

Montanez v Jeffrey M. Brown Assoc., Inc.

2010 NY Slip Op 31816(U)

July 10, 2010

Sup Ct, Suffolk County

Docket Number: 06-10504

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY



PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 1-12-10 (#002)
MOTION DATE 1-19-10 (#003)
MOTION DATE 1-13-10 (#004)
MOTION DATE 3-23-10 (#005)
MOTION DATE 2-23-10 (#006)
MOTION DATE 4-20-10 (#007)
MOTION DATE 4-23-10 (#008 & #009)
ADJ. DATE 5-7-10
Mot. Seq. # 002 - MD #003 - MotD
004 - MD #005 - MD
006 - MD #007 - MotD
008 - XMotD #009 - XMotD

-----X
RAUL MONTANEZ, :
 :
 : Plaintiff, :
 :
 : - against - :
 :
 : JEFFREY M. BROWN ASSOCIATES, INC., :
 : GMH MILITARY HOUSING-NAVY :
 : NORTHEAST, LLC, GMH MILITARY HOUSING :
 : MANAGEMENT LLC, GMH NORTHEAST :
 : HOUSING DESIGN/BUILD LLC., NORTHEAST :
 : HOUSING LLC, ALL SYSTEMS :
 : MAINTENANCE, INC., CENTEX :
 : CONSTRUCTION LLC, LEVIEN-RICH :
 : ASSOCIATES, INC., BALFOUR BEATTY :
 : CONSTRUCTION, ALL SYSTEMS PLUMBING :
 : & HEATING CORPORATION, CENTEX :
 : CONTRACTING CORP., and THE BENHAM :
 : COMPANIES, LLC, :
 : Defendant. :

SILBERSTEIN, AWAD & MIKLOS, P.C.
Attorneys for Plaintiff
600 Old Country Road
Garden City, New York 11530

FUREY, KERLEY, WALSH, MATERA, et al.
Attorneys for Defendant Jeffrey M. Brown Assoc.
2174 Jackson Avenue
Seaford, New York 11783

GOLDBERG SEGALLA, LLP
Attorneys for Defendants GMH Military Housing-
Navy Northeast, LLC, GMH Military Housing
Management LLC, GMH Northeast Housing Design
Build LLC. Northeast Housing LLC, Centex
Construction LLC and Balfour Beatty Construction
200 Old Country Road, Suite 210
Mineola, New York 11501

-----X
JEFFREY M. BROWN ASSOCIATES, INC., :
 :
 : Third-Party Plaintiff, :
 : - against - :
 :
 : WYNNE MANAGEMENT, INC., :
 :
 : Third-Party Defendant. :
-----X

LOCCISANO & LARKIN
Attorneys for Defendant All Systems Maintenance
150 Motor Parkway, Suite 405
Hauppauge, New York 11788-5108

MILBER MAKRIS & PLOUSADIS, ESQS.
Attorneys for Defendant Levien-Rich Associates
1000 Woodbury Road, Suite 402
Woodbury, New York 11797

Upon the following papers numbered 1 to 151 read on this motion and cross motions by Notice of Motion/Order to Show Cause and supporting papers (002) 1 - 11 ; Notice of Cross Motion and supporting papers (003) 12-19; (004) 20- 34; (005) 35-55; (006) 56-75; (007) 76-91; (008) 92-97; (009) 98-108 ; Answering Affidavits and supporting papers 109-111; 112-115; 116-120; 121-125; 126-133; 134-137; Replying Affidavits and supporting papers 138-141; 144-147; 148-149; 150-151 ; Other Pltff's Mem/Law 142-143 ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion (002) by the defendant/third-party plaintiff Jeffrey M. Brown Associates, Inc., pursuant to CPLR 3215 for an order granting default judgment against the third-party defendant Wayne Management, Inc. has been rendered academic by withdrawal of the motion by the moving party and is hereby denied as moot; and it is further

ORDERED that this cross-motion (003) by the defendants GMH Military Housing-Navy Northeast, LLC, GMH Military Housing Management, GMH Northeast Housing Design/Build, LLC, Northeast Housing LLC, Centex Construction, LLC, and Balfour Beatty Const. for an order pursuant to 22 NYCRR §202.21(e) vacating the Note of Issue and Certificate of Readiness is denied, and for an order pursuant to 22 NYCRR 202.25(a) denying plaintiff's application for a special preference has been rendered academic by denial of motion (006) and is hereby denied as moot; and it is further

ORDERED that this cross-motion (004) by the defendant/third-party plaintiff Jeffrey M. Brown Associates, Inc., for an order pursuant to CPLR Article 34 denying a special trial preference to the plaintiff Raul Montanez has been rendered academic by denial of motion (006) and is hereby denied as moot; and it is further

ORDERED that this cross-motion (005) by the plaintiff Raul Montanez pursuant to CPLR 3212 for an order granting summary judgment against Jeffrey M. Brown Associates, Inc., GMH Military Housing-Navy Northeast, LLC, GMH Military Housing Management, GMH Northeast Housing Design/Build, LLC, Northeast Housing LLC on the basis each or all failed to comply with the applicable Industrial Code Regulations 23-1.7(b) and/or 23-1.7(e)(1) and/or 23-1.7(e)(2) is hereby denied ; and it is further

ORDERED that this cross-motion (006) by the plaintiff Raul Montanez pursuant to CPLR 3403(a)(3) granting him a trial preference in the interests of justice is hereby denied; and it is further

ORDERED that this cross-motion (007) by the defendant/third-party plaintiff Jeffrey M. Brown Associates, Inc. pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint and cross-claims and counterclaims asserted against it is hereby granted only to the extent that the cause of action which is premised upon the alleged violation of Labor Law section 240(1) is dismissed as a matter of law with prejudice, and the remainder of the cross-motion is hereby denied; and it is further

ORDERED that this cross-motion (008) by the defendants GMH Military Housing-Navy Northeast, LLC, GMH Military Housing Management, GMH Northeast Housing Design/Build, LLC, Northeast Housing LLC, Centex Construction, LLC, and Balfour Beatty Const. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and any and all cross-claims asserted against them is hereby granted only to the extent that the cause of action which is premised upon the alleged violation of Labor Law 240(1) is granted and is dismissed as a matter of law with prejudice, and the remainder of the cross-motion is hereby denied; and it is further

ORDERED that this cross-motion (009) by the defendant All Systems Maintenance, Inc. pursuant to CPLR 3212 for summary judgment dismissing the complaint and any and all cross-claims asserted against it is hereby granted as to the cause of action premised upon the alleged violation of Labor Law section 240(1) which is dismissed as a matter of law with prejudice and the remainder of the cross-motion is hereby denied.

