[* 1]

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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 104311/2006

FARRELL, CHERYL

VS

PFIZER

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion by National Drywall, Inc. to dismiss plaintiffs' negligence and Labor Law §200 claims is denied; and it is further

ORDERED that the branch of the motion by National Drywall, Inc. to dismiss plaintiffs' Labor Law §241(6) as asserted against it is granted, and such claim is dismissed; and it is further

ORDERED that National Drywall, Inc. serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

FILED
OCT 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/8/09

HON. CAROL EDMEAD 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 35

----------X

CHERYL FARRELL AND STEVEN FARRELL,

Index No. 104311/06

Plaintiffs,

-against-

PFIZER, INC., BOVIS LEND LEASE INTERIORS, INC., BOVIS LEND LEASE LMB, INC., BOVIS LEND LEASE HOLDINGS, INC., EUROTECH CONSTRUCTION CORP. and NATIONAL DRYWALL INC.,

Defendants.

---------- X

HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

In this personal injury action, defendant National Drywall, Inc. ("National") moves for summary judgment dismissing all claims as asserted against it on the ground that none of the adverse parties can establish a *prima facie* case of negligence against it.

Factual Background

Plaintiff, Cheryl Farrell ("plaintiff"), alleges that on July 15, 2005, during the course of her employment, she slipped and fell on spackling compound ("compound") as she was walking through a hallway at a job site located at 150 East 42nd Street, New York, New York (the "jobsite"). Co-defendants' pleadings indicate that Pfizer owned the jobsite and that Bovis Lend Lease Interiors, Inc. ("Bovis Interiors") was the general contractor at the jobsite. The co-defendants' pleadings further indicate that Eurotech was performing construction work at the jobsite, and that it entered into a contract with National to perform construction work there.

In their Complaint, plaintiff and her husband Steven Farrell ("plaintiffs") allege that defendants

Pfizer, Inc., ("Pfizer") Bovis Interiors, Bovis Lend Lease LMB, Inc., Bovis Lend Lease Holdings, Inc., and Eurotech Construction Corp. ("Eurotech") (collectively, "co-defendants") and National negligently operated, controlled, supervised, managed and maintained the jobsite (first cause of action) and that they violated Labor Law §241(6) (second cause of action) and §200 (third cause of action). The fourth cause of action is for loss of consortium. In their Answer, co-defendants assert a first and second cross claim for common law contribution and contractual indemnification, respectively, against National.

Plaintiff's Deposition

Plaintiff testified that on the date of her accident, she was working for Power Optech Electric as an electrician at the jobsite on a project involving the rehabilitation of the space where walls were being removed and added; other trades, including carpenters, tapers, and laborers were also working on the project. When she started her work day at approximately 7:00 a.m., she observed three men in the hallway, on stilts, putting compound on the wall. She assumed that the men were putting compound on the wall "because that's what usually tapers do when they are on stilts." At approximately 9:00 a.m., plaintiff proceeded down the "one main hallway," alone, to retrieve items from her gang box. As she was walking, plaintiff's right foot slipped when it came into contact with spackling compound on the floor. Plaintiff had not seen this mass of spackling compound on the floor at any time prior to her fall, and was unaware of any witness to the occurrence or to the condition which allegedly caused it.

Deposition of Michael DiFilippi for National

Mr. DiFilippi was a drywall taper for National who was working at the jobsite at the time of the alleged accident. He testified that it was his job to place tape over the joints in the sheetrock, and then to put layers of "joint compound" over the joint and then sand and polish the compound. National employees would stack the cans of compound in one area, and then the National tapers would bring the compound

wherever they were working. DiFilippi's work was confined to the second floor. National performed taping in rooms which were newly sheetrocked and it did not perform any taping or compounding in hallways. He testified that painters at the jobsite might use compound to fix little nicks in the walls, but was not sure if painters were on the job at the time of the accident; painters come in to paint walls that had been finished by the tapers. Carpenters might also use compound to "laminate" a wall, and the carpenters on this job were Eurotech employees. For the most part, only tapers used compound on the job.

Eurotech also had a taper named "Greg," who performed taping work at the jobsite. Eurotech performed taping and compounding in hallways. He explained that the existing hallway walls required skim coating, which involves applying the same type of joint compound, to make the wall flat.

