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SHORT FORM ORDER

INDEX No. 05-2726
CAL. No. 09-01074-OT

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH F. COSTELLO
Justice of the Supreme Court

MOTION DATE 1-14-10 (013), (014),(015)
ADJ. DATE 11-15-2010
Mot. Seq. # 013 - MotD
014 - XMotD
015 - XMotD

----------X
DANIEL GORDON and DIANE GORDON,

Plaintiffs,

- against -

BARR & BARR INC., PARK AVENUE PLUMBING CORP., HUNTINGTON HOSPITAL and MATRIX MECHANICAL CORP.,

Defendants.
----------X
PARK AVENUE PLUMBING CORP.,

Third-Party Plaintiff,

-against-

PARAGON PIPING, INC.,

Third-Party Defendant.
----------X

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Upon the following papers numbered 1 to 46 read on this motion and cross-motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (013-previously 007) 1 - 15 ; Notice of Cross Motion and supporting papers (014- previoulsy 008) 16-23; (015 previously 009) 24-27 ; Answering Affidavits and supporting papers 28-33; 34-38 ; Replying Affidavits and supporting papers 39-40; 41-44; 45-46 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

By order dated November 15, 2010 (Costello,J.) after a conference of the matter and new counsel appearing for the defendants Barr & Barr and Huntington Hospital it is order ed that motions (007), (008) and (009) be reconsidered, and upon reconsideration, it is

ORDERED that this motion (013), previously motion (007) by the defendants, Barr & Barr, Inc. and

Huntington Hospital, pursuant to CPLR 3212 for summary judgment dismissing the complaint, all cross- claims claims and counterclaims is granted only to the extent that the cause of action premised upon the defendants' alleged violation of Labor Law section 240(1) is dismissed as a matter of law; and it is further.

ORDERED that this cross-motion (014) previously cross-motion (008) by the defendants, Matrix Mechanical Corp., pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims and counterclaims is granted only to the extent that the cause of action premised upon the defendant's alleged violation of Labor Law section 240(1) is dismissed as a matter of law; and it is further

ORDERED that this motion (015) previously cross-motion (009) by the defendants/third-party plaintiff, Park Avenue Plumbing Corp., pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's complaint is granted only to the extent that the cause of action premised upon the defendant/third-party plaintiff's alleged violation of Labor Law section 240(1) is dismissed as a matter of law .

This is an action sounding in negligence wherein the plaintiffs seek damages personally and derivatively for injuries sustained on November 14, 2003. The plaintiff, Daniel Gordon, was performing construction work at Huntington Hospital located at 270 Park Avenue, Town of Huntington, County of Suffolk, State of New York where he claims such injuries were sustained. Causes of action premised upon common law negligence, violation of Labor Law §§200, 240, 241, 241(6), and the Industrial Code 12 NYCRR Sections 23-1.7(d), 23-1.7(e)(1), 23-1.7(e)(2), 23-2.1(a), 23-2.1(b) and 23-1.5 have been set forth.

Michael Gordon was employed as a sheet metal worker by Paragon Sheet Metal, Inc. installing duct work at Huntington Hospital at the time the accident occurred. He walked from the area he was working to receive a delivery. There were hundreds of what he termed "plumber pipes" on the floor for weeks. He stepped on one of the pipes, the pipe rolled, causing him to fall. Barr & Barr was the construction manager at the site where new construction and interior renovations were being performed, and engaged in the coordination of the trades, scheduling for completion of the project, and assigning and retaining subcontractors for the project.

It is noted that Huntington Hospital has asserted a first cross-claim in its answer, affirmed June 14, 2005, against Barr & Barr, Inc., Park Avenue Plumbing Corp. and Matrix Mechanical Corp for indemnification; and a second cross-claim against Barr & Barr, Inc., Park Avenue Plumbing Corp and Matrix Mechanical Corp. for judgment over against them.

Motion (013) by the defendants Huntington Hospital and Barr & Barr, Inc., now represented by new counsel have been granted renewal of motion (007) for summary judgment dismissing the complaint and cross-claims asserted against them. In cross-motion (014) by Matrix Mechanical Corp. and cross-motion (015) by Park Avenue Plumbing, the moving defendants respectively seek summary judgment dismissing the complaint and any cross-claims asserted against them; said motions were previously denied as untimely pursuant to CPLR 3212.

