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

PRESENT: HON. MILTON A. TINGLING

PART 44

Index Number : 101670/2008
BURKE, THOMAS
VS.
HILTON RESORTS
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. 101670/08

MOTION DATE 9/13/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with annexed decision.

FILED
NOV 01 2010
COUNTY CLERK'S OFFICE

Dated: 10/25/10

MG t
J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 44

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THOMAS BURKE and MARIE BURKE,

Plaintiffs,

Index No.: 101670/08

-against-

HILTON RESORTS CORPORATION, TISHMAN CONSTRUCTION and CENTURY MAXIM CONSTRUCTION CORP.,

Defendants.

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HILTON RESORTS CORPORATION and TISHMAN CONSTRUCTION CORPORATION OF NEW YORK,

Third-Party Plaintiffs,

-against-

Third-Party Index No: 590059/09

CENTURY MAXIM CONSTRUCTION CORP., CONSTRUCTION AND REALTY SAFETY GROUP, INC., FAITHFUL AND GOULD, and REBAR LATHING CORP.,

Third-Party Defendants.

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DECISION

MILTON A. TINGLING, J.:

BACKGROUND

Plaintiffs move, pursuant to CPLR 3212 (c), for summary judgment on the issue of liability on their Labor Law § 240 (1) cause of action.[1]

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[1]The motion papers also state that plaintiffs are opposing defendants' motion to dismiss the complaint, but plaintiffs' counsel has indicated that that was an error, since defendants had

Third-party defendant Rebar Lathing Corp. (Rebar) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint asserted as against it by Hilton Resorts Corporation (Hilton) and Tishman Construction Corporation (Tishman) s/h/a Tishman Construction for contractual indemnification and breach of contract for failing to acquire insurance, and dismissing the cross-claims asserted as against it by third-party defendants Century Maxim Construction Corp. (Maxim) and Construction and Realty Safety Group, Inc. (C&R) for common-law indemnification, contractual indemnification and attorney's fees.

Third-party plaintiffs Hilton and Tishman cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint asserted as against them, for summary judgment granting them contractual indemnification as against Maxim, and for an order denying plaintiffs' motion for partial summary judgment.

Third-party defendant Maxim cross-moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' Labor Law § 240 cause of action as against it and for summary judgment on its cross claim asserted as against Rebar for contractual indemnification and for breach of contract for failing to obtain insurance.

On October 30, 2009, this court granted default judgments as

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not filed any motion on that point at the time that plaintiffs' motion was filed.

against C&R on the third-party complaint and third-party cross motions.

This action arises from a construction accident that occurred on December 17, 2008, at a work site located at 102-108 West 57th Street, New York, New York. Plaintiff Thomas Burke (Burke), a union laborer employed by Rebar, alleges that he suffered severe injuries when he fell approximately 15 feet through an unguarded and unprotected opening at the job site.

The complaint alleges two causes of action, the first on behalf of Burke, and the second as a derivative action on behalf of Burke' wife, Marie Burke. Burke' cause of action alleges common-law negligence and violations of Labor Law §§ 200, 240 and 241 (6), specifically regarding violations of 12 NYCRR 23-1.5, 23-1.7, 23-1.8, 23-1.16, 23-1.17. 23-1.18, 23-1.22, 23-1.24, 23-1.25 and 23-1.26, plus violations of OSHA regulations.

Hilton was the owner of the premises being constructed, Tishman was the construction manager hired by Hilton to build the project, and Maxim was the concrete superstructure contractor on the job, and was the subcontractor that retained Rebar.

Pursuant to the contract between Hilton and Tishman, Tishman's duties and responsibilities included hiring the subcontractors for the project, coordinating the work of all of the subcontractors, employing laborers for the project, chairing job progress and safety meetings, as well as having the authority

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to stop work at the site. Motion, Ex. 5.

According to the first examination before trial (EBT) of Burke, he had been working at this particular job site as a general laborer foreman for approximately one week prior to the date of the accident, and received all of his instructions from his Rebar foreman, Bryan Jimenez (Jimenez). Burke's First EBT, at 30, 50. Burke stated that he was not provided with a work harness on this job. *Id.* at 62. At the time of the accident, Burke had been assigned by Jimenez to receive a bundle of rebar that Jimenez was passing down to him from the second to the first floor. *Id.* at 66, 71, 76. According to Burke, as he raised his hands to receive the rebar, he slipped on ice and fell through a hoist opening in the floor 10 feet away from where he was working. Burke says that the opening lacked a safety railing or guardrails. *Id.* at 69, 74. Burke stated that, prior to the accident, he did not notice any snow or ice at the job site. *Id.* at 55-56, 69, 80-81. Burke also stated that he noticed that there was no fall protection around the hoist opening about two minutes before the accident, as he was walking to the first floor where he was to be working, but that he did not say anything to Jimenez about what he considered to be a dangerous condition. *Id.* at 67-68, 73. Burke fell from the first floor to the basement of the building, a distance of approximately 15 feet, landing on his foot and ankle. *Id.* at 88-89. According to

Burke's deposition, the cause of his accident was the presence of ice at the project and the lack of safety lines and guardrails. *Id.* at 272-273.

Burke first stated that he had the authority to stop the work of the laborers under his supervision, but then said that he would first have to notify his supervisors of a dangerous condition and then wait for their instructions. *Id.* at 9-16.

Burke was deposed a second time, and stated that the rebar that was being passed down to him was approximately 15-16 feet long, and that he was standing approximately 10 feet away from the hoist opening at the time of the occurrence. Burke's Second EBT, at 64-73. Burke again averred that there was no protection or safety tape around the hoist opening at the time of the accident. *Id.* at 70-71. Further, Burke testified that there was nothing to which he could have attached a harness even if one had been provided to him. *Id.* at 79. Burke also stated that he did not see any ice at any time prior to the accident, that he never noticed any ice prior to the accident, and that he was unable to describe the dimensions of the ice and was unsure as to how far it extended from the hoist opening. *Id.* at 55-56, 61, 59-74.

Jimenez testified that he was employed by Rebar as Deputy Foreman at the project on the date of the accident, and that he had instructed Burke to receive the rebar through the opening on the floor below. Jimenez EBT, at 8, 17. Jimenez was an

eyewitness to the accident, and saw Burke fall through the opening where the hoist was to be located. *Id.* at 40, 72. Jimenez further stated that there was no protection around the opening through which Burke fell. *Id.* at 66. According to Jimenez, there were safety harnesses available at the job site, but there was nowhere to tie a safety harness in the area at which the accident occurred. *Id.* at 49, 54-56, 86. In addition, Jimenez averred that there were several areas of ice on the project on the day of the accident. *Id.* at 101.

John Asaro (Asaro), the site safety manager for C&R, was also produced for a deposition. Asaro stated that, while he was not an eyewitness to the accident, he investigated the area shortly after Burke' fall, and that he observed that the fall protection around the hoist opening was in bad condition and that it had been removed. Asaro EBT, at 58. Asaro testified that Maxim was responsible for fall protection at the job site, and that after the accident, Maxim put the fall protection back in place over the opening. *Id.* at 34, 60. Asaro also said that there had been continuous problems with Maxim not having safety protection around this specific opening at the work site. *Id.* at 65.

Asaro testified that he inspected the site on a daily basis, and that if he observed any ice, he would contact Tishman or Maxim to address the condition. *Id.* at 30. Asaro also averred

that responsibility for snow and ice removal of a particular area depended upon whether concrete forms had been removed and the floor had been turned over to Tishman. *Id.* at 36-37.

Asaro prepared an accident report at the time of the occurrence, which confirms his testimony that fall protection was placed over the opening after Burke fell. Motion, Ex. 12.

