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SHORT FORM ORDER

INDEX No. 07-19656

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Supreme Court

Mot. Seq. # 001 - MotD

RICHARD MOISA,	:	SIBEN & FERBER
Plaintiff,	:	Attorneys for Plaintiff
	:	1455 Veterans Memorial Highway
- against -	:	Hauppauge, New York 11749
	:	
ATLANTIC COLLABORATIVE	:	BAXTER SMITH & SHAPIRO, P.C.
CONSTRUCTION COMPANY, INC. and	:	Attorneys for Defendants
DOUGLAS LLOYD,	:	99 North Broadway
Defendants.	:	Hicksville, New York 11801

Upon the following papers numbered 1 to 12 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001)1 - 8; Notice of Cross Motion and supporting papers___; Answering Affidavits and supporting papers 9-11; Replying Affidavits and supporting papers 12; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is

ORDERED that this motion (001) by the defendants, Atlantic Collaborative Construction Company, Inc and Douglas Lloyd., pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted to the extent that the complaint is dismissed in its entirety with prejudice as asserted against defendant Douglas Lloyd, and is granted as to the defendant Atlantic only to the extent that the cause of action premised upon Atlantic's alleged violation of Labor Law §240(1) is dismissed with prejudice, but is denied to Atlantic on the remaining causes of action premised upon negligence and violation of Labor Law §§200 and 241(6).

In this action the plaintiff, Richard Moisa seeks damages for personal injuries allegedly sustained on July 22, 2005 while working as an employee of Forge Heating and Air Conditioning at the premises located at 611 Lazy point Road, Amagansett, New York. It is claimed that Atlantic Collaborative Construction Company, Inc. (Atlantic) was the general contractor at the site pursuant to a contract entered into with Douglas Lloyd (Lloyd), the owner of the premises under construction. Liability is premised upon negligence and the alleged violation of New York State Labor Law §§200, 240(1) and 241(6) and the Industrial Code of the State of New York 12 NYCRR sections 23-1.5; 23-1.7(b); 23-2.1; and 23-2.30; and Article 1926 of the Rules and Regulations of Occupational Safety and Health Administration.

The defendants seek an order granting summary judgment dismissing the complaint on the basis that the plaintiff cannot establish negligence and in that Lloyd qualifies for the single family home exemption relative to New York State Labor Law §§200, 240(1) and 241(6). In support of the motion the defendants have submitted an attorney's affirmation; a copy of the pleadings, answer and bill of particulars; and copies of

the deposition transcripts of Richard Moisa dated August 14, 2008 and Richard Schumway dated August 14, 2008

The plaintiff opposes this motion submitting an attorney's affirmation and the affidavit of Richard Moisa dated April 28, 2009.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065 [1979]).

Richard Moisa testified to the effect that in July 2005 he was employed by Forge Heating and Air Conditioning (Forge) as an HVAC mechanic for about eight years and was also a free lance captain for boats up to seventy feet in length. On July 22, 2005 he was working at the premises located at Lazy Point Road, Amagansett for Forge where he had been working on and off for about two months. On that day he was running line sets (copper line) for the air conditioning and was digging a trench approximately one hundred twenty feet long, eight inches wide and two feet deep in which the line sets were to be encased in PVC and buried. The trench started on the side of the house where there was a mechanical room and was dug by using shovels and a rotary hammer (smaller handheld jackhammer) to dig through the dirt and construction debris. He described the construction debris as left over, hard packed concrete scattered all over the place through which they cleared a path. A scaffold set up by the house was in his way when he was digging the trench, so he went inside the house to speak to the employees of the general contractor to see if the four point scaffolding could be moved, but was told there was no one to move it. He went back outside and was standing in the trench digging under the scaffold just past the cross members and a foot underneath it and was leaning over to avoid the cross member while he was digging. As he picked up a scoop of dirt and debris with the shovel, he rotated to his left to dump it and his back went out. He sat down on the edge of the trench for about ten minutes when a co-worker came by and he told him that he "blew out his back." He described the premises as a single-family dwelling. Although workers from the general contractor were at the site on the date of his injury, the foreman was not. He did not know who the owner of the premises was but stated that the owner did not direct or control the way he did his job.

