[* 1]

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

PRESENT: Edmead Justice

PART 35

Hurley

INDEX NO. 106538/05

MOTION DATE

- v -

MOTION SEQ. NO. 005

Best Buy

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	

FILED
OCT 29 2009
COUNTY CLERK'S OFFICE
NEW YORK

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 defendants, Best Buy Stores, LP, Moklam Enterprises, Inc., and Schimenti Construction Company, LLC for an order extending their time to move for summary judgment is granted; and it is further

ORDERED that the branch of the motion by said defendants for summary judgment dismissing plaintiff's Labor Law 200 and negligence claims against said defendants is granted, and such claims are hereby dismissed; and it is further

ORDERED that the branch of defendants' motion for dismissal of plaintiff's Labor Law 241(6) claim, is denied; however, 12 NYCRR sections 23-1.15, 23-1.16, 23-1.17, 23-1.19, 23-1.30, 23-2.1, 23-5, 23-6, 23-1.5, 29 CFR 1926, and the alleged OSHA violations are dismissed from plaintiff's Labor Law 241(6) claim; and it is further

ORDERED that said defendants are entitled to contractual indemnification over and above Sage Electrical Contracting, Inc.; and it is further

ORDERED that plaintiff's application for summary judgment on his Labor Law 240(1) claim is denied; and it is further

ORDERED that the parties appear in Part 40 for trial on December 7, 2009, 9:30 a.m.; and it is further

ORDERED that defendants Best Buy Stores, LP, Moklam Enterprises, Inc., and Schimenti Construction Company, LLC shall 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: 10/22/09

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

MICHAEL HURLEY,

Index No. 106538/05

Plaintiff,

-against-

BEST BUY STORES, L.P., MOKLAM ENTERPRISES, INC., and SCHIMENTI CONSTRUCTION COMPANY, LLC,

DECISION/ORDER

Defendants.

----------X

SCHIMENTI CONSTRUCTION COMPANY, LLC,

Index No. 590952/05

Third-Party Plaintiff,

-against-

SAGE ELECTRICAL CONTRACTING, INC.,

Third-Party Defendant.

----------X

BEST BUY STORES, L.P., and MOKLAM ENTERPRISES, INC.,

Index No. 591014/05

Second Third-Party Plaintiffs,

-against-

SAGE ELECTRICAL CONTRACTING, INC.,

Second Third-Party Defendant.

----------X

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action alleging negligence and violations of Labor Law 200, 240 and 241(6), defendants, Best Buy Stores, LP, Moklam Enterprises, Inc., ("Moklam") and Schimenti Construction Company, LLC ("Schimenti") (collectively, "defendants"), move for an order

extending their time to move for summary judgment and upon such an extension, summary judgment dismissing the complaint of plaintiff, Michael Hurley ("Hurley" or "plaintiff").

Factual Background[1]

Plaintiff's accident occurred during the renovation of a building into a Best Buy store in New York, New York (the "work site"). Moklam, the owner of the building, hired Schimenti as the general contractor on the project, who in turn contracted with Sage Electrical Contracting, Inc. ("Sage") to perform the electrical work (the "Subcontract").

At his deposition, plaintiff, an electrician for Sage, testified that he reported to his foreman Andrzej Andrzej ("Andrzej") at the work site. Plaintiff received his instructions from Andrzej, who would show him blueprints and conduit in which to run and pull the wires. At the time of his accident, plaintiff was standing on the ground floor of the work site pulling wires when a light fixture fell and struck him on the head.

According to the deposition of Marcin Mackiewicz ("Marcin"), another electrician for Sage, he installed all of the light fixtures in the area of plaintiff's accident, including the subject light fixture that struck plaintiff. Andrzej was also Marcin's supervisor. Marcin testified that light fixtures are hung from the ceiling "most of the time" by a "U-bolt that go[es] straight into the beam." However, Marcin was unable to mount the subject light by using the bolt, and instead, put two chains over a sprinkler pipe and "supported" the subject light fixture on the two chains. After the accident, Marcin returned to where he had installed the subject light fixture and found that the pipe to which it was attached had been completely removed.

At his deposition, Andrzej testified that the installation of the light fixtures at the project

[1] The Factual Background is based in large part from defendants' motion.

was done by Sage only, and that hanging a light fixture from a pipe is not the standard method.

Further, Anthony Delnegro ("Delnegro"), a carpenter employed by non-party contractor, Avon Five Brothers of Freehold, stated in an affidavit that prior to the accident, he observed plaintiff ascend the scissor lift in order to conduct work near the ceiling. Delnegro observed plaintiff move the subject light fixture aside and tie it to a pipe in the ceiling in order for plaintiff to do his work. Thereafter, plaintiff descended the scissor lift. Delnegro then heard a sound and looked over towards plaintiff, and saw the subject light fixture that plaintiff had tied off. suspended from only one chain and swinging above the level of the top of the scissor lift.

Jim Sakolowski, job superintendent for Schimenti, testified that as the general contractor for the job, Schimenti hired the subcontractors for the job. Schimenti coordinated the subcontractors on the job and Schimenti had a superintendent at the work site, Paul Parker, who was on the job on a daily basis. Parker determined when parts of the project were ready for a particular subcontractor. Schimenti held weekly "subcontractor, general progress" meetings at the site. In January 2005, Schimenti had laborers on the job, between two and five, on a daily basis, who cleaned up "every day after the general trade and [took] out the trash." Schimenti also had an administrative person, Jim Sakolwski, on site on a daily basis. Mr. Sakolwski admitted that, if there was a question by a subcontractor, he was responsible for making sure it was presented to the architect. Mr. Sakolowski also walked the site on a daily basis. He would check for safety conditions and would report any unsafe conditions. Further, he admitted that he had the authority to stop any work he perceived to be unsafe and tell a trade to fix it.

Plaintiff previously moved for summary judgment against defendants on the issue of liability on his Labor Law 240(1) claim, and defendants moved for summary judgment for

contractual indemnity over and above Sage. This Court denied plaintiff's motion and granted summary judgment to defendants for contractual indemnification over and above Sage. The Court concluded that Sage's duty to indemnify defendants was triggered since plaintiff's injury was sustained during his performance of work under, and pursuant to, the Purchase Order between Schimenti and Sage, *i.e.*, the Subcontract.

On appeal by Sage, the First Department reversed this Court's order, finding that although "the contractual indemnification provision . . . is broad enough to apply here, where plaintiff was injured while performing electrical work for Sage on the project," the grant of summary judgment on the indemnification claim was premature." According to the First Department, "defendants never moved for summary judgment dismissing the common law negligence and Labor Law § 200 causes of action against them, or otherwise established their freedom from negligence as a matter of law. . . . Since there is a possibility plaintiff could prevail on a theory of negligent coordination of demolition and electrical projects that resulted in a dangerous condition allowing a lighting fixture to swing down and hit plaintiff, the grant of summary judgment on the indemnification claims was premature" *(Hurley v Best Buy Stores, L.P.*, 57 AD3d 239, 868 NYS2d 657 [1st Dept 2008]).

Defendants' Motion

Defendants argue that they have good cause for an extension of time to move for summary judgment. At the time the original motion was made, defendants were represented by prior counsel, and defendants have no information regarding prior counsel's strategic decision to move for summary judgment on indemnification only. Defendants speculate that such decision may have resulted from previously unsettled law in the First Department as to whether or not a

general contractor who only exercised general supervisory control at a job site is entitled to summary judgment as a matter of law. The First Department's decision was issued on December 4, 2008 and defendants did not delay in bringing the instant motion. While defendants' prior attorneys should have arguably been aware of the procedural issue noted by the First Department and defendants' right to move for summary judgment on the negligence and Labor Law 200 claims prior to the appeal, this ignorance alone is not grounds to deny the instant motion.

Defendants argue that plaintiff cannot establish a *prima facie* case against them for negligence or violations of the Labor Law. Defendants did not exercise supervisory control over plaintiff's work and had no knowledge of any alleged dangerous condition so as to be liable under negligence or Labor Law 200 theories. Rather, Sage directed, supervised and controlled the performance of plaintiff's work. Further, while it has been held that the regulations set forth in 12 NYCRR 23-1.7, 23-1.8, 23-1.15, 23-1.16, 23-1.17, 23-1.19, 23-1.30, 23-2.1, 23-5 and 23-6 are sufficiently specific to support a Labor Law 241(6) claim, such claim fails because plaintiff's injuries resulted from his own act. Notwithstanding the foregoing, 12 NYCRR sections 23-1.15 (safety railings), 23-1.16 (safety belts and harnesses), 23-1.17 (life nets), 23-1.19 (catch platforms), 23-1.30 (illumination), 23-2.1 (maintenance and housekeeping), 23-5 (scaffolds), and 23-6 (material hoisting equipment) are inapplicable since plaintiff claims that an installed light fell upon him and plaintiff does not allege that the amount of lighting fell below a specific statutory standard. 12 NYCRR 23-1.5, a general provision which is insufficiently specific, 29 CFR 1926, and alleged OSHA violations, cannot be considered predicates for liability under Labor Law 241(6).

Defendants further argue that Sage is contractually obligated to indemnify defendants for

the claims that are the subject of this litigation pursuant to Section 5 of the Terms and Conditions of the Subcontract between Schimenti and Sage. In Section 5, Sage agreed to indemnify Schimenti for all "claims, suits, losses or expenses... arising out of or in consequence of the performance of this Purchase Order." Since defendants were not negligent in that they did not exercise supervisory control over plaintiff's work and did not have knowledge of any alleged dangerous condition, Sage is obligated to indemnify defendants for the subject claims.

Sage's Partial Opposition

Sage argues that the Appellate Division never suggested that the instant motion be made. In response to defendants' claim that they were not negligent, the Court noted that defendants never moved to dismiss the plaintiff's negligence and Labor Law 200 claims, which indicated that defendants did not believe such a motion would be successful. Because those pending claims could be submitted to a jury for consideration, the Appellate Division held that Sage did not owe defendants indemnification as a matter of law.

Sage contends that issues of fact exist as to whether Schimenti properly supervised and coordinated the construction work, which may have caused the plaintiff's accident. Plaintiff's accident occurred because either Schimenti or another contractor cut the sprinkler pipe from which the light fixture was hung. If that pipe was to be removed by the demolition contractor, that work should have been performed prior to when Sage's electrical work was performed. Thus, the cause of the accident was the failure of Schimenti to properly coordinate the work, which was its responsibility. Also Delnegro's version of the accident is different than the plaintiff's version. Thus, since there are conflicting versions of the accident, a trial must go forward on the issue of causation.

Further, because the question of negligence has to be submitted to a jury, as indicated by the Appellate Division's decision, and a party may not be indemnified for its active negligence, there can be no finding as a matter of law that Sage owes Schimenti indemnification. Nothing has changed since the Appellate Division rendered its decision; indeed, the new deposition only creates a further question of fact as to Schimenti's negligence. Thus, the Appellate Division's decision is binding and cannot be disturbed.

Further, Sage does not oppose that portion of defendants' motion to dismiss the plaintiff's Labor Law 240 and 241(6) claims.

Plaintiffs' Opposition

Nothing in the Appellate Court decision granted them the right to move for summary judgment relief on the eve of trial. The Appellate Division simply remanded the matter for further proceedings back to the Supreme Court. Accordingly, this motion should be denied outright. In any event, this Court previously determined that a triable issue a fact had been raised by the Delnegro affidavit warranting a jury trial, notwithstanding that plaintiff had presented a *prima facie* violation of the statute. Defendants merely seek a second bite of the apple to further delay the trial of this action.

Plaintiff also contends that after this Court's decision, Delnegro appeared for a deposition, and gave testimony inconsistent with his previous affidavit, such that the court should completely disregard his statements as lacking in credibility. For instance, although Delnegro attested that plaintiff descended a scissor lift before the accident occurred, he testified that the accident occurred while plaintiff was on top of the scissor lift. Delnegro attested that he was standing nearly 30 feet away from plaintiff; however, Delnegro testified that he was right next to

him. Delnegro attested that the chain to the light fixture was no longer attached after it fell. Yet, at his deposition, he stated the chain remained in place. In his affidavit, it is alleged that Delnegro observed a scratch on plaintiff's head following the accident. Yet, at his deposition, Delnegro denied this.

More significantly, Delnegro indicated that plaintiff was working alone at the time of his accident and did not recall him working with a partner by the name of Joseph Doumas. However, Joseph Doumas testified at his deposition, that he was plaintiff's partner at the time of the accident, assigned by the foreman to "pull wire" through conduit pipe with plaintiff. At the time of the accident, Doumas was right next to plaintiff and both men were standing on the ground. Doumas saw the accident happen and testified to such. And, when asked specifically if he would be surprised to know that an individual prepared an affidavit stating that plaintiff was working on the light fixture that fell immediately prior to the accident, Doumas unequivocally stated that "That person would be lying."

Defendants' request that the plaintiffs' Labor Law 240(1) and 241(6) claims be dismissed based on the ground that plaintiff was the sole proximate cause of his accident was previously raised and there has been no new evidence since the Court's determination. At best, the non-party witnesses have varying recollections of the accident. Thus, the Court should grant judgment to the plaintiff based upon defendants' *prima facie* violation of Labor Law 240(1).

Defendants' further request that this Court dismiss plaintiff's Labor Law 241(6) claim on the ground that plaintiff was the sole proximate cause of his accident lacks merit, as defendants offer no argument as to why 12 NYCRR 23-1.8(c)(l), 23-1.19 and 23-2.6 do not apply.

Finally, plaintiff adopts those arguments set forth by Sage as to defendants' request to

dismiss plaintiffs' Labor Law 200 and negligence claims. The evidence establishes that Schimenti had full knowledge of the events giving rise to the accident, having directed the demolition subcontractor to perform this very work.

Reply to Sage

The Appellate Division did not indicate that defendants did not believe such a motion would be successful, but concluded that the grant of summary judgment on the indemnification claim was premature.

Sage's contention that questions of fact exist as to whether defendants properly supervised and coordinated the construction work which may have caused plaintiff's accident is contrary to the testimony and documentary evidence. Further, the retention of general supervisory control or a mere presence at the work site is insufficient to establish the type of control necessary to impose liability under the common law or Labor Law 200. The record reflects that while an employee of Schimenti was present at the worksite from time to time, plaintiff's employer, Sage, provided the assignments to its employees. There is no evidence that plaintiff received any instruction from Schimenti as to the performance of his work

Reply to Plaintiff

There is sufficient good cause for defendants' present motion and plaintiff cannot demonstrate any prejudice as a consequence of the instant motion. At the time defendants served the instant motion, plaintiff was attempting to secure the deposition of non-party, Delnegro. Moreover, plaintiff is not being subjected to repeated motions for summary judgment, as this is defendants' first request for such relief.

Further, argues defendants, consistent with his affidavit submitted with defendants'

original motion papers, Delnegro testified that prior to the accident, Delnegro observed plaintiff work on the subject light fixture while plaintiff was on the scissor lift, and move the light fixture aside and tie it off in order to conduct his work (pp. 31-35). Plaintiff's assertions that Delnegro could not recall certain events such as the partner plaintiff was allegedly working next to and whether he observed a scratch on plaintiff's head are largely insignificant to the issue at hand and insufficient to damage Delnegro's credibility.

Nor is plaintiff entitled to summary judgment on his Labor Law 240(1) claim based on the Court's rejection of Delnegro's testimony, as not every worker who falls or is struck by a falling object at a construction site is protected under Labor Law 240(1). Plaintiff's accident was not of the type this statute was meant to protect, and defendants cannot be held to a standard of absolute liability, regardless of their position as owner and contractor.

Defendants also point out that they argued that 12 NYCRR 23-1.19 is inapplicable to this case and that their failure to address 12 NYCRR 23-2.6 was the result of its absence in his complaint or bill of particulars.

As to indemnification, the indemnification provision to which Sage agreed does not require a finding of negligence on the part of Sage or a third person. Rather, indemnification is triggered when an employee of a subcontractor is injured, and that injury arises out of that subcontractor's work. Here, plaintiff's injury was sustained during his performance of work pursuant to the subcontract.

Discussion

Good Cause

Pursuant to CPLR 3212, a motion for summary judgment must be made no later than one hundred twenty days after the filing of the note of issue, "except with leave of court on good cause shown." "Good cause" requires a satisfactory explanation for the untimeliness of the motion (*see Brill v City of New York*, 2 NY3d 648, 652, 781 NYS2d 261).

Plaintiff herein filed the note of issue on or about June 20, 2007. On or about October 22, 2007, defendants timely moved for summary judgment for contractual indemnity over and above Sage. In its appeal, third-party defendant Sage alleged that defendant Schimenti was negligent in failing to properly coordinate the construction at the work site. Prior counsel's failure to seek relief as to plaintiff's Labor Law 200 and negligence claims is sufficient to establish good cause *(Guiracoche v Weiss*, 1 Misc 3d 904 [Supreme Court, Bronx County 2003] [good cause for the late filing for summary judgment found where new counsel was substituted and plaintiffs did not demonstrate any prejudice, even if defendants' prior counsel should have been aware of various defenses and should have moved for summary judgment in a timely manner]). Further, the First Department issued its determination on December 30, 2008, at which time, it was pointed out that defendants (albeit through prior counsel) failed to challenge plaintiff's Labor Law 200 and negligence claims. The instant motion, dated March 5, 2009, was brought three months after the First Department decision, and defendants claim that they did not delay in bringing this motion. During that three month period, the deposition of Delnegro was being sought and was ultimately obtained. Although not dispositive, it is also noted that there is no showing of prejudice as a result of the instant motion. Nor is plaintiff being subjected to repeated motions for summary

judgment, as this is the defendants' first request for such relief. Therefore, having found good cause to extend defendants' time to move for summary judgment, this branch of defendants' motion is granted.

Dismissal of Negligence and Labor Law 200

In order to establish liability for common-law negligence or a violation of Labor Law 200, the plaintiff must establish that the defendant in issue had "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Russin v Picciano & Son,* 54 NY2d 311, 317 [1981]; *see Rizzuto v Wenger Contr. Co.,* 91 NY2d 343, 352 [1998]; *Singleton v Citnalta Constr. Corp.,* 291 AD2d 393, 394 [2002]), or had actual or constructive notice of the defective condition causing the accident (*see LaRose v Resinick Eighth Ave. Assoc., LLC,* 26 AD3d 470, 810 NYS2d 493; [2006]; *Gatto v Turano,* 6 AD3d 390, 391 [2004]; *Abayev v Jaypson Jewelry Mfg. Corp.,* 2 AD3d 548 [2003]; *Duncan v Perry,* 307 A.D.2d 249 [2003]; *Giambalvo v Chemical Bank,* 260 AD2d 432 [1999]; *Cuartas v Kourkoumelis,* 265 AD2d 293[1999]; *Sprague v Peckham Materials Corp.,* 240 AD2d 392 [1997]). Thus, to prevail on their motion for summary dismissal, defendants must establish that they had no "authority to control the activity bringing about the injury" and no constructive notice of the dangerous condition that caused plaintiff's injury.

Contrary to plaintiffs contentions, there is no evidence that defendants exercised supervisory control as to how plaintiff was to perform his task of pulling electrical wires. Sage, plaintiff's employer, provided the assignments to its employees and there is no evidence that plaintiff received any instruction from defendants as to the performance of his work. The testimony of plaintiff, his foreman, and co-worker, Marcin, indicate that plaintiff received his

instructions solely from his foreman Andrzej, and reported only to Andrzej during the regular course of his duties. Marcin, a Sage employee installed the subject light fixture that struck plaintiff. The accident was caused by the manner and method in which the subject light fixture was secured to the pipe and the manner in which plaintiff conducted his work, which was solely under the control of Sage, and not the defendants. As the record clearly demonstrates that Sage directed, supervised and controlled the performance of plaintiff and plaintiff failed to raise an issue of fact in this regard, defendants are entitled to summary judgment dismissing the negligence and Labor Law 200 causes of action as asserted against them (*see Scott v American Museum of Natural Hist.*, 3 AD3d 442, 771 NYS2d 499 [1st Dept 2004] [holding dismissal of plaintiff's Labor Law § 200 and common-law negligence claims proper where although defendant construction manager had general supervisory and *coordinating responsibilities*, defendant "did not have the level of direct supervision and control over the injury-producing activity necessary to support a finding of liability for common-law negligence or violation of Labor Law § 200"]; *Kocurek v Home Depot, U.S.A.P.*, 286 AD2d 577, 580 [1st Dept 2001] [contractor could not be liable under Labor Law because plaintiff's employer had sole authority to supervise and control plaintiff's injury-producing activity]).

That Schimenti's job superintendent Sakolowski would check for safety conditions and would report any unsafe conditions on a daily basis, had the authority to stop any work he perceived to be unsafe, and had authority direct a trade to fix something he did not like is insufficient. General supervisory and coordinating authority at the worksite is insufficient to establish the type of control necessary to trigger liability under the common law or Labor Law § 200 (*Burgalassi v Mandell Mechanical Corp.*, 38 AD3d 363, 832 NYS2d 522 [1st Dept 2007];

Shields v General Elec. Co., 3 AD3d 715 [3d Dept 2004]; *see Singh v Black Diamonds LLC*, 24 AD3d 138, 140, 805 NYS2d 58 [1st Dept 2005] [dismissing Labor Law § 200 and common-law negligence claims against general contractor, even though its project superintendent "conducted regular walk-throughs and, if he observed an unsafe condition, had the authority to find whoever was responsible for the condition and have them correct it or, if necessary, stop the work"]).

Further, that the First Department stated that there was a *possibility plaintiff could prevail* on a theory of negligent coordination of demolition and electrical projects that resulted in a dangerous condition, does not preclude a finding that defendants lacked any supervisory control over the manner in which plaintiff performed his work or the manner in which plaintiff's co-worker installed the light fixture that fell upon the plaintiff. The First Department simply stated that there was still a possibility that plaintiff could prevail against defendants on the theory of negligent coordination so as to preclude defendants from obtaining indemnification from Sage at that juncture. However, since the issue of whether defendants exercised the sufficient level of control over the injury-producing activity was never before this Court, and thus, not before the Appellate Division, such issue was not explored. Having established that defendants did not exercise any supervision and control over plaintiff's work, defendants are now entitled to dismissal of plaintiff's negligence and Labor Law 200 claims as asserted against them *(see Geonie v OD & P NY Ltd.*, 50 AD3d 444, 855 NYS2d 495 [1st Dept 2008] [evidence that general contractor's project superintendent coordinated the work of the trades, conducted weekly safety meetings with subcontractors, conducted regular walk-throughs, and had the authority to stop the work if he observed an unsafe condition is insufficient to raise a triable issue whether general contractor exercised the requisite degree of supervision and control over the work to sustain the

Labor Law § 200 and common-law negligence claims]).

Therefore, defendants motion to dismiss plaintiff's negligence and Labor Law 200 claims as asserted against them is granted.

Labor Law 241(6)

The branch of defendants' motion for dismissal of plaintiff's Labor Law 241(6) claim on the ground that plaintiff's injuries resulted from his own act, is denied. As stated in this Court's earlier decision, Delnegro's testimony is inconsistent with plaintiff's testimony, thereby creating an issue of fact as to whether plaintiff's conduct was the sole proximate cause of the accident (*see e.g. Weininger v Hagedorn & Co.*, 91 N.Y.2d 958, 672 N.Y.S.2d 840, 695 N.E.2d 709 [1998]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 771 N.Y.S.2d 484, 803 N.E.2d 757 [2003]). Although a majority of the evidence indicates that plaintiff did not touch or otherwise work on the light fixture prior to his accident, Delnegro stated that he observed plaintiff move the subject light fixture and tie it off in order to conduct his work. And, Delnegro's deposition testimony is not so inconsistent with his earlier affidavit so as to render his entire statements incredible as a matter of law.

However, given that it is uncontested that 12 NYCRR sections 23-1.15 (safety railings), 23-1.16 (safety belts and harnesses), 23-1.17 (life nets), 23-1.19 (catch platforms), 23-1.30 (illumination), 23-2.1 (maintenance and housekeeping), 23-5 (scaffolds), 23-6 (material hoisting equipment), 23-1.5, and 29 CFR 1926, and alleged OSHA violations, are either insufficiently specific, inapplicable to the facts at bar, or simply cannot be considered as predicates for liability under Labor Law 241(6), such sections are dismissed from plaintiff's Labor Law 241(6) claim.

Labor Law 240(1)

Labor Law 240 (1) imposes absolute liability upon an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (*Ernish v City of New York*, 2 AD3d 256, 768 NYS2d 325 [1st Dept 2003], *citing Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880 [1985]).

However, defendants are not liable under Labor Law 240(1) where plaintiff's conduct in failing to use the safety equipment provided is the sole proximate cause of plaintiff's injuries (*see Blake,* 1 NY3d 280, *supra*; *see also Gambino v Massachusetts Mut. Life Ins. Co.,* 8 AD3d 337, 777 NYS2d 713 [2nd Dept 2004]; *Plass v Solotoff,* 5 AD3d 365, 773 NYS2d 84 [2d Dept 2004]; *Misirlakis v East Coast Entertainment Props.*, 297 A.D.2d 312, 746 N.Y.S.2d 307 [2d Dept 2002]). As stated in this Court's earlier decision, while this court finds that plaintiff moving papers make out a *prima facie* case for summary judgment as to liability under section 240(l), an issue of fact exists as to whether plaintiff's conduct was the sole proximate cause of the accident.

Therefore, plaintiff's application for judgment on his Labor Law 240(1) claim is denied.

Indemnification

Section 5 of the Terms and Conditions of the Subcontract provides that:

> To the fullest extent permitted by law You shall defend, indemnify, and hold Us, the Owner, and the agents and employees of the foregoing harmless, of and from any and all claims, suits, losses or expenses whether direct or consequential (including legal fees and other expenses of litigation) arising out of or in consequence of the performance of this Purchase Order, including, without limitation, wrongful death, bodily injury, property damage, and contractual and all other claims by any person, firm or corporation. This indemnity shall not extend to claims, cost, losses, or expenses for bodily injury or property damage to the extent that such claims, costs, losses, or expenses arise out of or are the consequences of the negligence of one or more indemnities of its agents or employees.

The contractual indemnification provision requires Sage to indemnify Schimenti for all

injuries arising out of Sage's work, except if Schimenti is negligent. As indicated by the First Department, the indemnification provision at issue is applicable. Since defendants have established their freedom from both negligence and liability under Labor Law 200, as required under the First Department decision for indemnification, defendants are entitled to summary judgment on its contractual indemnification claim against Sage. Therefore, the branch of defendants' motion for indemnification is granted.

Conclusion

Based on the above, it is hereby

ORDERED that the branch of the motion by defendants, Best Buy Stores, LP, Moklam Enterprises, Inc., and Schimenti Construction Company, LLC for an order extending their time to move for summary judgment is granted; and it is further

ORDERED that the branch of the motion by said defendants for summary judgment dismissing plaintiff's Labor Law 200 and negligence claims against said defendants is granted, and such claims are hereby dismissed; and it is further

ORDERED that the branch of defendants' motion for dismissal of plaintiff's Labor Law 241(6) claim, is denied; however, 12 NYCRR sections 23-1.15, 23-1.16, 23-1.17, 23-1.19, 23-1.30, 23-2.1, 23-5, 23-6, 23-1.5, 29 CFR 1926, and the alleged OSHA violations are dismissed from plaintiff's Labor Law 241(6) claim; and it is further

ORDERED that said defendants are entitled to contractual indemnification over and above Sage Electrical Contracting, Inc.; and it is further

ORDERED that plaintiff's application for summary judgment on his Labor Law 240(1) claim is denied; and it is further

ORDERED that the parties appear in Part 40 for trial on December 7, 2009, 9:30 a.m.; and it is further

ORDERED that defendants Best Buy Stores, LP, Moklam Enterprises, Inc., and Schimenti Construction Company, LLC shall 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 22, 2009

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

HON. CAROL EDMEAD