Steve Alverez (Alverez), the project superintendent, was deposed on behalf of Maxim. Alverez stated that he was not an eyewitness to the accident, but that he heard people screaming from his shanty in the basement shortly thereafter. Alverez EBT, at 34. Alverez said that Maxim was responsible for ice removal at the project and for maintaining wood protection around the opening involved in this accident, specifically 2x4's consisting of top rails, mid-rails and toe boards, and that, after the accident, he instructed his carpenters to fix the fall protection around the opening. *Id.* at 13, 15, 35. Alverez also averred that he told the workers, including Burke, to stop working around the hoist opening shortly before the accident occurred, because the fall protection was not in place. *Id.* at 31-34. Alverez said that, as part of his duties, he would look for snow and ice during his daily walk-through at the site. *Id.* at 43. Alverez stated that he had no authority to stop another contractor from working. *Id.* at 71.

Alverez also stated that, prior to the accident, he observed

Rebar workers wearing fall protection, and that there is a six-foot rule mandating that any worker working six feet or closer to a hole must have fall protection. *Id.* at 68-69. Alverez also said that he believed that there was a column near the hoist opening on which a lanyard could have been attached. *Id.*

Tishman produced Lawrence Long (Long) for an examination before trial. Long was not an eyewitness to the accident, but arrived on the scene shortly thereafter, at which time he saw Maxim workers putting in fall protection. Long's First EBT, at 33, 38-39. At the time that he arrived, Long stated that there was one rail in place that was chest high, but that there were no mid-rails or toe boards. *Id.* at 39. According to Long, there were no cable systems or nets in place around the hoist opening. *Id.* at 47. Long further testified that Maxim was responsible for installing safety protection at the job site, specifically, installing wood protection around any opening. *Id.* at 15-16. Tishman, according to Long, only supplied safety belts and equipment to its own employees. *Id.* at 31-32.

Long stated that the hoist opening was, at a minimum, required to have toe boards, mid-rails and handrails. Long's Second EBT, at 21. Long also averred that removal of the specific protection around the opening at which the accident occurred was a constant problem at the project. *Id.* at 54.

Long also testified that Tishman had a labor foreman at the

job site who would have removed any snow or ice at the project if there was any, but that there was no snow or ice removal during the month of December, 2007. *Id.* at 17. Long said that he performed daily walk-throughs at the project, and that, if he noticed a slippery condition, he would instruct Asaro to inspect the area to determine whether there were any fall hazards. *Id.* at 19-23.

Rebar has presented two motions to the court, one entitled "Notice of Cross-Motion for Summary Judgment," filed with the court on May 3, 2010 (initial cross motion), and one entitled "Notice of Cross Motion to Century Maxim Cross Motion and Amended Cross Motion for Summary Judgment," filed on August 4, 2010 (amended cross motion).

In its amended cross motion, Rebar asserts that, as Burke' employer, plaintiffs' action as against it is barred by the Workers' Compensation law, since Burke did not suffer a grave injury. However, it is noted that plaintiffs have not sued Rebar in the present action, and the court can ascertain no reason for this argument being posited by Rebar.

Further, Rebar maintains that, in the copy of the contract between Rebar and Maxim provided by Rebar in the amended cross motion, there is no indemnification provision. Rebar Amended Cross Motion, Ex. R. The court notes that the indemnification provision appears as an addendum to the main agreement. Also,

the contract appearing in the initial cross motion is dated May 5, 2005 on its heading, but is dated May 12, 2008 by the parties' signatures. The contract appearing in the amended cross motion is dated May 5 an 9, 2005 on the signatory page. Rebar Amended Cross Motion, Ex. R.

Michael Smith (Smith), the president of Rebar, has provided an affidavit in which he affirms that the contract between Rebar and Maxim did not contain an indemnification clause nor an insurance procurement provision. *Id.*, Ex. S.

Additionally, Rebar argues that, because it is not in contractual privity with either C&R, Hilton or Tishman, those parties claims as against it must be dismissed.

All of the parties have filed opposition to the various motions.

Plaintiffs assert that Burke is entitled to summary judgment on the issue of liability with respect to his Labor Law § 240 (1) cause of action because he was not a recalcitrant worker and because his injuries were caused by the lack of adequate fall protection devices. Burke maintains that his failure to adhere to Alverez' warning is legally insufficient to deem him recalcitrant. Further, according to Burke, the cause of his injuries was both the lack of a column on which to attach a safety belt even if he had worn one, and the lack of fall protection around the hoist opening through which he fell.

Hilton and Tishman oppose Rebar's cross motion for summary judgment on the grounds that, despite Rebar's assertions to the contrary, it did in fact procure insurance for Hilton and Tishman as additional insureds, as evidenced in Rebar's initial cross motion. Rebar Initial Cross Motion, Ex. O. In addition, Hilton and Tishman assert that, pursuant to the provisions of their contract with Maxim, Rebar, as one of Maxim's subcontractors, is contractually obligated to indemnify them, since the Hilton/Tishman-Maxim contract is incorporated into the Maxim-Rebar contract, according to the terms specified above in both versions provided by Rebar in its cross motions.

Moreover, Hilton and Tishman argue that, in its initial cross motion, Rebar submitted a copy of its contract with Maxim that included the indemnification provision reproduced above, as well as an insurance provision, but that, in its amended cross motion, the indemnification provision did not appear. Further, Hilton and Tishman contend that Rebar never withdrew its initial motion, cannot have two summary judgment motions pending simultaneously, and, therefore, only its first motion that includes the indemnification clause may be considered by the court.

In its opposition to Rebar's cross motions, Maxim makes the same arguments as those posited by Hilton and Tishman. Maxim also argues against granting Hilton's and Tishman's motion

because it was made more than 45 days after completion of all depositions, as ordered by this court on January 21, 2010 ("All parties have to move for summary judgment w/in 45 days of last party EBT"). According to Maxim, the last deposition was held on April 26, 2010, and Hilton's and Tishman's cross motion was not served until July 1, 2010 (and was filed on July 8, 2010), 111 days after the completion of the depositions.

It is noted that plaintiffs' motion, to which all the other motions are cross motions, was filed on April 9, 2010, Maxim filed its cross motion on July 14, 2010, and Rebar filed its initial cross motion on August 14, 2010, meaning that all of the cross motions failed to meet the court's 45-day mandate. Also, the note of issue was filed on January 28, 2009, a motion to vacate the note of issue was only granted to the extent of expediting discovery on June 4, 2009, and this court ordered the case to remain on the trial calendar on February 22, 2010.

Rebar's opposition to Maxim's cross motion is based on the argument that the contract referred to by Maxim, Hilton and Tishman was not in effect on the date of the alleged accident. Moreover, since none of the opposition papers address the common-law contribution and indemnity claims asserted as against Rebar in the cross motions, Rebar maintains that that portion of its cross motions seeking to dismiss those cross-claims should be granted.

Hilton/Tishman, Maxim and Rebar have all submitted reply papers as well.

According to Hilton and Tishman, plaintiffs' Labor Law § 240 (1) cause of action should be dismissed because Burke was not in an elevated position at the time of the occurrence. In addition, Hilton and Tishman assert that, even if plaintiffs' Labor Law § 240 (1) cause of action were deemed to be applicable to the facts of the case, Burke was a recalcitrant worker because he failed to heed Alverez' warning to stop work until a railing could be affixed to the hoist opening. Furthermore, Hilton and Tishman allege that their cross motion is timely because depositions were not completed in March of 2010, as alleged by Maxim. However, Maxim does not allege that depositions were completed in March. According to Maxim, depositions were completed on April 26, 2010, and Hilton and Tishman fail to provide any evidentiary support to contest this assertion by Maxim.