Richard Schumway testified to the effect that he is the owner/president of Atlantic Collaborative Construction Company, a New York corporation founded in 1997 to build high-end residences of modern architectural design primarily on the eastern end of Long Island. Atlantic entered into a contract or agreement

with Douglas Lloyd to erect a one-family house at 611 lazy Point Road, Amagansett and was the general contractor for the project and hired subcontractors for the job site. Mr. Lloyd did not retain any authority to hire the subcontractors and did not supervise any of the work that was done at the job site from when the job was started through July 22, 2005. Sal Dileo was the foreman for Atlantic at the site but was on vacation on the date of the accident. Schumway did not know who the foreman was who replaced Dileo on the date of the accident, but stated the substitute foreman could make a decision about something or call and get a decision, but that anyone (from Atlantic)other than a laborer would be able to remove a crossbar of scaffold. He did not ask any of his employees whether or not they were requested to remove the scaffold. He held safety meetings for his employees, but the subcontractors held their own safety meetings. He did not go the site on a daily basis, but typically went about two to three times a week. LGP was the concrete subcontractor on the site. Atlantic had laborers specifically assigned for the purpose of cleaning up and policing the job site. He thought pipe scaffolding had been set up for some trim work around the windows or for handrail work but he did not know if it was affixed to the ground. He had hired Forge and while Forge was on the site, Atlantic did not direct or control any of the work that was being done by the Forge workers and did not discuss the means or authorize the method of digging the trench. Mr. Dileo was not responsible for the instructions of any of the workers from Forge concerning the means and authorization to dig the trenches. He never directed or controlled the work of Richard Moisa.

Negligence

The first cause of action is premised upon the alleged negligence of the defendants in causing injury to the plaintiff. In New York, to establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. If, defendant's negligence were a substantial factor, it is considered to be a "proximate cause" even though other substantial factors may also have contributed to plaintiff's injury (***Spiegel v Fine Paint Co.*** 2006 NY Misc. LEXIS 2549, 236 NYLJ 51 [Sup. Ct. Nassau County 2006]). In order to establish the third element, proximate cause, the plaintiff must show that defendant's negligence was a substantial factor in bringing about the injury. Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (*see*, ***Espinal v Melville Snow Contractors, Inc.***, 98 NY2d 136 [2002]; ***Darby v Compagnie Natl. Air France***, 96 NY2d 343 [2001]. Summary judgment is rarely appropriate in a negligence action because the issue of whether a plaintiff or defendant acted reasonably under the circumstance could rarely be resolved as a matter of law (***Davis et al v Federated Department Stores, Inc.***, 227 AD2d 514 [2nd Dept 1996].

It is determined that the defendant Atlantic, as the general contractor, had a duty to maintain a safe working environment at the work site. Atlantic has not demonstrated prima facie entitlement to dismissal of the cause of action premised upon negligence in that there are factual issues concerning whether it breached that duty and was negligent in supervising the work site and in not providing someone with authority at the site to move the scaffolding when asked by the plaintiff to enable him to dig the trench on the date of the accident. There is further factual issue concerning whether Atlantic was negligent in permitting the unused concrete debris to remain at the construction site, and whether such debris impaired the plaintiff's ability to safely perform his job thus causing injury to the plaintiff.

It is determined that there was no duty owed to the plaintiff by the defendant Lloyd who did not supervise or control the work site, the general contractor, or any of the subcontractors at the site and therefore entitlement to summary judgment on the issue of negligence by the owner has been established prima facie. It is further determined that the plaintiff has not raised a factual issue to preclude summary judgment to the

homeowner on the issue of negligence as there has been no testimony or evidence submitted by the plaintiff to demonstrate any manner in which Lloyd was negligent.

