Sicilia v City of New York

2009 NY Slip Op 32832(U)

November 24, 2009

Supreme Court, New York County

Docket Number: 103443/2003

Judge: Harold B. Beeler

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SCANNED ON 12/4/2009

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

HAROLD BEELER J.S.C.

PART 21

Index Number : 103443/2003

SICILIA, STEPHEN

vs.

CITY OF NEW YORK

SEQUENCE NUMBER : 012

SUMMARY JUDGMENT

INDEX NO. 103443/03

MOTION DATE

MOTION SEQ. NO. 012

MOTION CAL. NO.

n 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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

FILED

DEC 04 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/24/09

HAROLD BEELER J.S.C.

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

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

----------X

STEPHEN SICILIA,

Plaintiff,

-against-

CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY and VERTEX ENGINEERING SERVICES,

Defendants,

Index No. 103443/2003
SEQUENCE MS012
DECISION & ORDER

CITY OF NEW YORK and NYCTA

Third-Party Plaintiffs,

-against-

MAINCO ELEVATOR & ELECTRICAL CORP.

Third-Party Defendants

VERTEX ENGINEERING SERVICES

Second Third-Party Plaintiff,

-against-

MAINCO ELEVATOR & ELECTRICAL CORP.
a/k/a MAIN ELEVATOR SERVICES., CO.

Second Third-Party Defendant,

FILED
DEC 04 2009
NEW YORK
COUNTY CLERK'S OFFICE

MAINCO ELEVATOR & ELECTRICAL CORP.,
a/k/a MAIN ELEVATOR SERVICES., CO.

Third Third-Party Plaintiff,

-against-

PRUDE CONSTRUCTION CORP. and JB ELECTRIC CORP.

Third Third-Party Defendants

----------X

HAROLD B. BEELER, J.S.C.:

Defendants and third-party plaintiffs City of New York, New York City Transit Authority, and Vertex (collectively, "City defendants") move for summary judgment dismissing plaintiff's claims and third-party defendant Mainco Elevator & Electrical Corp.'s ("Mainco")

cross-claims against them, and for summary judgment on City defendants' indemnification claim against Mainco. Plaintiff and Mainco oppose these motions respectively.

Mainco moves for summary judgment dismissing all claims against it, and for summary judgment on its common-law indemnification claims against third third-party defendant JB Electric Corporation ("JB Electric"). Mainco also moves to strike JB Electric's answer for failure to produce a knowledgeable witness for a deposition. Plaintiffs, City defendants, and JB Electric oppose these motions respectively.

Plaintiff Stephen Sicilia ("plaintiff" or "Sicilia") moves for summary judgment on liability for its claims against City defendants. City defendants oppose the motion.

For the reasons that follow, City defendants' motion to dismiss is granted on plaintiff's claim under Labor Law §§ 240 and 200, and denied on plaintiff's claim under Labor Law § 241(6). City defendants' motion for summary judgment on its indemnification claims against Mainco is granted. Plaintiff's motion for summary judgment on these claims is denied.

Mainco's motions to dismiss city defendants' claims based on § 241(6) is denied, and its motion to dismiss based on Labor Law §§ 240 and 200 is granted to the extent that they are mooted by this court's dismissal of the underlying claims. Mainco's motion for summary judgment on common-law indemnification against JB Electric and its motion to strike JB Electric's answer are denied.

Facts

The case arises from an accident during a renovation project where Vertex, Mainco, JB Electric, and Prude Construction Corp. held different tasks in connection with the rehabilitation of the subway station at 181st Street.

Vertex is a general contractor, hired by New York City Transit Authority to rehabilitate

the subway stations (Examination Before Trial of Kevin Heffernan, September 8, 2004, City defendants' Notice of Motion, Ex. L, pp. 10-16) (hereinafter "first Heffernan deposition"). JB Electric was the electrical subcontractor on the project, whose responsibilities included provision of temporary lighting for the station (first Heffernan deposition pp. 20-21). Sicilia was an employee of Mainco, another subcontractor on the project (Plaintiff's Verified Bill of Particulars, Plaintiff's Notice of Cross-Motion, Ex.3) (hereinafter "Bill of Particulars"). Mainco's specific responsibilities for the day of the accident are unclear and disputed, and the parties also dispute whether Sicilia was the only Mainco employee present that day. Another subcontractor, Prude Construction Corporation ("Prude"), employed carpenters at the site (Affidavit of Kevin Heffernan, City defendants' Reply Affirmation, Ex. A) (hereinafter "Heffernan Affidavit") .[1]

At the time of the accident, Sicilia was standing on the roof portion of an elevator (Examination Before Trial of Stephen Sicilia, Sept. 7, 2004, Plaintiff's Notice of Cross-Motion Ex. 7, p. 39) (hereinafter "first Sicilia deposition"). On that day, Prude and Vertex carpenters were installing gallery door hardware at each floor on the inside of the elevator shaft (first Heffernan deposition, pp. 22-23). A gallery door is the hollow metal door that, in this case, led to the stairwell (first Heffernan deposition, pp. 22-23). Plaintiff's sole responsibility was to operate the elevator with a device that enabled him to move the elevator up and down, so that the carpenters could install slam locks outside of the elevator (first Sicilia deposition, p. 34).

The top of the elevator was uneven by design (first Sicilia deposition, pp. 53, 55-56). To allow for the lights in the elevator's ceiling, two recessed lighting units protruded five inches above the elevator roof (first Sicilia deposition pp. 53-56). City defendants allege (without citation to the record) that Sicilia was sitting on these protrusions for a long period of time prior to his accident.

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[1] Prude Construction is no longer a party in this action, and none of the moving papers specify its involvement in the project.

