SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

THOMAS TADDEO and BONNIE TADDEO, Plaintiffs, - against - BLUMENFELD DEVELOPMENT GROUP, LTD., HOME DEPOT U.S.A., INC., CHARLESTON ENTERPRISES, LLLC, BED, BATH & BEYOND, INC., BR FRIES, EIC ASSOCIATES, INC., and E.W. HOWELL CO. INC., Defendants.	TRIAL / IAS PART 32 NASSAU COUNTY Index No. 2303/06 Motion Sequence No. 009

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1,
Answering Affidavits 2
Replying Affidavits 3,4
Briefs: Plaintiff's / Petitioner's .....
Defendant's / Respondent's .....

The defendants E. W. Howell Co., Inc. and Bed Bath & Beyond, Inc. cross move for summary judgment. The plaintiffs oppose this cross motion. The underlying action seeks monetary damages for injuries allegedly sustained from a construction accident on December 14, 2005, as a result of alleged wrongful conduct by the defendants. The parties specifically point out the procedural history of the litigation in their moving papers and the other papers in support and in opposition. The Court has carefully reviewed all of the papers submitted by the parties

with respect to this motion.

Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 325; ***Andre v. Pomeroy***, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (***see, Whelen v. G.T.E. Sylvania Inc.***, 182 A.D. 2d 446). The court's role is issue finding rather than issue determination (***see, e.g., Sillman v. Twentieth Century-Fox Film Corp.***, 3 N.Y.2d 395; ***Gervasio v. Di Napoli***, 134 A.D.2d 235, 236; ***Assing v. United Rubber Supply Co.***, 126 A.D.2d 590). Nevertheless, "the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated" (***Gervasio v. Di Napoli, supra***, 134 A.D.2d at 236, quoting from ***Assing v. United Rubber Supply Co., supra; see, Columbus Trust Co. v. Campolo***, 110 A.D.2d 616, ***aff'd*** 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (***see, Andre v. Pomeroy***, 35 N.Y.2d at 364; ***Assing v. United Rubber Supply Co., supra***).

The defense attorney states, in a supporting affirmation dated November 21, 2008, the defense seeks summary judgment dismissing the plaintiffs' negligence, Labor Law §§ 200, 240

(1) and 241 (6) causes of action. The defense attorney states the evidence set forth by the moving papers establishes the defendants E. W. Howell Co., Inc. and Bed Bath & Beyond, Inc. did not direct, supervise nor control the work the plaintiff performed at the time of the accident. The defense attorney asserts the defendants E. W. Howell Co., Inc. and Bed Bath & Beyond, Inc. had no notice of any alleged defective condition, so there can be no liability finding under Labor Law §200 or under a common law negligence theory. The defense attorney states the evidence establishes the defendants complied with the requirements of Labor Law § 240 (1) because the plaintiff was provided with appropriate height-related safety equipment required under the statute, and all the necessary equipment was available at the work site. The defense attorney asserts the plaintiff wore a safety harness with a lanyard for the safety apparatus there when he fell from the structural steel. The defense attorney avers the plaintiff's failure to attach the safety harness and lanyard was the sole proximate cause of the accident, so the Labor Law § 240 (1) claim must be dismissed. The defense attorney contends the Industrial Code rules cited by the plaintiffs as a predicate for liability under Labor Law § 241 (6) are either too general to support such a claim or inapplicable to the facts of the instant action, so that claim should be dismissed. The defense attorney points, in detail, to the deposition testimony and other moving papers for support of the defense contentions.

The plaintiffs' attorney states, in an opposing affirmation dated December 8, 2008, the plaintiffs filed the note of issue and certificate of readiness pursuant to the Court's order on January 25, 2008. The plaintiffs' attorney notes the defense never moved for leave to file a late cross motion, so this motion is untimely when served on November 21, 2008. The plaintiffs' attorney adds this defense cross motion is also untimely seeking for summary judgment on

causes of action which were not asserted in the plaintiffs' initial motion, to wit Labor Law §§ 200 and 241 (6).

