[* 1]

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

HON. JUDITH J. GISCHE

PART 10

Index Number : 111186/2008

RODRIGUEZ, CARLOS DANIEL

VS

50 WEST 15TH STREET

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

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

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED

OCT 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

and PC scheduled for January 5, 2012 at 9:30 am in Part 10

Dated: Oct 21, 2011

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Carlos Daniel Rodriguez,

Plaintiff (s),

-against-

50 West 15th Street LLC and 15th Construction LLC,

Defendant (s).

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50 West 15th Street LLC and 15th Construction LLC,

3rd Party Plaintiffs

-against-

New York Hoist LLC, New York Pre-Cast LLC, SSB Hoist, Inc. and Arch Insurance Group, Inc.,

3rd Party Defendants.

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DECISION/ ORDER
Index No.: 111186-08
Seq. No.: 002, 005

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Motion #002	
Defs' n/m (3212) w/ JM affirm, exhs	1
Pltfs' opp w/ALB	2
Defs' reply w/JMM affirm, exh	3
Motion #005	
Pltfs' n/m (consolidation) w/SH affirm, exhs	4
Defs' opp w/SMP affirm	5
Pltfs' reply w/SH affirm, exhs	6
Transcript OA 7/14/11	7

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action by plaintiff Carlos Daniel Rodriguez ("plaintiff") alleging violations of the New York State Labor Laws ("Labor Law § __"). Issue has been joined and the note of issue was filed September 15, 2010. Presently before the court is a timely motion by the defendants seeking summary judgment in their favor, dismissing all claims against them. Plaintiff has separately moved for an order directing the consolidation of this action with the matter entitled Carlos Rodriguez v. Alchemy Administrative LLC, Alchemy 15-21 LLC and Alchemy Construction LLC, Supreme Court, New York County Index No. 101923/11 ("2nd action"). Since the summary judgment motion is timely, it can be decided on the merits (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004)]. The motions are hereby consolidated for decision in this decision/order because they involve closely related issues and arguments. The court's decision and order is as follows:

Facts Considered and Arguments Presented

Plaintiff, a hoist operator employed by third party defendant New York Hoist LLC ("NYH"), contends he was injured on March 22, 2008 ("day of accident") while working on a construction project taking place at 50 West 15th Street in New York, New York ("the project"). According to plaintiff, defendants' violations of Labor Law §§ 240 [1], 241 [6] and 200 were a proximate cause of his injuries. The defendants are 50 West 15th LLC ("owner") , the owner of the project which entailed the construction of a building, and 15th Construction LLC ("construction manager"), identified as the construction manager in the construction contract between the parties dated June 1, 2005 ("the construction contract"). The owner and construction manager have brought a third party action against plaintiff's employer and others.

Plaintiff, who was deposed, testified that he was operating a hoist at the premises when it malfunctioned, forcing him and others in the hoist cab to jump approximately 10 feet to the ground floor. According to plaintiff, as he was descending in the hoist from the 5th floor, he heard a loud bang and felt the car jerk. He "thought something had hit the top of the hoist car so [he] continued to go down with the hoist. [He] thought it was something from above..." That was when he heard "everybody was yelling from downstairs to stop the hoist car, stop the hoist car, it's broken, it's broken, it's broken in so many different languages and accents." Plaintiff testified that although the hoist was still able to run, the cable dolly came loose. The cable dolly is the "pulley that runs underneath the hoist and it holds the main brain cables, the power cables...so it goes directly from the hoist car into a transformer on the side of the building..." The "brain cable" or cable dolly is, therefore, the main power source for the hoist.

Plaintiff testified that the men in the hoist with him "were terrified" and scared of the hoist because they were "like, man, this thing is bad luck," referring to a prior incident the day before involving the hoist. That day (March 21, 2008), the hoist had "broken down" when "something happened with one of the motors [and] it started throwing out smoke..."

When he stopped the hoist, there was approximately four (4) feet of space for "the body to actually get out of the hoist car [and] to drop down to the platform [below]" Plaintiff could not bring the hoist any closer to the ground floor because it would have pinched the brain cable and snapped it. According to plaintiff, he was concerned about electrocution and being "fried." There was no way for him to shut the electrical power to the hoist.

