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SHORT FORM ORDER

INDEX No. 09-21606
CAL. No. 11-01310OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 8-15-11
ADJ. DATE 10-14-11
Mot. Seq. # 001 - MG; CASEDISP

WILLIAM ROSSI,	:	DAVIS & FERBER, LLP
	:	Attorney for Plaintiff
Plaintiff,	:	1345 Motor Parkway
	:	Islandia, New York 11749
-against-	:	
	:	TROMELLO, McDONNELL & KEHOE
LAOUDIS OF CALVERTON, LLC,	:	Attorney for Defendant
	:	P.O. Box 9038
Defendant.	:	Melville, New York 11747

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant, dated July 8, 2011, and supporting papers 1- 14 (including Memorandum of Law dated ____); (2) Affirmation in Opposition by the plaintiff, dated September 27, 2011 and supporting papers 15 - 18; (3) Reply Affirmation by the defendant, dated October 12, 2011 and supporting papers 19 - 21; (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion by defendant for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff, a route driver and laborer for non-party PODS of New York, LLC (PODS), on August 16, 2007. The accident occurred in a warehouse facility known as Building 6 on premises located at 4062 Grumman Boulevard, Calverton, New York. The building was once a hangar used by Grumman to build aircraft. It has a concrete trench under the floor running the length of the building housing pipes that are no longer in use. The trench is covered by a series of heavy steel plates. At the time of plaintiff's accident, the building was owned by defendant, Laoudis of Calverton, LLC (Laoudis), and leased by PODS to store its storage containers pursuant to a written commercial lease.

The accident allegedly occurred while plaintiff was entering, and his body was partially within, the approximately four foot deep concrete trench in the warehouse floor and a steel plate hit his exposed right hip causing him to fall into the trench. At the time of the accident, plaintiff was attempting, on his own, to

replace the steel plate to cover the trench by sliding it with his hands off of the forklift that was holding it and onto a bar he had placed over the trench. Plaintiff's right foot had slipped on "something" in the trench before touching the bottom causing his body to knock the bar placed across the top of the trench and the steel plate to fall into him. Just prior to these events, plaintiff had applied concrete, pursuant to one supervisor's direction to fix a small area of missing concrete on the warehouse floor at the edge of the trench where the steel plate had rested. He had done so with the tools and supplies provided by said supervisor, and with another supervisor's assistance. There were no witnesses to plaintiff's accident.

Plaintiff alleges that defendant controls the premises and that defendant, its agents, servants, and/or employees supervised and controlled the construction, alteration and repair of the premises. In addition, plaintiff alleges that defendant, its agents, servants, and/or employees were negligent in, among other things, failing to provide plaintiff with a safe place to work; causing or permitting foreign objects to be in the trench in which he was performing repair work thereby creating a dangerous and defective condition; and failing to provide or erect scaffolding, hoists, stays, ladders, slings, blocks, pulleys, ropes and other devices for the proper protection of plaintiff in violation of Labor Law § 240. Plaintiff also alleges that defendant had actual and constructive notice of the alleged dangerous and defective condition as it existed for a long and unreasonable length of time. By his bill of particulars, plaintiff claims that defendant violated Labor Law §§ 200 and 241 (6) and by his supplemental bill of particulars, he claims that the following sections of the Industrial Code were violated: 12 NYCRR § 23-4.1 (a), (b), § 23-4.2 (a), (b), (f), (g), (k), (l), and § 23-1.7 (e) (2).

Defendant now moves for summary judgment in its favor dismissing the complaint. Defendant asserts that plaintiff's work is not subject to the protections of the Labor Law inasmuch as plaintiff was directed by his employer to make a small repair to the floor as part of PODS' routine maintenance, that there was no ongoing construction, excavation or demolition, and that it did not direct, supervise or control the manner or method of plaintiff's work. In addition, defendant asserts that it was an out-of-possession landlord that did not retain any control over the premises, that pursuant to the terms of the lease, PODS was responsible for maintenance and repairs, and that it did not have notice of any alleged dangerous condition. Defendant also asserts that all of the Industrial Code provisions cited by plaintiff are inapplicable to the circumstances of this incident. Defendant further asserts that the sole proximate cause of the accident was plaintiff's own negligence in attempting to replace the steel plate himself without the use of the forklift and entering the trench without any direction or instruction. Defendant's submissions in support of its motion include the pleadings, plaintiff's bill of particulars and supplemental bills of particulars, the deposition transcripts of plaintiff and of Steven Skopelitis, property manager of defendant, the commercial lease between defendant and PODS, and the affidavits of Terry Lachner and Billy Labozetta, employees of PODS, and of Steven Skopelitis.

