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SHORT FORM ORDER

COPY

INDEX No. 08-16904
CAL. No. 10-01749OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 11-10-10 (#002)
MOTION DATE 12-1-10 (#003)
MOTION DATE 11-18-10 (#004)
MOTION DATE 12-9-10 (#005)
ADJ. DATE 2-17-11
Mot. Seq. # 002 - Mot D # 004 - XMG
003 - Mot D # 005 - MG

JOHN HEANEY, Plaintiff, - against - WALTER D. O'HEARN, DENISE O'HEARN, I.D.A. PROPERTY MANAGEMENT & HOME IMPROVEMENTS, INC. and DRYWALL SURGEONS SPECIALISTS, INC., Defendants.	SIBEN & SIBEN, LLP Attorney for Plaintiff 90 East Main Street Bay Shore, New York 11706 PEREZ & VARVARO, ESQS. Attorney for Defendants Walter & Denise O'Hearn 333 Earle Ovington Boulevard, P.O. Box 9372 Uniondale, New York 11553 FISCHETTI & PESCE, LLP Attorney for Defendant I.D.A 310 Old Country Road, Suite 201 Garden City, New York 11530
I.D.A. PROPERTY MANAGEMENT & HOME IMPROVEMENTS, INC., Third-Party Plaintiff, - against - DRYWALL SURGEONS SPECIALISTS, INC. Third-Party Defendant.	LITCHFIELD & CAVO, ESQS. Attorney for Defendant Denise O'Hearn 420 Lexington Avenue, Suite 2104 New York, New York 10170 MILBER MAKRIS PLOUSADIS & SEIDEN, LLP Attorneys for Defendant Drywall 1000 Woodbury Road, Suite 402 Woodbury, New York 11797

Upon the following papers numbered 1 to 96 read on this motion and cross motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 -12 ; Notice of Cross Motion and supporting papers (003 13-34; (004) 35-45; (005) 46-66 ; Answering Affidavits and supporting papers 67-74; 75-84; 85-88 ; Replying Affidavits and supporting papers 89-90; 91-92; 93-94 ; Other 95-96 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (002) by defendant Walter D. O'Hearn for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's amended complaint and any cross claims asserted against him premised upon common law negligence and the alleged violation of Labor Law §§ 200, 240(1), and § 241(6) is granted with prejudice as a matter of law; and the further request for an order granting summary

judgment over and against the co-defendant IDA Property Management & Home Improvements, Inc. on the issue of common law indemnification has been rendered academic and is denied as moot on the basis of the dismissal of all the causes of action as asserted against him; and it is further

ORDERED that this motion (003) by defendant Denise O'Hearn for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and all cross claims asserted against her is granted and the amended complaint and all cross claims asserted against her are dismissed with prejudice; and the request for further order granting conditional summary judgment against co-defendants Drywall Surgeons Specialists and IDA Property Management & Home Improvements, Inc. on the issue of common law indemnification has been rendered academic and is denied as moot on the basis of the dismissal of the amended complaint and cross claims asserted against her; and it is further

ORDERED that this motion (004) by defendant/third-party plaintiff IDA Property Management & Home Improvements, Inc. for an order pursuant to CPLR 3212 granting partial summary judgment dismissing plaintiff's claims premised upon Labor Law §240(1) is granted with prejudice as a matter of law; and it is further

ORDERED that this motion (005) by defendant/third-party defendant Drywall Surgeons Specialists, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's amended complaint, any cross claims asserted against it, and further dismissing the third-party complaint is granted and the amended complaint, all cross claims, and the third-party complaint are dismissed with prejudice as asserted against it.

