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

PRESENT: PART 11

Index Number : 112405/2008

TYNAN, JAMES E.

vs

JETBLUE AIRWAYS

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 6-3-10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

	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 the annexed Memorandum Decision + Order -

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

Dated: January 4, 2011

J.S.C.

Check one: ☑ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

----------x

JAMES E. TYNAN and KAREN TYNAN,
Plaintiff,

-against-

Index No. 112405/08

JETBLUE AIRWAYS CORPORATION and TURNER CONSTRUCTION COMPANY,
Defendants.

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Joan A. Madden, J.

This is an action to recover damages for injuries allegedly sustained as the result of a workplace accident. In motion seq. no. 001 (the "Tynans' Motion"), plaintiffs James E. Tynan ("Tynan") and Karen Tynan (together with Tynan, the "Tynans") move for summary judgment against defendants JetBlue Airways Corporation ("JetBlue") and Turner Construction Company ("Turner") on the issue of liability on their Labor Law §240(1) claim. JetBlue and Turner oppose the Tynans' Motion. In motion seq. no. 002 (the "Defendants' Motion"), JetBlue and Turner move for summary judgment dismissing the complaint.[1] The Tynans oppose the Defendants' Motion to the extent that it seeks to dismiss their claims under Labor Law §§240(1) and 241(6). For the reasons stated below, the Tynans' Motion is granted, and the Defendants' Motion is granted in part and denied in part.

BACKGROUND

Tynan was injured on March 20, 2008, at approximately 11:30 a.m., while working for a subcontractor, American Architectural, on a construction project (the "Project") at John F. Kennedy International Airport, Queens, New York ("JFK"). The Project involved, in part, the construction of a new JetBlue Terminal Building (the "JetBlue Terminal Building") and an

[1] Motion seq. nos. 001 and 002 are consolidated for disposition.

elevated passenger connector (the "skywalk"), which was under construction at the time of the accident, connecting the JetBlue Terminal Building to the JFK AirTrain. The site on which the Project took place (the "Project Site") was leased by the Port Authority of New York and New Jersey ("Port Authority") to JetBlue.

JetBlue hired Turner to serve as the construction manager on the Project. Curt Zegler ("Zegler"), the Project Manager of Administration for Turner, testified that Turner's responsibilities included coordinating the work of the various subcontractors on site and holding safety meetings in which representatives from their subcontractors would be present. Zegler dep. at 15. He also testified that JetBlue gave Turner ultimate authority for coordinating the means and methods through which the Project was conducted. Id. at 34.

Turner retained American Architectural to perform curtain wall and exterior window work on the JetBlue Terminal Building and the skywalk. Tynan began working on the Project for American Architectural in August 2006.[2] At the time of the accident, Tynan served as the general foreman for the Project for American Architectural and was the person from American Architectural with the most seniority at the Project Site on a daily basis. Tynan was responsible for performing certain administrative tasks, monitoring the performance of American Architectural's workers, and "working on various details," including ensuring that American Architectural's workers were using safe methods to perform their work. Tynan dep. at 25.

During the time Tynan worked at the Project Site, he participated in a site specific safety orientation, as well as weekly "toolbox" meetings which would sometimes address safety issues. In particular, Tynan attended toolbox meetings on March 11, 2008, and March 18, 2008, that addressed the issue of ladder safety, including ensuring that extension ladders are tied off and that the pitch of a ladder is secure.

[2] The Defendants assert that Tynan was not actually an employee of American Architectural, but instead was employed by Paladin Construction, a subcontractor hired by American Architectural.

The record indicates that at the time of the accident, Tynan was working on the skywalk, which had not yet been completed although the concrete floor had been constructed. The skywalk is elevated about 40 feet above ground and measures about 700 feet in length and 30 feet in width. At the time of the accident, the floor of the skywalk contained 6 depressed slab pits (the "pits") which were formed to contain motorized equipment for a moving walkway to be installed by Schindler Elevator ("Schindler"). It appears from the record that each of the pits was square-shaped, measuring approximately 10 feet in length and between 4 and 6 feet in depth (Tynan dep. at 95-96).[3] Tynan acknowledges that he was aware of the pits for weeks before the accident and never reported any instances where he observed that the pits were not safed off. Rosario "Sal" Ragona ("Ragona"), a Union Ironworker employed by American Architectural who witnessed Tynan's fall, stated that there was no protection around the pit at the time of the accident, but "[w]ithin a day of the accident the pit was completely safed off." Ragona Aff. ¶¶2-3.

According to Colin Bradford ("Bradford"), a foreman employed by New England Construction Co., Inc. ("New England"), which was one of the subcontractors on the site, New England was responsible for installing safety protection around the perimeter of the pits as well as inspecting this safety protection on a daily basis. Bradford Aff. ¶¶3-4. Bradford stated that the protection that New England installed on the perimeter of the pits included guardrails and toe boards. Id at ¶3.

Around the time of the accident, workers from American Architectural completed welding up certain clips for the curtain wall they were installing on the skywalk. Tynan testified that he ascended a ladder, which had already been set up, approximately 16 feet to inspect the

[3] In the Tynans' Motion, they assert that the pit was 5 or 6 feet deep, which is consistent with Tynan's estimate of the depth of the pit in his deposition. See Tynan dep. at 95. However, it is unclear whether the Tynans concede in their reply that the pit was 4 feet deep as the Defendants maintain. In any event, this decision does not turn on whether the pit was 4 feet or 6 feet in depth.

installation of some of the window clips. Tynan dep. at 91-2, 112. He testified that the foot of the ladder was approximately one foot away from the edge of one of the pits and that he had verified that the ladder was secured and properly pitched before ascending it. Id. at 98, 112. Tynan was wearing a harness, but did not tie off prior to ascending the ladder. The parties agree that the ladder was not defective.

After inspecting the clips, Tynan descended the ladder and purposely skipped the last rung of the ladder although he testified that he usually descends one rung at a time. Id. at 116-8. Tynan testified that while his left foot was on the second rung of the ladder, he lowered his right foot down to the floor and, after his right foot became weight bearing, he removed his left foot from the ladder and lost his balance and fell into the pit. Id. at 119-121. There was debris in the pit at the time of the accident, but that there was no protection surrounding the pit. Ragona Aff. ¶2, Tynan Aff. at 2. No one who witnessed the accident testified that they observed anyone performing work which would require the pit to be unguarded at the time Tynan fell.

Zegler testified that on the date of the accident the pit was not covered with plywood or netting, but that he did not know whether it was surrounded by a safety cable system. Zegler dep. at 58. Zegler further testified that prior to the date of the accident but following the time "when we poured the concrete slab," he did not see the pits covered with plywood, nets, or surrounded with a safety cable system. Zegler dep. at 58-59. Zegler also testified that he did not observe any of these protections after the date of the accident. Id. at 59-60. However, Ragona stated that within a day of the accident the pit was completely "safed off" with steel cables and horizontal netting. Ragona Aff. ¶3.

In contrast, Bradford states that "[p]erimeter protection would remain in place surrounding the [pits] until [Schindler] had [completed its work]..." and that "had the perimeter protection in fact been removed from the [pit] in the vicinity of the accident location, same would have been replaced by no later than the end of the working day." Bradford Aff. ¶7.

Additionally, Donald Lomanto ("Lomanto"), an employee of Turner who served as the Exterior Wall Superintendent and was assigned to the skywalk, testified that he walked the skywalk several times a day and never heard anyone complain that the pits were unguarded or observed that they were unguarded, except when Schindler was working on them. Lomanto Aff. ¶¶2, 9, 11, 12. However, there appears to be some ambiguity in Lomanto's affidavit as to whether New England or Schindler was responsible for ensuring that the pits were properly safed off. Lomanto Aff. ¶¶10, 13.

Lomanto maintains that assuming the conditions alleged by Tynan existed, Tynan should have either "availed himself of another safety device to perform his work, i.e., the boom lifts or, alternatively, he should have placed an appropriate sized extension ladder within the depression and tied off." Lomanto Aff. ¶13. Lomanto stated that multiple boom lifts had been provided by American Architectural for use in the performance of its work, including work on the curtain wall, and that he was not informed that American Architectural's workers were using a ladder to perform work on the curtain wall on the date of the accident. Lomanto Aff. ¶¶7-8. Lomanto further stated that a progress photo of the unfinished skywalk taken a few dates after the accident shows boom lifts "provided and used by American Architectural to perform its work." Id. at ¶8.

However, according to Tynan, he could not have performed an inspection of the clips using boom lifts because they were located at the ground level outside of the skywalk and it was necessary for him to inspect the window clips from the inside of the skywalk because the glass of the curtain wall was tinted black, "so you couldn't see the window clips and insulation from the outside looking in." Tynan Aff. at 2. Furthermore, Tynan stated that the "actual weld is sandwiched between a horizontal steel girder and interior insulating panel....[and it] would be impossible to see that angle from outside. Id. Tynan further explained that he could not have safely placed a ladder inside the pit and tied off in order to appropriately perform his inspection for a variety of reasons, including that the ladder was not high enough so that it could be

properly secured and pitched from inside the pit in such a way that it would enable him to reach the clips, and "this does not include the fact that the [pit] was full of garbage and wood." Id. He further explained that one cannot ascend or descend a ladder while tied off and that he was coming down the ladder just before he fell and "there were absolutely no cable systems where [he] could have tied off to regardless." Id.

After his fall, Tynan asserts that he was able to get up and he was helped out of the pit by Cherille Yon, who appears to have been a worker for American Architectural. Tynan dep. at 84, 139. Tynan did not get medical attention or report the accident to Turner until the day after he fell when he began experiencing increased pain in his back. He was taken to the hospital on that day, March 21, 2008. Tynan testified that he returned to work at some time on the day after he sought medical attention, although it appears that the doctors who examined him recommended that he wait a longer period before returning to work. See Tynan dep. at 148-9. He eventually underwent a microdiscectomy in September 2008. Id. at 180.

The Tynans commenced this action against Turner and JetBlue by the filing a summons and complaint on or about January 11, 2007, seeking to recover damages under Labor Law §§240(1), 241(6), 200, and for common law negligence.

The Tynans now move for summary judgment as to liability on their claim under §240(1). The Tynans argue that the Defendants are liable for Tynan's injuries under §240(1) as Tynan was within the class of persons protected by §240(1) since he was a worker on the job who sustained injury from a fall into an opening that was unguarded and unprotected in violation of the statute, and his injury was caused by the application of the force of gravity. The Tynans also assert that JetBlue and Turner are respectively an owner and contractor within the meaning of the statute, such that they may be held liable for Tynan's injuries under Labor Law Section §240(1). Furthermore, the Tynans argue that comparative negligence and assumption of risk are not viable defenses to a Labor Law §240(1) claim.

In their opposition to Tynans' Motion and in support of their motion, the Defendants argue that summary judgment dismissing the Tynans' claims under section 240(1) is warranted as Tynan's injuries occurred as a result of the ordinary and usual dangers of a construction site. The Defendants argue that the pit, which they assert was at the ground level of the skywalk and did not present a danger of falling through to another level of the worksite, was not an elevation-related hazard such that the accident is within the purview of section 240(1). They further assert that section 240(1) is inapplicable since none of the protective devices identified in the statute could have prevented the accident.

With respect to the Tynans' claim under Labor Law §241(6), the Defendants argue that the Tynans are not entitled to relief because Industrial Code §23-1.7(b), upon which the Tynans' claim under §241(6) is predicated, does not encompass depressions that are less than 15 feet deep.[4] They also assert that although §23-1.7(b)(1) does not define "hazardous opening," the regulation is only meant to require safety measures to apply to depressions of a size and character such that a plaintiff could fall through to a level below.

The Defendants also contend that they are not liable under either Labor Law §§ 240(1) or 241(6) because Tynan was the sole proximate cause of his injuries. Specifically, the Defendants assert that Tynan's injuries were the result of his decision to perform the inspection of the clips from the interior of the skywalk in a narrow area using a ladder which he did not tie off as he had been instructed to do in his safety training. They assert that the accident would have been prevented if Tynan had either tied off when using the ladder or if he had performed his work from the exterior of the skywalk using a boom lift.

In reply and opposition, the Tynans assert that based on First Department decisions, including Salazar v. Novalex Contracting Corp., 72 A.D.3d 418 (1st Dep't 2010) and Carpio v.

[4] The Tynans claimed violations of other Industrial Code provisions in their complaint, but have withdrawn these claims.

Tishman Const. Corp. of New York, 240 A.D.2d 234 (1st Dep't 1997), the pit in which he fell was of the size and character such that liability could attach under section 240(1) and under section 241(6) based on a violation of Industrial Code 23-1.7(b).

With respect to the Defendants' allegations that Tynan was the sole proximate cause of the accident, the Tynans refer to the statements in Tynan's affidavit that he could not have used a boom lift to inspect the installation of the clips, and that he could not have tied off prior to the accident since he was descending the ladder before his fall and could not have done so while tied off. The Tynans also assert that the Defendants' position is based on speculative affidavits from non-witnesses who have no personal knowledge of the conditions at the site of the accident at the time of the accident. The Tynans further request the court to search the record and grant them summary judgment on their section 241(6) claim, based upon undisputed proof that Tynan fell through an unguarded opening at a worksite.

In reply, the Defendants argue that the precedents cited by the Tynans in support of their claims under sections 240(1) and 241(6), are not dispositive here as, unlike in those cases, Tynan was aware of the pit and had alternate means of performing his work. Defendants also argue that even if the pit did not have railing or other protection at the time of the accident, this condition did not constitute of violation of section 240(1) since Schindler could not perform its work if the pit was guarded.

The Defendants further claim that section 241(6) cannot serve as a predicate for liability here since a worker's fall into an opening does not implicate a violation of section 23-1.7(b) where the opening must remain open for work to progress, and they assert that the evidence shows that the pits were only unguarded when the moving walkway machinery was being installed by Schindler, which could not be achieved while the opening was covered.

DISCUSSION

On a motion for summary judgment, the proponent "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..." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

Labor Law § 240(1)

Labor Law §240(1) imposes a duty upon all "contractors and owners and their agents engaged in the erection, demolition, repairing, ...or pointing of a building or structure" to "furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, ...and other devices which shall be so constructed, placed and operated as to give proper protection...." The purpose of the statute is to "protect [] workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident." Zimmer v. Chemung County Performing Arts, 65 N.Y.2d 513, 520, reargument denied 65 N.Y.2d 1054 (1985)(internal quotations marks and citations omitted). To impose liability under §240(1), the plaintiff need only prove a violation of the statute (i.e. that the owner or general contractor failed to provide adequate safety devices), and that the statutory violation proximately caused his or her injuries. Blake v. Neighborhood Housing Services of New York City, Inc., 1 N.Y.3d 280, 290 (2003).

Under Labor Law §240(1), an owner or contractor is liable even if a job is performed by an independent party over which the owner or contractor exercised no supervision or control. See Gordon v. Eastern Railway Supply, Inc., 82 N.Y.2d 555 (1993). Moreover, comparative

negligence of the worker is unavailable as a defense to a Labor Law §240(1) claim. See Blake at 289-90; Morin v. Machnick Builders, Ltd., 4 A.D.3d 668 (3rd Dep't 2004).

It is well settled that section 240(1) should be construed as liberally as possible for the accomplishment of the purpose for which it was framed. See Misseritti v. Mark IV Construction Co., Inc., 86 N.Y.2d 487 (1995); see also Ortiz v. SFDS Development, 274 A.D.2d 341 (1st Dep't 2000). That being said, however, the "exceptional protection" afforded to workers under section 240(1) only applies to elevation-related risks. Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509, 514 (1991).

It is undisputed that Tynan qualifies as a person who is protected under section 240(1). It is also undisputed that JetBlue, as a lessee in possession, and Turner qualify respectively as an owner and contractor within the meaning of the statute. See Glielmi v. Toys R Us, Inc., 62 N.Y.2d 664, 665 (1984) (a lessee in possession may be deemed an owner or agent of the owner for purposes of determining liability under section 240(1)).

In addition, the record demonstrates that Tynan was exposed to an elevation-related risk when he fell into the unprotected pit that was at least 4 feet deep and approximately 10 feet wide and 10 feet long, such that the circumstances of this accident fall within the ambit §240(1). See Salazar v. Novalex Contracting Corp., 72 A.D.3d 418; Carpio v. Tishman Const. Corp. of New York, 240 A.D.2d 234 (1st Dep't 1997). Salazar involved an accident resulting from a plaintiff's fall into a trench that was 3 or 4 feet deep, 2 feet wide and between 10 and 15 feet long, while he was spreading freshly poured concrete in the basement of a building that was being renovated. Carpio involved a plaintiff who was extending a paint roller that he was going to use to paint a ceiling when his leg fell 3 feet down a 10 to 14 inch wide shaft. In each case, the First Department held that the uncovered opening posed an elevation-related hazard for the purposes of section 240(1). Here, the pit into which Tynan fell was of the same or greater depth than the depressions which were found to pose elevation related hazards in Salazar and Carpio. In fact, in

Salazar, only the plaintiff's right leg went into the opening whereas in this case the plaintiff's entire body fell into the pit.

Moreover, the Defendants' argument that the pit was at ground level does not preclude it from constituting an elevation-related risk. The Court of Appeals has held that the hazards contemplated by 240(1) "are those related to the effects of gravity where protective devices are called for...because of a difference between the elevation level of the required work and a lower level." Rocovich at 514. This is not inconsistent with an elevation related hazard being at ground level or below.

Additionally, the Defendants' argument that the protective devices identified in the statute could not have prevented the accident is unavailing. Labor Law §240(1), by its own terms, extends to other forms of protective devices than those explicitly enumerated in the statute. Specifically, it has been held that guardrails, which could have prevented Tynan's accident and which were allegedly usually in place around the perimeter of the pit, are a protective device within the purview of section 240(1). See Hagins v. State, 81 N.Y.2d 921, 922-3 (1993).

The First Department and Court of Appeals cases cited by the Defendants in support of their argument that the pit was not an elevation related hazard are not controlling here. For instance, the hole in Rocovich was only 12 inches deep. Toefer v. Long Island R.R., 4 N.Y.3d 399 (2005) is also distinguishable as that case involved a worker's fall from "the inherently stable surface of a flatbed truck." Additionally, Meslin v. New York Post, 30 A.D.3d 309 (1st Dep't 2006) is not controlling here as the manner in which the accident happened materially differs from this case. In Meslin, plaintiff was injured when he slipped off a scaffold which was at ground level, onto a pipe which then rolled and caused him to fall into a three-foot hole. Furthermore, the defense of sole proximate cause asserted by the Defendants is unavailing. In order to succeed on a defense of sole proximate cause, the defendant must establish that the

plaintiff "had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured." Cahill v. Triborough Bridge & Tunnel Auth., 4 NY3d 35, 40 (2004). In addition, "if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it." Blake v. Neighborhood Housing Services of New York City, Inc., 1 N.Y.3d at 290. Defendants argue that Tynan's fall was the result of his failure to use a boom lift or to tie off when using the ladder. Tynan contends that he could not perform the work using these devices. In any event, any failure by Tynan to use certain safety devices was not the sole proximate cause of the accident since that failure to provide guardrails as protection around the pit, in violation of section 240(1) was a proximate cause of his injuries.

Labor Law § 241(6)

Labor Law §241(6) requires that owners and contractors "'provide reasonable and adequate protection and safety' for workers and... comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." Ross v. Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d 494, 501-2 (1993). The duty under section 241(6) is non-delegable. Thus, "to the extent that [a] plaintiff has asserted a viable claim under section 241(6), he need not show that defendants exercised supervision or control over his worksite in order to establish his right of recovery." Ross at 502. However, a violation of section 241(6) only some evidence which a jury may consider in regard to the question of a defendant's negligence. Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 N.Y.2d 343, 349 (1998). Furthermore, in contrast to section 240(1), comparative negligence may be asserted as a defense to a section 241(6) claim. Zimmer at 521-2.

