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

PRESENT: _____ PART 15

Justice

Index Number : 112578/2006
SGAMBATI, JOSEPH
VS
BALL CONSTRUCTION
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
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 is consolidated for disposition with motion Seq. 002 and.

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
SEP 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/11/08

WALTER B. TOLUB 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 — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB PART 15

Index Number : 112578/2006
SGAMBATI, JOSEPH
VS.
BALL CONSTRUCTION
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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 is consolidated for disposition with mtn. seq. 001 and is

DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION, in 001.

Dated: 9/13/08

WALTER B. TOLUB 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: PART 15

JOSEPH SGAMBATI,

Plaintiff,

-against-

BALL CONSTRUCTION, INC., 100 DUFFY, LLC, APOLLO REAL ESTATE ADVISORS, LP and WINTHROP MANAGEMENT, LP,

Defendants.

Index No.: 112578/06

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100 DUFFY, LLC and APOLLO REAL ESTATE ADVISORS, LP,

Third-Party Plaintiffs,

-against-

CARUSO PAINTING & DECORATING CORPORATION,

Third-Party Defendant.

Index No.: 591034/06

Tolub, J.:

Motion sequence numbers 001 and 002 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries sustained by a worker when he fell through a scaffold while painting in a parking garage located at 100 Duffy Avenue in Hicksville, New York on May 3, 2006. In motion sequence number 001, defendant Ball Construction, LP (Ball) and defendant and third-party plaintiff 100 Duffy, LLC (Duffy) move, pursuant to

CPLR 3212, for summary judgment dismissing plaintiff's complaint as to them. Ball and Duffy also seek an order granting summary judgment in third-party action against Caruso Painting & Decorating Corporation (CPDC), based on Caruso's contractual obligation to defend and indemnify Ball and Duffy.

In motion sequence number 002, plaintiff moves, pursuant to CPLR 3212, for summary judgment on his Labor Law § 240 (1) claim against defendants. Plaintiff also seeks an order striking defendants' answer as a sanction for their spoilation of key pieces of evidence.

BACKGROUND

On the date of plaintiff's accident, defendant and third-party plaintiff Duffy was the owner of the premises where plaintiff's accident took place. Defendant Ball was the general contractor on a project at the premises which included the renovation of the building's main lobby, as well as the refurbishing of the parking garage. Pursuant to a subcontract, Ball hired plaintiff's employer, third-party defendant Caruso, to perform painting work at the site.

Plaintiff testified that, on the morning of his accident, his boss, Leonard Caruso (Caruso), called him on his cell phone and told him to "go to 100 Duffy and paint the outside walls" (Defendants' Notice of Motion, Exhibit P, Sgambati Deposition, at 19). When plaintiff arrived at the premises, George Lovett

(Lovett), Ball's project superintendent, informed him where to begin painting. However, plaintiff noted that Lovett did not direct him as to how to perform his painting work. After looking over the area that needed painting, plaintiff determined that he would need a scaffold or a ladder, a paint brush and roller and some paint to perform the work. Plaintiff testified that "[t]here was a scaffold there and I asked George if I could use it and he said, yes, it's right there" (id. at 21-22).

Plaintiff testified that the scaffold was already set up when he borrowed it, and that he did not need to do anything to it before getting on it. Plaintiff stated that he did not check the platform to confirm that it was locked in place properly, as that was generally not his practice. Plaintiff explained that, after he had been using the scaffold for approximately 15 minutes with no problems, it became necessary to move the platform. In order to move the platform, plaintiff unlocked the wheels and rolled it to where it was needed. After arriving at the second location, plaintiff locked the scaffold's wheels and then climbed up on it. Plaintiff stated that, after he had resumed painting for about a minute, the "wood fell, gave way and I fell through" (id. at 30). Plaintiff also stated that, as the wood fell through, he did not hear any cracks and that the entire platform moved as he was standing on it. As a result, plaintiff hit the side of the scaffolding and fell straight down. When two

laborers came to his aid after his fall, plaintiff told them that "[t]he wood gave way and I fell through the scaffolding" (id. at 36).

Plaintiff stated that, if there had not been a ladder or scaffold available to him, he would have just completed whatever painting he could without them. In addition, plaintiff stated that he did not know whether or not Caruso owned its own scaffolding. Plaintiff also maintained that he was never told that he was prohibited from using another trade's equipment when on the job for Caruso. In fact, when plaintiff had done work for Caruso in the past, he had been directed to use any scaffolding present at the job site.

Caruso testified that he was vice president of CPDC, a business owned by his mother. Caruso explained that CPDC had been hired by Ball to paint various parts of the building and the parking garage. Caruso maintained that CPDC provides its own equipment to its workers, such as ladders, scaffolds, drop cloths and safety equipment, which it keeps at the sites as needed. Caruso noted that the painter's union was in charge of training its workers to use Baker scaffolds.

Caruso testified that when he contacted plaintiff about the job at the premises, he informed plaintiff that "[t]here's no ladders, no scaffolds there. All there is, is drop cloths and paints and a stick. Roll the walls, cut whatever you could reach

by hand" (Defendants' Notice of Motion, Exhibit Q, Caruso Deposition, at 41). He also told plaintiff to "roll the walls today. Tomorrow I'll have the driver drop off [a] scaffold or a ladder, whatever you need, to finish the top part" (id. at 43). An hour later, Caruso received a phone call from Lovett informing him that plaintiff had fallen off a Baker scaffold and become injured.

Later, Caruso spoke with Lovett about the incident. At this time, the two men theorized that plaintiff must have been "pushing himself to move" from the top of the platform, having left the scaffold's wheels unlocked (id. at 52). Caruso stated that Lovett told him that, after he found plaintiff on the floor, he noticed that there was a drop cloth underneath the scaffold and the scaffold's wheels were unlocked. Caruso also stated that Lovett told him that the scaffold was still together at that time, and that "[j]ust the wood board was on the floor" (id. at 53).

Caruso explained that, "the way the scaffold's built, the wood is locked into the scaffold. It's not going anywhere unless it falls off the lip, and you're skipping with it and pushing it. That's the only really [sic] way it can happen" (id. at 53). Caruso testified that he always instructs the workers to protect the floor with a drop cloth and to lock the wheels of the scaffold so that it does not roll. Caruso also reiterated that

he did not advise plaintiff to get a scaffold; he had just instructed plaintiff to roll from the ground.

Lovett testified that Ball served as general contractor on the renovation project at the building. On the day of the accident, plaintiff was substituting for a painter that had been on the job previously. Lovett stated that plaintiff approached him and told him that he did not have any ladders or scaffolding with him, and so Lovett showed him an approximately eight-foot long by six-foot high Baker's scaffold that was located in the shanty where the trades kept their equipment locked up for safety.

Lovett described the flooring of the scaffold as consisting of a "piece of plywood planking being trimmed with a metal frame so that it fits properly into the carriage ... of the baker" (Defendants' Notice of Motion, Exhibit O, Lovett Deposition, at 22). In addition, the plywood flooring was not secured in the carriage, as it was only laid into the form. Lovett was not sure as to what entity owned the scaffold, though he had seen it assembled 10 to 12 times prior to the date of plaintiff's accident. In fact, Lovett observed the scaffold being assembled and used just two weeks prior to the day of the accident. Lovett noted that Caruso did not have any equipment at the site on the day of the accident.

Lovett also testified that, on the morning of plaintiff's

accident, the scaffold was already assembled with the platform set at approximately three and a half to four feet above the ground. Although Lovett gave plaintiff his work instructions that morning, he did not have a discussion with plaintiff about the use of the scaffold and he did not observe plaintiff performing any of his work. In fact, Lovett maintained that he only became aware of plaintiff's accident after one of Ball's laborers came to his office and notified him of it.

Lovett stated that when he reached the scene of plaintiff's accident, plaintiff was "almost laying inside" the scaffold, and the platform was still in one piece (id. at 31). Lovett noted that it was his "conjecture" that the wheels of the scaffold got "pinched up" in the drop cloth, which caused the scaffold to lunge (id. at 45). Lovett also maintained that, as they were already unlocked, he did not need to unlock the wheels before moving the scaffold after plaintiff's fall.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (Santiago v Filstein, 35 AD3d 184, 185-186 [1st Dept 2006], quoting Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in

admissible form sufficient to raise a genuine, triable issue of fact" (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; DeRosa v City of New York, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]; Grossman v Amalgamated Housing Corporation, 298 AD2d 224, 226 [1st Dept 2002]).

PLAINTIFF'S LABOR LAW § 240 (1) CLAIM AGAINST DEFENDANTS

Labor Law § 240 (1), also known as the Scaffold Law (Ryan v Morse Diesel, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

> 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.

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold ... or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (John v Baharestani, 281 AD2d 114, 118 [1st Dept

2001], quoting Ross v Curtis-Palmer Hydro-Electric Company, 81 NY2d 494, 501 [1993]). The Scaffold Law does not apply merely because work is performed at elevated heights, but also applies where the work itself involves risks related to differences in elevation (Binetti v MK West Street Company, 239 AD2d 214, 214-215 [1st Dept 1997]; see Ross v Curtis-Palmer Hydro-Electric Company, 81 NY2d at 500-501]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries (Blake v Neighborhood Housing Services of New York City, 1 NY3d 280, 287 [2003]; Felker v Corning Inc., 90 NY2d 219, 224-225 [1997]; Torres v Monroe College, 12 AD3d 261, 262 [1st Dept 2004]). "The statute is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed (internal citations omitted)" (Valensisi v Greens at Half Hollow, LLC, 33 AD3d 693, 695 [2d Dept 2006]).

Defendants assert that they are not liable for plaintiff's injuries under Labor Law § 240 (1), because plaintiff's alleged negligence in not properly locking the scaffold's wheels and in not properly placing the plywood platform on the floor of the scaffold constituted the sole proximate cause of his injuries. Where a plaintiff's own actions are the sole proximate cause of

the accident, there can be no liability under Labor Law § 240 (1) (see Robinson v East Medical Center, LP, 6 NY3d 550, 554 [2006][plaintiff's own negligent actions in choosing a ladder he knew was too short for the work to be accomplished, and then standing on the ladder's top cap in order to reach the work, were, as a matter of law, the sole proximate cause of his injuries]; Montgomery v Federal Express Corporation, 4 NY3d 805, 806 [2005]; Cahill v Triborough Bridge and Tunnel Authority, 4 NY3d 35, 39 [2004][where an employer has made available adequate safety devices and an employee has been instructed to use them, the employee may not recover under Labor Law § 240 (1) for injuries caused solely by his violation of those instructions]; Blake v Neighborhood Housing Services of New York City, Inc., 1 NY3d at 290).

Here, plaintiff has met his burden in that the collapse of the scaffold's platform constituted a prima facie violation of Labor Law § 240 (1) (Aragon v 233 West 21st Street, Inc., 201 AD2d 353, 354 [1st Dept 1994] [collapse of a scaffold is prima facie evidence of a violation of Labor Law § 240 (1) which shifts the burden to defendants to raise a factual issue on liability]; Becerra v City of New York, 261 AD2d 188, 190 [1st Dept 1999] [Court held that the collapse of unsecured plywood platform which supported a construction worker four stories above ground level constituted a prima facie violation of scaffolding statute]).

"[A] presumption in favor of plaintiff arises when a scaffold or ladder collapses or malfunctions 'for no apparent reason'" (Quattrocchi v F.J. Sciame Construction Corporation, 44 AD3d 377, 381 [1st Dept 2007], quoting Blake v Neighborhood Housing Services of New York City, 1 NY3d at 289).

In addition, defendants did not offer any evidence, other than mere speculation, to refute plaintiff's showing or to raise a bona fide issue as to how the accident occurred (see Pineda v Kechek Realty Corporation, 285 AD2d 496, 497 [2d Dept 2001]; Hauff v CLXXXII Via Magna Corporation, 118 AD2d 485, 486 [1st Dept 1986]). In any event, "[a] lack of certainty as to exactly what preceded plaintiff's fall to the floor below does not create a material issue of fact here as to proximate cause" (Vergara v SS 133 West 21, LLC, 21 AD3d 279, 280 [1st Dept 2005] [where either defective or inadequate protective devices constituted the proximate cause of plaintiff's accident, it did not matter whether plaintiff's fall was the result of the scaffold tipping over or was whether it was the result of plaintiff mis-stepping off its side]).

As plaintiff was not the sole proximate cause of his injuries in this case, any alleged contributory negligence attributable to him is immaterial, because the statutory violation has been established as a proximate cause of his injuries (see Figueiredo v New Palace Painters Supply Co. Inc.,

39 AD3d 363, 364 [1st Dept 2007] [plaintiff sustained her prima facie burden under Labor Law § 240 (1) through admissible evidence that her decedent fell through an open hole when an unsecured piece of plywood laid over beams shifted and no safety device was provided to prevent the decedent's fall]).

Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is a cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence [internal quotation marks and citations omitted]" (Tavarez v Weissman, 297 AD2d 245, 247 [1st Dept 2002]).

Thus, defendants are not entitled to summary judgment dismissing plaintiff's Labor Law § 240 (1) claim against them. Accordingly, plaintiff is entitled to summary judgment in his favor on his Labor Law § 240 (1) claim against defendants.

LABOR LAW § 241 (6)

Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

..."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (see Ross v Curtis-Palmer Hydro-Electric Company, 81 NY2d at 501-502). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (id.).

Although plaintiff alleges that defendants violated Labor Law § 241 (6) in his supplemental bill of particulars, he did not set forth any particular alleged Industrial Code violations. Now, in opposing that part of defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim against them, plaintiff asserts violations of Industrial Code 12 NYCRR 23- 5.1 © (1), (e) (1) and (h) and 23- 5.18 (a) and (b).

Industrial Code 12 NYCRR 23-5.1 [c] (1) is sufficiently specific to sustain a claim under Labor Law § 241 (6) (see O'Connor v Spencer (1997) Investment Limited Partnership, 2 AD3d 513, 515 [2d Dept 2003]).

Industrial Code 12 NYCRR 23-5.1 [c] (1) states, in pertinent part:

[c] Scaffold structure.

(1) Except where otherwise specifically provided in this Subpart, all scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use.

Here, the subject scaffold was not constructed such that it could bear four times the maximum weight as required, as evidenced by the fact that plaintiff fell through the scaffold while working on it. Thus, defendants are not entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-5.1 [c] (1).

Industrial Code 12 NYCRR 23-5.18 (a) and (b) are sufficiently specific to sustain a claim under Labor Law § 241 (6) (see Robertson v Little Rapids Corporation, 277 AD2d 560, 562 [3d Dept 2000]).

Industrial Code 12 NYCRR 23-5.18 (a) and (b) state:

Section 23-5.18. Manually-Propelled Mobile Scaffolds

(a) Platform planking. Scaffold platforms for manually-propelled mobile scaffolds shall be tightly planked for the full width of the scaffolds except for necessary access openings. Such planking shall consist of planks not less than two inches thick full size, exterior grade plywood at least three-quarters inch thick or material of equivalent strength.

(b) Safety railings required. The platform of every manually-propelled mobile scaffold shall be provided with a safety railing constructed and installed in compliance with this Part (rule).

Here, the evidence indicates that the manually-propelled

scaffold was not tightly planked, nor did it contain the required safety railing. Defendants are not entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on violations of Industrial Code 12 NYCRR 23-5.18 (a) and (b).

COMMON-LAW NEGLIGENCE AND LABOR LAW § 200 CLAIMS

Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work' [citation omitted]" (Cruz v Toscano, 269 AD2d 122, 122 [1st Dept 2000]; see also Russin v Louis N. Picciano & Son, 54 NY2d at 317). Labor Law § 200 (1) states, in pertinent part, as follows:

> "1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

Although defendants argue the issue of supervision, or lack thereof, on their part, that standard applies in Labor Law § 200 cases which involve injuries resulting from the means and methods of the work. However, in this case, plaintiff's injuries allegedly arose from an unsafe condition created when the plywood platform was not properly secured so that it would not shift and collapse while plaintiff was working on it. In such a case, the

proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident (see Keating v Nanuet Board of Education, 40 AD3d 706, 708-709 [2d Dept 2007] [where plaintiff's injuries stemmed not from the manner in which the work was performed, but rather from a dangerous condition on the premises, general contractor was liable in common-law negligence and Labor Law § 200 when it had control over the work site and actual or constructive notice of the same]; Thomas v Claffee, 24 AD3d 749, 751 [2d Dept 2005]; Murphy v Columbia University, 4 AD3d 200, 202 [1st Dept 2004] [to support finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff because the injury arose from the condition of the work place created by or known to contractor, rather than the method of plaintiff's work]).

As to defendant Duffy, there is no indication in the record to support a finding that Duffy created the unsafe condition at issue, or that it had actual or constructive notice of the same. Thus, Duffy is entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims as against it.

However, there is evidence in the record to indicate that defendant Ball had actual or constructive notice of the unsafe

condition. A review of Lovett's deposition testimony reveals that he was aware that the platform flooring was not secured to the scaffold. Lovett even stated that he had observed the scaffold being assembled and disassembled on many prior occasions. Moreover, the fact that Lovett surmised that the platform flooring probably shifted out of place because plaintiff pushed it indicates that he was aware that the scaffold's plywood flooring was not sufficiently secured in place so as to prevent the floor's collapse. Thus, defendant Ball is not entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims as against it.

SPOILATION

Plaintiff argues that he is entitled to an order striking defendants' answer based on the spoliation of key pieces of evidence. To this effect, plaintiff claims that the parking garage where he was working was equipped with a motion-activated surveillance camera which recorded plaintiff's pre-collapse actions, as well as the scaffold's sudden collapse. However, the pre-collapse portion of the video, which is critical to the issue of proximate cause of the scaffold's collapse, was later erased by defendants. Similarly, although defendants admit to having examined the subject scaffold to determine whether it had any flaws or defects after the accident, defendants now deny having any knowledge of the scaffold's present whereabouts.

CPLR 3126 governs the penalties for nondisclosure. Sanctions, pursuant to CPLR 3126, will be imposed upon a clear showing that "the failure to comply with discovery demands was willful, contumacious or in bad faith [internal quotations and citations omitted]" (Foncette v LA Express, 295 AD2d 471, 472 [2d Dept 2002]). "To impose a sanction for spoliation of evidence, it must be established that the individual to be sanctioned was responsible for the loss or destruction of evidence crucial to the establishment of a claim or defense, at a time when he was on notice that such evidence might be needed for future litigation" (Haviv v Bellovin, 39 AD3d 708, 709 [2d Dept 2007]; Lovell v United Skates of America, Inc., 28 AD3d 721, 721 [2d Dept 2006] [plaintiff did not establish that the defendant intentionally or negligently failed to preserve crucial evidence after being placed on notice that the evidence might be needed for future litigation]; Lawrence Insurance Group v KPMG Peat Marwick L.L.P., 5 AD3d 918, 920 [3d Dept 2004]).

It is well settled that when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned "by striking a party's pleading or instructing the jury that it may draw negative inferences from the missing evidence" (Lawrence Insurance Group, Inc. v KPMG Peat Marwick L.L.P., 5 AD3d at 920; Baglio v St.

John's Queens Hospital, 303 AD2d 341, 342 [2d Dept 2003]; Foncette v LA Express, 295 AD2d at 472; New York Central Mutual Fire Insurance Company v Turnerson's Electric, Inc., 280 AD2d 652, 652-653 [2d Dept 2001]).

Here, as defendants have negligently lost or intentionally destroyed pertinent key evidence, depriving plaintiff of the opportunity to utilize the evidence and to prove and defend his claims. It follows that defendants' answer is stricken.

Finally, that portion of defendants' motion seeking summary judgment on its third-party claims against third-party defendant Caruso is denied as moot. Caruso has agreed to defend and indemnify defendants and the parties have executed a Stipulation of Discontinuance with respect to the third-party action.

Accordingly, it is

ORDERED that defendant's motion for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims against them is granted only as to defendant Duffy, and these claims are severed and dismissed as to Duffy; and it is further

ORDERED that defendants' motion for summary judgment in favor of Duffy in the third-party action for contractual indemnification is denied as moot; and it is further

ORDERED that defendants' motion for an order dismissing plaintiff's Labor Law § 241 (6) claim predicated on all alleged

Industrial Code violations, with the exception of Industrial Code 12 NYCRR 23-5.1 [c] (1) and 23-5.18 (a) and (b), is granted, and defendants' motion is otherwise denied; and it is further

ORDERED that plaintiff's motion for summary judgment on his Labor Law § 240 (1) claim against defendants is granted; and it is further

ORDERED that the part of plaintiff's motion for an order striking defendants' answer on the grounds of spoilation is granted to the extent that every presumption or conclusion that might be drawn from a review of the partially erased videotape or allegedly defective scaffold will be found against defendants; and it is further

ORDERED that the remainder of the action shall continue.

Counsel for the parties are directed to appear for a pre-trial conference on October 24, 2008 at 11AM in room 335 at 60 Centre Street.

This constitutes the decision and order of the Court.

DATED: 9/16/08

WALTER B. TOLUB, J.S.C.