This is an action for damages arising out of a slip and fall incident which occurred on March 26, 2007 at approximately 8:00 a.m., wherein the plaintiff, John Heaney, claims to have sustained personal injury at 242 Herrick Road, Southampton, New York when he tripped and fell on a hole/rut in a garage while delivering sheet rock to the O'Hearn residence. The plaintiff has pleaded causes of action sounding in negligence, violation of Labor Law §§200 and 240, and violation of Labor Law §241(6) premised upon the alleged violation of 12 NYCRR 23-1.5, 23-1.7, 23-1.7(b), 23-1.7(d) and 23-1.7(e).

A third-party action was commenced by IDA Property Management & Home Improvements, Inc., wherein it has asserted causes of action against co-defendant Drywall Surgeons Specialists, Inc. for contractual indemnification, contribution, to hold harmless, and breach of agreement premised upon the failure to procure insurance naming IDA Property Management & Home Improvements, Inc. as an additional insured.

In motion (002) the defendant Walter D. O'Hearn seeks summary judgment dismissing the complaint premised upon his alleged violation of Labor Law §240 and §241(6) based upon the single family homeowner exception, and Labor Law §200 on the basis that he did not direct or control any of the renovation work and did not have actual or constructive notice of the alleged hazardous condition. Walter O'Hearn further seeks conditional summary judgment against co-defendants Drywall Surgeons Specialists (Drywall) and IDA Property Management & Home Improvements, Inc. (IDA) on the issue of common law indemnification.

In motion (003) the defendant Denise O'Hearn seeks summary judgment dismissing the complaint premised upon her alleged violation of Labor Law §240 and §241(6) based upon the single family homeowner exception, and Labor Law §200 on the basis that she did not direct or control any of the renovation work and did not have actual or constructive notice of the alleged hazardous condition complained of. Denise O'Hearn further seeks conditional summary judgment against co-defendants Drywall and IDA for common law indemnification.

In motion (004) the defendant/third-party plaintiff IDA seeks partial summary judgment dismissing the plaintiff's cause of action premised upon its alleged violation of Labor Law §240(1) on the basis the subject accident does not fall under the statute.

In motion (005) the defendant/third-party defendant Drywall seeks dismissal of the complaint, the third-party complaint, and any and all cross claims asserted against it on the bases, that as a subcontractor hired by the general contractor IDA, Drywall was not at the site of the accident on the date of the accident, Drywall had no authority to control the means, methods or sequences of the work which gave rise to the plaintiff's accident and injuries, and Drywall did not commence any work at the premises until subsequent to the accident.

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

In support of motion (002), Walter O'Hearn has submitted, inter alia, an attorney's affirmation; copies of the supplemental summons and amended complaint, the moving defendant's answer with cross claims against IDA for contribution, common law and contractual indemnification, and breach of contract; IDA's response to cross claims; third-party summons and complaint; answer to third-party complaint with cross claims against Walter O'Hearn, Denise O'Hearn and IDA for apportionment of damages, contribution, common law indemnification; the plaintiff's bill of particulars; copy of the revised contract dated October 9, 2006 entered into between Mr. and Mrs. O'Hearn and IDA; the signed transcript of the examination before trial of John Heaney dated August 18, 2009; and the unsigned transcripts of the examinations before trial of Walter O'Hearn and Denise O'Hearn dated November 19, 2009, John Tolson on behalf of IDA dated August 25, 2009, and Anthony Orlando on behalf of Drywall.

In support of motion (003), Denise O'Hearn has submitted, inter alia, an attorney's affirmation; the affidavit of Denise O'Hearn dated October 4, 2010; copies of the supplemental summons and amended complaint, the moving defendant's answer with cross claims against IDA for contribution and indemnification, answer served by IDA, plaintiff's bill of particulars, third-party summons and complaint, amended answer served by Walter and Denise O'Hearn, verified answer served by Denise O'Hearn, verified third-party answer with cross claims served by Drywall, verified answer served by Drywall to amended complaint, and the verified answer to cross claims served by IDA; copies of the unsigned transcripts of the examinations before trial of John Heaney dated August 18, 2009, John Tolson dated August 25, 2009, Walter O'Hearn and Denise O'Hearn

dated November 19, 2009, and Anthony Orlando dated May 6, 2010.

In support of motion (004), IDA has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint; IDA's answer; answer served by Walter and Denise O'Hearn; answer to the amended complaint served by Drywall; a copy of the third-party summons and complaint; plaintiff's bill of particulars; and copies of the unsigned transcripts of the examinations before trial of John Heany dated August 18, 2009 and John Tolson dated August 25, 2009.

Motion (005) is supported by, inter alia, an attorney's affirmation; the affidavit of Anthony Orlando dated November 12, 2010; copies of the summons and complaint, supplemental summons and amended complaint; third-party summons and complaint; copies of the answers served by Walter and Denise O'Hearn, Denise O'Hearn, and IDA; answers to amended complaint served by IDA and Denise O'Hearn; cross claim asserted against Drywall by IDA, answers to amended complaint served by Walter and Denise O'Hearn and Drywall; third-party answer served by Drywall; answer to cross claims served by IDA; copies of the unsigned transcripts of the examinations before trial of John Heaney dated August 18, 2009, John Tolson dated August 25, 2009, Denise O'Hearn dated November 19, 2009, Anthony Orlando dated May 6, 2010; and a copy of a proposal by Drywall dated March 21, 2007.

The unsigned copies of the deposition transcripts submitted by the moving parties as set forth above are not in admissible form as required by CPLR 3212 (see, ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2nd Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2nd Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2nd Dept 2006]), are not accompanied by an affidavit pursuant to CPLR 3116, and are not considered on this motion. CPLR 3212 requires that a motion for summary judgment be supported by an affidavit or the signed deposition transcript of a party with knowledge on behalf of the moving party. Motions (002) and (004) are not supported by an affidavit or the signed deposition transcript of a party with knowledge in support of their respective applications and therefore fail to comport with the requirements of CPLR 3212. It is noted, however, in searching the record, that the transcript of John Heaney, submitted by Walter O'Hearn in motion (002), is signed and is in admissible form and is, therefore, considered with the admissible evidence. The transcripts of Walter O'Hearn and Anthony Orlando submitted in the plaintiff's opposition are also noted to be in admissible form pursuant to PLR 3212 and are also considered.

John Heaney testified that on the date of the accident, March 26, 2007, he was working for Intercounty Building Materials. He stated that he had been employed by IDA since 2006 as a truck driver with a commercial driver's license. He began training with Intercounty Building Materials with the boom on the truck, and in March of 2007, was operating the boom on a regular basis. He (and his helper) also had training with Intercounty Building Materials concerning how to carry sheet rock. On the date of the accident, during the course of his employment with Intercounty Building Materials, he was delivering several pallets of sheet rock at about 7:30 a.m. or 8:00 a.m. to a job site on Herrick Road. When he arrived, the contractor, IDA, was there. He spoke to the man that he assumed was the contractor as the contractor's truck and trailer were the only vehicles on the job site and the trailer had IDA Property Management lettered on it. He was told by the man from IDA that the 16 foot boards were to go against the long wall in the room off the garage, but he was given no other instructions by IDA. He and his helper determined the route they would take from their truck to deliver the sheet rock to the room. He unloaded the first pallet of 16 footers with the boom. After that pallet was positioned on the forks located on the side of the truck, he pulled the tapes off the side of the sheet rock, grabbed one board with his helper who was in the front, and began to walk the board. The pallet was at the entryway of the garage. He could see part of the framed room where they were to put the sheet rock, but he had to walk through the garage, down a framed, four foot wide hallway to get to the room. He walked into the

garage, made a left into the hallway off the front part of the garage, and walked about fifteen feet into the room, following his helper who was in front of him. There was a cement floor in the room. He stated he could not see where he was walking because of the sheet rock he was carrying. Suddenly, his right foot went into a hole which he described as about eighteen by sixteen inches with a pipe in it. He thought the pipe might have been the gas line for the fireplace. He testified that the hole looked like it was clean cut with a saw. When his foot went into the hole, he fell into the sheet rock he was carrying, broke the sheet rock and fell to the ground. He testified that no one from IDA or Drywall directed, controlled, or supervised the manner in which he delivered the sheet rock from the truck to the site. He further testified that he did not know the owners of the property and never had a discussion with them.

Denise O'Hearn states in her supporting affidavit that she is presently, and at all times, has been the sole owner of the property located at 242 Herrick Road, Southampton, New York, the site of the plaintiff's accident. The building located on the aforementioned property is a single family residence. She states that neither she nor anyone else uses this property for commercial use and she does not rent it to anyone else. The building was being renovated at the time of the accident. She further testified that from time to time, she would visit the property and spend the night there. When visiting, she would occasionally converse with John Tolson regarding the progress of the work being done on the house. She states that at no time did she instruct any workers, contractors or subcontractors on the methods or means of performing their jobs. She continues that she did not create the hole that the plaintiff claims to have tripped in and was not aware of the existence of the hole. She states she is of the belief that the hole was constructed by Mr. Tolson as part of the renovation process and that it was covered immediately prior to the arrival of the plaintiff.

Walter O'Hearn testified at his examination before trial to the effect that his wife, Denise O'Hearn, was the owner of the premises located at 242 Herrick Road, Southampton since about 2005 or 2006. The property was not rented to anyone prior to or at the time of the accident, and they used it intermittently on weekends during the winter and spring, and for extended stays during the summer. He and his wife resided at the premises at times during the construction, as parts of the home were not affected by the renovation. There was no office at the house either before or after the renovation, and he did not conduct business from the house. He testified that his wife contracted with John Tolson of IDA in September 2006 to have work performed at the property to convert the two-car garage to an interior room with a fireplace, to construct a new garage with upper space for a bedroom, and to renovate the existing second floor above the two-car garage. He was involved in the contract negotiations with Mr. Tolson and he and his wife both signed the contract. The general contractor, IDA, retained the subcontractors who performed work on the project. The architect and Tolson obtained the necessary permits and Denise O'Hearn signed the applications. He visited the premises on occasion during the construction and observed that IDA employees and other trades were working at the site, but he did not engage in conversation with them. He did not retain any representative to supervise the construction other than IDA and no one inspected it on his behalf. He testified that he never observed any holes in the two-car garage floor or pipes protruding out of the floor. He stated that he never discussed safety at the site, and that at no time did he ever direct the work of any subcontractors.

Anthony Orlando has set forth in his supporting affidavit that he is the president of the defendant/third-party defendant Drywall Surgeons Specialists, Inc., a domestic corporation in the business of installing sheet rock for construction projects, but the company ceased conducting business in or about early 2009 and dissolved. Mr. Orlando states that Drywall entered into an agreement with the general contractor IDA Property Management & Home Improvement, Inc. pursuant to a written proposal dated March 21, 20007 which provided for Drywall to install drywall in connection with a renovation of a single family residence at 242 Herrick Road, Southampton. The agreement, he states, did not call for anyone from Drywall to be present at the site on the

date of delivery of the sheet rock to the project, that IDA never requested Drywall to be present during or prior to delivery of the sheet rock, and that no one from Drywall was present at the project on March 26, 2007. Mr. Orlando continues that it was the custom and practice of Drywall not to perform any work until at least one day after delivery of the sheet rock to the project site and that Drywall did not commence its work until March 27, 2007, the day after the plaintiff's accident. He states that Drywall had no authority to, and did not direct, control or oversee the means, methods or sequences of the work of any of the contractors, workers or the plaintiff at the project. He continues that Drywall did not have any authority to oversee or enforce site safety practices at the project, that Drywall never installed or created any holes or trenches in the floor, and that it did not receive notice of any holes or trenches in the floor at the project.

At his examination before trial, Anthony Orlando additionally testified that the sheet rock was ordered from Intercounty who delivered it to the job site. He gave them no instructions concerning the delivery. He did not know where the hole was that the plaintiff tripped on, who created the hole, or how long it had been there, and that Drywall had no need for a hole to be placed. His brother, Louis, visited the site to determine how much sheet rock would be needed for the job. He testified that there were no conversations with Intercounty concerning what to do when they arrived with the sheet rock, how to get the sheet rock into the building, or where to put the sheet rock. He testified that he gave no directives to workers or to Intercounty as to how to carry the sheet rock or how to get it inside the building. He further testified that his brother Louis who worked at Drywall, did not give directives to anyone concerning the delivery.

COMMON LAW NEGLIGENCE AND LABOR LAW §200

Labor Law §200 provides in pertinent part that "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places...." (***Trbaci v AJS Construction Project Management, Inc, et al,*** 2009 NY Slip Op 50153U; 22 Misc3d 1116A [Supreme Court of New York, Kings County 2009). "New York State Labor Law §200 is merely a codification of the common law duty placed upon owners and contractors to provide employees with a safe place to work" (***Kim v Herbert Constr. Co.,*** 275 AD2d 709, 713 NYS2d 190 [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 (***Markey et al v C.F.M.M. Owners Corp. et al,*** 51 AD3d 734, 858 NYS2d 293 [2nd Dept 2008]; ***Aranda v Park East Constr.,*** 4 AD3d 315, 772 NYS2d 70 [2004]; ***Akins v Baker,*** 247 AD2d 562, 669 NYS2d 63 [1998])" (***Marin v The City of New York, et al,*** 15 Misc3d 1003A, 798 NYS2d 710 [Sup. Ct. of New York, Kings County 2004]). An implicit precondition to the common law duty imposed upon an owner or general contractor to provide construction workers with a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury and have actual or constructive notice of the alleged unsafe condition (***Ramos v HSBC Bank et al,*** 29 AD3d 435, 815 NYS2d 504 [1st Dept 2006]). In order to prevail on a claim under Labor Law §200, a plaintiff is required to establish that a defendant exercised some supervisory control over the operation (***Mendoza v Cornwall Hill Estates, Inc.,*** 199 AD2d 368, 605 NYS2d 308 [2nd Dept 1993]).

In considering the causes of action premised upon common law negligence and Labor Law § 200, it is determined that Denise O'Hearn and Drywall Surgeons Specialists, Inc. have demonstrated prima facie entitlement to summary judgment dismissing those causes of action asserted against them. It has been demonstrated that neither Denise O'Hearn, as the sole owner of the one-family home, nor Drywall, exercised

supervision, direction and control over the safety of the work site or concerning the manner and method of the plaintiff's job. Drywall has further established that it was not at the work site on the date of the accident and that it did not commence any work at the site until the day after the accident. The plaintiff has not raised factual issues to preclude summary judgment to Denise O'Hearn or Drywall on the issues of common law negligence or for violation of Labor Law §200. The plaintiff testified that no one directed him in the manner or method of delivering the sheet rock and that he and his helper determined the route which they would take to place the sheet rock in the framed room. Further, it has been demonstrated that Denise O'Hearn and Drywall did not have knowledge of the potentially dangerous condition which existed at the time of the accident, that they did not create the condition complained of, and that they did not have actual or constructive notice of the claimed defect.

Accordingly, that part of motion (003) by Denise O'Hearn and motion (005) by Drywall for summary judgment dismissing the causes of action premised upon common law negligence and Labor Law §200 is granted.

In searching the record and in considering the adduced testimony by Walter O'Hearn, it is determined as a matter of law that he was not an owner of the premises which was undergoing renovation, and that he did not direct, supervise, or control the manner or method of any of the workers at the construction site, including the plaintiff's delivery of the sheet rock to the premises. The plaintiff has raised no factual issue to preclude summary judgment being granted to Walter O'Hearn on this cause of action.

Accordingly, summary judgment is granted as a matter of law dismissing the cause of action premised upon common law negligence and Labor Law §200 as asserted against Walter O'Hearn.

LABOR LAW §240

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

"New York State Labor Law §240 (1) is applicable to work performed at heights or where work itself involves risks related to differentials in elevation" (*see,* ***Plotnick et al v Wok's Kitchen Incorporated, et al,*** 21 AD3d 358, 800 NYS2d 37 [2nd Dept 2005]; ***Handlovic v Bedford Park Development, Inc.,*** 25 AD3d 653, 811 NYS2d 677 [2nd Dept 2006]). Labor Law §240 (1) was enacted to "prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (***Cruz v The Seven Park Avenue Corporation et al,*** 5 Misc3d 1018A, 799 NYS2d 159 [Supreme Court of New York, Kings County 2004]). In ***Ortega et al v Puccia et al,*** 2008 NY Slip Op 8350, 2008 NY App Div Lexis 8140 [2nd Dept October 28, 2008], the court set forth that Labor Law §240 is intended to protect workers from gravity-related occurrences stemming from the inadequacy or absence of enumerated safety devices. The duties articulated in §240 are nondelegable, and liability is absolute as to the general contractor or owner when its breach of the statute proximately causes injury.

"Labor Law §240(1) provides exceptional protection for workers against the special hazards that arise

when the work site itself is either elevated or is positioned below the level where materials or load are being hoisted or secured (*citations omitted*). These special hazards do not encompass any and all perils that may be connected in some tangential way with the effects of gravity.... Rather, they are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured ...." (***Natale v City of New York et al,*** 33 AD3d 772, 822 NYS2d 771 [2nd Dept 2006]). It is well settled that not every hazard or danger encountered in a construction zone falls within the scope of N.Y. 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, ***Conway et al v Beth Israel Medical Center,*** 262 AD2d 345. 691 NYS2d 576 [2nd Dept 1999]).

It is determined that the occurrence complained of herein was "a general hazard of the workplace, not one contemplated to be subject to Labor Law §240(1)" (*see,* ***O'Keefe v Tishman Westside Construction of New York,*** 2007 NY Misc Lexis 4783; 237 NYLJ 125 [Sup. Ct. of New York, New York County 2007]). The plaintiff was working at the site only to deliver sheet rock to the project. He was not working at an elevated height and there is no claim that he was not provided with proper safety equipment to prevent a gravity related occurrence. Denise O'Hearn falls withing the exception set forth in the statute as the owner of a one family dwelling who contracted for but did not direct or control the work at the premises. Drywall has demonstrated prima facie that it did not direct, supervise or control the plaintiff's activities at the site at the time of the accident and had not yet commenced its' work at the site when the incident occurred. The adduced testimony establishes that the plaintiff did not fall from a height, that this was not a gravity related occurrence within the meaning of the statute, and the plaintiff does not claim that he was not provided with a required safety device. Both Denise O'Hearn and Drywall have demonstrated prima facie entitlement to summary judgment dismissing the cause of action premised upon Labor Law §240(1) and the plaintiff has failed to raise a factual issue to preclude summary judgment on this issue. In that this occurrence does not fall within the ambit of this statute, the cause of action premised upon the alleged violation of Labor Law §240(1) must be dismissed as a matter of law against all the defendants.

Accordingly, that part of motion (003) by Denise O'Hearn and motion (005) by Drywall Specialists for dismissal of the cause of action premised upon violation of N.Y. Labor Law §240(1) is granted and that cause of action as asserted against them is dismissed with prejudice. The cause of action premised upon the alleged violation of Labor Law §240(1) is also dismissed as a matter of law against all the remaining defendants, Walter O'Hearn, and IDA Property Management & Home Improvements in that the nature of the accident does not fall within the ambit of the statute.

LABOR LAW §241(6)

New York State Labor Law §241(6) provides in part that 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 shall comply with the requirements set forth in the provision. Labor Law §241(6) provides that "[a]ll 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." "Labor Law §241(6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific

safety rules set forth in the Industrial Code (citing ***Ross v Curtis Palmer Hydro-Elec. Co.,*** 81 NY2d 494, 601 NYS2d 49). Liability may be imposed under §241(6) even where the owner or contractor did not supervise or control the work site (***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]). Unlike Labor Law §200, Labor Law §241(6) does not require the plaintiff to show that the defendant exercised supervision or control over the work site (***Mendoza v Cornwall Hill Estates,*** 199 AD2d 368, 605 NYS2d 308 [2nd Dept 1993]). The absolute liability imposed upon owners and general contractors pursuant to Labor Law §241(6) does not apply to prime contractors having no authority to supervise or control the work being performed at the time of the injury (***Hornicek et al v Lane, Inc.,*** 265 AD2d 631, 696 NYS2d 557 [3rd Dept 1999]), but liability can be imposed upon a subcontractor only when it supervises or controls the area involved or the work that gives rise to the injury (***DaSilva v Jantron Industries, Inc.,*** 155 AD2d 510, 547 NYS2d 370 [2nd Dept 1989]).

In the instant action, Denise O'Hearn has established prima facie that she is the owner of the one family residence where the construction and renovation work was being conducted and therefore falls within the exception afforded owners of one and two-family dwellings who contract for but do not direct or control the contracted work. The plaintiff has failed to raise a triable issue of fact to preclude summary judgment being granted to her on this issue.

Accordingly, that part of motion (003) by Denise O'Hearn for summary judgment dismissing the cause of action premised upon violation of Labor Law §241(6) is granted and the cause of action is dismissed with prejudice as asserted against her.

Drywall Surgeons Specialists has established prima facie entitlement to summary judgment dismissing the cause of action premised upon Labor Law §241(6) on the basis that it was not present at the job site on the date of the accident and did not commence its work until the date of the accident. Although an agent of the general contractor, Drywall has established that it had no liability in this occurrence as it did not, and was not, required to direct, supervise or control the work being performed by the plaintiff. The plaintiff has failed to raise a factual issue to preclude summary judgment being granted to Drywall.

Accordingly, that part of motion (005) by Drywall which seeks dismissal of the cause of action premised upon its alleged violation of Labor Law §241(6) is granted with prejudice.

In searching the record, it is determined that Walter O'Hearn was not an owner of the premises and did not supervise, direct or control the work being done by the contractor or subcontractors. It has also been established that he was not an agent for the general contractor or the owner, Denise O'Hearn. The plaintiff has failed to raise factual issue to preclude summary judgment being granted to Walter O'Hearn relative to this cause of action premised upon the alleged violation of Labor Law §241(6).

Accordingly, summary judgment is granted to Walter O'Hearn and the cause of action premised upon his alleged violation of Labor Law §241(6) is granted as a matter of law and is dismissed with prejudice.

Based upon dismissal of all the causes of action set forth in the amended complaint as asserted against Drywall Surgeons Specialists on the basis that Drywall has established that it bears no liability in this action, the third-party action commenced against Drywall Surgeons Specialists by IDA Property Management & Home Improvements, Inc. for contractual indemnification, contribution, to hold harmless, and breach of agreement premised upon the failure of Drywall to procure insurance naming I.D.A. Property Management & Home Improvements, Inc. is dismissed as a matter of law. The cross claims asserted by Denise O'Hearn against co-

defendants Drywall Surgeons Specialists and IDA Property Management & Home Improvements, Inc. on the issue of common law indemnification are accordingly dismissed. That part of motion (002) by Walter O'Hearn for summary judgment over and against the co-defendant IDA Property Management & Home Improvements, Inc. on the issue of common law indemnification is granted on the basis that the amended complaint as asserted against him has been dismissed.

Dated: 4/20/11

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**