SHORT FORM ORDER

INDEX NO. 19659/2005

SUPREME COURT - STATE OF NEW YORK

I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

JORGE PINA,

Plaintiffs,

-against-

ANATOLE PIVONSKY d/b/a A.P. CESSPOOL, ACTIVE DOOR WINDOW CORPORATION, BOUCHER CONSTRUCTION CORP., CALIBER Z. CONSTRUCTION CO., INC, CRAFTSMAN CONSTRUCTION SERVICES, INC., DANIC CONCRETE CORP., FITZPATRICK EXTERIORS, INC., RICHARD A. HAGSTROM GENERAL CONTRACTOR, INC., JOHN P. HUNTER d/b/a HUNTER INSULATION, J.P. HUNTER ENTERPRISES, INC., LAKE SHORE SIDING CORP., LANGE PLUMBING & HEATING CORP., LOVE DRYWALL, INC., NEW IMAGE TILE DESIGNS, INC., PRIMO CUSTOM FLOORING, LTD., TOWERS ELECTRICAL CONTRACTING, INC.,

Defendants.

ORIG. RETURN DATE: AUGUST 31, 2006
FINAL SUBMISSION DATE: JANUARY 18, 2007
MTN. SEQ. #: 004
MOTION: MG

ORIG. RETURN DATE: AUGUST 23, 2006
FINAL SUBMISSION DATE: JANUARY 18, 2007
MTN. SEQ. #: 005
MOTION: MG

ORIG. RETURN DATE: OCTOBER 19, 2006
FINAL SUBMISSION DATE: JANUARY 18, 2007
MTN. SEQ. #: 011
MOTION: MG

ORIG. RETURN DATE: OCTOBER 19, 2006
FINAL SUBMISSION DATE: JANUARY 18, 2007
MTN. SEQ. #: 012
MOTION: MG

ORIG. RETURN DATE: OCTOBER 18, 2006
FINAL SUBMISSION DATE: JANUARY 18, 2007
MTN. SEQ. #: 013
MOTION: MG

ORIG. RETURN DATE: OCTOBER 19, 2006
FINAL SUBMISSION DATE: JANUARY 18, 2007
MTN. SEQ. #: 014
CROSS-MOTION: XMG

ORIG. RETURN DATE: DECEMBER 14, 2006
FINAL SUBMISSION DATE: JANUARY 18, 2007
MTN. SEQ. #: 015
MOTION: MOT D

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Upon the following papers numbered 1 to 28 read on these motions _____ FOR SUMMARY JUDGMENT _____.
Notice of Motion and supporting papers 1-3; Notice of Motion and supporting papers 4-6; Notice of Motion and supporting papers 7-9; Notice of Motion and supporting papers 10-12; Notice of Motion and supporting papers 13-15; Notice of Cross-motion and supporting papers 16-18; Affirmation in Opposition and supporting papers 19; Reply Affirmation and supporting papers 20; Reply Affirmation and supporting papers 21; Reply Affirmation and supporting papers 22; Reply Affirmation and supporting papers 23; Notice of Motion and supporting papers 24-26; Affirmation in Opposition and supporting papers 27; Reply Affirmation and supporting papers 28.

The Court has before it seven motions filed by various defendants herein, all seeking an Order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint as well as any cross-claims asserted against each defendant. The first motion (Motion #1) was filed by defendant, ACTIVE DOOR & WINDOW CORPORATION ("ACTIVE DOOR"). The second motion (Motion #2) was filed by defendant, TOWERS ELECTRICAL CONTRACTING, INC. ("TOWERS"). The third motion (Motion #3) was filed by defendant, DANIC CONCRETE CORP. ("DANIC"). The fourth motion (Motion #4) was filed by defendants, JOHN P. HUNTER d/b/a HUNTER INSULATION and J.P. HUNTER ENTERPRISES, INC. ("HUNTER"). The fifth motion (Motion #5) was filed by defendant, RICHARD A. HAGSTROM GENERAL CONTRACTOR, INC. ("HAGSTROM"). The sixth motion (Motion #6) was filed by defendant, LOVE DRYWALL, INC. ("LOVE"). Plaintiff has filed a single affirmation of counsel in opposition to Motions #1-6. Defendants ACTIVE DOOR, TOWERS, HUNTER and HAGSTROM have all filed reply affirmations in response thereto.

