[* 1]
SCANNED ON 10/12/2007

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice PART 35

George Donaldson + Deborah Donaldson

-v-

Madison Park Apt. Corp. et al

INDEX NO. 105283/04

MOTION DATE 7/3/07

MOTION SEQ. NO. 005

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion Sequence 005 is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion (Mot. Seq. No. 005) by defendants Andrew Velez Construction, Inc. d/b/a Velez Organization, NYC Partnership Housing Development Fund Company, Inc., and Melrose Place Housing Corporation d/b/a Velez Equities USA, Inc. for summary judgment dismissing the amended complaint is granted to the following extent:

(1) the Labor Law §§ 200 and 241 (6) and common-law negligence causes of action (the first, second and fourth causes of action) are severed and dismissed as against defendants Andrew Velez Construction, Inc. d/b/a Velez Organization and NYC Partnership Housing Development Fund Company, Inc.; and

(2) the amended complaint is severed and dismissed as against defendant Melrose Place Housing Corporation d/b/a Velez Equities USA, Inc. with costs and disbursements to defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment in favor of said defendant.

FILED

Dated: 10/10/07

Page 1 of 2

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

135283/04

And it is further

ORDERED that the motion (Mot. Seq. No. 006) by plaintiffs George and Deborah Donaldson for partial summary judgment on the issue of liability on their Labor Law § 240 (1) cause of action (the third cause of action) is granted, insofar as asserted against defendants Andrew Velez Construction, Inc. d/b/a Velez Organization and NYC Partnership Housing Development Fund Company, Inc.; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that counsel for defendant Andrew Velez Construction, Inc. d/b/a Velez Organization, shall serve a copy of this Order with notice of entry within twenty days of entry on all counsel.

FILED
OCT 12 2007
COUNTY CLERK'S OFFICE

Dated 10/10/07 ENTER: _____, J.S.C.
HON. CAROL EDMEAD

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

----------X

GEORGE DONALDSON and DEBORAH DONALDSON,

Plaintiffs,

-against-

MADISON PARK APARTMENT CORP., ANDREW VELEZ CONSTRUCTION, INC., NYC PARTNERSHIP HOUSING DEVELOPMENT FUND COMPANY, INC., MADISON PARK DEVELOPMENT ASSOCIATES LLC, MELROSE PLACE HOUSING CORPORATION d/b/a VELEZ EQUITIES and VELEZ ORGANIZATION,

Defendants.

Index No. 105283/04

----------X

ANDREW VELEZ CONSTRUCTION, INC., d/b/a VELEZ ORGANIZATION, NYC PARTNERSHIP HOUSING DEVELOPMENT FUND COMPANY, INC., and MELROSE PLACE HOUSING CORPORATION d/b/a VELEZ EQUITIES,

Third-Party Plaintiffs,

-against-

Third-Party Index No. 590465/06

OLD CASTLE PRECAST, INC.,

Third-Party Defendant.

----------X

CAROL R. EDMEAD, J.:

MEMORANDUM DECISION

Motion sequence numbers 005 and 006 are consolidated for disposition.

In this action, plaintiff George Donaldson and his wife, Deborah Donaldson, seek to recover for injuries that he sustained while unloading concrete slabs from a flatbed truck, as he was standing on top of five to six slabs on the truck's bed.

Before the court are two motions for summary judgment. Defendants Andrew Velez Construction, Inc. d/b/a Velez Organization, NYC Partnership Housing Development Fund Company, Inc., and Melrose Place Housing Corporation d/b/a Velez Equities USA, Inc. move (Mot. Seq. No. 005), pursuant to CPLR 3212, for summary judgment dismissing the amended complaint. Plaintiffs move (Mot. Seq. No. 006) for partial summary judgment on the issue of liability under Labor Law § 240 (1).

Background

Plaintiff was employed as a laborer with Union Local 79, performing construction work for various companies. On July 10, 2002, plaintiff was assigned to work for third-party defendant Oldcastle Precast, Inc. (Oldcastle) at the Madison Park Homes project on East 119th Street in Manhattan. The project was a subsidized housing development which was sponsored by defendant NYC Partnership Housing Development Fund Company, Inc. (NYC Partnership). NYC Partnership was also the owner of the premises.