In opposition to the motion, plaintiff contends that he was not performing routine maintenance, since he had never performed cement work on the floor; the height differential cannot be characterized as deminimis under Labor Law § 240; the steel plate was not properly or sufficiently secured; and plaintiff was not equipped with devices that would have prevented his injury such as braces, shelving or other containment barriers or units. In addition, plaintiff argues that although PODS was responsible for maintenance and repairs pursuant to the lease, defendant admits that it made repairs to the concrete. Plaintiff also contends that defendant had notice of the defect inasmuch as defendant did prior work in and around

the area of the hazard, was aware that the structure and integrity of the cement was questionable, and failed to seal or secure the trenches. Plaintiff emphasizes that the steel plate and trench posed a foreseeable danger that should have been remedied by defendant by welding the plates or filling the trenches prior to plaintiff's accident. In support of his opposition, plaintiff submits an invoice for "floor in-fill" from 2005 and photographs of strips of concrete between two steel plates.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals, Inc. v Associated Fur Mfrs., Inc.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, *supra* at 324, 508 NYS2d 923, citing to ***Zuckerman v City of New York***, *supra* at 562, 427 NYS2d 595).

Plaintiff's deposition testimony from June 15, 2010 reveals that he was directed by his immediate supervisor, Billy Labozetta (Mr. Labozetta), to "take care of the hole in the floor," that is, to fix a small area of concrete that was missing at the edge of the trench in the floor, and was informed of an upcoming corporate inspection by PODS. According to plaintiff, he was not told how he was to perform the work, he had not previously performed this type of repair to the floor, but the floor had been repaired daily through the replacement of wood squares. Mr. Labozetta provided plaintiff with the tools and supplies for the work, which included a trowel, crowbar, hammer and two bags of cement, and plaintiff obtained other tools from a storage container on site. A forklift was used to lift and hold the heavy steel plate while plaintiff performed the concrete application as he kneeled on the floor at the edge of the open trench. For a 15 minute period during plaintiff's concrete application work another supervisor, Terry Lachner (Mr. Lachner), was inside the trench holding a board where the plate used to sit. After plaintiff completed the concrete application and Mr. Lachner had left, plaintiff attempted to slide the steel plate over the trench so that the steel plate would be level or "flush" in the new cement with the rest of the floor. He placed a bar across the width of the trench, the steel plate was on an angle on the forklift with the tip of the steel plate on the bar, plaintiff slid the plate halfway across the bar then attempted to enter the remaining opening of the trench. Plaintiff explained that he kneeled and put his right leg into the trench near the balancing steel plate, his right foot rolled off of something between the pipe and a chunk of concrete within the trench and touched the floor of the trench, so that his right leg was in the trench up to his femur. According to plaintiff, the sliding of his foot caused the steel plate to slide off of the bar on which it was balanced and hit his right hip, causing him to fall into the trench. Plaintiff stated that after he came out of the trench, Mr. Labozetta walked over to help him, and observed that plaintiff had a cut on his finger that required three stitches. Plaintiff testified that at no time during his employment with PODS was he ever supervised, directed or controlled by anyone from Laoudis in performing any task or function.

Defendant's property manager, Steven Skopelitis (Mr. Skopelitis), testified at his deposition on February 22, 2011 that the subject building is approximately 400,000 square feet, and that the steel plates

in the floor are each approximately four feet by two-and-a-half-feet, weigh 200 to 300 pounds, and run the length of the building covering a trench that houses hydraulic pipes that are no longer used. Mr. Skopelitis explained that the concrete outlines the trench at floor level and that the steel plates rest on the concrete. He testified that he had no notice of any defective condition of the floor, or the concrete in the floor, or any repair of the concrete around the steel plates in the floor by defendant or PODS or anyone else prior to or at the time of plaintiff's accident. Mr. Skopelitis did state that defendant did perform concrete work in December 2005 in the truck delivery area at the front of the building, which was approximately 200 feet away from the area of plaintiff's accident.

