At an IAS Term, Part 22, 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 16th day of June, 2006.

P R E S E N T:

HON. MARTIN M. SOLOMON,
Justice.

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ECUADOR INTRIAGO,

Index No. 46903/00

Plaintiff,

- against -

THE CITY OF NEW YORK, et al.,

Defendants.

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The following papers numbered 1 to 8 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1, 2, 3
Opposing Affidavits (Affirmations)	4, 5
Reply Affidavits (Affirmations)	6, 7, 8
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiff moves for an order: (1) pursuant to CPLR 3126, striking defendants' answers for defendants' alleged failure to comply with discovery demands and with orders of this court; and, or in the alternative, (2) pursuant to CPLR 3212, granting partial summary judgment in plaintiff's favor on the issue of defendants' liability under Labor Law § 240 (1); and, or in the alternative, (3) compelling defendants'

appearances for examinations before trial, along with defendants' responses to certain discovery previously demanded by plaintiff.

Defendants City of New York (the City), Board of Education of the City of New York (the Board or Board of Education) and New York City Department of Design and Construction (DDC) (collectively, Municipal Defendants) cross-move for summary judgment dismissing plaintiff's complaint as against them.

Defendant WDF, Inc. (WDF), cross-moves for an order lifting the automatic stay of discovery imposed by CPLR 3214 or, in the alternative, holding plaintiff's summary judgment motion in abeyance pending the completion of discovery.

Factual Background

On October 5, 2000, plaintiff Ecuador Intriago allegedly fell and sustained injuries while performing asbestos abatement/removal work at Public School 123 (P.S. 123), located in Brooklyn. Said public school building was, at all times relevant, owned by the City and operated by the Board of Education.

By bid and contract agreement entered into in July 2000, defendant NYC School Construction Authority (SCA)[1] retained WDF to serve as the SCA's primary contractor on a Boiler Conversion/Climate Control project to be performed at P.S. 123. Thereafter, in

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[1] The SCA is a public benefit corporation, created by and existing under the New York Pub. Auth. Law § 1725, *et seq*., to, *inter alia*, "design, construct, reconstruct, improve, rehabilitate, maintain, furnish, repair, equip and otherwise provide for educational facilities" (Pub. Auth. Law § 1728 [5]). Upon information and belief, for purposes of school construction/renovation projects involving the City, the Board and the SCA, the SCA is also designated an owner of the property.

August 2000, WDF entered into a subcontract agreement with non-party Roadway Contracting, Inc. (Roadway), for Roadway's performance of the project's asbestos abatement/removal work.

Plaintiff was employed by Roadway and received all of his work-related instructions and supervision from one or more Roadway supervisors. On October 5, 2000, plaintiff was working in P.S. 123's basement boiler room, sealing the room with plastic material preparatory to commencement of the actual abatement work. While hanging a piece of plastic on a wall next to or near the boiler, the ladder plaintiff was standing on allegedly collapsed, causing plaintiff to fall therefrom.

At a hearing held pursuant to General Municipal Law § 50-h, plaintiff testified that, on the accident date, the Roadway employee or employees charged with bringing ladders to the work site forgot to do so, thus forcing plaintiff and his co-workers to use A-frame ladders that they found in the boiler room.

At the time of the accident, plaintiff was standing on the second or third step of a four foot A-frame ladder that had been placed facing the boiler room wall, slightly closed and not in a locked A-frame position because, allegedly, plaintiff's work space was too small for the ladder to be fully-opened and locked. While the ladder was so positioned, and plaintiff standing thereon, the ladder allegedly closed and collapsed, causing plaintiff to fall therefrom. According to plaintiff's 50-h hearing testimony, neither the ladder nor its braces

(used to lock the ladder into an A-frame position) broke. Plaintiff further testified that, on the date in question, he personally selected, placed or positioned, and opened the ladder.

Procedural History

Plaintiff commenced this action in or about November 2000, naming the City, Board, DDC and SCA as defendants, and alleging defendants' negligence in the common law and violation of Labor Law §§ 200, 240 (1) and 241 (6). Plaintiff thereafter sought and was granted leave to file, in or about January 2003, a supplemental summons and complaint adding WDF as a defendant to the action.

