

Argueta v Hamparian
2010 NY Slip Op 30425(U)
March 2, 2010
Supreme Court, Queens County
Docket Number: 30658/2008
Judge: Denis J. Butler
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IA Part 12
Justice

	x	Index
SALVADOR ENRIQUE MENDEZ ARGUETA		Number <u>30658</u> 2008
- against -		Motion
CHARLES HAMPARIAN, et al.		Dates <u>November 18,</u> 2009
	x	Motion
		Cal. Numbers <u>3</u>
		Motion Seq. Nos. <u>1</u>

The following papers numbered 1 to 30 read on this motion by defendant Michael Hamparian for an order granting summary judgment dismissing the complaint and all of the plaintiff's cross claims; and by defendant and third party plaintiff Michael's One Stop Service, Inc., for an order granting summary judgment on its claim for common law indemnification against third party defendant Inner City Concrete, and a conditional judgment of indemnification on its claim for contractual indemnification against Inner City Concrete. Inner City Concrete separately moves for an order dismissing the plaintiff's complaint, and awarding it costs and disbursements. Defendant Charles Hamparian cross moves for an order granting summary judgment dismissing the plaintiff's complaint and all cross claims. Defendants Michael's One Stop Service, Inc., and Michael Hamparian cross-move for an order granting summary judgment dismissing the plaintiff's complaint.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Affidavit-Exhibits.....	1-5
Opposing Affirmation-Exhibit(A).....	6-8
Opposing Affirmation-Exhibit(A).....	9-11
Reply Affirmation.....	12-13
Notice of Motion-Affirmation-Exhibits(A-K).....	14-17
Notice of Cross Motion-Affirmation-Exhibit(A).....	18-21
Opposing Affirmation-Exhibits(A-B).....	22-24

Notice of Cross Motion-Affirmation.....	26-27
Reply Affirmation.....	28
Reply Affirmation.....	29
Reply Affirmation.....	30

Upon the foregoing papers these motions are consolidated for the purposes of a single decision and are determined as follows:

Plaintiff Salvador Enrique Mendez Argueta alleges that he sustained personal injuries during the course of his employment on November 19, 2007, at a job site located at 125-01 Merrick Boulevard, Jamaica, New York. The subject premises are owned by defendant Charles Hamparian and are leased to defendant Michael's One Stop Service, Inc., (Michael's) pursuant to a written lease dated April 1, 2006. Defendant Michael Hamparian is the son of Charles Hamparian, and the president of Michael's. Michael's operates an automobile service shop at said premises, and it entered into written contract, dated October 25, 2007, with the third party defendant Inner City Concrete for the removal and replacement of a masonry wall at the subject premises.

Plaintiff initially commenced this action against Charles Hamparian, Michael Hamparian and Inner City Concrete and asserted claims for common law negligence and violations of Labor Law §§ 200, 240 and 241(1). These defendants' served an answer and interposed affirmative defenses. Plaintiff's claim against Inner City Concrete was discontinued pursuant to a stipulation executed and dated June 4, 2008 and filed with the court on September 18, 2008.

Plaintiff thereafter served a supplemental summons and amended complaint against Charles Hamparian, Michael Hamparian and Michael's One Stop Service Inc., and alleges in the first cause of action against Charles Hamparian a claim for common law negligence and violations of Labor Law §§ 200, 240 and 241(1); the second cause of action against Michael Hamparian alleges a claim for common law negligence and violations of Labor Law §§ 200, 240 and 241(1); and the third cause of action against Michael's alleges a claim for common law negligence and violations of Labor Law §§ 200, 240 and 241(1). The supplemental bill of particulars alleges violations of 12NYCRR §§ 23-1.5, 23-1.7(a)(2), 23-1.17, 23-1.18, 23-1.19, 23-1.24, 23-1.32, 23-1.33, 23-1.33(a),(b), 23-2.1, 23-2.2, 23-3.1, 23-3.2(c), 23-3.3, 23-3.3(c)(d)(e)(f)(g), and 23-3.4(b) and(c).