NYC Partnership entered into a contract with defendant Melrose Place Housing Corp. d/b/a Velez Equities USA, Inc. (Melrose) as the site developer to develop the site. Melrose subsequently retained defendant Andrew Velez Construction, Inc. d/b/a Velez Organization (Velez) as the project's general contractor. Velez, in turn, hired Oldcastle as a subcontractor to supply and install precast concrete slabs for the floors of the houses. Oldcastle fabricated the slabs off site and then shipped them to the site on a flatbed truck. Upon arrival at the site, a crane hoisted the slabs into position in the new construction.

On July 10th, the day before the accident, plaintiff was engaged in installing the concrete

flooring on the second floors of the houses (Plaintiff EBT, at 31-32). When he arrived at the site the following day, the Oldcastle foreman told plaintiff that he would be doing the same work as he did the day before (*id.* at 36). Plaintiff's accident occurred while unloading the first truckload of the day (*id.* at 40). He was standing on a load of concrete slabs that were stacked five to six slabs high on the back of the truck (*id.* at 40-41, 43). Each slab was approximately one foot thick and was separated by wooden pallets (*id.* at 41-42). The entire stack stood about 10 feet off the truck's bed (*id.* at 52-53). Plaintiff's co-worker was standing next to him on top of the slabs (*id.* at 43). In order to unload the slabs, plaintiff testified that he and his co-worker would place two steel coil slings around the concrete slabs, which would then be hoisted by the crane (*id.* at 45). The first slab to be moved was shipped in two pieces, which had to be separated by a crowbar. Plaintiff's co-worker gave him a crowbar to pry the pieces apart (*id.* at 48). Plaintiff testified that when he "stuck the crowbar down into the piece of concrete and pulled on it, the concrete snapped, it cracked," which caused him to lose his balance and fall backwards approximately 12 to 15 feet to the street below (*id.* at 49, 53). He landed on his right side, injuring his arm as a result of the fall (*id.* at 53).

Plaintiffs commenced this action against defendants, seeking recovery pursuant to Labor Law §§ 200, 240, 241 and common-law negligence. They assert in their complaint and bill of particulars, inter alia, that defendants failed to provide any safety devices and failed to provide a safe work site. Defendants then impleaded Oldcastle by service of a third-party summons and complaint. By stipulations of discontinuance dated June 15, 2006 and July 18, 2006, plaintiffs agreed to discontinue the action against defendants Madison Park Development Associates LLC and Madison Park Apartment Corp. (Pillersdorf Affirm., Exh. F). On July 7, 2006,

defendants/third-party plaintiffs also agreed to discontinue the third-party action against Oldcastle (*id.*).

Analysis

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR 3212 [b]). It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (*id.*), by tendering evidentiary proof in admissible form (*Bush v St. Clare's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Where the proponent of the motion has made a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate the existence of a triable issue of fact, generally also through admissible evidence (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "'[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient' to defeat a motion for summary judgment" (*DeRosa v City of New York*, 30 AD3d 323, 326 [1st Dept 2006], quoting *Zuckerman*, 49 NY2d at 562).

Labor Law § 240 (1)

Labor Law § 240 (1) states that:

> All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper

protection to a person so employed.

The statute is intended to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *see also Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). Section 240 imposes a nondelegable duty and absolute liability on owners, contractors, and their agents for failing to provide adequate safety devices to workers subject to elevation-related hazards (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513-514 [1991]).

Significantly, the statute makes a distinction between the "extraordinary elevation risks envisioned by [the statute]," which give rise to liability, and "the usual and ordinary dangers of a construction site," which do not (*Toefer v Long Is. R.R.*, 4 NY3d 399, 407 [2005]; *Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 843-844 [1994]; *Thompson v St. Charles Condominiums*, 303 AD2d 152, 153 [1st Dept], *lv dismissed* 100 NY2d 556 [2003]). Elevation risks "'are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured'" (*Suwareh v State of New York*, 24 AD3d 380, 381 [1st Dept 2005], quoting *Rocovich*, 78 NY2d at 514).

Melrose, as the site developer, is clearly not an owner or contractor, and thus may only be liable as an agent. In support of their motion, plaintiffs argue that Melrose should be liable as an agent solely because it was the developer of the project. Defendants contend that Melrose played only a limited financial role in the project. "An agency relationship for purposes of section 240

(1) arises only when work is delegated to a third party who obtains the authority to supervise and control the job. Where responsibility for the activity surrounding the injury was not delegated to the third party, there is no agency liability under the statute" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 293 [2003], citing *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). Plaintiffs have not submitted any evidence to establish Melrose's statutory agency. On the other hand, defendants proffer proof that Melrose did not retain any subcontractors, had no employees at the site, and only handled the financing of the project (Elizabeth Velez EBT, at 19-21). Accordingly, defendants have established that Melrose was not a statutory agent of NYC Partnership or Velez, and that it cannot be liable under section 240 (1).