Light was provided by a drop light, which was suspended by a hundred-foot extension cord, which was in turn attached to an outlet in the motor room one flight from street level (first Sicilia deposition, p. 49; second Sicilia deposition p. 11). Plaintiff does not know when the drop light was set up or who installed it (first Sicilia deposition, p. 49). He testified that the lighting was set up by "a 100 foot extension cord plugged into an outlet, dropped down from the smoke hole, attached to a six foot extension cord and then another extension cord hooked to that to go in the cab and one hanging with tape and wire holding the drop light." (Examination Before Trial of Stephen Sicilia, November 14, 2005, City defendants' Notice of Motion, Ex. K. p. 18) (hereinafter "second Sicilia deposition"). He further alleges that the cord was just "plugged in," and not secured or taped to the outlet (second Sicilia deposition, p. 18). Plaintiff and Mainco allege that but for this drop light the surroundings were naturally dark, devoid of sunlight or permanent lighting (first Sicilia deposition, pp. 45, 48). In direct contrast, JB Electric insists that it installed temporary lighting in the shaft, consisting of a string of lights that ran from the motor room down the side of the elevator shaft into the shaft way (Examination Before Trial of Louis Viera, JB Electric Affirmation in Partial Opposition, Ex. C, pp. 84-85) (hereinafter "Viera deposition"). According to JB Electric, these lights were placed "every couple of feet" on the string (Viera deposition, pp. 84-85)

Kevin Heffernan, Vertex's Senior Project Manager testified at his examination before trial that either he, Ben Howell of Vertex, or Keith Spira of Prude would be present at the site on a daily basis to take care of safety management (first Heffernan deposition, pp. 23-25). Heffernan was present on the day of the accident, and he had authority to stop work if he observed unsafe conditions (first Heffernan deposition, p. 54). In his daily log, he noted that JB Electric, Mainco, and five Vertex employees were present at the site (Examination Before Trial of Kevin Heffernan, March 1, 2006, City defendants' Notice of Motion Ex. L, p. 16) (hereinafter

"second Heffernan deposition"). He identified JB Electric as the electrical contractor, who was responsible for temporary lighting pursuant to a written agreement (second Heffernan deposition, pp. 19-21). All of JB Electric's on-site employees were pulling wire in the motor room above the elevator shaft (first Heffernan deposition, p. 69). He testified that there was nothing securing the drop light's extension cord to prevent it from being pulled out, and no signs were put on or by the outlet to warn that the extension cord should not be pulled out (first Heffernan deposition, p. 68).

Prior to the accident, Sicilia noticed that the lighting was inadequate (first Sicilia deposition, p. 57). On February 1, 2002, three days before his fall, he approached the electricians and asked them for additional lighting (first Sicilia deposition, p. 57). He was told by an electrician that the lighting was for "his men" only (first Sicilia deposition, p. 57). Sicilia does not know if the electrician was employed by JB Electric (first Sicilia deposition, p. 57).

At 9:30 in the morning of February 4, 2002, Sicilia was on top of the elevator, operating it for the benefit of the carpenters, as previously described (Sicilia's first deposition, p. 29). Without warning, the drop light above him went out, leaving Sicilia in the dark (Sicilia's first deposition, pp. 65-67). In response, he took out his own flashlight, and inadvertently dropped it down the shaft while trying to turn it on (Sicilia's first deposition, p. 67). He then tried to reach for the drop light to see if it was unplugged (Sicilia's first deposition, p. 67). In attempting to do so, he fell on his back, landing on the elevator's recessed lighting (Sicilia's first deposition). It is undisputed that he landed on the surface where he had been working, and that his body did not drop below the elevator cab's roof (Sicilia's first deposition, p. 38). Sicilia believes that he lost consciousness for approximately one minute (Sicilia's first deposition, p. 66). Sicilia later learned that the drop light's electrical cord had become unplugged from its socket (Sicilia's first deposition, p. 81).

Sicilia sued the City defendants, alleging that his injuries were due to the faulty lighting

system and the elevator's uneven surface. He does not allege defects in the elevator. Sicilia alleges serious and permanent injuries, and seeks lost wages for two years. He was barred under the worker's compensation law from suing his employer Mainco. City defendants sued plaintiff's employer Mainco for indemnification. Mainco in turn sued subcontractors JB Electric and Prude for indemnification. Prude is no longer a party in this action.

In a prior motion sequence, Mainco moved for summary judgment against Vertex, and JB Electric moved to dismiss the claims against it. *Sicilia v. New York City Trans. Auth.*, Index No. 103443/03 (Sup. Ct. N.Y. Co. Dec. 13, 2007). Justice Mills denied Mainco's motion, which sought a judgment that Mainco was not legally obligated to indemnify Vertex because of an impermissible indemnification clause. *Id.* at 2-3, 5. The parties conceded that plaintiff's injury was not a "grave injury" under Worker's Compensation Law, so Mainco's liability could arise only from a contractual indemnification clause. *Id.* at 4. Although the contract contained a provision requiring Mainco to indemnify Vertex for Vertex's own negligence, an impermissible provision under General Obligations Law §5-322, the party to benefit from an indemnification clause still retains that right so long as it was not negligent. *Id.* at 5. Justice Mills held that since "there [is] absolutely no evidence that general contractor Vertex was negligent" because Vertex merely maintained a supervisory role over the work of the subcontractors, the indemnification clause is enforceable. *Id.* Vertex's liability, if any, is imposed only by statute. *Id.*

Justice Mills also denied JB Electric's motion to dismiss. *Id.*. She held that there are triable issues of fact with respect to who installed the drop light, who unplugged it, whether all the available lights went out, and other issues regarding JB Electric's negligence. *Id.*

The action has since been transferred to this court.

Discussion

At the outset, it will be helpful to identify some of the facts that are reasonably in dispute

and relevant to resolution of the legal issues. *See, e.g., Lehrer McGovern Bovis, Inc. v. New York Yankees*, 207 A.D. 256, 258, 615 N.Y.S.2d 31, 33 (1st Dept 1994) ("On a motion for summary judgment, the court's function is one of issue finding, not issue determination..."):

Whether Sicilia was the only Mainco employee on site at the time of the accident.

Who was responsible for providing the drop light in the elevator shaft.

Whether the drop light provided the sole illumination in the elevator shaft, such that plaintiff was in the dark after it went out.

Who supervised and controlled the work conducted at the site.

How the drop light became unplugged.

On the other hand, it is undisputed that Sicilia did not fall from the top of the elevator cab, but rather was injured by landing on top of the cab.