DiFilippi admitted that during taping, compound occasionally would fall to the floor, and if he dropped compound on the floor, he picked up any compound as soon as it was dropped. None of tapers on the job used any drop cloths. DiFilippi stated that the use of stilts was not permitted by his union in 2005; his union did not use of stilts as far back as the late 1960s. DiFilippi heard from others he was the only taper employed by National who was working on the date of the accident.

Deposition of Grzegorz Vlatowski for Eurotech

Mr. Vlatowski testified that he was the "only one doing taping" for Eurotech at the jobsite on the date of the accident. He described his work as using compound to perform touch-ups and refilling damage or cracks in the walls. The wall that he skim coated was approximately eight feet high and "[m]aybe" 20 to 30 feet long. He used three to four cans of compound during the week and used half of the compound to skim the wall. He performed work on some of the walls that National has already taped. He did not recall if he did any work in the hallways, because he was "doing touch ups everywhere," but he did perform skim coating (smoothing it out) on an existing wall. When Vlatowski went from one area to another, he

sometimes would bring compound with him. He would either take a whole can or else carry some on his "hawk," from place to place, through a hallway if necessary. Mr. Vlatowski testified that if he dropped any compound on the floor, he would clean it up. However, based on his experience, most tapers did not clean up, and would leave compound on the floor. He testified that National was performing taping work in the area near the elevators, on brand new constructed walls. He testified that National may have worked on the existing walls, but he did not remember.

Deposition of Michael Feeney for Eurotech

Mr. Feeney, a carpenter, was a foreman for Eurotech at the jobsite at the time of the accident. Eurotech was involved in building the walls and assembling the acoustic ceilings. In addition to building new walls, Eurotech would also laminate, *i.e.,* apply a new layer of sheetrock to the existing walls. He explained that Eurotech would frame the walls and install the drywall, and the tapers would then tape the walls (to cover any joints on the drywall) and use compound to prepare the walls for the painters. Eurotech "did no spackling, no taping whatsoever" during the period of June 15, 2005 to July 15, 2005, the tapers were the only trade using compound on the job, and National was the only taper on the jobsite to his knowledge. He testified that tapers performed work on all of the walls, and that compound was used on new and existing walls. He was not sure if Eurotech skimmed the walls during this job.

National's Motion

National argues that the depositions of plaintiff, National's employee Mr. DiFilippi, Eurotech's employee Mr. Vlatowski, and an affidavit by National's President, Peter Calcaterra, establish that it did not breach a duty to the plaintiff, performed no work at or near the area where the incident occurred, did not create the condition on which she fell, and had no responsibility with respect to safeguarding or maintaining the area where this incident allegedly occurred.

Mr. Calcaterra states that National was hired to tape and spackle all new construction, such as drywall partitions, fire walls, trimmed openings, beaded doors and beaded boxes. This work was limited to rooms and offices constructed during the Phase II renovation which was ongoing in July, 2005. National did not perform taping or spackling on any of the existing walls in the premises, leaving that to Eurotech, which used its own tapers and spacklers to tape and spackle the "existing or 'old' walls including the long walls in the hallways." Mr. DiFilippi was the only taper from National at the jobsite.

National argues that the allegedly slippery condition on the hallway floor was created by the three tapers who the plaintiff observed to be applying spackle to the wall at approximately 7:00 a.m. National had only one taper on site on July 15, 2005; National's tapers never used stilts; and National did not perform taping on any hallway or existing walls but only on new walls that had been erected during the renovation and those portions of the in-room walls listed by Mr. Calcaterra in his affidavit. Mr. Vlatowski, Eurotech's taper, admitted that he performed skimming of a long hallway wall. Any conclusion that National was responsible for the creation of the alleged defect would require rank speculation, and speculation is insufficient to raise an issue of fact.

Likewise, any claim under Labor Law § 241(6), which imposes duty upon owners and contractors to adequately protect construction workers, must also be dismissed. National was neither the owner nor general contractor, nor an agent of the same as evidenced by both the March 22, 2005, Proposal issued by National to Eurotech and the Subcontractor's Agreement executed by those two entities. Neither the Proposal nor the Subcontractor's Agreement transferred the responsibility for job safety or maintenance on the project to National. Further, National's work was separate and distinct from the work performed by the plaintiff and her employer and there is no proof that National supervised or controlled the plaintiff's work. Thus, the Labor Law causes of action against National must be dismissed.