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 [1957]. The movant has the initial burden of proving entitlement to summary judgment, Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [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 [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 [2nd Dept 1989], 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 [2nd Dept 1981]. Summary judgment shall be granted only 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 [1979].

In support of motion (013), the defendants Barr & Barr and Huntington Hospital have submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, answer with demands served by Huntington Hospital; answer to third-party complaint served by Matrix Mechanical Corp.; third party summons and complaint; answer and demands served by Barr & Barr; amended summons and amended complaint; answer to amended complaint with demands served by Park Avenue plumbing Corp.; answer to amended complaint with demands served by Matrix Mechanical Corp.; answer to third-party complaint served by paragon Piping; answer to amended complaint served by Barr & Barr and Huntington Hospital; plaintiff's verified complaint; copy of the transcript of the examination before trial of Daniel Gordon dated June 12, 2006; unsigned copy of the transcript of the examination of William Fiederlein on behalf of Barr & Barr dated May 20, 2008; copy of the transcript of the examination before trial of Johon M. LoBriglio dated August 7, 2006; copy of the transcript of the examination before trial of Thomas M. Hoeft dated August 7, 2006 on behalf of Huntington Hospital; unsigned copy of the transcript of the examination before trial of Russell Hoppe dated June 18, 2008 on behalf of Park Avenue Plumbing; unsigned copy of the transcript of the examination before trial of Glenn P. Boyd on behalf of Matrix Mechanical dated June 7, 2007; copy of the agreement dated March 7, 2003 between Barr & Barr and Park Avenue Plumbing; copy of the agreement dated March 11, 2003 between Barr & Barr and Matrix Mechanical; and uncertified copy of the time and expense report.

The unsigned copies of the transcripts of the examinations before trial of William Fiederlein, Russell Hoppe, and Glenn P. Boyd are not in admissible form as required by CPLR 3212 and are not accompanied by an affidavit pursuant to CPLR 3116, and therefore cannot be considered on this motion for summary judgment.

Daniel Gordon testified to the effect that he first became a member of Union Local 28 in 1996. He is a journeyman, having earned that title performing sheet metal work for a five year period. He has been doing sheet metal work for twenty-eight years. He worked for Paragon Sheet Metal, Inc. for a number of years as a journeyman installing duct work and worked installing duct work in new wing area at Huntington Hospital, bouncing in and out of the project, but was there for a couple of months at one point. Michael Kramer was his direct supervisor at the job for Paragon. Late morning, on November 13, 2003, he was installing duct work for HVAC all over the building. They were "booming" material up through a west window by crane as they were all on the delivery that day. The crane operator was operating the boom on the crane, but he did not know who owned the crane, but thought Barr & Barr were the owners. Other workers, such as carpenters, iron workers, plumbers, other sheet metal workers, fitters and electricians , were also working at the site. The addition he was working in was a three-sided addition, four stories high. He was working on the second or third story, and after stepping off a ladder, he walked with Jim Sederman to the next room through the studs to the area where the delivery was to be made. He later testified that he was pretty sure he was working on the second floor when the accident occurred. There were hundreds of plumber's pipes on the floor, stacked neatly, all facing the same direction, several layers deep about two to three inches deep covering the entire floor of this 16 x 16 foot room. He did not know the name of the plumbing company thepipes belonged to. He stated the pipes had been there for a while, for a couple of weeks. When he stepped on one of the pipes, it rolled, causing him to fall flat on his back, causing him to sustain

injury. At first his knee hurt, but the pain in his back got progressively worse. His co-workers, Jimmy and Frank, helped him up. He had previously taken a delivery on top of the pipes prior to the accident. He had previously seen plumbers removing pipes from that room to use them. He knew the workers were plumbers as he recognized the men as they get to know each other. He described the pipes as a small copper pipes, 2-inch diameter, a mixture in size but no bigger than 2-inch diameter, and ten feet in length. He did not recall seeing a delivery of pipe that day prior to sustaining his injury and did not know for sure if he had to walk on the pipes on other occasions. Someone complained to him about having to take a delivery over pipe. Mike was not there for the delivery, but he apprised him of his injury that day. He stated it was common courtesy that because they all used the same window for delivery, that when a delivery came, it would be moved at the time of the delivery to the locations where it was going to be used. About once a month there were gang box, or tool box, meetings concerning job safety, run by Mike Kramer. He stated that they really did not discuss safety, had to sign in, then Barr & Barr collected the sign-in sheets. Usually his foreman, on a daily basis, would have contact with "Pat" from Barr & Barr. He never had contact with anyone from Huntington Hospital. He believed Matrix Mechanical Inc. and Paragon Sheet Metal, Inc. were the same company because Glen Boyd and Faddy own part of Matrix, Paragon Sheet Metal and Paragon Piping. Matrix does repair and servicing of HVAC. Matrix Mechanical does steam fitting work as Paragon Piping. He had observed both Matrix Mechanical and Paragon Piping use the type of piping he slipped on. He testified that there were no steam fitting pipes in the room as those pipes are black or galvanized, and the steam fitters were working on the penthouse.

Thomas Hoeft testified on behalf of Huntington Hospital to the extent that he has been employed by Huntington Hospital for thirty-three years and is presently executive vice-president and chief operating officer. He was familiar with the new southwest addition at Huntington Hospital involving the project on the day of the incident on November 14, 2003. The project intersected two multi-story wings of the hospital. He played no role in negotiations or entering into the contracts for the project. Kevin Lawlor, as chief financial officer, signed the contracts involving the entities working at the project. Huntington Hospital is the owner of the site and Barr & Barr was the construction manager. Barr & Barr hired the various subcontractors. Huntington Hospital did not pay the subcontractors. Hoeft stated that when he received the subpoena involving this case, he called Barr & Barr and was advised by Tom LePage that there had been an incident, but he never learned how the incident occurred. He testified that he believed Barr & Barr was the construction manager. The construction began in the summer of 2003 and ended early 2005. He, Kevin Lawlor, John Siedlecki and Peter Helton were assigned by Huntington Hospital to oversee the project. His role was that of the administrative liaison representing the hospital for the coordination of all aspects of the project. In November 2003, they did not report to the job site. A control monitor from Barr & Barr was at the job site to authorize the access two and from the job site, but he did not know who they were employed by. He never saw piping delivered to the site or stored at the site. Park Avenue Plumbing was the plumber at the site. Matrix Mechanical was another subcontractor at the site whom he believed was there for the HVAC. No one from Huntington Hospital checked the site to determine if materials were properly stored or secured or that the area was clean. He stated that was the responsibility of Barr & Barr, but he did not know for sure if anyone from Barr & Barr held that position. Mike Saraceno was the job super whom he believed had the authority to decide where materials were to be stored when they were delivered to the job site. Neither he nor anyone from Huntington Hospital was present at any job safety programs. He never received any complaints concerning the way that materials were delivered or stored at the site. Barr & Barr never reported any unsafe conditions to him. The first floor shell space of the southwest addition was dedicated for subcontractor supplies, shanties, et cetera. Huntington Hospital did not fill out any reports concerning the accident.

John LoBriglio testified to the effect that he was and still is employed by Barr & Barr as a project manager. Michael Saraceno, who is no longer employed by Barr & Barr, was the project manager for Barr & Barr and oversaw the southwest addition of Huntington Hospital. Bar & Barr, he stated, is in the business of construction

management and managed the construction at Huntington Hospital, and entered into contracts with other contractors and subcontractors. He did not know if Barr & Barr had other employees other than Michael Saraceno. He himself was not working at the site and did not know if Barr & Barr had laborers at the site. He did not know if Barr & Barr directed the other trades where to store materials on site. He never went to the construction site and did not know if someone from Barr & Barr accepted deliveries for the trades at the site. He believed Paragon Sheet metal was a subcontractor for Matrix Mechanical. He never saw Park Avenue Plumbing accept deliveries of piping, but did work with them on the new southwest project, but not while it was being constructed. The project consisted of construction of the new ambulatory surgery facility and the renovation phase encompassed upgrading and modification to the existing hospital infrastructure. He did see piping being stored in the project typically in the swing or shell space by the shanties. Barr & Barr has a safety consultant firm that it uses, but he did not know who it was. He was aware of no safety complaints. He testified that he had no involvement with the project at the time of the accident. He did not observe the shell space prior to October 2004 and did not observe the manner in which materials, equipment, tools or anything of that nature was stored by any of the subcontractors during the construction of the new wing from the time the project started until the time he arrived to do his portion of the work. He was aware of piping being stored in the area of the shanties on the first floor by Park Avenue Plumbing and by other contractors, such as HVAC contractors and sprinkler contractors. When he came on site in October 2004, pipes from Park Avenue Plumbing was already there and there was more material being replenished used for the various renovation work.