Michael's served an answer to the amended complaint and interposed four affirmative defenses and a cross claim against Charles Hamparian for common law and contractual indemnification, common law contribution, and breach of contract based upon a failure to procure insurance. Charles Hamparian served an answer to the amended complaint and

interposed six affirmative defenses and two cross claims against Michael Hamparian and three cross claims against Michael's.

Charles Hamparian served an answer and interposed six affirmative defenses and cross claims against Michael Hamparian for common law indemnification and contribution, and cross claims against Michael's for common law indemnification and contribution, and contractual indemnification.

Michael's commenced a third party action against Inner City Concrete for common law indemnification and contribution, and contractual indemnification. Inner City Concrete served an answer and interposed seven affirmative defenses and a counter claim against Charles Hamparian, Michael Hamparian and Michael's.

Mr. Argueta, an employee of the third party defendant Inner City Concrete, was working at the job site for the first time on the day of the accident. He testified that just prior to the accident he had been instructed by a Carlos, an assistant supervisor or foreman, to assist another employee Mario, who was building a new wall. He stated that there were cement blocks on a pallet on the ground outside the building and that he would place a block on his shoulder and go up a ladder to a platform on the second story where Mario was constructing the wall. He stated that after he got off the ladder he walked ten or twelve feet with the cement block where he stacked them on the new floor, near the area where the wall was being built. He stated he did this about 20 times prior to the accident, and that another worker had started to assist him in moving the blocks as well. He stated that Mario, Carlos and the "guy who hit the wall", who also worked for Inner City Concrete, were on the second floor at the time of the accident. He stated that there was a portion of the old rear wall measuring eighteen feet wide and four feet high that was still in place; that he had dropped off a concrete block and was walking towards the ladder, and was underneath the old wall with his body bent in order to pass it, when he heard a noise "like a hit from a big hammer", turned his head and half the wall fell onto him. He stated that the wall fell down onto him when David hit the wall with a hammer. He stated that after the accident the owner Mike instructed the other workers not to call 911 for an ambulance and that Mike drove him to the emergency room of Jamaica Hospital with two of his co-workers.

Mr. Argueta stated that he supplied his own hammer, and that his employer supplied him with a crow bar; that the ladder he used was in place when he arrived at that portion of the work site; that he did not speak with anyone from the auto service shop prior to his accident; and that his co-workers told him what work to perform, but did not give any instruction as to how to perform the work.

James Feres testified at his deposition that he was a manager/ director employed by Inner City Concrete and that he executed the contract between Inner City Concrete and Michael's to perform the renovation work at Michael's. He stated that Inner City Concrete's business address is the same as Charles Hamparian's private residence, but that Charles Hamparian does not have an ownership interest in, nor is an employee of, Inner City Concrete. He stated that Inner City Concrete's president is Maral Acocella. He further stated that Inner City Concrete did not subcontract the work to any other person or entity; that the materials used for this job were purchased by an employee of Inner City; and that there was a separate contractor who removed the glass from the building. He stated that Victor Perierra was a foreman or perhaps a vice president of Inner City Concrete; that the laborers at the site were David Acocella, Juan Hernandez, Mario Perez and the plaintiff; that he was not aware of a Carlos working on the job; that the men were supervised by Victor who also supplied them with the tools necessary to perform the job; that Michael's did not supply said tools; that Michael's did not supervise the face lifting process or actual creation of the partition wall; that he did not witness the accident, but heard a crash and heard the plaintiff asking for help in Spanish. He stated that Inner City Concrete did not conduct a safety meeting on the day of plaintiff's accident, but that the plaintiff was provided with a hardhat.

Charles Hamparian testified at his deposition that he is the owner of the subject improved real property, and that Michael's has been his tenant since 1989. He stated that Michael's is owned by his son Michael Hamparian.

