



defendants 184 Fifth, LLC and Bernard Kayden Inc. Defendant Murray Hill Properties, LLC was the managing agent for the premises. In a letter dated February 20, 2003 Metronet submitted a proposal to Murray Hill Properties to perform repairs to 3,700 square feet of the existing ceiling on the seventh floor of the subject premises. The parties have not submitted an executed copy of the proposal. Although it is undisputed that the Metronet performed this work, some questions remain as to whether it was hired by Murray Hill Properties or some other entity on behalf of the owners.

Plaintiff Silvio Glavan testified that on the morning of February 28, 2003 he used an A-frame ladder to patch holes in the ceiling, and that although the floor was uneven he was able to place the ladder in a secure position. He stated that two other workers used a scaffold to perform their work that morning. Mr. Glavan stated that after his lunch break the other workers used the ladders and that he used the scaffold, which he described as being seven foot high, to perform his work. Neither plaintiff nor defendants presented any evidence as to the height of the ceiling. Mr. Glavan stated that he could perform his work faster and in a more efficient manner by using the scaffold. He stated that the scaffold had been on the job site for 5 days; that this was the first time he used the scaffold; that he knew how to use the brakes on the scaffold and; that when he moved the scaffold to the area where he was working he re-applied the brakes. Mr. Glavan stated the scaffold did not have any railings or barriers around the platform at level at which he was working. He stated that he had positioned the scaffold was about one meter from a window, and placed one bucket of compound on each side of the scaffold, and a bag of plaster on the deck of the scaffold. Mr. Glavan stated that he went up and down the scaffold several times, and that each time he moved the scaffold to a different position he re-applied the brakes. He stated that the wooden floor on which the scaffold was standing was uneven and that the scaffold felt unstable. Mr. Glavan stated that he was standing on the deck of the of the scaffold, using a spatula, a "hawk" and the compound to patch holes in the ceiling, when the scaffold began to tremble and began to fall over, causing him to fall off the scaffold to the floor below. Plaintiff sustained injuries to his left foot and ankle, including a dislocated heel. It is undisputed that plaintiff was not provided with a safety line, harness or other safety device.

In support of the within motion and in opposition to the defendants' motion Mr. Glavan has submitted an affidavit in English, which includes a notarized statement by Barjaram Bicic stating that it was translated from English to Croatian. Mr. Bicic, however, does not state that he is a translator and has not stated his qualifications as a translator (see generally

CPLR 2101[b])). Therefore, the court will not consider Mr. Glavan's affidavit.

Thomas Keegan testified that in February 2003 he was employed by AB Partners LLC and was paid by 184 Fifth LLC. He stated that Murray Hill Properties LLC shared offices with AB Properties. Mr. Keegan testified that Murray Hill Properties shared its accounts payable and payroll, but it is unclear from his testimony as to whether this occurred with 184 Fifth LLC or AB Properties. Mr. Keegan stated that he was employed as a property manager and oversaw the day-to-day operations at certain properties including the subject premises. He stated that in February 2003 he visited the subject property every other day and had been there the day before the plaintiff's accident. He stated that there were no tenants on the 7th floor and that Metronet was hired to plaster the ceiling and repair existing holes in the ceiling. However, he did not state which entity hired Metronet. Mr. Keegan stated that all the equipment, including ladders and baker scaffolds that were used to perform this work were supplied by Metronet. He stated that the scaffold had rails which held up the platform but that there were no rails above the top level of the platform. Mr. Keegan stated that he received a telephone call from Phil Robinson, who worked at the subject building, who told him that someone had fallen off a scaffold and that the glass window had broken and hit a pedestrian, and that the police had closed the street. He stated that he arrived at the premises about ten minutes after the accident occurred and that he did not have any conversations with either Mr. Glavan or any other Metronet employee.

Defendants in opposition to the plaintiff's motion for summary judgment and in support of their motion for to dismiss the complaint, assert that plaintiff's testimony regarding the events leading up to the accident is so inconsistent that it cannot be determined as to how plaintiff performed his work prior to and at the time of the accident, and therefore plaintiff's motion for summary judgment should be denied. Defendants further assert that as plaintiff placed the scaffold on an uneven floor, and chose to continue to use it rather than the available ladder, even though he knew it to be unstable, his conduct was the sole proximate cause of the accident, and therefore the Labor Law § 240(1) and § 241(6) causes of action should be dismissed. Defendants also assert that the plaintiff misused the scaffold and that this constitutes a superceding cause of the accident, warranting the dismissal of the Labor Law § 240 claim. Defendants assert that the Labor Law § 241(6) claim should be dismissed as a matter of law as the regulations cited by plaintiff in his bill of particulars are either too general or are inapplicable. Finally, defendants assert that plaintiff's common law and Labor Law § 200 claims should be

dismissed, as plaintiff was under the direct control of his employer and not the defendants.

At the outset, the court finds that these motions are timely and conform to the so-ordered stipulation of May 24, 2006, which required that all motions for summary judgment be returnable no later than October 5, 2006. It is noted that defendants' original notice of motion was served on September 21, 2006 and made returnable on October 4, 2006 and that an amended notice of motion was thereafter served and made returnable on November 29, 2006. Since the original notice of motion's return date was timely, the court will consider the defendants' motion.

It is well settled that a party seeking summary judgment "must make a prima facie showing of entitlement as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Ayotte v Gervasio, 81 NY2d 1062, 1063 [1993]; see Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). A prima facie showing shifts the burden to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material question of fact (see Alvarez v Prospect Hosp., supra).

Labor Law § 240(1) creates a duty that is nondelegable and an owner or general contractor who breaches that duty may be held liable in damages regardless of whether either had actually exercised supervision or control over the work (see Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494 [1993]). The "exceptional protection" provided for workers by § 240(1) is aimed at "special hazards" and is limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (see Ross v Curtis-Palmer Hydro-Electric Co., supra at 501; Rocovich v Consolidated Edison Co., 78 NY2d 509, 514 [1991]; Zimmer v Chemung County Performing Arts, 65 NY2d 513 [1985]). The legislative purpose behind Section 240(1) is to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs on the owner and general contractor instead of on workers who are "scarcely in a position to protect themselves from accident" (see Rocovich v Consolidated Edison, supra at 501). Although the "special hazards" contemplated "do not encompass any and all perils that may be connected in some tangential way with the effects of gravity" (see Ross v Curtis-Palmer Hydro-Electric Co., supra; Rodriguez v Tietz Center for Nursing Care, 84 NY2d 841 [1994]), the statute's purpose of protecting workers "is to be liberally construed" (Ross v Curtis-Palmer Hydro-Electric Co., supra at 500). In order to prevail upon a claim pursuant to Labor Law § 240(1), a plaintiff must establish that the statute was

violated and that this violation was a proximate cause of his injuries (see Bland v Manocherian, 66 NY2d 452 [1985]; Sprague v Peckham Materials Corp., 240 AD2d 392 [1997]).

The court has read Mr. Glavan's deposition testimony and finds that there are no inconsistencies as regards the work he performed immediately prior to the accident, or the manner in which the accident occurred. The court further notes that Mr. Glavan testified at his deposition in Croatian through an interpreter, that examining counsel at times asked compound questions, that the claimed inconsistencies only concerned the manner in which Mr. Glavan performed his work on the morning of the accident, and that when asked to, Mr. Glavan clarified his answers as regards this work. Plaintiff testified that, while standing a scaffold and applying plaster to the ceiling in the subject premises, the scaffold began to shake and then tipped over, causing him to fall to the floor below. Plaintiff also stated that the wooden floor on which the scaffold stood was uneven. It is well settled that a scaffold fall caused by the movement or shifting of the apparatus constitutes prima facie evidence of a Labor Law § 240(1) violation (deSousa v Dayton T. Brown Inc., 280 AD2d 447, 448 [2001]; Haulotte v Prudential Ins. Co. of America, 266 AD2d 38, 38-39 [1999]; Mooney v PCM Development Co., 238 AD2d 487, 488 [1997]; Rivera v Rite Lite Ltd., 13 Misc 3d 1142 [2006]). Furthermore, there is no evidence that the tipping over of the scaffold was caused by the plaintiff's actions, including his placement of the scaffold on the uneven floor, and his placement of two buckets of compound and a bag of plaster on the deck of the scaffold. Clearly, plaintiff did not create the floor condition, and defendants' claim that the plaintiff mishandled the scaffold is purely speculative and without merit. Contrary to defendants' assertions these acts do not constitute a superceding cause of the accident so as to relieve an owner or its agent of liability under the statute (deSousa, 280 AD2d at 448; Haulotte, 266 AD2d at 38-39). Defendants' claim that plaintiff was the "sole proximate cause" of the accident is also rejected (see Blake v Neighborhood Hous. Servs. of New York City, Inc., 1 NY3d 280 [2003]). The cause of this accident was the failure of the safety device provided, and it was not due solely to any the actions of the plaintiff. Therefore, that branch of plaintiff's motion which seeks summary judgment on the issue of liability on the Labor Law § 240(1) claim against the property owners defendants 184 Fifth LLC and Bernard Kayden Inc. is granted, and defendants' motion to dismiss this claim is denied. The court further finds that as the evidence regarding the managing agent, defendant Murray Hill Properties LLC's connection to AB Properties and 184 Fifth LLC is unclear, the parties' requests for summary judgment as regards this defendant are denied.