Maxim contends that plaintiffs' Labor Law § 240 (1) cause of action should be dismissed as against Maxim since plaintiffs have failed to refute Maxim's position that it did not direct or control Burke's work, and that Maxim is neither an owner, contractor or agent subject to liability under that section of the Labor Law. Maxim also supports the argument of Hilton and Tishman that Burke was a recalcitrant worker. In addition, Maxim states that it is entitled to judgment for indemnification from

Rebar based on its contract with Rebar. Lastly, Maxim states that Rebar, in its initial cross motion, provided evidence of its having acquired commercial general liability insurance for Maxim, thereby affirming that such a provision existed in the Maxim-Rebar contract.

Rebar, in its reply, states that since no party has opposed granting it summary judgment on the cross claims based on common-law contribution and indemnification, that portion of its cross motions should be granted. Rebar then goes on to argue as to which version presented to the court of the contract between it and Maxim was in force and effect at the time of the occurrence.

DISCUSSION

"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 [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46

NY2d 223, 231 (1978).

All of the cross motions are denied as untimely.

As mandated by this court in its order of January 21, 2010, all summary judgment motions had to be filed within 45 days of the date of the last deposition. The deposition transcripts provided by the parties in these motions indicate that the last deposition was taken on March 12, 2010. Hilton and Tishman argue that they reserved rights to take additional testimony, and that depositions did not conclude in March of 2010. Maxim has stated that the last deposition was taken on April 26, 2010, and no party has disputed that date. As a consequence, all of the cross motions seeking summary judgment were filed more than 45 days after the last deposition, and will not be considered by the court.

Plaintiffs' motion seeking summary judgment on the issue of liability on their cause of action alleging a violation of Labor Law § 240 (1) is granted only as against Hilton and Tishman.

Section 240 (1) of the New York Labor Law states, in pertinent part:

> "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, 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."

As stated by the Court in *Rocovich v Consolidated Edison Company* (78 NY2d 509, 513 [1991]),

> "It is settled that section 240 (1) is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed. Thus, we have interpreted the section as *imposing absolute liability* for a breach which has proximately caused an injury. ... In furtherance of this same legislative purpose of protecting workers against the known hazards of the occupation, we have determined that the duty under section 240 (1) *is nondelegable* and that an owner is liable for a violation of the section even though the job was performed by an independent contractor over which it exercised no supervision or control [internal quotation marks and citations omitted]."

Plaintiffs have provided all of the deposition transcripts discussed above, the contract between Hilton and Tishman, the subcontract between Tishman and Maxim, a copy of the accident report, and photographs of the work site area in which the accident occurred, as well as all pleadings associated with this litigation.

> "To establish a cause of action under section 240 (1), a plaintiff must prove both that the statute was violated and that the violation was a proximate cause of his or her injuries. The statute is violated when the plaintiff is exposed to an elevation-related risk while engaged in an activity covered by the statute and the defendant fails to provide a safety device adequate to protect plaintiff against the elevation-related risk entailed in the activity or provides an inadequate one [internal citations omitted]."

Jones v 414 Equities LLC, 57 AD3d 65, 69 (1st Dept 2008).

Based on the evidence presented, plaintiffs have made out a prima facie case for entitlement to the relief requested.

There is no question that Burke fell through a hole at the job site where he was employed, and that there were no adequate safety railings or cover around the opening through which he fell. The failure to provide safety railings or covering over the hoist opening was the proximate cause of Burke' injuries. Once it is established that the failure of Hilton and Tishman to ensure that such safety devices were in place caused plaintiff to fall through an opening at the job site, any argument that Burke caused the accident or was a recalcitrant worker is without merit. *McCarthy v Turner Construction, Inc.*, 52 AD3d 333 (1st Dept 2008). In addition, the fact that Burke fell down a hole an entire building story renders defendants' argument that the accident was not elevation-related unpersuasive.

Moreover, the fact that Burke was warned shortly before his accident that the opening presented a dangerous condition and that he should stop work, his failure to do so does not render him a recalcitrant worker, since it has not been shown that he was provided with adequate safety devices that he refused to use. *Guaman v New Sprout Presbyterian Church of New York*, 33 AD3d 758 (2d Dept 2006). Furthermore, even if Burke had used a safety belt, which is not something that would ordinarily be required of someone working on the first floor of a building, the evidence indicates that there was no adequate anchor to which he could have attached the lanyard (*Alzabe v Trustees of the Masonic Hall*

Asylum Fund, 303 AD2d 229 [1st Dept 2003]; *Stein v Yonkers Contracting, Inc.*, 244 AD2d 474 [2d Dept 1997]), and the absence of a safety belt and anchor does not negate the fact that there were no protective safety devices around the hoist opening itself.

Although the manner in which the accident allegedly occurred, by Burke slipping 10 feet over an icy surface, a condition that no one, including Burke, had observed, is somewhat unusual, there is no question that his injuries resulted in his falling through an unprotected hoist opening. Under these facts, Burke is entitled to the protections of Labor Law § 240 (1) as a matter of law. *Romanczuk v Metropolitan Insurance and Annuity Company*, 72 AD3d 592 (1st Dept 2010) (plaintiff entitled to judgment under Labor Law § 240 (1), even though there are conflicting versions of how the accident came about); *John v Baharestani*, 281 AD2d 114 (1st Dept 2001)(plaintiff was working on a permanent floor when he fell through an unprotected and unguarded opening).

As the owner of the property, Hilton is liable under Labor Law § 240 (1), and Tishman, as construction manager of the project, is similarly liable.

> "The label of construction manager versus general contractor is not necessarily determinative [of liability under Labor Law § 240 (1)]. Thus, on the facts of this case, given (1) the specific contractual terms creating agency, (2) the absence of a general contractor, (3) [Tishman]'s duty to oversee the construction site and the trade

> contractors, and (4) ... that [Tishman] had authority to control activities at the work site and to stop any unsafe work practices ..."

(*Walls v Turner Construction Company*, 4 NY3d 861, 864 [2005]), Tishman is considered to perform the functions of a general contractor for all intents and purposes with respect to the instant construction project, and, therefore, is held strictly liable for Burke's injuries, pursuant to Labor Law § 240 (1). *Barrios v City of New York*, 75 AD3d 517 (2d Dept 2010); *see Salsinha v Malcolm Pirnie, Inc.*, 76 AD3d 411 (1st Dept 2010).

Based on the foregoing, plaintiffs are entitled to summary judgment on the issue of liability on their Labor Law § 240 (1) cause of action as against Hilton, as the owner, and Tishman, as the construction manager, of the project. However, plaintiffs are not entitled to such judgment as against Maxim.

There is no evidence that Maxim had any control over the work being performed or had the authority to insist that proper safety practices be followed. *See Everitt v Nozkowski*, 285 AD2d 442 (2d Dept 2001). To impose liability, Maxim must be shown to have the authority to control the activity that brought about the injury so as to be able to avoid or correct the unsafe condition. *Natoli v City of New York*, 32 AD3d 507 (2d Dept 2006). This plaintiffs have failed to do.

Based on the foregoing, that portion of plaintiffs' motion seeking summary judgment on the issue of liability on their Labor

Law § 240 (1) cause of action as against Maxim is denied.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the portion of plaintiffs' motion seeking summary judgment on the issue of liability on their cause of action under Labor Law § 240 (1) as against defendants Hilton Resorts Corporation and Tishman Construction Corporation of New York is granted, and the issue of damages is to be determined at trial; and it is further

ORDERED that the portion of plaintiffs' motion seeking summary judgment on the issue of liability on their cause of action under Labor Law § 240 (1) as against defendant Century Maxim Construction Corp. is denied; and it is further

ORDERED that the cross motions of Hilton Resorts Corporation, Tishman Construction Corporation of New York, Century Maxim Construction Corporation and Rebar Lathing Corporation are all denied as untimely.

Dated: 10/25/10

ENTER:

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Milton A. Tingling, J.S.C.