.

The plaintiff contends that there is sufficient evidence to at least raise an issue of fact, specifically, what's most concentrated on in the motion papers was an issue of fact under 12 NYCRR 23-1.21 subdivision B, paragraph 4, subparagraph II, that that regulation was violated. That regulation reads as follows:

Quote, general requirements for ladders. All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings.

Plaintiff's contention that there was an issue of fact -- whether this regulation was violated -- is premised upon an OSHA -- the Occupational Safety and

Health Act regulation, which -- and I quote from the plaintiff's papers -- expressly contemplates concrete as a slippery surface, close quote.

It's an interesting argument; however, there is no actual evidence in the record that the concrete surface was slippery at the time of the plaintiff's fall, nor is there any evidence that the ladder footings were not firm.

In other words, the plaintiff's contention rests not upon evidentiary fact, but upon conclusory assertion and, really, theory.

The Court finds the defendant has made a prima facie case for summary judgment in its favor, and that the plaintiff has failed to raise an issue of fact.

Accordingly, defendant's motion for summary judgment resulting in dismissal of plaintiff's Labor Law 241 subdivision 6 claim is granted.

Labor Law 200 and general negligence. Labor Law Section 200 is a codification of the common law duty of owners and general contractors to provide workers on a job site with a safe place to work.

To establish a violation of Labor Law Section 200, plaintiff must prove that his injury arose from, one, the means and methods used, and that this defendant maintained authority and control over those means and

methods; or two, that the injury was caused by a dangerous condition on the premises of which defendant had actual or constructive notice.

The Court finds the defendant has made a prima facie showing that neither of these theories are applicable. In other words, the defendant has demonstrated that EST did not maintain control over the work performed by the plaintiff, and there was no dangerous condition.

The plaintiff contends that there is an issue of fact as to whether a dangerous condition on the property resulted in the plaintiff's incident. OSHA standards contemplate a concrete surface as a slippery surface for the purpose of ladder use. There is a question of fact as to whether the slippery nature of that surface contributed to the plaintiff's ladder shifting and walking, thereby contributing to his fall.

That's the plaintiff's contention.

I think the plaintiff's argument fails to consider, however, once again, there is no actual evidence, whatsoever, of any slippery surface occurring at the time of the plaintiff's fall.

The plaintiff has thus failed to raise an issue of fact as opposed to -- good theory, maybe, but fails to raise an issue of genuine fact, and defendant's motion

for summary judgment on Labor Law 200 is, therefore, granted.

Finally, the defendant's alter ego affirmative defense. As a general rule, when employees are injured in the course of their employment, their sole remedy against their employer lies in their entitlement to recovery under the Workers' Compensation Law, and the protection against lawsuits brought by injured workers. This also extends to entities which are alter egos of the entity which employs the plaintiff. Buchwald, B-U-C-H-W-A-L-D, versus 1307 Porterville Road, LLC, 160 AD3d 1464, Fourth Department case in 2018. That case held as follows -- and I quote, a defendant may establish itself as the alter ego of a plaintiff's employer by demonstrating that one of the entities controls the other; or, that the two operate as a single integrated entity. Factors relevant to the determination of that issue include whether the two entities share common purpose, have integrated or commingled assets, share a tax return, are treated by the owners as a single entity, share the same insurance policy, and share managers, or are owned by the same person.

Additional factors include whether the alter ego has any employees, whether the alter ego leases property

pursuant to a written lease, or pays rent to the plaintiff's employer, and whether one entity pays the bills for other, even if those bills are for the benefit of the nonpaying entity, close quote.

In this case, the defendant has alleged an alter ego affirmative defense and contends the plaintiff's claim is barred by the Workers' Compensation Law.

Plaintiff moves for summary judgment and seeks dismissal of this alter ego affirmative defense. In this regard, plaintiff highlights that defendant EST was established in 1999 for the sole purpose of owning the Lofts at Elk Terminal. By contrast, First Amherst Development Group -- which is the employer -- was formed 60 years earlier as a property management company which maintains several commercial and residential properties. Both companies share a common owner, but both entities are also owned by separate trusts. Both companies file separate tax returns, maintain separate bank accounts. EST Downtown contracted with First Amherst for property maintenance services and pays for those services.

Some of the -- some of the proof in this case -- the defendant opposes the plaintiff 's motion for summary judgment and moves for summary judgment on its own behalf, arguing that EST is an alter ego of First Amherst.

The defendant's argument focuses on two factors -- that both companies share an insurance policy, and that EST has only one employee -- to support that contention. The defendant basically ignores all the other factors discussed by the Court in Buchwald, which is a Fourth Department case, 2018.

The Court finds that the plaintiff has met his burden, and the defendant has failed to meet its burden on summary judgment. As to whether the defendant has, nonetheless, sufficiently raised an issue of fact to defeat summary judgment in the plaintiff's favor, while it is true that both companies share an insurance policy, there is no actual evidence to the effect that one of the entities controls the other, or that the two operate as a single integrated entity. To make that conclusion would be speculative.

The Court, therefore, finds that defendant has failed to raise a genuine issue of fact regarding whether defendant EST is the alter ego of defendant First Amherst.

More simply put, the Court finds that EST and First Amherst are separate and distinct entities and do not qualify as alter ego or mirror corporations as a matter of law.

Accordingly, plaintiff's motion for summary

judgment resulting in dismissal of the alter ego affirmative defense is granted. Defendant's motion in this regard is denied.

To recap and review, plaintiff's motions regarding -- plaintiff's motion for summary judgment in its favor regarding Labor Law 240 subdivision 1, granted.

Regarding dismissal of alter ego defense, granted.

Defendant's motion regarding dismissal of Labor Law 240 subdivision 1, denied.

Dismissal of Labor Law 241 subdivision 6, granted. Dismissal of Labor Law 200, granted.

Alter ego defense, denied.

Jury selection is scheduled for September 5th through 6th of 2019.

The next appearance is scheduled at least for a final pretrial conference on August the 23rd of 2019. We usually have them at 11:00. It's probably at 11:00.

If the parties want to set up a settlement conference or contemplate a return date before the final pretrial conference of August 23rd, I would strongly urge you to stop next -- stop by next door to my chambers and see my law clerk, Kristin St. Mary, in that regard.

MR. PANEPINTO: Thank you, Your Honor.

THE COURT: She's available.

Mr. Panepinto, I think -- I don't -- I don't know. I haven't -- I haven't counted who -- who -- I haven't done the ledger. Mr. Panepinto, I'm directing you to submit the proposed order within two weeks with a transcript attached.

(Discussion held off the record.)

THE COURT: Gentlemen, anything else we need to do?

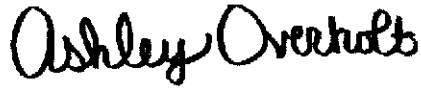
MR. NAVAGH: I think that covered it.

MR. PANEPINTO: Thank you, Your Honor.

THE COURT: Thank you.

(Proceedings concluded at 2:38 p.m.)

I hereby certify that the foregoing is a true and accurate transcription of the proceeding.



ASHLEY OVERHOLT, NYACR, NYRCR
SENIOR COURT REPORTER