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,

Plaintiff,

-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: FEBRUARY 9, 2007
FINAL SUBMISSION DATE: FEBRUARY 15, 2007
MTN. SEQ. #: 016
MOTION: MD

ORIG. RETURN DATE: FEBRUARY 9, 2007
FINAL SUBMISSION DATE: FEBRUARY 15, 2007
MTN. SEQ. #: 017
CROSS MOTION: MD

ORIG. RETURN DATE: FEBRUARY 15, 2007
FINAL SUBMISSION DATE: FEBRUARY 22, 2007
MTN. SEQ. #: 018
CROSS MOTION: MG

ORIG. RETURN DATE: MARCH 1, 2007
FINAL SUBMISSION DATE: MARCH 15, 2007
MTN. SEQ. #: 019
MOTION: MG

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Upon the following papers numbered 1 to 26 read on these motions _____
FOR SUMMARY JUDGMENT.
Amended Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers 4; Affirmation in Opposition and supporting papers 5; Reply Affirmation and supporting papers 6, 7; Notice of Cross-motion and supporting papers 8-10; Affirmation in Opposition and supporting papers 11; Affirmation in Opposition and supporting papers 12, 13; Reply Affirmation and supporting papers 14; Notice of Cross-motion and supporting papers 15-17; Affirmation in Opposition and supporting papers 18; Reply Affirmation and supporting papers 19, 20; Notice of Motion and supporting papers 21-23; Affirmation in Opposition and supporting papers 24; Reply Affirmation and supporting papers 25, 26.

The Court has before it four 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 Court has consolidated these four motions solely for the purpose of rendering the within decision and Order. The first motion (Motion #1) was filed by defendant, CALIBER Z. CONSTRUCTION CO., INC. ("CALIBER Z"). The second motion (Motion #2) was filed by defendant, LANGE PLUMBING & HEATING CORP. ("LANGE"). The third motion (Motion #3) was filed by defendant, BOUCHER CONSTRUCTION CORP. ("BOUCHER"). The fourth motion (Motion #4) was filed by defendant, LAKE SHORE SIDING CORP. ("LAKE SHORE"). Plaintiff has filed affirmations of counsel in opposition to Motions #1 and #2, and a single affirmation of counsel in opposition to Motions #3 and #4. All of the movants have filed reply affirmations in response thereto. Accordingly, the Court has considered the aforementioned 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 common law negligence and 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 upon which the scaffolding was erected was uneven. As a result of the fall, plaintiff alleges that he sustained multiple severe injuries, including quadriplegia.

Plaintiff has alleged, among other things, negligence and gross negligence on the part of the defendants, as well as violations of New York's Labor Law. Plaintiff's complaint does not specifically recite the sections of the Labor Law violated; however, it appears from a review of the complaint that plaintiff is alleging 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, a plaintiff must demonstrate that the defendants exercised supervision and control over the work performed and 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.

Motion #1, filed by defendant CALIBER Z, asserts that CALIBER Z completed its work by September 12, 2002, well before plaintiff's accident, that it was not on the jobsite on the date of the accident, and it had never been delegated any supervisory authority over the jobsite. CALIBER Z has submitted an affidavit of one of its principals and secretary, ANGELA ZOZIMO, who indicates that CALIBER Z had begun its work as framing subcontractor at the premises on or about August 9, 2002, and completed its work prior to September 12, 2002. In support thereof, CALIBER Z has submitted a proposal dated August 9, 2002, and a "final" invoice dated September 12, 2002, relative to CALIBER Z's work on the jobsite, which CALIBER Z argues establishes a lack of involvement in plaintiff's accident on September 25, 2002. Ms. Zozimo further avers that it never used any scaffolding at the site, and that it is CALIBER Z's custom and practice to send final invoices only after the work is completed. As such, CALIBER Z argues that based upon the foregoing facts, liability cannot be established against CALIBER Z. Accordingly, CALIBER Z seeks an Order granting summary judgment dismissing plaintiff's complaint as it pertains to CALIBER Z, as well as dismissing of any and all cross-claims as a matter of law.