Labor Law § 200

Labor Law § 200 codifies the common law duty of an owner or general contractor to provide construction site workers with a safe place to work. *Rizzuto v. L.A. Wenger Contracting Co.*, 91 N.Y.2d 343, 352, 693 N.E.2d 1068, 1073, 670 N.Y.S.2d 816, 821 *(1998); Comes v. N.Y.S. State Elec. and Gas Corp.*, 82 N.Y.2d 876, 877, 631 N.E.2d 110, 111, 609 N.Y.S.2d 168, 169 (1993). Where the injury arises out of the work being performed, a plaintiff must demonstrate that the "party charged with that responsibility [has] the authority to control the activity bringing about the injury." *Comes*, 82 N.Y.2d at 877, 631 N.E.2d at 111, 609 N.Y.S.2d at 169 (internal citations omitted); *Lombardi v. Stout*, 80 N.Y.2d 290, 295, 604 N.E.2d 117, 590 N.Y.S.2d 55 (1992).

Plaintiff argues, however, that his claim arises not out of the work being performed, but from a dangerous condition at the work site, in that 1) the top of the elevator cab upon which Sicilia was working was uneven, and no platform was erected so that he would be working on an

even surface; 2) the elevator had no electric source of its own, making necessary an ad hoc lighting system that failed; and 3) there was no railing or protection to prevent the plaintiff from falling off the elevator and down the shaft. Plaintiff argues that where the action arises out of a dangerous condition on the premises, a plaintiff need not show supervisory control, but may establish liability by demonstrating that defendant had actual or constructive notice of the condition. *Wynne v. State of New York*, 53 A.D.3d 656, 657, 863 N.Y.S.2d 222, 223 (2d Dept 2008); *Benefield v. Halmar Corp.*, 264 A.D.2d 794, 695 N.Y.S.2d 394 (2d Dept 1999).

City defendants argue that supervisory control is always necessary under § 200, and that they had no such control over plaintiff. Rather, they argue that Sicilia received all direction and supervision from his employer Mainco. Morever, Justice Mills already held that there was no evidence that general contractor Vertex was negligent, but had only a "supervisory role over its subcontractors." Finally, City defendants argue that even if plaintiff need only establish notice to sustain the § 200 claim, plaintiff cannot do so because the temporary lighting arrangement was not the kind of "defect" that someone would have had actual or constructive notice.

Although Mainco does not face liability directly under § 200, and only from City defendants' third-party claim for indemnification, Mainco disputes that it had any day to day supervisory control over the electrical lighting. Therefore, it cannot be held liable to City defendants if plaintiff prevails on this claim.

The Court agrees with plaintiff only to the extent that he is not bound as matter of law by Justice Mills' conclusion that "there is absolutely no evidence that general contractor Vertex was negligent." That order arose from Mainco's motion to invalidate the indemnification provision in its contract with Vertex, based on a violation of the General Obligations Law prohibiting that part of the clause indemnifying Vertex for its own negligence. It was not a dispositive summary judgment decision dismissing Vertex's claim for lack of negligence, such that plaintiff, who was not subject to the motion, would have been on notice to establish an issue of fact. Plaintiff was

not directly affected by the resolution of this motion. Moreover, it is unclear whether Justice Mills' statement was a legal conclusion, and not merely an observation that the substance of the motion required the movant to demonstrate some indication of the respondents' negligence in order to invalidate the provision. Under these circumstances, it would be unfair to hold that plaintiff lost the right to establish Vertex's negligence.

As to whether supervisory control is required where the accident arises out of a dangerous condition on the work site, the law is not as clear as plaintiff insists. City defendants further complicate the issue by moving as a single entity, although the analysis may be significantly different for an owner, who would generally be presumed not to have supervisory control over the work, than for a general contractor, who would not enjoy that presumption.

The Second Department has held that under § 200, a plaintiff need not demonstrate a defendant's supervisory control where the accident arises out of a dangerous condition on the premises, as opposed to the work being performed. *Wynne*, 53 A.D.3d at 657, 863 N.Y.S.2d at 223; *Benefield*, 264 A.D.2d at 794, 695 N.Y.S.2d at 394.

The First Department has not adopted this rule, but some cases have indicated that it would not require supervision or control. In *Higgins v. 1790 Broadway Assocs.*, 261 A.D.2d 223, 691 N.Y.S.2d 31 (1st Dept 1999), plaintiff worker fell off a defective ladder that had been stored in defendant owner's building. In declining to dismiss plaintiff's § 200 claim, the First Department noted that an owner of real property is obligated to maintain the premises in a reasonably safe condition, and that to establish liability arising from a dangerous condition the plaintiff need only demonstrate that the defendant exercised supervision and control over the work *or* had actual or constructive notice of the unsafe condition. *Id.* at 225, 691 N.Y.S.2d 31. *See also Sheehan v. Gong*, 2 A.D.3d 166, 170, 769 N.Y.S.2d 507, 511 (1st Dept 2003) (holding that, where plaintiff worker fell from a defective ladder found at the work site, landowner would not be liable under § 200 unless there is "evidence that the landowner exercised supervision or

control over the work or had notice of the existence of a dangerous condition"). *Compare Ramos v. HSBC Bank*, 29 A.D.3d 435, 436, 815 N.Y.S.2d 504, 505 (1st Dept 2006) (granting defendants' motion for summary judgment under § 200, where plaintiff worker fell from a ladder, holding that defendant must have responsibility to control to the activity bringing about the injury *and* have notice of a dangerous condition); *Havlin v. City of New York*, 17 A.D..3d 172, 172-73, 792 N.Y.S.2d 464 (1st Dept 2005) (denying municipal defendants' motion for summary judgment under § 200, where decedent lost his footing on a broken step and fell, holding that defendants may be liable because there was evidence that defendants had notice of the hazard *and* "sufficient supervisory authority and control over the work to see that the hazard was properly addressed"). In a case comparable to that at bar, an elevator mechanic fell through the escape hatch on an elevator roof in defendant's building. *Bonura v. KWK Assocs.*, 2 A.D.3d 207, 770 N.Y.S.2d 5 (1st Dept 2003). There, the court denied defendant employer's motion for summary judgment, holding that plaintiff need not show that defendant exercised supervisory control over the defendant. *Id.* at 207-08, 770 N.Y.S.2d 5. But there is a critical distinction between *Bonura* and the case at bar, in that in the former case there was an issue of fact as to whether the defendant caused the defective condition. *Id.* Plaintiff makes no such allegation here.