The action commenced under Index No. 06-10504 was filed by Raul Montanez against Jeffrey M. Brown Associates, Inc. (Brown). By order dated November 21, 2008 (Mayer, J.), that action was consolidated with the action commenced by under Index No. 07-31577 by Raul Montanez against the remaining defendants. The complaints assert causes of action for common law negligence and violation of Labor Law §§200, 240, 241(6) and the Industrial Code of the State of New York 12 NYCRR §23-1.7(b)(1) et seq. This action arises out of an incident which occurred on August 1, 2005 wherein the plaintiff Raul Montanez sustained injuries while working on a construction worksite and was caused to fall as a result of an open, loose and/or unsecure manhole cover and for which injuries the plaintiff seeks monetary damages. The defendant/third-party plaintiff Jeffrey M. Brown Associates, Inc. impleaded Wynne Management, the plaintiff's employer on the date of the accident, by commencing a third-party action under Index No. 06-10504 for common law indemnification, contractual indemnification, breach of agreement, and judgment over against the third-party defendant.

VACATE NOTE OF ISSUE

In cross-motion (003), the defendants GMH Military Housing-Navy Northeast, LLC, GMH Military Housing Management, GMH Northeast Housing Design/Build, LLC, Northeast Housing LLC, Centex Construction, LLC, and Balfour Beatty Const. seek an order pursuant to 22 NYCRR §202.21(e) vacating the Note of Issue and Certificate of Readiness.

Pursuant to 22 NYCRR §202.21(e) a motion to vacate the note of issue for lack of readiness must be filed within twenty days of the note being filed (*Schroeder v IESI NY Corporation*, 24 AD3d 180, 805 NYS2d 79 [1st Dept 2005]). The instant motion was served by the defendants on December 18, 2009. The Note of Issue and Certificate of Readiness were filed with this Court on December 3, 2009. Accordingly, defendants' motion to vacate the Note of Issue is timely in that it has been brought within twenty days of the filing of the Note of Issue. When a party moves to vacate the note of issue within twenty days following service of the same, 22 NYCRR 202.21(e) provides that the court may grant vacatur upon a showing that the case is not ready for trial and a material fact in the certificate of readiness is incorrect (*Weiss et al v Finkelstein, M.D. et al*, 2006 NY Slip Op 51502U, 12 Misc 3d 1189A, 824 NYS2d 767, 2006 NY Misc Lexis 2085 [Supreme Court of New York, Nassau County]).

Counsel for the defendants argues that by orders dated September 22, 2009 and November 24, 2009, the plaintiff was ordered to produce several authorizations and W-2's/1040's for two years prior to the alleged incident by December 24, 2009, and that this discovery is outstanding. However, in reviewing the order dated September 22, 2009, the defendants did not set forth the health care providers for whom they sought authorizations and do not set forth the names of those providers in the supporting affirmation. Pursuant to the order dated November 24, 2009, the plaintiff was to provide authorizations for Dr. Harold Avella, Dr. Robert McCord, Dr. Diane Peterman and Dr. Eiser, as well as W2's and/or 1040's for two years prior to the incident by December 24, 2009. By way of the Response to the Demand for Authorizations, the plaintiff has demonstrated that authorizations dated April 30, 2009 have been provided for the requested items. By way of a letter dated December 23, 2009, the plaintiff provided authorizations permitting the defendants to obtain copies of plaintiff's W2's/1040's for the years 2003, 2004 and 2005. Therefore, the defendants' baseless claim that the plaintiff has not supplied the aforementioned authorizations is belied by the evidentiary submissions. No basis to vacate the Note of Issue has been demonstrated.

Based upon the foregoing, it is determined that there is no basis for the Note of Issue and Certificate of

Readiness to be vacated in that there is no showing that a material fact in the Certificate of Readiness is incorrect as it has been demonstrated that the outstanding discovery has been previously provided to the defendants.

Accordingly, that part of motion (003) wherein the defendants GMH Military Housing-Navy Northeast, LLC, GMH Military Housing Management, GMH Northeast Housing Design/Build, LLC, Northeast Housing LLC, Centex Construction, LLC, and Balfour Beatty Const. seek an order pursuant to 22 NYCRR §202.21(e) vacating the Note of Issue and Certificate of Readiness is denied.

TRIAL PREFERENCE

In cross-motion (006) by the plaintiff Raul Montanez seeks an order pursuant to CPLR 3403(a)(3) granting him a trial preference in the interests of justice. In motion (003) the defendants GMH Military Housing-Navy Northeast, LLC, GMH Military Housing Management, GMH Northeast Housing Design/Build, LLC, Northeast Housing LLC, Centex Construction, LLC, and Balfour Beatty Const. seek an order, in part, pursuant to CPLR 202.25(a) denying the plaintiff's application for a special preference. In cross-motion (004), the defendant/third-party plaintiff Jeffrey M. Brown Associates, Inc., seeks an order pursuant to CPLR Article 34 denying a special trial preference to the plaintiff, Raul Montanez.

22 NYCRR §202.24 refers to CPLR 3403 (a) (3), which provides that a trial preference may be granted in an action "in which the interests of justice will be served by an early trial. Pursuant to section (b), "unless the court otherwise orders, notice of a motion for preference shall be served with the note of issue by the party serving the note of issue, or ten days after such service by any other party...." The court's computer indicates that the Note of Issue was filed on December 3, 2009. The motion for the preference was served January 26, 2010, and not with the Note of Issue.

In support of his application for a trial preference in the interest of justice, the plaintiff claims indigency. He has submitted an affidavit in which he claims he has not returned to work since August 1, 2005. He states he receives no social security or disability or public funding, but does not indicate whether or not he has made application for the same, and if not, why not. It is noted in his deposition transcript that he applied for social security and disability and was denied. He received an award dated February 4, 2009 from Workmen's Compensation in the amount of \$155,000.00 from which a child support lien in the amount of \$30,950.50 was deducted as well as attorneys' fees, yielding a net of \$100,799.50 to him. He claims he has no transportation as he cannot afford a car of insurance. He states he cannot work. He resides with his sister to whom he pays \$650 a month in rent but has been unable to pay her for the last six months. Mr. Montanez does not support his conclusory averments of indigency with copies of bank account statements or an accounting of the \$100,799.50 net recovery related to his Workmen's Compensation award. Here there is no actual proof of his actual fiscal condition and claim of financial hardship (see, *EFCO-FA Development Corp. v State of New York*, 266 AD2d 338, 698 NYS2d 53 [2nd Dept 1999]; *Farwell et al v Milbank*, 284 AD 898, 134 NYS2d 318 [2nd Dept 1954]).

Mr. Montanez's sister, Miriam Montanez, set forth in her affidavit that she owns the house located at 4 Bradley Street, Brentwood, New York, and that her brother Raul Montanez resides with her, but has been unable to pay the agreed upon rent for six months. She has financial problems and was served with foreclosure papers on her home. However, upon reviewing those papers, Miriam Montanez's name does not appear in the caption and she does not aver that she is known by any other name.

Dr. Paul R. Alongi, M.D. sets forth in his affirmation dated May 4, 2010, that he is an orthopedic surgeon who performed surgery on Mr. Montanez's back and neck (anterior lumbar interbody fusion L5-S1; peak intervertebral device L5-S1; posterior bilateral laminectomy L5-S1; posterior spinal fusion L5-S1; local bone graft

and bone morphogenic protein; anterior cervical discectomy at C5-6 and C6-7; anterior spinal fusion C5-6; peak intervertebral device C5-6, C6-7; anterior cervical plate C5-7; local bone graft and bone morphogenic protein) as a result of injuries Mr. Montanez sustained when he fell on August 1, 2005. Dr. Alongi sets forth that Mr. Montanez continues to be totally disabled and unable to work, but Dr. Alongi does not support this conclusory opinion with a basis. Dr. Alongi states that Mr. Montanez has discomfort, pain and impaired function and mobility, however, he does not set forth what the impaired function is or the degree of impaired mobility which renders Mr. Montanez totally disabled.

Based upon the foregoing, it is determined that Raul Montanez has not demonstrated entitlement to a trial preference based upon indigency as there has not been a sufficient showing warranting the exercise of discretion in favor of granting the preference.

Accordingly, cross-motion (006) by the plaintiff Raul Montanez for an order pursuant to CPLR 3403(a)(3) granting him a trial preference in the interests of justice is denied; that part of cross-motion (003) by the defendants GMH Military Housing-Navy Northeast, LLC, GMH Military Housing Management, GMH Northeast Housing Design/Build, LLC, Northeast Housing LLC, Centex Construction, LLC, and Balfour Beatty Const. for an order pursuant to CPLR 202.25(a) denying the plaintiff's application for a special preference, and cross-motion (004) by the defendant/third-party plaintiff Jeffrey M. Brown Associates, Inc., for an order pursuant to CPLR Article 34 denying a special trial preference to the plaintiff, have been rendered academic by denial of the preference and are denied as moot.

SUMMARY JUDGMENT

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [2nd Dept 1979]).

TESTIMONIES

RAUL MONTANEZ

Raul Montanez testified to the effect that he began employment at the end of June 2005 as a laborer with Wynne Management and was working for them on the date of the accident on August 1, 2005. As a laborer, he was involved in demolition, removing debris and throwing it into a dumpster. He described the day of the accident as being a nice day. He was working at apartments numbered 295 and 297 inside a building at the Mitchel Manor project with four other workers gutting bathrooms and kitchens by removing ceramic tiles, toilets, tubs and sinks,

kitchen cabinets, and taking out walls by removing sheet rock and two-by-fours. The debris was taken to dumpsters outside the building. Two dumpsters being used by Wynne Management were placed by the curb on the north side of the street on Mitchell Avenue and a third dumpster was placed on the south side of the road across from the building he was working on. He had arrived at work at about 5:30 a.m. to beat traffic and stayed in his van and slept until 7:00 a.m., then started work. Between his break at 8:30 a.m. and the time of the accident at about 11:00 a.m., he had been to the dumpster used for wood and glass about three times, but did not pass by the grassy area between the curb and sidewalk area where the manhole was located. When the dumpster became full, he closed the hatch on the dumpster and continued to work. Two sheet rock trucks came by and were unloading sheet rock, blocking the empty third dumpster on the south side of the road. His supervisor, Dave, told him to tell the sheet rock guys to back up the truck parked on the north side so Dave could move the empty dumpster from the front of the sheetrock truck over to the full dumpster so it would be closer to where he was working. Mr. Montanez then walked down the sidewalk in front of the building, used the port-a-potty across the street from his building, remained on the south side of the street, and spoke to the shop steward, Timmy. He then walked at an angle between the two sheetrock trucks, crossed in front of the one sheetrock truck and walked up onto the grassy area and asked the sheetrock driver to move his truck. He was about fifteen feet from the manhole cover, but did not observe it at that point or at any time up to the occurrence of the accident. He walked backwards away from the truck as the truck was backing up, directing the truck driver so the truck would not hit the low-hanging wires. He then stepped on the manhole cover with his right foot. The manhole cover, which was on top of the manhole, opened up by turning up on its edge, and his both his legs fell into the manhole. Mr. Montanez then testified that "To be honest with you, I'm—you know who I saw working on that was the Water District people." He made that observation about the middle of July before the accident. He did not know which water district it was, but saw the truck and two guys using a wrench with a big T. One guy was down in the hole and the other guy turned on the fire hydrant and drained it. The fire hydrant was located about eight to ten feet from the manhole. He never saw the men from the Water District speak to anyone at the project. He never saw anyone else involved in this project working on the manhole prior to the accident. He knew of no complaints about the manhole or cover. He stated that his shop steward Tim Farrell and one of the plumbers working at the building that day, Mike, saw him fall in the hole.

GMH MILITARY HOUSING-NAVY NORTHEAST, LLC, GMH MILITARY HOUSING MANAGEMENT, LLC, GMH NORTHEAST HOUSING DESIGN/BUILD LLC, NORTHEAST HOUSING LLC., CENTEX CONSTRUCTION LLC AND BALFOUR BEATTY CONSTRUCTION

William P. Sweeney testified to the extent that he is the vice president for renovation construction for Balfour Beatty Communities since April 30, 2008 when it purchased GMH for whom he had been working since 2004. He testified that GMH includes GMH Military Housing-Navy Northeast, LLC, GMH Military Housing Management, LLC, GMH Northeast Housing Design/Build as all part of the original GMH. GMH is the parent company for all the LLC's. The LLC's are the owners. GMH Northeast Housing LLC is the actual owner of the Navy Northeast contract which consists of eight naval based facilities, one of which is Mitchel Manor. GMH Northeast Housing LLC contracted with GMH Housing Management, a subcontractor to GMH Military Housing-Navy Northeast, LLC. GMH Housing Management was the renovation company which does the maintenance of the project (maintenance, cutting the grass, fixing whatever needs to be done) but not the construction at the project and is essentially the same company as GMH Northeast Housing Design/Build LLC. Although he did not know who Centex Contracting Corp. was, he stated Centex Construction LLC was the prime subcontractor for the entire Navy Northeast contract for all eight Navy bases, including Mitchel Manor. Centex Construction had a contract with the LLC and provided the bonding for the entire project as GMH did not have bonding capacity. Centex Construction was purchased by Balfour Beatty before it purchased GMH. Centex Construction subcontracted the renovation work to GMH Military Housing Management, the renovation company. GMH Military Housing Management in turn subcontracted the work to individual companies, such as Centex and Levien-Rich. GMH Military Housing Management was the owner of Jeffrey M. Brown Associates. GMH Northeast Housing, LLC, as