> As we made clear in ***Brill***, and underscore here, statutory time frames--like court-ordered time frames (***see Kihl v Pfeffer***, 94 NY2d 118 [1999])--are not options, they are requirements, to be taken seriously by the parties. Too many pages of the Reports, and hours of the courts, are taken up with deadlines that are simply ignored.

Miceli v. State Farm Mut. Auto. Ins. Co., 3 N.Y.3d 725, 727, 786 N.Y.S.2d 379 (2004)

The Second Department reverberates that holding:

> Contrary to the defendants' contentions, ***Brill v City of New York*** (2 NY3d 648 [2004]) applies to cases such as the present one, where a movant makes a motion for summary judgment after the expiration of a court-ordered deadline which is shorter than the 120-day deadline set forth in CPLR 3212 (a) (***see Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725 [2004]; Brooks v Ross, 24 AD3d 589 [2005]). Since the defendants failed to demonstrate the existence of good cause for their failure to make their motion for summary judgment prior to the expiration of the court-ordered deadline, the Supreme Court should have denied the motion

Mizell v. Eastman & Bixby Redevelopment Co., LLC, 34 A.D.3d 770, 825 N.Y.S.2d 513 [2nd Dep., 2006].

The Court finds here this instant cross motion is untimely, and subject to the constraints of the appellate rulings regarding time.

The plaintiffs' counsel states it is undisputed the plaintiff fell 25 feet from the steel superstructure upon which he worked at the time of the accident, and no scaffolding nor elevated work platform was provided for the workers to install bridging on that date. The plaintiffs' counsel submits the plaintiff is entitled to summary judgment. The plaintiffs' counsel notes it is also undisputed there were no safety cables, safety posts, life lines, stanchions nor any devices specifically erected to tie a safety belt. The plaintiffs' counsel points to safety reports, photographs of the accident scene, and eyewitness testimony which confirms no safety devices

were provided to attach a safety belt at the time of the accident. The plaintiffs' counsel asserts it is unrefuted there was no safety netting in place at that time to catch the plaintiff, and to prevent the accident. The plaintiffs' counsel points out an affidavit dated November 10, 2008, in opposition to the plaintiffs' motion for summary judgment, should be completely disregarded since that affiant testified at a deposition in this action that there were no safety devices in place at the accident scene, and no one ever told that witness the plaintiff failed to follow any instructions at the time of the accident. The plaintiffs' counsel contends that affidavit contradicts the prior testimony, and is feigned to create an issue of fact. The Second Department stated, in an analogous matter:

> his affidavit submitted in opposition to the defendants' motion for summary judgment conflicted with his deposition testimony regarding direction and control. The plaintiff offered no explanation why his affidavit, which was prepared nine months after his deposition, contradicted his deposition testimony. He "cannot create an issue of fact by making statements in an affidavit which completely contradict his prior sworn testimony without offering any explanation for the contradiction[s]" (***Gantt v County of Nassau***, 234 AD2d 338, 339). Under these circumstances, there is no issue of fact as to whether the plaintiff's work was directed and controlled exclusively by the defendants' employees

Zylinski v. Garito Contracting, 268 A.D.2d 427, 428, 702 N.Y.S.2d 86 (2nd Dept., 2000).

The plaintiffs' attorney challenges the defense attempt to create an issue based on the self-serving affidavit dated May 27, 2008, by a corporate officer because the plaintiffs moved to preclude that witness from testifying as his name was never exchanged as a witness to the event or the job site conditions at the time of the accident during the discovery process. The plaintiffs' attorney asserts that witness has no personal knowledge regarding how the accident happened, so the affidavit is self-serving speculation.

Labor Law § 200 (1) provides:

> 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. The board may make rules to carry into effect the provisions of this section.