Accordingly, that part of the motion by Atlantic for dismissal of the negligence cause of action as asserted against Atlantic is denied and that part of the motion by Lloyd for dismissal of the negligence cause of action as asserted against him is granted.

LABOR LAW VIOLATIONS

Causes of action for violation of Labor Law sections 200, 240(1), and 241(6) based upon violations of the Industrial Code 12 NYCRR sections 23-1.5; 23-1.7(b); 23-2.1; and 23-2.130; and Article 1926 of the Rules and Regulations of Occupational Safety and Health Administration.

Labor Law §200

Labor Law §200 provides in pertinent part that "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.... (***Trbaci v AJS Construction Project Management, Inc, et al,*** 2009 NY Slip Op 50153U; 22 Misc3d 1116A [Supreme Court of New York, Kings County 2009). "New York State Labor Law §200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (***Kim v Herbert Constr. Co.***, 275 AD2d 709 [2000]). Liability for causes of action sounding in common law negligence and for violations of Labor Law §200 is limited to those who exercise control or supervision over the plaintiff's work, or who have actual or constructive notice of an unsafe condition that causes an accident (***Aranda v Park East Constr.***, 4 AD3d 315 [2004]; ***Akins v Baker,*** 247 AD2d 562 [1998])" (***Marin v The City of New York, et al.*** 15 Misc3d 1003A [Supreme Court of New York, Kings County 2004]). An implicit precondition to the common-law duty imposed upon an owner or general contractor to provide construction workers with a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury and have actual or constructive notice of the alleged unsafe condition (***Ramos v HSBC Bank et al,*** 29 AD3d 435 [1st Dept 2006]). In order to prevail on a claim under Labor law §200, a plaintiff is required to establish that a defendant exercised some supervisory control over the operation (***Mendoza v Cornwall Hill Estates, Inc.***, 199 AD2d 368 [2nd Dept 1993]). NY Labor Law §200 governs general safety in the workplace, imposes upon employers, owners, and contractors the affirmative duty to exercise reasonable care to provide and maintain a safe place to work and is a reiteration of common-law negligence standards. Therefore, a party charged with liability must be shown to have notice, actual or constructive, of the unsafe condition and to exercise sufficient control over the work being performed to correct or avoid the unsafe condition (***Leon v J&M Pepe Realty Corp. et al,*** 190 Ad2d 400 [1st Dept 1993]).

In light of the foregoing, and based upon the adduced testimony and admissible evidence, it is determined that Atlantic has not demonstrated prima facie entitlement to summary judgment dismissing that part of the complaint premised upon violation of Labor Law §200. Atlantic, as the general contractor, is charged with the affirmative duty to provide and maintain a safe place for the plaintiff to work. As set forth above, there are factual issues which preclude summary judgment to Atlantic concerning whether it was negligent in supervising the work site, and in not having someone with authority to move the scaffolding to enable the plaintiff to dig the trench in a safe manner and to provide adequate room for him to work safely. The testimony establishes that employees of the general contractor were at the work site and that the scaffolding was used by Atlantic for trim around the windows or for handrail work. There is further factual issue concerning

whether Atlantic was negligent in permitting the unused concrete debris to remain at the construction site, and whether such debris impaired the plaintiff's ability to safely perform his job. However, on the date of the accident the foreman from Atlantic was on vacation and it was not known whom, if anyone, was supervising the site from Atlantic. Therefore, there are factual issues concerning whether Atlantic negligently supervised the work site on the date of the accident.

It has been established prima facie both by the plaintiff's testimony and the testimony of Richard Schumway that the owner of the premises, Douglas Lloyd, did not supervise, direct or control the work being done at the job site. There has been no factual issue raised by the plaintiff in opposing this motion concerning whether Lloyd supervised, directed or controlled the scaffold and work at the site or created the situation which the plaintiff claims caused his injury.

Accordingly, that part of defendants' motion to dismiss the cause of action premised upon the alleged violation of Labor Law §200 is denied as to the defendant Atlantic and is granted as to Douglas Lloyd and the cause of action premised upon violation of Labor Law §200 as asserted against Lloyd is dismissed with prejudice.

Labor Law §240(1)

New York State Labor Law §240. Scaffolding and other devices for use of employees at section (1) provides "[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, 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 a person so employed."

"New York State Labor Law §240 (1) is applicable to work performed at heights or where work itself involves risks related to differentials in elevation" (*see,* ***Plotnick et al v Wok's Kitchen Incorporated, et al,*** 21 AD3d 358 [2nd Dept 2005]; ***Handlovic v Bedford Park Development, Inc.,*** 25 AD3d 653 [2nd Dept 2006]). Labor Law §240 (1) was enacted 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 (***Cruz v The Seven Park Avenue Corporation et al,*** 5 Misc3d 1018A, 799 NYS2d 159 [Supreme Court of New York, Kings County 2004]). As set forth In ***Ortega et al v Puccia et al,*** 57 AD3d 54 [2nd Dept 2008], Labor Law §240 is intended to protect workers from gravity-related occurrences stemming from the inadequacy or absence of enumerated safety devices. The duties articulated in §240 are nondelegable, and liability is absolute as to the general contractor or owner when its breach of the statute proximately causes injury.

N.Y. Labor Law §240(1) applies to "both falling worker and falling object cases. In falling object cases, the object had to have been related to a risk inherent in the elevation at which material or loads had to have been positioned or secured. A plaintiff had to show that an object fell while being hoisted or secured, because of the lack of a proper safety device listed in the statute. Absolute liability for falling objects arises only when there was a failure to use proper hoisting or securing devices" (***Narducci et al v Manhasset Bay Associates, et al,*** 96 NY2d 259 [2001]).

"Labor Law §240(1) provides exceptional protection for workers against the special hazards that arise

when the work site itself is either elevated or is positioned below the level where materials or load are being hoisted or secured (*citations omitted*). These special hazards do not encompass any and all perils that may be connected in some tangential way with the effects of gravity.... Rather, they 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 .... To establish liability under Labor Law §240(1), a plaintiff must show more than simply that an object fell, thereby causing injury to a worker. The plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (***Natale v City of New York et al,*** 33 AD3d 772 [2nd Dept 2006]). It is well settled that not every hazard or danger encountered in a construction zone falls within the scope of N.Y. Labor Law §240(1) as to render the owner or contractor liable for an injured worker's damages. Rather, N.Y. Labor Law §240(1) is aimed at only elevation-related hazards, and accordingly, injuries resulting from other types of hazards are not compensable under that statute even if proximately caused by the absence of a required safety device.

Here the injury claimed to have been sustained by the plaintiff did not arise out of the effects of gravity within the meaning of N.Y. Labor Law §240 and it is not alleged that something fell or that the plaintiff fell (see, ***Auchampaugh v Syracuse University et al***, 57 AD3d 1291[3rd Dept 2008]. It is determined as a matter of law that the cause of action premised upon the violation of Labor Law §240 is not contemplated within the meaning of the statute as although this incident occurred while the plaintiff was digging by the scaffold, there was no gravity related event giving rise to application of Labor Law §240 to the facts in this action. It is determined that this is a usual and ordinary danger of a construction site rather than a special elevation-related hazard within the meaning of Labor Law §240.

Accordingly, that part of the defendants' motion for dismissal of the cause of action premised upon the defendants' alleged violation of Labor Law §240(1) as asserted against Atlantic and Douglas Lloyd is granted and the cause of action premised upon their violation of Labor Law §240(1) is dismissed with prejudice.

Labor Law §241(6)

New York State Labor Law §241(6) provides in pertinent part that "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to persons employed therein or lawfully frequenting such places." It is axiomatic that the statutory duties imposed by New York State Labor Law §241(6) place ultimate responsibility for safety practices on owners of the worksite and general contractors (***Bopp v A.M. Rizzo Electrical Contractors, Inc. et al,*** 19 AD3d 348 [2nd Dept 2005]).

Labor Law §241(6) imposes liability upon all contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith (see, ***Dipalma et al v Metropolitan Transportation Authority et al,*** 200 NY Slip Op 51654U, 20 Misc3d 1128A [Supreme Court of New York Bronx County]). It has already been established that the owner of the premises, Douglas Lloyd, in contracting with Atlantic for the construction of the one-family dwelling, did not direct, supervise or control any of the work connected therewith and that the construction was for a one-family home. It has therefore been established prima facie that Lloyd falls within the exception to Labor Law §241(6) as the owner of a one-family home who does not direct, supervise or control the work site as a basis for liability not being imposed against him. The plaintiff has not raised a factual issue in that regard.

Accordingly, that part of the motion which seeks dismissal of the cause of action premised upon Lloyd's

alleged violation of Labor Law §241(6) is granted and the cause of action premised upon Lloyd's alleged violation of Labor Law §241(6) is dismissed with prejudice.

The Court of Appeals has instructed that Labor Law §241(6) covers industrial accidents that occur in the context of construction (*see*, ***Nagel v D&R Realty Corp.***, 99 NY2d 98 [2002]. "In that regard, work that is an 'integral part of the construction contract' and is 'necessitated by and incidental to the construction... and involve[s] materials being readied for use in connection therewith' is construction work, ***Brogan v International Bus. Mach. Corp.***, 157 AD2d 76 [3rd Dept 1990]" ***(Shields et al v General Electric Company et al.***, 3 AD3d 715 [3rd Dept 2004]). "The lack of proximity between the place an accident occurs and the precise location of construction is not dispositive against New York Labor Law liability for injuries to workers handling construction materials and equipment" (***Shields et al v General Electric Company et al***, supra). In the instant action, it is determined that wherein the plaintiff was involved in digging a trench to bury the copper lines to be attached to the HVAC system, such work was necessary and incidental to the work he was performing, and that the plaintiff was engaged in construction work at the time he twisted his back while digging so as to bring this cause of action under Labor Law §241(6).

"Labor Law §241(6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors and their agents to comply with the specific safety rules set forth in the Industrial Code (citing ***Ross v Curtis Palmer Hydro-Elec. Co.,*** 81 NY2d 494 [1993]). As the Court of Appeals explained in ***Rizzuto v L.A. Wegner Contracting Co., Inc.,*** 91 NY2d 343 [1998], "Thus once it has been alleged that a concrete specification of the Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused plaintiff's injury. If proven, the general contractor (or owner, as the case may be) is vicariously liable without regard to his or her fault" (***McDevitt et al v Cappelli Enterprises, Inc. et al***, 16 Misc3d 1133A [Supreme Court, New York County 2007]).

Here, the plaintiffs allege that Title 12 NYCRR sections 23-1.5; 23-1.7(b); 23-2.1; 23-1.30 of the State of New York, and Article 1926 of the Rules and Regulations of the Occupational Safety and Health Administration have been violated.

Section 23-1.5 provides for the general responsibility of employers. At subsection (a) it is provided that all employers, owners, contractors and their agents and other persons obligated by law to provide safe working conditions, personal protective equipment and safe places to work for persons employed in construction... and shall provide or cause to be provided the working conditions, safety devices, types of construction, methods of demolition and of excavation and the materials, means, methods and procedures required. However, Industrial Code of the State of New York 12 NYCRR 23-1.5(a), (c)(2), and (3) are general provisions and do not provide a basis for liability under NY Labor Law §241(6) (***Williams v White Haven Memorial Park, Inc.***, 227 AD2d 923 [4th Dept 1996]).

Section 23-1.7 provides for protections from general hazards and at section (b) concerns overhead hazard, falling material, falling hazards, providing a barrier for free access to an opening for work in progress, protection from openings, and safety equipment. It has not been demonstrated how section 23-1.7 (b), as pleaded in the bill of particulars, is applicable to the facts of this action and therefore does not serve as a predicate for violation of Labor Law §241(6).

Section 23-2.1 provides, in relevant part, for maintenance and housekeeping and provides at (a)(1) that all building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all

conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare. Debris shall be handled and disposed of by methods that will not endanger any person employed in the area of such disposal. It is determined that this section relates to the plaintiff's claims that there was debris in the nature of concrete in the area where he was digging contributing to the claim that the area was unsafe for working.

Section 23-1.30 provides for illumination sufficient for safe working conditions to be provided at the construction site. However, although section 23-1.30 is a concrete and specific regulation whose violation can serve as a predicate for liability, a plaintiff must offer more than vague evidence evincing that the lighting in the area where the accident occurred was dark, poor or a little dark (see, ***Dipalma et al v Metropolitan Transportation Authority et al,*** supra). In the instant action, no evidence has been submitted in support of this alleged violation and accordingly does not serve as a predicate for violation of Labor Law §241(6).

The plaintiff has also claimed that the defendants violated Article 1926 of the Rules and Regulations of Occupational Safety and Health Administration. However, violations of OSHA regulations by an employer do not impose a nondelegable duty on the owner or general contractor under Labor Law §241(6) because OSHA regulates only the relationship between employers and employees and imposes no duty on an owner or general contractor; additionally, the owner and general contractor have no duty to monitor the compliance of the worker's employer with OSHA (*see*, ***Pellescki et al v City of Rochester et al,*** 198 AD2d 762 [4th Dept 1993]).

In order to raise a triable issue as to violation of NY Labor Law §241(6), "plaintiffs must show that the defendants violated a provision of the Industrial Code containing concrete specifications" with which the defendant must comply (***Donovan et al ve S&L Concrete Construction Corp, Inc. et al,*** 234 AD2d 336 [2nd Dept 1996]). In that the plaintiff has alleged violation of Section 23-2.1 there is a factual issue concerning whether the defendant Atlantic was negligent relative thereto. "Under Labor Law §241(6), once it has been alleged that a concrete specification of the State Industrial Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused plaintiff's injury. If proven, the general contractor, or owner, as the case may be, is vicariously liable without regard to his or her fault ... An owner or general contractor may raise any valid defense to the imposition of vicarious liability under Labor Law §241(6), including contributory or comparative negligence.... Since an owner or general contractor's vicarious liability under Labor Law §241(6) is not dependent on its personal capability to prevent or cure a dangerous condition, the absence of actual or constructive notice sufficient to prevent or cure must also be irrelevant to the imposition of Labor Law §241(6)", ***(Rizzuto v L.A. Wenger Contracting Co., Inc.***, supra). There is an absolute duty on the part of an owner of real property to comply with the provisions of N.Y. Labor Law §241(6) (***Page v State of New York et al***, 56 NY2d 604, 426 NYS2d 594 [1982]); and this duty is a nondelegable duty of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety" to persons employed in, or lawfully frequently, all areas in which construction, excavation or demolition work is being performed (***Rizzuto v L.A. Wenger Contracting Co., Inc.***, supra; ***Copertino v Ward***, 100 AD2d 565 [2nd Dept 1984]), unless the owner falls within the exception one and two-family dwelling as set forth above.

Accordingly, that part of the motion by Atlantic for dismissal of the cause of action premised upon its alleged violation of Labor Law §241(6) is denied.

Dated: December 31, 2009

HON. JOSEPH C. PASTORESSA

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION