

Vasquez v 21-23 S. William St.

2010 NY Slip Op 30111(U)

January 20, 2010

Supreme Court, New York County

Docket Number: 104246/2007

Judge: Carol R. Edmead

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

HON. CAROL EDMEAD

PART 35

PRESENT:

Index Number : 104246/2007

VASQUEZ, LUZ

vs

21-23 SOUTH WILLIAM STREET

Sequence Number : 001

PARTIAL SUMMARY JUDGMENT

INDEX NO.

MOTION DATE

11/20/09

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion of plaintiff Luz Vasquez, as Administratrix of the Estate of David Vasquez, deceased, for an order, pursuant to CPLR §3212, holding defendants 21-23 South William Street, LLC and Wall Street Builders, LLC liable for violating Labor Law §240(1), 240(2) and 241-a is granted; and it is further

ORDERED that the branch of plaintiff's motion for an order, pursuant to CPLR §3212, holding defendant Wall Street Builders, LLC liable for violating Labor Law §200 is granted; and it is further

(Page 1 of 2)

Dated: _____

J.S.C.

Check one: FINAL DISPOSITION ~~NON-FINAL DISPOSITION~~

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
JAN 21 2010
NEW YORK COUNTY CLERK'S OFFICE

PAPERS NUMBERED

ORDERED that the branch of defendants' cross-motion, for an order, pursuant to CPLR §3212, dismissing plaintiff's Labor Law §§240(1), 240(2), and 241-a claims is denied; and it is further

ORDERED that the branch of defendants' cross-motion, for an order, pursuant to CPLR §3212, for summary judgment dismissing plaintiff's Labor Law §241(6) claim is granted as to plaintiff's reliance on 12 NYCRR §§23-5.1(a)-(j), 23-2.5(a), 23-1.15, 23-1.16, 23-1.17, 23-1.7(d), and 23-1.7(e)(2), and denied as to plaintiff's reliance on 12 NYCRR §§23-2.5(b) and 23-1.7(b)(1); and the portion of plaintiff's Labor Law §246(1) claim relying on 12 NYCRR §§23-5.1(a)-(j), 23-2.5(a), 23-1.15, 23-1.16, 23-1.17, 23-1.7(d), and 23-1.7(e)(2) is hereby severed and dismissed; and it is further

ORDERED that plaintiff shall report to Part 40 located at 60 Centre Street, New York, New York, for an inquest of damages and attorneys' fees against defendant regarding plaintiff's Labor Law §240(1), 240(2), 241-a and 200 claims on February 22, 2010 at 9:30 a.m., and it is further;

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

(Page 2 of 2)

FILED
JAN 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated 1/20/10

ENTER: [Signature] J.S.C.
HON. CAROL EDMEAD

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
LUZ VASQUEZ, as Administratrix of the Estate of
DAVID VASQUEZ, deceased,

Plaintiff,

Index # 104246/07

-against-

21-23 SOUTH WILLIAM STREET, LLC,
WALL STREET BUILDERS, LLC, McCANN, INC.
and KENNELLY DEVELOPMENT COMPANY, LLC,

Defendants,

-----x
21-23 SOUTH WILLIAM STREET, LLC,
WALL STREET BUILDERS, LLC,

Third-Party Plaintiffs,

-against-

Third-Party
Index # 590770/07

HIGHRISE CONSTRUCTION COMPANY,

Third-Party Defendant.

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

FILED
JAN 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

This wrongful death action arises out of an alleged construction-site accident that occurred at 21-23 South William Street, New York, New York (the "work site").

Plaintiff Luz Vasquez, as Administratrix of the Estate of David Vasquez ("Mr. Vasquez"), deceased ("plaintiff") now moves for partial summary judgment against defendants 21-23 South William Street, LLC ("South William"), Wall Street Builders, LLC ("Wall Street"), McCann, Inc., and Kennelly Development Company, LLC ("Kennelly") on her Labor Law

§§240(1), 240(2), and 241-a claims, and against Wall Street on her Labor Law §200 claim.¹

South William and Wall Street (collectively “defendants”) cross move² for summary judgment, dismissing plaintiff’s Labor Law §§240(1), 240(2), 241-a and 241(6) claims.³

Background

South William is the owner of the work site, which, in September 2005, was being converted into residential and commercial condominiums. South William retained Wall Street to provide general contracting services during the conversion. Wall Street hired and coordinated the work of the subcontractors at the site. Charles F. McInnis (“Mr. McInnis”) worked for Wall Street as its project manager, in charge of coordinating trades and overall site management, and Giuseppe “Joe” Budetti (“Mr. Budetti”) was employed as Wall Street’s laborer foreman. Wall Street contracted with Highrise to provide laborers to work under Mr. Budetti’s direct supervision; those laborers included Mr. Vasquez.

According to the depositions of Mr. McInnis (the “McInnis EBT”) and Mr. Budetti (the “Budetti EBT”), on September 21, 2005, Mr. McInnis instructed Mr. Budetti to chop out a row of cinder blocks from the back wall of the elevator shaft on the seventh floor of the work site. Mr. Budetti enlisted the help of Mr. Vasquez in completing this task. In order to reach the work area on the seventh floor, Mr. Budetti and Mr. Vasquez used the elevator platform that ran in the

¹McCann, Inc. never appeared, and the action against Kennelly was discontinued, pursuant to a stipulation among the parties.

²South William and Wall Street also seek contractual and common law indemnification and contribution against third-party defendant Highrise Construction Company (“Highrise”). Highrise never appeared in the third-party action.

³In her Bill of Particulars (“BOP”), plaintiff alleges the following nine Industrial Code violations in support of her Labor Law §241(6) claim: 12 NYCRR §§23-1.7(b)(1), 23-1.7(d), 23-1.7(e)(2), 23-1.15, 23-1.16(a)-(f), 23-1.17(a)-(e), 23-2.5(a)(2), 23-2.5(b)(1)-(6), and 23-5.1(a)-(j).

shaft. The platform was raised about 2 feet above the level of the seventh floor, such that the row of blocks to be chopped out was at about chest level. Using a scrap piece of sheetrock and sandbags, Mr. Budetti and Mr. Vasquez covered the gap between the platform and the rear wall of the shaft to prevent debris from falling down into the shaft.

Mr. Budetti was using a jackhammer to chop the cinder block out of the back wall, and Mr. Vasquez, who was not wearing any safety equipment other than gloves, was removing the debris and placing it into garbage barrels. As the men performed their work, they were standing on the sheetrock facing the rear wall of the shaft. Mr. Budetti was positioned about two steps away from Mr. Vasquez and was putting the jackhammer down, when he heard the sheetrock crack beneath where Mr. Vasquez was standing. Mr. Budetti looked up and saw Mr. Vasquez fall, feet first, through the gap between the platform edge and the rear wall, all the way to the bottom of the shaft. The floor of the elevator pit was about 10 to 12 feet below the first floor of the building. Mr. Vasquez was taken to New York Downtown Hospital, where he was pronounced dead.

The next day, personnel from the Occupational Safety and Health Administration (“OSHA”) issued a citation against Wall Street for violating OSHA rule 29 CFR 1926.501(b)(1), which pertains to the duty to provide protection from falls at construction sites (OSHA Citation, p. 7). The OSHA investigators determined that Mr. Vasquez had not been protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest equipment.

In her motion, plaintiff first argues that there is sufficient evidence of violations of Labor Law §240(1) to grant her summary judgment. Plaintiff argues that South William is liable as an “owner” within the meaning of Labor Law §240, because South William admitted in its Answer

that it was the owner of the work site. Further, Wall Street is liable as an “agent” or “contractor,” because its duties and obligations included the hiring of the subcontractors, the overall management, supervision and coordination of all trades, and the oversight of the work site and performance of the work necessary to effectuate and complete the project, plaintiff contends. Therefore, defendants had a duty, pursuant to Labor Law §240(1), to provide a device to enable a worker to work safely at even a fairly small elevation, and where the lack of a device causes a worker to suffer an injury, absolute liability results, plaintiff argues.

Here, Mr. Vasquez was exposed to a gravity-related hazard as encompassed by the statute without appropriate protective devices. Defendants breached their duty because (1) the platform upon which Mr. Vasquez was standing collapsed and (2) there were no other safety devices in use, such as guardrails, railings, sub-platform planking, safety belts, or safety harnesses, that would have afforded him proper protection and kept him from falling. Plaintiff further argues that these breaches were proximate causes of Mr. Vasquez’s fall.

Second, plaintiff argues that the facts establish a *prima facie* violation of Labor Law §240(1), because the sheetrock placed over the opening upon which Mr. Vasquez was working collapsed. Plaintiff further contends that whether the elevated platform is technically classified as a “scaffold” is of no moment: Owners and general contractors have an absolute and non-delegable duty to ensure that a worker is provided with appropriate protection.

Third, plaintiff argues that she is entitled to summary judgment under Labor Law §240(2), which mandates safety rails on scaffolds over 20 feet in height. The OSHA investigators determined that Mr. Vasquez had “not been protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest equipment,” plaintiff contends. Had

a safety rail been installed on the rear edge of the platform, Mr. Vasquez would not have been able to access the area of the 14-inch gap between the edge of the platform and the rear wall of the elevator shaft, there would have been no need for the use of sheetrock to cover the gap, and “Mr. Vasquez would not have been able to stand on the sheetrock used to cover the gap because the safety rail would have prevented such an action,” plaintiff argues.

Fourth, plaintiff argues that she is entitled to summary judgment under Labor Law §241-a, because Mr. Vasquez was injured in a fall while working in an elevator shaftway without proper protection. Plaintiff contends that Labor Law §241-a imposes absolute liability upon a contractor and/or owner where it is uncontroverted that their failure to comply with the section’s requirements or the rules of the New York State Board of Standards and Appeals (the “Board”) relating to the protection of shaftways, hatchways or stairwells proximately caused a worker’s injuries. Here, it is “uncontroverted” that the elevated platform was not protected by the safety railing required by the Board rules or §241-a, and the violation was a proximate cause of the accident, plaintiff argues.

Finally, plaintiff argues that she is entitled to summary judgment against Wall Street, pursuant to Labor Law §200. Plaintiff argues that the unrefuted proof establishes that Wall Street exercised direct supervision and control over Mr. Vasquez; Wall Street assigned Mr. Vasquez the task he was performing at the time of the incident; Mr. Vasquez was working with and being directly supervised by Wall Street’s foreman, Mr. Budetti, at the time of the incident; and Mr. Budetti was directly involved in setting up the work area, including installing the sheetrock over the gap through which Mr. Vasquez fell.

In opposition, defendants first argue that summary judgment on all of plaintiff’s Labor

Law claims is inappropriate because issues of material fact exists as to whether the alleged dangerous condition was open and obvious, and whether Mr. Vasquez's own negligence was the sole proximate cause of the accident. Defendants contend that "it is undisputed" that Mr. Vasquez "decided" to use sheetrock to catch the cinder block debris before it fell into the elevator shaftway through the 12- to 14-inch gap between the elevator platform and the back wall. Mr. Vasquez also "fashioned" the sheetrock to fit around the cables on the back wall of the elevator shaft, covering the gap. The sheetrock was "simply intended" to block the cinder block debris from falling down into the shaftway. According to the Budetti EBT, Mr. Vasquez had only previously placed the sheetrock over the gap 20 minutes before he fell. As such, Mr. Vasquez was well aware of the open and obvious allegedly dangerous condition posed by the gap between the elevator platform and the shaftway back wall. Based upon the foregoing issues of fact, plaintiff's motion should be denied.

Second, in support of their cross-motion, defendants argue that summary judgment in their favor is warranted because plaintiff failed to establish a *prima facie* violation of Labor Law §§240(1), 240(2) and 241-a. Alternatively, defendants argue that the existence of issues of material fact preclude summary judgment in plaintiff's favor on all of her Labor Law claims. Defendants contend that Labor Law §240(1) does not create an exception to the fundamental principle of tort law that a defendant is liable only for the normal and foreseeable consequences of its acts. Here, there was no foreseeable risk of injury from an elevation-related hazard on the elevator platform, because the sheetrock through which Mr. Vasquez fell was merely placed to catch falling debris, defendants argue. Moreover, it was unforeseeable that someone would be able to fall through the 12- to 14- inch gap between the elevator platform and the shaftway wall.

Third, defendants argue that plaintiff failed to make out a *prima facie* Labor Law §240(2) claim. Defendants contend that it is undisputed that Mr. Vasquez was working on a “moveable elevator platform” when his accident occurred, and that the platform was used to bring materials up and down to the different levels at the job site. The moveable elevator platform was not a “scaffold or staging” pursuant to Labor Law §240(2), defendants argue. As such, plaintiff’s Labor Law §240(2) claim should be dismissed.

Fourth, defendants argue that plaintiff failed to make out a *prima facie* Labor Law §241-a claim. Defendants contend that Labor Law §241-a contemplates an open elevator shaft. Here, Mr. Vasquez was not working in an “open shaftway,” but only working near the 12- to 14-inch gap between the elevator platform and the shaftway’s back wall. As such, plaintiff’s Labor Law §240-a claim should be dismissed.

Finally, defendants argue that plaintiff’s Labor Law §241(6) claim should be dismissed because the Industrial Code provisions on which she relies are inapplicable to the facts herein, or were not the proximate cause of Mr. Vasquez’s injury. Defendants contend that 12 NYCRR §23-5.1(a)-(j) is inapplicable because Mr. Vasquez was not working on a scaffold at the time of his accident; 12 NYCRR §23-2.5(a) is inapplicable because Mr. Vasquez was working in an elevator shaft at the time of his accident, and the provision does not apply to persons working in elevator shafts; 12 NYCRR §23-2.5(b) is inapplicable because Mr. Vasquez was not involved in the installation, repair or replacement of any elevator at the time of his accident, but in modifying the existing elevator shaft; 12 NYCRR §§23-1.15, 1.16, and 1.17, which set standards for safety railings, safety belts and life nets, respectively, do not apply because plaintiff was not provided with any such safety devices; 12 NYCRR 23-1.7(d) is inapplicable, because Mr. Vasquez did not

slip on anything at the time of his accident, and there existed no slippery condition that played any role in his accident; and 12 NYCRR 23-1.7(e)(2) is inapplicable, because no accumulation of dirt, debris, scattered tools and materials or sharp projections had anything to do with Mr. Vasquez's accident.

In her opposition and reply, plaintiff first argues that the sole proximate cause defense is not applicable to the facts herein, because such a defense generally applies only where a plaintiff misused a safety device, removed a safety device, failed to use an available safety device that would have prevented the accident, or knowingly chose to use an inadequate device despite the availability of an adequate device. Here, plaintiff argues, several substantial factors contributed to Mr. Vasquez's accident: (1) the woodwork platform lacked guardrails or safety netting; (2) there was no planking laid across the elevator shaft below the platform upon which Mr. Vasquez and his supervisor were working; (3) defendants failed to provide Mr. Vasquez with any type of personal fall arrest equipment to prevent him from falling; and (4) Mr. Vasquez's foreman supervised and directed the use and positioning of the woodwork platform, as well as the cutting and placement of the sheetrock that covered the gap between the platform and the rear wall of the shaft, which ultimately broke and collapsed. Plaintiff further argues that it will not avail defendants to argue that the manner in which Mr. Vasquez set up or stood upon the sheetrock was the sole cause of the accident, where it is undisputed that the platform was unsecured and no other safety devices were provided.

With regard to use of the sheetrock by Mr. Vasquez to cover the gap, plaintiff argues that defendants were responsible for providing and constructing an adequate safety device to permit Mr. Vasquez to perform his elevation-related task, and it is improper to attempt to shift to Mr.

Vasquez the responsibility for creating such a safety device. Plaintiff further contends that even if one cause of an accident is a worker's general negligence, that will not constitute a defense if another cause was an unsecured or defective safety device or some other violation.

In addition, the sole proximate cause defense fails as a matter of law where the worker was following his foreman's directions and where the defendants had not provided the means for the job to be done safely, plaintiff argues. Here, the record demonstrates that Mr. Budetti was responsible for assigning, directing, and overseeing Mr. Vasquez's work. Mr. Budetti assigned Mr. Vasquez to help him chip out the block along the back wall of the elevator shaft. Further, Mr. Budetti placed the sheetrock over the gap between the platform and the rear wall of the shaft with the assistance of Mr. Vasquez. Thus, the record is clear that Mr. Vasquez had no requisite authority to exercise independent judgment with respect to safety issues.

Second, plaintiff argues that, contrary to defendants' argument, she is entitled to summary judgment under Labor Law §240(2), because Mr. Vasquez fell from an elevated work site more than 20 feet high, and he was working on an unguarded platform that served as the functional equivalent of a scaffold. Plaintiff contends that the presumption of employer liability applies where there is a collapse of "any elevation-related safety devices." Plaintiff argues that defendants offered no support for their proposition, either by proof of the intention of the legislature or by the application by the courts, that there is a distinction between the definition and use of the term "scaffold" in the separate subsections of Labor Law §240.

Third, plaintiff contends that the doctrine of foreseeability applies only in cases based involving an injury resulting from the failure of a completed and permanent building structure as a result of an unforeseen, dangerous condition of the permanent premises, and where the

elevation-related risk was not apparent from the nature of the work such that the defendant would not normally be expected to provide the worker with a safety device. Here, Mr. Vasquez was injured, not as the result of the collapse of some permanent structure, but rather as a result of work methods utilized at the work site without the provision of any appropriate safety devices, despite the fact that Mr. Vasquez was exposed to a fall of seven stories, plaintiff argues. Mr. Vasquez also was working on temporary structures: the wood elevator platform that was to be replaced by the installation of an elevator cab at a later date, and the sheetrock that was temporarily put in place to cover the gap. Further, the elevation-related risk to Mr. Vasquez was apparent from the nature of the work such that defendants would be expected to provide him with a safety device to prevent him from falling.

Fourth, plaintiff contends that defendants' argument that 241-a does not apply lacks merit. Plaintiff distinguishes the cases defendants cite on the ground that the plaintiffs in those cases were not exposed to the danger of falling more than one story in an open shaft, as Mr. Vasquez was herein. Plaintiff contends that Mr. Budetti described the shaft as being approximately 8 to 10 feet wide (side to side) and 6 to 7 feet in length (front to back). Plaintiff further contends that Mr. Vasquez was exposed to the risk of falling more than one story – seven stories – within the shaft to the ground below. Thus, Mr. Vasquez's accident is "exactly" the kind of occurrence against which the statute was designed to protect, plaintiff argues.

Fifth, plaintiff argues that no issues of material fact exist as to whether defendants violated their statutory duties under Labor Law §200. Plaintiff contends that it is unrefuted that Wall Street directed and supervised the manner and methods of the work of Mr. Vasquez; Wall Street's supervisors assigned Mr. Vasquez the task he was performing at the time of the incident;

and at the time of the incident, Mr. Vasquez was working with and being directly supervised by Mr. Budetti. In addition, Mr. Budetti's testimony illustrates that he was actively involved in the work taking place in the elevator shaft that afternoon and personally participated in the activities of cutting the sheetrock and placing the sheetrock over the gap. Thus, Mr. Budetti "contributed to causing and creating the dangerous condition that led to Mr. Vasquez's fall and was, at the very least, in a position prior to the occurrence to have reasonably foreseen the circumstances of the lack of the provision of adequate safety devices on the platform as well as the lack of the use of personal fall arrest equipment and should have been aware of the dangers of the use of the sheetrock as a working platform," plaintiff argues. Accordingly, summary judgment against defendant Wall Street, pursuant to Labor Law §200, is warranted.

Finally, plaintiff argues that the asserted violations of 12 NYCRR §23-1.7(b)(1), which pertains to protections from falling hazards, and 12 NYCRR §23-2.5(b)(5), which pertains to persons working in elevator shafts, are sufficient "to award summary judgment" in her favor on her Labor Law §241(6) claim, or at least require a jury's determination on the issue of defendants' liability.

In reply, defendants first add that, as to plaintiff's Labor Law §240(1) claim, the distinction plaintiff makes between a permanent and non-permanent structure is irrelevant as to whether the doctrine of foreseeability applies. Second, as to plaintiff's Labor Law §240(2) claim, defendants add that plaintiff provided no authority that holds that the elevator platform is a "scaffolding or staging." Third, as to plaintiff's Labor Law §241-a claim, defendants add that plaintiff's description of the elevator shaft's dimensions "is apropos of nothing, as the plaintiff fails to note the crucial fact here that the shaftway was not open, but that a 12- to 14-inch gap

existed between the elevator platform and the back shaftway wall.” Thus, Mr. Vasquez was only working near the gap, not an open elevator shaft. Finally, as to plaintiff’s Labor Law §241(6) claim, defendants point out that plaintiff failed to oppose defendants’ arguments regarding Industrial Code §§23-2.5(a), 1.15, 1.16, 1.17, 1.7(d), 1.7(e), and 5.1(a)-(j). Defendants also point out that for the first time in her opposition and reply, plaintiff inappropriately seeks summary judgment in regard to defendants’ alleged violation of §§23-1.7(b)(1) and 23-2.5(b)(5).

Discussion

Summary Judgment

The proponent of the motion for summary judgment must establish a cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR §3212 [b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbiner*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]). Thus, the motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman; Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any material issue of fact (CPLR §3212[b]). Thus, where the

proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82 [1978]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347 [1st Dept 1998]).

Plaintiff's Motion

Labor Law §240(1)

Labor Law §240(1), also known as the “Scaffold Law,” imposes absolute liability on 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 [1st Dept 2003], citing *Bland v Manocherian*, 66 NY2d 452 [1985]). To establish a cause of action under Labor Law §240, a plaintiff must show that the statute was violated, and the violation was a proximate cause of the worker’s injury (*Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280 [2003]). Labor Law §240(1) provides, in relevant part:

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 statute is violated when the plaintiff is exposed to an elevation-related risk while engaged in an activity covered by the statute and the defendant fails to provide a safety device adequate to protect the plaintiff against the elevation-related risk entailed in the activity or provides an inadequate one” (*Jones v 414 Equities LLC*, 57 AD3d 65, 69 [1st Dept 2008] [citations omitted]).

Traditionally, the Courts have construed Labor Law §240(1) to apply to falling worker cases (*Simione v City of New York*, 16 Misc 3d 1111, 847 NYS2d 899 [Sup Ct New York County 2007]; *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494 [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509 [1991]). However, in recently clarifying the statute’s scope, the Court of Appeals explained that “we think the dispositive inquiry framed by our cases does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker. Rather, the single decisive question is whether plaintiff’s injuries were the direct consequence of a *failure to provide adequate protection against a risk arising from a physically significant elevation differential*” (*Runner v New York Stock Exchange, Inc.*, --- NE2d ---, 2009 WL 4840213, 2009 NY Slip Op 09310 [2009] [emphasis added]). The Court continued: “[T]he governing rule is to be found in the language from *Ross* . . . where we elaborated more generally that ‘Labor Law §240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*’” (*id.*, quoting *Ross* at 501

[emphasis in original]).⁴

Further, “in cases involving ladders or scaffolds that collapse or malfunction, there is a presumption that the ladder or scaffolding device was not good enough to afford proper protection” (*Harrison v V.R.H. Const. Corp.*, 2009 WL 2137147, 3 [Sup Ct New York County 2009]; *Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, 289, n. 4 [2003]; *Aragon v 233 West 21st Street, Inc.*, 201 AD2d 353, 354 [1st Dept 1994]).

Finally, it does not matter whether the elevated platform on which a worker is positioned is technically classified as a “scaffold” (see *Becerra v City of New York*, 261 AD2d 188, 189 [1st Dept 1999] [“Although the unsecured plywood boards supporting plaintiff four stories above ground level are described by the parties as a floor, *they served, conceptually and functionally, as an elevated platform or scaffold*” (emphasis added)]).

Here, plaintiff demonstrates that Mr. Vasquez was exposed to an elevation-related risk contemplated by the statute. The eye-witness testimony of Mr. Budetti demonstrates that at the time of the accident, Mr. Vasquez was working on an elevator platform about two feet above the level of the seventh floor (Budetti EBT, p. 37). Mr. Vasquez was standing on sheetrock that he and Mr. Budetti cut to fit over the gap between the platform and the rear wall of the shaft (*id.* at 40-43). When the sheetrock broke and collapsed, Mr. Vasquez fell approximately 70 feet to the ground below (*id.* at 49-51).

The evidence in the record also demonstrates that defendants breached their duty to

⁴In *Runner*, a worker serving as a counterweight on a makeshift pulley was dragged into the pulley mechanism after a heavy object on the other side of the pulley rapidly descended a set of stairs, injuring the worker’s hand. Holding that Labor Law §240(1) applied to the worker’s injury, the Appeals Court explained that in falling object cases, whether the object has hit the worker is not dispositive; the “relevant inquiry . . . is rather whether the harm flows directly from the application of the force of gravity to the object” (*id.*).

provide or erect safety devices to protect Mr. Vasquez from such a gravity-related risk (*see Guillory v Nautilus Real Estate, Inc.*, 208 AD2d 336, 338 [1st Dept 1995] [holding that the “duty of providing a device to enable the plaintiff to work safely at an elevation, even a fairly small elevation, was on the owner and was not adequately met”]; *Gaffney v BFP 300 Madison II LLC.*, 2005 WL 2242442, 2 [Sup Ct New York County 2005] [holding that the plaintiff established a *prima facie* showing of a violation of a statutory duty that was the proximate cause of the accident by showing “the collapse of the scaffold without any apparent cause, spilling plaintiff and his co-worker to the roof below”]). It is undisputed that Mr. Vasquez was standing on the sheetrock covering the gap, when “without any apparent cause” the sheetrock broke and collapsed. It is further undisputed that Mr. Vasquez was not wearing any safety equipment other than gloves (Budetti EBT, pp. 46-47).

Finally, plaintiff demonstrates that defendants’ breach of their duty was a proximate cause of Mr. Vasquez’s fall. Mr. Budetti testified that when the sheetrock broke and collapsed, Mr. Vasquez fell approximately 70 feet to the ground below (Budetti EBT, at 49-51). Therefore, plaintiff has demonstrated a *prima facie* case that defendants violated Labor Law §240(1).

Defendants fail to demonstrate the existence of an issue of material fact defeating plaintiff’s motion. First, defendants’ arguments that the condition on the elevator platform was “open and obvious” and that Mr. Vasquez was the sole proximate cause of the accident lack merit. A “sole proximate cause” defense is applicable in Labor Law §240(1) actions only when the owner or contractor establishes that adequate safety devices are available at the job site, and “the worker either does not use or misuses them” (*Robinson v East Medical Center, LP*, 6 NY3d 550, 554 [2006]). “Hence, in determining whether there is a violation of Labor Law §240(1), or

whether a worker is the sole proximate cause of his injuries, the issue to be addressed first is whether adequate safety devices were provided, ‘furnished’ or ‘placed’ for the worker’s use on the work site” (*Cherry v Time Warner, Inc.*, 66 AD3d 233, 236 [1st Dept 2009]).

Defendants fail to demonstrate that Mr. Vasquez “had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured” (*Kosavick v Tishman Const. Corp. of New York*, 50 AD3d 287, 289 [1st Dept 2008], quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]). The record contains no evidence that safety devices were provided, furnished or placed for Mr. Vasquez at the work site. Further, defendants provide no evidence that Mr. Vasquez had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured. Thus, defendants fail to raise an issue of material fact on any of the sole proximate cause factors.

With regard to defendants’ arguments about Mr. Vasquez’s “decision” to “fashion” the sheetrock to cover the gap only to prevent the cinder block debris from falling down into the shaftway, the First Department case of *Collins v West 13th Street Owners Corp.* (63 AD3d 621 [1st Dept 2009]) is instructive. In *Collins*, the plaintiff was injured when he fell from a makeshift scaffold that he had constructed by resting one end of a piece of plywood on top of an A-frame ladder and resting the other end on top of a wall that was the same height as the ladder. In rejecting the defendants’ argument that plaintiff was the sole proximate cause of his injuries, the First Department held: “The motion court properly recognized that defendants’ argument,

that the onus is on plaintiff to construct an adequate safety device, using assorted materials on-site which are not themselves adequate safety devices but which may be used to construct a safety device, *improperly shifted to the worker the responsibility for creating a proper safety device*" (*id.* at 622) (emphasis added).⁵ Here, the Court similarly rejects defendants' improper attempt to shift the burden of furnishing a proper safety device to Mr. Vasquez.

Finally, defendants' arguments regarding foreseeability lack merit, as the caselaw they cite is not on point. The Courts make clear that, in Labor Law §240(1) cases, foreseeability is a factor only in determining whether an accident entails an elevation-related risk. In *Jones v 414 Equities LLC* (57 AD3d 65, 74 [1st Dept 2008]), the First Department engaged in a lengthy discussion about whether a worker's fall through a permanent floor that collapsed involved an elevation-related risk contemplated by Labor Law §240(1). After surveying the caselaw across the Appellate Divisions, the First Department clarified the foreseeability test in the context of Labor Law §240(1) claims:

Our conclusion that liability under section 240 (1) under these circumstances requires a showing that the collapse of the floor was foreseeable *does not effectively consign plaintiff to the remedies he would have in any event under general principles of negligence*. The issue of foreseeability in this context *is relevant only with respect to whether the plaintiff was exposed to an elevation-related risk, and only where the elevation-related risk was not apparent from the nature of the work such that the defendant would not normally be expected to provide the worker with a safety device to prevent the worker from falling*. (*Id.* at 79-80) (emphasis added)

⁵See also, *Spitzer v Atlantic Heydt Corp.*, 2006 WL 2021027, 3 [Sup Ct Kings County 2006] [holding that "despite defendants' arguments that the side panels *functioned merely to keep debris from falling* and to demarcate the edges of the scaffold, common sense indicates that a person should be able to lean on what appears to be a side wall" (emphasis added)].

Here, as discussed above, the evidence in the record clearly establishes that Mr. Vasquez was exposed to an elevation-related risk when he was caused to work at an elevation on sheetrock to perform his task on the seventh floor. The record further establishes that the elevation-related risk was apparent from the nature of Mr. Vasquez's work (see the OSHA Citation). Therefore, as defendants have failed to raise an issue of material fact defeating plaintiff's *prima facie* case, summary judgment on the issue of defendants' liability, pursuant to Labor Law §240(1), is granted in plaintiff's favor.

Labor Law §240(2)

Plaintiff also makes a *prima facie* case entitling her to summary judgment against defendants for violations of Labor Law §240(2), which provides:

Scaffolding or staging more than twenty feet from the ground or floor, swung or suspended from an overhead support or erected with stationary supports, except scaffolding wholly within the interior of a building and covering the entire floor space of any room therein, *shall have a safety rail of suitable material properly attached, bolted, braced or otherwise secured, rising at least thirty-four inches above the floor or main portions of such scaffolding or staging and extending along the entire length of the outside and the ends thereof, with only such openings as may be necessary for the delivery of materials.* Such scaffolding or staging shall be so fastened as to prevent it from swaying from the building or structure.
(Emphasis added)

New York Courts have found that a plaintiff is entitled to summary judgment on a Labor Law §240(2) claim where "there is uncontradicted evidence that the scaffolding was more than 20 feet off the ground and that no safety rail was present" (*Gaffney* at 3). Here, it is undisputed that Mr. Vasquez was working on an elevated platform approximately 70 feet above the ground that was not equipped with any guardrails to prevent him from falling. Therefore, plaintiff makes a *prima facie* case that defendants are liable under §240(2).

Defendants fail to raise an issue of material fact precluding summary judgment in plaintiff's favor. Defendants' argument that the elevated platform herein does not qualify as a "scaffold," pursuant to Labor Law §240(2), lacks merit. The Court of Appeals makes clear that the Legislature intended Labor Law §240 to be "construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 520-521 [1985]). Further, the First Department makes clear that "the Scaffold Law was designed to protect workers in construction projects against injury from the expected risks of inherently hazardous work posed by *elevation differentials at the work site. The use of the types of protective devices enumerated* therein is required to prevent injuries from either 'a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured'" (*Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 267 [1st Dept 2007], quoting *Rocovich* at 514). Accordingly, the Courts have construed an elevated platform to be a "scaffold" within the purview of the statute (*see e.g., Macedo v J.D. Posillico, Inc.*, 2009 WL 4672171, 1 [1st Dept 2009] ["It is undisputed that he was working on an elevated platform, attempting to lift a cone hanging from a rope, when he and a co-worker fell from the platform"]; *Becerra* at 189). The Scaffold Law also has been construed to apply to plywood boards seated on four cinder blocks (*Gettys v Port Authority of New York and New Jersey*, 248 AD2d 226 [1st Dept 1998]).

Here, defendants fail to demonstrate that the "moveable elevator platform" is not the type of device contemplated by the statute. While it is well settled that an "elevator" is not a safety device within the meaning of Labor Law §240 (*Kleinberg v City of New York*, 61 AD3d 436, 437

[1st Dept 2009]; *DiPilato v H. Park Cent. Hotel, L.L.C.*, 17 AD3d 191, 192 [1st Dept 2005]), the evidence in the record does not establish that the platform from which plaintiff fell was an elevator. In fact, Mr. McInnis and Mr. Budetti testified that there was no “working elevator system in place in September 2005,” just “a platform that would move up and down” (McInnis EBT, p. 57; Budetti EBT, p. 26). Further, the fact that the platform moved up and down is of no moment (*see e.g., Dominguez v Lafayette-Boynton Housing Corp.*, 240 AD2d 310, 310-311 [1st Dept 1997] [holding that a “motorized scaffold” with insufficient guardrails fell within the purview of Labor Law §240]). The dispositive issue is whether the “moveable elevator platform” was properly secured so as to prevent Mr. Vasquez from the risks of a gravity-related accident (*Rocovich* at 514). The Second Department case of *Dooley v Peerless Importers, Inc.* (42 AD3d 199 [2d Dept 2007]) is instructive in its reasoning. Holding that a worker’s fall from platform that floated on surface of creek fell within purview of Labor Law §240, the Court explained:

Manifestly, there was a differential between the level of the plaintiff’s work, and a lower level—the latter being the bottom of the creek. An elevated platform – in this case a floating platform instead of a scaffold – was necessary to enable the plaintiff to do his job precisely because gravity otherwise would have been a hindrance to his work, much as it would be, for example, in a situation where a worker has to perform work enumerated in Labor Law § 240(1) on a building with the help of a scaffold. In the scaffold situation, if a worker had no protective devices, such as a harness or a guardrail, and suffered injuries in a fall from a shifting scaffold, Labor Law § 240(1) clearly would offer the worker its protection. We see no reason why a different result should obtain here because the plaintiff, while working from a floating stage, was standing at or near the surface of a creek. A sufficient number of tie lines and/or a guardrail could have prevented this accident.
(*Id.* at 204).

Here, it is undisputed that the platform on which Mr. Vasquez was standing lacked protective devices in that it lacked guardrails. Therefore, as defendants have failed to raise an

issue of material fact defeating plaintiff's Labor Law §240(2) claim, summary judgment on the issue of defendants' liability is granted in plaintiff's favor.

Labor Law §241-a

Plaintiff also makes a *prima facie* case entitling her to summary judgment against defendants for violations of Labor Law §241-a, which provides that “[a]ny men working in or at elevator shaftways . . . of buildings in course of construction or demolition shall be protected by sound planking at least two inches thick laid across the opening at levels not more than two stories above and not more than one story below such men, or by other means.” According to the First Department, the statute “is meant to protect workers either from falling through the shaft for more than one story or from being hit from above by falling debris or other materials. It contemplates an open shaft, not a falling elevator, and its allowance of means of protection other than planking as may be specified by the board (see 12 NYCRR 23-2.5[b][5] [safety belts and harnesses]) does not suggest otherwise” (*Sharp v Scandic Wall Ltd. Partnership*, 306 AD2d 39, 39-40 [1st Dept 2003] [citations omitted]; *Seiger v Port of New York Authority*, 43 AD2d 339 [1st Dept 1974] [holding that where the planking on which a workman was kneeling broke, causing him to fall three stories below, the workman was entitled to judgment against owner and contractor on issue of liability]; *cf. Gorman v Grand Central Bldg., Inc.*, 29 AD2d 849, 849 [1st Dept 1968] [holding that where construction workers were working above the 30th floor, and the elevator shaftway at the 30th floor was covered by planking at least two inches thick, the construction company complied with the statute, and no recovery could be had for the death of a worker who fell from the 30th floor]).

Here, it is undisputed that Mr. Vasquez was working in an elevator shaftway at the work

site. Further, the record establishes that when the platform collapsed, Mr. Vasquez fell *through* the elevator shaft *seven stories* down to the *bottom* of the shaft. There was no “sound planking at least two inches laid across the opening [of the elevator shaft] . . . not more than one story below” Mr. Vasquez to prevent his fall, pursuant to Labor Law §241-a (*Sharp* at 39-40). As plaintiff demonstrates that the violation of Labor Law §241-a was a proximate cause of Mr. Vasquez’s accident, she makes a *prima facie* case entitling her to summary judgment.

Defendants fail to raise an issue of material fact defeating plaintiff’s *prima facie* case. Contrary to defendants’ argument, the shaftway indeed was “open,” as contemplated by the statute and caselaw (*Sharp*). The fact that Mr. Vasquez was “working near the 12- to 14-inch gap between the elevator platform and the shaftway back wall,” as defendants point out, does not speak to whether the shaftway was “open.” The record clearly establishes that no planking was present to prevent Mr. Vasquez’s fall through the elevator shaft seven stories below the platform where he was working. Accordingly, summary judgment on the issue of defendants’ liability, pursuant to Labor Law §241-a, is granted in plaintiff’s favor.

Labor Law §200

Labor Law §200 codifies the common-law duty imposed on an owner or general contractor to provide construction site workers with a safe work site (*Nevins v Essex Owners Corp.*, 276 AD2d 315 [1st Dept 2000], citing *Blessinger v Estee Lauder Companies, Inc.*, 271 AD2d 343 [2000]). In order to establish liability under 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]; *Maza v University Ave. Development Corp.*, 13 AD3d 65 [1st Dept 2004]

[holding that the “general contractor was correctly found liable under Labor Law §200 based on its employee’s deposition testimony that it had authority to direct the various trades to clean up and had also directed its own employees to always keep the site clean”). The plaintiff also must show that the defendant had actual or constructive notice of the alleged unsafe condition that caused the accident (*Dilena v The Irving Reisman Irrevocable Trust*, 263 AD2d 375 [1st Dept 1999]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]).

Here, plaintiff meets her burden by making a *prima facie* showing of entitlement to summary judgment against Wall Street. As discussed above, it is undisputed that Wall Street exercised direct supervision and control over the work site. It is further undisputed that, based on the eye-witness testimony of Mr. McInnis and Mr. Budetti, Wall Street had actual notice of the alleged unsafe condition. On the day of the accident, Mr. McInnis instructed Mr. Budetti to chop out a row of cinder blocks from the back wall of the elevator shaft on the seventh floor. Mr. Budetti testified that he enlisted the help of Mr. Vasquez, and they cut the sheetrock to cover the gap between the platform and the rear wall of the elevator shaft, and used sandbags to secure the sheetrock. Mr. Budetti was actually on the platform working beside Mr. Vasquez, when the sheetrock beneath Mr. Vasquez collapsed. Therefore, as the evidence in the record establishes that Wall Street had the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition, and had actual notice of said condition, plaintiff makes a *prima facie* case.

Defendants fail to raise an issue of material fact defeating plaintiff’s *prima facie* case. As discussed above, defendants fail to provide any evidence that Mr. Vasquez’s own negligence was the sole proximate cause of his accident. Therefore, as defendants’ arguments alleging Mr.

Vasquez's negligence lack merit, plaintiff's motion is granted as to Wall Street's liability on her Labor Law §200 claim.

Defendants' Cross-Motion

Defendants' cross-motion for summary judgment, dismissing plaintiff's Labor Law §240(1), 240(2) and 241-a claims is denied, because, as indicated above, defendants fail to provide any evidence that they are not liable on such claims as a matter of law. Thus, the Court will address defendants' remaining cross-motion for summary judgment, dismissing plaintiff's §241(6) claim.

Labor Law §241(6)

Labor Law §241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation or demolition (*Ross* at 501-502). However, the worker must allege and prove that the owner or contractor violated a rule or regulation of the Commissioner of the Department of Labor that sets forth a specific standard of conduct, as opposed to a general reiteration of the common law (*Ross* at 502-504). The violation of a specific standard of conduct, once proved, does not establish negligence as a matter of law, but rather is some evidence of negligence to be considered with other relevant proof (*Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982]). Finally, the "interpretation of an Industrial Code regulation and determination as to whether a particular condition is within the scope of the regulation present questions of law for the court" (*Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002]).

Here, defendants make a *prima facie* showing that seven of the nine Industrial Code

violations on which plaintiff relies – 12 NYCRR §§23-5.1(a)-(j), 23-2.5(a), 23-1.15, 23-1.16, 23-1.17, 23-1.7(d), and 23-1.7(e)(2) – cannot support her Labor Law §241(6) claim. In her opposition and reply, plaintiff does not contest the defendants’ arguments that these seven provisions are inapplicable. It is well settled that facts appearing in the movant’s papers that the opposing party does not controvert may be deemed to be admitted (*Arteaga v 231/249 W 39 Street Corp.*, 45 AD3d 320, 321 [1st Dept 2007], citing *Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 544 [1975]). Accordingly, plaintiff’s claim based on these seven provisions is dismissed.

However, defendants fail to make a *prima facie* case that 12 NYCRR §23-2.5(b) is inapplicable. Titled “Protection of Persons in Elevator Shafts,” §23-2.5(b)(1) provides in relevant part:

During the installation, repair or replacement of any elevator where persons are working in the elevator shaft, except for the stacking of elevator rails, a tight platform consisting of planks at least two inches thick full size, exterior grade plywood at least three-quarters inch thick or material of equivalent strength shall be installed not more than two stories or 30 feet, whichever is less, above the level at which any work is being performed so as to provide protection against falling objects or material. Such platform shall cover the entire cross-sectional area of the shaft except that spaces not exceeding 12 inches may be left for rail clearance between the edge of the platform and the sides of the shaft.
(Emphasis added)

Defendants argument that the statute does not apply because Mr. Vasquez was “modifying the existing elevator shaft” as opposed to being involved with the “the installation, repair or replacement” of an elevator lacks merit. Other than their conclusory assertion, defendants fail to provide any evidence that the work Mr. Vasquez was performing on the date of the accident is not covered by the Code provision. It is clear from the testimony of Mr. McInnis that Mr. Vasquez was involved with the “installation” of an elevator. Mr. McInnis states: “The platform

was installed as a process of *completing the elevator* and within the time frame of them *constructing* the elevator, if there was time available to move materials, then [elevator platform] was used” (McInnis EBT, p. 60) (emphasis added). Mr. McInnis further testified that the “newly constructed walls were made of cinder block” (*id.* at 73), and that Mr. Vasquez and Mr. Budetti were chopping out a row of cinder blocks “to be able to put in an additional piece of structural steel to ensure the integrity of the elevator shaft” (*id.* at 105-106). As the McInnis EBT demonstrates that Mr. Vasquez was involved in the “installation” of an elevator, defendants fail to demonstrate that 12 NYCRR §23-2.5(b) is inapplicable as a basis for plaintiff’s Labor Law §241(6) claim.

Further, defendants fail to challenge plaintiff’s reliance on 12 NYCRR §23-1.7(b)(1), titled “Protection from General Hazards.” Therefore, defendants fail to establish a *prima facie* case warranting them summary judgment, dismissing plaintiff’s Labor Law §241(6) claim. Accordingly, plaintiff’s Labor Law §241(6) claim survives, to the extent that plaintiff relies on 12 NYCRR §§23-2.5(b) and 23-1.7(b)(1).⁶

Hearing to Assess Damages

According to CPLR §3212(c), if the only issues of fact that exist in the case relate to damages rather than to liability, summary judgment will be granted on the liability question. If the plaintiff has prevailed, then the Court is required to direct an “immediate hearing” of the damages question (*Lloyd v Imperial Auto Collision, Inc.*, 120 AD2d 354, 355 [1st Dept 1986]).

⁶ Since plaintiff raises arguments for summary judgment on her Labor Law §241(6) claim for the first time in reply, and defendants have not been given an opportunity to address her arguments in any sur-reply, this Court does not reach the issue of whether summary judgment is warranted on plaintiff’s Labor Law §241(6) claim (*Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]; *Apartment Recycle Co. of Manhattan Inc.*, citing *Fiore v Oakwood Plaza Shopping Center, Inc.*, 164 AD2d 737, 739 [1st Dept], *affd*, 78 NY2d 572 [1991], *cert denied*, 506 US 823 [1992]).

Here, the Court finds defendants liable on plaintiff's Labor Law §240(1), 240(2) and 241-a claims, and Wall Street liable on plaintiff's Labor Law §200 claim. Accordingly, a hearing on damages on these claims is warranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the motion of plaintiff Luz Vasquez, as Administratrix of the Estate of David Vasquez, deceased, for an order, pursuant to CPLR §3212, holding defendants 21-23 South William Street, LLC and Wall Street Builders, LLC liable for violating Labor Law §240(1), 240(2) and 241-a is granted; and it is further

ORDERED that the branch of plaintiff's motion for an order, pursuant to CPLR §3212, holding defendant Wall Street Builders, LLC liable for violating Labor Law §200 is granted; and it is further

ORDERED that the branch of defendants' cross-motion, for an order, pursuant to CPLR §3212, dismissing plaintiff's Labor Law §§240(1), 240(2), and 241-a claims is denied; and it is further

ORDERED that the branch of defendants' cross-motion, for an order, pursuant to CPLR §3212, for summary judgment dismissing plaintiff's Labor Law §241(6) claim is granted as to plaintiff's reliance on 12 NYCRR §§23-5.1(a)-(j), 23-2.5(a), 23-1.15, 23-1.16, 23-1.17, 23-1.7(d), and 23-1.7(c)(2), and denied as to plaintiff's reliance on 12 NYCRR §§23-2.5(b) and 23-1.7(b)(1); and the portion of plaintiff's Labor Law §246(1) claim relying on 12 NYCRR §§23-5.1(a)-(j), 23-2.5(a), 23-1.15, 23-1.16, 23-1.17, 23-1.7(d), and 23-1.7(e)(2) is hereby severed and dismissed; and it is further

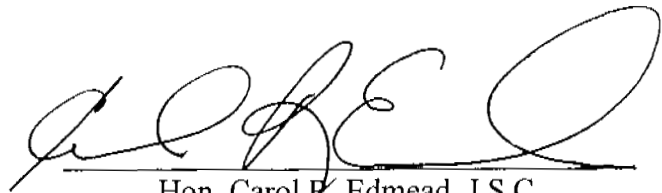
ORDERED that plaintiff serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office (Room 158), file of a note of issue and a statement of readiness and pay the proper fees, if any, by February 22, 2010 for a trial on damages on plaintiff's Labor Law §240(1), 240(2), 241-a and 200 claims; and it is further;

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

That constitutes the decision and order of the Court.

Dated: January 20, 2010



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

HON. CAROL EDMEAD

FILED
JAN 21 2010
NEW YORK
COUNTY CLERK'S OFFICE