The seventh motion (Motion #7) was filed by defendant, NEW IMAGE TILE DESIGNS, INC. ("NEW IMAGE"), also seeking an Order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint as well as any cross-claims asserted against NEW IMAGE. Plaintiff has filed an affirmation of counsel in opposition to Motion #7, and NEW IMAGE has filed a

reply affirmation in response thereto. Accordingly, the Court has considered the foregoing submissions in rendering the within decision and Order.

The Court will address each of the foregoing applications *seriatim*.

This is an action to recover for personal injuries allegedly sustained by plaintiff on September 25, 2002, when he fell from a scaffolding while performing construction work at the premises located at 31 View Road, Setauket, New York. The action was commenced by summons and complaint dated April 21, 2005, alleging various violations of New York's Labor Law. Plaintiff alleges that the scaffolding he fell from was not properly erected, secured or positioned, and that the ground surface where the scaffolding was erected was uneven. As a result of the fall, plaintiff alleges that he sustained multiple severe injuries, including quadriplegia.

Specifically, plaintiff has alleged violations of Labor Law §§ 200, 240 and 241(6). Labor Law § 200 codifies and extends the common-law duty of an owner or general contractor to provide a safe place for workers at a construction site (*see Jock v Fien*, 80 NY2d 965 [1992]; *Gasper v Ford Motor Co.*, 13 NY2d 104 [1963]; *Brown v Brause Plaza, LLC*, 19 AD3d 626 [2005]). Actions based on Labor Law § 200 are premised on negligence (*see e.g. Karaktin v Gordon Hillside Corp.*, 143 AD2d 637 [1988]). To establish liability for a violation of Labor Law § 200 and for common-law negligence, a plaintiff must demonstrate that the defendants exercised supervision and control over the work performed, or had actual or constructive notice of an allegedly unsafe condition (*see Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347 [2006]; *Pilch v Board of Educ. of City of New York*, 27 AD3d 711 [2006]; *Riccio v NHT Owners, LLC*, 13 Misc 3d 1209[A] [Sup Ct, Kings County 2006]).

Labor Law § 240 imposes an absolute liability upon an owner, general contractor and their agents for failing to provide proper protection against elevation-related hazards that proximately cause injury, whether or not the owner or contractor actually exercised supervision or control over the work and whether or not there is comparative fault (*see Albanese v City of New York*, 5 NY3d 217 [2005]; *Armentano v Broadway Mall Props., Inc.*, 30 AD3d 450 [2006]; *Morales v Spring Scaffolding, Inc.*, 24 AD3d 42 [2005]). In order to prevail on a cause of action pursuant to Labor Law § 240(1), a plaintiff must establish a violation of the statute and that the violation was a proximate cause of his or her injuries

(*Armentano v Broadway Mall Props., Inc.*, 30 AD3d 450, *supra*; *Guaman v Ginestri*, 28 AD3d 517 [2006]; *Reinoso v Ornstein Layton Mgmt.*, 19 AD3d 678 [2005]).

Labor Law § 241(6) provides that "[a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith" (Labor Law § 241[6]). The Court of Appeals in *Ross v Curtis-Palmer Hydro-Elec. Co*, 81 NY2d 494 (1993), held that this statute "is, in a sense, a hybrid, since it reiterates the general common-law standard of care and then contemplates the establishment of specific detailed rules through the Labor Commissioner's rule-making authority." The Court of Appeals has further held that the statute imposes a nondelegable duty on owners and contractors to comply with those "specific detailed rules" (*Toefer v Long Island R.R.*, 4 NY3d 399 [2005]). Thus, the statute creates a cause of action against owners and contractors, making them vicariously liable for the negligence of others whom they did not supervise, where, and only where, a "specific, positive command" (*Ross v Curtis-Palmer Hydro-Elec. Co*, 81 NY2d 494, *supra*) or a "concrete specification" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]) of a regulation promulgated by the commissioner pursuant to the statute has been violated (*Toefer v Long Island R.R.*, 4 NY3d 399, *supra*).

The Appellate Division has held that where a subcontractor did not control or supervise the injured plaintiff and did not have the authority to do so, the Labor Law claims were properly dismissed insofar as asserted against that subcontractor (*Mancini v Pedra Construction*, 293 AD2d 453 [2002]; *see also Lozado v Felice*, 8 AD3d 633 [2004]; *Zervos v City of New York*, 8 AD3d 477 [2004]). In *Cook v Thompkins*, 305 AD2d 847 (2003), the Appellate Division held that an excavator who did not supervise the work, and who was not even on site when the plaintiff was injured, was not a proper defendant within the meaning of Labor Law §§ 240 or 241. Courts have interpreted the statutory "agent" language under Labor Law § 241(6) to limit a subcontractor's liability to those areas and activities within the scope of work delegated to it, i.e., where it has been given

authority to supervise and control the injury producing activity (*Musillo v Marist College*, 306 AD2d 782 [2003]; *Everitt v Nozkowski*, 285 AD2d 442 [2001]; *O'Connor v Lincoln Metrocenter Partners*, 266 AD2d 60 [1999]; *Rice v City of Cortland*, 262 AD2d 770 [1999]). It is the ability to control or supervise the work giving rise to the duties imposed under the Labor Law which renders a third-party, who is neither an owner nor a general contractor, liable as their statutory "agent" (*see e.g. Kehoe v Segal*, 272 AD2d 583 [2000]; *Riley v S&T Constr.*, 172 AD2d 947 [1991]). Subcontractors may be held liable as agents under Labor Law § 241(6) only when they have been specifically, contractually delegated the duty or obligation to correct unsafe conditions, or maintain work site safety (*Rice v City of Cortland*, 262 AD2d 770, *supra*; *Riley v S&T Constr.*, 172 AD2d 947, *supra*).

In the instant applications, as will be more fully discussed below, each defendant has proffered some or all of the following arguments in support of summary judgment: That they did not have the authority to supervise or control the work performed by plaintiff; that they did not use scaffolding in the performance of their work and did not provide scaffolding equipment to plaintiff; that they were not present at the site on the day of plaintiff's accident; and that they did not have actual or constructive notice of an allegedly unsafe condition.

By Order dated September 21, 2005 (Werner, J.), the Court granted the summary judgment motion of WHITFORD DEVELOPMENT, INC. ("WHITFORD"), a defendant in a related action under Index Number 19605-2003, which has been consolidated with the instant action for joint trial purposes by Order dated August 7, 2006 (Werner, J.). WHITFORD had proffered similar arguments to the arguments proffered by the defendants in the instant applications, and plaintiff proffered similar arguments in opposition. Plaintiff had appealed the Order granting summary judgment to WHITFORD, which the Appellate Division, Second Department affirmed by decision and Order dated November 21, 2006. In an opinion instructive in the context of the instant applications, the Second Department held:

> The president of Whitford Development, Inc. (hereinafter Whitford), clearly and unequivocally set forth, in his affidavit in support of his motion for summary judgment, that Whitford had no involvement in the construction and/or renovation work at the subject premises and that at no time did either Whitford or any of its employees

> undertake, direct, control, or supervise any work at the premises, including the work performed by the plaintiff. This established Whitford's prima facie entitlement to judgment as a matter of law dismissing the complaint and all cross claims insofar as asserted against it, thereby shifting the burden to the plaintiff to produce sufficient evidentiary proof in admissible form to show the existence of a triable issue of fact. In response, the plaintiff failed to present evidence sufficient to raise a triable issue of fact.
> Moreover, contrary to the plaintiff's contention, summary judgment was not granted prematurely, as the plaintiff failed to offer an evidentiary basis to suggest that discovery might lead to relevant evidence and that facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant. The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment motion may be uncovered during the discovery process is insufficient to deny the motion or to postpone a decision on the motion.

Pina v Merolla, 34 AD3d 663 (2006) (citations omitted).

Turning to the instant applications, Motion #1, filed by defendant ACTIVE DOOR, asserts that ACTIVE DOOR's only involvement with the subject location was the installation of two garage doors on or about November 27, 2002, approximately two months after the subject accident. ACTIVE DOOR has submitted an affidavit of its president, WILLIAM VOLK, who indicates that ACTIVE DOOR was retained by JJR ASSOCIATES ("JJR"), the general contractor and plaintiff's employer, to install two garage doors, weather stripping and remote entry devices. ACTIVE DOOR has submitted a copy of the invoice for the work performed, dated November 27, 2002, which, based upon ACTIVE DOOR's custom and practice in the industry, indicates that the actual work would have been performed either on the date of the invoice or a day or two prior. ACTIVE DOOR has also submitted two undated photographs of the subject location, which were forwarded to ACTIVE DOOR by plaintiff's counsel. ACTIVE DOOR contends that these photographs depict the garage door openings at the

subject location, prior to the installation of the garage doors. After a review of these photographs, MR. VOLK avers that the construction project was nowhere near the point where the garage doors would be installed, as typically garage doors are one of the last items to be installed. As such, ACTIVE DOOR argues that it is "obvious" from these photographs that any work by ACTIVE DOOR was performed after plaintiff's accident. Moreover, ACTIVE DOOR alleges that it did not use any scaffolding on the job, nor did it provide any scaffolding to be used by others. Accordingly, ACTIVE DOOR seeks an Order granting summary judgment dismissing plaintiff's complaint as it pertains to ACTIVE DOOR, as well as dismissing of any and all cross-claims asserted against it.

In opposition, plaintiff has merely submitted an affirmation of counsel wherein counsel argues that summary judgment is a drastic remedy which is not warranted herein, in that a questions of fact exist as to who had notice of the defective condition, who supplied the defective equipment, who acted as general contractor, who had the authority to control a jobsite and failed to do so, who failed to provide proper protection, and who failed to comply with statutorily mandated safety rules and regulations. In the alternative, plaintiff submits that defendants' applications are premature, as there remains substantial pretrial discovery. Specifically, with respect to ACTIVE DOOR's motion, plaintiff argues that the affidavit of MR. VOLK does not contain information based upon actual knowledge, but instead refers to ACTIVE DOOR's "custom and practice." As such, plaintiff asserts that questions remain as to the extent of ACTIVE DOOR's participation in the construction project.

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact

which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

In the case at bar, the Court finds that ACTIVE DOOR has made a *prima facie* showing of entitlement to judgment as a matter of law (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Andre v Pomeroy*, 35 NY2d 361, *supra*; *Rodriguez v N.Y. City Transit Auth.*, 286 AD2d 680 [2001]). The burden then shifted to plaintiff to establish, by competent evidence in admissible form, the existence of material issues of fact that would warrant a trial. Here, plaintiff has failed to do so. Ironically, plaintiff criticizes the affidavits submitted in support of all defendants' motions for summary judgment as "vague and conclusory" and insufficient to make a *prima facie* showing of entitlement to judgment as a matter of law. However, each of the moving defendants has submitted an affidavit of a principal containing specific factual allegations. Plaintiff has submitted an affirmation of counsel in opposition to the instant motions, but has failed to submit an affidavit of someone with personal knowledge of the essential facts to demonstrate the existence of any material issues of fact that would preclude the granting of summary judgment to the moving defendants. Counsel's affirmation in opposition, made without personal knowledge of the facts, is without any evidentiary value and is insufficient to defeat a motion for summary judgment (*see S. J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *Moran v Man-Dell Food Stores, Inc.*, 293 AD2d 723 [2002]; *Hoffman v Eastern Long Island Transp. Enter.*, 266 AD2d 509 [1999]; *Cataldo v Waldbaum, Inc.*, 244 AD2d 446 [1997]). Accordingly, it is

ORDERED that this motion by defendant ACTIVE DOOR, for an Order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint as it pertains to ACTIVE DOOR, as well as any cross-claims asserted against ACTIVE DOOR, is hereby **GRANTED**.

Motion #2, filed by defendant TOWERS, asserts that TOWERS was not involved with the subject location on or before the date of plaintiff's accident, and therefore a claim of negligence cannot be maintained against this defendant. TOWERS alerts the Court that along with its Verified Answer dated September 22, 2005, TOWERS served upon plaintiff a demand for Verified Bill of Particulars, to which plaintiff has failed to respond. TOWERS indicates that a review of the within complaint reveals that plaintiff alleges that each of the defendants were

negligent in the operation, control and performance of work at the site. However, TOWERS alleges that it was not in contract to perform any work at the site until approximately one month *after* plaintiff's accident. TOWERS has annexed a copy of the proposal between TOWERS and JJR, which indicates that the proposal was not accepted by JJR until October 21, 2002, approximately one month after plaintiff's accident. Further, TOWERS contends that it was not on the subject site to perform any work until approximately one month later on November 18, 2002. TOWERS has submitted an affidavit of its president, MICHAEL S. TOWERS, who attests to the foregoing.

