

**Walker v Metropolitan Transp. Auth.**

2008 NY Slip Op 33220(U)

November 24, 2008

Supreme Court, New York County

Docket Number: 401561/04

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 21

WALKER, ERNEST

Plaintiff,

-v-

NEW YORK CITY TRANSIT AUTHORITY, et al.,  
Defendants.

INDEX NO. 401561/04

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL NO. \_\_\_\_\_

The following papers, numbered 1 to 4 were read on this motion for summary judgment.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits....

1+2

Answering Affidavits- Exhibits \_\_\_\_\_

3

Replying Affidavits \_\_\_\_\_

4

CROSS-MOTION:  YES  NO

**FILED**  
DEC 03 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH MEMORANDUM DECISION WHICH IS ATTACHED.

Dated: 11/24/05

Donna M. Mills  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

**DONNA M. MILLS, J.S.C.**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 21

-----X  
ERNEST WALKER,

Plaintiff,

-against-

METROPOLITAN TRANSPORTATION AUTHORITY,  
METROPOLITAN TRANSPORTATION AUTHORITY  
BRIDGES AND TUNNELS, TRIBOROUGH BRIDGE AND  
TUNNEL AUTHORITY and THE CITY OF NEW YORK,

Defendants.  
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Index No. 401561/04

**FILED**  
DEC 03 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Donna Mills, J.:

This action arises from a trip-and-fall accident within the Brookly Battery Tunnel. The tunnel extends from Redhook in Brooklyn to Battery Park in Manhattan, a length of approximately two miles. Two catwalks, one on each side of the tunnel, run the length of it. About midway through the tunnel, there is a pump room, also called the Ventilation Building, on Governor's Island, where non-party Twin Towers Enterprises (Towers) was replacing the drainage pumps. On the day of the accident, May 2, 2003, plaintiff, then an employee of Towers, had worked in the pump room. After the workday ended, as he was walking home, he tripped on a stainless steel band or wire on the catwalk, fell, and was injured. He did not fall off the catwalk. The location of the accident was approximately one quarter of a mile from the Manhattan end of the tunnel.

Plaintiff now brings this action, seeking damages for

common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6). Defendants<sup>1</sup> move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff cross-moves, pursuant to CPLR 3126, for discovery sanctions, alleging spoliation of evidence.

#### **Plaintiff's Cross Motion**

Plaintiff asks the court to resolve all issues of notice and of the way the accident happened in his favor because the videotape that might have recorded the accident and indicated how long the stainless steel band or wire was there was not saved.

#### **Lighting**

According to plaintiff, there were florescent lights spaced along the length of the tunnel above the catwalks, but on the day of the accident, "[m]ost of them were not working" (Plaintiff's Depo., at 30-32). He testified that a week before the accident, he had complained to "maintenance" (*id.* at 33) or "electricians" employed by "MTA" (*id.* at 34) about the lights being out, and that "[i]t was kind of dark" (*id.* at 35). When he complained about the lighting, the electricians told him to "[f]ix it yourself. Why don't you get up and do it" (*ibid.*). On the day of the accident, plaintiff "[could not] really tell"

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<sup>1</sup>The action has been discontinued as against the City of New York.

~~whether the lights within 10 feet of the accident site were on or~~  
not because there was "a lot of soot on the top" of the lights  
(*id.* at 38-39). Plaintiff testified that his accident occurred  
when a circle of a stainless steel band or wire wrapped itself  
around both of his ankles, and he fell (*id.* at 40-43). He had  
not seen the stainless steel band or wire before he fell (*id.* at  
40).