Although Michael's was deposed, the deposition transcript was not available at the time the motion was made, and therefore Michael Hamparian has submitted an affidavit in which he states he is the president and proprietor of Michael's; that Michael's was the tenant in possession of the subject premises on November 19, 2007; that Michael's had entered a written contract with Inner City Concrete dated October 25, 2007 to perform the renovation work to the subject building; that Michael's did not provide any laborers, supervisors, foremen, architects or inspectors for this job; that it was contemplated pursuant to the contract that Inner City Concrete would provide all labor, supervision and direction for the work to be performed; that Michael's did not provide any tools or materials for the work; that Inner City Concrete provided all of the tools and materials necessary for the completion of the job; that Michael's did not in any manner supervise or control the manner in which Inner City Concrete's employees performed their work and that said employees were directly supervised by Inner City Concrete. He further states that neither Michael's or its employees conducted any safety meetings or oversight of the work performed at the subject premises.

In order to establish liability for common-law negligence or a violation of Labor Law § 200, the plaintiff must establish that the defendant in issue had "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe

condition” (*Russin v Picciano & Son*, 54 NY2d 311, 317 [1981]; *see Rizzuto v Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Singleton v Citnalta Constr. Corp.*, 291 AD2d 393, 394 [2002]), or had actual or constructive notice of the defective condition causing the accident (*see LaRose v Resinick Eighth Ave. Assoc., LLC*, 26 AD3d 470 [2006]; *Gatto v Turano*, 6 AD3d 390, 391 [2004]; *Abayev v Jaypson Jewelry Manufacturing Corp.*, 2 AD3d 548 [2003]; *Duncan v Perry*, 307 AD2d 249 [2003]; *Giambalvo v Chemical Bank*, 260 AD2d 432 [1999]; *Cuartas v Kourkoumelis*, 265 AD2d 293 [1999]; *Sprague v Peckham Materials Corp.*, 240 AD2d 392 [1997]). “General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common-law negligence and under Labor Law 200” (*Dos Santos v STV Engrs., Inc.*, 8 AD3d 223, 224 [2004], *lv denied* 4 NY3d 702 [2004]). Further, the authority to review safety at the site is insufficient if there is no evidence that the defendant actually controlled the manner in which the work was performed (*see Loiacono v Lehrer McGovern Bovis*, 270 AD2d 464, 465 [2000]). “‘Where the alleged dangerous condition arises from the contractor’s methods and the owner exercises no supervisory control over the operation, no liability attaches’ (*Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709)” (*Rosenberg v Eternal Mems.*, 291 AD2d 391, 391-392 [2002]; *see also Perri v Gilbert Johnson Enterprises*, 14 AD3d 681 [2005]; *Toefer v Long Is. R.R.*, 308 AD2d 579, 581 [2003], *affd* 4 NY3d 399 [2005]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]).

Labor Law § 240(1) creates a duty that is nondelegable and an owner or general contractor who breaches that duty may be held liable in damages regardless of whether either had actually exercised supervision or control over the work (*see Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494 [1993]). The “exceptional protection” provided for workers by § 240(1) is aimed at “special hazards” and is limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (*see Ross v Curtis-Palmer Hydro-Electric Co.*, *supra* at 501; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513 [1985]). The legislative purpose behind Section 240(1) is to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs on the owner and general contractor instead of on workers who are “scarcely in a position to protect themselves from accident” (*see Rocovich v Consolidated Edison*, *supra* at 501). Although the “special hazards” contemplated “do not encompass any and all perils that may be connected in some tangential way with the effects of gravity” (*see Ross v Curtis-Palmer Hydro-Electric Co.*, *supra*; *Rodriguez v Tietz Center for Nursing Care*, 84 NY2d 841 [1994]), the statute’s purpose of protecting workers “is to be liberally construed” (*Ross v Curtis-Palmer Hydro-Electric Co.*, *supra* at 500). In order to prevail upon a claim pursuant to Labor Law § 240(1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his or her injuries (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 553-555 [2006]; *Weininger v Hagedorn & Co.*,

91 NY2d 958, 960, 695 [1998]; *see also Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35 [2004]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 [2003]; *Marin v Levin Props., LP*, 28 AD3d 525 [2006]).

Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]). In order to establish his Labor Law § 241(6) claim, plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code regulation that is applicable given the circumstances of the accident, and which sets forth a concrete or “specific” standard of conduct, rather than a provision which merely incorporates common law standards of care (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 503-505; *Ares v State*, 80 NY2d 959, 960 [1992]; *Fair v 431 Fifth Avenue Assocs.*, 249 AD2d 262, 263 [1998]; *Vernieri v Empire Realty Co.*, 219 AD2d 593, 597 [1995]; *Adams v Glass Fab, Inc.*, 212 AD2d 972, 973 [1995]). Plaintiff must also present some factual basis from which a court may conclude that the regulation was in fact violated (*Herman v St. John’s Episcopal Hospital*, 242 AD2d 316, 317 [1997]; *Creamer v Amsterdam H.S.*, 241 AD2d 589, 591 [1997]).

Defendant Michael Hamperian’s motion for an order granting summary judgment dismissing the complaint and all of the plaintiff’s cross claims:

Defendant Michael Hamperian has met his burden of establishing that he neither directed nor controlled the method or manner in which the plaintiff conducted his work, (*see Amaxes v Newmark & Co. Real Estate*, 15 AD3d 321 [2005]), and neither created nor had actual or constructive notice of a defective condition (*see Beltrone v City of New York*, 299 AD2d 306 [2002]). In addition, Michael Hamperian is not an owner of the subject premises, nor a contractor, or an agent of the owner or contractor. Plaintiff thus concedes that it cannot maintain an action against Michael Hamperian, as he cannot satisfy the requisite elements to sustain causes of action based on Labor Law §§ 200, 240 and 241, or common-law negligence. Therefore, that branch of defendant Michael Hamperian’s motion which seeks to dismiss plaintiff’s complaint and plaintiff’s cross claims against him is granted.

Defendant and third party plaintiff Michael’s One Stop Service, Inc., request for an order granting summary judgment on its claim common law indemnification against third party defendant Inner City Concrete, and a conditional judgment of indemnification on its claim for contractual indemnification against Inner City Concrete:

It is undisputed that plaintiff was employed by Inner City Concrete on the date of the accident. Section 11 of the Worker's Compensation Law provides, in pertinent part, that:

“An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a “grave injury” which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.”

Here, as third party plaintiff Michael's has failed to establish through competent medical evidence that plaintiff sustained a grave injury, its request for summary judgment on its claim for common law indemnification against third party defendant Inner City Concrete, is denied.

As regards Michael's claim for contractual indemnification, the written contract dated October 25, 2007, contains a “Subcontractor indemnity” which provides that:

“this subcontractor to the Owner, Contractor, Architect, Architect's Consultants, agents and employee's of any of them from and against claims, damages, losses and expenses arising out of out of or resulting from the Subcontractor's work under this letter of intent and/ or Subcontract, Provided that any such claim, damage, loss or expense is attributable to economic loss, bodily injury, sickness, disease, or death, or injury to or destruction of tangible property (other than the work itself) but only to the extent caused by the negligent acts or omissions of the subcontractor, the subcontractor's Sub-contractors, anyone directly employed by them or anyone for whose acts they may be liable, regardless or whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.”

The contract identifies Inner City Concrete as the contractor, and Michael's as the client, and does not contain a general contractor's indemnification clause. It is undisputed that the work was performed by Inner City Concrete's employees and there is no evidence that any work was performed by a subcontractor. Since Inner City Concrete was not a subcontractor, the indemnification clause is inapplicable here. Therefore, Michael's request for a conditional judgment of indemnification on its claim for contractual indemnification against Inner City Concrete, is denied.

Third party defendant Inner City Concrete Corp.’s separate motion for an order dismissing the plaintiff’s complaint, and awarding it costs and disbursements; Defendant Charles Hamparian cross motion for an order granting summary judgment dismissing the plaintiff’s complaint and all cross claims; Defendants Michael’s One Stop Service, Inc., and Michael Hamparian’s cross motion for an order granting summary judgment dismissing the plaintiff’s complaint:

Plaintiff discontinued his action against Inner City Concrete Corp., pursuant to a stipulation dated June 4, 2008, which was filed with the County Clerk on September 18, 2008. Although the stipulation was filed more than 20 days after the discontinuance, the failure to comply with 22 NYCRR 202.28 is a mere irregularity here, as the stipulation was accepted by the County Clerk and the filing fee was paid.

To the extent that third party defendant Inner City Concrete and Michael Hamparian, both seek dismissal of plaintiff’s claims against Michael Hamparian, these requests are identical to the relief previously granted to Michael Hamparian and therefore are denied as moot.

To the extent that defendant Inner City Concrete seeks dismissal of the plaintiff’s complaint on behalf of defendants’ Charles Hamparian, and Michael’s, and as these defendants have each cross moved for identical relief, these requests are determined as follows:

Defendant Charles Hamparian is an out of possession landlord, and Michael’s is the tenant who contracted to have the work performed. Under the provisions of the Labor Law, the term “owner” is not limited to the titleholder of the property where the accident occurred and encompasses a person “who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit” (*Copertino v Ward*, 100 AD2d 565, 566,[1984]; *see also Scaparo v Village of Ilion* 2009 NY Slip Op 8857, 2009 N.Y. LEXIS 4142 [Dec. 1, 2009]); *Reisch v Amadori Constr. Co.*, 273 AD2d 855, 856, 26 [2000]).

As regards the common law negligence and Labor Law § 200 claim, Charles Hamparian and Michael’s have each met their burden of establishing that they neither directed nor controlled the method or manner in which the plaintiff conducted his work,(*see Amaxes v Newmark & Co. Real Estate*, 15 AD3d 321 [2005]), and that they neither created nor had actual or constructive notice of a defective condition which existed on the subject property (*see Beltrone v City of New York*, 299 AD2d 306 [2002]). Plaintiffs, thus, cannot satisfy the requisite elements to sustain causes of action based on Labor Law § 200 or common-law negligence against these defendants (*see Lombardi v Stout*, 80 NY2d 290 [1992]; *Fumo v NAB Constr. Corp.*, 19 AD3d 436 [2005]; *Sattar v Natural Stone Indus.*, 19 AD3d 681

[2005]; *Loreto v 376 St. Johns Condominium, Inc.*, 15 AD3d 454 [2005]; *Gatto v Turano* 6 AD3d 390 [2004]). Therefore, those branches of the Inner City Concrete's motion and the cross motions which seek an order granting summary judgment dismissing plaintiffs' claims against Charles Hamparian and Michael's for common law negligence and a violation of Labor Law § 200, are granted.

With respect to plaintiff's Labor Law § 240 claim, plaintiff alleges that he was working on the second level of the building, that he was walking on the floor, and had to duck under the remaining portion of the old wall in order to pass it, when a co-worker struck a portion of the old wall with a sledge hammer, causing portions of the wall to fall onto him. This portion of the old wall was some four feet above the plaintiff and attached to the ceiling. Plaintiff was not working at an elevation so as to require a protective device enumerated in Labor Law § 240(1) (*cf. Greaves v Obayashi Corp.*, 55 AD3D 409, [2008], *lv dismissed* 12 NY3d 794, [2009]), and the collapse of a wall is not "the type of elevation-related accident that section 240(1) is intended to guard against" (*Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 491, [1995]; *Kaminski v 53rd St. & Madison Tower Dev., LLC*, 2010 NY Slip Op 1532, 1 [N.Y. App. Div. 1st Dep't Feb. 23, 2010]. Unlike cases where an object has been inadequately installed, hoisted, braced, or secured, the old wall was in the process of being demolished, and thus cannot be considered a falling object within the protection of Labor Law § 240 (*see Perillo v Lehigh Construction*, 17 Ad3d 1136 [2005]). Therefore, those branches of Inner City Concrete's motion, Charles Hamparian's cross motion, and Michael's cross motion which seek to dismiss plaintiff's claims against Charles Hamparian and Michael's for a violation of Labor Law § 240, are granted.

To recover under Labor Law § 241(6), a plaintiff must establish the violation of an Industrial Code provision, which sets forth specific, applicable safety standards, in connection with construction, demolition, or excavation work (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502-505, [1993]).

The bill of particulars alleges violations of 12NYCRR §§ 23-1.5, 23-1.7(a)(2), 23-1.32, 23-1.33, 23-1.33(a),(b), 23-3.1, 23-3.2(c), 23-3.3, 23-3.3(c)(d)(e)(f)(g), and 23-3.4(b) and(c).

Section 23-1.5 merely sets forth general safety standards, which is an insufficient predicate for liability under Labor Law § 241(6) (*see Gasques v State of New York*, 59 AD3d 666 [2009]; *Maday v Gabe's Contr., LLC*, 20 AD3d 513, [2005]; *Sparkes v Berger*, 11 AD3d 601, [2004]; *Madir v 21-23 Maiden Lane Realty, LLC*, 9 AD3d 450, [2004]).

Section 23-1.7(a)(2), is inapplicable here as plaintiff alleges that he was required to work or pass in an area exposed to falling material or objects.

Section 23-1.17 which governs life nets is inapplicable here as plaintiff was not provided with this safety device.

Sections 23-1.18 and 23-1.19 which govern sidewalk sheds and barricades and catch platforms are inapplicable here, as there has been no showing that such items were required to perform the work within the subject building.

Section 23-1.24 pertains to work on roofs and therefore is inapplicable as there is no evidence that the accident arose out of work performed on a roof.

Section 23-1.32 is inapplicable here, as there is no evidence that either Charles Hamparian or Michael's ever received written notice of an Industrial Code violation (*Mancini v Pedra Constr.*, 293 AD2d 453, 454 [2002]).

Section 23-1.33 is inapplicable here, as the plaintiff was working at, and not passing by, the construction site.

Section 23-2.1 which governs the storage of materials and supplies, and the disposal of debris, is inapplicable as plaintiff's accident was not caused by improperly stored materials or supplies, or the failure to dispose of debris.

Section 23-2.2 which governs concrete work is inapplicable as plaintiff's accident did not arise out of such work.

Section 23-3.1, provides that "[a]ny method of demolition of any building or other structure not named or described in this Subpart shall not be used unless granted a special approval." Plaintiff has not established that the subject demolition work required special approval.

Section 23-3.2 sets forth general requirements and subdivision (c) provides "demolition sites shall be fenced, barricaded or provided with sidewalk sheds in compliance with this Part (rule)". This subdivision provides protection for those outside of such work sites and thus is inapplicable here.

Section 23-3.4(b) and (c) pertains to mechanical methods of demolition, and therefore are inapplicable here, as there is no evidence that the demolition was accomplished by mechanical means.

However, plaintiff has presented a factual issue on the Labor Law 241(6) claim against the owner and tenant, predicated upon a violation Sections 23-3.3 (c), which requires

inspection during hand demolition operations, as plaintiff's accident is alleged to have resulted "from...loosened material", as well as violations of sections 23-3.3(d),(e),(f) and (g), as it is alleged that the wall was demolished while plaintiff was working in the same area without providing proper protection of the work site, proper disposal of the debris, proper access to the work site, and proper protection in the area where the demolition took place. Therefore, plaintiff's Labor Law § 241(6) cause of action is dismissed only to the extent that it is predicated on a violation of Industrial Code provisions 12 NYCRR 23-1.5, 23-1.7(a)(2), 23-1.32, 23-1.33, 23-1.33(a)(b), 23-3.1, 23-3.2(c), and 23-3.4(b)(c).

Defendant Inner City Concrete's request for costs and disbursements is denied.

Dated: March 2, 2010

J.S.C.