Mr. Lachner, a Storage Center Manager for PODS, states in his affidavit dated June 21, 2011that he not only supervised plaintiff's work, he assisted plaintiff on the date of the alleged accident. He explains that he was in the trench clearing small pieces of loose concrete from the edge and helped place a two by four form to hold the wet concrete. In addition, he states that the work was essentially patching a small chipped area of the concrete lip of the trench with concrete, which was considered routine maintenance in order to maintain the building in good condition and allow the forklifts to easily drive over the metal plates. Mr. Lachner further states that once the concrete was in place, he left and plaintiff's remaining job was to clean up. According to Mr. Lachner, plaintiff had no reason to access the trench and no reason and/or instructions to move the steel plate by himself without the use of the forklift. He indicates that he is not aware of any prior complaints concerning the trenches, or any prior complaints made by PODS or its employees or anyone else to the defendant landlord concerning the trenches. Mr. Lachner explains that the more than 200-pound steel plates covering the trenches facilitate their ability to drive their forklifts over the trenches while transporting storage containers from one area of the leased space to another. Mr. Labozetta, a Storage Center Manager for PODS, states in his affidavit dated June 21, 2011 that on the date of plaintiff's accident, he was plaintiff's immediate supervisor, he was present at the facility, and no complaints were ever made to defendant regarding the heavy steel plates covering the trenches. He notes that on occasion PODS would spot weld some of the steel plates to minimize their bouncing when driven over by a vehicle or forklift. According to Mr. Labozetta, Mr. Lachner informed him upon returning to the office that plaintiff was cleaning up, and when plaintiff did not return to the office he went to the trench to see what was taking plaintiff so long and found plaintiff sitting on the ground outside the trench, plaintiff had cut his finger, and told Mr. Labozetta that he was cut by the trowel. Both Mr. Lachner and Mr. Labozetta emphasize in their affidavits that there was no ongoing construction, demolition or excavation work occurring at the facility during the time of plaintiff's accident and that basic maintenance and repair were the responsibility of PODS.

The subject commercial lease provides in paragraph 4, entitled "Care and Maintenance of Premises," that "Tenant shall, at his own expense and at all times, maintain the premises in the same order and repair as they were at the commencement of the lease, including plate glass, electrical wiring, plumbing and heating installations, overhead doors, hanger doors, exit and passage doors, walls and partitions and any other system or equipment upon the premises ... Tenant shall be responsible for all necessary repairs to the premises caused from [sic] Tenant's use of the premises, excluding the roof, exterior walls, structural foundations and main water and waste lines, which shall be maintained by Landlord." Paragraph 5 of the lease, entitled "Alterations," provides, "Tenant shall not, without first obtaining the written consent of the Landlord, make any alterations, additions, or improvements, in, to or about the premises."

Labor Law §§ 200, 240, and 241 apply to owners, general contractors, or their "agents" (Labor Law §§ 200 [1], 240 [1], 241). Common to all cases imposing Labor Law §§ 240 (1) and 241 (6) liability on an out-of-possession owner is some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest (***Abbatiello v Lancaster Studio Assocs.***, 3 NY3d 46, 51, 781 NYS2d 477 [2004]; *see* ***Coleman v City of New York***, 91 NY2d 821, 666 NYS2d 553 [1997]; ***Gordon v Eastern Ry. Supply, Inc.***, 82 NY2d 555, 606 NYS2d 127 [1993]; ***Celestine v City of New York***, 86 AD2d 592, 446 NYS2d 131 [2d Dept 1982], *affd* 59 NY2d 938, 466 NYS2d 319 [1983]). So long as a violation of the statute proximately results in injury, the owner's lack of notice or control over the work is not conclusive. Thus, an out-of-possession landlord may not escape strict liability as an owner based on its lack of notice or control over the work ordered by its tenant (***Sanatass v Consolidated Investing Co., Inc.***, 10 NY3d 333, 858 NYS2d 67 [2008]). The burden placed upon a defendant seeking summary judgment on the ground that it is not an owner is a heavy one (*see* ***Sanatass v Consolidated Investing Co., Inc.***, *supra* at 341-342, 858 NYS2d 67). Here, defendant's status as an out-of-possession landlord/owner does not shield it from liability under Labor Law §§ 240 (1) or 241 (6) since the record shows that there was a clear nexus between it and the injured plaintiff (*see* ***Ali v Richmond Industrial Corp.***, 59 AD3d 469, 873 NYS2d 207 [2d Dept 2009]).