After he stopped the hoist, he heard the men on the ground floor telling him it was the cable dolly that had broken. At that point, he told the men with him in the hoist "listen, we need to get out of here, I don't know what the situation is, I don't know what is going on with the power situation, I don't know what is going to happen. The first thing that came to [his] mind was everybody let's get out of here." He let all the other men exit first, which they did by going out the four (4) foot opening and jumping to the platform on the ground floor. They did this by sitting on the edge of the hoist and leaping down unassisted. No one brought a ladder to help the men out, nor did any of the workers ask for one or wait for one to be brought. When it came to plaintiff's turn, he did the same thing, but did not land on his feet. Instead, plaintiff hit the floor with his right leg behind him. He felt a pop which was apparently the rupture of his right ACL.

Defendants allege that plaintiff was the sole proximate cause of his injuries because there was a ladder inside the hoist which he should have used to exit the hoist when it stopped. Alternatively, they point out he could have requested that some one prop up a ladder for him to climb down. Defendants state that the day before (March 21, 2008), when the problem arose with the hoist, plaintiff did not jump out of the car, but calmly detached the ladder inside the car and used it to climb out. The ladder inside the hoist is 8 feet tall. Defendants separately claim plaintiff could easily have radioed for help using his Nextel walkie-talkie/phone, but he did not. Daniel Moliterno, a technician who made repairs to the hoist after the accident, testified on behalf of NYH that the hoist has a opening or hatch on its roof, providing an alternative means of escape, so that plaintiff could have climbed out of the hoist instead of jumping out.

Defendants argue that plaintiff's Labor Law § 200 claim against them must be

dismissed because the plaintiff's accident did not involve any dangerous or defective condition at the premises, nor did the hoist malfunction. The defendants deny they had the authority to control the manner or method by which the plaintiff performed his work, nor did they provide the equipment involved in the accident. Joel Breitkopf, a partner of Alchemy, a named defendant in the 2nd action, was deposed. His testimony is that NYH, not the defendants, was responsible for erection, maintenance, repair and operation of the hoist. According to Breitkopf, neither the owner nor construction manager had supervisory staff directing the work NYH workers were doing at the project. Any problems that arose with the hoist were brought to the attention of NYH.

Defendants urge the court to dismiss plaintiff's Labor Law § 241 [6] claims because the individual code sections he relies upon are either too general or inapplicable to the facts of this case. In particular, defendants deny that the accident involved any of the enumerated defects identified in sections 12 NYCRR 23-7.1 or 23-7.2 of the Industrial Code applicable to personnel hoists.

According to defendants, plaintiff's Labor Law § 240 [1] should also be dismissed because his injuries were not gravity related, he did not fall from a height and nothing fell on him. They contend his injuries (if any) resulted from his jumping from the cab of the hoist, rather than from any defective safety device and, since he was the sole proximate cause of his injuries, plaintiff cannot recover under this section of the law.

In opposition to defendants' motion, plaintiff first argues that defendants had actual notice of a dangerous condition because on March 18, 2008, just a few days before the accident, the owner's attorney sent a letter to NYH, notifying the company of its "failure...to perform under its contract with [the owner] dated July 6, 2007...to supply,

install and maintain a hoist..." at the premises. In the letter, the owner states that "the hoist supplied and installed at the Premises has repeatedly failed to operate. In fact the hoist has failed to operate on no less that 22 of the last 60 business days and a total of 70 days since its installation on November 3, 2007." The writer specifically states that "the hoist has not been operational since Tuesday, March 11, 2008 through and including the date of this letter...this condition exists despite [the owner's repeated notices to you that the hoist is not functioning and requests that NYH undertake immediate repairs and/or maintenance as it is required to do under the Contract."

Plaintiff also relies on Moliterno's testimony on behalf of NYH that the main issue with the hoist was "weak, insignificant building power" that resulted in "premature wear on the brakes, premature rewiring of the electrical parts of the brakes" ultimately causing the motor to burn out. He also testified that the hoist would stop very frequently because this problem with power. According to Moliterno, the hoist was incapable of lifting the requiring amount of weight which was 5,000 pounds. Nonetheless, the hoist passed inspection by the inspection company that NYH hired for that purpose. According to Moliterno, he told Marc Erdman, who Moliterno referred to as the "general contractor" all about these problems.

Although Moliterno testified at his deposition that there are evacuation instructions inside the hoist about what to do if the hoist is stuck between floors, and that the proper procedure is to use the ladder in the cab to get out, plaintiff testified at his own deposition that he never received any safety instructions other than to "find the quickest and easiest way out" in an emergency situation. According to plaintiff, he feared the cable dolly was broken and hanging loose, exposing the power cable to

damage and creating a dangerous electrical hazard which is why he felt the need to act so quickly

Plaintiff points out that the "corporate and contractual 'incest' between the various entities" involved in this project. For example, the construction contract is signed by the owner as "50 West 15th LLC c/o Alchemy Properties" and the construction manager signed it "15th Construction LLC c/o Alchemy Properties" Breitkopf signed on behalf of the construction manager, but he also has a membership interest in the owner. Breitkopf also signed the contract between NYH and the owner. This time, however, he signed on behalf of the owner, not the construction manager. All this, plaintiff argues, is proof that the owner was actively involved in the project and had the power to control, direct and supervise the work being done by NYH.

Plaintiff also highlights provisions in the contract between NYH and the owner, reserving to the lessee/owner the right to operate the hoist: "It is agreed that the Lessee [owner] will operate and use the equipment in accordance with safe practices..." According to plaintiff, this is a clear articulation of the owner's intent and obligation to maintain a high degree of control over the project. Put differently, plaintiff contends the defendants, Alchemy and another company "Alchemy Administrative LLC," the entity employing Marc Erdman, the site superintendent, are alter egos and, therefore, the supervisory lines among these companies are indistinct. He points out that Erdman was the superintendent for the project and an employee of Alchemy Administrative LLC. Breitkopf testified at his deposition that the construction manager hired Alchemy Administrative LLC to provide site supervisors and project managers for the project.

Not only was Breitkopf involved in contract negotiations on behalf of the construction manager, he admitted to being affiliated with Alchemy Administrative or another entity (NOHO Construction), the sole member of Alchemy Administrative. These arguments are repeated in plaintiff's motion to have this case consolidated with the 2nd action, discussed later in this decision

Plaintiff argues further that the hoist was demonstrably defective, based upon the owner's March 2008 correspondence to NYH about service outages and that there is a triable issue of fact whether the construction manager is actually a general contractor. Plaintiff also stands by his pleaded violations of Industrial Code 23-7.1 [b] and 23-7.2 [g], arguing that each of these sections directly apply to the facts of this case, as alleged.

In support of his motion for consolidation of this and the 2nd action, plaintiff (in addition to arguments addressed, *supra)* contends that the issues in each action are indistinguishable, arising from the same accident, and that all the defendants in each case are united interest because of the interlocking relationships among these entities. He states no further discovery is needed because he offered to appear for a deposition but none of the defendants exercised that right. The defendants contend there has been no discovery at all in the 2nd action and plaintiff's motion for summary judgment is premature if the two actions are consolidated. They point out that plaintiff knew the salient facts about the Alchemy entities before it filed the note of issue in this action and many months before it commenced the 2nd action. Thus, defendants argue, in essence, that the present situation is of plaintiff's own making and these tactics should not be rewarded.

Discussion

Defendants' motion for summary judgment dismissing this action against them is decided first because, if as defendants argue, they are entitled to summary judgment this will render plaintiff's motion for consolidation moot.

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its prima facie case that would entitle it to judgment in its favor, without the need for a trial (Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980]). The party opposing the motion must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her/its failure so to do (Alvarez v. Prospect Hosp., 68 N.Y.2d 320 [1986]).

Labor Law § 240 [1]

Labor Law § 240 [1], commonly known as the "scaffold law," was enacted to protect workers in construction projects against injury from the expected risks of inherently hazardous work posed by elevation differentials at the work site (Buckley v. Columbia Grammar and Preparatory, 44 A.D.3d 263, 267 [1st Dept 2007] *citing* Misseritti v. Mark IV Constr. Co., 86 N.Y.2d 487 [1995]). Labor Law § 240 [1] imposes a non-delegable duty upon owners, contractors and their agents to supply necessary security devices for workers at an elevation, to protect them from falling (Bland v. Manocherian, 66 N.Y.2d 452, 458-459 [1985]). An owner, contractor or agent who breaches that duty may be held liable in damages, regardless of whether it has actually exercised supervision or control over the work (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500 [1993]). Therefore, a violation of this duty results in absolute liability where the violation was a proximate cause of the accident (Meade v. Rock-McGraw, Inc., 307

A.D.2d 156 [1st Dept. 2003]). To establish a prima facie case, the plaintiff must show that there is a Labor Law § 240 [1] violation and that such violation proximately caused the injuries sustained (Quattrocchi v. F.J. Sciame Const. Corp., 44 A.D.3d 377 [1 Dept. 2007]). A hoist is, by its very nature, a device used in construction projects which enables workers to work at elevated levels. A hoist is, therefore, a "safety device," as that term is used in the scaffold law, protecting workers from an elevated risk.

Although defendants, in urging dismissal, rely heavily on the case of George v. State of New York (251 AD2d 541 [2nd Dept 1998]) noting, in their words, how "strikingly similar" the facts of George are to those in the case at bar, there is one critical difference they overlook. In George, the plaintiff did not fall from a height. Rather, he decided to jump down to help a coworker who had fallen onto a debris shield. After ascertaining the coworker was fine and calling for help, the plaintiff went back up to where he had been working. Plaintiff then jumped a second time to where the coworker was. It was on the second jump that the plaintiff in George was injured. The appellate court held that the plaintiff in that case could not recover under the Labor Law "because his gratuitous and unnecessary second jump was the sole and superseding proximate cause of his injuries" (George v. State of New York, 251 AD2d at 542). Those facts are easily distinguishable from the case at bar.

Here, plaintiff was afraid of electrocution because the power cable holding the electrical power to the hoist may have been pinched or wedged under the hoist. At his deposition, Rocine Auringer, NYH's operations manager, testified that Moliterno examined the hoist after the accident and reported to Auringer that the power cable had, in fact, been pinched or wedged between the mast upon which the hoist travels

and the hoist itself. Therefore, defendants have failed to prove that plaintiff's jump was wholly "gratuitous and unnecessary" and, therefore, the sole and superseding proximate cause of his injuries (compare, Robinson v. East Medical Center, 6 NY3d 550 [2006]) There are triable issues of fact whether, in light of plaintiff's fears and the circumstances presented (including being surrounded by eight terrified coworkers), plaintiff's decision to quickly evacuate the hoist by jumping out of it was a normal and logical response to the situation (see, Montgomery v. Federal Express Corp., 4 NY3d 805 [2005]; Rice v. West 37th Group, 78 AD3d 913 [1st Dept 2010]).

A ladder is within the category of "safety devices" under Labor Law § 240 (1). Where, as here, ladder is offered as a work-site safety device, it must provide the proper protection; the failure to properly secure a ladder, to ensure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240 (1) (Schultze v. 585 W. 214th St. Owners Corp., 228 A.D.2d 381, 644 N.Y.S.2d 722 [1st Dept 1996]). The ladder inside the hoist was a straight, metal ladder and it is unclear whether it was tall enough or secure enough to have allowed plaintiff to more safely exit the hoist under the circumstances that were present. Therefore, defendants' motion for summary judgment dismissing the Labor Law § 240 [1] claim must be denied for this reason as well.

Labor Law § 241 [6]

Labor Law § 241 [6] imposes a non-delegable duty upon owners, contractors and their agents to provide reasonable and adequate protection and safety to construction workers (Comes v. New York State Electric & Gas Co., 82 NY2d 876 [1993]; Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 348 [1998]; Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 [1993]). To properly state a claim

under Labor Law § 241(6), the plaintiff must identify a specific and applicable Industrial Code provision that has been violated (Ross v. Curtis-Palmer Hydro-Elec. Co., *supra*). The question of whether the plaintiff has alleged a specific provision of the Industrial Code, and whether the condition alleged is within the scope of the Industrial Code regulation, usually presents a legal issue for the court to decide (Messina v. City of New York, 30 AD2d 121 [1st Dept 2002])

Plaintiff only opposes defendants' motion for summary judgment based upon his reliance on Industrial Code sections 23-7.1 [b] and 23-7.2 [g]. Therefore, to the extent that he has identified other alleged violations of the Industrial Code, evidently he has abandoned those claims and defendants' motion for summary judgment dismissing his Labor Law § 241 [6] claim is granted for that reason.

Part 23 sets forth protection standards in "Construction, Demolition and Excavation Operations" and subpart 23-7 specifically applies to "Personnel Hoists." Section 23-7.1 [b] pertains to maintenance requirements and provides as follows:

> (b) Maintenance. Personnel hoisting equipment shall be maintained in good repair and in proper operating condition at all times. Inspections of such equipment shall be made with such frequency as to insure such maintenance and operation.

Section 23-7.2 specifically applies to "Temporary Personnel or Workmen's Hoists" and subpart 23-7.2 [g] pertains to wiring and provides as follows:

> (g) Wiring. Wiring and other electrical equipment shall be of proper quality and properly installed. Electrical installations shall be in accordance with the 1971 National Electrical Code. Hoistway wiring may consist of heavy-duty rubber-covered traveling cable. All wiring and other electrical equipment exposed to the elements shall be weatherproof.

Section 23-7.1 [b] is too general to provide a predicate basis for a Labor Law § 241 [6] claim and section 23-7.2 [g] does not apply to the facts of this case. Therefore, without a predicate basis for his Labor Law § 241 [6] claim, defendants' motion for summary judgment must be granted for that reason as well. Plaintiff's Labor Law § 241 [6] claim is severed and dismissed.

Labor Law § 200

Labor Law § 200 codifies the common law duty imposed upon an owner or general contractor to maintain a safe construction site and unlike Labor Law §§ 240 [1] and 241 [6], liability can only be imposed if the defendant has actually been negligent. The elements of a prima facie Labor Law § 200 claim are that the defendants: 1) exercised supervision and control over the work performed or 2) had actual or constructive notice of the dangerous condition alleged, or 3) created the condition (Sheridan v. Beaver Tower Inc., 229 AD2d 302 [1st Dept. 1996] *lv den* 89 NY2d 860 [1996]; O'Sullivan v. IDI Construction Co., Inc., 7 NY3d 805 [2006]; Gonzalez v. United Parcel Serv., 249 AD2d 210 [1st Dept. 1998]).

Issues of fact as to whether the defendants exercised supervision and control over the plaintiff's work and worksite, and whether defendants had actual or constructive notice of the hazardous condition alleged. Although the defendants focus their arguments on their lack of supervision or control over the injury producing work and deny they created the dangerous condition alleged, there is a triable issue of fact whether they had notice of it and if so, whether the actions they took were reasonable under the circumstances. The March 18, 2008 letter the owner sent to NYH, complaining about the hoist being out of service more days than it was operable,

requires the denial of the defendants' motion. The letter is evidence that defendants may have had notice of a dangerous condition (Shipkoski v. Watch Case Factory Associates, 292 AD2d 589 [2nd Dept 2002]). Although defendants contend the hoist was "completely and safely stopped" when plaintiff decided to jump out of it, this statement is nothing more than a self-serving conclusion. There are repeated references in this record to prior occasions when the hoist malfunctioned and, prior to plaintiff's accident, he was forced to evacuate the hoist when the motor on the hoist started to billow smoke. According to plaintiff "everybody" knew the hoist was unsafe and that complaints had been made. Therefore, defendants have not ruled out the possibility that the hoist was defective or malfunctioned in some way (Reilly v. Newireen Associates, 303 A.D.2d 214 [1st Dept. 2003]). There was also no general contractor on this project, only the construction manager, raising issues about what the construction manager's actually was in this project.

Further arguments by defendants that plaintiff was the sole proximate cause of his injuries because he chose to jump instead of climb out of the hoist have already been addressed in connection with the court's denial of summary judgment against plaintiff on his scaffold claims. Defendants have not ruled out the possibility that they were negligent or that such negligence was a proximate cause of plaintiff's injuries.

Consolidation

The court has the discretion to order the consolidation of actions where common questions of law or fact exist. CPLR 602 [a]; Bradford v. John A. Coleman Catholic High School, 110 AD2d 965 (3rd Dept 1985). It is unnecessary that all the facts and issues be the same, but there must be "at least some important rules of law and fact in

common to both actions." Bradford v. John A. Coleman Catholic High School, supra at 966. Thus, while the cases do not have to be identical in every respect, individual issues should not predominate. Bender v. Underwood, 93 AD2d 747 (1st Dept 1983). Where the actions arise from the same incident, have substantially the same facts and issues of law, and the same witnesses would testify at both trials if actions were tried separately, consolidation is appropriate. Burger v. Long Island Rail Road Company, 24 AD2d 509 (2nd 1965) [different damages, but same collision, same witnesses]. As a practical matter, it eliminates the potential for injustice from divergent decisions based upon the same facts. Chinatown Apartments Inc. v. New York City Transit Authority, 100 AD2d (1st Dept 1984).

The claims against the defendants in the 2nd action are indistinguishable from those asserted against the defendants in this action. The only difference is that the Alchemy defendants are not named defendants in this case. Although defendants in the case at bar argue that consolidation of the two actions would be prejudicial, they have shown no prejudice. Furthermore, arguments by them that "plaintiff is totally to blame" for this "procedural quandary," does not present a legal argument for why the two cases should not be consolidated. Consolidation is justified and the motion is granted. Since discovery is complete in the case at bar, the consolidation is for joint trial only.

To the extent that the Alchemy defendants contend they need discovery, it is permitted, notwithstanding arguments by plaintiff that Alchemy has all the discovery it needs or that they have waived it. The court, on its own motion, strikes the note of issue filed by plaintiff on September 15, 2010 under index number 111186-08. This is

without prejudice to plaintiff refiling the note of issue once the parties stipulate in writing that all discovery is complete and both cases are ready for trial. A Preliminary Conference is hereby scheduled for **January 5, 2012 at 9:30 a.m. In Part 10.**

Plaintiff shall serve a copy of this order on the Count Clerk, Room 141B so that the caption of this case can be amended to reflect the consolidation as well as on the Office of Trial Support, Room 158, so that the note of issue can be stricken and the case stricken from the trial calendar.

Conclusion

In accordance with the foregoing,

It is hereby

ORDERED that the motion by defendants 50 W.15th Street LLC and 15th St. Construction, LLC for summary judgment is denied for the reasons provided; and it is further

ORDERED that plaintiff's motion to consolidate this action with Carlos Daniel Rodriguez v. Alchemy Properties, Inc., and Alchemy 15-21 LLC and Alchemy Construction LLC, Index No. 101923-2011 is granted and the two cases are consolidated under this (the older) index number so that the amended caption is as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

----------x

Carlos Daniel Rodriguez, Index No.: 111186-08

Plaintiff (s),

-against-

50 West 15th Street LLC and 15th Construction LLC, Alchemy Properties, Inc., and Alchemy 15-21 LLC and Alchemy Construction LLC,

Defendant (s).

----------x

50 West 15th Street LLC and 15th Construction LLC,

3rd Party Plaintiffs

-against-

New York Holst LLC, New York Pre-Cast LLC, SSB Holst, Inc. and Arch Insurance Group, Inc.,

3rd Party Defendants.

----------x ; and it is further

ORDERED that the court, on its own motion, strikes the note of issue filed by plaintiff on September 15, 2010 under index number 111186-08. This is without prejudice to plaintiff refiling the note of issue once the parties stipulate in writing that all discovery is complete and both cases are ready for trial. **A Preliminary Conference is hereby scheduled for January 5, 2012 at 9:30 a.m. in Part 10.**; and it is further

ORDERED that plaintiff shall serve a copy of this order on the Count Clerk, Room 141B so that the caption of this case can be amended to reflect the consolidation as well as on the Office of Trial Support, Room 158, so that the note of issue can be stricken and the case stricken from the trial calendar; and it is further

ORDERED that any relief requested but not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
October 21, 2011

So Ordered:

Hon. Judith J. Gische, JSC