Defendants contend that plaintiff's unloading activities were not a covered activity under Labor Law § 240 (1). To assert an actionable claim under the statute, a plaintiff must demonstrate that he was injured during "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (Labor Law § 240 [1]; *see also Martinez v City of New York*, 93 NY2d 322, 326 [1999]). In *Prats v Port Auth. of N.Y. & N.J.* (100 NY2d 878 [2003]), in finding that the plaintiff's inspection work was a covered activity, the Court of Appeals reasoned that:

> [Plaintiff] was a member of a team that undertook an enumerated activity under a construction contract, and it is neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of the work. The intent of the statute was to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts.

(*Prats*, 100 NY2d at 882). The Court also noted that "[t]he inspections were ongoing and contemporaneous with the other work that formed part of a single contract" (*id.* at 881). In this case, plaintiff was unloading concrete for installation, and only the day before was installing the

concrete flooring in the houses. Under these circumstances, plaintiff's unloading work was covered for purposes of Labor Law § 240 (1) (*see Worden v Solvay Paperboard, LLC*, 24 AD3d 1187, 1188 [4th Dept 2005] [where plaintiff was injured while retrieving materials from bed of tractor-trailer, the work was covered because it was "'ongoing and contemporaneous' with protected construction activity"]; *Orr v David Christa Constr.*, 206 AD2d 881 [4th Dept 1994] [unloading structural steel from trailer was protected activity]).

The issue, thus, is whether plaintiff was subject to an elevation-related hazard sufficient to trigger absolute liability. The courts have held that falls from the surface of flatbed trucks generally do not involve such hazards, but rather constitute ordinary risks at a construction site. In *Toefer* (4 NY3d 399, *supra*), the Court of Appeals held that "workers who fall when working on, or getting down from, the surface of a flatbed truck that is between four and five feet off the ground may not recover under Labor Law § 240 (1), because their injuries did not result from the sort of 'elevation-related risk' that is essential to a cause of action under that section" (*id.* at 405; *see also Landa v City of New York*, 17 AD3d 180, 181 [1st Dept 2005] [unloading of truck was not elevation-related risk]; *Betemit v Spring*, 306 AD2d 177, 178 [1st Dept 2003] [loading flatbed tow truck did not involve special elevation-related hazard]). In a similar case, the Court in *Dilluvio v City of New York* (95 NY2d 928 [2000]) affirmed the First Department's determination that a plaintiff, who fell three feet from the back of a pickup truck, was not injured as a consequence of an elevation-related risk (*id.* at 929, *affg* 264 AD2d 115 [1st Dept 2000]).

However, where plaintiffs fall from a position on top of materials or other objects located on a flatbed truck, courts have determined that they were subject to an elevated hazard. Recently, the Appellate Division, Second Department, in *Ford v IIRII Constr. Corp.* (41 AD3d 639 [2d

Dept 2007]), held that a plaintiff's injury in a fall from a flatbed truck "was caused by his falling from a height" (*id.* at 640). In that case, the plaintiff was standing on wooden cross braces securing 10-foot high stacks of curtain wall panels, which were located on the truck's platform (*id.*). Some pre-*Toefer* cases involving falls from flatbed trucks also hold that the plaintiffs were exposed to elevation risks if they were standing on objects on the trucks[1] (*see Curley v Gateway Communications*, 250 AD2d 888, 890 [3d Dept 1998] [plaintiff standing on top of pipe on flatbed truck]; *Monroe v Bardin*, 249 AD2d 650, 652 [3d Dept 1998] [plaintiff standing on bundles of materials about 7 ½ to 8 feet above ground]; *Cox v LaBarge Bros. Co.*, 154 AD2d 947, 948 [4th Dept 1989], *lv dismissed* 75 NY2d 808 [1990] [plaintiff standing on top tier of gas pipes stacked on flatbed truck]).