A careful review of the decisions in the First and Second Department establishes that there are particular circumstances where a defendant may be held liable under § 200 without having any supervisory control over the plaintiff's work. Defendants can be held liable for a dangerous condition on the premises that they might otherwise be responsible for, had the injury been sustained by a non-worker and the action been brought as a common law negligence claim. In *Akins*, plaintiff construction worker fell because the defendants removed steps to the doorway without replacing them. 247 A.D.2d at 562, 669 N.Y.S.2d 63. In *Wynne*, plaintiff dump truck driver was injured because the ground underneath the dump truck collapsed when an

underground septic tank collapsed. 53 A.D.3d at 657, 863 N.Y.S.2d at 223. Plaintiff alleged that the injury was caused by defendant State of New York's failure to perform a reasonable investigation such that it would have discovered the tank. *Id.* In *Azad v. 270 5th Realty Corp*, 46 A.D.3d 728, 730-31, 848 N.Y.S.2d 688, 690 (2d Dept 2007), plaintiff fell from the ladder because the ladder was placed on top of garbage, and therefore defendant landowner might have been responsible for cleaning the garbage on the site and plaintiff could have established its claim by demonstrating notice. In *Higgins*, plaintiff fell from an allegedly defective ladder that belonged to defendants. 261 A.D. at 224, 691 N.Y.S.2d 31.

The case at bar does not present a situation where defendants would otherwise be responsible, and therefore there is no justification for loosening the standard for establishing a § 200 violation. The top of the elevator is not a common area for passengers, but one specific to the task being assigned to this plaintiff. But for plaintiff's presence for this particular project, there would have been no expectation that the shaft way otherwise be lit. Plaintiff was required to sit on the elevator to maneuver it, in order to render services that had been contracted to other parties who were responsible for safety. *See, e.g., Balbuena v. New York Stock Exchange*, 49 A.D.3d 374, 853 N.Y.S.2d 330 (1st Dept 2008) (finding no liability where plaintiff fell through scaffold, because there was no evidence that defendant had supervisory control over the activity that caused the injury). Therefore, it cannot be said that plaintiff's injury arose out of a dangerous condition in the elevator shaft, but rather from the work he was required to perform in the shaft. *See Lombardi*, 80 N.Y.2d 290, 295, 590 N.Y.S.2d 55 (1992) (finding that where plaintiff fell from a ladder while removing tree branches, the accident arose from the manner plaintiff conducted his work, and not from a dangerous condition). Labor Law § 200 attaches liability to the party responsible for the work that created the hazard. *Favia v. Weatherby Constr. Corp.*, 26 A.D.3d 165, 166, 808 N.Y.S.2d 675, 676 (1st Dept 2006). Here, there is no evidence that the drop light, whose failure allegedly caused plaintiff's fall, was provided by Vertex or the

municipal defendants.

Because any injury due to the failure of the drop light arises from the work plaintiff was performing, the law is clear that evidence of control or supervision is required. *Cahill v. Triborough Bridge & Tunnel Auth.*, 31 A.D.3d 347, 819 N.Y.S.2d 732 (1st Dept 2006); *Balbuena*, 49 A.D. at 376-77. *Compare Rizzuto*, 91 N.Y.2d at 352-53 (denying defendant contractor's motion for summary judgment where defendant's vice president testified that he personally supervised the project). Plaintiff presents no such evidence here, where his work was supervised by his subcontractor Mainco and the other subcontractors.

Additionally, the elevator roof's uneven surface is not a dangerous condition within the meaning of the Labor Law. The raised surface is integral to the elevator's design, and necessary for the elevator to maintain its overhead lights. The absence of railings at the top of the elevator is irrelevant, because there is no dispute that plaintiff did not fall from the elevator.

Accordingly, plaintiff's claims under Labor Law § 200 fail as a matter of law. Because the claims against the City defendants are dismissed, Mainco's third party arguments as to § 200 are moot.

Labor Law § 240(1) - The Scaffolding Law

Labor Law § 240(1), known as "The Scaffolding Law," protects workers from the dangers of elevation-related hazards. *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 500, 618 N.E.2d 82, 85, 601 N.Y.S.2d 49, 52 (1993). It requires 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 construed, placed and operated as to give proper protection to" construction workers. *Id.* The duty to maintain this safe working environment is non-delegable, and therefore an owner or contractor may be absolutely liable under the Scaffolding Law regardless of whether it exercised

supervision or control. *Id.*; *Streigel v. Hillcrest Heights Dev. Corp.*, 100 N.Y.2d 974, 977, 800 N.E.2d 1093, 1095, 768 N.Y.S.2d 727, 729 (2003).

In order to enforce this duty on a contractor or owner, however, the injury must have arisen from a risk created by elevation. *Toeffer v. Long Island R.R.*, 4 N.Y.3d 399, 407, 828 N.E.2d 614, 617, 795 N.Y.S.2d 511, 514 (2005). Accordingly, courts have recognized two distinct causes of action under the section: "falling worker," where the risk is related to the relative elevation at which the task must be performed, and "falling object," where the risk is related to the elevation of materials or loads that must be positioned or secured.[2] In a falling worker case, it is necessary to demonstrate that a worker fell from a height, and that the injury was attributable to the failure to provide the worker with safe equipment. *See Rocovich v. Con. Ed. Co.*, 78 N.Y.2d 509, 514-15, 583 N.E.2d 932 (1991); *Auchampaugh v. Syracuse Univ.*, 57 A.D.3d 1291, 1293, 870 N.Y.S.2d 564, 567 (3d Dept 2008).

Sicilia's injury is not of the kind contemplated by the Scaffolding Law. Although he fell while standing on an elevated surface, he did not fall from a height. He merely fell on the same surface where he had been standing or sitting. *See Auchampaugh*, 57 A.D.3d at 1293, 870 N.Y.S.2d at 567 (holding that fall is not related to the effects of gravity, and therefore not covered by § 240(1), where plaintiff tripped and fell over the edge of the trapdoor and injured his elbow on the platform where he had been working); *Milligan v. Allied Builders, Inc.*, 34 A.D.3d 1268, 824 N.Y.S.2d 524 (4th Dept 2006) (holding that plaintiff's injury was not covered by § 240(1) where he tripped over a planking of a scaffold and fell to one knee, because he did not fall from the scaffold). The incident was no different than if he had been at ground level and fell onto the surface. *Auchampaugh*, 57 A.D. at 1293, 870 N.Y.S.2d at 567. Therefore, his accident

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[2] The Second Circuit Court of Appeals recently certified to the New York Court of Appeals the question of whether these are the only two types of cases recognized under this section. *Runner v. N.Y.S.E., Inc.*, 12 N.Y.3d 892, 883 N.Y.S.2d 792 (2009); *Runner v. N.Y.S.E., Inc.*, 568 F.3d 383 (2d Cir. 2009).

was not attributable due to an elevation relation risk.

Plaintiff argues that the elevator was "in effect a scaffolding" because it was used as a temporary elevated moving platform, and City defendants did not afford protection. Whether or not this argument is true, it misses the point. It is irrelevant that Sicilia was on an elevated platform, because he did not fall from a height and his injury was not attributable to the height. *See Streigel*, 100 N.Y.2d at 977, 800 N.E.2d at 1095, 768 N.Y.S.2d at 729; *Milligan*, 34 A.D.3d 1268, 824 N.Y.S.2d 524. Sicilia's injury would not likely have been avoided had he been wearing applicable protection such a harness, nor would such a device have been designed to prevent this kind of accident. Moreover, Sicilia's complaint attributes his fall to an allegedly faulty lighting system, and is therefore inconsistent with liability based on failure to protect him with a harness.

Cases cited by plaintiff are not to the contrary. Each one involves a plaintiff falling from a height and subject to gravity, an object falling from a height that should have been secured, or the failure of an enumerated safety device. *Peralta v. American Telephone and Telegraph Co.*, 29 A.D.3d 493, 816 N.Y.S.2d 436 (1st Dept 2006) (denying defendant's motion for summary judgment on § 240(1) where unsecured ladder moved, causing plaintiff to lose balance and slip down two rungs); *Montalvo v. J. Petrocelli Construction, Inc.*, 8 A.D.3d 173, 780 N.Y.S.2d 558 (1st Dept 2004) (denying defendant's motion for summary judgment on § 240(1) where a metallic casing fell on plaintiff, and plaintiff fell off ladder); *Ortiz v. Turner Construction Co.*, 28 A.D.3d 627, 813 N.Y.S.2d 770 (2d Dept 2006) (denying defendant's motion for summary judgment on § 240(1) where plaintiff's accident left him dangling outside a window).

Therefore, plaintiff's claims under this § 240(1), and any third-party claims that are dependent on plaintiff's underlying claims, fail as a matter of law.

Labor Law 241(6)

Labor Law § 241 (6) imposes a nondelegable duty upon owners and contractors to "provide reasonable and adequate protection and safety" to workers at construction sites. *Rizzuto v. L.A. Wenger Contracting Co.*, 91 N.Y.2d 343, 350, 693 N.E.2d 1068, 1071, 670 N.Y.S.2d 816, 819 (1998). In order to establish a claim, a plaintiff must plead and prove that the defendant violated a specific provision or provisions of the Industrial Code. *Id.*; *Pesca v. City of New York*, 298 A.D.2d 292, 293 749 N.Y.S.2d 26, 28 (1st Dept 2002). Liability is absolute, and plaintiffs need not establish that the parties to be charged exercised supervision or control of the activities. *Ross v. Curtis-Palmer Hyrdro Elec. Co.*, 81 N.Y.2d 494, 502, 618 N.E.2d 82, 86, 601 N.Y.S.2d 49, 53 (1993).

Plaintiff originally specified many provisions of the Industrial Code in his bill of particulars. In response to City defendant's motion he has narrowed the alleged violations to one. He also, for the first time, argues another violation not specified in the bill of the particulars.

12 NYCRR § 23-1.30

Industrial Code 12 NYCRR § 23-1.30 mandates specific illumination requirements at construction sites:

> Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but 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.

Defendants argue that the First Department places the initial burden on plaintiff, on a summary judgment motion, to establish that defendants did not meet the requirements imposed

by 23-1.30, and that plaintiff fails to do so. *Dand v. Columbus Centre, LLC*, 19 Misc.3d 1116(A), * 8, 862 N.Y.S.2d 813 (N.Y.C. Civ. Ct. 2008). Additionally, they argue that liability is not established because there was never was a problem or complaint with the sufficiency of the lighting prior to the accident. Mainco's employees testified there was sufficient light for the project and that the drop light was not the sole source of illumination, and that the unplugging of the cord was a sudden and unexpected accident that is not covered by 23-1.30.

Defendants' argument that plaintiff bears the initial burden on defendants' motion for summary judgment is a departure from normal civil procedure, which generally places a burden on the movant. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 476 N.E.2d 642, 643, 487 N.Y.S.2d 316 (1985). Their argument rests primarily on *Dand*, a Civil Court opinion to which this Court is not bound. Moreover, decisions relied upon by that court do no support the conclusion that plaintiff bears the initial burden. *Carty v. Port Authority of N.Y. and N.J.*, 32 A.D.3d 732, 821 N.Y.S.2d 178 (1st Dept 2006); *Cahill v. Triborough Bridge & Tunnel Auth.*, 31 A.D.3d 347, 819 N.Y.S.2d 732 (1st Dept 2006). In *Cahill*, the court set aside a jury verdict on liability under 22-1.30, on the basis that plaintiff offered no evidence that the lighting failed to meet its specifications. 31 A.D. at 350, 819 N.Y.S.2d at 737. There, plaintiff relied on his conclusory and vague assertions of two witnesses that the area was "dark" and "a little dark." In *Carty*, plaintiff first asserted a 23-1.30 violation on defendant's motion for summary judgment, four and a half months after the note of issue and certificate of readiness were filed. 32 A.D.3d at 733, 819 N.Y.S.2d 737. Plaintiff's allegations were based on his vague testimony that the lighting was "poor" and the area was "dark." *Id.* In the instant case, plaintiff's allegations are not vague and conclusory, but dependent on factual allegations that the elevator shaft was illuminated by a single drop light dangled from a hundred foot cord tenuously connected to a socket, and that it was the sole source of light in an otherwise pitch dark shaft. Accordingly, Court declines to place the initial burden to plaintiff .