Brian Mullin, defendants' maintenance supervisor who  
was responsible for the physical plant of the tunnel in 2003,  
(Mullin Depo., at 6-7, 9), testified that he visited the tunnel  
nightly, five nights a week, Sunday through Thursday, during the  
5 P.M. to 1 A.M. shift (*id.* at 13-14). That night shift was  
"primarily responsible for the tunnel" (*id.* at 15). The lighting  
for the tunnel consisted of 150-watt metal halide bulbs in the  
ceiling, spaced 11 feet apart over each lane of traffic (*id.* at  
23-26). No other source of light illuminated the catwalks (*id.*  
at 28). The lights were replaced on an "as needed" basis, and  
Mullin would "wait until we had maybe two or three bulbs out  
before I would send ... the electrical crew in to replace [them]"  
(*id.* at 30). When they replaced the bulbs, they would also clean  
the fixture and the reflector of each bulb before they replaced  
the clear tempered-glass cover (*id.* at 30-31). No records were  
kept of when particular bulbs were replaced (*id.* at 32).  
However, as part of defendants' maintenance procedure, every two

years, during the months of April, May and June, every light bulb in the tunnel was replaced, whether it was working or not, and the fixtures were cleaned (*id.* at 32-33). This is because the lights degrade over time, usually after the third year of use (*id.* at 33-37). Inspections were made by Mullin's superiors to see that the goal of 98% lighting was being met, i.e., that at the time of the inspection, 98% of the lights in the tunnel were working. The inspection report for the first quarter of 2003, covering the months of January through April, indicates that the lighting in the tunnel was 100% operational (*id.* at 37-40). Lastly, when asked specifically whether "any type of dust or debris [would] accumulate on the lighting fixtures over a period of time, whether from exhaust from the cars or something else, based on your observations?", Mullin replied, "Minimal. Yes, minimally, yes" (*id.* at 54).

Defendants' project manager at the time, Earl Walcott, testified that he knew, from his own observations, that the tunnel walls and ceiling were washed "on a regular basis" (Walcott Depo., at 48-49),<sup>2</sup> and stated that in the time period that he had worked in the tunnel, he had never observed that the

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<sup>2</sup>According to Mullin, the tunnels ("the roadway, the walls, the ceilings, everything") were washed three times a year with "a truck that looks like a car wash on wheels, with rotating brushes" (Mullin Depo., at 41), in addition to maintenance workers flushing "all the surfaces on the tunnel" after rain (*id.* at 42).

lights within the tunnel were dirty (*id.* at 49-50), and no one had complained to him about lighting conditions along the catwalk (*id.* at 57).

Plaintiff contends that, had the videotape from the time of his accident been saved, it would have shown the lighting conditions in the area of the accident.

**Debris**

According to plaintiff, trash on the catwalks was a recurring condition of which defendants had notice. In his affidavit, dated May 13, 2008, he attested that

[o]n many [occasions prior to the accident], I had encountered debris and wires on the catwalk and had complained on at least three occasions to the maintenance people and engineers, who worked for the Triborough Bridge and Tunnel Authority. I also heard my co-workers complain about the same things and my boss, Kevin Dobson, too, for at least two or three months prior to my accident. My first complaint was about a month before my accident, and also about a week after that. The situation did not improve

(Plaintiff's 5/13/08 Aff., ¶ 3). His affidavit does not disclose whether his co-workers and Dobson complained to one of defendants' employees, or whether they just complained about the conditions among themselves, and no other evidence concerning those complaints has been adduced. Further, in his affidavit, plaintiff averred that Towers' project manager, Kevin Dobson, had told him shortly after the accident that "he had been in a room with Triborough Bridge and Tunnel Authority employees watching a

videotape which showed me tripping, and debris and wires on the catwalk. He said this was very visible on the videotape" (*id.*, ¶ 4). No affidavit or deposition testimony by Kevin Dobson has been submitted on these motions. Lastly, plaintiff testified that after he fell, he removed the stainless steel band or wire from his ankles, and threw it back down onto the catwalk (Plaintiff's Depo., at 43).

Plaintiff attested that he had seen stainless steel bands or wires like the one that caused his fall used for cables, like electrical cables (*id.* at 41). However, defendants' Mullin testified that there had not been "any type of construction work being performed along the walls next to the cat walk throughout the tunnel" in 2003, prior to May 2, the date of plaintiff's accident (Mullin Depo., at 59), and he had not received any complaints concerning construction debris along the catwalk during that time (*id.* at 58-59). Instead, in his walks along the catwalk, the kind of debris that he would encounter "[c]ould be a traffic cone, delineator, sometimes a part from a vehicle and things like coffee cups" (*id.* at 58). In fact, there was a "rule" at that time that forbade contractors from carrying construction materials on the catwalks (*id.* at 57) because defendants "don't want anybody to drop anything into the roadway and cause an accident" (*id.* at 57-58). It is part of security personnel's duties to stop people from entering the tunnel with

such materials (*id.* at 57).

Defendants' Walcott testified that during the time that Towers was working in the pump room, he used to walk the catwalk within the tunnel once a week to get to the job site (Walcott Depo., at 55). During that time, he never observed debris or garbage along the catwalk, and no one complained to him about garbage or debris on the catwalk (*id.* at 56-57). Mullin testified that when plaintiff's accident was reported to him, he "immediately" sent someone to go to the location, and that that person observed that "[t]he complaint was unfounded. ... There was nothing to report. There was no debris on the cat walk, no debris on the roadway" (Mullin Depo., at 62-63).

With respect to the videotape which plaintiff alleges may have shown the debris and lighting conditions in the area of his accident, Mullin maintains that the surveillance videotape was pulled from the security office, and that he, Mr. Graham, defendants' day supervisor, and Mr. Munk, defendants' maintenance superintendent, viewed the tape (*id.* at 66-67). When asked if anyone else viewed the tape with him, these were the only two people that Mullin mentioned. When specifically asked if Dobson had viewed the tape, Mullin said that he did not know (*id.* at 68). Concerning viewing the tape, Mullin observed:

We were able to watch Mr. Walker as he started, he started very near a camera and we were able to watch his progress down the cat walk until he got at the area where he said

he fell, you really couldn't see whether he fell. You really couldn't see him on the cat walk anymore. He was about 1,000 feet away from the camera. Keep in mind, 1,000 feet, three football fields

(*id.* at 67-68). As a result, the tape was considered "unremarkable and not saved" (*id.* at 72).

Earlier in his deposition, Mullin testified that the surveillance cameras are located every 1,000 feet along the walls of the tunnel (*id.* at 59). When asked whether the cameras are able to "videotape and see the cat walk sections of the tunnel," Mullin did not really answer the question, saying only that "[t]heir purpose is to monitor the roadway, vehicular traffic" (*ibid.*).

### **Spoliation**

"Spoliation is the destruction of evidence" (*Kirkland v New York City Housing Authority*, 236 AD2d 170, 173 [1st Dept 1997]). "Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them" (*ibid.*).

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]). "Where a party destroys essential physical evidence such that its opponents are 'prejudicially bereft of appropriate means [to either present or] confront a claim with incisive evidence,' the spoliator may be sanctioned by the striking of its pleading [citation omitted]" (*Friel v Papa*, 36 AD3d 754, 754 [2d Dept 2007]), or by "preclud[ing] the defendant from controverting the plaintiffs' prima facie showing regarding the existence of a defect and the defendant's notice of it" (*Erdely v Access Direct Systems*, 45 AD3d 724, 727 [2d Dept 2007]). Sanctions for spoliation will be denied when "the plaintiffs fail[] to show that the evidence destroyed was central to their case or that they were prejudiced by its destruction" (*Friel*, 36 AD3d at 754).

Plaintiff's cross motion for the imposition of sanctions against defendants for their purported spoliation of the videotape that plaintiff alleges might have shown how his accident happened, the lighting and debris conditions then at the site, and possibly how long the stainless steel band or wire had been there, is denied. The only evidence he has adduced in support of his assertion that the tape showed his accident and the wire on the catwalk is his testimony about the alleged statement by Dobson, which is pure hearsay, and inadmissible (see e.g. *Precision Auto Accessories v Utica First Insurance Co.*, 52 AD3d 1198, 1202 [4th Dept 2008] [deposition testimony was "both

speculative and inadmissible hearsay"]; *Lapin v Atlantic Realty Apts. Co., LLC*, 48 AD3d 337, 338 [1st Dept 2008] [plaintiff's averments "constituted inadmissible hearsay, absent firsthand evidence"]. Thus, plaintiff has failed to produce any evidence that contradicts defendants' unrebutted testimony concerning the videotape, the maintenance and conditions of the tunnel, the lighting, the catwalks, and the rules and protections against construction debris being brought into the tunnel. In light of defendants' evidence that the videotape did not show plaintiff's accident, plaintiff has also failed to show that the videotape was a "crucial" or "essential" item of evidence without which he cannot prove his case. Furthermore, plaintiff has failed to demonstrate that defendants had notice that the videotape might be needed for future litigation, and that he has been prejudiced by their failure to keep the "unremarkable" tape.

Plaintiff's cross motion is denied.

#### **Defendants' Motion**

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; see also *Smalls v AJI Industries*, 10 NY3d 733, 735 [2008] [proponent must tender "sufficient evidence to demonstrate the

absence of any material issues of fact'"], quoting *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). "'Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers'" (*Santiago v Filstein*, 35 AD3d 184, 186 [1st Dept 2006], quoting *Winegrad*, 64 NY2d at 853; see also *Johnson v CAC Business Ventures*, 52 AD3d 327, 328 [1st Dept 2008], quoting *Alvarez*, 68 NY2d at 324). However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson*, 39 AD3d at 306, citing *Alvarez*, 68 NY2d at 324). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso*, 50 AD3d 535, 544 [1st Dept 2008]). "The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues" (*Sheehan v Gong*, 2 AD3d 166, 168 [1st Dept 2003], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]).

The complaint asserts claims sounding in violations of Labor Law §§ 200, 240 (1), 241 (6), and common-law negligence.

**Labor Law § 240 (1)**

Plaintiff concedes that his claim under section 240 (1)

is "questionable" (Friedman 5/27/08 Affirm., ¶ 4), and does not oppose defendants' motion with respect to this claim. Accordingly, summary judgment disposing of this claim is granted.

#### **Labor Law § 200 and Common-Law Negligence**

"Labor Law § 200, the codification of the common-law negligence standard, imposes a duty upon an owner or general contractor to provide construction site workers with a safe place to work" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 272 [1st Dept 2007]; see also *Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005]). When an accident results from a dangerous condition, e.g., the stainless steel band or wire on the catwalk, the statute applies "to owners and contractors who either created a dangerous condition or had actual or constructive notice of it" (*Linares v United Management Corp.*, 16 AD3d 382, 384 [2d Dept 2005]).

No evidence has been produced which indicates how the stainless steel band or wire came to be on the catwalk, how long it had been there, or what entity was responsible for it being there. No evidence has been produced that indicates that the area was poorly lit. Rather, defendants have proffered plentiful, unrefuted evidence concerning the substantial efforts that they expended to keep the tunnel and catwalks well-lit, clean and litter-free, and plaintiff has failed to provide any evidence that raises a question of fact as to whether defendants

were responsible for the creation of the dangerous conditions of which plaintiff complains.

It is clear, also, that defendants did not have actual notice of the alleged poor lighting, or the stainless steel band or wire on the catwalk. The evidence indicates that none of their personnel that walked along that way observed either situation, and that none of their personnel received any complaints about an absence of adequate lighting or the presence of construction debris there. Defendants' Mullin, who viewed the videotape, did not see the debris that caused the accident, and did not note any problem with the lighting. Although plaintiff maintains that debris and poor lighting caused his accident, he has provided no evidence that counters defendants' demonstration that they did not have actual notice of any dangerous condition at the site.

"[C]onstructive notice of the allegedly unsafe condition that caused the accident ... must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken" (*Mitchell v New York University*, 12 AD3d 200, 201 [1st Dept 2004]; see also *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Even if, as plaintiff avers, he complained to defendants' maintenance people, electricians, and/or engineers about the lighting and debris, he has not attested that his

complaints pertained to the particular area where he fell. Since it is uncontested that the tunnel is approximately two miles long, complaints of poor lighting or debris in the tunnel, without indicating a specific location, are insufficient to constitute constructive notice.

Accordingly, the part of defendants' motion which seeks summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims is granted.

**Labor Law § 241 (6)**

Labor Law § 241 (6) provides that

[a]ll contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

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6. All 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 section "imposes a nondelegable duty upon an owner or general contractor to see to it that the construction, demolition and excavation operations at the workplace are conducted so as to provide for the reasonable and adequate protection of the workers" (*Buckley*, 44 AD3d at 271). The duty is imposed "regardless of the absence of control, supervision, or direction

of the work" (*Romero v J & S Simcha, Inc.*, 39 AD3d 838, 839 [2d Dept 2007]).

To establish liability under the statute, a plaintiff must specifically plead and prove the violation of an applicable Industrial Code regulation. The Code regulation must constitute a specific, positive command, not one that merely reiterates the common-law standard of negligence. The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury [internal citations omitted]

(*Buckley*, 44 AD3d at 271).

The part of defendants' motion which seeks summary judgment dismissing this cause of action must be granted for several reasons. First, the statute does not apply because plaintiff's accident did not occur in an area in which the work was performed. The replacement work was taking place in the pump room on Governor's Island, not within the tunnel. The pump room was mid-point in a tunnel which is approximately two miles long. Plaintiff fell when he was approximately one-quarter of a mile from the Manhattan entrance to the tunnel, roughly three-quarters of a mile from where the work was in progress. While plaintiff urges the court to follow the Appellate Division, Fourth Department's decision in *Zito v Occidental Chemical Corp.* (259 AD2d 1015 [4th Dept 1999]), the court declines to do so. That case involved a worker that was injured as he was proceeding to the worksite from a designated parking lot to a designated guard shack. No indication is given of the distance from the parking

lot to the guard shack. The decision determined as follows:

We have consistently held that a worksite within the meaning of Labor Law §§ 200 and 241 (6) is not limited to the actual area where the construction work is to be performed and includes adjacent areas that are part of the construction site, such as passageways or walkways to and from the work area

(*Zito*, 259 AD2d at 1016). To apply this standard to the facts of this case would be to stretch the meaning of "adjacent areas that are part of the construction site" far beyond any precedent which plaintiff has cited or this court has discovered. Plaintiff was a good three-quarters of a mile from the worksite which was on Governor's Island, and not within the tunnel itself (*compare DeTommaso v M. J. Fitzgerald Construction Corp.*, 138 AD2d 341, 343 [2d Dept 1988] [storeroom 20 feet away was "not within the immediate renovation site"]; *Derion v Buffalo Crushed Stone*, 135 AD2d 1105, 1105 [4th Dept 1987] [regarding Labor Law § 200, "(t)he safe 'place to work' contemplated by the statute does not include the roadway leading to defendant's business"]).

In addition, the sections of the Industrial Code (12 NYCRR Part 23) alleged as bases for plaintiff's section 241 (6) claim are either not specific enough to support such a claim, or are inapplicable to the facts of this case.

Section 23-1.1 provides simply the "Title and Citation" for the Industrial Code section of the NYCRR, and does not constitute a "specific, positive command" that requires a

defendant to do anything. It cannot support a Labor Law § 241 (6) claim.

Industrial Code § 23-1.3 ("Application") is also insufficiently specific to support a section 241 (6) claim (see e.g. *Williams v White Haven Memorial Park*, 227 AD2d 923 [4th Dept 1996]; *McGrath v Lake Tree Village Assocs.*, 216 AD2d 877 [4th Dept 1995]).

Section 23-1.5 ("General responsibility of employers") has long been held to be not specific enough to support a section 241 (6) claim (see e.g. *Meslin v New York Post*, 30 AD3d 309 [1st Dept 2006]; *Maldonado v Townsend Avenue Enterprises*, 294 AD2d 207 [1st Dept 2002]).

While section 23-1.7 (e) (1) is specific enough to support a Labor Law § 241 (6) claim (see e.g. *Halloway v Sacks and Sacks, Esqs.*, 275 AD2d 625 [1st Dept 2000]; *Corbi v Avenue Woodward Corp.*, 260 AD2d 255 [1st Dept 1999]), it is inapplicable in this instance because plaintiff was not injured in a "passageway" within the immediate area of a worksite. The section provides:

(e) Tripping and other hazards.

- (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping.

The case of *Bruder v 979 Corp.* (307 AD2d 980 [2d Dept 2003]) is instructive in the interpretation of the word, "passageway." As

with the Court in *Zito*, the *Bruder* Court concluded that "[t]he areas that must be kept in a safe condition include not only the actual construction sites but the passageways the workers must travel through to get to and from those areas" (*Bruder*, 307 AD2d at 981). However, in interpreting section 23-1.7 (d), which requires that passageways not be allowed to be in a slippery condition, the Court decided that the staircase involved was not a "passageway" "since it was in an open and common area which was remote from the work site" (*ibid.*). This court finds that the catwalk on which plaintiff fell was also "an open and common area which was remote from the work site," and that it did not constitute a "passageway" within the intendment of section 23-1.7 (e) (1).

Section 23-1.22 (c) ("Structural runways, ramps and platforms"), while specific enough (*see Bryant v General Electric Co.*, 221 AD2d 687 [3d Dept 1995]), is also inapplicable to this matter. Subsection (c) pertains to "Platforms" which are either "used as a working area or used for the unloading of wheelbarrows, power buggies, hand carts or hand trucks" (§ 23-1.22 [c] [1]) or are "more than seven feet above the ground, grade, floor or equivalent surface" (§ 23-1.22 [c] [2]). It is undisputed that plaintiff was walking on his way home at the time of his accident, that the replacement of the drainage pumps occurred only in the pump room on Governor's Island, and that the

catwalk was not being used as a working area. In addition, it is also undisputed that the catwalk was approximately five feet above the surface of the roadway.

Appellate courts have found section 23-1.30 of the Industrial Code ("Illumination") sufficiently specific to support a Labor Law § 241 (6) claim (see e.g. *Cahill v Triborough Bridge & Tunnel Authority*, 31 AD3d 347 [1st Dept 2006]; *Murphy Columbia University*, 4 AD3d 200 [1st Dept 2004]), but plaintiff has not alleged any details which would bring his accident within the specifics of this section. The section requires that "in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass." Plaintiff's assertion that "[i]t was kind of dark" (Plaintiff's Depo., at 35), is insufficient to bring his claim within this provision.

Sections 23-5.1 and 23-5.8 pertain to scaffolds, and have no relevance in this matter.

Accordingly, the part of defendants' motion which seeks summary judgment dismissing plaintiff's Labor Law § 241 (6) claim is granted.

#### CONCLUSION

Accordingly, it is

ORDERED that defendants' motion for summary judgment is

granted; and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's cross motion is denied.

Dated: 11/24/08

ENTER:

*Donna M. Mills*

J.S.C.

**DONNA M. MILLS, J.S.C.**

**FILED**  
DEC 03 2008  
COUNTY CLERK'S OFFICE  
NEW YORK