At an IAS Term, Part 17 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of July, 2005.

P R E S E N T:

HON. DIANA JOHNSON,

Justice.

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ERROL MCDONALD ET ANO.,

Plaintiffs,

Index No. 50661/01

- against -

COLONIAL STEEL CORP., ET AL.,

Defendants.

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Index No. 75095/03

SIX AB LLC,

Third-Party Plaintiff,

- against -

JAYA CONSULTING, INC.,

Third-Party Defendant.

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The following papers numbered 1 to 18 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1 - 2; 3, 5; 7; 8; 9; 15
Opposing Affidavits (Affirmations)	4; 10 - 11; 16-17
Reply Affidavits (Affirmations)	6; 12-14
Affidavit (Affirmation)	
Other Papers Order to show cause	18

Upon the foregoing papers:

(1) defendant Six AB LLC (Six AB) moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiffs' complaint, as well as any and all cross claims asserted against it;

(2) plaintiffs Errol McDonald (McDonald or plaintiff) and Veriline McDonald cross-move: (a) pursuant to CPLR 3212 for an order granting partial summary judgment in their favor on the issue of the liability of Six AB under Labor Law § 240 (1) and (b) pursuant to CPLR 3126, for an order striking the answer of defendant Colonial Steel Corp. (Colonial);

(3) Colonial cross-moves: (a) for an order granting summary judgment in its favor dismissing all claims against it and (b) for an order: (i) rendering a decision on the recommendation of the Judicial Hearing Officer who was appointed to hear and report on the issue of Colonial's purported spoliation; (ii) denying plaintiff's cross motion to strike Colonial's answer; and (iii) pursuant to CPLR 8303-a and/or 22 NYCRR 130-01, sanctioning plaintiffs and their counsel for engaging in frivolous motion practice; and

(4) third-party defendant Jaya Consulting Inc. (Jaya) cross-moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the third-party complaint against it.

BACKGROUND

On June 18, 2001, Errol McDonald was employed by Jaya as a worker's helper. Jaya had been hired to perform renovations at a building owned by Six AB and located at 539-541 East 6th Street in Manhattan. Prior to that date, defendant Taman Management Corp.

(Taman) placed an order with Colonial for twenty pieces of steel angle iron, which Colonial delivered, curbside, at the premises on June 18, 2001.

At about 1:30 p.m., plaintiff's supervisor, Kevin Goh (Goh), directed him and two other laborers to unload the steel beams from Colonial's flatbed truck, which was parked parallel to the sidewalk. The passenger side of the flatbed area of the truck was open and there were approximately 20 beams lying on the flatbed, parallel to its length. Bundles of three to four beams were tied together with wire. The beams rested on three to four wooden boards, which were placed across the width of the truck, perpendicular to the steel beams. Miguel Acosta (Acosta), Colonial's driver, gave the men clippers to cut the wire ties that bound the beams together. The three men cut the ties and used crow bars, also supplied by Acosta, to lift each beam and push it onto the sidewalk. After unloading all but one or two bundles, plaintiff, standing on the truck, attempted to put a crowbar under one of the beams. At that time, as a result of the unloading method employed, one of the boards upon which the steel beams were resting extended over the edge of the truck. That piece of lumber "see-sawed" when plaintiff pushed his end of the piece of steel over the edge of the truck, striking plaintiff in the face and causing him to fall off the truck onto the pile of steel beams on the sidewalk, resulting in physical injuries.

On December 31, 2001, plaintiffs commenced this action in which McDonald asserted causes of action under Labor Law §§ 240 (1), 241 (6) and 200, and Veriline McDonald sued derivatively for loss of consortium. Following joinder of issue, plaintiffs

served a bill of particulars and an amended bill of particulars. Depositions were subsequently held and discovery is complete.

SIX AB'S MOTION/PLAINTIFFS' CROSS MOTION

In its motion, Six AB (supported by Jaya) contends that it is entitled to summary judgment dismissing plaintiffs' common-law negligence and Labor Law claims. Although the court notes that plaintiffs, in their cross motion, advance arguments only with respect to their Labor Law § 240 (1) claim, the court will address all issues raised by Six AB in its motion.

The burden on a motion for summary judgment rests initially upon the moving party to come forward with sufficient proof in admissible form to enable a court to determine that it is entitled to judgment as a matter of law. If this burden cannot be met, the court must deny the relief sought (CPLR 3212; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). However, once a moving party has made a prima facie showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]; *see also, Zuckerman,* 49 NY2d at 562). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat the motion (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]).

Plaintiffs' Labor Law § 240 (1) cause of action

Labor Law § 240 (1) 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 enacted to "prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). In order to accomplish this goal, the statute places the responsibility for safety practices and devices on owners and general contractors and their agents who "are best situated to bear that responsibility" (*id.* at 500; *see also Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280 [2003]; *Zimmer v Chemung County Perf. Arts*, 65 NY2d 513, 520 [1985]). Moreover, "the duty imposed by Labor Law § 240 (1) is nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (*Ross*, 81 NY2d at 500; *see also Haimes v New York Tel. Co.*, 46 NY2d 132, 136-137 [1978]). Finally, the statute is to be construed as liberally as possible in order to accomplish its protective goals

(*see Blake,* 1 NY3d at 284-285; *Martinez v City of New York*, 93 NY2d 322, 326 [1999]). However, given the exceptional protection offered by Labor Law § 240 (1), the statute does not cover accidents which are merely tangentially related to the effects of gravity; rather, gravity must be a direct factor in the accident, such as when a worker falls from a height or is struck by a falling object (*Ross*, 81 NY2d at 501; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]. In determining whether the statute applies, the question is whether there is "a significant risk inherent in the particular task because of the relative elevation at which the task must be performed or at which materials or loads must be positioned or secured" (*id. at* 514). Finally, even where the underlying accident involves an improperly hoisted or inadequately secured object, Labor Law § 240 (1) will not apply where there is a *de minimis* elevation differential between the worker's position and the level of the materials or load being hoisted or secured (*see Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 269-270 [2001]; *see also Spenard v Gregware Gen. Contr.*, 248 AD2d 868, 869 [1998] ["the mere fact that an injured worker fell from a scaffold, ladder or other similar safety device that did not slip, collapse or otherwise fail is insufficient to establish that the device did not provide proper protection * * * "]).

In support of that branch of its motion seeking summary judgment dismissing plaintiffs' § 240 (1) cause of action, Six AB contends that: (1) the act of unloading the flatbed truck was not "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" and (2) falls from flatbed trucks are not the type of

special, elevation-related hazards contemplated by Labor Law § 240 (1). In opposition to Six AB's motion and in support of their cross motion, plaintiffs assert that the unloading of the truck was a part of and necessary for the extensive alteration of existing premises. They further challenge, as unsupported, Six AB's assertion of the existence of a blanket exclusion that would bar recovery under § 240 (1) for falls from flatbed trucks where, as Six AB argues here, the differential was insufficient to invoke the protections of the statute. Finally, plaintiffs aver that the "undisputed facts" establish that McDonald was injured by two interconnected gravity-induced incidents---the fall of the wood and his own fall---and that the accident could have been prevented by the use of braces, blocks, irons or ropes or mechanical means such as a hoist.

Plaintiffs correctly assert that the unloading of construction materials constitutes an integral part of a construction project (*see Monroe v Bardin,* 249 AD2d 650 [1999]; *Orr v David Christa Constr., Inc.*, 206 AD2d 881 [1994]; *Cox v LaBarge Bros. Co., Inc.,* 154 AD2d 947 [1989], lv. dismissed 75 NY2d 808 [1990]) and Six AB's reliance upon *Martinez v City of New York* (93 NY2d 322 [1999]) is misplaced. In *Martinez*, the Court of Appeals affirmed the dismissal of the Labor Law § 240 (1) claim asserted by plaintiff, an environmental inspector who fell from a height during the course of an inspection before the commencement of an asbestos abatement program at the subject location. The Court determined that such work was outside the purview of the statute and explicitly noted that none of the activities enumerated in the statute was then underway (*Id.* at 326). In rejecting

the analysis employed by the majority of the Appellate Division which focused on whether plaintiff's work was an "integral and necessary part" of a larger project within the purview of section 240(1) (*Id.*), the Court, citing its holding in *Joblon v Solow* (91 NY2d 457 [1998]), acknowledged that "[w]hile the reach of section 240 (1) is not limited to work performed on actual construction sites . . ., the task in which an injured employee was engaged must have been performed during 'the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.'" (*Id.*) And such was clearly the situation in the case at bar.

Moreover, plaintiffs' contention that no blanket rule bars recovery under Labor Law § 240 (1) for injuries resulting from falls from flatbed trucks is largely accurate, although, as shown, different theories underlie the implication of the statute's protections in a given situation. Thus, the use of a truck's flatbed as the "functional equivalent" of a scaffold has resulted in the imposition of liability under Labor Law § 240 (1) (*see Watson v Hudson Valley Farms, Inc.*, 276 AD2d 1004 [2000] [where plaintiff, a self-employed sign painter, fell from a flatbed truck with which he had been provided to use as a scaffold in order to paint the side of defendant's 48-foot trailer, conflicting evidence as to whether plaintiff misstepped or tripped as a result of an alleged defect in the flatbed precluded granting of defendant's motion for summary judgment]), as has the existence of a significant elevation differential between the plaintiff's position and the lower surrounding ground (*see Monroe,* 249 AD2d at 652 [plaintiff, who was standing atop a bundle of logs he was unloading from

a flatbed truck approximately 8 feet off sloping ground, injured when metal band broke, causing logs to come loose and plaintiff to be propelled off the trailer, resulting in a fall of over 12 feet, awarded partial summary judgment]).

However, in general, the act of unloading a truck does not give rise to liability under Labor Law § 240 (1) (*see Jacome v State,* 266 AD2d 345 [1999] [where the Court, in rejecting the imposition of liability under Labor Law § 240 (1) where plaintiff's hand was struck by a sheet of steel which slid sideways during the process of unloading a truck, held that "(t)he task of unloading a truck is not an elevation-related risk simply because there is a difference in elevation between the ground and the truck bed"]*; see also Cabezas v Consolidated Edison,* 296 AD2d 522 [2002]*;Samuel v A.T.P. Development Corp.,* 276 AD2d 685 [2000]; *Tillman v Triou's Custom Homes, Inc.,* 253 AD2d 254 [1999]; *but see, e.g., Monroe v Bardin,* 249 AD2d 240 [1998]; *Orr,* 206 AD2d at 881 [1994]).

Here, no reasonable interpretation of the events that gave rise to plaintiff's injuries brings this case within the ambit of the extraordinary protections afforded by Labor Law § 240 (1) (*see DePuy v Sibley, Lindsay & Curr Co., Inc.,* 225 AD2d 1069 [1996]). "[A] work site is 'elevated' within the meaning of the statute where the required work itself must be performed at an elevation, i.e., at the upper elevation differential, such that one of the devices enumerated in the statute will safely allow the worker to perform the task" (*D'Egidio v Frontier Ins. Co.,* 270 AD2d 763, 765 [2000], *lv. denied* 95 NY2d 765 [2000]). In this context, the Court of Appeals, in *Toefer v Long Island R.R.* (4 NY3d 399 [2005]), examined

the interplay between non-elevation related risks and the use of (or failure to use) hoists as safety devices. In *Toefer,* the plaintiff was working on a large and stable surface only four feet from the ground, using wooden poles to pry steel lattice-type beams from the flatbed and lower them, when a wooden lever, for unexplained reasons, flew back and struck him in the head, propelling him off the truck and causing serious injury. He argued that a hoist, which is one of the devices listed in the statute, should have been used instead of wooden poles to lower the beams from the truck. With particular relevance to the facts in the case at bar, the Court rejected the plaintiff's arguments that § 240 (1) was applicable, focusing instead on the purpose a hoist would have served and whether the injury sustained was attributable to any elevation-related risk that § 240 (1) was meant to address. While stating that Labor Law § 240 (1) was arguably implicated in the case because plaintiff fell from the truck's trailer to the ground, the Court rejected its applicability, observing both the *de minimus* height differential that was present and that the purpose of a hoist would not have been to prevent plaintiff from falling, but to prevent the beams themselves from doing damage. Therefore, since plaintiff was injured by a flying object, his injury was not attributable to the type of elevation-related risk that § 240 (1) was meant to address (*see Ames v Norstar Bldg. Corp.* (2005 NY Slip Op 04730 [4th Dept. 2005]).

Plaintiffs rely on inapposite authority where liability under Labor Law § 240 (1) was imposed in the context of falls from ladders or scaffolds (*see e.g., Barber v Roger P. Kennedy General Contractors, Inc.,* 302 AD2d 718 [2003] [plaintiff fell from a railing atop a fully-

extended mobile scaffold which attaching a partition during building construction]; *Binnetti v MK West Street Co.*, 239 AD2d 214 [1997] [plaintiff fell from a ladder while installing temporary lighting]; *Gramigna v Morse Diesel Inc.* 210 AD2d 115 [1994] [plaintiff fell while stepping down from a two-tiered scaffold]; *Guillory v Nautilus Real Estate, Inc.*, 208 AD2d 336 [1995] [plaintiff hit in the face by debris and fell off of a ladder]). Similarly, plaintiffs fail to demonstrate that McDonald was struck by a piece of lumber because of the effects of gravity or that his injuries resulted from anything beyond "a general hazard of the workplace" (*Narducci,* 96 NY2d at 269-270; *see also Toefer,* 4 NY2d at 408; *Alix v Utica & Mohawk Valley Chapter of the Nat. Ry. Historical Society, Inc.*, 240 AD2d 995, 997 [1997] ["(t)he fact of plaintiff's elevation, such as it was, was fortuitous; of itself, it posed little danger, and more importantly, it played no discernible part in the damages actually sustained by plaintiff"]). Plaintiffs have thus failed to meet their initial burden of establishing, prima facie, their entitlement to judgment under Labor Law § 240 (1) or to show the existence of an issue of fact in opposition to Six AB's motion.[1]

Plaintiffs' Labor Law § 241 (6) and § 200 causes of action

Labor Law §241 (6) provides in pertinent part that:

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged,

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[1] The Court rejects the affidavit of Dr. Anthony Storace, P.E., proffered by plaintiffs for the first time in their reply papers, as both untimely (*see Simon v Mehryari* (16 AD3d 664 [2005]) and the product of speculation (*see Finkelman v City of New York,* 207 AD2d 522).

> operated and conducted as to provide reasonable and adequate protection and safety to persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors and their agents to comply with the specific safety rules set forth in the Industrial Code (*Ross*, 81 NY2d at 501-502). Accordingly, in order to support a cause of action under Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable given the circumstances of the accident and sets forth a concrete standard of conduct rather than a mere reiteration of common-law principles (*Ross* at 502; *Ares v State*, 80 NY2d 959, 960 [1992]; *see also Adams v Glass Fab*, 212 AD2d 972, 973 [1995]).

Labor Law § 200 is merely a codification of the common law duty placed upon owners and contractors to provide employees with a safe place to work (*Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2000]). Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the methods that plaintiff employs in his work or who have actual or constructive notice of, or are otherwise responsible for, an unsafe condition that causes an accident (*Aranda v Park East Constr.*, 4 AD3d 315 [2004]; *Akins v Baker*, 247 AD2d 562, 563 [1998]).

As noted by Six AB, plaintiffs do not oppose those branches of its summary judgment motion seeking dismissal of their causes of action alleging violations of Sections 241(6) and 200 of the Labor Law. However, even if such opposition were interposed, Six AB would prevail.

As established by the testimony of Robert Perl, one of four members of Six AB, the latter hired Jaya pursuant to a written contract to convert and renovate the subject premises from a warehouse to an apartment house. Either Mr. Perl or his partner, Steven Dunaif, would visit the site one or two times a week to monitor the progress of the work and they never at any time supervised the activities of plaintiff. Since the uncontradicted record amply demonstrates that Six AB neither directed nor controlled the manner, means and methods of plaintiff's work or created a defective condition, Six AB is entitled to summary judgment with respect to plaintiffs' causes of action which allege violations of Labor Law § 200 and/or common law negligence (*see Perri v Gilbert Johnson Enterprises, Ltd.*, 14 AD3d 681 [2005]; *Kanarvogel v Tops Appliance City, Inc.*, 271 AD2d 409, 411 [2000]; *see also Ross,* 81 NY2d at 504-505).

In support of their Labor Law § 241 (6) cause of action, plaintiffs, in both their complaint and their amended verified bill of particulars, allege violations of the following sections of the Industrial Code: 12 NYCRR 23-1.5, 12 NYCRR 23-1.7 and 12 NYCRR 23-

1.16. Section 23-1.5[2] is a regulation that relates to general safety standards and, accordingly, will not alone provide a basis for a claim under Labor Law § 241 (6) (*see Greenwood v Shearson, Lehmann & Hutton,* 238 AD2d 311 [1997]). Section 23-1.7 is a regulation that relates to protection from general hazards, none of which apply to the facts of the case at bar.[3]

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[2] Section 23-1.5 (General responsibility of employers) provides: "[t]hese general provisions shall not be construed or applied in contravention of any specific provisions of this Part (rule).

(a) Health and safety protection required. All places where employees are suffered or permitted to perform work of any kind in construction, demolition or excavation operations shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection for the lives, health and safety of such persons as well as of persons lawfully frequenting the area of such activity. To this end, all employers, owners, contractors and their agents and other persons obligated by law to provide safe working conditions, personal protective equipment and safe places to work for persons employed in construction, demolition or excavation operations and to protect persons lawfully frequenting the areas of such activity shall provide or cause to be provided the working conditions, safety devices, types of construction, methods of demolition and of excavation and the materials, means, methods and procedures required by this Part (rule). No employer shall suffer or permit an employee to work under working conditions which are not in compliance with the provisions of this Part (rule), or to perform any act prohibited by any provision of this Part (rule).

(b) General requirement of competency. For the performance of work required by this Part (rule) to be done by or under the supervision of a designated person, an employer shall designate as such person only such an employee as a reasonable and prudent man experienced in construction, demolition or excavation work would consider competent to perform such work.

(c) Condition of equipment and safeguards.(1) No employer shall suffer or permit an employee to use any machinery or equipment which is not in good repair and in safe working condition. (2) All load carrying equipment shall be designed, constructed and maintained throughout to safely support the loads intended to be imposed thereon.(3) All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged.

[3] Section 23-1.7 ("Protection from general hazards") provides:

(a) Overhead hazards. (1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of

equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot. (2) Where persons are lawfully frequenting areas exposed to falling material or objects but wherein employees are not required to work or pass, such exposed areas shall be provided with barricades, fencing or the equivalent in compliance with this Part (rule) to prevent inadvertent entry into such areas.

(b) Falling hazards. (1) Hazardous openings. (I) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule). (ii) Where free access into such an opening is required by work in progress, a barrier or safety railing constructed and installed in compliance with this Part (rule) shall guard such opening and the means of free access to the opening shall be a substantial gate. Such gate shall swing in a direction away from the opening and shall be kept latched except for entry and exit. (iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows: (a) Two-inch planking, full size, or material of equivalent strength installed not more than one floor or 15 feet, whichever is less, beneath the opening; or (b) An approved life net installed not more than five feet beneath the opening; or (c) An approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage. (2) Bridge or highway overpass construction. (I) Approved safety belts shall be provided for and used by persons employed at elevations greater than 30 feet above land or water during bridge or highway overpass construction or at any elevation during structural or construction work performed over highways or railroads open to public traffic. (ii) Scaffolds, platforms or approved life nets may be provided as alternatives to approved safety belts. When used, such alternatives shall be installed not more than five feet below the lower edge of the structural members on or above which the persons to be protected are working. Such scaffolds, platforms or life nets shall be installed and maintained at all times when persons are working except when such safety protection would interfere with the placement of structural members or assemblies, in which case approved safety belts shall be worn.

(c) Drowning hazards. Where any person is exposed to the hazard of falling into water beneath his work location in which he might drown, equipment for the prompt rescue of such person from the water shall be provided. Such equipment shall consist of a manned boat of a size suitable for the existing water conditions and area. Such boat shall be equipped with oars, with United States Coast Guard approved life preservers, with a life ring fastened to a line not less than 50 feet in length and with a boat hook. Such boat shall continuously patrol the area beneath the work location at all times when any person is exposed to the falling and drowning hazard.

(d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

(e) Tripping and other hazards. (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered. (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass

Finally, plaintiffs' allegations of a violation of rule 23-1.16 are unavailing since the provisions of this section, which pertain to safety belts, harnesses, tail-lines and lifelines, are inapplicable in the instant case where there is no evidence that any such devices should have or even could have been attached to the flatbed truck.[4] Accordingly, as plaintiffs fail to establish the

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shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed. (f) Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.

(g) Air contaminated or oxygen deficient work areas. The atmosphere of any unventilated confined area including but not limited to a sewer, pit, tank or chimney where dangerous air contaminants may be present or where there may not be sufficient oxygen to support life shall be tested by the employer, his authorized agent or by a designated person before any person is suffered or permitted to work in such area. Such testing shall be in accordance with the provisions of Industrial Code Part (rule) 12 relating to the "Control of Air Contaminants" and such areas shall be subject to the other pertinent provisions of Industrial Code Part (rule) 12 and of Industrial Code Part (rule) 18 relating to "Exhaust Systems".

(h) Corrosive substances. All corrosive substances and chemicals shall be so stored and used as not to endanger any person. Protective equipment for the use of such corrosive substances and chemicals shall be provided by the employer.

[4] Section 23-1.17 ("Life nets) provides:

(a) Approval required. Any life net used in construction or demolition operations shall be approved.

(b) Materials and construction. Approved life nets shall be made of first grade fibre cordage, woven fabric or synthetic fibre and all such materials shall be treated to render them fire resistant; or such approved life nets shall be constructed of wire rope. An approved life net shall have a mesh not exceeding four inches. The perimeter of every life net shall be reinforced with cloth-covered wire rope, manila rope or synthetic fibre rope and shall be equipped with properly sized padded thimbles, sockets or equivalent approved means of attachment to supports and anchorages.

(c) Size, strength, location and attachment of life nets. Every life net or combination of life nets shall be of sufficient size and strength to catch and hold any person for whose protection such net or combination of nets is being used in case of a fall. Such net or combination of nets shall be located so as to completely cover the area of possible fall. Every life net shall be attached to sufficient anchorages or supports outside of and beyond the area of possible fall and shall be supported at a height to prevent sagging which may cause the net to strike or touch any surface or object beneath when cushioning the fall of any person.

(d) Maintenance. Every life net in use shall be thoroughly dried before storage and shall be

existence of an issue of fact regarding defendant's violation of any provision of the Industrial Code, the court grants Six AB's motion for summary judgment regarding plaintiffs' 241 (6) causes of action. All causes of action asserted by Errol McDonald against Six AB are dismissed, as well as Veriline McDonald's derivative cause of action against said defendant

JAYA'S CROSS MOTION

Because the complaint has been dismissed with respect to Six AB, the Court grants third-party defendant Jaya's cross motion for summary judgment and dismisses Six AB's third-party complaint against it. Consequently, there is no need to address Jaya's contentions concerning the existence of a "grave injury" as defined under Section 11 of the Workers' Compensation Law or any purported contractual obligation on its part to defend, indemnify and hold harmless Six AB or to procure liability insurance for Six AB's benefit.

PLAINTIFFS' AND COLONIAL'S CROSS MOTIONS

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stored in a dry location which is protected from the elements. Every life net shall be protected against damage from mechanical devices, acid or other corrosive substances or from any other type of deterioration.

(e) Inspection. Every life net shall be thoroughly inspected by a designated qualified person before each installation. A daily visual inspection shall be made by a designated person of every life net in use. Employers shall not suffer or permit any installation or use of any life net which shows any indication of mildew, broken fibre or fabric, excessive wear or any other damage or deterioration which could materially affect the strength of any portion of such life net. Any life net found to be unsafe shall be immediately removed from the job site and not returned for reuse unless properly repaired.

Plaintiffs, who seek to strike Colonial's answer based upon its failure to produce notes prepared by its driver, Miguel Acosta (Acosta), and its belated production of certain documents prepared by its employees, fail to make the requisite showing necessary to justify such drastic relief. The court notes that the striking of a pleading for spoliation of evidence is justified only when a party alters, destroys, or loses possession of key physical evidence before it can be examined by its opponents' experts "such that its opponents are 'prejudicially bereft of appropriate means to confront a claim with incisive evidence'" (*New York Cent. Mut. Fire Ins. Co. v Turnerson's Elec.*, 280 AD2d 652, 653 [2001], quoting *DiDomenico v C&S Aeromatik Supplies*, 252 AD2d 41, 53 [1998]; *see also Tommy Hilfiger, USA v Commonwealth Trucking*, 300 AD2d 58, 60 [2002]). Thus, courts are "reluctant to dismiss a pleading [based upon spoliation of evidence] absent willful or contumacious conduct" and will only do so where the extent of prejudice to a party requires it or when "dismissal is necessary as a 'matter of elementary fairness'" (*Favish v Tepler*, 294 AD2d 396, 396 [2002], quoting *Puccia v Farley*, 261 AD2d 83, 85 [1999]; *see also Mylonas v Town of Brookhaven*, 305 AD2d 561 [2003]; *Klein*, 303 AD2d at 376). "Where the evidence lost is not central to the case or its destruction is not prejudicial, a lesser sanction, or no sanction, may be appropriate" (*Klein*, 303 AD2d at 376; *see also Mylonas*, 759 NYS2d at 752).

As pointed out by Colonial in its cross motion, plaintiffs previously sought an order striking Colonial's answer on the grounds of spoliation and this court, by order dated March 4, 2004, granted the motion to the extent of referring the matter to a Judicial Hearing Officer

to hear and report on the issue of Colonial's alleged spoliation. As further noted, plaintiffs subsequently moved by order to show cause for an order: (a) staying the hearing and determination of Colonial's (cross) motion for summary judgment following the completion of the then-pending court-ordered hearing regarding the disappearance of certain accident reports and (b) permitting plaintiff to submit additional papers in opposition to Colonial's (cross) motion, as well as other related relief, but that before this court resolved the order to show cause, plaintiffs filed the instant cross motion.

Based upon the official transcript of the hearing conducted before the Judicial Hearing Officer, the court finds that all parties had a full and fair opportunity to be heard on the issues of missing handwritten notes and accident reports, office procedures regarding the retention of documents and efforts made to locate the documents. Accordingly, the court adopts the recommendation of the Judicial Hearing Officer that the proceeding on the issue of spoliation of evidence be dismissed based upon the fact that there was no proof that the missing documents were destroyed and there was no demonstration that either of the two witnesses called to testify at the hearing had any motive to destroy the documents. Since plaintiffs' most recent cross motion is duplicative of an earlier request for relief, the court grants Colonial's cross motion and denies plaintiffs' cross motion.

That branch of plaintiffs' application which seeks a conditional order determining that they are entitled to a missing documents charge is denied without prejudice with leave to renew at the time of trial. That branch of Colonial's cross motion seeking the imposition of

sanctions is denied, given Colonial's failure to demonstrate that plaintiffs engaged in frivolous conduct within the meaning of CPLR 8303-1 or 22 NYCRR 130-1.1 (*see Crandell v Schutz,* 188 AD2d 635 [1992]).

COLONIAL'S CROSS MOTION FOR SUMMARY JUDGMENT

In cross-moving for summary judgment, Colonial points out that plaintiffs' claims against it are rooted in negligence. As amplified in their bill of particulars, plaintiffs alternately claim that Colonial had a duty to: (1) equip its flatbed truck with a "lifting device" and breached that duty by not equipping its truck with such device; or (2) have its truck driver lift the steel off the truck at curbside and breached that duty when its driver failed and refused to unload the truck; or (3) secure loose objects on its truck which might strike plaintiff and breached that duty by failing to secure the piece of wood which struck plaintiff. In support of its cross motion, Colonial asserts that it owed no duty to McDonald to provide mechanical or human assistance to unload the cargo it carried; rather, it contends that it only owed a duty to Taman and that such duty was to deliver the correct amount of steel to the subject location. Through the deposition testimony and affidavit of its owner and chief executive, Arnold Cohen (Cohen), Colonial asserts that it had been engaged by Taman on approximately six different occasions over a period of approximately one year and that, although it carried crowbars or pry-bars on its truck to issue to workers whose responsibility it was to unload the truck, it never took part in the unloading of the trucks on which the steel was delivered nor did it utilize (or even own) trucks with material hoists. Colonial maintains that "it was the

understanding of this customer, supported by a prior course of performance . . . that it was solely and completely . . . Taman's responsibility to unload the steel delivered to the job site." It also avers that it is the duty of the customer to provide hoisting equipment for the lifting of the steel components.

Colonial refers to the testimony of McDonald's co-worker, Leobardo Solano, who stated that he was present at the worksite for many such deliveries and that at no time did anyone from Colonial assist in the unloading of the truck. Finally, in his affidavit, Cohen describes the means by which the load of steel rods was transported, noting that three 4" by 4" pieces of timber were placed, widthwise, on the floor of the flatbed upon which the steel rods were placed, that it was not customary for the timber sections to be tied down (because the steel would vary in length), and that the weight of the steel and the chains and straps used to secure the steel prevented its movement during road travel[5]. In seeking summary judgment, Colonial contends that McDonald and his co-workers, by their method and manner of unloading the beams, created the condition that caused the accident.

In opposition to Colonial's cross motion, plaintiffs argue that the existence of material issues of fact precludes summary judgment. Referring to the deposition testimony of various witnesses, plaintiffs assert that, upon the arrival of Colonial's truck at the worksite, Acosta told Jaya's supervisor, Kevin Goh, to arrange to have the truck unloaded and that Kevin Goh

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[5] As indicated by Colonial's routing sheet, when the truck in question left Colonial's facility, it was loaded with 13,270 pounds of steel.

directed McDonald and two co-employees to go up onto the flatbed and manually off-load the steel angle iron and instructed them to make sure that they stepped on the wood rails to prevent their sliding. They further note that Acosta himself cautioned Jaya's workers with regard to the possibility that the wood supports would slide if not stepped on.

It is, of course, hornbook law that a defendant may be held liable for negligence only when it breaches a duty owed to the plaintiff (*see Pulka v. Edelman,* 40 NY2d 781, 782 [1976] ["In the absence of duty there is no breach, and without a breach there is no liability"]; *see also Eiseman v State of New York,* 70 NY2d 175 [1987]). The court finds that Colonial's contention that it owed a duty solely to its contractor, Taman, and not to McDonald, is unconvincing. "Foreseeablilty should not be confused with duty" (*Pulka,* 40 NY2d at 785). "Duty in negligence cases is defined neither by foreseeability of injury (citation omitted) nor by privity of contract" (*Strauss v Belle Realty* Co., 65 NY2d 399, 402 [1985]). Although public policy has been held to limit the bounds of duty in certain unusual instances (*see Strauss*, 65 NY2d at 402-403), Colonial has identified no such concerns which would operate to prevent the application of "traditional tort principles" (*Id.* at 403). Accordingly, while defendant may have been under no duty to install special machinery or to provide assistance in unloading the flatbed (*see* 79 NY Jur 2d, Negligence § 23; *see also Lippman v Island Helicopter Corp.,* 248 AD2d 596 [1998]), the court rejects said defendant's reliance on the terms of its contract with Taman as a basis for finding that it owed no duty to plaintiff.

Having thus found that Colonial owed a duty to plaintiff, the court further finds that there is plainly an issue of fact as to whether Colonial was negligent in the manner in which it loaded, supported, and transported its steel angle irons onto its truck, whether it breached its duty to McDonald to perceive and adequately warn him regarding the hazard which ensued (*see Sprague v Louis Picciano Inc.,* 100 AD2d 247, 251 [1984]), and whether breach of its duty was the proximate cause of McDonald's injuries (*see Palsgraff v Long Is. R. Co.,* 248 NY 339 [1928]). Colonial's acknowledged policy of relying on workers other than its own to unload material from its delivery truck undermines any argument that plaintiff's injuries were unforeseeable (*see Pulka,* 40 NY2d at 785; *Ward v State,* 81 Misc 2d 583 [1977]). Indeed, Colonial's contention that the accident occurred not because of the way in which the load was placed onto the truck but, rather, because of the means employed by McDonald and his co-workers to unload the angle irons, simply demonstrates the existence of comparative negligence as a viable defense. Accordingly, the cross motion by Colonial for summary judgment is denied.

The foregoing constitutes the decision and order of this court.

E N T E R

Diana A. Johnson

J. S. C.