Labor Law § 240 (1) requires that owners and contractors: "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." Where a worker is engaged in routine maintenance, the statute is inapplicable (*see* ***Smith v Shell Oil Co.***, 85 NY2d 1000, 630 NYS2d 962 [1995]; ***Fox v H & M Hennes & Mauritz, L.P.***, 83 AD3d 889, 890, 922 NYS2d 139 [2d Dept 2011]). The type of accident triggering Labor Law § 240 (1) coverage is one that will sustain the allegation that an adequate "scaffold, hoist, stay, ladder or other protective device" would have "shield[ed] the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (***Runner v New York Stock Exch., Inc.***, 13 NY3d 599, 603, 895 NYS2d 279 [2009], quoting ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 501, 601 NYS2d 49 [1993] [emphasis removed]; *see* ***Salazar v Novalex Contracting Corp.***, ___ NY3d ___, 2011 NY Slip Op 08446 [Nov 21, 2011]). "[T]he purpose of the strict liability statute is to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction work site elevation differentials, and, accordingly, ... there will be no liability under the statute unless the injury producing accident is attributable to the latter sort of risk" (***Runner v New York Stock Exch., Inc.***, *supra*; *see* ***Davis v Wyeth Pharmaceuticals, Inc.***, 86 AD3d 907, 909, 928 NYS2d 377 [3d Dept 2011]). "Where there is no statutory violation, or where the plaintiff is the sole proximate cause of his or her own injuries, there can be no recovery under Labor Law § 240 (1)" (***Treu v Cappelletti***, 71 AD3d 994, 997, 897 NYS2d 199 [2d Dept 2010]; *see* ***Poracki v St. Mary's Roman Catholic Church***, 82 AD3d 1192, 1194, 920 NYS2d 233 [2d Dept 2011]).

Here, defendant established its prima facie entitlement to judgment as a matter of law dismissing plaintiff's Labor Law § 240 (1) cause of action by demonstrating that the elevation differential was minimal as plaintiff was already partially inside the four foot deep trench with his femur exposed when the steel plate hit his hip, and a lack or failure of a device prescribed by Labor Law § 240 (1) for hoisting or securing the steel plate did not proximately cause his injury (*see* ***Cambry v Lincoln Gardens***, 50 AD3d 1081, 857 NYS2d

225 [2d Dept 2008]; *compare* ***Pritchard v Tully Constr. Co., Inc.***, 82 AD3d 730, 918 NYS2d 154 [2d Dept 2011]). Notably, the steel plate was not being hoisted or secured or otherwise being moved vertically from one elevation to another, instead, it was being moved by sliding it horizontally over the bar spanning the trench, and the steel plate tipped over because plaintiff knocked it off the bar when he slipped (*see* ***Davis v Wyeth Pharmaceuticals, Inc.***, *supra*; ***Mueller v PSEG Power N.Y., Inc.***, 83 AD3d 1274, 922 NYS2d 588 [3d Dept 2011]; *see also* ***Natale v City of New York***, 33 AD3d 772, 822 NYS2d 771 [2d Dept 2006]). Plaintiff's argument in opposition that the elevation differential cannot be viewed as de minimis, given the weight of the steel plate and the amount of force it was capable of generating, even in a fall of a short distance, is inapplicable to the subject circumstances where there was no appreciable vertical movement of the steel plate, it merely tipped and slid into his hip (*compare* ***Wilinski v 334 East 92nd Hous. Dev. Fund Corp.***, 18 NY3d 1, ___ NYS2d ___ [2011] [debris from a wall being demolished hit unsecured ten foot tall vertical plumbing pipes that were four inches in diameter causing them to topple and fall at least four feet before striking the five-foot-six-inch tall plaintiff]; ***Runner v New York Stock Exch., Inc.***, *supra* at 601-605, 895 NYS2d 279 [the specific task being performed at the time of plaintiff's injury was moving a heavy reel from a higher to a lower elevation, the danger to be guarded against arose from the reel's insufficiently checked descent, and plaintiff's injury flowed directly from the effect of gravity on the reel as it descended]; *see* ***Harris v City of New York***, 83 AD3d 104, 108, 923 NYS2d 2 [1st Dept 2011]).

Plaintiff, as the tenant's employee given the task of repairing the concrete at the edge of the trench, cannot avail himself of the argument that the accident could have been avoided if defendant had permanently covered all the trenches thereby eliminating his task of repairing the concrete. Plaintiff's task of repairing the trench's edge required that the trench be open to access its edge. A recent decision of the Court of Appeals, ***Salazar v Novalex Contracting Corp.***, ___ NY3d ___, 2011 NY Slip Op 08446 [Nov 21, 2011], involves circumstances very similar to those of plaintiff. In ***Salazar***, the accident occurred in a basement that had a trench system for piping. Salazar and the other workmen were laying a concrete floor by pouring and spreading concrete over the entire basement floor, including the trenches, which were described by Salazar as being approximately two feet wide and three to four feet deep. Salazar was injured as he was walking backwards raking concrete, when he stepped into a trench that was partially filled with concrete, his right foot hit the bottom of the trench, and his right leg folded underneath him. The Court of Appeals held that "Labor Law § 240 (1) should be construed with a common sense approach to the realities of the workplace at issue" and found that "the installation of a protective device would have been contrary to the objectives of the work plan in the basement" (*see id.*). The same can be said of the instant circumstances, where plaintiff purposely entered the four foot deep trench to replace the heavy steel plate so that the steel plate would cover the trench and sit level with the floor in the newly applied cement on the edge of the trench. Notably, there was a forklift available that had lifted and was holding the steel plate near the trench, and plaintiff chose not use the forklift to replace the steel plate over the trench but instead attempted to slide the steel plate off of the forklift onto a bar with his hands while standing partially in the trench. This is a situation where plaintiff, on his own initiative, took a foolhardy risk which resulted in injury (*see e.g.* ***Montgomery v Federal Express Corp.***, 4 NY3d 805, 795 NYS2d 490 [2005]; *cf.* ***Harris v City of New York***, *supra* at 110, 923 NYS2d 2 [1st Dept 2011]). In light of the foregoing, a determination of whether plaintiff was performing a repair or routine maintenance prior to his accident is unnecessary. Therefore, defendant is granted summary judgment dismissing plaintiff's Labor Law § 240 (1) claims.

Labor Law § 241 (6) "imposes a nondelegable duty of reasonable care upon owners and contractors

'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 348, 670 NYS2d 816 [1998], quoting Labor Law § 241[6]; *see* ***Harrison v State***, 88 AD3d 951, 931 NYS2d 662 [2d Dept 2011]). Inasmuch as the statute is not self-executing, a plaintiff must allege a violation of a specific and applicable provision of the Industrial Code (*see* ***Wilinski v 334 East 92nd Housing Dev. Fund Corp.***, *supra*; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra* at 530, 601 NYS2d 49; ***Jara v New York Racing Assn., Inc.***, 85 AD3d 1121, 1123, 927 NYS2d 87 [2d Dept 2011]; ***D'Elia v City of New York***, 81 AD3d 682, 684, 916 NYS2d 196 [2d Dept 2011]). The interpretation of an Industrial Code regulation and the determination as to whether a particular condition comes within the scope of the regulation generally present questions of law for the court (*see* ***Spence v Island Estates at Mt. Sinai II, LLC***, 79 AD3d 936, 914 NYS2d 203 [2d Dept 2010]; ***Messina v City of New York***, 300 AD2d 121, 752 NYS2d 608 [1st Dept 2002]; ***Penta v Related Cos.***, 286 AD2d 674, 730 NYS2d 140 [2d Dept 2001]).

Plaintiff alleges violations by defendant of the following sections of the Industrial Code, 12 NYCRR § 23-4.1 (General Requirements in Excavation Operations), 12 NYCRR § 23-4.2 (Trench and Area Type Excavations), and § 23-1.7 (Protection from General Hazards). Initially, the Court notes that the adduced evidence reveals that plaintiff was not in an area where construction, excavation or demolition work was being performed. In addition, 12 NYCRR § 23-4.1 and 12 NYCRR § 23-4.2 are inapplicable to the circumstances of plaintiff's accident inasmuch as both sections relate to excavations and plaintiff's work did not involve any excavation (*see* ***Scarso v M.G. General Constr. Corp.***, 16 AD3d 660, 792 NYS2d 546 [2d Dept 2005], *lv to appeal dismissed* 5 NY3d 849, 806 NYS2d 168 [2005]). As for the last section alleged by plaintiff, 12 NYCRR § 23-1.7 (e) (2) (protection from tripping and other hazards in working areas), it provides that "[t]he parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed." Said section is also inapplicable inasmuch as plaintiff did not trip or slip on scattered tools, materials, or sharp projections and to the extent that his foot slipped on "something" between the pipe and a chunk of concrete, that "something" was inside the trench, and not on the floor or the area where plaintiff was working or would pass. Thus, defendant made a prima facie showing of entitlement to judgment as a matter of law dismissing plaintiff's Labor Law § 241 (6) claims (*see* ***Settimo v City of New York***, 61 AD3d 840, 878 NYS2d 89 [2d Dept 2009]). Plaintiff's argument in opposition that there is a question of fact as to whether the trench constituted a "passageway" under 12 NYCRR § 23-1.7 is unavailing. Plaintiff testified at his deposition that the trench was not a passageway, that PODS employees walked on the steel plates covering the trenches, that PODS employees did not perform any work inside the trenches, and that they were not supposed to walk inside the trenches. Plaintiff also argues in opposition that plaintiff was required to enter the trench and that 12 NYCRR § 23-4 is applicable. According to plaintiff, although the trench was not being excavated when plaintiff was injured, it had been excavated at some time, and defendant failed to prevent access to the trench, which was foreseeably dangerous, and failed to safeguard him from entry into the trench. Here, plaintiff was not directed or instructed to enter the trench, his work of fixing a small area of concrete that was missing at the edge of the trench did not require him to actually enter the trench, and he voluntarily entered the trench after he had completed the work that he had been directed to perform. As indicated hereinabove, plaintiff cannot avail himself of the argument that if defendant had permanently covered the trench he would not have been injured inasmuch as his task of repairing the trench's edge required that the trench be open to access its edge. Plaintiff's deposition testimony demonstrates that the fact that the trench was uncovered did not pose a

danger to plaintiff. Thus, plaintiff failed to raise a triable issue of fact with respect to defendant's liability pursuant to Labor Law §241 (6) (*see id.*). Therefore, defendant is granted summary judgment dismissing plaintiff's Labor Law § 241 (6) claims.

Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Haider v Davis***, 35 AD3d 363, 827 NYS2d 179 [2d Dept 2006]). Where the injury allegedly arises from the means and methods of the work performed, rather than a dangerous condition on the premises, an implicit precondition to this duty is that the party charged with that responsibility have the authority to supervise or control the activity bringing about the injury (*see* ***Hart v Commack Hotel, LLC***, 85 AD3d 1117, 1118, 927 NYS2d 111 [2d Dept 2011]; ***Ferrero v Best Modular Homes, Inc.***, 33 AD3d 847, 823 NYS2d 477 [2d Dept 2006]). An out-of-possession landlord is not liable for injuries that occur on its premises unless it retains control over the premises or is contractually bound to repair unsafe conditions (*see* ***Taylor v Lastres***, 45 AD3d 835, 847 NYS2d 139 [2d Dept 2007]; ***Lindquist v C & C Landscape Contrs., Inc.***, 38 AD3d 616, 831 NYS2d 523 [2d Dept 2007]; ***Yadegar v International Food Mkt.***, 37 AD3d 595, 830 NYS2d 244 [2d Dept 2007]; ***Scott v Bergstol***, 11 AD3d 525, 782 NYS2d 793 [2d Dept 2004]). Control may be evidenced by lease provisions making the landlord responsible for repairs or by a course of conduct demonstrating that the landlord has assumed responsibility to maintain a particular portion of the premises (*see* ***Taylor v Lastres***, *supra*; ***Ever Win, Inc. v 1–10 Indus. Assocs., LLC***, 33 AD3d 845, 827 NYS2d 63 [2d Dept 2006]; ***Winby v Kustas***, 7 AD3d 615, 775 NYS2d 906 [2d Dept 2004]).

Here, defendant established its prima facie entitlement to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims (*see* ***Robinson v County of Nassau***, 84 AD3d 919, 920, 923 NYS2d 135 [2d Dept 2011]; ***Enriquez v B & D Dev., Inc.***, 63 AD3d 780, 781, 880 NYS2d 701 [2d Dept 2009]). Defendant's proffered proof demonstrated that plaintiff's accident arose from the means and methods of his work, not from the allegedly dangerous condition of the steel plate or the trench, that the work was directed and controlled exclusively by his fellow employees, and that defendant had no authority to exercise supervisory control over his work (*see id.*). Thus, the lease provisions concerning repairs and whether defendant assumed control over the premises through its separate concrete work are immaterial to this determination. In opposition, plaintiff failed to offer evidence sufficient to raise a triable issue of fact (*see id.*). Therefore, defendant is granted summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims.

Accordingly, the instant motion is granted and the complaint is dismissed in its entirety.

Dated: 2/11/12

Peter H. Mayer

PETER H. MAYER, J.S.C.