

Caban v Maria Estela Houses I Assoc. L.P.

2009 NY Slip Op 30018(U)

January 6, 2009

Supreme Court, New York County

Docket Number: 109711/06

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
MARTIN SHULMAN

PRESENT: J.S.C. PART 1

Index Number : 109711/2006 *Justice*

CABAN, WILLIAM

vs

MARIA ESTALA HOUSE I ASSOC.

Sequence Number : 002

DISMISS ACTION

INDEX NO. 109711/06

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered _____ this motion to/for _____

Notice of Motion/ ~~Order to Show Cause~~ - Affidavits - Exhibits A-0

Cross-Motion
Answering Affidavits - Exhibits A-2

Replying Affidavits - Exhs. A-4
Reply Aff.

PAPERS NUMBERED	
1	_____
2	_____
3	_____
4	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion are
decided in accordance with the attached
decision and order.

FILED

JAN 08 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: January 6, 2009

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

-----x
WILLIAM CABAN and ROSA CABAN,

Plaintiff,

Index No: 109711/06

-against-

Decision and Order

MARIA ESTELA HOUSES I ASSOCIATES L.P.,
PROPERTY RESOURCES CORPORATION and
JEROME CHATZKY,

Defendants.

FILED
JAN 08 2009
COUNTY CLERK'S OFFICE
NEW YORK

-----x
Hon. Martin Shulman, J.S.C.:

Plaintiff, William Caban ("plaintiff" or "Caban") brings this action against defendants, Maria Estela Houses I Associates L.P. ("Maria Estela"), Property Resources Corporation ("PRC") and Jerome Chatzky ("Chatzky")(collectively, "defendants"), to recover damages for personal injuries sustained falling off a 24-foot extension ladder after he experienced an electrical shock while attempting to open the cover of an exterior light fixture affixed to one of Maria Estela's residential buildings. Plaintiff's verified complaint pleads five causes of action: common law negligence (first cause of action); Labor Law §240(1) violation (second cause of action); Labor Law §241(6) violation (third cause of action); Labor Law §200 violation (fourth cause of action); and plaintiff-spouse, Rosa Caban's ("Rosa") loss of consortium claim (fifth cause of action) (Exhibit A to Motion, *infra*).

Defendants move for summary judgment pursuant to CPLR 3212 to dismiss the entire complaint as a matter of law. Plaintiff cross-moves for partial summary judgment

on the issue of liability pursuant to Labor Law §240(1). Both the motion and cross-motion are consolidated for disposition.

Factual Background of the Accident

Maria Estella is the owner of an apartment building complex including a residential building located at 975 Simpson Street, Bronx, New York ("975 Simpson Bldg."), where Caban's accident occurred. Chatzky and PRC are general partners in Maria Estella (see Exhibits D and E to Motion).

In June 2005, Tomas Hernandez ("Hernandez"), a Maria Estella superintendent, noticed a cluster of four malfunctioning, exterior floodlights (400 watt metal halide lights with sensors¹) affixed to one side of the 975 Simpson Bldg. After notifying his supervisor of this situation, PRC Management Co., LLC, Maria Estella's property manager ("PRC Mgt."), issued a work order to QNCC Electrical Contracting Corp. ("QNCC"), an independent contractor, to restore these non-working exterior floodlights. At the time of his accident, QNCC employed Caban, a journeyman electrician.

During the morning hours of June 24, 2005, Caban arrived and met Hernandez at the accident site. Together, they located the circuit breaker box in the basement of the 975 Simpson Bldg. and shut off the circuit breaker, cutting off electrical power to these lights. Plaintiff worked alone without any supervision or assistance from Hernandez or any of defendants' other employees. Getting a QNCC owned 24-foot extension ladder from his van, Caban positioned the ladder against the exterior wall of

¹ A metal halide light produces a powerful light for its compact size and is an efficient light source. The photocell sensor component allows for automatic dusk-to-dawn illumination. This type of lighting is used in commercial and residential settings.

the 975 Simpson Bldg., extended the ladder about 20 feet right under the photocell box and went up to the particular flood light unit with various supplies including a new photocell, screwdriver, pliers, an Amprobe testing meter and electrical tape. Plaintiff taped the light sensor to simulate darkness, went back down to turn on the circuit breaker to restore power and observed no illumination. Thereafter, Caban presumably turned off the circuit breaker, went back up the ladder and this is what he did:

. . . I removed the tape, I took my screwdriver, I removed the cap and the two screws and I removed the old photocell and I began to install the new photocell; and to install the new photocell, you have to splice all the wires from the photocell and the wires that come out from the box and then I have to put them together, put a wire nut and when I finish putting it up, I push all the wires back to its place, put the cover, put the two screws, put a piece of tape [over the sensor], go down again, put the power on and the light never came on. (Exhibit A to Cross-Motion, Caban EBT Tr. at p. 84, lines 11-24).