owner, contracted with Jeffrey M. Brown Associates for the renovation project at Mitchel Manor. Jeffrey M. Brown was the general contractor from the start of the project until completion, and performed all the site supervision, scheduling all of the subcontractors and work, and performed the day-to-day operations of the renovation project. Jeffrey M. Brown was also responsible for safety at the work site. Once a month during the project, there was a draw meeting in which the third-party banker's representative, Levien-Rich, showed up at Mitchel Manor in the Jeffrey M. Brown offices concerning requests for money for the previous month's work, but sometimes there was just a phone conference with no actual meeting with the bankers, but Jeffrey M. Brown people would be there. Levien-Rich, as a consulting firm, oversaw the project from a financial perspective and to verify that the work has been done, but did not do quality control of the work. All Systems Maintenance, Inc. was not employed by GMH Management. On April 30, 2008, Balfour Beatty purchased all of the assets of GMH Military. Benham was the architect on record for the project. Mr. Sweeney testified that he believed the board of directors was the same board for the three GMH companies: GMH Housing-Navy Northeast, GMH Military Housing Management, and GMH Northeast Housing Design/Build Company, and they all shared the same physical location, a common accounting department and corporate counsel. He stated that the board of directors for Balfour Beatty, formerly GMH, has oversight over all of them.

The particular Mitchel Manor renovation project at the site started around May or June of 2005 and it finished in November 2008. The project consisted of interior and exterior renovations of multi-unit structures wherein there were six units per building. GMH Military Housing Management had no role with respect to site safety and site safety was never discussed at draw meetings. GMH Military Housing Management had no responsibility at all with respect to any work the trades were doing or in performing the renovation. He learned of the plaintiff's accident when he was completing the due diligence for going over the contract for purposes of termination and noted that there was indemnification for a personal injury between GMH and Jeffrey M. Brown Associates. GMH Military Housing, when they terminated the contract with Jeffrey M. Brown in about July 2008, brought in another contractor who completed the project in November 2008. He had no knowledge where at Mitchel Manor the accident occurred; who would have had access to the manhole; or who would want to open it. He had no idea who was responsible.

JEFFREY M. BROWN ASSOCIATES, INC.

Gregory Gambino testified on behalf of Jeffrey M. Brown Associates, Inc. and stated he was employed by Jeffrey M. Brown Associates from March 1997 to November 2007. John Diaz was the senior project manager, Tom Grando was the project manager, Sean McCallum was a project superintendent, and he was the construction manager/ project superintendant for the Mitchel Manor project, involving the five or six phase renovation of the military housing complex to be used for U.S. Naval housing. Phase one involved buildings 11B, 12B, 13B and 14B. His responsibilities as construction manager with respect to this project were to oversee the subcontractors, coordinate the subcontractor's work, to make sure they performed the work carried out in their executed contract, and to make daily computer generated reports concerning the activity of each contractor on each particular day. He walked the site to make sure the subs did the work in accordance with the plans and specifications. Brown had the overall responsibility for the job on a day to day basis. Brown hired various subcontractors for phase one, including All Systems Maintenance pursuant to a written contract dated July 25, 2005. Brown hired all the contractors. He did not recall if GMH hired any trades for the project. Jeffrey M. Brown worked for GMH pursuant to a contract to perform interior renovation to 312 military homes and install exterior siding and gutters. GMH made routine visits to the site, but Brown was at the site to oversee or control the work. An architect was hired through GMH, and the engineer worked through the architect. The architect and engineer came to the site at times and walked the premises, reviewed the progress, and ascertained if the building was as per their drawings, but they did not direct or control any of the work. When he was walking the site, he and the project managers and superintendents would make observations. If they saw a subcontractor using a ladder which was not tied off, they would make a

recommendation to the subcontractor through the foreman to make sure that the ladder was tied off in a safe manner so it can be used safely.

In the initial phase of phase one, asbestos abatement work was started first for which it was necessary to find the water shut-off. Wynne Management then commenced demolition work wherein dry wall within the confines of the complex housing, insulation, toilet fixtures, plumbing fixtures, kitchen cabinetry, flooring materials were removed. In order for Wynne Management to remove the toilets and plumbing fixtures, it would have been necessary for the water to be turned off. Locating the shut-offs was a problem as they did not have as-built drawings of each building and therefore hired plumbing contractors or the intended plumbing contractor to do the investigative work. Lynbrook Plumbing came in to do exploratory investigation to determine where shut-offs were for the individual buildings and performed work in buildings 11B, 12B, 13B and 14B. He did not know if Lynbrook was hired by Brown to perform the work pursuant to a contract. Lynbrook did water disconnect from 11B and removed toilets June 20, 2005. On June 21, 2005 and June 24, 2005, Lynbrook continued to disconnect water from 11B and 12B and continued removal of the toilets and plugging waste pipes. They left water on exterior hose bibs only. On June 27th, 28th and 29th, 2005, Lynbrook continued to investigate water shut-off in building 14B and continued with gas shut-offs. On the 29th, Lynbrook located a crawl space water shut-off for building 14B, which shut-off was turned off. Mr. Gambino believed the water shut-offs for the buildings were located in the crawl spaces beneath each of those buildings. Pursuant to report 80 dated July 25, 2005, it was All Systems Maintenance's first day at the job. They started demo of plumbing piping in 11B at all chase walls, removed gas regulators and capped the gas main outside the building to be safe. As indicated by reports 81 and 82, All Systems continued their work at 11B on July 26 and 27, 2005. According to report 85, All Systems was not at the project site on July 30, 2005.

Mr. Gambino testified that there were manholes at the construction site. The manhole covers with blue on them indicated water. He did not know if there were manholes located outside the buildings which had shut-off valves similar to the ones in the crawl space of the buildings. He stated that an unsecured manhole cover would be an unsafe condition. Based upon the accident report filled out on Mr. Montanez's behalf, he stated that "Prevention" would be to secure the manhole cover and periodically check manhole covers. Brown ran weekly safety meetings, also known as a weekly tool box talk wherein a representative for each subcontractor working on site would be required to attend and at which time a written topic would be provided as sent down from Brown's main office and minutes of the meeting were taken. He indicated walkways were not referred to as sidewalks. If he saw an open manhole, he would take care of it right away. He believed the manhole at issue would probably have been investigated to see if there was a water device such as a shut-off within the manhole. It was his understanding that once the investigation was undertaken that the manhole would be secured. No outside safety consultant was brought in to monitor safety on the site.