Here, plaintiff was standing on five or six concrete slabs on the flatbed truck, which stood about 10 feet off the truck's bed. Thus, this case is more similar to *Ford*, *Curley*, *Monroe*, and *Cox* than it is to *Toefer* or *Dilluvio*. Plaintiff's unloading activities subjected plaintiff to the risk of falling off the slabs. Although defendants rely on Velez's president's testimony that workers generally stood on the truck during unloading (Andrew Velez EBT, at 89-90), he also testified that he did not witness plaintiff's accident (*id.* at 37, 38, 96). As a result, there are no issues of fact as to how plaintiff's accident occurred. Defendants also have not disputed that there were no safety devices in place to prevent plaintiff from falling. Because there is no view of the evidence

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[1]The First Department in *Dilluvio* noted the existence of these cases but found them factually distinguishable. The Court stated that "[c]ontrary to the matter at bar, it appears that the workers in each of these cases were exposed to a significant danger by virtue of the height at which they were working . . . ." (*Dilluvio*, 264 AD2d at 120, citing *Curley*, *Monroe*, *Orr*, and *Cox*, *supra*).

by which defendants' violation of section 240 (1) could not have been a proximate cause of plaintiff's injury (*see Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524, *rearg denied* 65 NY2d 1054 [1985]), plaintiffs are entitled to summary judgment on this cause of action.

Labor Law § 200 (1)/ Common-Law Negligence

Labor Law § 200 is a codification of the common-law duty imposed upon owners and general contractors to maintain a safe workplace (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Where liability arises from the means and methods employed, the plaintiff must establish that the owner or contractor had "'the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition'" (*Carty v Port Auth. of N.Y. & N.J.*, 32 AD3d 732, 733 [1st Dept 2006], *lv denied* 8 NY3d 814 [2007], quoting *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]).

In moving for summary judgment, defendants assert that Labor Law § 200 does not apply because plaintiff was not engaging in construction work when he was injured, and that, in any event, they did not have the requisite supervision and control over plaintiff's work. Defendants' first assertion is unpersuasive, because the statute does not require that the plaintiff have been engaged in construction work (*Mejia v Levenbaum*, 30 AD3d 262, 263 [1st Dept 2006]).

As for their second assertion, defendants point to evidence that plaintiff only received work assignments and instructions from Oldcastle employees (Plaintiff EBT, at 29, 30-31). In addition, as previously noted, Melrose did not retain any subcontractors and had no employees at the site at any time (Elizabeth Velez EBT, at 19-20). Rather, Melrose only handled the financing

of the project (*id.* at 21). NYC Partnership's involvement in the construction was limited to approving the advancement of public moneys (Martin EBT, at 31, 39, 43). Plaintiffs have not disputed NYC Partnership or Melrose's lack of authority to supervise the work. Accordingly, these defendants cannot be liable under Labor Law § 200 or in negligence.

Both plaintiffs and defendants rely on the deposition testimony of the president of Velez, Andrew Velez. He testified that, in July 2002, Velez had a project manager on site "as needed," whose job was limited to ensuring that the work was being performed to code (Andrew Velez EBT, at 38, 39). Velez had four or five laborers on the job site that were not involved in the unloading of the concrete slabs (*id.* at 41). Velez also had a site superintendent on site, who supervised the contractors, coordinated the trades, supervised safety procedures being used by subcontractors, and had the authority to order subcontractors to stop work if he observed unsafe conditions (*id.*, at 41-43). However, no one from Velez was assigned to supervise or aid in the installation of the concrete slabs (*id.* at 84). Notably, Velez's president testified that "[t]he unloading of the plank was the responsibility of Oldcastle. . . . We were watching them unload the truck making sure that everything was done safe-wise, but we weren't supervising these people" (*id.* at 102).

General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled how the injury-producing work was performed (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]; *O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 226 [1st Dept], *affd* 7 NY3d 805 [2006]). Monitoring and oversight of the timing and quality of the work is insufficient to impose liability under section 200 (*Dalanna v City of New York*, 308 AD2d 400 [1st Dept 2003]). And, a general duty to ensure compliance

with safety regulations or the authority to stop work for safety reasons fails to raise a triable issue of fact as to the requisite supervision and control (*Smith v McClier Corp.*, 22 AD3d 369, 371 [1st Dept 2005]; *Reilly v Newireen Assoc.*, 303 AD2d 214, 221 [1st Dept], *lv denied* 100 NY2d 508 [2003]; *Buccini v 1568 Broadway Assoc.*, 250 AD2d 466, 468-469 [1st Dept 1998]). Here, the evidence indicates that Velez coordinated trades, supervised subcontractors' safety procedures, and had the authority to stop subcontractors' work for safety reasons. However, there is no evidence that Velez supervised how plaintiff performed his work. Indeed, plaintiff testified that he only received instructions from Oldcastle. Because there is no evidence that Velez had supervisory control, plaintiffs' Labor Law § 200 and negligence claims against it must be dismissed.

Labor Law § 241 (6)

Labor Law § 241 (6) imposes a nondelegable duty on owners, contractors, and their agents to ensure that construction, demolition, and excavation operations at construction sites are conducted so as to provide for the reasonable and adequate protection of construction workers (*Rizzuto*, 91 NY2d at 350). The statute is not self-executing, and the plaintiff must plead and prove the violation of an applicable Industrial Code provision (*Zimmer*, 65 NY2d at 523; *Buckley v Columbia Grammar and Preparatory*, – AD3d –, 841 NYS2d 249, 256 [1st Dept, Aug 16, 2007]). The Industrial Code regulation must constitute a specific, positive command, rather than a reiteration of common-law safety standards, and must proximately cause the accident (*Ross*, 81 NY2d at 503). Further, the interpretation of an Industrial Code provision and determination as to whether a particular condition falls within its scope are issues of law for the court (*Messina v*

City of New York, 300 AD2d 121, 123 [1st Dept 2002]).

Initially, defendants assert that this statute does not apply to unloading a truck. By its terms, the statute applies to construction, demolition, and excavation operations (Labor Law § 241 [6]). However, the Court of Appeals has held that the statute and regulations encompass any work "in connection with" or "in the context of construction, demolition and excavation" (*Nagel v D & R Realty Corp.*, 99 NY2d 98, 102-103 [2002]). Plaintiff's unloading activities were an integral part of the construction operation at the site, considering that the concrete slabs were being unloaded for installation in the houses (*see Murray v Lancaster Motorsports, Inc.*, 27 AD3d 1193, 1195 [4th Dept], *lv denied* 30 AD3d 1115 [4th Dept 2006]; *cf. Peterkin v City of New York*, 5 AD3d 652 [2d Dept], *lv denied* 3 NY3d 605 [2004] [plaintiff injured while unloading fencing panels from truck did not have section 241 [6] cause of action because panels were being "stockpil[ed] for future use"]). Thus, plaintiff was engaged in a protected activity at the time of his injury.

Although section 241 (6) applies to plaintiff's accident, only NYC Partnership and Velez's liability are at issue. Melrose has established that it was not a statutory agent and thus cannot be charged with the statutory duties under section 241 (6) (*see Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 46-47 [1st Dept 2005]).

Next, defendants argue that plaintiffs have failed to plead any specific or applicable Industrial Code provision. Plaintiffs allege in their verified bill of particulars that defendants violated four Industrial Code provisions: 12 NYCRR 23-1.5, 23-1.7, 23-1.16 and 23-1.21. Additionally, plaintiffs allege that defendants violated several rules and regulations of the Occupational Safety and Health Administration (OSHA) pertaining to construction: 29 CFR

1926/1910; section 450 (a), *et seq*. In opposition to defendants' motion, plaintiffs also submit an affidavit of a professional engineer, Daniel S. Burdett, P.E., in which he opines that plaintiff was working on the functional equivalent of an unguarded makeshift scaffold, and that defendants thus violated sections 23-1.4 (b) (45), 23-1.7 (b), 23-1.15, 23-1.16, 23-1.22 (c) and 23-5.1 (j) of the Industrial Code. Plaintiffs also request leave to amend their bill of particulars.

Leave to amend the bill of particulars to specify an Industrial Code violation is properly granted where the plaintiff makes a proper showing of merit and where amendment involves no new factual allegations or theories of liability, and causes no prejudice to the defendants (CPLR 3025 [b]; *Dowd v City of New York*, 40 AD3d 908, 911 [2d Dept 2007]; *Kelleir v Supreme Indus. Park*, 293 AD2d 513, 514 [2d Dept 2002]; *Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231, 232 [1st Dept 2000]). Because plaintiffs do not allege any new facts, and the court cannot discern any prejudice to defendants, the court shall consider these additional alleged violations in deciding defendants' motion.

12 NYCRR 23-1.5, 23-1.4 (b) (45) and OSHA regulations are insufficiently specific

12 NYCRR 23-1.5, entitled "General responsibility of employers," outlines an employer's general responsibility for health and safety in the workplace. Thus, this section sets forth a general standard of care and is insufficiently specific to support a section 241 (6) claim (*see Carty*, 32 AD3d at 733; *Maday v Gabe's Contr., LLC*, 20 AD3d 513 [2d Dept 2005]; *Sajid v Tribeca N. Assoc. L.P.*, 20 AD3d 301, 302 [1st Dept 2005]). Since section 23-1.4 (b) (45) merely defines the term "scaffold" for purposes of the Industrial Code, it also does not provide a "specific, positive command" (*Ross*, 81 NY2d at 503).

OSHA regulations also do not provide a specific statutory duty which could result in defendants' liability (*see Khan v Bangla Motor & Body Shop, Inc.*, 27 AD3d 526, 529 [2d Dept], *lv dismissed* 7 NY3d 864 [2006]). Moreover, given that OSHA governs employer/employee relationships, none of the defendants could have violated these regulations because they were not plaintiff's employer (*see id.*).

12 NYCRR 23-1.7, 23-1.15, 23-1.16, 23-1.21, 23-1.22 (c), and 23-5.1 (j) do not apply

Sections 23-1.15 and 23-1.16 provide regulations for safety railings, safety belts, harnesses, tail lines, and lifelines. These regulations do not specify when any such devices are required. Therefore, these sections do not apply because plaintiff was not provided with any of these devices (*see e.g. Plump v Wyoming County*, 298 AD2d 886, 887 [4th Dept 2002] [regulation did not apply to worker's 4 ½-foot fall from flatbed truck]; *see also Dzieran v 1800 Boston Rd., LLC*, 25 AD3d 336, 337 [1st Dept 2006]; *D'Acunti v New York City School Constr. Auth.*, 300 AD2d 107, 108 [1st Dept 2002]).

12 NYCRR 23-1.7 (b), entitled "Falling hazards," states as follows:

> Every hazardous opening into which a person may step or fall shall be guarded with a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).

12 NYCRR 23-1.7 (b) (1) (i). It has been held that "[t]he safety measures required [by this regulation . . .] all bespeak of protections against falls from an elevated area to a lower area through openings large enough for a person to fit" (*Messina*, 300 AD2d at 123; *see also Alvia v Teman Elec. Contr.*, 287 AD2d 421, 423 [2d Dept 2001], *lv dismissed* 97 NY2d 749 [2002]). Because plaintiff did not fall into a hole or hazardous opening, this regulation does not apply to

these facts (*see e.g. Plump*, 298 AD2d at 887 [regulation did not apply to worker's 4 ½-foot fall from flatbed truck]; *see also Garlow v Chappaqua Cent. School Dist.*, 38 AD3d 712, 714 [2d Dept 2007]; *Sopha v Combustion Eng'g*, 261 AD2d 911, 912 [4th Dept 1999]). The remaining subdivisions of this regulation plainly do not apply to plaintiff's accident.

Section 23-1.21 concerns "ladders and ladderways." While this regulation is sufficiently specific (*see Jicheng Liu v Sanford Tower Condominium, Inc.*, 35 AD3d 378, 379 [2d Dept 2006]), it does not mandate the use of ladders in particular situations, but only states how specific types of ladders, such as stepladders and extension ladders, are to be used and constructed. Given that plaintiff did not use a ladder in this case, this regulation is not relevant (*see e.g. Norton v Park Plaza Owners Corp.*, 263 AD2d 531, 532 [2d Dept 1999] [elevator repairman's fall from staircase not covered by regulation]).

Finally, plaintiffs cite two regulations concerning platforms. Section 23-1.22 (c) (2) requires that "[e]very platform more than seven feet above the ground . . . shall be provided with a safety railing constructed and installed in compliance with this Part (rule) on all sides except for those used for loading and unloading. . . ." Similarly, section 23-5.1 (j) provides that "all scaffold platforms . . . shall be provided with safety railings constructed and installed in compliance with this Part (rule)" (12 NYCRR 23-5.1 [j] [1]). Neither of these regulations applies because plaintiff was not working on a platform (*see Luckern v Lyonsdale Energy Ltd. Partnership*, 281 AD2d 884, 886 [4th Dept 2001]).

In sum, because plaintiffs have failed to identify a specific and applicable violation of the Industrial Code, their section 241 (6) claim is dismissed.

Conclusion

Accordingly, it is hereby

ORDERED that the motion (Mot. Seq. No. 005) by defendants Andrew Velez Construction, Inc. d/b/a Velez Organization, NYC Partnership Housing Development Fund Company, Inc., and Melrose Place Housing Corporation d/b/a Velez Equities USA, Inc. for summary judgment dismissing the amended complaint is granted to the following extent:

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HON. CAROL EDMEAD

ORDERED that the remainder of the action shall continue.

Dated:

HON. CAROL EDMEAD

ENTER:

Hon. Carol Robinson Edmead, J.S.C.