Allegations which rely on claimed failures to measure up to general regulatory criteria are insufficient to give rise to a triable claim under the statute; the plaintiff must allege a

violation of a regulation that requires compliance with concrete specifications. Id. at 501-5. "Only a violation of the State Industrial Code and regulations promulgated by the State Commissioner of Labor may serve as a basis for liability under §241(6)." Heller v. 83rd Street Investors Ltd. Partnership, 228 A.D.2d 371, 372 (1st Dep't), lv denied 88 N.Y.2d 815 (1996).

Here, the Tynans' section 241(6) claim is predicated on an alleged violation Industrial Code §23-1.7(b)(1), which has been held to be a sufficiently concrete specification to provide a basis for a violation of the statute. Olsen v. James Miller Marine Service, Inc., 16 A.D.3d 169, 171 (1st Dep't 2005). Industrial Code §23-1.7(b)(1)(I) requires that "[e]very 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 Part." However, in circumstances where an opening must remain open in order for work to progress, a worker's fall into the opening does not implicate a violation of §23-1.7(b)(1), unless the opening is equal to or greater than 15 feet in depth. Salazar at 423.

The pit at issue here qualifies as a hazardous opening. Contrary to the Defendants' contentions, a hole need not be 15 feet in depth in order to qualify as a hazardous opening such that §23-1.7(b)(1)(I) would apply. The First Department has held that a hazardous opening is one which is "large enough for a person to fit" into. Salazar at 422, citing Messina v. City of New York, 300 A.D.2d 121, 123 (1st Dep't 2002) (holding that a hole that is 2 feet wide, 3 or 4 feet deep, and 15 feet long, constituted a hazardous opening). The pit at issue here, which was approximately 10 feet wide, 10 feet long, and at least 4 feet deep, is deeper and wider than the hole in Salazar, and the record shows that Tynan's entire body fell into the pit. Thus, the pit qualifies as a hazardous opening.

Furthermore, the cases relied upon by the Defendants in opposition are not to the contrary. See e.g.. Dzieran v. 1800 Boston Road, LLC, 25 A.D.3d 336 (1st Dep't 2006)(concerning §23-1.7(b)(1)(iii), and not the provision at issue here); Alvia v. Teman Elec.

Contracting, Inc., 287 A.D.2d 421 (2nd Dep't 2001), lv dismissed, 9 NY2d 749 (2002)(holding that hole was not a hazardous opening when plaintiff's leg and not whole body fell into it).

The Defendants' apparent argument that dismissal of the section 241(6) claim is appropriate because the hole had to remain open for work to progress is also without merit. The Defendants do not provide any evidence controverting Tynan's or Ragona's description of the accident, which are inconsistent with the proposition that work in the pit was being performed at the time of the accident or that the pit contained any machinery. Moreover, Lamanto's affidavit is insufficient to raise an issue of fact as to whether work was being performed in the pit at the time of the accident as his statements are based on his past observations of the protection provided around the pits.

As indicated above in connection with the Tynans' section 240(1), it cannot be said that Tynan's conduct was the sole proximate cause of his injury. Accordingly, the Defendants' motion for summary judgment dismissing the Tynans' section 241(6) claim is denied. At the same time, the Tynans are not entitled to summary judgment on their section 241(6) claim since a violation of this code provision is only some evidence of negligence, and the fact finder must determine whether negligence by Tynan or "some [other] party to, or participant in, the construction project caused plaintiff's injury." Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 N.Y.2d 343, 350 (1998).

Conclusion

In view of the above, it is

ORDERED that the motion of James E. Tynan and Karen Tynan for summary judgment as to liability on their claim under Labor Law §240(1) against defendants JetBlue Airways Corporation and Turner Construction Company is granted; and it is

ORDERED that summary judgment is granted in favor of defendants JetBlue Airways Corporation and Turner Construction Company to the extent of dismissing the Labor Law §200

and negligence claims asserted against them by James E. Tynan and Karen Tynan and these claims are hereby severed and dismissed; and it is further

ORDERED that the parties shall appear for a pretrial conference to be held in Part 11, room 351, 60 Centre Street, New York, NY on January 13, 2011 at 3:00 p.m.

A copy of this decision and order are being mailed by my chambers to counsel for the parties.

Dated: ~~December~~ January 4, 2011

J.S.C.