In February 2001, the City, Board and DDC appeared in this action by service of their answer with affirmative defenses and a cross-claim against the SCA. The municipal defendants also served an answer to the supplemental complaint.

In May 2003, WDF appeared in this action by serving an answer to the supplemental complaint, including therein affirmative defenses and cross claims against the municipal defendants and the SCA.

The SCA appeared or was represented at plaintiff's 50-h hearing, but has, thus far, failed to answer the complaint or to otherwise appear in this action. Plaintiff failed to move for a default judgment, and appears from the record to have abandoned his claims as against the SCA.

Although plaintiff has yet to file a Note of Issue and Certificate of Readiness in this matter, the instant summary judgment motion ensued, followed by the cross motions.

Although several discovery and compliance conferences were scheduled by and held before the court, discovery in this action, prior to the instant relief applications, appears to have been limited to a minimal exchange of documents and plaintiff's 50-h hearing. No examination before trial of plaintiff, of other parties, or of non-parties has been conducted, and very little other discovery seems to have taken place.

Motion to Strike

Plaintiff's motion for an order striking defendants' separate answers for defendants' alleged willful failure to respond to plaintiff's discovery demands and/or with prior discovery orders of this court is denied.

The imposition of CPLR 3126 sanctions (here, the striking of pleadings), for the failure to comply with discovery orders or demands, is an extreme and drastic measure that lies within the court's discretion (*Franznick v Town of Huntington*, 21 AD3d 875 [2005]; *Milbrandt & Co., Inc. v Griffin*, 19 AD3d 662 [2005]) and is appropriate only where the moving party clearly and conclusively demonstrates that the failure to comply is willful, contumacious, or in bad faith (*Euro-Central Corp. v Dalsimer, Inc.*, 22 AD3d 793 [2005]; *Grisales v City of New York*, 292 AD2d 419 [2002]; *Birch Hill Farm, Inc. v Reed*, 272 AD2d 282 [2000]; *Dauria v City of New York*, 127 AD2d 459 [1987]; *Associated Mutual Insurance*

Co. v Dyland Tavern, Inc., 105 AD2d 892 [1984]; *see also Olmoz v Town of Fishkill*, 258 AD2d 447 [1999]; *Anteri v NRS Construction Corp.*, 117 AD2d 696, 697 [1986]).

Upon review of the record, and while it is clear that defendants (in particular, the municipal defendants) might have acted more expeditiously, the municipal and non-municipal defendants separately assert in opposition to this branch of plaintiff's motion that they were not in possession of the discovery demanded, the material demanded was not relevant, and or they have since provided the subject disclosure material, and are now in full compliance with all discovery orders and demands. Plaintiff, in his reply papers, does not dispute such assertions to the extent of plainly demonstrating to the court that defendants have willfully failed or refused to disclose any information demanded to be disclosed by them, are, at present, in violation of a court order, or have otherwise committed any discovery transgression worthy of such drastic sanction.

Defendants are advised that their future dilatory or contumacious behavior in this area will be subject to sanction, including the imposition of fines and the possible striking of pleadings, regardless of the merits or likelihood of success of their defenses. Plaintiff is similarly advised that the court will take a dim view of any future failure on his part to cooperate with discovery demands or proceedings, including, but not limited to, the conduct of plaintiff's own deposition, as directed herein.

Discussion

To grant summary judgment, it must clearly appear that there are no material issues of fact (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Proper Statutory Defendants

The municipal defendants cross-move for summary judgment dismissing plaintiff's Labor Law causes of action as against the Board of Education on the ground that this defendant does not fall within the class of those subject to liability under the Labor Law. No reason or explanation is given by cross movants for their request that the action also be dismissed as against the DDC.

As to the instant matter, the record, without the need for further discovery, is clear and uncontradicted that the City, and not the Board, is the owner of the public school building in question, and there is no issue of fact as to whether the Board contracted for or otherwise controlled the work being performed by plaintiff at the time of his accident.

Under these circumstances, the Board of Education is entitled to dismissal of plaintiff's Labor Law §§ 240 (1) and 241 (6) causes of action against it (*see Kowalska v Board of Education of the City of New York*, 260 AD2d 546, 547 [1999]; *see also Hernandez v Board of Education of City of New York*, 264 AD2d 709, 710 [1999]). This branch of the cross-motion is, accordingly, granted.

To the extent the municipal defendants additionally argue that the City's status as an out-of-possession landlord absolves it of any liability in this action under Labor Law §§ 240 (1) and 241 (6), such argument is without merit, since "[t]he Court of Appeals has

unequivocally held that 'liability rests upon the fact of ownership and whether the owner had contracted for the work or benefitted from it are legally irrelevant'" (*Otero v Cablevision of New York*, 297 AD2d 632, 634 [2002], *quoting Coleman v City of New York*, 91 NY2d 821, 822 [1997]; *see also Pineda v 79 Barrow Street Owners Corp.*, 297 AD2d 634, 636 [2002]; *Adimey v Erie County Industrial Development Agency*, 226 AD2d 1053, 1054 [1996]; *Graybill v City of New York*, 2003 WL 21649704, *3 [NY Sup 2003]).[2]

As to DDC, its alleged connection to the project and/or plaintiff's accident, and the grounds for it being named or remaining as a defendant to this action, are not apparent from the face of the record. However, neither is any argument made by cross-movants and, thus, no *prima facie* case made, as concerns DDC.

Cross-movants' failure to make a *prima facie* showing of DDC's entitlement to summary judgment as a matter of law requires denial of this branch of the cross motion, regardless of the sufficiency of plaintiff's opposing papers (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Davern v City of New York*, 287 AD2d 679 [2001]; *Greenidge v HRH Construction Corp.*, 279 AD2d 400 [2001]; *Rentz v Modell*, 262 AD2d 545 [1999]; *McCue v Battaglia*, 211 AD2d 625 [1995]; *Colt v*

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[2] But see *Albanese v City of New York* (5 NY3d 217 [2005] [City not a Labor Law "owner" of arterial highway with respect to work involving placement of signs because it had no say as to which contractor or consultants were hired, did not perform any of the work, had neither planned nor erected the scaffold in issue, and its role was largely confined to its regulatory responsibilities arising out of its work permits] *reversing* 10 AD3d 545 [2004]).

Great Atlantic & Pacific Tea Co., Inc., 209 AD2d 294 [1994]). Such denial is, however, without prejudice to renewal, upon the proper and relevant supporting facts after completion of discovery.

Protected Activity

The municipal defendants further cross-move for summary judgment dismissing plaintiff's complaint on the ground that the Labor Law is inoperable as against defendants with regard to this incident, since plaintiff was injured while performing work preparatory to the actual asbestos removal work and, thus, not injured while engaged in an enumerated activity protected under the Labor Law.

The Appellate Division, Second Department, has ruled that necessary preparation for work that would be covered construction work under the Labor Law is itself covered construction work (*Makaj v Metropolitan Transportation Authority*, 18 AD3d 625, 626 [2005] ["the fact that (plaintiff) was engaged in preparation for the covered activity in which he was involved, rather than in the activity itself, did not defeat the claim under Labor Law § 240 (1)"]; *see also Moody v United States*, 753 F Supp 1042 [1990] [addressing state Labor Law violations where worker was injured while wrapping air ducts with plastic, preparatory to asbestos abatement work, so as to prevent asbestos from escaping work area]).

Here, abatement/removal of asbestos was part of the renovation/repair of the public school's boiler conversion/climate control project, and such abatement, pursuant to federal

and local law and for the safety of all involved, included sealing the room with plastic to ensure that there would be no escape of asbestos.

The court, thus, finds that the activity in which plaintiff was engaged at the time of his alleged accident and injury falls within the scope of Labor Law §§ 240 (1) and 241 (6), as his task in sealing the room with plastic must be considered work required for the completion of the demolition, repair or alteration work covered by the statute (*see Pino v Robert Martin Co.*, 22 AD3d 549, 552 [2005]).

Labor Law § 200 and Common Law Negligence

Upon review of the record, the court finds that defendants have made a *prima facie* showing of their entitlement to summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims and that plaintiff, in response, has failed to rebut said showing with admissible evidence sufficient to raise a legitimate question of fact requiring a trial of those issues.

Labor Law § 200 is nothing more than a codification of the common law duties of landowners and general contractors to provide workers with a reasonably safe place to work (*see Comes v New York State Electric & Gas Corp.*, 82 NY2d 876 [1993]; *Allen v Cloutier Construction Corp.*, 44 NY2d 290 [1978]). Thus, "[l]iability will be imposed upon an owner or general contractor under Labor Law § 200 only where the plaintiff's injuries were sustained as the result of a dangerous condition at the work site, rather than as a result of the manner in which the work was performed, and then only if the owner or general contractor

exercised supervision and control over the work performed at the site or had actual or constructive notice of the unsafe condition causing the accident" (*Begor v Mid-Hudson Hardwoods, Inc.*, 301 AD2d 550 [2003]).

Here, cross-movants have conclusively demonstrated that plaintiff's alleged accident and injuries were caused by plaintiff's own or his employer's methods rather than by a dangerous condition at the work site (*see Lombardi v Stout*, 80 NY2d 290, 295 [1992]). Plaintiff's own account of the accident, as related in his 50-h testimony and sworn affidavit in support of his instant motion, "establishe[s] that there was no dangerous condition on the premises that caused the accident, but rather, it was caused by the manner in which he attempted to" use the ladder (*Nastasi v Span, Inc.*, 8 AD3d 1011 [2004]).

The municipal defendants have established, prima facie, their entitlement to summary judgment as a matter of law by further demonstrating, through the proffered 50-h hearing testimony and other evidence, that they neither had nor exercised any requisite authority to control or supervise the particular work being performed by plaintiff at the time of his accident, and did not have notice of the particular dangerous condition caused by plaintiff's failure to fully open the A-frame ladder while in use by him.

As such, it was incumbent upon plaintiff, in opposing the motion, to lay bare his proof by presenting evidence in admissible form demonstrating the existence of a material issue of fact requiring a trial of this matter (*see Alvarez*, 68 NY2d at 324; *Montour v City of New York*, 270 AD2d 236 [2000]). Plaintiff, however, fails to offer any cognizant opposition to

this branch of the cross motion, and certainly none sufficient to raise a triable question of fact on this issue.

Because the record is clear that plaintiff's work activities and the method of performance of same were supervised and controlled by his own employer, none of the municipal defendants supervised or controlled the underlying injury-producing work, and there is absolutely no basis for plaintiff's common law negligence and Labor Law § 200 claims against the municipal defendants, those claims must be dismissed (*see Brogan v City of New York*, 4 Misc 3d 1017[A], *2 [2004]; *see also Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 353 [1998]; *Lombardi*, 80 NY2d at 295; *Bateman v Walbridge Aldinger Co.*, 299 AD2d 834, 836 [2002]; *Rice v City of Cortland*, 262 AD2d 770, 772-773 [1999]).

WDF is equally entitled to summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims against it (CPLR3212 [b]; *see Amore Partners, Inc. v Mephisto, Inc.*, 222 AD2d 473 [1995] [court has power to grant summary judgment to a nonmoving party, predicated upon a motion for that relief by another party]; *see also Carnegie Hall Corp. v City University of New York*, 286 AD2d 214, 215 [2001]; *Dormena v Wallace*, 282 AD2d 425, 427 [2001]).

In his sworn affidavit, discussed in further detail below, Robert Blyden,[3] Roadway's site supervisor for the P.S. 123 asbestos abatement project, asserts that plaintiff was provided

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[3] In response to plaintiff's concerns regarding said affidavit, the court advises that it is in possession on the instant motion and cross motions, and the record contains, one or more full and complete copies of Mr. Blyden's affidavit, properly signed and notarized.

with all of his work equipment by Roadway, "worked at the project under the exclusive direction, supervision and control of Roadway," and at no point, "prior to or during the accident, did anyone from WDF [ ] direct, supervise or control [plaintiff] in the performance of his duties at the project."

Plaintiff similarly testified at his 50-h hearing that he received his work instructions from Roadway's site supervisor, "Roberto," and, upon arriving at the public school on the afternoon of the accident, received specific work instructions from Mr. Blyden, including what specific area needed to be enclosed with plastic, and what needed to be removed from the area.

According to plaintiff's 50-h testimony, only Roadway workers were present at the work site; no other construction work was ongoing; and no one except those persons actually performing the asbestos removal work was allowed or permitted to enter the work area until such work was completed. Further, in his proffered affidavit, plaintiff acknowledges that, on the accident date and at the time of the accident, he was "following the directions of [his Roadway] supervisor in utilizing the ladder on which [his] accident occurred."

As to the instant matter, the record undisputedly demonstrates that WDF did not specifically direct Roadway's method or manner of work and did not direct plaintiff or the other workers "regarding specific tasks" (*see Carney v Allied Craftsman General Contractors, Inc.*, 9 AD3d 823 [2004]; *Dos Santos v STV Engineers, Inc.*, 8 AD3d 223 [2004]; *Parisi v Loewen Development of Wappinger Falls, L.P.*, 5 AD3d 648 [2004];

Dalanna v City of New York, 308 AD2d 400 [2003]; *Dennis v City of New York*, 304 AD2d 611 [2003]; *Alexandre v City of New York*, 300 AD2d 263, 264 [2002]; *cf. Spagnuolo v Port Authority of New York and New Jersey*, 8 AD3d 64 [2004]).

Indeed, plaintiff's own sworn affidavit supports and confirms WDF's statement that it had no control over plaintiff's work methods, and could not even have had notice of the specific hazardous condition which allegedly led to this accident since, due to the nature of this work, neither WDF nor any other entity or person not actually involved in the asbestos abatement/removal was allowed into the area. Even if notice were demonstrated, mere notice of unsafe methods of performance is not enough to hold the general contractor liable under Labor Law § 200 in the absence of supervisory control and where, as here, the injury results from the contractor's unsafe work methods or tools (*see Colon v Lehrer, McGovern & Bovis, Inc.*, 259 AD2d 417, 419 [1999]; *see also Sprague*, 240 AD2d at 394).

Based upon the foregoing, WDF is entitled to dismissal of plaintiff's Labor Law 200 and common law negligence claims against it.

Labor Law § 240 (1)

Plaintiff's Labor Law § 240 (1) cause of action has already herein been dismissed as against the Board of Education.

So much of the municipal defendants' cross motion as seeks summary judgment dismissing plaintiff's Labor Law § 240 (1) cause of action as against the City and DDC, on the ground that plaintiff was not engaged in a statutorily protected activity at the moment of

his injury is denied, as the court has already determined herein that the activity in which plaintiff was engaged at the time of his alleged injury falls within the scope of Labor Law §§ 240 (1) and 241 (6).

Plaintiff moves for partial summary judgment on the issue of defendants' liability under Labor Law § 240 (1), claiming that he suffered an elevation-related injury that was caused by defendants' failure to provide the proper statutory safety devices.

To prevail on his Labor Law § 240 (1) claim, plaintiff must establish that the statute was violated by the absence or defect of a type of protective device enumerated therein and that this violation was a proximate cause of his injuries (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Bahrman v Holtsville Fire Dist.*, 270 AD2d 438 [2000]; *Sprague v Peckham Materials Corp.*, 240 AD2d 392, 393 [1997]).[4]

WDF opposes plaintiff's summary judgment motion on the grounds that (1) the motion is premature, discovery not yet having been completed, plaintiff, the municipal defendants, WDF and relevant non-parties not yet having been deposed and there having been limited exchange of the construction and other contractual agreements, and (2) there is, on the existing record, a legitimate issue of fact as to whether plaintiff was the sole proximate cause of his own accident and injuries.

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[4] Proximate cause is established where "defendant[s] act or failure to act as the statute requires was a substantial cause of the events which produced the plaintiff's injuries" (*Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 561-562 [1993]).

The municipal defendants also oppose the motion, and assert that plaintiff's own actions, including his intentional improper use of the safety device actually provided him, was the sole proximate cause of the accident.

Whether the device at issue provided proper protection within the meaning of Labor Law § 240 (1) is ordinarily a question of fact (*see Garhartt v Niagara Mohawk Power Corp.*, 192 AD2d 1027 [1993]; *see also Plass v Solotoff*, 283 AD2d 474 [2001]; *Russell v Rensselaer Polytechnic Inst.*, 160 AD2d 1215 [1990]; *Blair v Rosen-Michaels, Inc.*, 146 AD2d 863, 865 [1989]).

Further, a Labor Law § 240 (1) cause of action will not stand where the plaintiff's own conduct was the sole proximate cause of his or her injuries (*see Tweedy v Roman Catholic Church of Our Lady of Victory*, 232 AD2d 630 [1996]; *see also Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280 [2003]).

Here, plaintiff testified that he was working on a four foot A-frame ladder, there were no tangible defects of the ladder, and his accident was caused due to the small or cramped nature of his work space and his alleged resultant inability to fully open the A-frame ladder to a complete and locked position.

WDF, however, proffers Mr. Blyden's sworn affidavit, wherein Mr. Blyden asserts, *inter alia*, that he was present at the work site and supervising plaintiff's work activities on the accident date and, on the date and at the time and place of the accident, there was sufficient space for plaintiff to fully open and lock the hinges on a six foot A-frame ladder.

It is well-settled that a plaintiff cannot prevail on a motion for summary judgment on the issue of liability under Labor Law § 240 (1) if there is any view of the evidence which would permit a finding that the defendant's violation of that provision might not have been a proximate cause of the plaintiff's accident (*see Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 524 [1985]). Where there are factual questions as to whether a plaintiff's own actions were the sole proximate cause of the accident, summary judgment must be denied (*see Weininger v Hagedorn & Co.*, 91 NY2d 958, 960 [1998]; *see also Blake*, 1 NY3d at 290; *Tylman v School Construction Authority*, 3 AD3d 488 [2004]).

As explained by the Court of Appeals in *Blake*, the fact that contributory negligence is not a § 240 (1) defense does not warrant the imposition of an insurer's form of liability and, even when a worker is not "recalcitrant," without a violation of the section, there can be no liability (1 NY3d at 290). The *Blake* court further noted that "it is conceptually impossible for a statutory violation (which serves as a proximate cause of a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause of the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. **Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation**" (*id.* at 292) (*emphasis supplied*).

The record of the instant matter presents material inconsistencies, and triable questions of fact are raised concerning (1) whether the device actually provided and available to plaintiff provided adequate and proper protection within the meaning of the statute and

was an appropriate safety device for the work function being performed by plaintiff, in the space within which he was required to perform such work, and (2) whether the accident occurred solely as a result of an independent act on plaintiff's part which "undermined the stability of the ladder," including what defendants allege was plaintiff's intentional misuse of the A-frame ladder in standing and working on same while it was in a semi, rather than fully, locked position (*see generally Costello v Hapco Realty, Inc.*, 305 AD2d 445, 446 [2033], *citing Weininger*, 91 NY2d at 960; *see also Blake*, 1 NY3d at 292; *Tylman*, 3 AD3d at 489).

Plaintiff's motion for partial summary judgment on his Labor Law § 240 (1) is, accordingly, denied.

Labor Law § 241 (6)

The municipal defendants cross-move, based upon the pleadings and plaintiff's 50-h hearing testimony, for summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action.

Labor Law § 241 (6) places a non-delegable duty upon owners to "provide reasonable and adequate protection and safety" for their workers in accordance with the rules and regulations promulgated thereunder (*see Comes*, 82 NY2d at 878; *Ross*, 81 NY2d at 503). The statute imposes absolute liability on owners for violations of the provisions of that section where such violation proximately causes a plaintiff's injury, irrespective of the

owner's lack of control or supervision over the work site (*Rizzuto*, 91 NY2d at 348-349; *Allen*, 44 NY2d at 300).

Plaintiff's Labor Law § 241 (6) claim has already herein been dismissed against the Board of Education. Additionally, the court has rejected, as being without merit and for the reasons delineated above, the City's argument that dismissal of this claim is required on the ground that plaintiff was not engaged in any protected activity at the time of the injury-producing accident.

The court further notes, however, that, in order to establish his Labor Law § 241 (6) claim, plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code regulation that is applicable given the circumstances of the accident, and which sets forth a concrete or "specific" standard of conduct, rather than a provision which merely incorporates common law standards of care (*Ross*, 81 NY2d at 503-505; *Ares v State*, 80 NY2d 959, 960 [1992]; *Fair v 431 Fifth Avenue Assocs.*, 249 AD2d 262, 263 [1998]; *Vernieri v Empire Realty Co.*, 219 AD2d 593, 597 [1995]; *Adams v Glass Fab, Inc.*, 212 AD2d 972, 973 [1995]). Plaintiff must also present some factual basis from which a court may conclude that the regulation was in fact violated (*Herman v St. John's Episcopal Hospital*, 242 AD2d 316, 317 [1997]; *Creamer v Amsterdam H.S.*, 241 AD2d 589, 591 [1997]).

Plaintiff fails to specifically allege any Industrial Code or other violations in his complaint, but contends in his bill of particulars that his Labor Law § 241 (6) claim is

properly asserted based upon defendants' alleged violation of certain Occupational Safety and Health Act (OSHA) regulations, and 12 NYCRR §§ 23-1.5 (a), (b) and (c), 23-1.7 (d), 23-1.16, 23-1.17, 23-1.19 and 23-1.21.

OSHA violations, in fact, do not support a Labor Law § 241 (6) cause of action (*see Ciraolo v Melville Court Assocs.*, 221 AD2d 582, 583 [1995]; *Delormier v 731 Ltd. Partnership*, 10 Misc 3d 1052[A], *5 [2005]; *Bender v TBT Operating Corp.*, 186 Misc 2d 394, 402 [2000], *citing Schiulaz v Arnell Construction Corp.*, 261 AD2d 247 [1999]).

Subsections (a), (b) and (c) of § 23-1.5 set forth general safety standards and lack the specificity required to qualify for predicate liability under Labor Law § 241 (6) liability (*see Maday v Gabe's Contracting, LLC*, 20 AD3d 513 [2005]; *Sajid v Tribeca North Assocs., L.P.*, 20 AD3d 301 [2005]; *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800 [2005]; *Madir v 21-23 Maiden Lane Realty, LLC*, 9 AD3d 450, 452 [2004]; *Hassett v Celtic Holdings, LLC*, 7 AD3d 364, 365 [2004]; *Mancini v Pedra Construction*, 293 AD2d 453, 454 [2002]; *Vernieri*, 219 AD2d at 598; *Delormier*, 10 Misc 3d 1052[A] at *4; *Spence v New York City Transit Authority*, 8 Misc 3d 1007[A], *5 [2005]; *Reddy v Ed-Sand Realty Corp.*, 5 Misc 2d 1015[A], *7 [2003]; *Bender v TBT Operating Corp.*, 186 Misc 2d 394, 402 [2000], *citing Hawkins v City of New York*, 275 AD2d 634 [2000]).

12 NYCRR § 23-1.7 (d), subtitled "Slipping hazards,"[5] "contains specific directives that are sufficient to sustain a cause of action under Labor Law § 241 (6)" (*Whalen v City of New York*, 270 AD2d 340, 342 [2000]), but is inapplicable under the facts of this case, since plaintiff clearly and unequivocally testified that the subject ladder did not slip or slide, and his accident was caused, not by a slippery condition of the floor, but because the ladder, allegedly, could not be locked into its proper and full A-frame position.

While § 23-1.16 is sufficiently concrete to support a Labor Law § 241 (6) claim (*see Bender*, 186 Misc 2d at 402), there is no evidence that plaintiff's fall involved a faulty safety belt or the lack of a safety belt (*see Bennion v Goodyear Tire & Rubber Co.*, 229 AD2d 1003 [1996]; *see also Plump v Wyoming County*, 298 AD2d 886, 887 [2002]; *Delormier*, 10 Misc 3d 1052[A] at *4).

Similarly, § 23-1.17, "which applies when life nets are used" (*Delormier*, 10 Misc 3d 1052[A] at *4), is clearly inapplicable under the facts of this case (*Plump*, 298 AD2d at 887).

Similarly, § 23-1.19, which applies to catch platforms, is clearly inapplicable under the facts of this case.

Finally, § 23-1.21, entitled, "Ladders and ladderways," and its subsections are also inapplicable to the facts of this matter. Section 23-1.21 is inapplicable, since the facts of this matter do not involve an unapproved metal or fiberglass ladder; there is no allegation or

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[5] 12 NYCRR § 23-1.7 (d) provides that: "employers shall not suffer or permit any employee to use a floor, passageway, ... 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."

evidence that the subject ladder was defective with respect to its strength, protective coating or maintenance, or that any such alleged defect was a proximate cause of plaintiff's accident; the ladder was not used as a regular means of access between floors or other building levels; there is no allegation that the ladder's footings were not firm, or that such was a proximate cause of plaintiff's accident; the accident did not involve a "leaning ladder" as contemplated by the subsection; plaintiff was not working from a ladder rung between six and ten feet above the ladder footing; the ladder is not alleged to have been leaning against a slippery surface; assuming a wooden, rather than aluminum ladder was involved, there is no allegation that its rungs were of improper diameter or strength, and no evidence that any such defect was a proximate cause of plaintiff's accident; and there is no allegation that the ladder was spliced, that a metal ladder was placed near an electric source, that the subject ladder was not equipped with a "locking type spreader" (only that plaintiff chose not to lock the ladder), that the ladder was placed in a door in use, or that use of the subject ladder was prohibited by statute, due to nonconformity.

As plaintiff presents no other violation of the Industrial Code which, under the facts of this matter, will form the basis for a viable cause of action under Labor Law § 241 (6), that cause of action is dismissed.

Discovery Issues

WDF's cross motion for an order lifting the stay of discovery automatically imposed by CPLR 3214 upon the making of plaintiff's summary judgment motion or, in the

alternative, holding plaintiff's summary judgment motion in abeyance pending the completion of discovery, is rendered academic by the denial of said summary judgment motion herein.

So much of plaintiff's motion as seeks an order compelling defendants' appearances for examinations before trial in this action, is granted to the extent that the parties are directed to proceed with discovery as specified by the court below.

Conclusion

Based upon all of the foregoing, plaintiff's motion is denied, except for certain discovery relief as specified below.

Defendants City, Board of Education and DDC's cross motion for summary judgment is granted to the extent that plaintiff's action is dismissed in its entirety as against the Board of Education, plaintiff's common law negligence and Labor Law §§ 200 and 241 (6) claims are dismissed in their entirety, as against all defendants, and the cross motion is otherwise denied, except without prejudice to renewal by or on behalf of DDC.

Defendant WDF's cross motion is denied as academic.

The City is directed to produce any available witness with knowledge, if any, about the circumstances surrounding the accident within 90 days of service of this order with notice of entry or submit a sworn affidavit from a person with personal knowledge that no such witness is available. Plaintiff and WDF are directed to appear for deposition within 90 days of service of this order with notice of entry. Any and all non-party depositions are directed

to be conducted at a time mutually convenient to the parties, but in no event more than 60 days from the date of this order with notice of entry.

The parties are directed to appear in Part 22, Room 461, on October 30, 2006, at 9:30 a.m. for a compliance conference, so that the court may, *inter alia*, monitor the progress of the discovery.

The foregoing constitutes the decision and order of this court.

ENTER,

J. S. C.

Hon. Martin M. Solomon S.C.J.