ALL SYSTEMS MAINTENANCE

Gregory Abruzzo testified to the effect that on August 1, 2005 he was a project manager for All Systems Maintenance, setting up job sites, directing men where to go and what to do, keeping track of materials and coordinating with the general contractors. All Systems Maintenance was in the business of installing plumbing in commercial and residential buildings and was at the job site known as Mitchel Manor in East Meadow, New York, for which he was the only project manager on site. The first area they worked in consisted of four buildings: 11 B, 12 B, 14 B and 13-B, in that order. When they arrived on the job on July 25, 2001, they started working on 11B as the others were behind schedule and without them demoing the pipe the walls could not be built and the deadline would not be met. Therefore, they were to concentrate their work in 11 B. When they first came on site, the water was already off to buildings 11B and 12 B and building 11B was pretty much all demoed. In the two weeks prior to August 1, 2005, they were performing demolition of piping inside the building where the water risers or waste pipe risers run up to the second floor or into the crawl space. Those pipes would be removed so that the walls could

be taken down and new walls reframed in a different location. Sometimes the work required All Systems Maintenance employees to obtain access to manholes through manhole covers to tie into water mains or any other piping to bring new water lines to the new facility. If the shut-off valve did not work inside the building, the only alternative was to go outside to shut it off at the manhole cover, which could not be done until first it was determined that no one in the building needed the water on. The manhole cover would be open with a bar. When All Systems Maintenance was capping of gas mains, that would be accomplished from next to the building and not from a manhole. A water meter and a shut-off valve were located inside the manholes.

Mr. Abruzzo testified he saw Gregory Gambino, a site coordinator, at the site most days to make sure that everything was moving in the right direction. Mr. Gambino had the right to tell them he did not like the way something was being done in terms of safety protocol, but would not be involved in the technical aspects of how they would do their plumbing work. Prior to August 1, 2005, All Systems did not shut down the water to building 13 B, at 293-295 Mitchel Avenue and he did not know who did. An outside contractor came in to shut down the water in building 14 B as they could not get the water to shut off from inside. 13B was fed from 14 B by an underground water main which had a meter on the other end. There were two water mains that came into building 14 B. He stated it was cheaper to pick up the water main from inside 13 B, the real water main, and just continue that further down the line. The manhole for 13 B was located just off the curb on the grass. The manhole for building 11 B was located outside. He was not sure about whether 12 B had a manhole as it was a much smaller building fed from building 11B underground and the manhole for 12 B may have been the one outside 11B. 13 B had a manhole also.

The Jeffrey M. Brown report of July 26, 2005 indicated that All Systems Plumbing continued demo of plumbing piping in 11 B at all chase walls and in crawl spaces in the work area of 11B that day. The report of July 27, 2005 indicated All Systems Plumbing started demo of plumbing at 11 B at all chase walls, removed gas regulators and capped gas main outside building to be safe. The report of July 29, 2005 indicates All Systems Plumbing continued demo of plumbing piping in 12B at all chase walls and laid out piping in for upstairs bathrooms and kitchens in 11B.

Mr. Abruzzo testified that there were asbestos workers at the site performing asbestos abatement and needed water for the job and would possibly go into a manhole cover to turn the water on. He also saw other contractors at the site repairing water mains and believed those workers were from Bancor, the water main specialists. He stated that his own men would not have been into a manhole that first week as when they arrived, the water was already turned off at 11 B and they are usually contracted to work within five feet of the building. Where there is a water meter or a meter pit further back than five feet, it is actually considered site work. There is special machinery and equipment to shut down the water mains and they do not have it. He believed the shut-off valve for 11 B was in the basement of the building for the entire building. Their work consisted of replumbing the bathrooms and the kitchens, running new gas lines in the building and installing new fixtures. He recalled no time turning any water off in the manhole cover within the first week of being on the project. All Systems was not the only plumbing company doing demolition in phase one of this project as Lynbrook Plumbing was also at the site. He believed GMH's presence at the jobsite was general oversight.

BALFOUR BEATTY COMMUNITIES

Anthony Buczynski testified to the extent that he is employed as facility manager since September 2004 by Balfour Beatty Communities, a managing company for military housing, and works with the community manager, Stephanie Davis at the Mitchel complex. Balfour Beatty Communities is the management company for Mitchel Manor. He stated that Balfour Beatty Construction and Balfour Beatty Communities are owned by the same parent company from the United Kingdom, but he did not know the official company name but thought it might be Balfour

Beatty Associates. The parent company purchased the military housing from GMH Housing. GMH Military Housing Management, LLC was the managing company for Mitchel Manor for GMH Housing prior to Balfour Beatty Communities and owned the buildings at Mitchel Manor. GMH Military Housing Management, for whom he was previously employed, was the managing company for Mitchel Manor in 2005. Deborah Rivas was the community manager at that time for GMH Military Housing Management. He was familiar with the Navy Northeast Mitchel Manor project as it was the renovation project done at his site. He believed that in 2005, the Navy still owned the grounds upon which those building were located and believed that Northeast Housing LLC was designated as an owner on contracts they had for services such as trash removal, snow removal and landscaping. He did not believe the Navy owned Northeast Housing, LLC but did not know who did. People from Centex Construction Company, which did a lot of work for GMH Military Housing, were at the site. Centex Construction was bought out by Balfour Beatty Construction which, he thought, was created sometime in about May, 2008 when they bought out Centex Construction. He did not know if Balfour Beatty Construction existed in 2005 and that Centex Construction was at the project in 2005. There was also a Centex Corporation, but he did not know what they did. He stated that Balfour Beatty Construction would come to the site for the "draw" or financial matters. He was familiar with Chris Williams and stated Williams was the C.O. for Balfour Beatty Communities and prior to that for GMH Military Housing. Gary Michael Holloway was the president of GMH Military Housing, and Bruce Robinson was vice president.

In 2005, his responsibilities as facility manager while working for GMH Military Housing Management at the Mitchel Manor project was to oversee the facilities of the existing houses. He had a staff of five technicians and two porters and took care of any maintenance issues in any of the existing housing. The porters cleaned the property and assisted the technicians who were responsible for clogged toilets, frozen door locks, heating or air conditioning problems, and things like that. They did not employ any plumbers.

The project started at Mitchel Manor in 2005. At phase one of the Mitchel Manor project, he believed buildings 11, 12, 13, and 14 were worked on, and referred to them as "A" buildings, described as separate buildings. There was a total of twenty-two buildings located on thirty acres in East Meadow, bordered by the Meadowbrook Parkway, Merrick Avenue, Mitchel Avenue and Front Street. The buildings and about six acres of property were initially fenced around, and on the fence was a sign which read "Jeffrey M. Brown." It was his understanding Brown was the general contractor. Work commenced in April 2005 with the abatement of asbestos and lead, followed by full demolition of the inside of the building. His employees or staff had nothing to do with the construction and were specifically instructed by Tommy Granato from Brown not to enter beyond the barricade unless accompanied by some one from Brown. He stated that at the beginning of phase one of the project, Mr. Gambino from Brown came to him and asked him such questions as, how to shut off the water in the buildings, where the electric and telephone service mains came from. Mr. Buczynski testified that he told Mr. Gambino how they would shut off water the main to the buildings located in the manhole located in front of each building on the curb cut between the sidewalk and the street. Prior to April 2005, neither he nor anyone from his company shut off the water. During phase one, they did not shut off water at the mains on the construction site as the water could be shut off to an individual apartment from under the building without having to shut off the entire building, which would be a logistical nightmare. He testified that there are twenty two buildings and twenty two mains. Occasionally they had to shut off a building at the manhole and used a wrench made specifically for the manhole cover which was locked with a nut which. When the nut was turned, it released a couple of locks around the manhole and then the cover, which weighs about forty pounds, could be lifted with a screwdriver. The main is located about a foot down into the manhole which is about twenty-four inches in diameter and about four feet deep with fiberglass or concrete on the bottom. The valve was described as about a four-inch pipe which sometimes needed a wrench to turn, especially if it had not been closed in a long time. A meter was located above the valve and sometimes even on the cover of the manhole. He did not believe he or his staff had to work on any of those