Regardless, plaintiff has met his burden whether that burden is initially borne by plaintiff or subsequently shifted from movants to plaintiff. Plaintiff has sufficiently alleged violations of § 23-1.30 and has presented triable issues of fact as to these violations. Plaintiff alleges that the lighting in the shaft consisted of only an ad hoc setup consisting of a single drop light, dangling a hundred feet down the shaft and precariously secured to a socket. But for this light, plaintiff alleges, his working area would be completely dark. Third-party defendant Mainco also maintains this position. These specific allegations, if proven true, would indicate that the illumination was insufficient under § 23-1.30, and, by extension, § 241(6). Although City defendants and third party JB Electric dispute these allegations, these factual disputes only highlight the inappropriateness of summary judgment at this stage. *Compare Carty*, 32 A.D.3d at 733, 821 N.Y.S.2d 178 (finding allegations of § 241(6) violation were insufficient where the only evidence was plaintiff's own vague testimony that lighting was "poor" and the subject area was "dark"); *Cahill*, 31 A.D.3d at 349, 819 N.Y.S.2d 732 (holding that jury verdict could not stand based on conclusory and nonspecific assertions by witnesses that the area was "dark").

12 NYCRR §23-1.7.(e)(2)

Plaintiff also seeks to establish liability under §241(6) through a violation of 12 NYCRR § 23-1.7(e)(2), which protects against tripping hazards in a work area. Although this violation was not specified in plaintiff's complaint or bill of particulars, plaintiff nonetheless requests that this court may consider it so long as the code violation is specific and consistent with plaintiff's testimony and theory of the case. *Zulaga v. P.P.C. Const.*, LLC, 45 A.D.3d 479, 480, 847 N.Y.S.2d 30 (1st Dept 2007). Plaintiff has indeed pleaded a section of the industrial code whose safety provisions are specific enough to establish liability under § 241(6). *Cf. Isola v. JWP Forest Elec. Corp.*, 267 A.D.2d 157, 158, 691 N.Y.S.2d 492 (1st Dept 1999) (acknowledging that, under § 241(6), plaintiff must establish a violation of a specific safety regulation, and

dismissing his §23-1.7(e) claims on the merits); *Lenard v. 1251 Americas Assocs.*, 241 A.D.2d 391, 392-93, 660 N.Y.S.2d 416, 417-18 (1st Dept 1997) (acknowledging that, under § 241 (6), plaintiff must establish a violation of a specific safety regulation, and dismissing his § 23-1.7(e) claims on the merits). However, because the facts as alleged cannot establish a violation of this code, summary judgment against plaintiff as to § 23-1.7(e) is appropriate on the merits.

§ 23-1.7(e), in relevant part, requires:

> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

See Lenard, 241 A.D.2d at 391, 660 N.Y.S.2d at 417.

Plaintiff argues that the light fixtures protruding above the elevator ceilings were "sharp projections" under § 23-1.7(e)(2), and therefore defendants are liable for not leveling the work surface to avoid the accident. This argument has no merit, because "there is be no liability under § 241 (6) where the injury-producing object is an integral part" of the surface area where the construction work is taking place. *O'Sullivan v. IDI Const. Co.*, 28 A.D.3d 225, 226, 813 N.Y.S.2d 373, 374 (1st Dept 2006); *see also Vieira v. Tishman Const. Corp.*, 225 A.D.2d 235, 679 N.Y.S.2d 618 (1st Dept 1998). The ceiling's protrusions were necessary to allow for the lights inside the elevator. It defies logic that such an integral part of its design ought to be leveled or destroyed for plaintiff's temporary, ad hoc task of maneuvering the elevator while standing on its top.

Accordingly, plaintiff's § 241 (6) may be established based on an alleged violation of § 23-1.30, but not on an alleged violation of § 23-1.7.(e)(2).

Mainco's Contractual Indemnification of Vertex

Vertex moves for summary judgment on its indemnification claim against Mainco, based on the contractual clause requiring Mainco, as subcontractor, to indemnify Vertex, as general contractor:

> The Contractor shall not be responsible for any injury to any person including death, whether employed by the Subcontractor or otherwise, or to the public, or for damage to any property, whether belonging to the Subcontractor or to others, arising from the acts of the Subcontractor or his employees during the progress of the work, against all of which injuries, death and damages to persons and property the subcontractor must properly guard, and make good all such damages from whatever cause. *The Subcontractor shall indemnify and save harmless the Contractor and the Owner, it [sic] officers, agents or servants may be one of them from all damages or liability to which the Contractor and/or the Owner*, its officers, agents or servants may be subjected by reason of injury, including death at any time resulting therefrom, to the person or property of others resulting from the performance of the work of the Subcontractor hereunder, or through the negligence, act or omission of the Owner, Contractor or the Subcontractor or any of their agents, servants or employees or any other person on or near the site of the project with the consent of the Subcontractor or through any improper or defective machinery, implements or appliances used by the Subcontractor in the project, and *shall further indemnify and save harmless the Contractor and the owner, its officers, agents, and servants from all suits and actions of any kind and character whatsoever which may be brought or instituted by a subcontractor or any material man or laborer who has performed work or furnished materials for the Subcontractor under and by virtue of his subcontractor in or about the project.*
>
> *In the event of suit being brought against the Contractor for any claim growing out of any of the above causes, the Subcontractor shall pay all expense of such litigation as soon and as often as incurred, and in the event of judgment being entered against the defendant in any such judgment; failure to pay any such expenses or judgment in the manner above stated shall be construed as a breach of this agreement.* [italics added]

An indemnification clause, like any other provision in a contract, is enforceable on a party's motion for summary judgment where the clause is clear and unambiguous on its face. *Omansky v. Whitacre*, 55 A.D.3d 373, 866 N.Y.S.2d 109 (1st Dept 2008). A clause requiring indemnification for a contractor's own negligence is unenforceable as a matter of law. N.Y. Gen. Obl. § 5-322-.1. However, a clause requiring a subcontractor to indemnify a general contractor or owner for injury to a worker is enforceable, so long as the party to be indemnified is not negligent in producing the injury. *Id.*; *see Linarello v. City Univ. of N.Y.*, 6 A.D.3d 192, 194, 774 N.Y.S.2d 517, 519 (1st Dept 2004). Therefore, an indemnification clause is generally enforced where liability arises only from the promisee's vicarious liability. *Id.* at 193-94, 774 N.Y.S.2d at 519; *Buccini v. 1568 Broadway Assocs.*, 250 A.D. 466, 468, 673 N.Y.S.2d 398 (1st Dept 1998).

Vertex argues that because there is no evidence of its own negligence, as Justice Mills previously held, the indemnification provision is enforceable as a matter of law. *See Linarello*, 6 A.D.3d at 194, 774 N.Y.S.2d at 519.

Mainco argues that the provision is inapplicable, because there is no evidence that Mainco is negligent, and there is evidence that Vertex may be negligent because its employees were present on a daily basis to take care of safety management. *See Worth Const. Co. v. Admiral Ins. Co., 10 N.Y.3d 411, 416, 888 N.E.2d 1043* (2008) . Vertex replies that a general duty to supervise the work of subcontractors at a work site and ensure compliance with safety regulations does not amount to supervision and control such that the supervising entity would be liable for the negligence of the subcontractors who perform the day to day operations. *See Buccini*, 250 A.D.2d at 469, 673 N.Y.S.2d 398.

Mainco's reliance on its own lack of negligence is not supported by the record, because City

defendants and JB Electric have raised triable issues of fact as to Mainco's own involvement in causing Sicilia's injury. But more importantly, Mainco's own lack of negligence is irrelevant to the issue of whether or not Vertex is to be indemnified. Although an indemnification clause that rewards the promisee in the event of its own negligence is unenforceable as a matter of law, the clause is still enforceable so long as the promisee is not negligent. *Brown v. Two-Exchange Plaza Partners*, 76 N.Y.2d 172, 178, 556 N.E.2d 430 (1990). There is no requirement, by law or by nature of this contract, that promisor Mainco be found negligent in order for the indemnification clause to take effect. *Id.* Rather, as Justice Mills has held, this contract is enforceable where any liability attributed to City defendants is a result of vicarious liability under a specific statute. *See Buccini*, 250 A.D. at 468, 673 N.Y.S.2d 398.

Cases relied upon by Mainco are not to the contrary. *Worth*, 10 N.Y.3d 411, 888 N.E.2d 1043; *Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co.*, 89 N.Y.2d 786, 680 N.E.2d 1200 (1997). In *Itri*, the First Department held that a general indemnification clause was completely invalid under 5-322.1 where the general contractor/promisee was found to have been negligent. *Itri*, 89 N.Y.2d at 795, 680 N.E.2d 1200. However, the court explicitly reiterated that without a finding of negligence on the part of the general contractor the agreements as applied would not violate the statute. *Id.* at 795, FN5, 680 N.E.2d 1200. *Worth* turned not on enforceability of an indemnification clause, but on interpretation of the clause limiting indemnification "only with respect to liability arising out of [promisor's] operations." 10 N.Y.3d at 415, 888 N.E.2d 1043. There, the underlying injury did not arise out of the promisor's operations, because the promisor had completed construction of the staircase and another company was specifically responsible for the handrails whose failure was the cause of the accident. *Id.* at 416. Therefore, there was no connection between

the accident and the intended coverage. *Id.*

This case is distinguishable from *Itri* and *Worth*. There is no evidence that general contractor Vertex was negligent. Justice Mills has already found so, and regardless of whether her observation is law of the case against Mainco, there is still no such evidence. The unenforceable portion is therefore severable, as *Inti* acknowledges it would be where the promisee has not been held to be negligent. Unlike in *Worth*, the injured plaintiff is an employee of the promisor Mainco, and there are issues of fact as to what degree Mainco was responsible for his safety, and therefore Mainco cannot argue that the injury did not arise out of its own operations.

Accordingly, because the relevant clause clearly provides that Mainco shall indemnify Vertex for the injury sustained by the Mainco's employee, there are no triable issues of fact as to Vertex's entitlement to indemnification and summary judgment is granted to Vertex.

Mainco's Claim for Common Law Indemnification Against JB Electric

To establish a claim for common law indemnification, the party to be indemnified must demonstrate that it was not negligent, that its own liability to the injured party arises only from an obligation imposed by law, and that the party from whom indemnification is sought was negligent. *Correria v. Professional Data Mgmt., Inc.*, 259 A.D.2d 60, 64, 693 N.Y.S.2d 596 (1999). Unlike a claim for contractual indemnification, the purported indemnitee must demonstrate the other party's negligence. *Id.*

Mainco argues that JB Electric is liable for indemnification, because there are no triable facts as to JB Electric's negligence and Mainco's lack thereof. To support this argument, Mainco alleges that it had no authority to direct, supervise, or control the faulty lighting that caused the injury by its

failure. It further asserts that JB Electric's contract with Vertex provided that JB Electric was to be responsible for all of the lighting in connection to the subway renovation project.

JB Electric responds that Mainco, not JB Electric, was responsible for providing the drop light. This assertion is supported by the testimony of a Mainco employee that it "could be one of our employees" that supplied it, and the testimony of a JB Electric employee that his company does not provide drop lights. JB Electric further alleges that Mainco instructed plaintiff on how to operate the elevator while guiding the drop light's extension cord, and that Mainco had the duty to ensure that the extension cord was properly attached to the electrical socket. Moreover, because JB Electric alleges that it properly installed lighting in the elevator shaft, there is no evidence that it was negligent.

Here, unlike most of the cases involving claims of common law indemnification, no party has sued movant Mainco for its negligence. Any potential liability attributable to Mainco derives from its contractual obligation to indemnify general contractor Vertex, whose liability derives from Labor Law 241(6). Therefore, Mainco's liability arises by statute, albeit indirectly, and therefore satisfies that prong of a common law indemnification claim. However, it does not follow that Mainco's absence of negligence is established as a matter of law, or that Mainco would have been immune from a negligence action. Accordingly, in order to demonstrate its entitlement as a matter of law, it must still demonstrate its own lack of negligence and JB Electric's own prima facie negligence.

There are triable issues of fact as to both parties' negligence in creating plaintiff's injuries. As Justice Mills previously held, there remains an issue of fact as to who supplied the drop light. Mainco's elevator mechanic testified that he worked in the shaft way everyday, and that his company

provided the hand-held drop-light, with a single bulb, tied underneath the car to a Ground-faulted interrupter (GFI), which in turn was connected to the motor room (Viera deposition, pp. 74-75). He testified that his company generally provides its employees with drop lights. (Viera deposition, p. 970) Therefore, there are triable issues over whether Mainco was responsible for illumination, and whether it provided the faulty drop light that allegedly caused Sicilia's injuries.

Moreover, even if Mainco was not responsible for the drop light, it maintains overall responsibility for its own employee working within the scope of his employment. *See Frank v. Meadowlakes Development Corp.*, 20 A.D.3d 874, 875, 798 N.Y.S.2d 820 (4th Dept 2005), *affirmed in relevant part and remitted on other grounds*, 6 N.Y.3d 687, 849 N.E.2d 938, 816 N.Y.S.2d 715 (2006). Mainco has the responsibility to instruct, train, supervise, and possibly equip Sicilia. *Id.* It is this respect that this case differs significantly from *Correia*, where the injured plaintiff was employed by the company from which indemnification was sought, and the movant bore no responsibility for the plaintiff or the accident. 259 A.D. at 62, 693 N.Y.S.2d 596.

Therefore, summary judgment on common law indemnification is denied.

Mainco's Motion to Strike JB Electric's Answer for Failure to Produce a Knowledgeable Witness

Mainco, as third third-party plaintiff, seeks to strike third third-party defendant JB Electric's answer, on the grounds that JB Electric has failed to produce a knowledgeable witness. Two representatives from JB Electric were deposed, and Mainco alleges that neither had personal knowledge of the incident. Mainco argues that since producing an unprepared witness is tantamount to failure to appear, JB Electric should be obligated to produce a witness or have its answer stricken.

JB Electric argues that Mainco cherry picked testimony from each deponent to emphasize only those portions where those witness did not have sufficient knowledge to answer questions. Moreover, Mainco never reserved its right to depose more witnesses, and two years have passed before Mainco raised objections.

JB Electric submitted two witnesses for deposition. Jay Lender, Vice President, was familiar with the project that his company and Mainco were performing (Examination Before Trial of Jay Lender, July 28, 2006, Mainco's Notice of Amended Cross-Motion, Ex. H., p. 9) (hereinafter "Lender deposition"). He testified that he negotiated the scope of work with general contractor Vertex (Lender deposition, p. 10). He also visited the project on numerous occasions (Lender deposition, p. 10). He did not have a specific recollection of the elevator shaft way where plaintiff was injured (Lender deposition p. 10). He did not recall an investigation of the accident, and he never saw a report (Lender deposition p. 10). As a result a second JB Electric witness, project manager James Moran, was deposed (Examination Before Trial of James Moran, March 15, 2007, Mainco's Notice of Amended Cross-Motion, Ex. I) (hereinafter "Moran deposition"). He testified as to the work performed at the project site. However, he also was unable to recall anything about the temporary lighting system (Moran deposition pp. 28-37), and he testified that he did not know about plaintiff's accident until the day of deposition (Moran deposition p. 32).

Because these witnesses are unable to provide meaningful information on facts that are critical to this case, and Mainco has not waived the right to depose another witness, Mainco is entitled to depose another JB Electric witness with knowledge of the accident location. JB Electric is precluded from calling a witness to testify at trial that had not been previously produced for deposition. However, there is no indication that the previous witnesses were produced in bad faith,

and therefore that portion of Mainco's motion that seeks to strike JB Electric's answer is denied.

Conclusion

Accordingly, it is hereby

ORDERED that the motion by City of New York, New York Transit Authority, and Vertex Engineering Services to dismiss plaintiff's claims under Labor Law § 240 and § 200, and the clerk is to enter judgment in favor of defendants on these claims;

ORDERED that the motion by City of New York, New York Transit Authority, and Vertex Engineering Services to dismiss plaintiff's claims under Labor Law § 241(6) is denied;

ORDERED that the motion by plaintiff Stephen Sicilia for summary judgment against defendants City of New York, New York Transit Authority, and Vertex Engineering Services is denied;

ORDERED that the motion by second third-party plaintiff Vertex Engineering Services second third-party defendant Mainco Elevator & Electrical Corp. a/k/a Mainco Elevator Services, Co. for contractual indemnification is granted, and the clerk is to enter judgment in favor of Vertex Engineering Services;

ORDERED that the motion by third-party defendant and second third-party defendant Mainco Elevator & Electrical Corp. a/k/a Mainco Elevator Services, Co. to dismiss the claims by third-party plaintiffs City of New York and New York City Transit Authority and second third-party plaintiffs Vertex Engineering Services are granted only to the extent that they are mooted by this court's dismissal of plaintiff's claims under Labor Law § 240 and § 200, and otherwise denied,

ORDERED that the motion by third third-party plaintiff Mainco Elevator & Electrical Corp.

a/k/a Mainco Elevator Services, Co. on its claim for common-law indemnification against third third-party defendant JB Electric Corporation is denied;

ORDERED that the motion by third third-party plaintiff Mainco Elevator & Electrical Corp. a/k/a Mainco Elevator Services, Co. to strike third third-party defendant JB Electric Corporation's answer is denied;

ORDERED that Mainco Elevator & Electrical Corp. a/k/a Mainco Elevator Services, Co. is entitled to depose another JB Electric witness with knowledge of the accident location, and JB Electric Corporation is precluded from calling a witness to testify at trial that had not been previously produced for deposition;

ORDERED that all other relief not expressly granted is denied; and it is

ORDERED that the action shall continue as to the remaining Causes of Action.

This constitutes the decision and order of the court.

Dated: New York, New York

November 24, 2009

FILED
DEC 04 2009
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

Harold B. Beeler, JSC

HAROLD BEELER
J.S.C.