In opposition, plaintiff has 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 CALIBER Z's application is premature, as there remains substantial pretrial discovery. Plaintiff argues that the affidavit of Ms. Zozimo does not contain information based upon actual knowledge, but instead refers to CALIBER Z's "custom and practice." In addition, plaintiff challenges the "final" invoice submitted by CALIBER Z, arguing that the invoice does not provide a date when CALIBER Z completed its work, and in fact refers to work that had yet to be completed (i.e. installation of windows, and basements stairs and walls). As such, plaintiff asserts that questions remain as to the extent of CALIBER Z's participation in the construction project.

Co-defendant RICHARD A. HAGSTROM GENERAL CONTRACTOR, INC. ("HAGSTROM") has also submitted an affirmation of counsel in opposition to CALIBER Z's motion, which similarly argues that Ms. Zozimo's affidavit does not contain information based upon actual knowledge, but instead refers to CALIBER Z's "custom and practice." HAGSTROM further argues that the "final" invoice does not explicitly indicate that it is a "final" invoice, nor does it indicate the date CALIBER Z's work was completed.

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]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It has been held that "the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue . . . or where the issue is even arguable" (*Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65 [1987] [citations omitted]; *see also Andre v Pomeroy*, 35 NY2d 361, *supra*; *Henderson v New York*, 178 AD2d 129 [1991]). 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 admissible evidence 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 CALIBER Z has failed to make 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 Court finds that questions of fact exist as to CALIBER Z's involvement with the subject construction project, and on what dates CALIBER Z performed its work. The affidavit of Ms. Zozino and the "final" invoice submitted are insufficient to establish the absence of any material issues of fact. Ms. Zozino's affidavit lacks specificity with regard to the dates CALIBER Z performed its work, and indicates CALIBER Z's "custom and practice," instead of what actually transpired at the subject location. The failure CALIBER Z of to make an initial *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Smith v City of New York*, 288 AD2d 369 [2001]; *Sipourene v County of Nassau*, 266 AD2d 450 [1999]). Accordingly, it is

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

Motion #2, filed by defendant LANGE, asserts that LANGE was contracted by the general contractor, JJR ASSOCIATES ("JJR"), to install interior plumbing and heating at the subject location, and that it did not begin its work until approximately one month after the date of plaintiff's accident. LANGE has submitted an affidavit of HENRY G. LANGE, the president of LANGE, who attests to the foregoing, but also indicates that LANGE had been at the jobsite one month prior to plaintiff's accident to install the cesspool and outside piping for the plumbing system of the house. Mr. Lange avers that this outdoor work was completed well before plaintiff's accident, and that LANGE had properly covered and sealed the area in which the cesspool and piping was installed. LANGE submits that it did not have a supervisory role at the jobsite, nor did it use any scaffolding during the performance of its work.

In opposition, plaintiff argues that the actions of LANGE in performing its plumbing work outside prior to plaintiff's accident may have contributed to the accident. In addition, plaintiff criticizes Mr. Lange's affidavit in that it lacks specificity with respect to what work was performed and on what dates it was performed.

Co-defendant HAGSTROM has also submitted an affirmation of counsel in opposition to LANGE's motion, which similarly argues that LANGE's plumbing work performed on the outside prior to plaintiff's accident may have contributed to a condition that gave rise to plaintiff's accident. HAGSTROM argues that in plaintiff's Bill of Particulars and Amended Bill of Particulars, plaintiff alleges that the ground surface where plaintiff's scaffolding was placed was "uneven" and "out of level" due to the negligence of the defendants, including defendant LANGE. Further, HAGSTROM contends that LANGE's application is premature in that party depositions have yet to be conducted, including the deposition of LANGE.

The Court finds that LANGE has failed to make a *prima facie* showing of entitlement to judgment as a matter of law (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320, *supra*; *Andre v Pomeroy*, 35 NY2d 361, *supra*; *Rodriguez v N.Y. City Transit Auth.*, 286 AD2d 680, *supra*). The Court finds that questions of fact exist as to LANGE's involvement with the subject construction project, and on what dates LANGE performed its work. The affidavit of Mr. Lange lacks specificity with regard to the dates LANGE performed its work, but does acknowledge that LANGE was onsite prior to plaintiff's accident on September 25, 2002. Mr. Lange merely indicates that LANGE's work was completed "well before" plaintiff's accident, and makes conclusory statements that LANGE's work area was properly covered and sealed before the accident. Although it appears from LANGE's submission that any claims predicated on Labor Law §§ 200, 240 and 241(6) cannot be maintained against LANGE, questions of fact exist with respect to plaintiff's claim for common law negligence against this defendant. Courts have repeatedly held that negligence claims should not be resolved at the summary judgment stage (*see e.g. Kahane v Marriott Hotel Corp.*, 249 AD2d 164 [1998]; *Rivers v Atomic Exterminating Corp.*, 210 AD2d 134 [1994]; *Chahales v Garber*, 195 AD2d 585 [1993]; *In re World Trade Ctr. Bombing Litig.*, 3 Misc 3d 440 [Sup Ct, NY County 2004]).

As discussed above, the failure of LANGE to make an initial *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, *supra*; *Smith v City of New York*, 288 AD2d 369, *supra*; *Sipourene v County of Nassau*, 266 AD2d 450, *supra*). Accordingly, it is

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

Motion #3, filed by defendant BOUCHER, asserts that BOUCHER was merely hired to perform trim work at the premises, and that it had not begun its work until five days after plaintiff's accident, or on September 30, 2002. BOUCHER alleges that it had no ownership interest in the property; did not employ plaintiff; and did not supervise plaintiff's work. BOUCHER has submitted an affidavit of GHISLAIN BOUCHER, a principal of BOUCHER, who attests to the foregoing, and indicates that there was no written contract between JJR and BOUCHER. Mr. Boucher avers that BOUCHER had not brought or supplied any tools or equipment to the jobsite prior to plaintiff's accident.

Plaintiff argues in opposition that liability could rest on BOUCHER if it is discovered that BOUCHER exercised some authority to supervise or control the jobsite. Plaintiff contends that the mere fact that BOUCHER was not present at the premises on the date of plaintiff's accident does not establish that BOUCHER 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 BOUCHER 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. 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 BOUCHER. Although plaintiff urges a denial of the motion, speculating as to BOUCHER'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 [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 BOUCHER for an Order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint as it pertains to BOUCHER, as well as any cross-claims asserted against BOUCHER, is hereby **GRANTED**.

Motion #4, filed by LAKE SHORE, asserts that LAKE SHORE contracted with JJR to install siding at the premises. LAKE SHORE alleges that it was not present on the date of the accident, and that no employees or representatives of LAKE SHORE were present on the jobsite until 2003, at least three months after plaintiff's accident. In addition, LAKE SHORE alleges that it did not use any scaffolding on the job, nor did it have any involvement with scaffolding. Further, LAKE SHORE alleges that it never acted as general contractor on the site, nor did it have any authority or control over plaintiff's work. LAKE SHORE has submitted an affidavit of WILLIAM MOLINARO, the owner of LAKE SHORE, who attests to the foregoing on the basis that he is "fully familiar" with LAKE SHORE's activities at the subject location. LAKE SHORE argues that liability cannot attach pursuant to Labor Law §§ 200, 240 or 241(6), as LAKE SHORE was not the owner or general contractor of the jobsite, and did not have the authority to supervise or control plaintiff's work on the date of the accident.

In opposition, plaintiff argues that the affidavit of Mr. Molinaro is insufficient to demonstrate an entitlement to summary judgment in that it did not provide specific dates when LAKE SHORE's work was performed, and did not annex any documentary evidence to support the claim that LAKE SHORE was not present on the jobsite until 2003. Plaintiff further argues that Mr. Molinaro's affidavit fails to sufficiently answer questions regarding whether LAKE SHORE had the authority to control the jobsite and failed to do so.

In reply, LAKE SHORE argues that plaintiff failed to controvert LAKE SHORE's allegation that it was not involved with the construction project until 2003. Moreover, LAKE SHORE contends that plaintiff failed to establish a question of fact as to whether this defendant had any authority to control the job

site on the date of plaintiff's accident, as plaintiff failed to proffer any evidence that LAKE SHORE was present at the site in September of 2002. This Court agrees. The Court finds that LAKE SHORE 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 LAKE SHORE, for an Order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint as it pertains to LAKE SHORE, as well as any cross-claims asserted against LAKE SHORE, is hereby **GRANTED**.

The foregoing constitutes the decision and Order of the Court.

Dated: June 13, 2007

HON. JOSEPH FARNETI
Acting Justice Supreme Court