manholes prior to phase one. The reason he was familiar with the manholes was because one of his employees, Omar Batres, a lead technician who had worked for the Navy on that site, informed him about the manholes. Mr. Gambino advised him they needed to shut off the water during phase one and that, prior to August 1, 2005, he was having a hard time. He never learned that Mr. Gambino did turn off the water or that he hired a company to do so. He then testified that a water main at building 13 was replaced during phase one and that decision was made by Brown. After phase one, in April or May 2007, he noticed a new manhole cover on the curb about five feet from the manhole cover by building 13. There was a new meter, which he was told was installed by Brown. No one from GMH ever assisted anyone at the site to remove manhole covers during phase one. He never saw anyone performing work on a manhole during phase one. Phase one was completed about April, 2006, but they started moving people in around December 2005. It was his impression that Brown was responsible for safety on the site inside the barricaded area. He believed Benham was the architect for the project. The Town of Hempstead Department of Water and Sewer services the complex and reads the meter.

CONTRACTS

A copy of the contract entered into between Jeffrey M. Brown Associates, Inc. as construction manager or contractor and All Systems Maintenance dated July 25, 2005 has been submitted by All Systems Maintenance. This agreement provides in relevant part “ The subcontractor covenants, promises and agrees to furnish all material and personal property of every description, and to diligently and fully perform all Work hereinafter described for the construction of *Navy Northeast-Mitchel Manor*, hereinafter called the Project, to be located at *193 Mitchel Manor, East Meadow, NY 11554* for the use and benefit of *GMH Military Housing Management, LLC and Northeast Housing LLC d Delaware limited liability company*, hereinafter designated the Owner; in strict accordance with the Contract between the Contractor and the Owner entered into on *March 1, 2005* (the “Owner Contract”) and hereby made a part of the subcontract by reference.”

A copy of the AIA Document A111-1997, “a standard form of agreement between Owner and Contractor” has been submitted by Raul Montanez. The agreement is set forth as a “Renovation subcontract between the Contractor, GMH Military Housing Management LLC and the subcontractor, Jeffrey M. Brown Associates, Inc., for the Navy Northeast-Mitchel Manor project. It sets forth the “The project generally involves the renovation and rehabilitation of certain existing military housing facilities of the U.S. Department of the Navy (“DoN) known as “Mitchel Manor” at the Mitchel Complex in Nassau County, New York.... This Project is one “Phase” of a larger project known as “Navy Northeast” which involves the construction and renovation of military housing facilities of the DoN at various installations in the northeastern United States, including Mitchel Manor.... Other interested parties in this Project and the larger “Navy Northeast Project” are as follows: The Owner is: Northeast Housing LLC,.... The Design/Build Manager (“DBM”) is: GMH Northeast Housing Design/Build LLC,.... The Primary Contractor (“Centex”) is Centex Construction, LLC,.... The Architect is The Benham Companies, LLC....”

DETERMINATIONS

In support of cross-motion (005), the plaintiff Raul Montanez has submitted, inter alia, an attorney’s affirmation; copies of the pleadings and answers and third-party summons and complaint; copy of the order dated November 21, 2008 (Mayer, J.); plaintiff’s verified bills of particulars; copies of the transcripts of the examinations before trial of Raul Montanez, Gregory Gambino on behalf of Jeffrey M. Brown Associates, Inc., William Sweeney on behalf of the GMH and Northeast Housing defendants, five pages of deposition transcript by Gregory Abruzzo; copy of a Renovation Subcontract between the contractor GMH Military Housing Management, LLC and Jeffrey M. Brown Associates, Inc. dated March 1, 2005; Weekly Safety Meeting dated July 18, 2005; Jeffrey M. Brown, Associates, Inc. daily report dated July 29, 2005; and the plaintiff’s response pursuant to CPLR 3101(d) with the curriculum vitae of Kayhleen V. Hopkins. It is determined that there are factual issues as set forth below which preclude a determination as a matter of law to summary judgment being granted to the plaintiff.

Accordingly, motion (005) for summary judgment in favor of the plaintiff, Raul Montanez, is hereby denied.

In support of cross-motion (007), the defendant Jeffrey M. Brown Associates, Inc. has submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint and answer; plaintiff's verified bill of particulars; and copies of the transcripts of the examinations before trial of Raul Montanez, Gregory Gambino on behalf of Jeffrey M. Brown, William P. Sweeney on behalf of the GMH Military and Northeast Housing defendants. However, Jeffrey M. Brown Associates has not submitted copies of the answers served by the co-defendants containing the cross-claims which it seeks to have dismissed with the complaint. In searching the record, it is determined that even if the moving papers complied with CPLR 3212, that there are factual issues which preclude summary judgment dismissing the complaint and cross-claims against Jeffrey M. Brown Associates as set forth below.

Accordingly, cross-motion (007) for summary judgment dismissing the complaint and cross-claims is denied.

In support of cross-motion (008), the defendants GMH Military Housing-Navy Northeast, LLC, GMH Military Housing Management, LLC, GMH Northeast Housing Design/Build, LLC, Northeast Housing LLC, Centex Construction LLC and Balfour Beatty Constructions (GMH/ Northeast/ Centex/ Balfour defendants) has submitted, inter alia, an attorney's affirmation; a photograph; and a copy of the transcript of the examination before trial of Anthony Buczynski on behalf of Balfour Beatty Construction dated January 15, 2009. It is determined that cross-motion (008) fails to comport with the requirements of CPLR 3212 in that copies of the pleadings and answers with cross-claims asserted against them, and supporting affidavits or signed copies of the transcripts of the examinations before trial on behalf of each moving defendant has not been provided with the moving papers, rendering it insufficient for summary judgment. In searching the record, it is determined that had the defendants in cross-motion (008) complied with the requirements of CPLR 3212, there remains factual issues which preclude summary judgment to them as a matter of law as set forth below.

Accordingly, cross-motion (008) for summary judgment is denied.