In order to establish liability for common-law negligence or a violation of Labor Law § 200, the plaintiff must establish that the defendant in issue had "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (Russin v Picciano & Son, 54 NY2d 311, 317 [1981]; see Rizzuto v Wenger Contr. Co., 91 NY2d 343, 352 [1998]; Singleton v Citnalta Constr. Corp., 291 AD2d 393, 394 [2002]), or had actual or constructive notice of the defective condition causing the accident (see LaRose v Resinick Eighth Ave. Assoc., LLC, 26 AD3d 470 [2006]; Gatto v Turano, 6 AD3d 390, 391 [2004]; Abayev v Jaypson Jewelry Manufacturing Corp., 2 AD3d 548 [2003]; Duncan v Perry, 307 AD2d 249 [2003]; Giambalvo v Chemical Bank, 260 AD2d 432 [1999]; Cuartas v Kourkoumelis, 265 AD2d 293 [1999]; Sprague v Peckham Materials Corp., 240 AD2d 392 [1997]). "General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common-law negligence and under Labor Law 200" (Dos Santos v STV Engrs., Inc., 8 AD3d 223, 224 [2004], lv denied 4 NY3d 702 [2004]). Further, the authority to review safety at the site is insufficient if there is no evidence that the defendant actually controlled the manner in which the work was performed (see Loiacono v Lehrer McGovern Bovis, 270 AD2d 464, 465 [2000]). Here, there is no evidence that the defendants supervised or controlled the work performed by plaintiff, his co-workers, or their employer. However, plaintiff claims that the uneven floor constituted a dangerous condition. In view of the fact that plaintiff testified that the wooden floor was uneven, and the owner's agent Mr. Keegan testified that the wooden floor was not uneven, a triable issue of fact exists as to whether the owners had actual or constructive notice of the alleged dangerous condition. In addition, as the evidence regarding the managing agent, defendant Murray Hill Properties LLC's connection to AB Properties and 184 Fifth LLC is unclear, a triable issue of fact exists as to whether Murray Hill Properties, had actual or constructive knowledge of the alleged dangerous condition. Accordingly, that branch of defendants' motion which seeks to dismiss plaintiff's Labor Law § 200 and common-law claims, is denied.

In order for an owner, or its agent, to be liable under Labor Law § 241(6), a plaintiff is required to establish a breach of a rule or regulation of the Industrial Code which gives a specific, positive command (see Rizzuto v Wenger Contr. Co., supra; Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]; Vernieri v Empire Realty Co., 219 AD2d 593 [1995]). In addition, even if the alleged breach is of a specific Industrial Code rule, that rule must be applicable to the facts of the case (see Thompson v

Ludovico, 246 AD2d 642 [1998]; Vernieri v Empire Realty Co., supra). Plaintiff's reliance on alleged violations of 12 NYCRR §§ 23-1.15, 23-1.16 and 23-1.17 is misplaced. Those sections, which set standards for safety railings, safety belts and life nets, respectively, do not apply because plaintiff was not provided with any such safety devices (see Dzieran v 1800 Boston Rd., LLC, 25 AD3d 336 [2006]; D'Acunti v New York City School Constr. Auth., 300 AD2d 107, 108 [2002]). However, plaintiff also relies on 12 NYCRR 23-5.1(b) which is a specific provision sufficient to maintain a Labor Law 241(6) cause of action (see O'Connor v Spencer (1997) Inv. Ltd. Partnership, 2 AD3d 513 [2003]). In addition plaintiff cites to 12 NYCRR 23-5.3, which is also a specific standard, (see Sopha v Combustion Eng'g., 261 AD2d 911, 912 [1999]) and to 12 NYCRR §§ 23-5.3, 23-5.4, 23-5.5, 23-5.6, 23-5.7 and 23-5.16, which are specific standards governing scaffolds. The court finds that contrary to defendants' assertions, plaintiff's conduct was not the sole cause of his injury so as to bar a claim under Labor Law § 241(6). Inasmuch as the parties have not clearly identified the type of scaffold used by the plaintiff, the court is unable to determine at this time, which of these provisions governing different types of scaffolds are applicable. However, as plaintiff has sufficiently alleged a violation of Labor Law § 241(6) and as the defense of sole proximate cause is not available here, that branch of defendants' motion which seeks to dismiss this cause of action is denied.

In view of the foregoing, plaintiff's motion for summary judgment on the issue of liability on its Labor Law § 240(1) is granted as against defendants 184 Fifth LLC and Bernard Kayden Inc., and is denied as against defendant Murray Hill Properties, LLC. Defendants' motion for summary judgment dismissing the complaint is denied in its entirety. This action shall proceed to trial as to damages on plaintiff's Labor Law § 240(1) claim against defendants 184 Fifth LLC and Bernard Kayden Inc.

Dated: March 5, 2007

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J.S.C.