Plaintiffs' Opposition[1]

In opposition to dismissal of plaintiffs' Labor Law §200/common law negligence claims, plaintiffs contend that National failed to attach the deposition transcripts of Eurotech's carpenter/foreman Mr. Feeney, which contradicts the testimony of DiFilippi (National) and Vlatowski, the other Eurotech employee. National's self-serving deposition by its employee, DiFilippi, and the self-serving affidavit of its President, Mr. Calcaterra, do not resolve the issue as to which party caused the compound to be dropped on the floor. Even assuming that National did not tape the hallway wall where plaintiff's accident occurred, a question remains as to whether National otherwise caused the spackling compound to be dropped on the floor. It is possible that a National employee spilled the compound while transporting it through the hallways. Further, even if National's employees were not supposed to use stilts, that does not mean necessarily that they were not, in fact, using stilts. Moreover, even if plaintiff was mistaken about the use of stilts, that would not mean that tapers were not working in the area. Nor is it necessarily so that the men that plaintiff saw working in the hallway were the ones who dropped the compound that caused her to slip and fall. Plaintiffs maintain that (a) the only trades that were using spackling compound on the job site were the tapers; (b) the only tapers that were possibly on the job site on the date of accident were National and Eurotech; (c) the tapers occasionally dropped spackling compound on the floor; and (d) the tapers frequently failed to clean up taping compound that dropped on the floor. In the absence of conclusive proof that Eurotech was responsible for dropping the compound that caused plaintiff to slip and fall, or an admission by Eurotech to that effect, a question of fact exists at to whether Eurotech or National was responsible for plaintiff's injuries.

[1] Plaintiffs state that they do not oppose the dismissal of plaintiffs' Labor Law §241 (6) claim against National since National was neither an owner nor a general contractor with respect to the job site.

Co-Defendants' Opposition

Co-defendants also argue that issues of fact preclude summary judgment. The Scope of Work Rider, upon which Mr. Calcaterra relies in his affidavit, described the Phase 2 work of National as follows: "Tape and spackle all new drywall partition, . . . header, beaded doors and beaded boxes as per job site walk through with Eurotech Supervisor Donald Maher." The Scope of Work Rider also indicated that National would adhere to the work details on the Architectural Drawings and Specifications: "The Trade Contractor shall perform all Taping work detailed in the Scope Documents as defined on the Architectural Drawings and specifications" (the "Drawings").

Co-defendants contend that according to the affidavit of Mr. Feeney, the Drawings (A-03, A-05 and A-10) indicate that National was responsible to perform taping work on the new drywall, soffits, and trimmed openings that were installed at various locations along the north core hallway, and plaintiff's fall was along the north core hallway.

Neither the testimony of National's witness, Mr. DiFilippi nor that of Eurotech witness, Vlatowski addressed the new construction areas along the north core hallway. Those areas are, by classification, included within the Work Scope description (*i.e.*, soffits, trimmed openings, and new drywall partition), and are illustrated on the Drawings. National has proffered no evidence that the taping of the new construction at the locations enumerated in Feeney's affidavit was ever excluded from the "Contract by Change Order" or other written instrument. Inasmuch as plaintiff claims that she fell in compound along the north core hallway, a question of fact exists as to whether National's work in the areas described by Feeney's affidavit caused and/or created the alleged slippery condition.

National's Reply

Speculation by plaintiffs that National was the entity that caused the compound to spill upon the

floor is not only a veiled attempt to impeach the testimony of his own client who described the workers she saw applying compound to the walls, but it is based on conclusions, expressions of hope by counsel or unsubstantiated allegations which are insufficient to defeat National's motion. Further, identifying purported contradictions in disclosure does establish a triable question of law or fact.

National further argues that Mr. Feeney's affidavit and, accordingly, the opposition submitted by the co-defendants must be disregarded. Mr. Feeney testified that National, to the exclusion of all other entities, performed the taping and spackling work at this site; he denied that Eurotech utilized any spackle or tape on the site and that National was the only taper. However, Feeney's co-employee, Mr. Vlatowski, consistent with that of Messrs. DiFilippi and Calcaterra of National, testified that as Eurotech's employee, Mr. Vlatowski's job was to tape the existing wall and that he utilized compound as part of his work. Thus, co-defendants' opposition predicated solely upon Mr. Feeney's affidavit fails to defeat National's motion for summary judgment.

National also contends that the Drawings are irrelevant. Drawing A-03, dated December 22, 2003, pertains to Phase I of the renovation project. The work performed by National was on Phase II. Phase II was identified on the National proposal to Eurotech, the Scope of Work Rider between Eurotech and National, the request for certification of insurance and the subcontract agreement. The Phase I construction plans as set forth in Drawing A-03 are dated more than 1½ years before the plaintiffs accident. The plans which accompany the Feeney affidavit are not authenticated or certified by anyone who has knowledge of them and there is nothing to suggest that the information contained on drawing A-03 relates to that portion of the project that was ongoing in July, 2005.

Similarly, there is nothing on either Drawings A-05 and A-10 to indicate to which Phase

they relate, although they appear relate to Phase I. These Drawings are dated more than 1½ years before the date of the plaintiff's incident, and are not authenticated or certified by anyone who can attest to their applicability to the facts of this case. We note that drawing A-05 refers to a ceiling plan and drawing A-10 pertains to offices, pantries, work rooms and conference rooms which, by their very description, do not pertain to core walls or hallways. Therefore, the Drawings are inadequate proof on this summary judgment motion.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390 [U] [Sup Ct New York County, 2003]). Thus, the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show

facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; Zuckerman, *supra* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Negligence

In order to set forth a *prima facie* case of negligence, the plaintiff's evidence must establish (1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) that such breach was a substantial cause of the resulting injury (*Merino v New York City Transit Auth.*, 218 AD2d 541, 639 NYS2d 784 [1st Dept 1996]). A plaintiff must also show that the defendant either created the hazardous condition which proximately led to the injury, or had actual or constructive notice of it (*Carty v Port Auth. of New York and New Jersey*, 6 Misc 3d 1017, 800 NYS2d 343 [Sup Ct Bronx County 2004] citing *Gordon v American Museum of Natural History*, 76 NY2d 836, 501 AD2d 646 [1986]). Where the evidence demonstrates that the defendant performed no work at or near the area where the incident occurred, the defendant

cannot be held responsible and is entitled to summary judgment in its favor (*see Prvor v City of New York*, 63 AD3d 508, 879 NYS2d 716 [1st Dept 2009]).

Here, National's submissions establish that it did not perform its compound work at the location of plaintiff's accident, and thus, did not create the dangerous condition, *i.e.*, spilled compound, on which the plaintiff allegedly fell.

Plaintiff testified that her accident occurred in what she believed was the "main" hallway. The testimony of Messrs. DiFilippi (National) and Vlatowski (Eurotech) establish that both of them were tapers for their respective employers at the jobsite who used compound, but that DiFilippi (National) only performed taping and spackling of compound on *newly* sheetrocked walls, whereas Eurotech tapers used compound in the hallways, where plaintiff allegedly slipped and fell. Messrs. DiFilippi's and Vlatowski's testimonies further established that Eurotech carpenters also used compound, albeit to laminate walls. Therefore, the record, as presented by National, established that National did not perform any taping or compound work in the *hallway area* in which plaintiff's accident occurred.

However, the deposition testimony of Eurotech employee Mr. Feeney, submitted by plaintiff, raises an issue of fact as to whether National performed taping in the hallway. Contrary to the testimony of Mr. DiFilippi (National) (and Mr. Vlatowski), Mr. Feeney, the foreman at the jobsite at the time of plaintiff's accident, testified that National was responsible for taping *new and old* (existing) walls, and that only tapers, such as National, which was the only taper at the jobsite, used compound. Mr. Feeney testified that the jobsite had at least one, main hallway, which "would be on the core," and one hallway on the perimeter along a row of offices.

Mr. Feeney's affidavit is not wholly inconsistent with his earlier deposition testimony.

Mr. Feeney attests that Eurotech installed new drywall in the north core hallway "at corridors 203E, 226E, 201E, 201W, 208E, and 101E" and National's contract required it to tape of those new walls, as well as new soffits along the north core hallway. Mr. Feeney attests that National's work at the site was limited to new construction, but that *new construction was not limited to rooms and offices, and included "new drywall installed along the north core hallway*; the new soffits installed along the north core hallway; the trimmed opening leading to 25W on the north core hallway, and the drinking fountain niche at 201W on the north core hallway." Mr. Feeney also attests that "the construction drawings A-03, A-05, and A-10 identify[] and describ[e] the aforementioned locations and work." That the Drawings are dated more than 1½ years before the date of the plaintiff's incident does not render them insufficient to establish that the area in which National allegedly performed its work included the area in which plaintiff's accident occurred. Mr. Feeney testified to his knowledge of National's taping and compound work at the time of plaintiff's accident and pertaining to the hallway area where plaintiff's accident allegedly occurred. To the extent Mr. Feeney's deposition testimony and affidavit indicate that National's work on *new* walls included hallway walls, and plaintiff's accident occurred in a hallway, an issue of fact exists as to whether National caused the compound to fall upon the floor, thereby causing plaintiff's injuries.

Contrary to National's contention, Mr. Feeney's affidavit is not wholly unreliable, as a matter of law, so as to remove it from this Court's consideration. In this regard, *Perez v Mekulovic* (13 AD3d 158, 789 NYS2d 6 [1st Dept 2004]) to which National cites for the proposition that this Court should not consider Mr. Feeney's affidavit, is not controlling. In *Perez*, plaintiff initially testified at her deposition that prior to her accident she did not observe

urine on the steps, she did not know how long the condition existed, and she did not remember ever seeing urine on the stairs prior to her accident. In opposition to defendants' summary judgment motion, plaintiff submitted, *inter alia*, an affidavit that "materially conflicted with her previous sworn deposition testimony." The First Department held that the affidavit should not have been considered by the motion court. However here, Feeney's affidavit does not conflict *his* prior deposition testimony, but arguably conflicts with the deposition testimony of another witness, albeit of the same employer Eurotech.

Therefore, as there is an issue of fact as to National's negligence as to whether it caused the compound to spill on the floor, thereby causing plaintiff's injuries, National's motion for summary judgment is denied as to plaintiffs' claims for negligence (first cause of action) and violation of Labor Law §200 (third cause of action).

Labor Law §200 Against National

Labor Law § 200 codifies the common-law duty imposed on an owner or general contractor to provide construction site workers with a safe work site *(Nevins v Essex Owners Corp.*, 276 AD2d 315, 714 NYS2d 38 [1st Dept 2000]; citing *Blessinger v The Estee Lauder Co.*, 271 AD2d 343, 707 NYS2d 78). In order for a plaintiff to recover under Labor Law §200, "where the defendant is an owner, general contractor or sub-contractor, the plaintiff [must] demonstrate that said defendant had the authority to control the activity which led to plaintiff's injury and/or exercised the control over the work site to enable the avoidance or correction of the proximate unsafe condition" *(Carty v Port Auth.*, citing *Russin v Picciano & Son,* 54 NY2d 311, 317 [1981]; *see Rizzuto v Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]). Thus, in order for defendant to establish entitlement to dismissal of plaintiffs' Labor Law § 200 claim, defendant

must establish that it did not supervise or control plaintiff's work at the construction site, cause or create the dangerous condition, or have actual or constructive notice of the unsafe condition of which plaintiff complains *(Arrasti v HRH Const. LLC*, 60 AD3d 582, 876 NYS2d 373 [1st Dept 2009]; *Carty v Port Auth.*, citing *Maggi v Innovax Methods Group Co.*, 250 AD2d 576, 578 [1998]; *Berberi v Fifth Ave. Dev. Co., LLC*, 20 Misc 3d 1106, 866 NYS2d 90 [Sup Ct New York County 2008]).

As there is an issue of fact as to whether National caused or created the condition which caused plaintiff's injuries, dismissal of plaintiffs' Labor Law §200 claim is unwarranted. Therefore, the branch of National's motion to dismiss plaintiffs' Labor Law §200 claim is denied.

Labor Law 241 (6) Against National

Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors and their agents to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation or demolition (*see Ross,* 81 N.Y.2d at 501-502). Thus, where a defendant is neither the owner or general contractor of the work in the performance of which plaintiff was injured, nor the agent of the owner or general contractor who had entered into the contract with plaintiff's employer, dismissal of a Labor Law 241(6) claim as asserted against such defendant is warranted (*Mocarska v 200 Madison Assocs., LP.*, 262 AD2d 163, 692 NYS2d 58 [1st Dept 1999]). Notably, plaintiffs do not oppose the dismissal of their Labor Law 241(6) claim against National. Therefore, plaintiffs' Labor Law §241(6) claim against National is dismissed.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the motion by National Drywall, Inc. to dismiss plaintiffs' negligence and Labor Law §200 claims is denied; and it is further

ORDERED that the branch of the motion by National Drywall, Inc. to dismiss plaintiffs' Labor Law §241(6) as asserted against it is granted, and such claim is dismissed; and it is further

ORDERED that National Drywall, Inc. serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: October 8, 2009

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD