

<b>Bryant v CVP I, LLC</b>
2009 NY Slip Op 33424(U)
July 21, 2009
Supreme Court, New York County
Docket Number: 113800/05
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

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EDWARD BRYANT and PATRICIA BRYANT,

Index No. 113800/05

Plaintiffs,  
-against-

CVP I, LLC, CHRYSTIE VENTURE PARTNERS LLC,  
AVALON BAY NYC DEVELOPMENT, INC. and  
AVALON BAY COMMUNITIES CONSTRUCTION  
MANAGEMENT,

Defendants.

-----X  
HON. CAROL R. EDMEAD, J.S.C.

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MEMORANDUM DECISION

In this personal injury action, defendants CVP I, LLC, Chrystie Venture Partners LLC ("Christie Venture"), Avalon Bay NYC Development, Inc. ("Avalon NYC") and Avalon Bay Communities Construction Management ("Avalon Bay Communities Management") (collectively, "defendants") move for summary judgment dismissing the Complaint of the plaintiffs Edward Bryant ("plaintiff") and Patricia Bryant ("plaintiffs").

Plaintiffs oppose defendants' motion and cross moves for partial summary judgment on the issue of liability under Labor Law §§240(1) and 241(6) and for a trial on damages.

*Factual Background*

Plaintiff was involved in a construction-site accident which occurred in December 2004 at a building under construction in Manhattan. It is alleged that defendants were negligent and violated Labor Law §§ 200, 240 and 241(6) and Industrial Code §§ 23-1.7(a) and 23-2.1(a),<sup>1</sup>

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<sup>1</sup> Although plaintiffs also alleged violations of Industrial Code §§ 23-1.15, 23-1.17, 23-1.19, and 23-2.1(b) in their cross-motion, plaintiffs concede that sections 23-1.15, 23-1.17 and 23-1.19 do not apply, do not address 23-2.1(b), and advance arguments solely in support of sections 23-1.7(a) and 23-2.1(a)(2). Thus, only the latter sections are analyzed herein.

According to plaintiff's deposition, at the time of the accident, plaintiff was employed by SJ Electric to install pipe risers at a site on Chrystie Street and West Houston in Manhattan where a high-rise apartment building was being constructed. Plaintiff began working on the first floor of the building, which was going to be a two-story supermarket; the second floor was a mezzanine around the perimeter of the building, 25 feet from the ground. The accident happened when plaintiff was standing on a platform "electric scissor" lift. Plaintiff had just lowered the lift from where he had been working, which was just above the mezzanine. As he was standing on one end of the lift about to get off, plaintiff was suddenly hit with an object, causing him injuries. When the accident happened, directly above the plaintiff was the mezzanine floor, which was 12-15 feet from where he was standing. After the firemen arrived five minutes later, one of them carried over to plaintiff a three-foot long, 30-40 pound "chipping gun," which was "the first time [plaintiff] saw it."<sup>2</sup> Although it was an electric device, he did not notice any extension cord or electrical wires attached to it.

Plaintiff observed similar types of chipping guns being used by "every trade on the job, plumbers, fitters, laborers" months before the accident. Although he never observed anyone from SJ Electric using chipping guns, he observed at least one chipping gun stored in the SJ Electric gang box but could not describe whether that chipping gun was similar to the chipping gun he saw when the accident happened because he "never really got a good look at the one that hit" him. While plaintiff was working on the lift for a couple of hours before the accident, he did not remember seeing anyone using a chipping gun. Finally, plaintiff testified that he never came to

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<sup>2</sup> The bill of particulars alleges that a "Dewalt chipping gun and/or drill/drill-like device" fell from an elevated height and struck the plaintiff.

learn how the chipping gun fell when the accident happened.

According to the deposition of Andrew Forsberg (“Forsberg”), in December 2004, Forsberg was employed by “Avalon Bay Communities, Inc.”<sup>3</sup> as a senior project manager for the project at “East Houston Street between Bowery and Chrystie Street in Lower Manhattan,” referred to as Avalon Chrystie Place. His job duties were to insure that the documentation is prepared, that contracts are let and that schedules are maintained. Forsberg explained that Avalon Bay Communities was the managing member of defendant Chrystie Venture Partners, LLC, the owner of the site. Avalon Bay Communities<sup>4</sup> oversaw the construction manager, Bovis Lend Lease LMB, Inc. (“Bovis”). Bovis, as “the construction manager[,] had overall responsibility for the day-to-day operations of the construction site.” He did not know what role the general contractor had. Avalon NYC was the general contractor for the project. Forsberg did not know if Avalon NYC had any workers at the site in December 2004. Forsberg never heard of an entity called Avalon Bay Communities Construction Management. Forsberg did not supervise the work performed by SJ Electric to insure that it was being done safely.

### *Defendants’ Motion*

Defendants argue that plaintiffs’ Labor Law § 240(1) must be dismissed because the chipping gun was not an object being hoisted or secured. Defendants contend that the fact that

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<sup>3</sup> Although Forsberg indicated that he worked for defendant Avalon Bay Communities Construction Management (Q: “You for one worked for Avalon Bay Communities Construction Management on this project known as Avalon Chrystie Place, correct?”; A: “Yes.”), Forsberg testified that “There is no Avalon Bay Communities Construction Management as a title.” When asked if “that [was] who you told me you worked for?”, Forsberg responded, “No. I said I worked for Avalon Bay Communities, Inc.” (p. 44). At the outset of his deposition, Forsberg in fact stated that he was employed by the company named “Avalon Bay Communities” for “[a]pproximately seven years.”

<sup>4</sup> When asked “You oversaw the construction manager [Bovis Lend Lease LMB, Inc.]?” Forsberg responded, “Correct.” (p. 15).

plaintiff does not know and cannot state what caused the chipping gun to fall, and has proffered no evidence in discovery on the issue of the cause of the fall, there is no evidence that it fell while being hoisted or secured to support plaintiffs' Labor Law § 240(1) claim. The mere fact of the chipping gun falling does not, absent more, state a cause of action under § 240(1). It would be speculation for the Court to find a question of fact as to whether the chipping gun was in the process of being hoisted or secured when the accident happened.

Further, argue defendants, plaintiffs' Labor Law § 241(6) must be dismissed as the alleged sections of the Industrial Code are either not applicable to the facts of this case or do not set forth a concrete standard of care.

Defendants contend that § 23-1.7(a)(1), entitled, "Protection from General Hazards," only applies to places normally exposed to falling material or objects. Here, there is no evidence of any prior falling object in the area where plaintiff's accident occurred and, in fact, no evidence that any work at all was being performed at any elevation above the place where plaintiff sustained injuries. Consequently, it cannot be said that the accident occurred in an area exposed to falling objects. Defendants also contend that section 23-2.1(a)(2) is not applicable inasmuch as there is no evidence of any material or equipment placed or stored close to the edge of the mezzanine where the accident occurred.

Defendants further argue that plaintiffs' Labor Law § 200 must be dismissed because defendants did not direct or control the plaintiff's work, or direct or supervise plaintiff at the time of the accident. The accident at issue was a result of a fall of a chipping gun, and none of the defendants had any awareness of, or actual or constructive notice of, the specific defect or hazard which allegedly caused the accident.

Finally, defendants argue that in the event the Court finds that a question of fact exists with regard to a Labor Law violation, plaintiffs' Complaint must be dismissed against Chrystie Venture, Avalon NYC and Avalon Bay Communities Management, as they are improper parties to this action. To the extent that plaintiffs claim the defendant, Avalon NYC and/or defendant, Avalon Bay Communities Management, was a statutory agent of the owner for purposes of Labor Law liability, such claim lacks merit. As Forsberg testified, Avalon NYC's role was to supervise the construction manager, Bovis, which was responsible for the day-to-day operations of the construction site. Forsberg, as senior project manager for "Avalon Bay Communities Management,"<sup>5</sup> stated that his duties were to insure that the documentation is prepared, that contracts are let and that schedules are maintained. Forsberg did not know if Avalon NYC had any workers at the site in December 2004. Significantly, Forsberg did not supervise the work performed by SJ Electric to insure that it was being done safely.

Although §§240 and 241 now make non-delegable the duty of an owner or general contractor to conform to the requirement of those sections, the duties themselves may in fact be delegated. When the work giving rise to these duties has been delegated to a third party, that third-party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third-party fall within the class of those having non-delegable liability as an "agent" under sections 240 and 241. Here, there is no evidence that Avalon NYC or Avalon Bay Communities Management was in any way supervising or controlling the work being performed.

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<sup>5</sup> Forsberg denied working for Avalon Bay Communities Management .

Further, with respect to Chrystie Venture, although Forsberg believed that Chrystie Venture was the owner of the site, as an employee of Avalon Bay Communities Management, Forsberg lacked authority to speak for and to bind Christie Venture. And, according to the affidavit of Maria Masi, Development Director for Avalon Bay Communities, Inc., the building known as Avalon Chrystie Place was built on land owned by the State of New York (Empire State Development Corporation ("ESDC")). Defendant, CVP1, LLC leased the land from ESDC and developed and built Avalon Chrystie Place. The sole member of CVP1, LLC is Downtown Manhattan Residential, LLC. Downtown Manhattan Residential has two members. One of them is Chrystie Venture and the other is Avalon Bay Communities, Inc. Consequently, defendant Chrystie Venture is not a statutory owner of the premises and is not subject to Labor Law liability.

*Plaintiffs' Cross-Motion and Opposition*

Plaintiffs argue that since plaintiff was injured when a piece of equipment, which was an integral part of the construction project and which required proper securing when it was not being utilized, became a "falling object" for purposes of Labor Law § 240(1) protection, that proper protection was not provided, and that said violation was "a" proximate cause of plaintiff's injuries. Plaintiff was struck by a falling object in an open work area directly below a mezzanine where there were active construction activities going on and where there were no safety devices so placed, operated or erected to protect workers on the ground level from the risk inherent in falling objects. The nature of the work being performed, which involved elevation related risks required compliance with Labor Law § 240(1) and required that the structure's owner, [land's lessee], its agents and general contractor furnish or erect such safety devices which were so

constructed, placed and operated so as to give proper protection to those so employed in the performance of such labor, and that did not occur in the case at bar. Owners and lessors of property who do not hire or control contractors are still responsible under Labor Law §§ 240 and 241 to workers injured as a result of an unsafe condition at the work site, as the purpose of the statute is to impose a nondelegable duty on general contractors to provide adequate protection and safety to persons employed in construction work, regardless of the absence of control, supervision or direction of the work. And, a lessee who hired a general contractor to perform work on the premises, which would eventually belong to a lessor, is considered an "owner" within the meaning of the Labor Law §§ 200 and 240. Where, as in the case at bar, it is uncontroverted that none of the safety devices explicitly required by statute were provided to the plaintiff at the work site and where there is no possible view of the evidence which would negate a finding of a proximate cause, then plaintiff is entitled to a directed verdict as to liability.

Further, plaintiffs argue that falling object liability is not limited only to cases in which the falling object is being actively hoisted or secured at the time it falls. The object that fell from the over-head mezzanine was integral to the construction project and should have been secured from falling when not in use. Furthermore, there should have been safety devices around the perimeter of the mezzanine to protect workers below from falling objects. Plaintiffs maintain that this work involved the elevation related risk to the workers positioned at a lower level than the materials and equipment integral to and utilized in this major construction project on the mezzanine level, which should have been properly secured, and as the plaintiff was engaged in an enumerated activity, and this is the type of accident designed to be avoided by section 240(1).

Additionally, section 241(6) applies, as the defendants also violated specific and concrete

sections of the Industrial Code. When alleged violations are disclosed after pre-trial discovery, a Bill of Particulars may be supplemented, prior to the filing of the Note of Issue. Courts can also consider alleged Industrial Code violations raised for the first time in opposition to a summary judgment motion or grant plaintiff leave to amend the Bill of Particulars to add such allegations *sua sponte*, as long as no new factual allegations or theories of liability are raised.

Plaintiffs allege that defendants violated Industrial Code sections 12 NYCRR 23-1.7(a) and 23-2.1(a) and said violations caused plaintiff's accident, or at the very least, questions of fact exist pertaining to the such sections. 12 NYCRR 23-1.7(a), entitled, "Protection from general hazards: (a) Overhead hazards" requires overhead protection in every place where persons are required to work or pass that is normally exposed to falling material or objects. The testimony and photographs provided show that the plaintiff was working in an area of on-going construction by multiple trades where there was no overhead protection and which was exposed to falling materials and/or objects from the mezzanine area that also had no safety devices surrounding it to protect from falling objects.

12 NYCRR 23-2.1(a)(2) under "Maintenance and housekeeping, (a) Storage of material or equipment" applies to the case at bar, as plaintiff was struck by a chipper gun/drill which must be classified as "equipment" and the only place it could have fallen from was from was the edge of mezzanine's floor which was directly above where plaintiff was standing/working, thereby evidencing that it was placed or stored too close to the edge of the mezzanine's floor.

Defendants' contention that there is "no evidence of any material or equipment placed or stored close to the edge of the mezzanine where the accident occurred," is baseless and ignores the law of physics and the fact that circumstantial evidence is still admissible. The fact that the drill fell

from the mezzanine directly above him, is proof in itself that it was placed or stored too close to the edge of the floor. And, causation is a question of fact to be determined by a jury. Plaintiffs are not required to exclude every other possible cause, but need only offer evidence from which proximate cause may be reasonably inferred. Plaintiffs' burden is satisfied if the possibility of another explanation for the event is sufficiently remote or technical to enable the jury to reach its verdict based not upon speculation but upon the logical inferences to be drawn from the evidence. The Court should grant plaintiffs' cross-motion under § 241(6) for a violation of section 23-2.1(a)(2) or in the alternative find that there exists a question of fact based on this section so as to deny defendants' motion.

Further, factual issues pertaining to section 200 also render summary judgment in favor of defendants inappropriate. Defendants' witness testified that defendant, Avalon NYC was the general contractor, that defendant Avalon Bay Communities Construction Management's duty was to oversee the construction manager, and that Avalon Bay had the authority to stop work if they saw unsafe work conditions. Such testimony raises a question of fact as to whether defendant, CVP 1, LLC, through its "owner's representative" and "general contractor" had the authority to assume control over safety and to stop the work if it was not being conducted in a safe manner, thereby presenting questions of fact which preclude the granting of summary judgment under Labor Law § 200 and common law negligence.

*Defendants' Opposition to Cross-Motion*

Defendants argue that there is no evidence that the tool was "not being utilized" when the accident occurred or, evidence of what caused the tool to fall. Plaintiffs speculate that it was "placed" near the edge of the mezzanine and fell from the mezzanine because it was "unsecured."

Thus, the cross-motion must be denied and defendants' motion should be granted.

In addition, plaintiffs offer no explanation for failing to produce the testimony of plaintiff's co-employee, "Danny," who plaintiffs identify as a witness to the accident. The failure of plaintiff to testify to the cause of the tool falling yet at the same time identifying an eyewitness who would naturally have testimony regarding the cause of the accident cannot be ignored.

Also, the cases cited by plaintiffs are distinguishable, in that here, there is no proof at all that the tool fell because it was inadequately secured or, for that matter, for any other reason. For example, there is no evidence at all offered by plaintiffs as to what caused the tool to fall, whether the tool was accidentally dropped by a worker during the course of using it, whether the tool was intentionally dropped, or whether plaintiff, himself, caused the tool to drop while he was lowering the lift. With respect to the latter, plaintiff, Patricia Bryant testified that she discussed with plaintiff the possibility "that it was the cord [of the chipping gun which] got stuck to the lift as it was on the shelf. Maybe the cord got stuck as the lift came down. . . ." A jury would have to speculate that the tool fell as a result of a violating section 240(1) by reason of being improperly secured. The cases cited by plaintiffs do not change this result. In each case, section 240(1) was found to be applicable based on proof of the factual cause of the falling object.

The complete absence of any evidence as to the cause of the tool to fall requires a dismissal of plaintiff's 240(1) claim.

Further, none of the Industrial Code sections alleged by plaintiffs applies. Defendants maintain that plaintiffs' reliance on § 23-1.7(a) (under protection from general hazards) and § 23-2.1(a) (storage of material or equipment) is misplaced. As to § 23-1.7(a), while plaintiffs assert that plaintiff was working in an area "which was exposed to falling materials and/or

objects from the mezzanine area," caselaw holds that this regulation only applies to places normally exposed to falling materials or objects and there is no evidence of anything falling from the mezzanine prior to the accident. As to § 23-2.1(a), subdivision (1) applies only to storage of "building materials" and there is no evidence that the chipping gun was "placed or stored . . . close to the edge" of the mezzanine prior to the accident and the court would have to speculate that such was the case ignoring any other possible causes for the gun to fall: whether the tool was accidentally dropped by a worker during the course of using it, whether the tool was intentionally dropped or whether plaintiff, himself, caused the tool to drop while he was lowering the lift, a jury would have to speculate that the tool fell as a result of a violating § 240(1) by reason of being improperly secured." Subdivision (2), provides that "Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge."

Finally, defendants' activities do not fall under Labor Law § 200. Caselaw holds that plaintiffs' contention that Avalon Bay had authority to stop work if they saw an unsafe condition is insufficient to trigger liability under Labor Law § 200.

*Reply in Support of Cross-Motion*

Plaintiff's deposition testimony and affidavit are evidence sufficient to support plaintiffs' claims. Defendants' proposal that someone might have deliberately hurled or dropped a 40-pound chipper gun off the edge of the mezzanine is absolutely unsupported by any evidence. No one has ever come forth with this mythical version of the day's events.

Furthermore, cases cited by defendants to explain why Labor Law § 240(1) does not apply are factually distinguishable.

Finally on this point, it must be pointed out to this Court that, as construction workers move from project to project, they often never know their coworkers' last names or sometimes even their proper first names and it has taken us some time to locate one of the eyewitnesses to plaintiff's accident. The co-worker, David Sands, who was talking to plaintiff just as he was struck in the head by the falling chipping gun has submitted an affidavit and plaintiff has submitted another affidavit to support his claims. According to Sands' affidavit, he was a journeyman/electrician for SJ Electric at the time of the accident. Sands began speaking to plaintiff, who was standing on the scissor lift and which was in the process of coming down to his level. He waited while the lift came completely down and he was standing just a few feet away from plaintiff, and they were talking to each other face to face, when all of sudden Sands saw a "chipping gun" fall straight down from the edge of the mezzanine level that was directly above plaintiff. Sands stated that he saw the "chipping gun" strike the back of plaintiff's head, and drawing blood and it glanced off his shoulder. The scissor lift had been down for a couple of seconds before the "chipping gun" fell and struck plaintiff. Sands has also verified that in all the time he continued to work at the project and for SJ Electric, until today, he was never told, nor did he ever hear, nor did he ever come to learn or even hear of the possibility that someone may have either intentionally, deliberately or accidentally dropped, hurled or tossed the chipping gun off of the mezzanine. Sands also stated that the accident occurred in an area of the work site where wearing hard hats was required, due to the possibility of falling objects and debris. Lastly, the mezzanine area above plaintiff's accident did not have any netting or other

safety devices around its edge, unlike other areas of the mezzanine.

Therefore, plaintiff's accident occurred while in the course of his employment as an electrician in the construction/erection of a high-rise building, when he was struck by a falling object/piece of equipment, in an open work area directly below a mezzanine where there were active construction activities going on and where there were no safety devices so placed, operated or erected to protect workers on the ground level from the risk inherent in falling objects or equipment. The Court should grant plaintiffs summary judgment on Labor Law §§240(1) and 241(6) and deny defendants' motion for summary judgment, or at the very least find that there exists a question of fact for jury determination.

As to section 241(6), 12 NYCRR 23-1.7(a) deals with protection from overhead hazards and the area plaintiff was working in was subject to falling objects. All workers were required to wear hard hats in that area, to protect against falling items. Furthermore, although there was red netting draped around most of the mezzanine to keep items from falling, there was no netting just above where he was struck nor was there any other type of overhead protection provided at that work area. Thus, defendants violated this section. Furthermore, plaintiffs are relying on 12 NYCRR 23-2.1(a)(2) which pertains to "equipment" and request that this Court grant plaintiffs' cross-motion under § 241(6) for a violation of section 23-2.1(a)(2) or in the alternative find that there exists a question of fact based on this section thereby rendering defendants' summary judgment motion inappropriate.

*Defendants' Further Opposition to Plaintiffs' Cross-Motion*

The Sands affidavit contains no new facts or arguments and is merely cumulative. Although Sands states that he was an eyewitness to plaintiffs' accident, Sands offers no

explanation for the cause of the chipping gun to fall from the mezzanine level. Further, Sands's representations that he was never "told" that someone dropped the chipping gun off the mezzanine or that someone threw or tossed the chipping gun off the mezzanine or that someone threw the chipping gun off the mezzanine or that anyone dropped or tossed the chipping gun off the mezzanine either accidentally or intentionally have no probative value. Even if he was, such out-of-court declarations are inadmissible hearsay. But the fact that he was never told how the gun fell supports defendants' argument that plaintiff has failed to offer any proof of what caused the chipping gun to fall. Also, Sands's statement that the accident occurred in an area where wearing hardhats was required due to the possibility of falling objects and debris does not support plaintiffs' claim that he was working in an area "normally exposed to falling materials or objects" without evidence that other workers had been injured in the same manner.

Since plaintiffs cannot establish the cause of his accident, the claim has no merit.

Moreover, Sands later testified at a deposition that on the date of the accident, the orange protective netting surrounding the edge of the balcony/mezzanine in the area where plaintiff was working was removed "because Ed Bryant and his partner were working in that area." Sands thought plaintiff was using either a chipping gun or a core drill, which has a flat base with two wheels on the end to enable one to maneuver it and move it around. Sands explained that plaintiff was either core drilling or chopping because plaintiff was on a lift and his job was to run the pipe riser, and "that would be the only reason he was in that area on the lift because there was a riser going up in that area." Sands admitted that plaintiff had to be using the chipping gun because if plaintiff was using the core drill, plaintiff would have had to be standing on the second floor slab operating the drill; if he was using the chipping gun, he could have been "either on the

second floor or on the lift.” The fact that plaintiff was on the lift proves that plaintiff was using the chipping gun which fell striking him after lowering the lift to speak to Sands.

Sands explained that the holes plaintiff was working on were located in the 1' wide area between the edge and where the perimeter netting had been situated. The reason plaintiff was on the lift was because being on the lift, he could access the area about 1' from the edge. Sands identified the chipping gun as one of the guns that were provided by SJ Electric. There was no extension cord attached to the gun. Sands confirmed that the only reason the plaintiff was coming down off the lift was because he could not hear him speaking. Sands agreed that if a chipping gun was used to clear the holes in the area where plaintiff was working prior to the accident, it would be an SJ Electric worker who was using that chipping gun. Sands had no idea what caused the chipping gun to fall. Although Sand denied knowing what caused the chipping gun to fall, his testimony clearly establishes that the plaintiff was using the chipping gun immediately prior to the accident and was in exclusive custody and control of the chipping gun prior to the accident. Consequently, the case of the accident was plaintiff's negligence.

Any argument that plaintiff was not using the chipping gun is belied by the undisputed facts: (a) that the chipping gun fell within seconds of the lift reaching the ground level; (b) that Sands testified that plaintiff was using either a chipping gun or a core machine prior to the accident; and (c) that use of a core drill requires the operator to be standing on the floor while being assisted by a co-worker.

Sands's testimony falls squarely within the doctrine of *res ipsa loquitur* as to plaintiff's negligence. Where the actual or specific cause of an accident is unknown, under the doctrine of *res ipsa loquitur* a jury may in certain circumstances infer negligence merely from the happening

of an event and the defendant's relation to it. Should the court nevertheless find that Sands's testimony regarding plaintiff's use of the chipping gun prior to the accident is not conclusive, Sands's testimony that he had no idea what caused the chipping gun to fall is consistent with defendants' argument that, absent facts establishing that the chipping fell as a result of a violation of Labor Law §§ 240(1) or 241(6)-that the proximate cause of the accident was a failure to properly secure the tool or failure to provide appropriate safety devices to prevent the accident-the court must deny plaintiffs' motion and dismiss plaintiffs' Labor Law causes of action.

Additionally, Sands's testimony is entirely consistent with the accident report, which states the actual cause of the accident based on information provided by Charles Fontana, plaintiff's partner: "Mr. Bryant was using the hammer drill from the working platform of a hydrolic [sic] lift. He placed the hammer drill on a ledge. He began to lower the lift platform which caught the extension cord connected to the hammer causing the hammer to fall and strike him in the head."

Defendants argue that if there was any factual issue as to how the accident happened, it is completely resolved by an affidavit of eyewitness, Charles Fontana (the "Fontana affidavit"). The Fontana affidavit unequivocally proves that the accident was caused by the plaintiff's negligence in failing to secure the chipping gun and the extension cord before lowering the lift platform. Fontana states that he was assigned to assist plaintiff in installing risers from the first floor through a second floor. Prior to the accident, plaintiff was chipping out holes using a chipping gun provided by SJ Electric. He was not operating a coring drill. An extension cord was connected to the electric cord coming from the chipping gun and was plugged into a nearby

outlet. Fontana saw plaintiff place the chipping gun on the ledge of the mezzanine. When he began to lower the lift platform, the extension cord became caught on the lift causing the gun to fall and hit plaintiff on the head. The Fontana affidavit does not contradict either the testimony plaintiff-who did not know what caused the accident-or by the testimony of Sands-who testified that plaintiff was operating either a chipping gun or a coring machine just prior to the accident.

Defendants contend that plaintiffs have no basis to object to the submission of this accident report since they were provided a copy under defendants' Response to Plaintiffs' Notice for Discovery and Inspection, and have had ample opportunity to depose him.

Thus, since plaintiff's own conduct is the proximate cause of the injury, Labor Law § 240(1) is not violated, plaintiffs' cross-motion should be denied, and defendants' motion should be granted.

*Plaintiffs' Sur-Reply*

Plaintiffs contend that the accident report is not in admissible form, no foundation has been laid, it has not been identified, and it should not be considered.

The Fontana affidavit, a new nonparty alleged eyewitness, should also not be considered. Plaintiffs contend that although his name may have been provided in the past, plaintiffs have not been provided with his address or way to contact him or even who he is currently employed by. Fontana could be employed by the defendants. In any event, Fontana's affidavit raises questions of fact as both the plaintiff and Sands stated that Fontana was definitely "not present" when plaintiff's accident occurred.

Finally, although defendants cite Sands's testimony that plaintiff "must/might" have been using the chipping gun just prior to the accident, counsel omits all of Sands's testimony that he

did not know what type of work the plaintiff was doing prior to him bringing the lift down. Sands testified that he did not know when the chipping gun was last used or who used it last. Thus, the Court should not consider the parts that go beyond the Court's directive for defendants' sur-reply, and consider all of Sands' testimony, not just those parts cited by defense counsel.

### *Analysis*

“It is well settled that ‘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 demonstrate the absence of any material issues of fact’” (*Johnson v CAC Bus. Ventures, Inc.*, 52 AD3d 327, 328 [1st Dept 2008], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). A failure to meet this burden requires that the motion be denied, regardless of the sufficiency of the opposing papers (*id.*). If the proponent makes a *prima facie* showing, the burden shifts to the opposing party to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court must view the evidence in the light most favorable to the party opposing the motion, giving it the benefit of every reasonable inference (*Ashland Mgt. Inc. v Altair Invs. NA, LLC*, 59 AD3d 97, 869 NYS2d 465, 467 [1st Dept 2008]).

### *Labor Law § 200*

Labor Law § 200 provides:

1. 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 . . . . All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. . . .

Labor Law § 200 is a codification of the common-law duty imposed on an owner or general contractor to provide construction-site workers with a safe place to work (*Singh v Black Diamonds LLC*, 24 AD3d 138, 805 NYS2d 58 [1<sup>st</sup> Dept 2005] citing *Comes v New York State Elec. & Gas Corp.*, 81 NY2d 876, 609 NYS2d 168 [1993]). In order to prevail under Labor Law § 200, plaintiff must demonstrate that defendant had the authority to “control the activity bringing about the injury to enable it to avoid or correct an unsafe condition” (*Singh v Black Diamonds LLC*, *supra* citing *Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 352, 670 NYS2d 816, 693 [1998]). Liability can only be found if defendant exercised control or supervision over the work and had actual or constructive notice of the purportedly unsafe condition (*Singh v Black Diamonds LLC*, *supra* citing *Giovento v P&L Mech.*, 286 AD2d 306, 730 NYS2d 284 [1<sup>st</sup> Dept 2001]; *Mitchell v New York Univ.*, 12 AD3d 200, 784 NYS2d 104 [1<sup>st</sup> Dept 2004]). The notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken (*Mitchell v New York Univ*, *supra*)

Here, there is no indication that any of the defendants had the authority to control the activity that brought about plaintiff’s injury. The record is devoid of any evidence that defendants, supervised, controlled or directed the performance of plaintiff’s job. None of the defendants even had overall responsibility for the day-to-day operations of the construction site, which was a responsibility of nonparty Bovis. Nor is there any indication that plaintiff took instructions from anyone other than his supervisor at SJ Electric.

In *Singh v Black Diamonds LLC* (24 AD3d 138, 805 NYS2d 58 [1<sup>st</sup> Dept 2005]), the plaintiff was injured when he fell through an opening in a roof. He sued, among others, Bovis, the construction manager. The Court affirmed dismissal of the Labor Law 200 claim against

Bovis, noting that “plaintiff never took orders from Bovis and that Bovis had no responsibility for overseeing the work performed by him or his employer.” According to the Court, that Bovis's 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; that he discussed covering the subject hole in the roof with subcontractor Nastasi's representative; and that he had inspected the plywood in question after it had been nailed down over the hole, “simply indicates Bovis's general supervision and coordination of the work site and is insufficient to trigger liability.” Thus, plaintiffs’ claim that Avalon NYC was the general contractor, that defendant Avalon Bay Communities Construction Management’s duty was to oversee the construction manager, and that Avalon Bay had the authority to stop work if they saw unsafe work conditions, is plainly insufficient to trigger liability under Labor Law §200.

Defendants’ reliance on *DaBolt v Bethlehem Steel Corp.* (92 AD2d 70, 459 NYS2d 503 [4<sup>th</sup> Dept 1983]) and *Brogan v International Business Machines Corp.* (157 AD2d 76, 555 NYS2d 895 [3d Dept 1990]), is misplaced.

In *DaBolt*, plaintiff was injured while repairing a conveyor belt on a “separator.” In affirming denial of summary dismissal of plaintiff’s Labor Law 200 claim, the Court found an issue of fact as to the amount of control and supervision the owner exercised over the separator, including the amount of control over the details and manner in which work is performed under its contract with” plaintiff’s employer, Hackett. Pursuant to its contract with Hackett, the owner had “sole discretion as to the amount” of materials to be delivered to the separator plant and the right to reject any unusable delivery. Moreover, the contract required Hackett to conduct its

operations in a safe manner and subjected Hackett's operations to the safety rules and regulations "promulgated by Bethlehem," the owner.

In *Brogan*, plaintiff was injured in the course of his employment wherein his employer, C.B. Strain and Company, was engaged to install certain deionization tanks for IBM. The Third Department held that there was sufficient evidence to create an issue of fact as to whether defendant had assumed control over the safety conditions affecting C.B. Strain and Company's employees, thus giving rise to liability under Labor Law § 200. IBM's representatives were present as the tanks were being loaded, including IBM's project coordinator, who testified at a deposition that he was there to "make sure the hard hats were being worn, the types of straps being utilized, and their procedure on lifting the piece of equipment to the truck." Additionally, IBM's safety technician testified that he had the authority to stop the work if, in his opinion, it was not being carried on in a safe manner.

Unlike defendant's representatives in *DaBolt*, who controlled the manner in which work is performed, and the representatives in *Brogan*, who oversaw the actual procedures used in lifting the piece of equipment to the truck, there is no indication that defendants herein directed or oversaw the manner in which plaintiff was using the lift or tool in question. And, First Department caselaw clearly holds that an overall responsibility for the safety of the work done by the subcontractors, and duty to supervise and enforce general safety standards at the work site, are insufficient to raise a question of fact as to its common-law negligence and liability under Labor Law § 200 (*O'Sullivan v IDI Const. Co., Inc.*, 28 AD3d 225, 226, 813 NYS2d 373, 375 [1<sup>st</sup> Dept 2006]).

Accordingly, as there is no question of fact as to violation of § 200 to require a trial, the

branch of defendants' motion seeking dismissal of this claim is granted.

*Labor Law §240(1)*

It is uncontested that the chipping gun fell from the mezzanine level onto the plaintiff standing on the first level 12-15 feet below, causing him injuries.

Labor Law §240(1) provides, in relevant part, that:

All contractors and owners and their agents, . . . 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.

The purpose of the statute is to protect workers and to impose the responsibility for safety practices on those best situated to bear that responsibility (*Lawrence v HRH Const. Corp.*, 165 Misc 2d 690, 629 NYS2d 976 [Sup Ct New York County 1995] [Labor Law § 240(1) requires all owners, contractors and their agents who are involved in the erection, demolition, repairing, altering, painting, clearing or painting of a building to erect proper scaffolding, hoists, stays, ladders, etc.]) citing *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 601 NYS2d 49 [1993] and *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 493 NYS2d 102 [1985]). With respect to falling objects, the Court of Appeals in *Narducci v Manhasset Bay Associates* (96 NY2d 259 [2001]), explained:

. . . Labor Law § 240(1) applies where the falling of an object is related to “a significant risk inherent in . . . the relative elevation . . . at which materials or loads must be positioned or secured” (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Thus, for section 240(1) to apply, a plaintiff must show more than simply that an object fell causing injury to a worker. A 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.

(*Narducci* at 268)

“While the Court of Appeals decision in *Narducci* appeared to limit a plaintiff’s ability to bring a Section 240 “falling object” claim solely to situations where the object was in the process of being hoisted or secured, that court later explained that falling objects not in the process of being hoisted or secured may also trigger § 240 protections (*Jawara v BHA, Inc.*, 24 Misc 3d 1201, 2009 WL 1676004 [Sup Ct Bronx County 2009]). The protections of § 240 also extend to falling objects which *should have been secured*, or were improperly secured [emphasis added] *id.* citing *Outar v City of New York*, 5 NY3d 731 [2005][stating that “dolly was an object that required securing for the purposes of the undertaking”] and *Quattrocchi v F.J. Sciame Constr. Co., Inc.*, 44 AD3d 377, 843 NYS2d 564 [1<sup>st</sup> Dept 2007], *affd as modified.*, 11 NY3d 757 [2007][stating “As our holding in *Outar v. City of New York* indicates, ‘falling object’ liability under Labor Law § 240(1) is not limited to cases in which the falling object is in the process of being hoisted or secured”]; *cf. Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 841 NYS2d 249 [1<sup>st</sup> Dept 2007] [causing counterweight that fell on plaintiff when counterweight frame tilted while elevator was being tested was not a foreseeable risk inherent in the testing of the elevator, and as such, did not compel the need for a protective device as contemplated by § 240(1)]. Thus, the falling object need not be “in the actual process of being ‘hoisted and/or secured,’” in order for the statute to apply (*Quattrocchi v F.J. Sciame Const. Corp.*, *supra* citing *Outar v City of New York*, 5 NY3d 731, 799 NYS2d 770 [2005]).

In *Outar v City of New York*, 286 AD2d 671, 730 NYS2d 138 [2d Dept 2001], *affd* 5 NY3d 731, 799 NYS2d 770 [2005]), while working on subway tracks, plaintiff “was lifting pieces of track and replacing them *when an unsecured dolly, which was used in his work and stored on top of a “bench wall”* that was 5 ½ feet high and adjacent to the worksite, fell and hit

him.” (Emphasis added). The plaintiff alleged that the defendant did not assert that the dolly was secured prior to the accident. The Second Department held that plaintiffs were entitled to summary judgment on the issue of liability under Labor Law § 240(1). On appeal, the Court of Appeals agreed, holding that not only was “the elevation differential between the dolly and plaintiff was sufficient to trigger Labor Law § 240(1)'s protection,” but “the dolly was an object that required securing for the purposes of the undertaking” (5 NY3d at 732).

Similarly, though not in the process of being hoisted or secured, the chipping gun which fell from the mezzanine level upon the plaintiff standing on the first level below is the type of falling object to which Labor Law §240(1) applies (*see also, Bush v Gregory/Madison Avenue, LLC*, 308 AD2d 360, 764 NYS2d 262 [1<sup>st</sup> Dept 2003] [finding that court properly denied summary dismissal of sections 240(1) and 241(6) claims as issues of fact existed as to whether a statutorily enumerated protection device would have been "necessary or expected" to shield the plaintiff, an ironworker, from an improperly secured angle iron, which struck plaintiff when it fell from the floor above his work site]; *see also, Galvan v Triborough*, 29 AD3d 517, 518, 814 NYS2d 256 [2d Dept 2006][issue of fact as to whether the C-clamp which struck the plaintiff fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute' or whether it was deliberately thrown off the side of the scaffolding, or whether it was accidentally dropped or fell]).

Thus, defendants' contention that plaintiffs' Labor Law §240(1) claim fails on the ground that the chipping gun was not an object being hoisted or secured, and caselaw cited in support, are insufficient to warrant dismissal of this claim. For example, in *Sahota v Celaj* (2004 NY Slip Op 07411 [1st Dept 2004]), cited by defendants, plaintiff was injured when as he stood on a fire

escape platform attempting to lower the fire escape ladder, its securing mechanism broke, suddenly releasing a metal bolt (and the ladder), which crashed down and struck his left arm. No work was being done from or to the fire escape, nor during the course of this project was the fire escape ever used as a scaffold. The fire escape ladder mechanism was not being hoisted or secured at the time of the accident. The safety equipment that plaintiff used in his work, the scaffold and a harness, functioned perfectly and did not contribute to the accident. In dismissing the 240(1) claim, the court stated that the accident involved a “general hazard of the workplace,” (see also *Monir v 393 Jericho Turnpike, LLC*, 293 AD2d 585, 587, 741 NYS2d 78 [2d Dept 2002])[When the plaintiff attempted to leave the extension ladder and climb onto an adjacent fire escape, which was permanently affixed to the building, the moveable section of the fire escape ladder fell onto his left arm and leg. "Since the plaintiffs injuries did not result from either his falling from the extension ladder or his being struck by a falling object which was being hoisted or secured as part of the work being performed, his injuries did not result from an elevated-related risk as contemplated by Labor Law § 240(1), and that statute does not apply)].

In *Sahota* and *Monir*, the objects that fell (*i.e.*, metal bolt (and ladder) in *Sahota* and moveable section of the fire escape ladder in *Monir*) were part of the preexisting building structure as it appeared before the attempted work began. Such cases did not involve a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected. Here, like the dolly (equipment) being used in *Outar v City of New York*, the chipping gun herein was an unsecured object to the extent that protective netting appearing at other portions of the mezzanine was not utilized in the area of the mezzanine affecting the plaintiff. Therefore, that the object that fell upon the plaintiff herein was not being

hoisted or secured at the time it fell is not fatal to plaintiffs' Labor Law §240(1) claim (*see Zuluaga v P.P.C. Const., LLC*, 45 AD3d 479, 847 NYS2d 30 [1<sup>st</sup> Dept 2007] [summary judgment was properly granted to plaintiff on his Labor Law § 240(1) where plaintiff, while performing work on the building's first floor, was injured when he was struck by a pipe that fell from several floors above where other workers were performing demolition work]).

Further, defendants' contention that the chipping gun could have been dropped by an employee is also insufficient to defeat plaintiffs' Labor Law 240(1) claim (*see Brust v Estee Lauder Inc.*, 184 AD2d 474, 585 NYS2d 432 [1st Dept 1992][holding that Labor Law §240 clearly applies where plaintiff was injured when struck on the arm by a spud wrench that was dropped from above by a fellow employee in the course of erection of the steel skeletal frame of a warehouse facility]). And, there is no evidence in the record from which a jury may reasonably infer that the chipping gun was deliberately dropped from the mezzanine level, as defendants argue (*cf. Roberts v General Electric Co.*, 97 NY2d 737, 738, 742 NYS2d 188 [2002] [where plaintiff was injured when a piece of asbestos was "deliberately" dropped from a tank 12 feet above him, such is not a situation "where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected"]).

This is not an instance where the chipping gun and slipped from the hand of a co-worker while the chipping gun was in use, where it can be said that one of the enumerated safety devices would have been necessary, or even expected (*cf. Goodleaf v Tzivos Hashem, Inc.*, 19 Misc 3d 1104, 859 NYS2d 902 [Sup Ct 2008][plaintiff was injured at a job site when a sledgehammer fell and struck his head when a co-worker, attempting to hit a steel bolt to further fasten a beam on the fifth floor, let it slip out of his hands and drop through an uncovered opening between the

floor beams to the first floor)).

It cannot be said that the cause of plaintiff's injuries or the cause of the chipping gun falling from the mezzanine would be based on sheer speculation. That plaintiff testified that he did not know *what caused* the chipping gun to fall is not fatal to plaintiffs' Labor Law § 240(1) claims. In this regard, *Sieling v New York Convention Center Dev. Corp.* (35 AD3d 227, 828 NYS2d 303 [1st Dept 2006])[holding "[t]he deposition testimony of [plaintiff] and his co-workers failed to identify the cause of the accident, [where plaintiff was electrocuted while working as an electrician] and no reasonable inference as to causation can be drawn from any of plaintiffs' evidence . . . ."], *Gonzalez v Vigo Const. Corp.* (17 Misc 3d 1130, 851 NYS2d 69 [Sup Ct Queens County 2007]), and *Hemmings v St. Marks Housing Assoc.*, 272 AD2d 442, 707 NYS2d 667 [2d Dept 2000] cited by defendants are not controlling.

In *Gonzalez*, plaintiff alleged that he was struck by a falling piece of concrete while working at a construction site. The Court acknowledged that a plaintiff unable to testify about an accident will not be held to as high a degree of proof in establishing his or her right to recover under some circumstances, plaintiff did not meet her obligation to introduce evidence supporting his *prima facie* case. The Court held that giving the "plaintiff the benefit of every favorable inference, the evidence reveals that the cause of the plaintiff's accident is unknown and plaintiff's complaint must be dismissed . . . . There [was] no admissible evidence of how the plaintiff was injured or what he was doing when he was injured." Further, plaintiff failed to submit an affidavit from a claimed eyewitness to the accident. In *Hemmings*, plaintiff was denied summary judgment where plaintiff relied upon his deposition testimony, which indicates that he was knocked unconscious and that his co-workers subsequently advised him that he had been struck

in the head by a falling beam. None of the alleged witnesses was deposed, and the plaintiff did not submit affidavits from these witnesses to corroborate how the accident occurred. The Court held that under these circumstances, the plaintiff failed to establish as a matter of law the manner in which the accident occurred to warrant an award of summary judgment in his favor.

However here, plaintiff indicated that he was struck by an object that fell from above, and his testimony is corroborated by the affidavit of a co-worker, Fontana, who attests that as plaintiff “began to lower the lift platform, the extension cord became caught on the lift pulling the gun from the ledge, causing the gun to fall and hit Eddie on the head.” It may be reasonably inferred that the chipping gun fell from the edge of the mezzanine due to the absence of protective netting along the mezzanine above the area where plaintiff was situated.

Furthermore, defendants’ argument that plaintiff was the proximate cause of his injuries, thereby relieving defendants of liability, lacks merit. It is “well settled that the injured's contributory negligence is not a defense to a claim based on Labor Law §240(1) and that the injured's culpability, if any, does not operate to reduce the owner/contractor's liability for failing to provide adequate safety devices” (*Stalt v General Foods Corp.*, 81 NY2d 918, 920, 597 NYS2d 650 [1993]). However, it is clear that “section 240 does not give absolution to the plaintiff when his injury has been caused, exclusively, as a result of his own willful or intentional acts” (*Tate v Clancy-Cullen Storage Co. Inc.*, 171 AD2d 292, 296, 575 NYS2d 832 [1st Dept 1991]). Thus, liability will not be imposed upon owners and contractors when the worker's conduct is the “sole proximate cause” of the occurrence (*Weininger v Hagedorn & Co.*, 91 NY2d 958, 672 NYS2d 840 [1998], *rearg. denied*, 92 NY2d 875, 677 NYS2d 777 [1998]). When a statutory violation was a contributing factor to a worker's fall from a ladder or scaffold, the

worker's comparative negligence (as distinguished from intentional wrongdoing) is irrelevant, and cannot be used to defeat summary judgment on the speculation that the accident may have been caused “solely” because of the culpable conduct of the worker (*see, Kyle v City of New York*, 268 AD2d 192, 196 [1st Dept 2000]). Thus, the “sole proximate cause” defense should be limited to the situation where a worker has been provided with “proper protection,” and the worker thereafter, through intentional misuse of the safety device, or via other egregious misconduct, neutralizes the protections afforded by the safety device (*Robinson v City of New York*, 4 Misc 3d 542, 779 NYS2d 757 [Sup Ct Bronx County 2004]; *McMahon v 42nd St. Dev. Project, Inc.*, 188 Misc 2d 25, 726 NYS2d 203 [Sup Ct Bronx County 2001]). Once plaintiff makes a *prima facie* showing that he was subjected to one of the hazards covered by Section 240, the burden shifts to the defendants to establish that proper protection was afforded but rendered ineffective as a result of intentional or culpable conduct on the part of plaintiff (*Robinson, supra*; *McMahon, supra*).

Here, defendant failed to make such a showing. The record indicates that plaintiff's use of the scissor lift may have caused the chipping gun to fall from the mezzanine level, which did not have protective netting. However, under these circumstances, plaintiff's actions amount to no more than comparative negligence, which is irrelevant in an absolute liability case predicated on a Labor Law §240(1) violation (*see Crespo v City of New York, supra*).

As to plaintiffs' cross-motion for partial summary judgment under Labor Law 240(1), such application is denied. Issues of fact are raised among the depositions and affidavits of the eyewitnesses as to the whether plaintiff's injuries were proximately caused by defendants' alleged failure to supply protective devices to prevent objects from falling from the mezzanine.

*Labor Law § 241(6)*

Labor Law § 241(6) provides:

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 the person's employ herein or lawfully frequenting such places. The Commissioner may make rules to carry into effect the provisions that this subdivision, and the owners and contractors and their agents for such work, except owners of one-two family dwellings for contracted work but do not direct or control the work, shall comply therewith.

Section § 23-1.7(a), entitled, "Protection from General Hazards," provides as follows:

(a) Overhead hazards.

\* \* \* \* \*

(2) Where persons are lawfully frequenting areas exposed to falling material or objects but wherein employees are not required to work or pass, such exposed areas shall be provided with barricades, fencing or the equivalent in compliance with this Part (rule) to prevent inadvertent entry into such areas.

In *Zaluaga v P.P.C. Constr., LLC* (45 AD3d 479, 847 NYS2d 30 [1st Dept 2007]), the Court stated that partial summary judgment under Labor Law § 241(6) was properly granted to plaintiff based on the sufficiently specific violations of the Industrial Code, 12 NYCRR § 23-1.7(a), where plaintiff was injured when he was struck by a six-foot long pipe that fell from several floors above where other workers were performing demolition work, including the cutting and removal of pipes and the record established that no safety devices were provided. Likewise, in *Amerson v Melito Construction Corp.* (45 AD3d 708, 845 NYS2d 457 [2d Dept 2007]) plaintiff, was working for a masonry subcontractor for the construction of a concrete block wall for a new supermarket when he was struck in the head by a concrete block which fell from the top of the wall where the masons were working. Plaintiff wore a hard hat and was equipped with a chipping hammer, scraper etc., in order to perform his work. The Second

Department found that the area where the plaintiff was required to work was one which was "normally exposed to falling material or objects" and therefore fell within the ambit of the 12 NYCRR 23-1.7(a)(1). The Court found that an issue of fact existed as to whether the falling of a concrete block or portion thereof was foreseeable and "whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances."

Defendants' contention that the area at issue was not a site normally exposed to falling material or objects lacks merit (*cf. Perillo v Lehigh Constr. Group, Inc.*, 17 AD3d 1136, 1138, 795 NYS2d 808, 810 [4th Dept 2005] [where plaintiff was injured when a piece of a partition wall that had been partially demolished from the floor upward fell and struck him, § 23-1.7(a) (1) inapplicable because plaintiffs work site was not normally exposed to falling material or objects.]; *Cruz v 7 Park Avenue Corp.*, 5 Misc 3d 1018, 799 NYS2d 159 (Sup Ct Kings County 2004)[holding that § 23-1.7(a)(1) was inapplicable where "the swinging down of the access panel on the air-conditioner was an unexpected occurrence]). Therefore, the branch of defendants' motion seeking dismissal of plaintiffs' Labor Law 241(6) claim to the extent they rely on 12 NYCRR 23-1.7(a)(1) is denied.

As to Industrial Code § 23-2.1(a)(2), such section, under "Maintenance and housekeeping," provides as follows:

(2) Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge.

Defendants' contention that the above section is inapplicable as there is no evidence of any material or equipment placed or stored close to the edge of the mezzanine where the accident

occurred lacks merit. Based on the record, an issue of fact exists as to whether the was struck by the chipper gun, *i.e.*, "equipment" that fell from the edge of mezzanine's floor which was directly above where plaintiff was standing. Such evidence raises an issue as to whether the chipper gun was placed or stored too close to the edge of the mezzanine's floor. Therefore, the branch of defendants' motion seeking dismissal of plaintiffs' Labor Law 241(6) claim to the extent they rely on 23-2.1(a)(2) is denied.

Further, for the reasons stated above, plaintiffs' cross-motion for partial summary judgment on the issue of liability under this section is denied.

*Statutory Agent*

The record fails to indicate that Avalon NYC or Avalon Bay Communities Management in any way supervised or controlled the work being performed. Further, the record establishes that the land on which the building at issue is situated was leased by ESDC to defendant CVP1, LLC, the sole member of CVP1, LLC is Downtown Manhattan Residential, LLC, and that defendants Chrystie Venture and Avalon Bay Communities, Inc. are the sole members of Downtown Manhattan Residential, LLC. Therefore, defendant Chrystie Venture is not a statutory owner of the premises and is not subject to Labor Law liability.

It is uncontested that the definition of a statutory agent of an owner or general contractor for labor law purposes is as follows: when the work giving rise to the owner or general contractor's non-delegable duties has been delegated to a third party, that third-party then obtains the concomitant authority to supervisor and control that work and becomes a statutory "agent" of the owner or general contractor (*Russin v Picciano*, 54 NY2d 311, 318, 445 NYS2d [1981]).

Here, there is no evidence that Avalon NYC or Avalon Bay Communities Management

was in anyway supervising or controlling the work being performed. Therefore, said defendants were not the statutory agent for the owner or general contractor to support labor law liability (*see e.g., Borbeck v Hercules Constr. Corp.*, 48 AD2d 498, 852 NYS2d 254 [2d Dept 2008] [where defendant did not have the authority to enforce the provisions of the contracts entered into by the owner with the projects prime contractors, or to stop the work in the event that an unsafe condition or work practice became known, defendant did not have the authority to control and supervise the work to become the owner's statutory agent]).

Therefore, the branch of defendants' motion to dismiss the Complaint as against Avalon NYC, Avalon Bay Communities Management, and Chrystie Venture is granted.

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that the branch of defendants' motion to dismiss the Complaint as against Avalon NYC, Avalon Bay Communities Management, and Chrystie Venture is granted; and it is further

ORDERED that the branch of defendants' motion to dismiss plaintiffs' Labor Law §§ 240(1) and 241(6) claims (based on Industrial Code §§ 23-1.7(a) and 23-2.1(a)(2)), is denied as to all defendants except Avalon NYC, Avalon Bay Communities Management, and Chrystie Venture; and it is further

ORDERED that the branch of defendants' motion to dismiss plaintiffs' claim alleging violations of Industrial Code §§ 23-1.15, 23-1.17, 23-1.19, and 23-2.1(b) in support of plaintiffs' Labor Law §241(6) claim is granted; and it is further

ORDERED that the branch of defendants' motion to dismiss plaintiffs' negligence and

Labor Law § 200 claims is granted, as to all defendants; and it is further

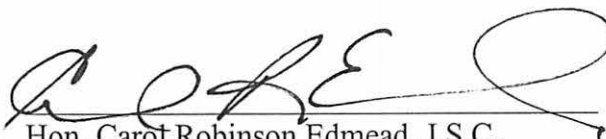
ORDERED that plaintiffs' cross-motion for partial summary judgment in their favor under Labor Law §§240(1) and 21(6) is denied; and it is further

ORDERED that the Clerk may enter judgment accordingly; and it is further

ORDERED that plaintiffs 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: July 21, 2009

  
Hon. Carol Robinson Edmead, J.S.C.  
**HON. CAROL EDM EAD**

**FILED**  
JUL 24 2009  
COUNTY CLERK'S OFFICE  
NEW YORK