After climbing the ladder to remove the tape, Caban descended to extend his ladder higher about another 12 inches to reach the lamp housing above the photocell box. Caban did not shut off the circuit breaker. Plaintiff went back up to check the lamp (or lighting unit), tested the lamp housing and its exterior component parts and obtained negative meter readings (i.e., no current flow). He then removed two screws to open an apparently rusted lamp housing door-like cover. When plaintiff used his hands to pry open this cover, he received an electrical shock causing him to shake. This in turn caused the ladder to move. Plaintiff then lost his balance and fell to the ground suffering serious injuries to his right foot and ankle that are, and continue to be, disabling and permanent.

After plaintiff's accident, QNCC sent three electricians who collectively took ten hours to complete the necessary work restoring service of the exterior floodlights at the

975 Simpson Bldg. at a total cost of \$1,601.79 (see Exhibit I to Motion). The work *inter alia* entailed dismantling the lamp housings of the malfunctioning flood lights, testing all the component parts, tracing and replacing various defective ballasts,² bulbs and terminations.

Defendants' Motion

Defendants' summary judgment motion seeks dismissal of Caban's Verified Complaint evidently relying on settled case law. First, defendants contend they exercised no control or supervision over plaintiff, thus, the first cause of action for common law negligence and the fourth cause of action for violation of Labor Law §200 warrant dismissal. Defendants then argue that the second and third causes of action for violation of Labor Law §240(1) and Labor Law §241(6), respectively, require dismissal because the work Caban performed on the exterior floodlights at the 975 Simpson Bldg. was routine maintenance (citing to *Smith v. Shell Oil Co.*, 85 N.Y.2d 1000, 630 N.Y.S.2d 962 [1995] [*"Shell"*] and *Esposito v. New York City Industrial Development Agency*, 1 N.Y.3d 526, 770 N.Y.S.2d 682 [2003][*"Esposito"*])). Further, defendants argue that not only was the work not in the context of construction, demolition and excavation, but also that the Industrial Code provisions plaintiff relies on to otherwise trigger a Labor Law §241(6) violation are either irrelevant or not implicated (*viz.*, 12 NYCRR §23-1.5, a general safety standard regulation, cannot be a basis for

² Illustratively, ballast replacement requires exposing same within the housing, unscrewing wire nuts and disconnecting two wires (two wires going to the power line and two wires going to the socket), untaping and/or splicing wires, if necessary, removing the defective ballast, reconnecting a new ballast to the wiring and bracketing same within the housing. See Kashinsky EBT Tr. as Exhibit F to Cross- Motion at pp. 116-132).

liability; 12 NYCRR §23-1.13 *et seq.* is not implicated, *in toto*;³ 12 NYCRR §23-1.16 regulates the standards for safety belts, harnesses, tail lines and lifelines and is not implicated as plaintiff was never furnished with these safety devices; 12 NYCRR §23-1.21 is also not implicated as plaintiff testified to the 24-foot extension ladder having no defects; and alleged breaches of Occupational Safety & Health Administration (“OSHA”) Regulations CFR §§ 1926.25, 1926.200, 1926.202, 1926.252 and 1926.851 cannot be bases for violation of Labor Law 241[6]). Finally, without any viable claim against defendants, defendants argue Rosa’s derivative claim must fail, warranting dismissal of the fifth cause of action.

Plaintiff’s Cross-Motion

In addition to opposing defendants’ summary judgment of dismissal, plaintiff has cross-moved for partial summary judgment on his second cause of action claiming that: (1) defendants’ request for summary judgment dismissing plaintiff’s first and fourth causes of action is premature because potential discovery in a related Bronx Supreme Court action *inter alia* could potentially disclose facts of defendants’ authority to control historic activity involving these exterior floodlights which indirectly created the accident producing condition and/or actual or constructive notice of same; (2) what Caban was doing at the time of his accident was repair work, and not routine maintenance (i.e.,

³ Defense counsel explains how certain subparts of Industrial Code Regulation 12 NYCRR § 23-1.13 are irrelevant: “Subparts (b)(4) and (b)(5) specifically listed by plaintiffs in the Verified Bill of Particulars are directed to ‘employers.’ Subparts (b)(3) and (b)(6), not specifically listed by plaintiffs are also directed to ‘employers.’ It is uncontroverted that QNCC was Caban’s employer, and not any of the defendants herein. Subparts (b)(1), (b)(7), (c) and (d) only apply to ‘construction, demolition and excavation sites.’ . . .” (Feldman Aff. in Support of Motion at ¶ 51).

merely changing a lightbulb), which falls squarely within the ambit of Labor Law §240(1) as protected activity (relying on *Piccione v. 1165 Park Avenue, Inc.*, 258 A.D.2d 357, 685 N.Y.S.2d 242 [1st Dept.], *lv. to app. dism.*, 93 N.Y.2d 957, 694 N.Y.S.2d 634 [1999]) ("*Piccione*"); (3) plaintiff is not required to show a ladder defect; and (4) at the very least, a violation of any of the subparts of Industrial Code 12 NYCRR §23-1.21 *et seq.* is a triable issue as to what caused plaintiff's fall, namely, plaintiff's shaking body from an electrical shock on an otherwise steady ladder or an unsecured ladder having failed to hold up after plaintiff received the electrical shock.

DISCUSSION

An award of summary judgment is appropriate when no issues of fact exist. See CPLR 3212(b); *Sun Yau Ko v. Lincoln Sav. Bank*, 99 A.D.2d 943, 473 N.Y.S.2d 397 (1st Dept., 1984), *affd.*, 62 N.Y.2d 938, 479 N.Y.S.2d 213 (1984); *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974). In order to prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 (1985); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986). Indeed, the moving party has the burden to set forth evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979).

While the moving party has the initial burden of proving entitlement to summary judgment (*Winegrad v. N.Y. Univ. Med. Center, supra*, once such proof has been

offered, in order to defend the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 597 (1980); *Freedman v. Chemical Const. Corp.*, 43 N.Y.2d 260, 401 N.Y.S.2d 176 (1977); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, *supra*.

Common Law Negligence and Labor Law §200

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe . . . [work] site . . . It is well settled that an implicit precondition to this duty is that the party to be charged with that obligation 'have the *authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition*' . . . [emphasis supplied] . . ." *Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 N.Y.2d 343, 352, 670 N.Y.S.2d 816, 821 (1998) (bracketed matter added).

Here, defendants have made a prima facie showing of entitlement to partial summary judgment dismissing plaintiff's common law negligence and Labor Law §200 causes of action. This branch of defendants' summary judgment motion is clearly not premature. Plaintiffs should have been in a position to plead specific facts to establish Caban has a cause of action to sustain his claim of common law negligence and a Labor Law §200 violation. Prospecting for a factual nugget in a related Bronx Supreme Court action with the hope of having some success is not a viable option here. Except for conclusorily pleaded allegations, even as amplified in the Verified Bill of Particulars, plaintiff has not laid bare any proof in admissible form establishing the existence of a

material fact to counter defendants' assertions that they neither jointly and severally caused the accident-producing condition nor directly supervised or controlled any of the injury-producing activity Caban engaged in. Nor has Caban competently demonstrated that defendants had actual or constructive notice of any dangerous condition of exterior floodlight housing at the 975 Simpson Bldg. being electrified which ultimately shocked plaintiff (see *Mitchell v. New York Univ.*, 12 A.D.3d 200, 784 N.Y.S.2d 104 [1st Dept., 2004]). Contrarily, it was Caban, with the requisite qualifications to perform this work and the exclusive responsibility to de-energize the circuit powering the exterior lights, who admittedly left the circuit breaker on to better ascertain the cause of the malfunctioning flood lights, and who tested the lamp housing which ruled out any potentially hazardous condition (Exhibit A to Cross-Motion at pp. 87-88).

That defendants may have colorably retained inspection privileges resulting from PRC Mgt.'s work order (Exhibit G to Motion) and/or that Hernandez was present at the work site from time to time to observe Caban's progress (and even when plaintiff's accident occurred) are not enough to demonstrate defendants' control over QNCC and its employees or their supervision over Caban. *Sainato v. City of Albany*, 285 A.D.2d 708, 727 N.Y.S.2d 741 (3rd Dept., 2001); see also, *Buckley v. Columbia Grammar and Preparatory*, 44 A.D.3d 263, 841 N.Y.S.2d 249 (1st Dept., 2007). Plaintiff's common law negligence and Labor Law §200 claims must fail.

Labor Law §241(6)

Generally in tort actions, "where the complaint alleges a statutory violation, the pleader is required to specify each statute, law, rule and regulation claimed to have

been violated . . .” *Alvarado v. New York City Housing Authority*, 302 A.D.2d 264, 265, 756 N.Y.S.2d 6, 7 (1st Dept., 2003). Relevant to the discussion, *infra*, a plaintiff’s failure to identify a qualifying regulation(s) in a Verified Bill of Particulars may even warrant summary dismissal of a Labor Law 241(6) claim. See *Walker v. Metro-North Commuter Railroad*, 11 A.D.3d 339, 340, 783 N.Y.S.2d 362, 364 (1st Dept., 2004).

Pursuant to Labor Law §241(6), owners have a non-delegable duty to “provide reasonable and adequate protection and safety” for workers in accordance with the Industrial Code regulations enacted thereunder. *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 503, 601 N.Y.S.2d 49, 54 (1993). And liability will attach to an owner when a violation of any applicable Industrial Code regulation is found to have been the competent producing cause of a worker’s injuries even in the absence of an owner’s control or supervision over the work site (see *Rizzuto, supra*, 91 N.Y.2d at 348-349, 670 N.Y.S.2d 816 at 818).

Stated differently, to sustain a cause of action for violation of Labor Law 241(6), plaintiff must plead that his injuries were proximately caused by a specific Industrial Code regulation, that is to say a specific deviation of a regulated standard of conduct. In this context, it is also well-settled that “[l]iability under Labor Law §241(6) is not limited to accidents on a building construction site . . . we look to the regulations contained in the Industrial Code . . . to define what constitutes construction work within the meaning of the statute . . .” *Joblon v. Solow*, 91 N.Y.2d 457, 466, 672 N.Y.S.2d 286, 291 (1998) (emphasis supplied). Plaintiff’s Verified Bill of Particulars (see Exhibit N to Motion, Item 36), pleads violations of Industrial Code Regulations 12 NYCRR

§§23-1.5, 23-1.13 (and in particular 23-1.13[b][4] and 23-1.13[b][5]), 23-1.16 and 23-1.21 as well as violations of certain OSHA regulations.

Defendants correctly argue that 12 NYCRR §23-1.5 “sets only general safety standards, [and] would not constitute a basis for a claim under Labor Law §241(6).” *Meslin v. New York Post*, 30 A.D.3d 309, 310, 817 N.Y.S.2d 279, 281 (1st Dept., 2006). Defendants also correctly claim that a violation of an OSHA regulation can never be a predicate for violation of Labor Law §241(6) because OSHA regulations govern the relationship between employers and employees and do not otherwise impose any duty on an owner to trigger this Labor Law violation. *See generally, Pellescki v. City of Rochester*, 198 A.D.2d 762, 605 N.Y.S.2d 692 (4th Dept., 1993). And as more fully set forth in footnote 3, *supra*, certain of the subparts of 12 NYCRR §23-1.13 are not implicated because they involve electrical hazard violations at a construction, demolition or excavation site or are otherwise irrelevant to the accident producing hazard. Further, plaintiff’s opposition and reply do not meaningfully challenge defendants’ legal analysis as to the irrelevancy and/or inapplicability of alleged violations of OSHA regulations and certain Industrial Code regulations and subparts thereof (i.e., 12 NYCRR §§ 23-1.5, 23-1.13[b][5] and 23-1.16) as a predicate to Caban’s Labor Law §241(6) claim, as particularized. Accordingly, the branch of defendants’ summary judgment motion to dismiss the third cause of cause pleading a Labor Law §241(6) violation claim relying on the foregoing Industrial Code and OSHA regulations is granted.

Defendants urge the court to reject plaintiff’s reliance on 12 NYCRR §23-1.3(b)(4) as being directed solely to “employers”, namely, this subpart is an employer command to ensure worker safety against potential electrical hazards at the work site.

Defendants' limiting interpretation of this subpart is erroneous especially when case law in both the First and Second Departments is to the contrary. Labor Law §241(6) makes an owner vicariously liable for a violation of any relevant Industrial Code Regulation including 12 NYCRR §23-1.3(b)(4)(see *Hernandez v. Ten Ten Co.*, 31 A.D.3d 333, 819 N.Y.S.2d 42 [1st Dept., 2006])[one of the guidelines to protect workers against electrocution]; see also, *Harris v. Arnell Constr. Corp.*, 47 A.D.3d 768, 850 N.Y.S.2d 547 [2nd Dept, 2008]). Clearly, an employment relationship between plaintiff and defendant is not a requisite element to impose liability under this and other similarly worded subparts (parenthetically, a plaintiff's direct suit against his employer for this violation would in most instances be barred because of the workers' compensation defense).

Notwithstanding the foregoing, by pleading a violation of an "explicit and concrete provision of the State Industrial Code [12 NYCRR §23-1.3(b)(4)] by a participant [i.e., employer] . . ." [t]he owner may [still] raise any valid defense to the imposition of vicarious liability under Labor Law §241(6), including contributory and comparative negligence [i.e., Caban admittedly decided to work with the circuit breaker on] . . ." *Lorefice v. Reckson Operating Partnership, L.P.*, 269 A.D.2d 572, 573, 703 N.Y.S.2d 507, 509 (2nd Dept., 2000) (bracketed matter added). In any event, summary dismissal of plaintiff's Labor Law §241(6) claim relying on a pleaded violation of this Industrial Code regulation is not warranted.

Labor Law §240(1)

The branch of defendants' summary judgment motion seeking dismissal of plaintiff's second cause of action for violation of Labor Law §240(1) is denied. Relying principally on Second Department case law (e.g., *Deoki v. Abner Properties, Co.*, 48 A.D.3d 510, 852 N.Y.S.2d 261[2nd Dept., 2008]) which rests on the foundational authority of *Shell* and *Esposito*, defendants essentially argue that the work Caban had been performing at the 975 Simpson Bldg. was routine maintenance in a non-construction and non-renovation context.

The question of whether an activity is routine maintenance not covered by Labor Law §240(1) as distinguished from a repair or alteration covered by Labor Law §240(1) must be considered in light of the legislative purpose to protect against risks related to elevation differentials. *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 577 N.Y.S.2d 219 (1991). The court has to look at the "totality of the work done . . . [at the work site to determine whether it was] simple, routine activity that would fall outside the scope of the statute..." *Lee v. Astoria Generating Co., L.P.*, 55 A.D.3d 124, 132, 863 N.Y.S.2d 164, 170 (1st Dept., 2008) (bracketed matter added).

When viewing plaintiff's unchallenged deposition testimony of his preliminary work on the light sensor (work on one small component of one of the light units requiring wire splicing, etc.) and Kashinky's attested-to description of the scope of the work performed on the cluster of four floodlights at the 975 Simpson Bldg. as set forth in QNCC's invoice which took three journeyman electricians (jointly and severally) a total of 10 hours to complete, it cannot be seriously disputed that the totality of the work

done did not involve merely changing a lightbulb. It must be emphasized that the QNCC electricians' follow-through after Caban's initial work to replace a photo cell, required dismantling lamp housings, replacing ballasts and bulbs while concomitantly disconnecting and re-connecting termination wiring to power sources and ultimately rebuilding the housings. The work rendered operable four malfunctioning floodlights and restored exterior lighting to a section of the 975 Simpson Bldg. These tasks strongly suggest this work in its totality to be the equivalent of replacing a light fixture. After all, the replacement of a light fixture is simply a replacement of the sum of its component parts.

Notably, even the Second Department found light fixture replacement to be protected activity even though this work clearly did not significantly alter or physically change a building or structure. See *Purdie v. Crestwood Lake Heights Section 4 Corp.*, 229 A.D.2d 523, 646 N.Y.S.2d 815 (2nd Dept., 1996); cf., *Joblon v. Solow*, *supra*, 91 N.Y.2d at 466, 672 N.Y.S.2d at 291 (work included chiseling a hole through a block wall to route a conduit pipe and wiring to power a wall clock).

Accordingly, this court concludes that the work order Caban initiated and his colleagues completed entailed non-routine "repairs" and protected activity within the meaning of Labor Law §240(1) making this case four-square with the facts of *Piccione*.⁴ Notwithstanding the holdings of *Shell* and *Esposito*, *Piccione* continues to be a viable precedent in this Department for similarly situated plaintiffs six years later. See

⁴ *Piccione* was an in-house handyman who was tasked with repairing a non-working florescent light fixture within a professional apartment and who fell off an unsteady ladder while repairing/replacing component parts (e.g., ballasts, etc.) of the light fixture.

Rios v. WVF-Paramount 545 Property, LLP, 36 A.D.3d 511, 828 N.Y.S.2d 368 (1st Dept., 2007).

Having concluded that Caban's work was protected activity, this court further finds that plaintiff has made a prima facie showing that he is entitled to partial summary judgment on liability on his Labor §240(1) claim (second cause of action). This statute imposes a non-delegable duty and absolute liability on an owner for a failure to properly ensure that a work safety device such as a ladder offers sufficient protection to a worker exposed to risks at elevated work sites. *Kijak v. 330 Madison Ave. Corp.*, 251 A.D.2d 152, 675 N.Y.S.2d 341 (1st Dept., 1998). It is undisputed that upon Caban receiving an electrical shock about 20 feet above the ground and losing his balance, the ladder became unsteady causing plaintiff to fall and suffer serious injuries.

Plaintiff is not required to show that the ladder was defective. *Montalvo v. J. Petrocelli Constr., Inc.*, 8 A.D.3d 173, 780 N.Y.S.2d 558 (1st Dept., 2004). Defendants have intimated that plaintiff may have contributed to his fall (allowing power to the exterior light fixture, purportedly defective Amprobe testing meter, etc.). Nonetheless, “[r]egardless of the precise reason for his fall, or whether . . . [Caban] acted negligently, or whether defendants were in complete compliance with the Industrial Code, . . . [Caban] is entitled to summary judgment on the Labor Law §240(1) claim.” *Orellano v. 29 East 37th Street Realty Corp.*, 292 A.D.2d 289, 290, 740 N.Y.S.2d 16, 18 (1st Dept., 2002) (bracketed matter added).

Against this backdrop, and as plaintiff concedes, there remains a triable issue of fact regarding plaintiff's Labor Law §241(6) claim predicated on a violation of Industrial

Code Regulation 12 NYCRR §23-1.21 *et seq.* and whether a violation of this provision and any of its relevant subparts was the proximate cause of Caban's injuries.

Montalvo, supra, 8 A.D.3d at 176, 780 N.Y.S.2d at 561. Accordingly, plaintiff's third cause of action resting on this pleaded violation of this Industrial Code provision survives defendants' summary judgment motion. Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted to the extent that plaintiff's first and fourth causes of action are dismissed; and it is further

ORDERED that defendants' motion for summary judgment is granted to the extent of dismissing plaintiff's third cause of action predicated on violations of OSHA Regulations and Industrial Code Regulations 12 NYCRR §§ 23-1.5, 23-13[b][5] and 23-1.16, and the motion is otherwise denied; and it is further

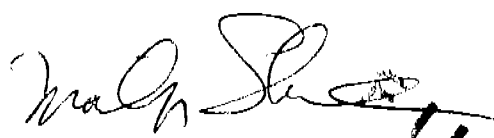
ORDERED that plaintiff's cross-motion for partial summary judgment on his second cause of action against defendants on liability on his Labor Law §240(1) claim is granted.

The Clerk is directed to enter judgment accordingly.

Counsel for the parties are directed to appear for a status conference on January 27, 2009 at 9:30 a.m. at I.A.S. Part 1, Room 1127B, 111 Centre Street, New York, New York.

This constitutes this court's Decision and Order. Courtesy copies of same have been provided to counsel for the parties.

DATED: New York, New York
January 6, 2009


HON. MARTIN SHULMAN, J.S.C.

FILED
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