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

**PRESENT:** HON. DAVID B. COHEN **PART** 58

*Justice*

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KENNETH FUNDUS and TERESA FUNDUS,

Plaintiffs,

- v -

MICHAEL SCAROLA, JOSEPH ALFIERI, CAROL CUDDY, MWS RIGGING CONSULTANTS LLC, ROGER PARADISO, MICHAEL TADROSS, COLUMBIA PICTURES INDUSTRIES, INC., ASTORIA STUDIOS INCORPORATED, ASTORIA STUDIOS LIMITED PARTNERSHIP, ASTORIA STUDIOS LIMITED PARTNERSHIP II, KAUFMAN ASTORIA STUDIOS, INC., GREENWICH STREET PRODUCTIONS, INC., AMBLIN' ENTERTAINMENT, INC., AMBLING MANAGEMENT COMPANY, LLC, AMBLING PROPERTY INVESTMENTS, LLC, MEN IN BLACK, INC., JOHN DOE 1-10, XYZ, INC. 1-10, and XYZ, LLC 1-10,

Defendants.

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**INDEX NO.** 156032/2014

**MOTION SEQ. NO.** 002, 003, and 004

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 135, 136, 175, 176, 177, 178, 179

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 180, 183

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 181, 182

were read on this motion to/for JUDGMENT - SUMMARY.

In this negligence and Labor Law action commenced by Kenneth Fundus ("plaintiff") and Teresa Fundus ("Mrs. Fundus") (collectively "plaintiffs"):

1) defendants Roger J. Paradiso, Michael Tadross, and Greenwich Street Productions, Inc. ("Greenwich") move (mot. seq. 002), pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims against them;

2) plaintiffs move (mot. seq. 003), pursuant to CPLR 3212, for summary judgment: a) on their first cause of action (negligence) against defendants Greenwich, the Stop & Shop Supermarket Company ("Stop & Shop"), and M&M Holding Company ("M&M"); b) on their third cause of action (Labor Law § 200) against defendant Astoria Studios Limited Partnership II ("ASLP II"); c) on their third cause of action (Labor Law § 240[1]) against ASLP II; d) on their fourth cause of action (Labor Law § 241[6], as predicated upon violations of 12 NYCRR §§ 23-6.1[c][1] and 23-6.1[h]) against ASLP II; and e) for such other and further relief this Court deems just and proper;

3) defendants Michael Scarola, Joseph Alfieri, Carol Cuddy, Columbia Pictures Industries, Inc. ("Columbia"), Amblin' Entertainment Inc. ("AEI"), MWS Rigging Consultants LLC ("MWS"), Astoria Studios Incorporated ("ASI"), Astoria Studios Limited Partnership ("ASLP"), ASLP II, and Kaufman Astoria Studios, Inc. ("Kaufman") move (mot. seq. 004), pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims against them.

After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motions, which are each opposed, are decided as follows.

**FACTUAL AND PROCEDURAL BACKGROUND**

This case arises from an incident on June 20, 2011 in which plaintiff Kenneth Fundus was allegedly injured during the course of his employment as a construction grip when he was struck in the head by a piece of movie scenery he was dismantling at Kaufman Astoria Studios ("KAS"), located at 34-12 36th Street in Astoria, New York.[1] The scenery had been used to film a scene in a movie entitled Men in Black 3 ("MIB 3" or "the film").

Plaintiffs commenced the captioned action by filing a summons and complaint against Scarola, Alfieri, Cuddy, MWS, Paradiso, Tadross, Columbia, ASI, ASLP, ASLP II, Kaufman, Greenwich, AEI, Ambling Management Company, LLC ("AMC"), Ambling Property Investments, LLC ("API"), Men In Black, Inc. ("MIB"), John Doe 1-10, XYZ, Inc. 1-10, and

[1] A construction grip assists in building and dismantling movie sets and in packing and unpacking parts of sets from storage.

XYZ, LLC 1-10 on June 19, 2014. Doc. 1. As a first cause of action, plaintiff alleged that he was injured due to the negligence of defendants. Doc. 1 at 42-46. As a second cause of action, plaintiff alleged that defendants violated Labor Law § 200. Doc. 1 at 46. As a third cause of action, plaintiff alleged that defendants violated Labor Law § 240 (1). Doc. 1 at 46-47. As a fourth cause of action, plaintiff alleged that defendants violated Labor Law § 241 (6). Doc. 1 at 47. As a fifth cause of action, Mrs. Fundus claimed a loss of consortium. Doc. 1 at 48.

In April 2014, approximately two months prior to the commencement of the captioned action, plaintiffs commenced a separate action in this Court ("the initial action"), under Index Number 154030/14, against Scarola, Alfieri, Cuddy, MWS, Paradiso, Tadross, Columbia, Stop & Shop, FNS, M&M, Ahold Lease, U.S.A., Inc., Ahold U.S.A., Inc., Ahold USA Administrative Services LLC, Greenwich, AEI, AMC, API, and Men In Black, Inc. In the initial action, plaintiff alleged that, on April 26, 2011, he was injured while loading wood, which was to be used during the production of MIB 3 at Kaufman, onto a truck in Yonkers, New York. Doc. 29.[2] In the complaint in the initial action, plaintiffs asserted the same five causes of action as those herein.

Paradiso, Tadross and Greenwich joined issue in the captioned action by filing their answer on August 27, 2014, in which they denied all substantive allegations of wrongdoing and cross-claimed against their codefendants for contribution and common-law indemnification. Doc. 22.

Scarola, Alfieri, Cuddy, Columbia, and AEI joined issue by filing their answer, dated September 8, 2014, on October 14, 2014. Doc. 25. In their answer, said defendants denied all substantive allegations of wrongdoing, asserted various affirmative defenses, and cross-claimed

[2] Although the initial action was commenced in April 2014, the Request for Judicial Intervention in the captioned action, filed January 6, 2015, does not mention any related action. Doc. 27.

against Paradiso, Tadross, Stop & Shop, M&M, AMC, and API for contribution and contractual and common-law indemnification. Doc. 25.[3]

On February 16, 2015, plaintiffs moved for a joint trial of the initial action and the captioned action. By order filed April 8, 2015, this Court (Mills, J.) granted the motion. Doc. 41.[4]

MWS joined issue by filing its answer on July 2, 2015. Doc. 48. In its answer, MWS denied all substantive allegations of wrongdoing, asserted various affirmative defenses, and cross-claimed against Paradiso, Tadross, Stop & Shop, M&M, Ahold Lease, U.S.A., Inc. AMC, and API for contribution and common-law and contractual indemnification. Doc. 48.

**Deposition Testimony of Plaintiff**

In April 2011, plaintiff began working as a construction grip on MIB 3 at Kaufman.[5] Doc. 117 at 20-21, 27, 36. He was on the construction team at the set and his duties included building and dismantling sets for the film, which was produced by Columbia. Doc. 117 at 21-22, 29, 33. He believed that his employer was Entertainment Partners ("EP"), which issued his paychecks. Doc. 117 at 22, 30-31. EP prepared daily reports reflecting who was at the site and who did which

[3] For reasons which cannot be discerned from the motion papers, the same defendants filed an identical answer, dated October 7, 2015, on August 2, 2016. Doc. 53.

[4] Although some of the parties represent in their motion papers that the captioned action was "consolidated" for joint trial with the initial action, this is incorrect. Justice Mills' order did not even mention the words "consolidated" or "consolidation." Rather, the actions maintained their separate identities, as evidenced by the fact that neither caption was changed and Justice Mills directed that "notes of issue and statements of readiness [be filed] in each [action]." Doc. 26. Unfortunately, however, the parties have created some unnecessary confusion herein by treating the actions as if there had been a true consolidation. Specifically, some of the summary judgment motions in the captioned action address issues pertaining to the April 2011 accident as well as the June 2011 accident. Since the captioned action involves only allegations arising from the June 2011 accident, this decision will only address claims relating to that incident. The summary judgment motions pertaining to claims arising from the April 2011 incident have been addressed in a decision and order in the initial action filed November 24, 2021. Docs. 253-256 filed under Ind. No. 154030/14. In an attempt to rectify any confusion and ensure that all claims regarding both incidents are addressed, this Court directed the parties to file all their summary judgment motions in both the initial action and the captioned action. Nevertheless, further confusion has been created since some of the motion papers have not been filed on NYSCEF under the correct motion sequence number.

[5] Although plaintiff was certain that he worked on Men in Black II (Doc. 117 at 21), and the questions at his deposition therefore referred to a film by that name, he appears to have been mistaken. However, there is no dispute that plaintiff worked on the production of a "Men in Black" film at Kaufman in June 2011.

job, and provided him with workers' compensation insurance, which he received after the incident. Doc. 117 at 105-106, 162-164. However, EP did not direct his work. Doc. 117 at 31.

Plaintiff's supervisor, Michael Scarola, was the head construction grip on the film and he provided machinery to the site. Doc. 117 at 23-25, 28. According to plaintiff, Scarola rented equipment, including the hoist used on June 20, 2011, to Columbia through his company, MWS. Doc. 117 at 34, 108-109. Plaintiff received instructions from Scarola and Alfieri, the construction coordinator. Doc. 117 at 28, 30-31, 62. Scarola reported to Alfieri and Alfieri reported to Cuddy, the construction manager. Doc. 117 at 32, 55. Cuddy in turn reported to Columbia, which was "in charge of managing the work of the production crew on [the] set", which included plaintiff. Doc. 117 at 55, 169-170. Plaintiff never heard of AEI. Doc. 117 at 34.

Although plaintiff testified that he was required to wear a hard hat at the site "any time [he did] anything", he then said that a hard hat was not required for every task he performed. Doc. 117 at 25-27, 56-57. He also said that a hard hat should be worn any time one works with an object being lowered from a height. Doc. 117 at 121-122. It was plaintiff's understanding that, if a hard hat was required for a particular task, then Scarola was obligated to provide him with one. Doc. 117 at 56-57. If he was not provided with a hard hat, he could have requested one, but did not do so during the time he worked on MIB 3. Doc. 117 at 57.

On June 20, 2011, Scarola directed plaintiff to dismantle a steel elevator which was part of a set at KAS, which had been built to resemble a launching pad, so that another set could be constructed in its place. Doc. 117 at 89-93. The set being disassembled was owned by Columbia. Doc. 117 at 110. A team of workers, including plaintiff, was standing on one side of a steel I-beam as it was lowered to the ground with blocks and falls (a type of pulley system) from a height of approximately 10 feet. Doc. 117 at 92-94, 97. The pulley system, which was owned by Scarola

and bore his initials, "MWS", was rented to Columbia. Doc. 117 at 108-109. It hoisted the beam from both ends and in the middle and three tag lines, including one held by plaintiff, were attached to the bottom of the beam at its ends and in the middle. Doc. 117 at 97, 99-100, 108-109, 115. The tag lines were used so that the beam "wouldn't hit other parts of the elevator or get snagged onto any other part of the set." Doc. 99-100. Plaintiff also explained that tag lines were used to prevent an object being hoisted from spinning. Doc. 117 at 101. Although plaintiff said that workers usually held tag lines on both sides of a beam being lowered, this was not the case that day. Doc. 117 at 100.

Nobody directed the crew to stay clear of the work area at the time the beam was lowered. Doc. 117 at 97. For reasons unknown to plaintiff, the beam began to spin as it was lowered, and he went "to the other side of it" by walking underneath it in an attempt to stop it from spinning. Doc. 117 at 98-101. Before he did so, he handed his tag line to another worker. Doc. 117 at 114. He intended to grab the beam to stop it from spinning. Doc. 117 at 101. He admitted that it was generally unsafe to walk under an item which was being lowered from a height. Doc. 117 at 114.

Although nobody instructed plaintiff to go from one side of the beam to the other, he maintained that he did so because "there should have been somebody there in the first place and there wasn't and it was just coming down fast and it was spinning" and, if he did not go to the other side of the beam, "[a] lot of other people were going to get hurt." Doc. 117 at 98-99. When he went to the other side of the beam, the edge of the beam struck him in the head. Doc. 117 at 98, 102. He admitted that the beam did not detach from any of the points at which it was hoisted and that it may have been possible to raise the beam back up despite the fact that it was spinning. Doc. 117 at 99, 104.

Plaintiff said that he had worked on movies with Paradiso and Tadross but that these individuals did not work on MIB 3. Doc. 117 at 132-134. He was not familiar with Greenwich and was unaware of any work it did on MIB 3. Doc. 117 at 134-135.

**Deposition Testimony of Paradiso**

Paradiso, a film producer, testified that Greenwich, a company formed to develop film projects and conduct other film-related business, operated a sound stage in Yonkers, New York. Doc. 85 at 9, 13-15. His partner and co-chair in Greenwich was Tadross. Doc. 85 at 22, 25-26. Paradiso had no involvement with MIB 3. Doc. 85 at 12.

**Deposition Testimony of Tadross**

Tadross, also a movie producer, testified that he and Paradiso were partners in Greenwich, which operated a sound stage in Yonkers, New York, but that he, too, had no involvement in the production of MIB 3. Doc. 86 at 9-10, 12.

**Deposition Testimony of Hal Rosenbluth of Kaufman**

Rosenbluth testified that KAS was located at 34-12 36th Street in Astoria, Queens. Doc. 118. KAS was not an actual incorporated entity, but rather a "d/b/a" for the partnerships which rented the property. Doc. 118 at 9. Stage E, one of the spaces used during the production of MIB 3, was owned by the City of New York and leased to ASLP II. Doc. 118 at 10, 12-13. ASLP II was owned by ASLP II and ASLP. Doc. 118 at 14-15. ASLP did not own any real property. Doc. 118 at 15. ASI, the managing partner of ASLP, owned nothing other than a percentage of ASLP II. Doc. 118 at 15-16.

Rosenbluth was president and CEO of Kaufman and, as of 2011, was a limited partner in ASLP. Doc. 118 at 15, 19. He said that Kaufman, the management company for ASLP II, was responsible for ensuring that things ran properly at KAS. Doc. 118 at 19. ASLP II entered into a

license agreement with Columbia pursuant to which Columbia rented Stage E at KAS and, as the film's production company, had sole control over how MIB 3 was made. Doc. 118 at 17, 20, 23, 30: Doc. 152. Cuddy was Columbia's production manager, Alfieri was its construction coordinator, and Scarola was its head grip. Doc. 118 at 99-100. Although Rosenbluth testified that AEI was a production company involved in MIB 3, he did not know its specific role in the production. Doc. 118 at 106.

Rosenbluth conceded that he did not have the expertise to determine whether a production company was operating in an unsafe manner so as to render a decision regarding whether its work should be stopped. Doc. 118 at 33. Kaufman did not conduct safety meetings and did not employ safety or construction managers. Doc. 118 at 35. Although two stage managers worked at KAS, they did not control the activities of production companies. Doc. 118 at 38. According to Rosenbluth, the construction of any structure on a set was the exclusive responsibility of the production company which, in the case of MIB 3, was Columbia. Doc. 118 at 43-44.

During the production of MIB 3, Columbia constructed a set built to look like a launching pad on Stage E. Doc. 118 at 26, 106. The set was made of steel. Doc. 118 at 106. Rosenbluth did not know the details of the plaintiff's June 2011 accident but recalled that, during that month, the set on Stage E was being dismantled. Doc. 118 at 53-55, 105.

Rosenbluth admitted that, when he walked through the set during the filming of MIB 3 he did not see any workers wearing hard hats. Doc. 118 at 60-61. He was unfamiliar with what equipment was used to build or dismantle sets during the production of MIB 3. Doc. 118 at 64.

**Deposition Testimony of Peter Romano of ASI, ASLP, ASLP II and Kaufman**

Romano, Vice-President of Operations at KAS, testified that he was an employee of ASLP II, that Rosenbluth was his boss, and that he worked on engineering matters at the studio. Doc. 119

at 15, 18-19, 27, 37.[6] He believed that KAS and ASLP II were the same company and that ASLP II owned the property located at 34-12 36th Street in Astoria. Doc. 119 at 23, 30-32, 73-74, 98-99. He did not know whether KAS was the same entity as Kaufman (Doc. 119 at 23-24); he never heard of ASI (Doc. 119 at 24); and he did not know whether ASLP was the same entity as ASLP II (Doc. 119 at 28).

According to Romano, MIB 3 was produced on Stages E and H at Kaufman. Doc. 119 at 56. He identified the January 25, 2010 license agreement between ASLP II and Columbia, pursuant to which MIB 3 leased Stage E in order to film MIB 3. Doc. 119 at 58-59, 74-75; Doc. 156. The license agreement expired December 31, 2010 but was subsequently extended through July of 2011. Doc. 119 at 75-78.

Romano had no reason to go to Stage E while MIB 3 was being filmed unless someone called his attention to a problem. Doc. 119 at 69. As of 2011, neither Kaufman nor ASLP II had personnel on, or in the vicinity of, the sound stage while a film was being produced. Doc. 119 at 84, 100.[7] He did not know whether Kaufman had the authority to shut down a production if it saw an unsafe condition, although he said that it had such authority in the case of a fire emergency. Doc. 119 at 84-86. Kaufman did not employ any safety personnel. Doc. 119 at 85.

Romano confirmed that Alfieri, the construction coordinator on MIB 3, was in charge of building the sets and props for the film. Doc. 119 at 89.

**Deposition Testimony of Thomas Clark**

Clark, a grip on the MIB 3 production, testified that he was with plaintiff, Mike Kappa, and two other people when the incident occurred. Doc. 124 at 14, 29-30, 82-83. According to

[6] He later testified that his employer was KAS and, after that said he did not know whether he was employed by Kaufman Astoria Studios or ASLP II. Doc. 119 at 99.
[7] He later testified that he did not know whether ASLP II has any employees present on the sound stage where MIB 3 was filmed. Doc. 119 at 103, 112.

Clark, plaintiff was injured during the removal of handrails from a three-story staircase built on the set of MIB 3. Doc. 124 at 29-31. The sections of handrail being removed were approximately 12 feet long and weighed approximately 100 pounds each. Doc. 124 at 31, 78-79. Clark advised his coworkers that the sections of handrail would be lowered using a motorized electric chain hoist, also known as a chain fall, so that nobody had to hold all of the weight. Doc. 124 at 33-34. He did not know who owned the device. Doc. 124 at 34.

At the beginning of the operation, which he supervised, Clark, who was at the bottom of the staircase, wrapped the handrail with a lifting strap about two-thirds of the way towards the top and attached it to the hook on the chain hoist. Doc. 124 at 36-37, 106-107. He told his coworkers that he would cut the three upright pieces supporting the handrail, which would cause it to tilt towards the bottom of the staircase, and that he would then grab it. Doc. 124 at 57-60. He told the other workers, who were standing on the second landing of the staircase, about 13-14 feet above the ground, to "stay back because everything [was] sharp" and that he would be the only one handling the railing after it was cut. Doc. 124 at 49-54, 106-107. He then intended to lower the railing down the 10" space between the sets of stairs. Doc. 124 at 54-55.

As Clark cut the third upright (the one highest up the stairs), he stepped onto the landing where the other men were standing. Doc. 124 at 57. After he made the cut, which was at "the very top step [just below the landing]", the railing came free and was connected to the chain fall. Doc. 124 at 52, 61. When Clark completed the cut his hand, which was holding the railing, started to move upwards and the other end of the rail fell into the space between the stairs. Doc. 124 at 62-64. At that time, three of the men, including plaintiff, were to his left, and one was to his right. Doc. 124 at 46, 57, 62. The men were there to help guide the railing down through the opening in the staircase. Doc. 124 at 75-76. Despite telling the others not to move, plaintiff, who was not

wearing a hard hat, ran between Clark and the handrail to the other side of the platform, where Kappa was standing, and hit his head on the bottom of the railing Clark had just cut. Doc. 124 at 28, 60, 63-65, 71-72, 108-112. The accident occurred seconds after the third cut was made. Doc. 124 at 62. Clark saw plaintiff's head bleeding after the occurrence but never asked him why he ran to the other side of the platform. Doc. 124 at 67, 111.

Clark admitted that no tag lines were used during the removal of the railing, although one could have been attached to it. Doc. 124 at 82-83, 94-95. He insisted that the railing did not spin and cause plaintiff's injury. Doc. 124 at 83. He conceded that the railing could have been cut into smaller sections and walked to the ground, but that his boss told him to take it down in sections in the manner he did because there was a "time constraint." Doc. 124 at 92-93. Clark also admitted that he had the ability to stop the work if a dangerous condition existed. Doc. 124 at 112-113.

Clark did not know who the "safety guy" was at the site but said he worked for, or was hired by, Columbia. Doc. 124 at 73. He believed that he was technically employed by the payroll company, which did not have the power to hire or fire him, but that one of his supervisors, Scarola, was able to. Doc. 124 at 99-100. The payroll company was not involved in the production. Doc. 124 at 104. Clark and plaintiff were supervised by Scarola and Tim Montgomery, who was second in charge. Doc. 124 at 28, 100-101; 110.

**Deposition Testimony of Paul Wardwell**

Wardwell, who performed metal work at the set, testified that EP was merely a payroll company which had no ability to fire him and no role in the production. Doc. 125 at 53-54.

**Deposition of John Clements of Columbia**

John Clements, an employee of Sony Pictures Entertainment, provided safety support and advice for that company's subsidiaries, such as Columbia. Doc. 128 at 10-18, 32, 78. Cuddy was

the unit production manager for Columbia, which produced MIB 3. Doc. 128 at 73. Clements was not always on a set when filming was in progress and said that site safety was generally the responsibility of the production company. Doc. 128 at 80.

**Deposition of Joseph Alfieri**

Alfieri testified that, beginning in March 2011, he was employed as a construction coordinator for EP, which was the "payroll disbursement" company for Columbia during the production of MIB 3. Doc. 126 at 14-17. In that role, he prepared construction budgets and oversaw construction for the film. Doc. 126 at 8-9, 15-16, 26. He supervised the construction grips, who installed sets built by carpenters. Doc. 126 at 53. He did not receive any paychecks from an entity other than EP while he worked on the film at three locations, including at KAS. Doc. 126 at 17-22. Alfieri believed that Kaufman owned the studio where plaintiff's accident occurred. Doc. 126 at 165.

Alfieri's production designer and art director controlled his work by telling him what he needed to do. Doc. 126 at 35-36, 46. His art director, who was hired by, and took direction from, Columbia, had the ability to fire him. Doc. 126 at 36. The producers of the film oversaw the entire production for Columbia "from beginning to end." Doc. 126 at 45. The producers also supervised Alfieri's work. Doc. 126 at 46.

Although EP paid all of the grips, it did not have the ability to terminate them. Doc. 126 at 33-34. Columbia had the ability to direct and control, and to hire and fire, the grips. Doc. 126 at 34-35. Scarola, the key construction grip, ran the grip department, which assembled sets, and directed the grips. Doc. 126 at 31- 32.

Alfieri said that plaintiff was his coworker on MIB 3 and that Scarola was the key grip or construction grip who worked for him on MIB 3. Doc. 126 at 61-63. Alfieri directed Scarola's

work. Doc. 126 at 65. Scarola hired plaintiff to work on MIB 3 as a grip to assist in constructing the sets. Doc. 126 at 65-66. Although Alfieri had the authority to direct plaintiff's work, he instead allowed Scarola to supervise plaintiff because Scarola was in charge of set construction. Doc. 126 at 70.

Although Cuddy was in charge of the entire production, her assistant, Patty Willet, supervised the construction crew. Doc. 126 at 73-75.

Scarola's company, MWS, rented tools to Columbia. Doc. 126 at 64. Alfieri did not know whether MWS provided any equipment in connection with MIB 3. Doc. 126 at 64.

According to Alfieri, the launching pad set was approximately 40' tall, was constructed out of I-beams and sheet metal, and had metal railings which were made of "tube or pipe." Doc. 126 at 56, 110-113. The steps and platforms of the structure, which had four levels and an elevator in the middle and weighed approximately 100,000 pounds, were made of plywood. Doc. 126 at 111-112.

Alfieri was not present at the time of plaintiff's accident on June 20, 2011 and did not know how many people were involved in the operation, which consisted of the dismantling of the launching pad set on Stage E. Doc. 126 at 107-108, 121, 126-127, 151-152. Doc. 126 at 126-127. Following the incident, Scarola advised Alfieri that plaintiff "hit his head" when he "walked into" the railing as it was being lowered. Doc. 126 at 104-106, 124. To his knowledge, the crew dismantling the set included Clark, plaintiff and Wardwell. Doc. 126 at 109. Following the incident, Alfieri spoke to Clark, a construction grip, who advised him that he (Clark) had advised the workers on the platform of the stairway to "stand back"; that there were tag lines on the railing being lowered; and that plaintiff walked into the railing. Doc. 126 at 106, 115. Additionally, Wardwell advised Alfieri that, after Clark told everyone to stand clear until the railing was

lowered, plaintiff came out of nowhere while the railing was being lowered and walked into the same. Doc. 126 at 170, 176-177.

According to Alfieri, Clements, who conducted safety meetings at the site approximately once every ten days, directed that all workers dismantling the set were supposed to wear hard hats and that plaintiff did not have one on. Doc. 126 at 106, 135-140. In fact, Alfieri maintained that plaintiff admitted after the incident that he had not been wearing a hard hat. Doc. 126 at 172. Although Alfieri believed that Clark was operating an electric hoist or chainfall at the time of the incident, the machine did not belong to Scarola although he (Scarola) ordered the hoist for the job. Doc. 126 at 115-117. Alfieri did not know whether Scarola was present at the time of the accident. Doc. 126 at 133.

Although the best boy had the authority to supervise the operation, the workers involved were "answerable" to him and Scarola. Doc. 126 at 152-154. According to Alfieri, he, Scarola, Scarola's "best boy" (assistant), and Clark all had the authority to stop the work if they deemed it unsafe. Doc. 126 at 161.

Alfieri identified an injury report reflecting that plaintiff was "[s]truck on [the] head with a steel railing that was being disassembled" on Stage E. Doc. 126 at 156. The report further indicated that plaintiff "was underneath the railing when it swung down and struck him in the head." Doc. 82; Doc. 126 at 157-158.

**Deposition of Michael Scarola**

Scarola testified at his deposition that, as key construction grip, he hired the construction crew which erected the sets, and also performed construction. Doc. 152 at 15-16, 22-23. Although he said he was hired by Columbia and Alfieri to work on MIB 3, his employer was EP, a payroll company which also employed Alfieri. Doc. 152 at 12-13. His foreperson, Montgomery, and Clark

"probably" directed the work involved in dismantling the set at the time of plaintiff's accident. Doc. 152 at 95-96.

Following plaintiff's accident, Clark told Scarola that, despite the fact that he (Clark) directed the members of the crew to stand back, plaintiff walked right into the railing being lowered. Doc. 152 at 89-90. He further stated that all of the grips were "given a hardhat and vest and that was theirs to keep." Doc. 152 at 113-114. Additionally, he said that members of the production crew wore hard hats while dismantling the set. Doc. 152 at 79-80, 95.

Scarola further testified that he was the sole member of MWS, which rented tools such as screw guns, drills, and small saws to Columbia. Doc. 152 at 100-102. MWS was not involved in the day-to-day production of the film and did not direct, control, manage, or supervise the production crew or any production-related activities. Doc. 143 at par. 3).

Plaintiff filed a note of issue and certificate of readiness for trial on September 23, 2020. Doc. 69. The same day, plaintiffs served an amended bill of particulars against Scarola, Alfieri, Cuddy, Columbia and AEI alleging, inter alia, that said defendants were negligent and violated sections 200, 240 and 241(6) of the Labor Law by allowing an improperly hoisted steel railing to strike plaintiff's head while he was working at Kaufman. Doc. 114. Plaintiffs claimed that the incident occurred because the railing twisted or swung because it was not properly hoisted and secured, and that plaintiff was injured because he was not provided with a hard hat. Doc. 114. Additionally, they claimed that plaintiff's claim pursuant to Labor Law § 241(6) was predicated on numerous sections of the New York State Industrial Code ("the Industrial Code"), including 23-6.1. Doc. 114.

On September 23, 2020, plaintiffs served an amended bill of particulars containing virtually identical allegations against ASI, ASLP, ASLP II, and Kaufman. Doc. 116.

The parties now move for the relief set forth above.

**Motion for Summary Judgment By Paradiso, Tadross, and Greenwich (Mot. Seq. 002)**

Paradiso, Tadross and Greenwich argue that they are not liable, in whole or in part, for plaintiff's accidents in April 2011 and June 2011. Doc. 73. In affidavits in support of the motion, they attest that Greenwich operated the sound stage in Yonkers but did own or operate Kaufman. Doc. 178.

Plaintiffs' arguments in opposition, as well as the arguments by Scarola, Alfieri, Cuddy, Columbia, AEI, MWS, ASI, ASLP, ASLP II, and Kaufman in partial opposition, relate solely to the April 2011 accident and will thus not be considered herein. Docs. 170, 179.

**Plaintiffs' Motion for Summary Judgment (Mot. Seq. 003)**

Plaintiffs move, pursuant to CPLR 3212, for summary judgment: a) on their first cause of action (negligence) against defendants Greenwich, Stop & Shop, and M&M; b) on their third cause of action (Labor Law § 200) against defendant ASLP II; c) on their third cause of action (Labor Law § 240[1]) against ASLP II; d) on their fourth cause of action (Labor Law § 241[6]), as predicated upon violations of 12 NYCRR §§ 23-6.1[c][1] and 23-6.1[h]) against ASLP II; and e) for such other and further relief this Court deems just and proper.

In support of the motion, plaintiffs argue that, as owner of the premises, ASLP II is absolutely liable for plaintiff's accident pursuant to Labor Law § 240(1) since the railing was improperly hoisted. Doc. 101. Specifically, argue plaintiffs, ASLP II failed to: 1) to use a hoist which provided proper protection; 2) utilize tag lines to secure the railing; and 3) provide plaintiff with a hard hat. Doc. 101.

Plaintiffs further allege that ASLP II is liable pursuant to Labor Law § 241(6) because it failed to comply with Industrial Code sections 23-6.1(c)(1) (requiring hoisting equipment to be

operated in a safe manner) and 23-6.1(h) (requiring that hoisted materials which tend to swing or turn freely be secured by tag lines). Doc. 101.

In support of the motion, plaintiffs submit the affidavit of Steven Schneider, P.E., an engineer licensed in New York. Schneider, who reviewed the pleadings, discovery demands and responses, and plaintiff's deposition transcript and affidavit in support of the motion, opines, inter alia, that ASLP II violated Labor Law § 240(1) by failing to provide him with proper safety devices, including a helmet, tag line, tag line personnel, and/or an appropriate hoisting device. Doc. 180. Schneider further opines that ASLP II violated Labor Law § 241 (6) by failing to comply with Industrial Code sections 12 NYCRR § 23-6.1 (c) (1) and 23-6.1 (h). Doc. 180.

Paradiso, Tadross, and Greenwich oppose the branch of plaintiffs' motion seeking liability in connection with the April 2011 accident on the ground that they did not cause or contribute to the same. Docs. 133, 181, 183. The said defendants also oppose the branch of the motion seeking to impose liability against them for the June 2011 accident, arguing that they had no connection to Kaufman or the production of MIB 3. Docs. 133, 181, 183.

In opposition, ASLP II argues that it is not liable pursuant to Labor Law § 200 because it did not control the means and methods of plaintiff's work or have notice of any dangerous condition at the site. Doc. 164. It further asserts that it cannot be liable because plaintiff was not engaged in activity protected by Labor Law §§ 240(1) or 241(6). Doc. 164. Specifically, it urges that Labor Law § 240(1) is inapplicable herein since plaintiff was not injured by a gravity-related risk and was not engaged in the demolition of a building or structure. Doc. 164. ASLP II argues that Labor Law § 241(6) is also inapplicable herein since plaintiff was not involved in the construction or demolition of a building. Doc. 144. Further, ASLP II maintains that 23-6.1(c)(1)

does not set forth a specific safety directive and is therefore an insufficient predicate for liability under Labor Law § 241(6), and that 23-6.1(h) is inapplicable herein. Doc. 144.

In reply, plaintiffs argue that ASLP II is absolutely liable pursuant to Labor Law § 240(1) because plaintiff was injured by a gravity-related risk while performing demolition work, and that ASLP II's failure to provide him with any safety devices at all constitutes a per se violation of the statute. Doc. 180. Plaintiffs also assert that Labor Law §241(6) is applicable herein since plaintiff was engaged in demolition at the time of the accident and that sections 23-6.1(c)(1) and 23-6.1(h) of the Industrial Code are sufficiently specific to invoke liability under the statute. Doc. 180.

**Motion for Summary Judgment By Scarola, Alfieri, Cuddy, Columbia, AEI, MWS, ASI, ASLP, ASLP II, and Kaufman (Mot. Seq. 004)**

Defendants Scarola, Alfieri, Cuddy, Columbia, AEI, MWS, ASI, ASLP, ASLP II, and Kaufman move (mot. seq. 004), pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims against them in connection with the April 2011 and June 2011 accidents. In support of the motion, the said defendants argue that the Workers' Compensation Law bars plaintiff's claims against Columbia, his special employer, as well as against his coworkers Scarola, Alfieri, and Cuddy. Docs. 138, 144. They further assert that ASI (managing partner of ASLP), ASLP (the majority owner of ASPL II) and Kaufman (the management company for ASLP II) cannot be liable herein since they committed no wrongdoing and had no contractual duty for the activities giving rise to plaintiff's injuries. Docs. 138, 144.

ASLP II, which allowed Columbia to use Stage E pursuant to a license agreement, argues that it cannot be liable pursuant to Labor Law § 200 because it did not control the means and methods of the operation during which plaintiff was allegedly injured. Docs. 138, 144. ASI, ASLP, and Kaufman also assert that they have no liability pursuant to this section for the same reason.

The movants also argue that they cannot be liable pursuant to Labor Law §§ 240(1) or 241(6) because plaintiff was not engaged in activity protected by those sections. Docs. 138, 144. Specifically, defendants assert that Labor Law § 240(1) is inapplicable because plaintiff was not working on a "structure" at the time of the incident and that Labor Law § 241(6) is inapplicable because he was not involved in the construction or demolition of a building. Doc. 144. Additionally, they assert that they did not violate a section of the Industrial Code which would serve as a predicate for plaintiff's claim pursuant to Labor Law § 241(6). Docs. 138, 144. Movants also maintain that the claims against MWS and AEI must be dismissed since those entities had no involvement in the production of MIB 3. Docs. 138, 144. Further, they contend that all cross claims against them must be dismissed since they did not breach any duty to plaintiff or codefendants. Doc. 144.

Alternatively, Scarola, Alfieri and Cuddy assert that the claims against them must be dismissed since they are not proper Labor Law defendants. Doc. 144.

Finally, the movants assert that they are not liable for the April 2011 accident. Doc. 144.

In support of the motion, the movants submit the affidavit of Andrew Given, Executive Vice President, Production, for Columbia. Doc. 139. Given represents that he was the production executive in charge of the production of MIB 3, and that Columbia, the film's production company, "through its employees, had operational control of technical personnel and facilities" while the film was being made. Doc. 139. He admitted that "Columbia supervised, managed and directed the work of the production crew and had the authority to fire, reprimand or discipline the members of the crew," including plaintiff, Cuddy, Scarola, and Alfieri. Doc. 139. Given further states that, although EP, a payroll company, issued plaintiff's check, Columbia reimbursed EP for the salary paid to plaintiff and supervised his work. Doc. 139.

Movants also submit the affidavit of Rosenbluth, who states that, in 2010, ASLP II entered into a license agreement with Columbia pursuant to which Columbia was permitted to use Stage E for the production of MIB 3. Doc. 140. The license agreement was subsequently extended and was in effect as of the date of the June 2011 accident. Doc. 140. Rosenbluth attests that Kaufman did not control, supervise, or manage any activities during the production of MIB 3, including those performed by plaintiff. Doc. 140.

Michael Rutman, Chief Financial Officer for AEI, submits an affidavit in which he attests that the said entity is "the loan out company for filmmaker Steven Spielberg" and that its services were provided during the production of MIB 3. Doc. 141. Rutman maintains that AEI did not control, supervise or manage any activities on the set of MIB 3, including those performed by plaintiff. Doc. 141.

Cuddy also submits an affidavit in support of the motion in which she attests that, during the production of MIB 3, she was under the supervision, direction and control of Columbia. Doc. 142. Her duties included, among other things, overseeing the production and scheduling, although she was not involved in the daily supervision and management of the construction crew, and that such supervision was the job of the head of the construction department. Doc. 142.

Scarola submits an affidavit in support of the motion in which he represents that he is the sole member of MWS, which rented tools to Columbia during the production of MIB 3. Doc. 143. According to Scarola, MWS was not involved in the day-to-day production of the film and did not manage, supervise or direct any production-related activities. Doc. 143. He confirmed his deposition testimony that Columbia was the production company, and that it controlled, supervised, managed, and directed the work of the production crew, including he and those who

reported to him. Doc. 143. Scarola further stated that Columbia assigned work to the production crew, made its schedule, and had the ability to hire and fire those on it. Doc. 143.

Plaintiffs oppose the motion, arguing that plaintiff's work fell within the scope of Labor Law § 240(1) since he was performing the demolition of a "structure". Doc. 179. They further assert that plaintiff's demolition work fell within the scope of Labor Law § 241(6) and that the claim pursuant to that statute is predicated on the violation of sections 23-6.1 (c) (1), 23-6.1 (h), and 23-1.8 (c) (1) (requiring that hard hats be provided to those exposed to the risk of falling objects or head bumping). Doc. 179.

Paradiso, Tadross and Greenwich oppose the motion by Scarola, Alfieri, Cuddy, Columbia, AEI and Kaufman in part, asserting that, if the motion by those movants is denied, then their cross claims against the said defendants should remain viable. Doc. 183.

## LEGAL CONCLUSIONS

**Summary Judgment Standard**

On a motion for summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once this showing is 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*, 68 NY2d at 324). A movant's "failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

**Motion for Summary Judgment By Paradiso, Tadross, and Greenwich (Mot. Seq. 002)**

Paradiso, Tadross and Greenwich argue that they are not liable for the April 2011 accident. Since the only claims and cross claims alleged in this action arise from the June 2011 accident, the branch of the motion seeking dismissal of all claims arising from the April 2011 accident is granted and those claims and cross claims are dismissed.

Paradiso and Tadross, the principals of Greenwich, testified that they had no involvement in the production of MIB 3. They also stated in their affidavits in support of the motion that Greenwich did not own, manage, or operate Kaufman. Thus, Paradiso, Tadross, and Greenwich have clearly established their entitlement to summary judgment dismissing all claims and cross claims against them arising from the June 2011 accident.

**Motion for Summary Judgment By Plaintiffs (Mot. Seq. 003)**

The branch of plaintiffs' motion seeking summary judgment on their negligence claim against Greenwich, Stop & Shop, and M&M is denied, since they have submitted no proof that any of these entities caused or contributed to plaintiff's June 2011 accident. Indeed, the claims against Greenwich are dismissed and Stop & Shop and M&M are not even parties to this action.

The branch of plaintiffs' motion seeking summary judgment against ASLP II on their third cause of action (Labor Law § 200) is denied. Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Two distinct standards are applicable to the statute, depending on whether the accident is the result of the means and methods used by a contractor to perform its work, or whether it is the result of a dangerous

condition at the premises (*see e.g. Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013]).

"Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work" (*Soller v Dahan*, 173 AD3d 803, 805 [2d Dept 2019], quoting *Sullivan v New York Athletic Club of City of N.Y.*, 162 AD3d 955, 958 [2d Dept 2018]; *see also LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]). Specifically, "liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012] [emphasis provided]). Where an injury arises from a dangerous condition at the premises, an owner or contractor may be liable in common-law negligence and under Labor Law § 200 if it created the dangerous condition or failed to remedy a dangerous or defective condition about which it had actual or constructive notice (*See Bradley v HWA 1290 III LLC*, 157 AD3d 627, 630 [1st Dept 2018] [citation omitted]).

Here, plaintiff was allegedly injured as a result of the means and methods used during the hoisting operation supervised by Clark, which was part of a production over which Columbia had complete control. Since plaintiffs submit no evidence that ASLP II supervised the operation in question, the branch of its motion seeking summary judgment against that entity pursuant to Labor Law § 200 is denied.

Plaintiffs have submitted evidence establishing their prima facie entitlement to summary judgment on their claim against ASLP II pursuant to Labor Law § 240 (1). That statute provides, in pertinent part, that:

> 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.

"Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . 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" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

Not every worker who falls at a construction site is afforded the protections of Labor Law § 240 (1), and "a distinction must be made between those accidents caused by the failure to provide a safety device [required by the statute] . . . and those caused by general hazards specific to a workplace" (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010]). Thus, to prevail on a claim pursuant to this section, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]).

Contrary to ASLP II's contention, the set being dismantled was a "structure" within the meaning of Labor Law § 240(1). A structure is "any production or piece of work artificially built up or composed of parts joined together in some definite manner" (*Joblon v Solow*, 91 NY2d 457, 464 [1998] [internal quotation marks omitted]). Whether an item is a "structure" requires an examination of "the item's size, purpose, design, composition, and degree of complexity; the ease or difficulty of its assembly and disassembly; the tools required to create it and dismantle it; the manner and degree of its interconnecting parts; and the amount of time the item is to exist" (*McCoy v Abigail Kirsch at Tappan Hill, Inc.*, 99 AD3d 13, 17 [2d Dept 2012]). Given that the set was approximately 40' tall, built of steel, sheet metal, and plywood, and required a crew to build and

dismantle it, it is evident that it was a "structure" within the meaning of the statute (*See Rutkowski v. New York Convention Ctr. Dev. Corp.,* 146 AD3d 686 [1st Dept 2017] [temporary exhibition booth at a trade show deemed a structure]).

Plaintiff testified that, at the time he was injured, the steel beam being lowered from a height of approximately 10 feet was coming down fast and spinning. He said that, although there were tag lines attached to the beam, the tag lines did not stop it from spinning because the members of the crew holding them were not located on opposite sides of the beam, as they usually were. When he tried to go underneath the beam to stop it from spinning, it struck him in the head. Since the beam was being lowered by a hoist at the time of the alleged accident, it "was a load that required securing for the purposes of the undertaking at the time it fell" (*Cammon v City of New York*, 21 AD3d 196, 200 [1st Dept 2005] [internal quotation marks and citation omitted]; *Mora v Sky Lift Distrib. Corp.*, 126 AD3d 593, 595 [1st Dept 2015]). Thus, plaintiff has established his prima facie entitlement to summary judgment on the Labor Law § 240 (1) claim against ASLP II, the lessee of KAS (*See Fraser v City of New York*, 158 AD3d 428 [1st Dept 2018] [plaintiff injured when chain fall was unable to support a load, which spun down and struck him, knocking him from the beam where he was working to the ground below]).

In opposition, however, ASLP II raises an issue of fact regarding whether plaintiff's actions constituted the sole proximate cause of the accident (*See Cahill*, 4 NY3d at 40 [2004]; *cf., Guanopatin v Flushing Acquisition Holdings, LLC*, 127 AD3d 812, 812-813 [2d Dept 2015]). In *Guanopatin*, plaintiff moved for summary judgment pursuant to Labor Law § 240(1) and defendant opposed the same, arguing that plaintiff's own actions, i.e., failing to obey specific instructions by his foreman, were the sole proximate cause of his injuries. The Appellate Division determined that defendant failed to raise an issue of fact because the evidence it submitted was

unsworn, not in admissible form, and consisted of hearsay. Here, however, ASLP II submits the testimony of Clark, who testified that, although he told the crew members to stay where they were while he maneuvered the railing onto the chain fall, plaintiff disregarded his instructions and ran between him and the handrail and, as he did so, walked into the railing and bumped his head. Indeed, plaintiff even admitted at his deposition that he walked from one side of the beam to the other while it was being lowered, although nobody told him to do so, and that it was unsafe to walk under an object which was being lowered from a height. Doc. 117 at 114.

ASLP II also raises issues regarding plaintiff's credibility by submitting Clark's testimony that there were no tag lines in use at the time of the incident because they were not needed and that the railing was not spinning as it was being lowered. "Where credible evidence reveals differing versions of the accident, one under which defendants would be liable and another under which they would not, questions of fact exist making summary judgment inappropriate" (*Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442 [1st Dept 2012]; *see also Pearson v Wallace,* 140 AD3d 1731 [4th Dept 2016] [plaintiff's motion for summary judgment denied where issue of fact existed regarding whether his failure to comply with instructions constituted sole proximate cause and credibility issues were raised by contradictory versions of the incident]; *Militello v Landsman Dev. Corp.* 133 AD3d 1378 AD3d 1731 [4th Dept 2016] [denial of plaintiff's motion for summary judgment warranted due to issues of fact regarding sole proximate cause and adequacy of safety device provided, as well as credibility issues arising from divergent accounts of accident]).

Plaintiffs have also established their prima facie entitlement to summary judgment on their fourth cause of action (Labor Law § 241[6]), as qualified below. Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which

construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]). In order to establish a claim pursuant to this section, a plaintiff must establish that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross*, 81 NY2d at 505). Additionally, the violation must be a proximate cause of the plaintiff's injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544, 949 N.Y.S.2d 717 [2d Dept 2012]).

In their motion, plaintiffs allege that ASLP II violated Industrial Code sections 23-6.1 (c) (1) and 23-6.1 (h).[8] 12 NYCRR 23-6.1 (h) provides that "[l]oads which have a tendency to swing or turn freely during hoisting shall be controlled by tag lines." Despite recognizing that other Appellate Departments have deemed this regulation insufficiently specific to impose liability under Labor Law § 241 (6) (*see Morrison v City of New York*, 5 AD3d 642, 643 [2d Dept 2004]; *Smith v Homart Dev. Co.*, 237 AD2d 77, 80 [3d Dept 1997]), the Appellate Division, First Department has held to the contrary (*See Naughton v City of New York*, 94 AD3d 1, 9 [1st Dept 2012]). As noted in the discussion regarding Labor Law § 240 (1), plaintiff testified that the beam was spinning as it was being lowered and that, although tag lines were in use, they were not used properly because workers holding them should have been on both sides of the beam, whereas Clark stated that the railing did not spin as it was being lowered; that there were no tag lines in use as it was lowered; and that the incident occurred when plaintiff walked into the railing. Thus, although plaintiff has established its prima facie entitlement to summary judgment pursuant to Labor Law

[8] Although plaintiffs only seek affirmative relief based on 23-6.1 (c)(1) and 23-6.1 (h), they also rely on 23-1.8 (c) in opposition to the defendants' motion for summary judgment in sequence 004 (Doc. 179) and, thus, that section will be addressed in the discussion of that motion. This Court deems the remainder of the Industrial Code sections alleged in the bill of particulars to be abandoned (*Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014]).

§ 241 (6), as predicated upon 23-6.1 (h), ASLP II has raised an issue of fact in opposition warranting the denial of the motion.

12 NYCRR 23-6.1 (c) (1) provides that "[o]nly trained, designated persons shall operate hoisting equipment and such equipment shall be operated in a safe manner at all times." This a general, not specific, regulation, and is thus legally insufficient to support a claim under Labor Law § 241 (6) (*Higgins v Consol. Edison Co. of New York, Inc.*, 2009 NY Slip Op 31935[U], *16 [Sup Ct, NY County 2009] citing *Cardenas v. American Ref-Fuel Co. of Hempstead*, 244 A.D.2d 377 [2nd Dept 1997]; *Sharrow v. Dick Corp.*, 233 AD2d 858 [4th Dept 1996]). Therefore, the branch of plaintiffs' motion seeking summary judgment pursuant to Labor Law § 241 (6), as predicated upon 23-6.1 (c) (1), is denied.

**Motion for Summary Judgment By Scarola, Alfieri, Cuddy, Columbia, AEI, MWS, ASI, ASLP, ASLP II, and Kaufman (Mot. Seq. 004)**

Scarola, Alfieri, Cuddy, Columbia, AEI, MWS, ASI, ASLP, ASLP II, and Kaufman move, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims against them in connection with the April 2011 and June 2011 accidents.

Initially, since there are no claims in this action pertaining to the April 2011 incident, the branch of the motion seeking dismissal of all claims pertaining thereto is denied as academic.

Defendants correctly assert that the Workers' Compensation Law bars plaintiffs' claims against Columbia, his special employer, as well as against his coworkers Scarola, Alfieri, and Cuddy.[9] "An employee's rights to Workers' Compensation benefits is the employee's exclusive

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[9] "A special employee is one who is transferred for a limited time of whatever duration to the service of another, and limited liability inures to the benefit of both the general and special employer" *(Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 359 [2007] [internal quotation marks and citations omitted]).

remedy against his employer or coemployee for injuries sustained during his employment (*see* Workers' Compensation Law §§ 11, 29[6]); *Fung v Japan Airlines Co., Ltd.*, 9 NY3d [at 357])." (*Donnelly v Christian*, 182 AD3d 477, 477-478 [1st Dept 2020]).

Plaintiff admitted that he received workers' compensation benefits as a result of his June 2020 accident. Additionally, the evidence adduced by defendants reflects that the work of the construction crew was performed under the ultimate supervision of Columbia. "Many factors are weighed in deciding whether a special employment relationship exists, and generally no one is decisive. While not determinative, a significant and weighty feature has emerged that focuses on who controls and directs the manner, details and ultimate result of the employee's work" (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 558 [1991] [citations omitted]). Here, that control rested with Columbia and those it supervised, including Scarola, Alfieri and Cuddy. Thus, the claims against these defendants are dismissed.

ASLP II correctly asserts that it cannot be held liable pursuant to Labor Law § 200 because it did not control the means and methods of the operation during which plaintiff was allegedly injured. For the same reason, ASI, ASLP, and Kaufman are not liable pursuant to this statute.

Nor are defendants ASI (the managing partner of ASLP), ASLP (the majority owner of ASPL II), and Kaufman (the management company for ASLP II) proper Labor Law defendants. They did not own the premises, had no control over the production of MIB 3, and had no contract related to the activities giving rise to plaintiff's alleged injuries. Thus, the claims against these entities pursuant to Labor Law § 240(1) and 241 (6) are dismissed.

Although MWS, through Scarola's testimony and affidavit, attempts to establish that all claims against it pursuant to Labor Law §§ 240(1) and 241(6) must be dismissed, it fails to establish its prima facie entitlement to such relief. Scarola admits that MWS leased equipment to Columbia,

and plaintiff testified that the hoist used during the operation bore the initials "MWS." Since MWS has not established that it was not a contractor within the meaning of Labor Law §§ 240(1) and 241(6), this Court cannot dismiss these claims despite plaintiffs' failure to oppose this branch of the application (*Vega,* 18 NY3d at 503). MWS has, however, established that it did not direct or control the work in progress at the time of the alleged incident and, thus, plaintiffs' common-law negligence claim and claim pursuant to Labor Law § 200 against MWS are dismissed.

Rutman's affidavit establishes AEI's prima facie entitlement to summary judgment dismissing all claims and cross claims against it and plaintiffs raise no issue of fact in opposition. Therefore, the complaint and all cross claims are dismissed as against AEI.

For the reasons in the analysis of plaintiffs' motion for summary judgment (mot. seq. 003) set forth above, summary judgment must be denied to ASLP II, the lessor of the premises, which allowed Columbia to use the premises pursuant to a license agreement. As discussed previously, issues of fact exist which preclude the granting of summary judgment to ASLP II pursuant to Labor Law § 240(1) and pursuant to Labor Law § 241(6), as predicated on 12 NYCRR 23-1.8(h).

Additionally, as plaintiffs argue in opposition to defendants' motion, ASLP II has failed to establish its prima facie entitlement to summary judgment pursuant to Labor Law § 241(6) as predicated on 12 NYCRR 23-1.8(c). 12 NYCRR 23-1.8 (c) requires that approved safety helmets be provided to individuals "required to work or pass within any area where there is a danger of being struck by falling objects or materials." This section is sufficiently specific to impose liability under Labor Law § 241 (6) (*Rutkowski,* 146 AD3d at 687). Since plaintiff admitted that he was not wearing a hard hat at the time of the incident, ASLP II is not entitled to the dismissal of plaintiff's Labor Law § 241 (6) claim as predicated on this section of the Industrial Code.

ASLP II is, however, entitled to dismissal of plaintiffs' claim pursuant to Labor Law § 241(6), as predicated on 12 NYCRR 23-6.1(c)(1), since that section of the Industrial Code is insufficiently specific (*Ross*, 81 NY2d at 505).

ASLP's contention that it cannot be liable pursuant to Labor Law §§ 240(1) or 241(6) because plaintiff was not engaged in activity protected by those sections is without merit. As discussed previously, plaintiff was clearly working on a "structure" at the time of the alleged accident. Additionally, § 241(6) encompasses the work performed by plaintiff, who was engaged in demolition when he was allegedly injured. ASLP II's contention that demolition work protected by § 241(6) is limited to situations in which a building is being demolished is specious, since 12 NYCRR 23-1.4 (b) (16) clearly defines "demolition work" as "work incidental to or associated with the total or partial dismantling or razing *of a building or other structure . . .*" (*emphasis added*).

Accordingly, it is hereby:

ORDERED that the motion for summary judgment by defendants Roger J. Paradiso, Michael Tadross, and Greenwich Street Productions, Inc. (mot. seq. 002) is granted, and all claims and cross claims against said defendants are dismissed; and it is further

ORDERED that the branch of plaintiffs' motion (mot. seq. 003) seeking summary judgment on their first cause of action (negligence) against Greenwich Street Productions, Inc., Stop & Shop Supermarket Company, and M&M Holding Company is denied; and it is further

ORDERED that the branch of plaintiffs' motion (mot. seq. 003) seeking summary judgment on their third cause of action (Labor Law § 200) against defendant Astoria Studios Limited Partnership II is denied; and it is further

ORDERED that the branch of plaintiffs' motion (mot. seq. 003) seeking summary judgment as to liability on their third cause of action (Labor Law § 240[1]) against Astoria Studios Limited Partnership II is denied; and it is further

ORDERED that the branch of plaintiffs' motion (mot. seq. 003) seeking summary judgment as to liability on their fourth cause of action (Labor Law § 241[6], as predicated on 12 NYCRR 23-6.1[c][1]) against Astoria Studios Limited Partnership II is denied; and it is further

ORDERED that the branch of plaintiffs' motion (mot. seq. 003) seeking summary judgment on their fourth cause of action (Labor Law § 241[6], as predicated on 12 NYCRR 23-6.1[h]) against Astoria Studios Limited Partnership II is denied; and it is further

ORDERED that the branch of the motion by defendants Michael Scarola, Joseph Alfieri, Carol Cuddy, Columbia Pictures Industries, Inc., Amblin' Entertainment Inc., MWS Rigging Consultants LLC, Astoria Studios Incorporated, Astoria Studios Limited Partnership, Astoria Studios Limited Partnership II, and Kaufman Astoria Studios, Inc. (mot. seq. 004) seeking summary judgment dismissing the complaint and all cross claims against them is granted to the extent that the complaint and all cross claims are dismissed as against defendants Michael Scarola, Joseph Alfieri, Carol Cuddy, Columbia Pictures Industries, Inc., Amblin' Entertainment Inc., Astoria Studios Incorporated, Astoria Studios Limited Partnership, and Kaufman Astoria Studios, Inc.; and it is further

ORDERED that the branch of the motion (mot. seq. 004) seeking summary judgment dismissing plaintiffs' negligence claim and claim pursuant to Labor Law § 200 against defendant Astoria Studios Limited Partnership II is granted, and those claims are dismissed; and it is further

ORDERED that the branch of the motion (mot. seq. 004) seeking summary judgment dismissing plaintiffs' claim pursuant to Labor Law § 240(1) against defendant Astoria Studios Limited Partnership II is denied; and it is further

ORDERED that the branch of the motion (mot. seq. 004) seeking summary judgment dismissing plaintiffs' claim pursuant to Labor Law § 241(6) as predicated on 12 NYCRR 23-6.1(c)(1) is granted, and that claim is dismissed; and it is further

ORDERED that the branch of the motion (mot. seq. 004) seeking summary judgment dismissing plaintiffs' claim pursuant to Labor Law § 241(6) as predicated on 12 NYCRR 23-6.1(h) and 23-1.8(c) is denied as to defendants Astoria Studios Limited Partnership II and MWS Rigging Consultants LLC; and it is further

ORDERED that the branch of the motion (mot. seq. 004) seeking summary judgment dismissing plaintiffs' negligence claim and claim pursuant to Labor Law § 200 against defendant MWS Rigging Consultants LLC is granted, and that claim is dismissed; and it is further

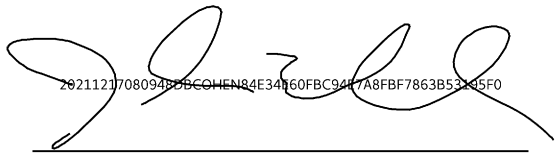
ORDERED that the branch of the motion (mot. seq. 004) seeking the dismissal of all claims relating to plaintiff Kenneth J. Fundus' April 2011 accident is denied as academic; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the caption be amended to reflect the dismissals and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that, within 20 days of entry of this order, counsel for plaintiffs shall serve a copy of this order, with notice of entry, upon defendants, as well as on the Clerk of the Court (Room 141B) and the General Clerk's Office (Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supetmanh).




12/17/2021
DATE

HON. DAVID B. COHEN, J.S.C.

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|---|---|---|---|---|---|---|---|
| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | | GRANTED | | DENIED | X | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | REFERENCE |