The Second Department holds: "[f]or an owner to be held liable under Labor Law § 200, the plaintiff must show that the owner supervised or controlled the work, or had actual or constructive notice of the unsafe condition causing the accident (***see Garcia v Petrakis***, 306 AD2d 315 [2003]; ***Duarte v East Hills Constr. Corp.***, 274 AD2d 493 [2000]; ***Charles v City of New York***, 227 AD2d 429 [1996])" (***Lioce v. Theatre Row Studios***, 7 A.D.3d 493, 493-494, 776 N.Y.S.2d 89 [2nd Dept., 2004]).

> An owner of premises cannot be held liable for injuries caused by an allegedly defective condition unless the plaintiff establishes that the owner either created or had actual or constructive notice of the condition (***see Gordon v American Museum of Natural History***, 67 NY2d 836 [1986]). To constitute constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time before the accident to permit the defendant an opportunity to discover and remedy it (***see Gordon v American Museum of Natural History, supra; Lee v Bethel First Pentecostal Church of Am.***, 304 AD2d 798, 799 [2003]). Moreover, constructive notice will not be imputed where a defect is latent and would not be discoverable upon reasonable inspection (***see Lee v Bethel First Pentecostal Church of Am., supra; Rapino v City of New York***, 299 AD2d 470 [2002]; Ferris v County of Suffolk, 174 AD2d 70, 76 [1992])

Curiale v. Sharrotts Woods, Inc., 9 A.D.3d 473, 474-475, 781 N.Y.S.2d 47 (2nd Dept., 2004).; ***see also Kretowski v. Braender Condominium***, 57 A.D.3d 950, ***supra***, at 952.

Here, the plaintiff to raises a triable issue of fact as to a Labor Law § 200 violation (***see Lal v. Ching Po Ng***, 33 A.D.3d 668, 823 N.Y.S.2d 429 [2nd Dept., 2006]; ***see also Loreto v. 376 St. Johns Condominium, Inc.***, 15 A.D.3d 454, 790 N.Y.S.2d 190 [2nd Dept.,2005]).

"In order to prevail on a Labor Law § 240 (1) claim, a plaintiff must establish that the

statute was violated, and that the violation was a proximate cause of his or her injuries (***see Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.***, 1 N.Y.3d 280, 771 N.Y.S.2d 484, 803 N.E.2d 757; ***Rudnik v. Brogor Realty Corp.***, 45 A.D.3d 828, 829, 847 N.Y.S.2d 141; ***Gardner v. New York City Tr. Auth.***, 282 A.D.2d 430, 723 N.Y.S.2d 204)"

> Labor Law § 240 (1), often called the "scaffold law," provides that "[a]ll contractors and owners ... shall furnish or erect, or cause to be furnished or erected ... 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 [construction workers employed on the premises]."FN3 The purpose of this statute is to protect workers and to impose the responsibility for safety practices on those best situated to bear that responsibility (***see, Zimmer v Chemung County Performing Arts***, 65 NY2d 513, 520; 1969 NY Legis Ann, at 407). It is by now well established that the duty imposed by Labor Law § 240 (1) is nondelegable and that an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work (***see, e.g., Haimes v New York Tel. Co.***, 46 NY2d 132, 136-137).

Ross v. Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d 494, 499-500, 601 N.Y.S.2d 49 (1993).

This State's highest Court proceeded further on the issue of elevation risks, and stated:

> We recently had occasion to consider the nature of the occupational hazards to which Labor Law § 240 (1) was addressed. Noting that the statute " 'is to be construed as liberally as may be for the accomplishment of the purpose for which it was ... framed' " (***Koenig v Patrick Constr. Corp.***, 298 NY 313, 319, quoting Quigley v Thatcher, 207 NY 66, 68), we held in ***Rocovich v Consolidated Edison Co. (supra)*** that Labor Law § 240 (1) was aimed only at elevation-related hazards and that, accordingly, injuries resulting from other types of hazards are not compensable under that statute even if proximately caused by the absence of an adequate scaffold or other required safety device

Ross v. Curtis-Palmer Hydro-Electric Co., supra, at 500.

So, the Court of Appeals stated:

> As we observed in that case, Labor Law § 240 (1)'s list of required safety devices (e.g., "scaffolding," "hoists," "braces," "irons" and "stays"), all of which are used in connection with elevation differentials, evinces a clear legislative intent to provide "exceptional *501 protection" for workers against the "special hazards" that arise when the work site either is itself elevated or is positioned below the level where "materials or load [are] hoisted or secured" (78 NY2d, at 514). The "special hazards" to which we referred in Rocovich, however, do not encompass

> any and all perils that may be connected in some tangential way with the effects of gravity. Rather, the "special hazards" referred to are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (see, DeHaen v Rockwood Sprinkler Co., 258 NY 350). In other words, Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder 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. The right of recovery afforded by the statute does not extend to other types of harm, even if the harm in question was caused by an inadequate, malfunctioning or defectively designed scaffold, stay or hoist

Ross v. Curtis-Palmer Hydro-Electric Co., supra, at 500-501.

"The Second reiterated the proposition by acknowledging: "[t]he protections of Labor Law § 240 (1) are not implicated simply because the injury is caused by the effects of gravity upon an object" (***Melo v. Consolidated Edison Co. of N.Y.***, 92 N.Y.2d 909, 911, 680 N.Y.S.2d 47, 702 N.E.2d 832; ***see Ross v. Curtis-Palmer Hydro-Elec. Co., supra*** at 501, 601 N.Y.S.2d 49, 618 N.E.2d 82)" (***Aloi v. Structure-Tone, Inc.***, 2 A.D.3d 375, 375-376, 767 N.Y.S.2d 832 (2nd Dept., 2003). Here, the plaintiff has presented, in opposition, evidence there was a fall as occasioned by the statutory requirements of Labor Law § 240 (1).

> Where a "plaintiff's actions [are] the sole proximate cause of his injuries, . . . liability under Labor Law § 240 (1) [does] not attach" (***Weininger v Hagedorn & Co.***, 91 NY2d 958, 960 [1998]; ***see also Cahill v Triborough Bridge & Tunnel Auth.***, 4 NY3d 35 [2004]; ***Blake v Neighborhood Hous. Servs. of N.Y. City***, 1 NY3d 280 [2003]). Instead, the owner or contractor must breach the statutory duty under section 240 (1) to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries. These prerequisites do not exist if adequate safety devices are available at the job site, but the worker either does not use or misuses them

Robinson v. East Medical Center, LP, 6 N.Y.3d 550, 554, 814 N.Y.S.2d 589 (2006).

> In order to establish a violation of Labor Law § 241 (6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards and is applicable to the circumstances of the accident (***see Ross v. Curtis-Palmer Hydro-Elec. Co.***, 81 N.Y.2d 494, 502-505, 601 N.Y.S.2d 49, 618 N.E.2d 82; ***Meng Sing Chang v. Homewell Owner's Corp.***, 38 A.D.3d 625, 627, 831 N.Y.S.2d 547)

Here, the plaintiffs' attorney submits the defendants violated the Rule 23 of the Industrial Code, to wit provisions 23-1.7 (b) (1); 23-1.16 (a) (b) and 23-1.7 (d) regarding falling hazards, safety belts, harnesses, tail lines and lifelines, and protection from general hazards.

The defense attorney reiterates, in an reply affirmation dated January 27, 2009, the defense contentions regarding the underlying action. The defendants claim they established they did not direct, supervise or control the work performed by the plaintiff nor have notice of the alleged defective condition. The defense attorney contends the plaintiff was provided with all necessary safety equipment, and instructed on a daily basis, and argue the plaintiff was a recalcitrant worker, and his actions in failing to utilize available safety clips or to tie off to the open web design of the steel were the sole proximate cause of the accident and his injuries. The defense attorney maintains the defendants established the Industrial Code rules cited by the plaintiff as a predicate for liability were either too general to support such a claim or did not apply to the facts. The Court finds the defense has not met its burden on this motion.

Accordingly, the defense cross motion is denied. So ordered.

So ordered.

Dated: **March 31, 2009**

ENTER:

J. S. C.

FINAL DISPOSITION NON FINAL DISPOSITION XXX