In cross-motion (009), the defendant All Systems Maintenance, Inc. (All Systems) seeks summary judgment dismissing the complaint and any and all cross claims asserted against it. In cross-motion (009), the defendant All Systems Maintenance, Inc. has submitted, inter alia, an attorney's affirmation; a copy of its answer with cross-claims asserted against the co-defendants; plaintiff's verified bill of particulars; copy of the subcontract between All Systems Maintenance, Inc. and Jeffrey M. Brown Associates dated July 25, 2005; copies of the transcripts of the examinations before trial of Eileen Penny on behalf of the moving defendant, Gregory Gambino on behalf of Jeffrey M. Brown, Gregory Abruzzo on behalf of All Systems Maintenance, Inc.; and reports from Jeffrey M. Brown Associates. All Systems Maintenance has not provided a copy of the complaints or the third-party complaints, or co-defendants' answers with cross-claims asserted against them. Therefore it is determined that this application fails to comport with CPLR 3212 as a matter of law. In searching the record, it is determined that even if All Systems Maintenance's moving papers complied with CPLR 3212, there remains factual issues which preclude summary judgment in their favor.

Accordingly, cross-motion (009) by All Systems Maintenance is denied.

FACTUAL ISSUES

Based upon a review of the evidentiary submissions and testimonies of the various parties, it is determined that there are multiple factual issues which preclude summary judgment. Although testimony establishes that Jeffrey

M. Brown Associates, Inc. was a contractor for this project, the agreement submitted as “Renovation subcontract between the Contractor, GMH Military Housing Management LLC and the subcontractor, Jeffrey M. Brown Associates, Inc., for the Navy Northeast-Mitchel Manor project, designates Jeffrey M. Brown Associates as the subcontractor. The agreement also sets forth that the primary contractor is Centex Construction LLC, however, from the agreement, this court cannot determine whether the general contractor is GMH Military Housing Management LLC or Centex Construction, LLC. It further sets forth the “The project generally involves the renovation and rehabilitation of certain existing military housing facilities of the U.S. Department of the Navy (“DoN) known as “Mitchel Manor.” The court cannot determine from the submissions whether the owner of the housing is actually the U.S. Department of the Navy or Northeast Housing LLC, or what their relationship is, or if the housing was owned by GMH Military Housing, LLC on the date of the accident. There are factual issues concerning who owned the property upon which the housing was being constructed as well. There are further factual issues concerning who the owners of the contracts were.

Anthony Buczynski of Balfour Beatty Communities, a managing company for military housing, testified that Balfour Beatty Construction and Balfour Beatty Communities are owned by the same parent company from the United Kingdom, and that the parent company purchased the military housing from GMH Housing, thus further confusing the issues. No deeds or affidavits or admissible evidence establishing ownership of the property or the housing has been submitted by any of the moving parties, leaving it to the court to speculate as to the same.

Mr. Montanez testified that three weeks prior to his accident, he saw people from the “Water District” performing work at the manhole, that the Water District had removed the cover and worked on the fire hydrant, therefore raising further factual issues concerning who owned the manhole and its contents and who had responsibility for the operation and maintenance of the manhole contents and the manhole cover (see, *Posner v New York City Transit Authority*, 27 AD3d 542, 813 NYS2d 106 [2nd Dept 2006]; *Scheele v The City of New York and BJW Associates, LLC*, 2008 NY Slip Op 30228U, 2008 NY Misc Lexis 7557 [Supreme Court of New York, New York County January 24, 2008]). There is further factual issues concerning whether any of the defendants turned on or turned off water at the manhole as the plaintiff testified that the “Water District” was the only company he saw working at the manhole cover and that the water district removed the manhole cover while working on it. Other conflicting testimony includes whether the water main had been turned off, if so by whom, and whether the cover was secured when replaced. There are further factual issues concerning if and when inspections of manhole covers were made and by whom.

NEGLIGENCE

In New York, to establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. If, defendant’s negligence were a substantial factor, it is considered to be a “proximate cause” even though other substantial factors may also have contributed to plaintiff’s injury (*Spiegel v Fine Paint Co.* 2006 NY Misc. LEXIS 2549, 236 NYLJ 51 [Sup. Ct. Nassau County 2006]). In order to establish the third element, proximate cause, the plaintiff must show that defendant’s negligence was a substantial factor in bringing about the injury. Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (see, *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 746 NYS2d 120 [2002]; *Darby v Compagnie Natl. Air France*, 96 NY2d 343, 728 NYS2d 731 [2001]). Summary judgment is rarely appropriate in a negligence action because the issue of whether a plaintiff or defendant acted reasonably under the circumstance could rarely be resolved as a matter of law (*Davis et al v Federated Department Stores, Inc.*, 227 AD2d 514, 642 NYS2d 707 [2nd Dept 1996]).

Based upon the foregoing factual issues set forth above, it cannot be determined who the parties are who

owed a duty to the plaintiff and what the defendants' respective roles and responsibilities were. Therefore, no determination as to negligence can be made based upon the evidentiary submissions and adduced testimonies.

LABOR LAW VIOLATIONS

Causes of action have been asserted for the defendants' violation of Labor Law sections 200, 240(1), and 241(6) based upon violations of the Industrial Code 12 NYCRR sections 23-1.7(b) and/or 23-1.7(e)(1) and/or 23-1.7(e)(2).

Labor Law §200

Labor Law §200 provides in pertinent part that "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places.... (*Trbaci v AJS Construction Project Management, Inc, et al*, 2009 NY Slip Op 50153U; 22 Misc3d 1116A [Supreme Court of New York, Kings County 2009]). "New York State Labor Law §200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Kim v Herbert Constr. Co.*, 275 AD2d 709, 880 NYS2d 227 [2000]). Liability for causes of action sounding in common law negligence and for violations of Labor Law §200 is limited to those who exercise control or supervision over the plaintiff's work, or who have actual or constructive notice of an unsafe condition that causes an accident (*Aranda v Park East Constr.*, 4 AD3d 315, 772 NYS2d 70 [2nd Dept 2004], " (*Marin v The City of New York, et al*, 15 Misc3d 1003A [Supreme Court of New York, Kings County 2004]). An implicit precondition to the common-law duty imposed upon an owner or general contractor to provide construction workers with a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury and have actual or constructive notice of the alleged unsafe condition (*Ramos v HSBC Bank et al*, 29 AD3d 435, 815 NYS2d 504 [1st Dept 2006]). In order to prevail on a claim under Labor law §200, a plaintiff is required to establish that a defendant exercised some supervisory control over the operation (*Mendoza v Cornwall Hill Estates, Inc.*, 199 AD2d 368, 605 NYS2d 308 [2nd Dept 1993]). Labor Law §200 governs general safety in the workplace, imposes upon employers, owners, and contractors the affirmative duty to exercise reasonable care to provide and maintain a safe place to work and is a reiteration of common-law negligence standards. Therefore, a party charged with liability must be shown to have notice, actual or constructive, of the unsafe condition and to exercise sufficient control over the work being performed to correct or avoid the unsafe condition (*Leon v J&M Pepe Realty Corp. et al*, 190 Ad2d 400, 596 NYS2d 380 [1st Dept 1993]).

