[* 1]

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

PRESENT: EDWARD H. LEHNER Justice PART 19

Index Number : 100769/2001

GALLAGER, JOSEPH

VS

LEVIEN & COMPANY

Sequence Number : 002

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ ... is 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 is decided in accordance with accompanying memorandum decision

FILED

SEP 16 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: SEP 10 2008

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

----------x

JOSEPH GALLAGHER and AMY GALLAGHER,

Plaintiffs,

Index No.
100769/01

- against -

LEVIEN & COMPANY and F.J. SCIAME CONSTRUCTION CO., INC.,

Defendants.

EDWARD H. LEHNER, J.;

Before the court is a motion by defendants F.J. Sciame Construction Co., Inc., ("Sciame") and Levien & Company ("Levien") for reargument of their prior motion for summary judgment and to grant i) both defendants summary judgment on plaintiff's claim under Labor Law § 240(1), ii) Sciame summary judgment on plaintiff's claim under Labor Law § 200 and common law negligence, and iii) Sciame summary judgment on its claim for contractual indemnification against third-party defendant Shroid Construction, Inc. ("Shroid"); and a cross-motion by Cord Construction ("Cord") for reargument of its prior motion for summary judgment and to grant it summary judgment on plaintiff's claims under Labor Law §§ 240(1) and 241(6). Said motions for reargument are granted and, upon reargument, decided as follows:

1) Movants' motions for summary judgment dismissing plaintiff's claim under

§ 240(1) is granted. Originally, the court held that a triable issue of fact existed on this claim because of a belief that plaintiff was claiming he fell into a hole when plywood covering the hole came loose, while defendants asserted that the plywood had been nailed down. On reargument it became clear that plaintiff voluntarily removed the plywood cover himself from the ramp and then fell into a hole that had been covered by the plywood. It has been held that, even where the injured plaintiff himself removed plywood covering a hole, issues of fact may exist as to whether the plywood provided the protection required by the statute and whether the plaintiff's own actions were the sole proximate cause of the accident. See, Lardaro v. New York City Builders Group, Inc., 271 AD2d 574 (2d Dept. 2000); Bahrman v. Holtsville Fire District, 270 AD2d 438 (2nd Dept. 2000); Singh v. Black Diamonds LLC, 24 AD3d 138 (1st Dept. 2005). However, each of these cases involved a plaintiff who was on an elevated floor.

Here, the injury occurred on a ramp in the alleyway adjacent to the subject building. On reconsideration of the applicable law, the court is persuaded that the § 240(1) claim is not viable because the injury sustained resulted from a fall into a hole existing at ground level and it has been held that, under such circumstances, the protection intended by § 240 is inapplicable due to the absence of an elevation related risk.

In the recent case of Wynne v. B. Anthony Construction Corporation, 53 AD3d 654 (2nd Dept. 2008), the court concluded that the "safety devices to protect workers from elevation-related risks (were not required because) [t]he plaintiff was not exposed to any risk that the safety devices referenced in Labor Law § 240(1) would have protected against since he was working at ground level." The court in Miller v. Weeden, 7 AD3d 684, 686 (2nd Dept. 2004), held that "[b]ecause the worksite was at ground level, the scaffolding, hoists, ladders, and other protective devices required under Labor Law § 240(1) were inapplicable." See also, Wells v. British American Development Corporation, 2 AD3d 1141, 1143 (3rd Dept. 2003) ("the work which plaintiff was completing on the foundation did not take place at an elevation (and hence) [h]e did not require the use of one of the devices contemplated by Labor Law § 240(1) in order to safely perform his tasks"); Paolangeli v. Cornell University, 296 AD2d 691 (3rd Dept. 2002); D'Egidio v. Frontier Insurance Company, 270 AD2d 763 (3rd Dept. 2000), lv. to app. den. 95 NY2d 765 (2000); Polanski-Tarnowa, 15 Misc. 3d 1139(A), 2007 WL 1500950 (Sup. Ct. NY Co. 2007).

In the cases of Figueiredo v. New Palace Painters Supply Co., Inc., 39 AD3d 363 (1st Dept. 2007) and Carpio v. Tishman Construction Corp., 240 AD2d 234 (1st Dept. 1997), cited by the court in the original decision, the injured plaintiffs were not working at ground level. In Gomez v. 2355 Eighth Avenue LLC, 45 AD3d 493, cited by the plaintiff, there was a basement floor under the plaintiff's work site and, as a

result of the plywood platform collapsing, the plaintiff's feet were "dangling in the air above the basement floor." Here, there is not indication of any basement level below the alley where plaintiff sustained his injury.

2) Sciame's application to dismiss the claims under § 200 and for common-law negligence is granted. Here, upon a review of the facts, the court finds that the record contains no proof that Sciame had actual or constructive notice of an unsafe condition or exercised control or supervision of plaintiff's work, and thus it cannot be held liable under § 200 or for common-law negligence. See, O'Sullivan v. IDI Construction Company, 28 AD3d 225, 226 (1st Dept. 2006) ("while the general contractor's on-site safety manager may have had overall responsibility for the safety of the work done by the subcontractors, such duty to enforce general safety standards as to the work site was insufficient to raise a question of fact as to its negligence"), aff'd. 7 NY3d 805 (2006); Singh v. Black Diamonds LLC, supra.

3) The application of Cord to dismiss the claim under § 241 (6) is denied as a triable issue has been raised as to the claimed violation of the regulation relied upon by plaintiff, § 23-1.7(b) [see, tr. Sept. 25, 2007, p. 20], which requires that "[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place." Here, there are factual disputes as to whether the plywood had been secured into the cement alleyway and as to wether plaintiff's own actions were the sole proximate cause of his injuries.

4) In light of the dismissal of the claim against Sciame for common-law negligence, its request for summary judgment on its claim for contractual indemnification against Shroid is granted (see, tr. September 25, 2007, p. 23).

This decision constitutes the order of the court.

Dated: September 10, 2008

J.S.C.