In opposition, plaintiff argues that the affidavit of MR. TOWERS is silent on what role TOWERS played in the construction project, i.e., whether TOWERS acted as a general contractor at any point prior to plaintiff's accident, or whether TOWERS asserted any direction or control of the jobsite at any point prior to plaintiff's accident.

The Court finds that TOWERS has made a *prima facie* showing of entitlement to judgment as a matter of law, and plaintiff has failed to establish, by competent evidence in admissible form, the existence of material issues of fact that would warrant a trial. As discussed, plaintiff has failed to submit an affidavit of someone with personal knowledge of the essential facts to demonstrate the existence of any material issues of fact that would preclude the granting of summary judgment to the moving defendants. In addition, although plaintiff urges a denial of the motion, speculating as to TOWERS' involvement with the construction project prior to plaintiff's accident, the mere hope or speculation that evidence sufficient to defeat a motion for summary judgment motion may be uncovered during the discovery process is insufficient to deny the motion or to postpone a decision on the motion (*see Arbizu v REM Transp.*, 20 AD3d 375 [2005]; *Kershis v City of New York*, 303 AD2d 643 [2003]; *Associates Commercial Corp. v Nationwide Mut. Ins. Co.*, 298 AD2d 537 [2002]). Accordingly, it is

ORDERED that this motion by defendant TOWERS, for an Order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint as it pertains to TOWERS, as well as any cross-claims asserted against TOWERS, is hereby **GRANTED**.

Motion #3, filed by defendant DANIC, asserts that DANIC was hired to pour concrete footings and foundation at the subject premises, as well as to install the concrete floor slab in a new extension and in the basement of the residence. According to an affidavit of PABLO LUCAS, the president of DANIC, there was no written contract between JJR and DANIC. Further, MR. LUCAS avers that DANIC did not supply, furnish or install any scaffolding at the jobsite, as none of the work performed by DANIC required the use of scaffolding. MR. LUCAS indicates that a review of the invoices sent to JJR, the footing and foundation would have been performed in mid-July 2002; waterproofing would have been performed in the latter part of July 2002; a slab on a metal deck would have been installed in late August 2002; and the concrete basement would have been poured in the early part of October 2002. As such, MR. LUCAS submits that there were no employees of DANIC at the premises on the date of plaintiff's accident, and further, there was no work performed by DANIC at all in the month of September 2002.

Plaintiff again argues in opposition that liability could rest on DANIC if it is discovered that DANIC exercised some authority to supervise or control the jobsite. Plaintiff contends that the mere fact that DANIC was not present at the premises on the date of plaintiff's accident does not establish that DANIC was not hired to perform work as a general contractor or hired to direct or control the actions of those working at the premises on the date in question.

The Court finds that DANIC has made a *prima facie* showing of entitlement to judgment as a matter of law, and plaintiff has failed to establish, by competent evidence in admissible form, the existence of material issues of fact that would warrant a trial. As discussed, plaintiff has failed to submit an affidavit of someone with personal knowledge of the essential facts to demonstrate the existence of any material issues of fact that would preclude the granting of summary judgment to the moving defendants. Also as discussed, although plaintiff urges a denial of the motion, speculating as to DANIC's role in the construction project prior to plaintiff's accident, the mere hope or speculation that evidence sufficient to defeat a motion for summary judgment motion may be uncovered during the discovery process is insufficient to deny the motion or to postpone a decision on the motion (*see Arbizu v REM Transp.*, 20 AD3d 375, *supra*; *Kershis v City of New York*, 303 AD2d 643, *supra*; *Associates Commercial Corp. v Nationwide Mut. Ins. Co.*, 298 AD2d 537, *supra*). Accordingly, it is

ORDERED that this motion by defendant DANIC, for an Order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint as it pertains to DANIC, as well as any cross-claims asserted against DANIC, is hereby **GRANTED**.

Motion #4, filed by the HUNTER defendants, asserts that HUNTER provided an estimate to JJR in October of 2002 for insulation work to be performed at the subject premises, which work was ultimately performed in November and December of 2002. HUNTER has annexed copies of the invoices sent to JJR which reflect the work performed by HUNTER and corroborate the aforementioned dates. In addition, HUNTER alleges that the work performed by HUNTER did not require the use of any scaffolding equipment, and that all work performed was done in the interior of the building. HUNTER has submitted an affidavit of KEVIN BURCH, vice president of the HUNTER defendants, who attests to the foregoing, and further attests that no employee of HUNTER was involved in any work in the area where plaintiff's accident occurred.

In opposition, plaintiff argues that the affidavit of MR. BURCH is insufficient to demonstrate an entitlement to summary judgment in that it did not provide specific dates when the work was performed. In reply, HUNTER argues that plaintiff failed to controvert HUNTER's allegation that it was not involved with the construction project until October 10, 2002, when they provided an estimate to JJR for insulation work. Moreover, HUNTER contends that plaintiff failed to establish a question of fact as to whether these defendants had any authority to control the job site, as plaintiff failed to proffer any evidence that these defendants were in any way connected to the construction project in September of 2002. This Court agrees. The Court finds that the HUNTER defendants have made a *prima facie* showing of entitlement to judgment as a matter of law, and plaintiff has failed to establish, by competent evidence in admissible form, the existence of material issues of fact that would warrant a trial. Accordingly, it is

ORDERED that this motion by the HUNTER defendants, for an Order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint as it pertains to the HUNTER defendants, as well as any cross-claims asserted against the HUNTER defendants, is hereby **GRANTED**.

Motion #5, filed by defendant HAGSTROM, asserts that HAGSTROM is a masonry contractor, hired by JJR, and was on the jobsite during

the period July 31, 2002 through August 2, 2002. HAGSTROM has submitted an affidavit of RICHARD A. HAGSTROM, the president of HAGSTROM, who avers that HAGSTROM was hired by JJR, on or about July 31, 2002, to extend the foundation approximately eight inches by laying one course of block around the existing foundation. MR. HAGSTROM submits that all work performed by HAGSTROM was done by one employee, and was completed by August 2, 2002, over forty-five days prior to plaintiff's accident. MR. HAGSTROM alleges that no employee of HAGSTROM was on the jobsite on the date of plaintiff's accident. In addition, MR. HAGSTROM contends that his company did not use any scaffolds to extend the foundation.

Plaintiff argues that MR. HAGSTROM's affidavit is silent with respect to what role, if any, his company had supervising, directing, or controlling others at the jobsite. In reply, HAGSTROM argues that it cannot be found liable under Labor Law §§ 240 or 241, as it was not at the jobsite when the accident occurred, was not the general contractor for the construction project, and was not the owner of the subject premises.

The Court finds that HAGSTROM has made a *prima facie* showing of entitlement to judgment as a matter of law, and plaintiff has failed to establish, by competent evidence in admissible form, the existence of material issues of fact that would warrant a trial. Accordingly, it is

ORDERED that this motion by defendant HAGSTROM, for an Order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint as it pertains to HAGSTROM, as well as any cross-claims asserted against HAGSTROM, is hereby **GRANTED**.

Motion #6, a cross-motion filed by defendant LOVE, asserts that LOVE was hired to install drywall inside the house; that LOVE was not hired until after plaintiff's accident; and that LOVE did not perform any work on the jobsite until after the accident. In addition, LOVE alleges that it did not use scaffolding at the premises and was in no way involved with plaintiff's work. Defendant LOVE has included an affidavit from its president, CHRISTOPER LOVE, who confirms the foregoing, and indicates that his company prepared a proposal for JJR on November 12, 2002, six weeks after the accident, and faxed it to JJR the same day. LOVE has submitted a copy of the proposal as well as an invoice, dated December 5, 2002, which was sent to JJR. Moreover, MR. LOVE contends that

his company did not provide any tools or equipment to plaintiff or JJR, that all work by LOVE was performed *inside* the house, and that LOVE did not supervise, direct or control any work performed at the jobsite.

Plaintiff argues in opposition that the affidavit of MR. LOVE is silent with respect to whether LOVE provided any supervision, direction or control over any subcontractors at the premises on September 25, 2002. This argument is unavailing, as it is undisputed that LOVE did not become involved with the construction project until on or about November 12, 2002. The Court finds that LOVE has made a *prima facie* showing of entitlement to judgment as a matter of law, and plaintiff has failed to establish, by competent evidence in admissible form, the existence of material issues of fact that would warrant a trial. Accordingly, it is

ORDERED that this motion by defendant LOVE, for an Order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint as it pertains to LOVE, as well as any cross-claims asserted against LOVE, is hereby **GRANTED**.

Motion #7, filed by defendant NEW IMAGE, seeks an Order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint as it pertains to NEW IMAGE, as well as any cross-claims asserted against NEW IMAGE. In addition, NEW IMAGE seeks costs, sanctions and attorneys' fees incurred in connection with the instant application. NEW IMAGE has submitted an affidavit of its president, RUHI CANBAYDAR, who avers that NEW IMAGE performed bathroom tiling work at the premises, and that all work was performed in the interior of the building. In addition, MR. CANBAYDAR alleges that it never used any scaffolding in connection with its work and did not maintain any scaffolding at the jobsite; that it did not direct, supervise or control the work of plaintiff or any other worker at the jobsite; and that it had no involvement with plaintiff or the scaffolding from which plaintiff claims to have fallen. With respect to the imposition of sanctions, NEW IMAGE indicates that on or about October 11, 2006, it attempted to procure a voluntary stipulation of discontinuance from plaintiff against NEW IMAGE. As the stipulation of discontinuance was not forthcoming, NEW IMAGE alleges it was forced to make the instant application for summary judgment, and now seeks its costs and attorneys' fees incurred in connection with the application, as well as an imposition of sanctions. However, NEW IMAGE did not indicate whether it seeks

an imposition of sanctions against plaintiff, his counsel, or both (*see* 22 NYCRR 130-1.1[a]).

In opposition, plaintiff alleges that the "cursory" attempts by NEW IMAGE to explain away any liability are overly general. Plaintiff argues that the affidavit of MR. CANBAYDAR failed to address when NEW IMAGE was hired; by whom they were hired; when they began their work; where they worked; who on behalf of the company was working there; and whether NEW IMAGE was present at the time of the incident. As such, plaintiff argues that questions of fact preclude the granting of summary judgment to this defendant. In addition, plaintiff argues in opposition to the imposition of sanctions that plaintiff has presented a "colorable claim" which precludes sanctions.

In reply, NEW IMAGE reiterates that it was merely hired to tile the bathrooms in the interior of the building, and never used or possessed any scaffolding at the jobsite. NEW IMAGE argues that plaintiff failed to raise even the specter of a triable issue of fact and accordingly, summary judgment in favor NEW IMAGE is warranted.

The Court finds that NEW IMAGE has made a *prima facie* showing of entitlement to judgment as a matter of law, and plaintiff has failed to establish, by competent evidence in admissible form, the existence of material issues of fact that would warrant a trial. "It is well-settled that the shadowy semblance of an issue or bald conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment" (*Spodek v Park Prop. Dev. Assocs.*, 263 AD2d 478 [1999]; *see Orange County-Poughkeepsie Ltd. Partnership v Bonte*, 2007 NY Slip Op 1539 [2d Dept]; *Seaboard Sur. Co. v Nigro Bros.*, 222 AD2d 574 [1995]; *Mlcoch v Smith*, 173 AD2d 443 [1991]). Accordingly, it is

ORDERED that this motion by defendant NEW IMAGE, for an Order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint as it pertains to NEW IMAGE, as well as any cross-claims asserted against NEW IMAGE, is hereby **GRANTED**. It is further

ORDERED that the branch of NEW IMAGE's motion, for an Order, pursuant to 22 NYCRR 130-1.1, seeking an award of costs and attorneys' fees incurred in connection with the instant application, as well as the imposition of sanctions against plaintiff and/or plaintiff's counsel, is hereby **DENIED**. The Court

finds that plaintiff's conduct of failing to voluntarily discontinue this action as against defendant NEW IMAGE was not frivolous within the meaning of 22 NYCRR 130-1.1(c).

Finally, while the Court acknowledges that plaintiff alleges to have suffered serious and severe injuries, including quadriplegia, the Court does not condone the apparent blanket assertions of potential liability against the sixteen defendants herein. It is not appropriate to subject the moving defendants to the time and expense of preparing a defense to this action and participating in numerous depositions so that plaintiff can then sort out who is ultimately responsible for his injuries (*see Schwartzman v Wertz*, 153 Misc 2d 187 [Sup Ct, NY County 1991], *affd* 179 AD2d 540 [1992]; *see also Drexel Burnham Lambert Group, Inc. v Vigilant Ins. Co.*, 157 Misc 2d 198 [Sup Ct, N.Y. County 1993]).

The foregoing constitutes the decision and Order of the Court.

Dated: March 29, 2007

HON. JOSEPH FARNETI
Acting Justice Supreme Court