Based upon the foregoing, it is determined that Barr & Barr, Inc. and Huntington Hospital have not established prima facie entitlement to summary judgment dismissing the complaint and cross-claims with regard to the causes of action premised upon common law negligence, and Labor Law sections 200 and 241(6). However, it is determined as a matter of law that the cause of action premised upon the defendants' alleged violation of Labor Law section 240(1) is inapplicable to the facts of this action.

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 [2002]; Darby v Compagnie Natl. Air France, 96 NY2d 343 [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 [2nd Dept 1996].

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 [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 [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 [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 [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 [1st Dept 1993].

The admissible evidence does not establish to whom the pipes upon which Mr. Gordon fell belonged, thus raising factual issue in the moving paper as to liability. The contracts entered into between Barr & Barr and Matrix Mechanical and Park Avenue Plumbing Corp. specifically state that the subcontractor, under the direction of the Construction Manager, shall provide all labor, materials, equipment and services required. Therefore, the Construction Manager, Barr & Barr, has not established that it did not direct, supervise or control the work at the construction site. It is further determined that there are factual issues which preclude summary judgment. No copy of the agreement entered into between Huntington Hospital and Barr & Barr has been provided. Therefore, there are factual issues with regard to any control and supervision exercised by the moving defendants over the job site pursuant to Labor Law section 200. No party has established that reasonable care was exercised or that a safe work site was provided and maintained. Here, neither Barr & Barr nor Huntington Hospital has established prima facie that it did not have actual or constructive notice of the condition and neither has demonstrated pursuant to the contract the amount of supervision and control which may have been maintained by Huntington Hospital. Thomas Hoeft testified on behalf of Huntington Hospital indicating he and Kevin Lawlor, John Siedlecki and Peter Helton were assigned by Huntington Hospital to oversee the project. Hoeft did not set forth the duties and responsibilities of Lawlor, Siedlecki and Helton, and neither their testimonies nor affidavits have been submitted, leaving it to this court to speculate as to whether they visited the site, supervised or directed any activities, or made or received any complaints concerning the job site and work being done.

Accordingly, that part of motion (013) which seeks dismissal of the causes of action premised upon common law negligence and Labor Law section 200 are denied.

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 [2nd Dept 2005]; Handlovic v Bedford Park Development, Inc., 25 AD3d 653 [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 [Supreme

Court of New York, Kings County 2004]. As set forth in Ortega et al v Puccia et al, 57 AD3d 54 [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.

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]).

Based upon the testimony of the plaintiff, it is determined as a matter of law that Labor Law section 240 is inapplicable in this action. The plaintiff's testimony clearly establishes that he did not fall from a ladder or an elevated work site, but stepped down from the ladder, stepped into the next room through the studs, stepped onto the pipes and then fell on the pipes, a hazard not compensable under Labor Law section 240.

Accordingly, that part of the complaint premised upon the alleged violation of Labor Law section 240 is dismissed as a matter of law as asserted against all defendants.

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 [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, 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 [Dept 1993]. As the Court of Appeals explained in Rizzuto v L.A. Wegner Contracting Co., Inc., 91 NY2d 343 [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].

Liability may be imposed under §241(6) even where the owner or contractor did not supervise or control the worksite, Navin et al v SJP TS, LLC et al, 2010 NY Slip Op 30988U, 2010 NY Misc Lexis 1904 [Supreme Court of New York, New York County]. Accordingly, 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 v Curtis Palmer Hydro-Elec. Co., supra; Ares v State, 80 NY2d 959 [1992]; see also, Adams v Glass Fab., 212 AD2d 972 [1995]," Rizzuto v L.A. Wenger Contracting Co., Inc.,

supra ; Marin v The City of New York, et al, 15 Misc3d 1003A [Supreme Court of New York, Kings County 2004]; *see*, Mahoney v Madeira Associates et al, 32 AD3d 1303 [4th Dept 2006]). Here, the plaintiff has alleged violation of various sections of the Industrial Code of the State of New York. As the Court of Appeals explained in Rizzuto v L.A. Wegner Contracting Co., Inc., supra, "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 the instant action the plaintiff has plead violation of Labor Law section 241(6) premised upon the alleged violations of the Industrial Code 12 NYCRR Sections 23-1.7(d), 23-1.7(e)(1), 23-1.7(e)(2), 23-2.1(a), 23-2.1(b) and 23-1.5. Such determination is a factual issue to be resolved by the jury. Here the plaintiff claims that 12 NYCRR §23-1.7(d) and (e) and 23-2.1 have been violated and are sufficiently specific to support a cause of action under Labor Law §241(6), Vieira v Tishman Construction Corporation et al, 155 AD2d 235 [1st Dept 1998]). 12 NYCRR §23-1.5 has been deemed a general provision that cannot sustain a Labor Law §241(6) cause of action, Krause et al v Central New York Oil and Gas Comany, LLC, 16 Misc3d 1106A [Supreme Court of New York, Broome County 2007] citing McGrath v Lake Tree Vil. Assocs., 216 AD2d 877 [1955]).

12 NYCRR §23-1.7(d) provides "Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing." 12 NYCRR §23-1.7(e) provides "Tripping and other hazards. (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping...." 12 NYCRR §23-2.1(a)(1) which requires that building materials be "so located that they do not obstruct any passageway, walkway, stairway, or other thoroughfare is specific enough to support an action under Labor Law §241(6), Lehner v Dormitory Autho., 221 Ad2d 958 [4th Dept 1996]).

In the instant action the plaintiff is claiming that the pipes obstructed the floor and passage to the window necessary for retrieving the supplies being hoisted for him to perform his job, and the flooring with the pipes was the only means of access to the area he was to work in. Accordingly 12 NYCRR §23-1.7(d) and (e) and §23-2.1 serve as a basis for jury determination as to whether liability may be imposed premised upon Labor Law §241(6).

Accordingly, that part of motion (013) which seeks to dismiss the cause of action premised upon the alleged violation of Labor Law section 241(6) is denied.

As liability cannot be determined from the moving papers, no determination can be made with regard to any claims for common law or contractual indemnification or contribution.

Accordingly that part of motion (013) which seeks dismissal of the cross-claims asserted against them is denied.

Motion (014) by Matrix Mechanical is supported by an attorney's affirmation; a copy of the agreement dated April 1, 2003 between Huntington Hospital and Barr & Barr, Inc.; uncertified copy of a Supervisor's Investigation and Report; copy of Employer's Report of Work Related Accident/Occupation/Disease; Certificate of Liability Insurance; and response to Preliminary Conference Order.

Cross-motion (014) is not supported by copies of the pleadings, the affidavit of a person with knowledge from Matrix Mechanical or a copy of the signed deposition transcript as required by CPLR 3212. A party may not incorporate by reference exhibits from another party's motion pursuant to CPLR 3212. Therefore, the cross-motion is insufficient as a matter of law to be considered upon application for summary judgment.

Accordingly, motion (014) is granted only to the extent that the cause of action premised upon the defendants' alleged violation of Labor Law section 240(1) is dismissed as a matter of law.

Cross-motion (015) by the defendant/third-party plaintiff Park Avenue Plumbing Corp. is supported by an attorney's affirmation; copy of the Precision Portfolio Policy issued by Northern Insurance Company of New York; and the affidavit of Warren Benedict.

Cross-motion (015) is not supported by copies of the pleadings as required by CPLR 3212. The affidavit submitted by Warren Benedict, even if considered, is conclusory and does not indicate the type of piping used by Park Avenue Plumbing and how it differed from the piping the plaintiff fell over. Submissions by other parties cannot be incorporated by reference into the cross-motion pursuant to CPLR 3212.

Accordingly, motion (015) is granted only to the extent that the cause of action premised upon the defendants' alleged violation of Labor Law section 240(1) is dismissed as a matter of law.

Dated: Nov 29, 2010

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION