[* 1]

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

PRESENT: LOUIS B. YORK J.S.C. PART 2
Justice

Boatman

-v-

Irving Manor et al

INDEX NO. 113921/08

MOTION DATE

MOTION SEQ. NO. 005

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 is decided in accordance with the accompanying decision

FILED

FEB 23 2012

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/22/12

LOUIS B. YORK 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 2

EDWARD BODTMAN,

Plaintiff,

Index No. 113921/08

-against-

LIVING MANOR LOVE, INC., RM FARM REAL ESTATE INC., GINA MOLINET d/b/a RM FARM REAL ESTATE, GINA MOLINET a/k/a JENNA MOLINET, MOTEL MANAGEMENT CORP d/b/a WILLOWMEC MOTEL

Defendants.

LOUIS B. YORK, J.:

Background

On April 10, 2008, Plaintiff Edward Bodtman ("Bodtman") performed work on the roof of the Willowmec Hotel, owned by Living Manor Love, Inc. The complaint alleges that defendant Gina Molinet, the real estate agent responsible for selling the premises, hired and directed Bodtman to do work on the roof of the building; defendants counter that Bodtman volunteered his labor and therefore they were not his employees. Bodtman alleges that, as Molinet does business as defendant RM Farm Real Estate and heads RM Farm Real Estate, Inc. ("RM"), and Molinet and RM were agents of defendant Living Manor Love, Inc. ("Living Manor"), he worked for all of these parties, and he therefore names them all as defendants. The complaint further contends that on or prior to April 10, 2008 Molinet contracted with Living Manor Love to "erect, repair, alter, paint, clean or pointing of the building, and/or the structure

atop the building, specifically but not limited to the sign on the roof of the building in order to facilitate the sale thereof." (Compl. ¶ 14.)

Next, according to Bodtman, Molinet instructed him to drill and attach a "For Sale/RM Farm Real Estate" sign to the "Motel" sign on the top of the building. Bodtman states that Molinet provided him with the drill and ladder but not with any scaffolding or safety devices. Bodtman states that he was to receive $20 an hour for this work. Bodtman fell from the roof of the building allegedly due to the lack of safety equipment. Bodtman also alleges he sustained serious and permanent injuries. According to Bodtman, defendants did not provide worker's compensation benefits to him.

Bodtman commenced this action on October 14, 2008 asserting causes of action for common law negligence, for violations of Sections 200, 240 and 241 of the Labor Law of the State of New York, and for applicable provisions of Rule 23 of the Industrial Code of the State of New York. In particular, Bodtman alleges that defendants violated 12 NYCRR §§ 23-1.5; 23-1.7(d), (e), and (f); 23-1.15; 23-1.6; 23-1.17; 23-1.21(b)(1), and (b)(4); 23-1.22(c)(1); 23-1.30; 23-.2.7(b); 23-5.1(b), (c), (f), (g), (h), and (j).

The Court has two motions before it: RM and Molinet's (collectively, "movants") motion for summary judgment dismissing all claims and cross-claims against them; and Living Manor's ("cross-movant") cross-motion, which in part seeks dismissal of all claims against them. Bodtmans ("plaintiff") opposes both motions.

Initially, the Court dispenses with some preliminary issues. Cross-movant requests permission to enter judgment on its behalf, but as the papers do not address this and Living Manor's answer does not contain a counterclaim for damages the Court denies this portion of the

cross-motion based on its ambiguity. Movants oppose the cross-motion but only to the extent that it seeks to dismiss their counterclaims.

The Court also does not consider the portion of the motion and cross-motion which allege that the activity in which plaintiff was engaged is not protected by the Labor Law. "Under the law of the case doctrine, parties or their privies [cannot relitigate] an issue decided in an ongoing action where there previously was a full and fair opportunity to address the issue." Briggs v. Chapman, 53 A.D.3d 900, 901, 863 N.Y.S.2d 97, 99 (3rd Dept. 2008). The doctrine applies here because movants already made the identical argument in a previous motion. The Court rejected the argument, and movants did not appeal or move to reargue. Moreover, movants do not even refer to the Court's earlier decision, although they annex it. The cross-movant, which also fails to mention the earlier Court order, also is bound by the law of this case. Id.

Next, the Court notes that, in arguing the merits of the remainder of the motion and cross-motion, the parties frequently refer to the deposition testimony and to the affidavits which they submit in support of or opposition to the motions. Accordingly, the Court has examined the relevant portions of these documents, rather than rely on the excerpts to which the parties cite. Below are the pertinent facts.

Plaintiff stated in his deposition that he knew Molinet for a number of years prior to the accident. He further stated that he did some work on a barn, adding to the apartments in the structure; he installed light fixtures; he worked on closet doors; he worked on the ceiling in one of the apartments; and he removed a barbed wire fence from her property. In addition, he said that Molinet would contact him when she had work for him and that she would pay him $20 an hour for his labor, sometimes in cash and other times by check. He did not keep records of his work, and was unable to specify exactly when he worked for her and how much he was paid on

each occasion. However, he states the work was steady and periodic, ranging from once every other week – which movants note – to a few times a week when he had a bigger job. He further describes their arrangement in this fashion:

> You know, she had enough work to keep me going for a little bit, a couple of days here, a couple of days there.

Bodtman Dep. p. 68.

The building where plaintiff sustained his injury was the Willowemoc Motel. Before the accident plaintiff had performed some work at the hotel, including draining the waterlines, boilers and water heaters, and winterizing the toilets. The building was for sale and through her company RM Molinet was attempting to sell the property. Plaintiff had never put up a "for sale" sign for her or RM before. However, he alleges that he helped her unbox some "for sale" signs a few days before the accident. He estimates the one at the heart of this lawsuit was around three feet by five feet and weighed around fifteen to twenty pounds. Moreover, he states that a few days before the accident Molinet left him a phone message asking him to come into her office. Plaintiff indicates that he came up with the idea to put a sign on the roof but that she agreed with his suggestion. He stated that Molinet was going to pay him; as support, he mentions that she asked what the cost would be if he put up the sign. Plaintiff stated also that when he told her he didn't own the type of drill necessary to do the work, Molinet indicated that she would leave one for him at the office; and that in fact he retrieved the drill from the office on the accident date. He also stated that she directed him to use a ladder from the hotel as well. He picked up the drill and went to the hotel, where in an attempt to install the sign he fell from the roof, sustaining injuries.

Molinet also gave deposition testimony. At the deposition, she indicated that she is a real estate broker and in that capacity listed Living Manor's property, the Willowemoc Hotel, for

sale. In connection with the listing, Molinet put up a sign on the property's driveway which apparently did not say "for sale" but included information relating to her real estate business. She acknowledges that she'd retained plaintiff's services on prior occasions. Initially he did plumbing work for her at an apartment or apartment building she owned. Subsequently, plaintiff went to her office and asked if she could refer him to additional odd jobs. She stated that he did additional work for her, though not for her firm. Additionally he did some minor work in her office building, which she also owned. She paid by cash but more often by personal check, she stated. However, at deposition she acknowledged that at least one check, dated November 1, 2007, was drawn on RM's account. She stated that, as plaintiff had testified, he suggested putting a sign on the hotel's roof for her. However, contradicting plaintiff's testimony, Molinet stated that she strongly objected to the idea:

> [H]e said why don't you put one [sign] on the roof. I said I can't do that. He said I'll do it for you. I said that's not necessary, that's really not something you need to do, and he said I want to do that. I said if you wanted to do that, you certainly shouldn't do it alone.

Molinet Dep. p. 39. According to Molinet, the next thing she knew, people from her office informed her that he had stopped by to pick up a sign. Later, they informed her that he'd fallen off the roof while attempting to install it. Subsequently, in an affidavit dated January 27, 2009, Molinet said that, with respect to the installation of the sign, "I did not tell Mr. Bodtman that he was prohibited from doing this but I never agreed to provide him with anything in exchange for doing this." Molinet Aff. ¶ 9. She further stated that she believed he wanted to install the sign as a volunteer in the hope that it would lead her to recommend him to other people for additional handyman jobs.

According to the deposition testimony of Nasir Sasouness, who co-owned the Willowemoc Hotel as defendant Living Manor, he learned about the accident from Molinet. "She told me all about it, that he went on the roof to put up a sign, and he fell down." Sassouness Dep. p. 60 ll 6-8. He didn't inquire further because, as he put it, "That's her business . . . ." Id. l 14. Moreover, as he viewed himself as uninvolved, he did not follow up or inquire as to the condition and health of plaintiff. A real estate agent with RM, Lynne Carlin, testified at deposition that as far as she knew, installing the sign was plaintiff's idea, because she did not tell him to install it. She said it was possible Molinet had instructed him to put up the sign but unlikely, because after the accident Molinet told her that she had not directed him to install it. Another agent, Dennis Raymond, stated that although he did not know whether Molinet had directed plaintiff to install the sign on the roof, in prior conversations plaintiff had told him he thought there should be one on the roof.

Analysis

First, the Court addresses the argument that this action should be dismissed because plaintiff volunteered to put the sign on the roof, and thus he was not an employee within the meaning of the Labor Law. Movants argue this is true because (1) movants lacked the authority to ask plaintiff to put a sign on the roof of the hotel in question; (2) it was plaintiff's idea to put the sign on the roof; (3) movants did not instruct plaintiff as to how to install the sign or provide him with a ladder, safety hoists or other equipment when he installed the sign; and (4) plaintiff did not know whether he would be paid for the work. Movants allege that the deposition testimony and affidavits incontrovertibly establish all of the above points. Plaintiff points to his deposition and affidavit, which he claims show he was an employee of movants.

To come within the purview of Labor Law § 240(1), a plaintiff must show that he or she (1) had permission to work at the site, and (2) that either the owner, contractor or an agent of the owner or contractor hired him or her. Cromwell v. Hess, 63 A.D.3d 1651, 879 N.Y.S.2d 883 (4th Dept. 2009). If on the other hand an individual volunteers her or his services, the protections of the Labor Law do not apply. For example, where the plaintiff agreed to build a shed on the defendant's property in exchange for the right to participate in a group hunting trip on the defendant's property, the Court of Appeals determined that the plaintiff was a volunteer. Stringer v. Musacchia, 11 N.Y.3d 212, 869 N.Y.S.2d 362 (2008). The Court of Appeals agreed with the appellate court that the benefit the plaintiff derived – the ability to participate in a hunting trip – was a recreational one. Moreover, as the plaintiff paid his own travel expenses and had no expectation that he would be compensated. Id. at 217, 869 N.Y.S.2d at 365. Where an issue of fact exists as to whether the plaintiff was an employee or a volunteer, on the other hand, summary judgment should be denied. Cromwell, 63 A.D.3d at 1652, 879 N.Y.S.2d at 884-85; see Schroeder v. Centro Pariso Tropical, 233 A.D.2d 314, 315, 649 N.Y.S.2d 820, 821 (2nd Dept. 1996). Thus, for example, where there was conflicting evidence as to whether the plaintiff was helping his friend on a volunteer basis or working for pay, the Second Department held that summary judgment was inappropriate. Curatolo v. Postiglione, 2 A.D.3d 480, 481, 767 N.Y.S.2d 894, 895 (2nd Dept. 2003).

In the case at hand, plaintiff's deposition testimony and his affidavit indicate that movants hired him to install the sign on the roof, agreed to pay him his usual rate of $20 per hour, and advised him to pick up equipment at their office and at the site. These contentions, coupled with the undisputed facts (1) that he did, indeed, pick up the drill from RM's office without objection from RM employees, and (2) that plaintiff had worked for one or more of the

movants before, are sufficient raise a triable issue as to plaintiff's employment status. In the Molinet affidavit and deposition, Molinet states that she did not tell plaintiff he would be compensated for installing the sign; in fact, she states that she urged plaintiff not to install the sign. However, the contradiction between her statements and plaintiff's do not refute plaintiff's contentions definitively but instead create triable issues of fact. Similarly, even if, as movants state, plaintiff's testimony contains inconsistencies on this issue – which the Court accepts without deciding for the purpose of this motion – they simply have raised issues of fact as to plaintiff's credibility. See Cromwell, 63 A.D.3d at 1652, 879 N.Y.S.2d at 884-85; Baker v. Muraski, 61 A.D.3d 1372-73, 1374, 877 N.Y.S.2d 582, 583 (4th Dept. 2009).

For the same reason, the Court concludes that an issue of fact exists as to whether movants had supervisory control over plaintiff. According to plaintiff, Molinet gave plaintiff general directions, including where to get a drill and a ladder, and agreed upon payment. If true, this would be sufficient to raise an issue under Labor Law § 200 and 240 as to movants. The fact that neither she nor another RM staff member was physically present to oversee the work is not dispositive.

Next, the Court addresses the portions of the motion and cross-motion that seek to dismiss plaintiff's Labor Law 241(6) claim. To assert a cause of action under this provision, a party must point to a specific rule or regulation that has been violated. See Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 505, 601 N.Y.S.2d 49, 55 (1993). Here, plaintiff alleges that defendants violated 12 NYCRR §§ 23-1.5; 23-1.7(d), (e), and (f); 23-1.15; 23-1.6; 23-1.17; 23-1.21(b)(1), and (b)(4); 23-1.22(c)(1); 23-1.30; 23-.2.7(b); 23-5.1(b), (c), (f), (g), (h), and (j). Defendants argue that these claims all should be dismissed. The Court agrees with movants and cross-movants for the reasons below:

1) As to 12 NYCRR § 23-1.5, movants and cross-movants argue the rule is too vague to be the basis of a Labor Law § 241(6) claim. They are correct in this assertion. See Cordeiro v. TS Midtown Holdings, LLC, 87 A.D.3d 904, 906, 931 N.Y.S.2d 41, 44 (1st Dept. 2011). Moreover, plaintiff does not assert a counter-argument. Plaintiff also concedes that 12 NYCRR § 23-1.6 does not apply. In addition, plaintiff does not challenge the arguments relating to 12 NYCRR 23-1.30, relating to work site lighting; and to 12 NYCRR 23-2.7, relating to defective staircases.

2) Plaintiff's 12 NYCRR §§ 23-1.7(d), (e) and (f) claims should also be stricken. Sections (d) and (e) of this regulation expressly relate to hazards such as debris, snow, or water on the surface – all of which might create a slipping or tripping hazard at the work site. See Murphy v. American Airlines, Inc., 277 A.D.2d 25, 26, 715 N.Y.S.2d 62, 63 (1st Dept. 2000). Section (f) states that a ladder or other means of safe access must be provided if there is no stairway or ramp or runway which leads to the elevated area and does not appear to be applicable.

In response, plaintiff asserts that because at the deposition he was not asked about tripping hazards and was not asked whether he noticed any slipping or tripping hazards, movants and cross-movants cannot rely on his statement – that the roof was dry and there was no ice – as dispositive of the issue. He did not state, his argument continues, that there were no other slipping and tripping hazards. However, this is not an adequate rebuttal to the argument. Plaintiff has the responsibility to provide adequate support for his contentions. Moreover, defendants have raised the issue now, in their motions, and plaintiff still has not provided any evidence or testimony indicating there was debris or another slipping or tripping hazard on the roof. See McDevitt v. Cappelli Enterprises, Inc., Index No. 100181/2004, 16 Misc. 3d 1133(A),

847 N.Y.S.2d 903(table) (Sup. Ct. N.Y. County Aug. 28, 2007)(avail at 2007 WL 2482248, at *3). Also, contrary to plaintiff's suggestion, the fact that he slipped does not, by itself, indicate that a tripping or slipping hazard present. The smooth condition of the roof itself also is not the sort of hazard contemplated by these provisions.

3) Movants and cross-movants are correct that 12 NYCRR 23-1.15, which describes the minimum requirements for safety railings, only applies when the employer/owner/agent installs safety railings. See Dzieran v. 1800 Boston Rd., LLC., 25 A.D.3d 336, 337-38, 808 N.Y.S.2d 36, 38 (1st Dept. 2006); Forschner v. Jucca Co., 63 A.D.3d 996, 998-99, 883 N.Y.S.2d 63, 67 (2nd Dept. 2009). Plaintiff notes that Dzieran also held that the defendant's failure to provide safety railings proximately caused the plaintiff's fall. Though plaintiff is free to make this argument at trial or in support of a motion, of course, that is not the issue currently before the Court.

4) For the same reasons as above, 12 NYCRR 23-1.17, which relates to the standards which apply when life nets are provided, is inapplicable here. See Dzieran, 25 A.D.3d 337-38, 808 N.Y.S.2d at 38. Plaintiff also alleges that he views the failure to provide life nets as critical in this circumstance. However, as above, the proximate cause of the fall remains an issue of fact.

5) Movants and cross-movants also challenge plaintiff's reliance on 12 NYCRR 23-1.21 . This provision includes safety regulations relating to ladders. To rely on this rule, "[t]here must be evidence that the subject ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries." Melchor v. Singh, 90 A.D.3d 833, –, 935 N.Y.S.2d 106, 109 (2nd Dept. 2011). Where the failure to secure a ladder is not the proximate cause of the worker's fall, the rule is inapplicable. Clavijo v. Universal Baptist Church, 76 A.D.3d 990, 907 N.Y.S.2d 515, 517 (2nd Dept. 2010).

In his deposition, plaintiff stated that the ladder, which he describes as "a piece of junk ladder," Bodtman Dep. p. 92, fell from where he'd leaned it against the hotel wall. As a result, he looked around to see if anyone could assist him. "I went to take a couple of steps and after I took a few steps my feet went out from underneath me and I fell to the ground." Id. Currently, counsel asserts that because plaintiff fell off the roof while looking for someone to help him or to set the ladder back up, the ladder was a proximate cause of the accident. However, this does not make the ladder's alleged defects a proximate cause of the accident within the meaning of the Labor Law. Morever, in the past, counsel for plaintiff suggested as much. In particular, when at plaintiff's deposition counsel for defendants asked plaintiff about the ladder – whether, for example, it was properly secured, and why it fell – plaintiff's counsel cut off the line of questioning, stating the questions were irrelevant because "the ladder falling is not what caused him to fall." Bodtman Dep. p. 93.

6) As for 12 NYCRR 23-1.22, although movants' reliance on Silvas v. Bridgeview Investors, LLC, 79 A.D.3d 727, 912 N.Y.S.2d 618 (2nd Dept. 2010) is misplaced, they are nevertheless correct: this provision does not apply to work done on a roof and is inapplicable. Plaintiff appears to be arguing that the roof is a scaffold, although under 12 NYCRR § 23-1.4(b)(45) "scaffold" expressly refers to temporary platforms. He seems to state that the provision somehow contemplates the existence of permanent structures as well. However, the argument is convoluted and appears to miss the point of the provision.

7) Plaintiff's argument relating to 12 NYCRR 23-5.1 is similar to that raised in 12 NYCRR 23-1.15 and 12 NYCRR 23-1.17 – that is, he concedes that the section is inapplicable because there was no scaffold, but argues that the lack of a scaffold, in itself, raises an issue of fact under Labor Law § 240 (1).

8) The Court also dismisses the claims based on alleged OSHA violations. "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 [Labor Law § 241(6)]." Heller v. 83rd Street Investors Ltd. Partnership, 228 A.D.2d 371, 372, 645 N.Y.S.2d 8, 10 (1st Dept. 1996). Contrary to plaintiff's contention, Rizzuto v. Wenger Contr. Co., 91 N.Y.2d 343, 670 N.Y.S.2d 816 (1998) does not change this rule or otherwise stand for the proposition that a supervising employer can be charged with OSHA violations under this statute. Instead, the Court of Appeals stated, "any violation of the OSHA regulations by . . . plaintiff's employer, would not form the basis for liability under Labor Law § 241(6)." Rizzuto, 91 N.Y.2d at 351, 670 N.Y.S.2d at 820. Subsequent cases have consistently relied on Rizzuto in holding that OSHA does not provide a basis for a Labor Law § 241(6) claim. See, e.g., Shaw v.RPA Assoc., LLC, 75 A.D.3d 634, 636-37, 906 N.Y.S.2d 574, 577 (2nd Dept. 2010); Millard v. City of Ogdensburg, 274 A.D.2d 953, 954, 710 N.Y.S.2d 507, 509 (4th Dept. 2000).

The Court next grants the prong of the motion which seeks to dismiss Molinet from the action in her individual capacity, as plaintiff allegedly performed the work for the RM defendants and not for Molinet individually. Plaintiff has the burden of proof to show that it is appropriate to pierce the corporate veil; and, moreover, it is a heavy burden. See Etex Apparel, Inc., v. Tractor Intern. Corp., 83 A.D.3d 587, 587, 922 N.Y.S.2d 315, 316 (1st Dept. 2011). Here, plaintiff states that because the "about me" section of RM's website is about Molinet, "[i]t is . . . difficult to tell where the one ends and the other begins." However, this is insufficient to pierce the corporate veil; instead, plaintiff must provide detailed evidence supporting his claim. See, e.g., AHA Sales, Inc. v. Creative Bath Prod., Inc., 58 A.D.3d 6, 867 N.Y.S.2d 169 (2nd Dept. 2008). Moreover, even if plaintiff could show that RM was an alter ego of Molinet, he also

would have to show that she used the alter ego to commit a fraud against plaintiff. Sound Communications, Inc. v. Rack 'n Roll, Inc., 88 A.D.3d 523, 523, 930 N.Y.S.2d 577, 578 (1st Dept. 2011). Plaintiff also has failed to satisfy this second prong of the test, thus necessitating dismissal of the claims against Molinet. See James v. Loran Realty V Corp., 85 A.D.3d 619, 619-20, 925 N.Y.S.2d 492, 493 (1st Dept. 2011)(where plaintiff did not show alter ego was created either to render corporation judgment proof or to commit another wrong against plaintiff, corporate veil could not be pierced). Finally, plaintiff argues that because defendants did not tell plaintiff they would raise the issue, plaintiff conducted no discovery on it and therefore he is not prepared to address it fully. This argument borders on the frivolous. It is plaintiff's burden to seek the discovery necessary to support his contentions – not defendants' responsibility to inform plaintiff that he must make out a prima facie case with respect to each defendant.

As for movants' and cross-movants' arguments relating to negligence, the parties have not articulated or developed their positions adequately. This Court has done substantial research in deciding this motion; but as to this issue, the parties cite cases for only the most generic principles and make only conclusory statements as to notice. Moreover, Living Manor relies entirely on its council's statements about its knowledge; counsel does not point to any particular statements in the x deposition that relate to this point. Accordingly, the Court denies this part of the motion and cross-motion at this time.

The remainder of Living Manor's cross-motion seeks to dismiss all claims and cross claims against it on the ground that it had nothing to do with plaintiff's activities or his injury. In particular, the motion states that Living Manor "has even less a relationship, connection or nexus to the occurrence herein and . . . is only a 'named party coincidental to its ownership of the property . . . ." Kafko Aff. p.1. Living Manor alleges that it had only recently purchased the

property and intended to sell it without operating it as a hotel, that it did not enter into a contract for any work on the property, that it did not know plaintiff or know that he was working at the property, that it did not know of any alleged problems with the roof, and that there are no problems with the roof. On this basis, Living Manor states, the Labor Law does not apply to it.

The Court concludes that Living Manor has not presented a sufficiently clear argument on this issue. For one thing, plaintiff asserts causes of action against it based on Labor Law §§ 200, 240 and 241, and Living Manor does not explain why it cannot be held liable under these provisions. It cites to no case or statutory law, and does not develop its legal arguments. Therefore, it is impossible for the Court to evaluate this prong of the application. The Court notes that movants' opposition – which essentially suggests that a nonparty co-owner of the property might reveal some hitherto undisclosed basis for liability – is deficient, but this does not matter as Living Manor did not satisfy its burden. Finally on this point, the RM defendants state they are commencing another action against this nonparty, with the intent of moving to consolidate that action with this one.

Based on the above, therefore it is

ORDERED that the motion and cross-motion are granted to the extent that they seek dismissal of plaintiff's Labor Law § 241(6) claims, and these claims are severed and dismissed; and it is further

ORDERED that the motion also is granted to the extent that it seeks dismissal of the claims asserted against Molinet, and the causes of action are severed and dismissed as to Molinet; and it is further

ORDERED that the remainder of the motion and cross-motion are denied.

Finally, the Court notes that in the future counsel for RM should bind its papers in manageable groupings. During the course of reviewing counsel's motion papers, the overtaxed binder clip loosened and fell off, and the Court was unable to rebind it because the clip was too small. Thus, the pages are all loose at this time.

Dated: 2/22, 2012

Enter:

LOUIS B. YORK, J.S.C.