In light of the foregoing, and based upon the adduced testimony and admissible evidence, none of the moving parties has demonstrated prima facie entitlement to summary judgment dismissing that part of the complaint premised upon violation of Labor Law §200 due to the factual issues set forth above. There are further factual issues concerning whether any of the parties had actual or constructive notice of the condition complained of and who, if anyone, exercised sufficient supervision or control over the work being performed to correct or avoid the unsafe condition.

Labor Law §240(1)

New York State Labor Law §240. Scaffolding and other devices for use of employees at section (1) provides "[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

“New York State Labor Law §240 (1) is applicable to work performed at heights or where work itself involves risks related to differentials in elevation” (see, *Plotnick et al v Wok’s Kitchen Incorporated, et al*, 21 AD3d 358, 800 NYS2d 37 [2nd Dept 2005]; *Handlovic v Bedford Park Development, Inc.*, 25 AD3d 653, 811 NYS2d 677 [2nd Dept 2006]). Labor Law §240 (1) was enacted to “prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person (*Cruz v The Seven Park Avenue Corporation et al*, 5 Misc3d 1018A, 799 NYS2d 159 [Supreme Court of New York, Kings County 2004]). As set forth in *Ortega et al v Puccia et al*, 57 AD3d 54, 886 NYS2d 323 [2nd Dept 2008], Labor Law §240 is intended to protect workers from gravity-related occurrences stemming from the inadequacy or absence of enumerated safety devices. The duties articulated in §240 are nondelegable, and liability is absolute as to the general contractor or owner when its breach of the statute proximately causes injury.

Labor Law §240(1) imposes absolute liability to encompass injuries to worker sustained either in a fall from scaffolding or some other elevated platform or when struck by objects that fall from such a platform (*Allen et al v City of Buffalo et al*, 161 Ad2d 1134, 555 NYS2d 944 [4th Dept 1990]). It is well settled that not every hazard or danger encountered in a construction zone falls within the scope of Labor Law §240(1) as to render the owner or contractor liable for an injured worker’s damages. Rather, Labor Law §240(1) is aimed at only elevation-related hazards, and accordingly, injuries resulting from other types of hazards are not compensable under that statute even if proximately caused by the absence of a required safety device (see, *Natale v City of New York et al*, 33 AD3d 772 [2nd Dept 2006]). Here the injury claimed to have been sustained by the plaintiff did not arise out of the effects of gravity within the meaning of Labor Law §240 and it is not alleged that something fell or that the plaintiff was working on an elevated work height when he fell (see, *Auchampaugh v Syracuse University et al*, 57 AD3d 1291[3rd Dept 2008]. In *Masullo et al v City of New York*, 253 AD2d 541, 677 NYS2d 162 [2nd Dept 1998], it was determined that falling into a manhole is not one of the gravity-related hazards or perils subject to the safeguards prescribed by Labor law 240(1); to the contrary, it is the type of ordinary and usual peril a worker is commonly exposed to at a construction site. Section 240(1) is applicable to work performed at heights or where the work itself involves risks related to differentials in elevation. It is determined as a matter of law that the cause of action premised upon the violation of Labor Law §240 is not contemplated within the meaning of the statute as although this incident occurred while the plaintiff was walking on the ground at the worksite, there was no gravity related event wherein the plaintiff was working at an elevated height giving rise to application of Labor Law §240 to the facts in this action. It is determined that this is an usual and ordinary danger of a construction site rather than a special elevation-related hazard within the meaning of Labor Law §240.

Accordingly, the cause of action premised upon the defendants’ alleged violation of Labor Law §240(1) is dismissed as a matter of law as asserted against all the defendants.

Labor Law §241(6)

Labor Law §241(6) provides in pertinent part that “All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to persons employed therein or lawfully frequenting such places.” It is axiomatic that the statutory duties imposed by New York State Labor Law §241(6) place ultimate responsibility for safety practices on owners of the worksite and general contractors (*Bopp v A.M. Rizzo Electrical Contractors, Inc. et al*, 19 AD3d 348, 796 NYS2d 153 [2nd Dept 2005]). Labor Law §241(6) imposes liability upon all contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith (see, *Dipalma et al v Metropolitan Transportation Authority et al*, 200 NY Slip Op 51654U, 20 Misc3d 1128A [Supreme Court of New York Bronx County]).

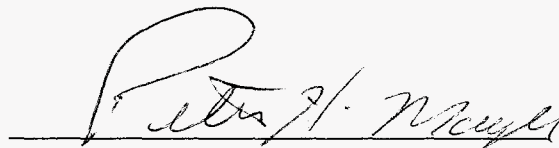
“Labor Law §241(6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code” (citing *Ross v Curtis Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49 [Dept 1993]). As the Court of Appeals explained in *Rizzuto v L.A. Wegner Contracting Co., Inc.*, 91 NY2d 343; 670 NYS2d 816 [1998], “Thus once it has been alleged that a concrete specification of the Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused plaintiff’s injury. If proven, the general contractor (or owner, as the case may be) is vicariously liable without regard to his or her fault” (*McDevitt et al v Cappelli Enterprises, Inc. et al*, 16 Misc3d 1133A [Supreme Court, New York County 2007]).

In order to support a cause of action under Labor Law §241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code that is applicable given the circumstances of the accident, and set forth a concrete standard of conduct rather than a mere reiteration of common-law principals (*Ross* at 502; *Ares v State*, 80 NY2d 959, 590 NYS2d 874 [1992]; *see also, Adams v Glass Fab.*, 212 AD2d 972, 624 NYS2d 705 [4th Dept 1995]) (*Marin v The City of New York, et al*, 15 Misc3d 1003A, 798 NYS2d 710 [Sup. Ct, Kings County 2004]; *see, Mahoney v Madeira Associates et al*, 32 AD3d 1303, 822 NYS2d 190 [4th Dept 2006]).

Here, the plaintiff alleges that Title 12 NYCRR section 23-1.7(b) et seq. of the State of New York have been violated. Section 23-1.7 provides for protections from general hazards and at section (b) concerns “Falling hazards. (1) Hazardous openings. (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this par. (rule). It is determined as a matter of law that section 23-1.7 is applicable to the facts of this action and therefore serves as a predicate for violation of Labor Law §241(6). Therefore, it for the jury to determine whether the negligence of some party to, or participant in the construction project caused the plaintiff’s injuries. The above noted factual issues also preclude summary judgment.

Dated: _____

7/10/10


 PETER H. MAYER, J.S.C.

LEWIS JOHS AVALLONE AVILES, LLP
 Attorneys for Defendant The Benham Companies, LLC
 425 Broad Hollow Road
 Melville, New York 11747

HAVKINS ROSENFELD RITZERT & VARRIALE, LLP
 Attorneys for Third-Party Plaintiff Jeffrey M. Brown Associates
 Eleven Penn Plaza, Suite 2101
 New York, New York 10001