

McCullough v L.P. Stair & Rail, Inc.

2012 NY Slip Op 31189(U)

April 18, 2012

Sup Ct, Nassau County

Docket Number: 16458/07

Judge: Roy S. Mahon

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SCW

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON
Justice

MICHAEL McCULLOUGH,

TRIAL/IAS PART 5

Plaintiff(s),

INDEX NO. 16458/07

- against -

**MOTION SEQUENCE
NO. 2,3,4,5,6 & 7**

**L.P. STAIR & RAIL, INC., TEIXERIA CONSTRUCTION
CO., CORP., EASTPORT HOME & LAND COMPANY,
LLC, QUINTAL CONTRACTING CORP., ACURA
PLUMBING & HEATING CORP., and LIBERTY
EAGLE PLUMBING & HEATING, CORP.,**

**MOTION SUBMISSION
DATE: January 31, 2012**

Defendant(s).

EASTPORT HOME & LAND COMPANY, LLC,

Third-Party Plaintiff,

- against -

BOVE INDUSTRIES, INC.,

Third-Party Defendant.

The following papers read on this motion:

Notice of Motion	XXX
Notice of Cross Motion	XXX
Affirmation in Opposition	XXXXXXXXXX
Reply Affirmation	XXXXXXXX

Submitted for this Court's consideration and determination, in the above captioned action, are three (3) motions and three(3) cross-motions which are described as follows:

Motion brought by the Plaintiff, for an order of this Court pursuant to Rule 3404 of the CPLR, restoring the instant action to the trial calendar of this Court (motion sequence number 2).

Cross-motion brought by the Defendant, Quintal Contracting Corp., for an order of this Court, pursuant to Rule 3212 of the CPLR, granting this moving Defendant Summary Judgment dismissing the Plaintiff's Complaint and all claims against it (motion sequence number 3).

Motion brought by the Defendants, L.P. Stair & Rail, Inc. and Teixeria Construction Co., Corp., for an order of this Court pursuant to Rule 3212 of the CPLR granting these moving Defendants Summary Judgment dismissing those portions of the Plaintiff's Complaint seeking to recover under common law negligence and Labor Law Sections 200 and 241(6) (motion sequence number 4).

Cross-motion brought by the Defendants, Acura Plumbing & Heating Corp. and Liberty Eagle Plumbing Corp., for an order of this Court, pursuant to Rule 3212 of the CPLR, granting these moving Defendants Summary Judgment dismissing the Plaintiff's Complaint and all claims against them (motion sequence number 5).

Cross-motion brought by the Third-Party Defendant, Bove Industries, Inc. for an order of this Court, pursuant to Rule 3212 of the CPLR, granting this moving Third-Party Defendant Summary Judgment dismissing the Third-Party Complaint and any and all cross-claims and counterclaims (motion sequence number 6).

Motion brought by the Defendant, Eastport Home & Land Company, LLC, for an order of this Court, pursuant to Rule 3212 of the CPLR, granting this moving Defendant Summary Judgment dismissing the Plaintiff's Complaint and any and all cross-claims and counterclaims asserted against it and, furthermore, granting this moving Defendant Summary Judgment on its cross-claims and third-party claims against the Defendants, L.P. Stair & Rail, Inc., Teixeria Construction Co. Corp., Quintal Contracting Corp., Acura Plumbing & Heating Corp., Liberty Plumbing & Heating Corp. and Third-Party Defendant Bove Industries, Inc., for common law and/or contractual indemnification and breach of agreement (motion sequence number 7).

Based upon all of the papers submitted for this Court's consideration, the Court makes the following findings of fact solely for the purpose of determining the hereinabove described motions and cross-motions.

This action arises out of an accident that occurred on March 4, 2005 at approximately 2:30 p.m. at a construction site in the general vicinity of Buildings 201-209 Moriches Road, Eastport, New York.

At the time, date and place of the subject accident, the Plaintiff, Michael McCullough, was an independent contractor employed by the Defendants, L.P. Stair & Rail, Inc. and/or Teixeria Construction Co., Corp.

The construction site where the subject accident took place was known and designated as the Encore Condominium Development project which premises were owned by the Defendant, Eastport Home & Land Company, LLC, at the time and date of the subject accident.

On March 19, 2004, L.P. Stair & Rail, Inc. entered into a contract with Eastport Home & Land Company, LLC, for the said Defendant to construct and install prebuilt stairs in the interior of residential units under construction at the subject construction site.

The aforesaid contract set forth, *inter alia*, the following:

"Commercial General Liability. Contractor shall procure and maintain coverage to include all operations of the Contractor and coverage for all liability assumed hereunder with the following limits and extensions of coverage. Coverage to be on Occurrence Basis. Claims Made form is not acceptable. Coverage to be issued under ISO Form CG0001 (1988 or equivalent) include: Premises/Operations; Supplementary Payments in addition to limit; Independent Contractor's Protective; Personal Injury Liability with Employee Exclusion deleted; 50' Railroad Exclusion to be eliminated when necessary; Contractual Liability, including specified provisions for Contractor's obligation; Broad Form Property Damage, including Completed Operations, all with the following limits:

Bodily Injury and Property Damage:

Each Occurrence	\$1,000,000
General Aggregate	\$2,000,000
Personal Injury Liability	\$1,000,000

Products and Complete Operations Insurance Aggregate Limit of \$1,000,000 shall be maintained for two (2) years after final acceptance and Contractor shall continue to provide evidence of such coverage to Eastport Home & Land Company, LLC on an annual basis during the aforementioned period.

* * *

ARTICLE 13: INDEMNIFICATION

13.1 Contractor's Performance. To the fullest extent permitted by law, the Contractor hereby assumes the entire responsibility and liability for any and all damage or injury of any kind or nature whatever (including death resulting therefrom) to all persons, whether employees of the Contractor or otherwise, and to all property, caused by, resulting from, arising out of or occurring in connection with the execution of the Work; and if any claims for such damage or injury (including death resulting therefrom) be made or asserted, against Owner or the Owner's Representative, the Contractor agrees to indemnify, defend and save harmless Owner and the Owner's Representative, their partners, officers, agents, servants and employees from and against any and all such claims, and further from and against any and all loss, cost expenses, liability, damage or injury, including legal fees and disbursements, that Owner or the Owner's Representative, their partners, officers, agents, servants and employees may directly or indirectly sustain, or incur as a result.

* * *

Contractual Indemnification Agreement. Contractor shall indemnify and hold harmless, to the maximum extent permitted by law, each of the parties named above under the heading additional insured (the "Indemnitees") and/or their agents, officers, directors and employees from and against all claims, damages, losses and expenses including attorney's fees, arising out of or resulting from the performance of the Work, including any such claim, damage, loss or expense (a) attributable to

bodily injury, sickness, disease or death, or to injury to, or destruction of tangible property including the loss of use resulting therefore, (b) caused in whole or in part by any act or omission of the Contractor, any subtier contractor (whether or not consented to) or anyone directly or indirectly employed by them or anyone acting under their direction, control or on their behalf, regardless of whether it is caused in part by an Indemnitee. Such obligation shall not be considered to negate, or abridge, or otherwise reduce any other right to obligation of indemnity which would otherwise exist as to any party or person described in this paragraph.

(i) Additionally, the indemnity and hold harmless given above shall include the obligation to reimburse Indemnitees for all defense costs and expenses incurred (including expert witness fees and attorney fees) in any legal actions or proceedings.

(ii) At Indemnitee's election, the undersigned shall itself defend Indemnitees in any and all such actions or proceedings.

(iii) Should litigation be necessary to enforce any provision of this Agreement, then all litigation expenses, witness fees, court costs and attorney fees shall be paid to the prevailing party.

(iv) In the event any provision of this Agreement shall be held to be invalid or unenforceable, the other provisions of this Agreement shall be valid and binding on the parties hereto."

On May 13, 2004, the Defendant, Quintal Contracting Corp., entered into a contract with Eastport Home & Land Company, LLC, for the said Defendant to perform landscaping and irrigation work at the subject construction site.

The aforesaid contract set forth, *inter alia*, the following:

Commercial General Liability. Contractor shall procure and maintain coverage to include all operations of the Contractor and coverage for all liability assumed hereunder with the following limits and extensions of coverage. Coverage to be on Occurrence Basis. Claims Made form is not acceptable. Coverage to be issued under ISO Form CG0001 (1988 or equivalent) include: Premises/Operations; Supplementary Payments in addition to limit; Independent Contractor's protective; Personal Injury Liability with Employee Exclusion deleted; 50' Railroad Exclusion to be eliminated when necessary; Contractual Liability, including specified provisions for Contractor's obligation; Broad Form Property Damage, including Completed Operations, all with the following limits:

Bodily Injury and Property Damage:

Each Occurrence	\$1,000,000
General Aggregate	\$2,000,000
Personal Injury Liability	\$1,000,000

Products and Complete Operations Insurance Aggregate Limit of \$1,000,000 shall be maintained for two (2) years after final acceptance and Contractor shall continue to provide evidence of such coverage to Eastport Home & Land Company, LLC on an annual basis during the aforementioned period.

* * *

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Contractual Indemnification Agreement. Contractor shall indemnify and hold harmless, to the maximum extent permitted by law, each of the parties named above under the heading additional insured (the "Indemnitees") and/or their agents, officers, directors and employees from and against all claims, damages, losses and expenses including attorney's fees, arising out of or resulting from the performance of the Work, including any such claim, damage, loss or expense (a) attributable to bodily injury, sickness, disease or death, or to injury to, or destruction of tangible property including the loss of use resulting therefore, (b) caused in whole or in part by any act or omission of the Contractor, any subtier contractor (whether or not consented to) or anyone directly or indirectly employed by them or anyone acting under their direction, control or on their behalf, regardless of whether it is caused in part by an Indemnitee. Such obligation shall not be considered to negate, or abridge, or otherwise reduce any other right to obligation of indemnity which would otherwise exist as to any party or person described in this paragraph.

- (i) Additionally, the indemnity and hold harmless given above shall include the obligation to reimburse Indemnitees for all defense costs and expenses incurred (including expert witness fees and attorney fees) in any legal actions or proceedings.
- (ii) At Indemnitee's election, the undersigned shall itself defend Indemnitees in any and all such actions or proceedings.

(iii) Should litigation be necessary to enforce any provision of this Agreement, then all litigation expenses, witness fees, court costs and attorney fees shall be paid to the prevailing party.

(iv) In the event any provision of this Agreement shall be held to be invalid or unenforceable, the other provisions of this Agreement shall be valid and binding on the parties hereto."

On February 15, 2004, the Defendant, Acura Plumbing & Heating Corp., entered into a contract with Eastport Home & Land Company, LLC, for the said Defendant to perform plumbing work at the subject construction site.

The aforesaid contract set forth, *inter alia*, the following:

Commercial General Liability. Contractor shall procure and maintain coverage to include all operations of the Contractor and coverage for all liability assumed hereunder with the following limits and extensions of coverage. Coverage to be on Occurrence Basis. Claims Made form is not acceptable. Coverage to be issued under ISO Form CG0001 (1988 or equivalent) include: Premises/Operations; Supplementary Payments in addition to limit; Independent Contractor's protective; Personal Injury Liability with Employee Exclusion deleted; 50' Railroad Exclusion to be eliminated when necessary; Contractual Liability, including specified provisions for Contractor's obligation; Broad Form Property Damage, including Completed Operations, all with the following limits:

Bodily Injury and Property Damage:

Each Occurrence	\$1,000,000
General Aggregate	\$2,000,000
Personal Injury Liability	\$1,000,000

Products and Complete Operations Insurance Aggregate Limit of \$1,000,000 shall be maintained for two (2) years after final acceptance and Contractor shall continue to provide evidence of such coverage to Eastport Home & Land Company, LLC on an annual basis during the aforementioned period.

* * *

ARTICLE 13: INDEMNIFICATION

13.1 Contractor's Performance. To the fullest extent permitted by law, the Contractor hereby assumes the entire responsibility and liability for any and all damage or injury of any kind or nature whatever (including death resulting therefrom) to all persons, whether employees of the Contractor or otherwise, and to all property, caused by, resulting from, arising out of or occurring in connection with the execution of the Work; and if any claims for such damage or injury (including death resulting therefrom) be made or asserted, against Owner or the Owner's Representative, the Contractor agrees to indemnify, defend and save

harmless Owner and the Owner's Representative, their partners, officers, agents, servants and employees from and against any and all such claims, and further from and against any and all loss, cost expenses, liability, damage or injury, including legal fees and disbursements, that Owner or the Owner's Representative, their partners, officers, agents, servants and employees may directly or indirectly sustain, or incur as a result.

* * *

Contractual Indemnification Agreement. Contractor shall indemnify and hold harmless, to the maximum extent permitted by law, each of the parties named above under the heading additional insured (the "Indemnitees") and/or their agents, officers, directors and employees from and against all claims, damages, losses and expenses including attorney's fees, arising out of or resulting from the performance of the Work, including any such claim, damage, loss or expense (a) attributable to bodily injury, sickness, disease or death, or to injury to, or destruction of tangible property including the loss of use resulting therefore, (b) caused in whole or in part by any act or omission of the Contractor, any subcontractor (whether or not consented to) or anyone directly or indirectly employed by them or anyone acting under their direction, control or on their behalf, regardless of whether it is caused in part by an Indemnitee. Such obligation shall not be considered to negate, or abridge, or otherwise, reduce any other right to obligation of indemnity which would otherwise exist as to any party or person described in this paragraph.

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(ii) At Indemnitee's election, the undersigned shall itself defend Indemnitees in any and all such actions or proceedings.

(iii) Should litigation be necessary to enforce any provision of this Agreement, then all litigation expenses, witness fees, court costs and attorney fees shall be paid to the prevailing party.

(iv) In the event any provision of this Agreement shall be held to be invalid or unenforceable, the other provisions of this Agreement shall be valid and binding on the parties hereto."

On April 13, 2005, the Defendant, Liberty Plumbing & Heating Corp., entered into a contract with Eastport Home & Land Company, LLC, for the said Defendant to perform plumbing work at the subject construction site.

The aforesaid contract set forth, *inter alia*, the following:

Commercial General Liability. Contractor shall procure and maintain coverage to include all operations of the Contractor and coverage for all liability assumed

hereunder with the following limits and extensions of coverage. Coverage to be on Occurrence Basis. Claims Made form is not acceptable. Coverage to be issued under ISO Form CG0001 (1988 or equivalent) include: Premises/Operations; Supplementary Payments in addition to limit; Independent Contractor's protective; Personal Injury Liability with Employee Exclusion deleted; 50' Railroad Exclusion to be eliminated when necessary; Contractual Liability, including specified provisions for Contractor's obligation; Broad Form Property Damage, including Completed Operations, all with the following limits:

Bodily Injury and Property Damage:

Each Occurrence	\$1,000,000
General Aggregate	\$2,000,000
Personal Injury Liability	\$1,000,000

Products and Complete Operations Insurance Aggregate Limit of \$1,000,000 shall be maintained for two (2) years after final acceptance and Contractor shall continue to provide evidence of such coverage to Eastport Home & Land Company, LLC on an annual basis during the aforementioned period.

* * *

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Contractual Indemnification Agreement. Contractor shall indemnify and hold harmless, to the maximum extent permitted by law, each of the parties named above under the heading additional insured (the "Indemnitees") and/or their agents, officers, directors and employees from and against all claims, damages, losses and expenses including attorney's fees, arising out of or resulting from the performance of the Work, including any such claim, damage, loss or expense (a) attributable to bodily injury, sickness, disease or death, or to injury to, or destruction of tangible

property including the loss of use resulting therefore, (b) caused in whole or in part by any act or omission of the Contractor, any subtier contractor (whether or not consented to) or anyone directly or indirectly employed by them or anyone acting under their direction, control or on their behalf, regardless of whether it is caused in part by an Indemnitee. Such obligation shall not be considered to negate, or abridge, or otherwise reduce any other right to obligation of indemnity which would otherwise exist as to any party or person described in this paragraph.

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(iii) Should litigation be necessary to enforce any provision of this Agreement, then all litigation expenses, witness fees, court costs and attorney fees shall be paid to the prevailing party.

(iv) In the event any provision of this Agreement shall be held to be invalid or unenforceable, the other provisions of this Agreement shall be valid and binding on the parties hereto."

On March 1, 2004, the Third-Party Defendant, Bove Industries, Inc., entered into a contract with Eastport Home & Land Company, LLC, for the said Defendant to perform site work and preparatory work at the subject construction site.

The aforesaid contract set forth, *inter alia*, the following:

"Commercial General Liability. Contractor shall procure and maintain coverage to include all operations of the Contractor and coverage for all liability assumed hereunder with the following limits and extensions of coverage. Coverage to be on Occurrence Basis. Claims Made form is not acceptable. Coverage to be issued under ISO Form CG0001 (1988 or equivalent) include: Premises/Operations; Supplementary Payments in addition to limit; Independent Contractor's protective; Personal Injury Liability with Employee Exclusion deleted; 50' Railroad Exclusion to be eliminated when necessary; Contractual Liability, including specified provisions for Contractor's obligation; Broad Form Property Damage, including Completed Operations, all with the following limits:

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Products and Complete Operations Insurance Aggregate Limit of \$1,000,000 shall

be maintained for two (2) years after final acceptance and Contractor shall continue to provide evidence of such coverage to Eastport Home & Land Company, LLC on an annual basis during the aforementioned period.

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(ii) At Indemnatee's election, the undersigned shall itself defend Indemnitees in any and all such actions or proceedings.

(iii) Should litigation be necessary to enforce any provision of this Agreement, then all litigation expenses, witness fees, court costs and attorney fees shall be paid to the prevailing party.

(iv) In the event any provision of this Agreement shall be held to be invalid or unenforceable, the other provisions of this Agreement shall be valid and binding on the parties hereto."

At the time, date and place of the subject accident, the Plaintiff was injured when he and a co-worker were carrying a prefabricated staircase across an open area of the subject construction site, in the vicinity of condominium unit 201 with the Plaintiff walking backwards.

It is the Plaintiff's testimony that the subject construction site had "debris" and that he tripped over an exposed piece of buried PVC pipe.

The Defendants, Quintal Contracting Corp., Acura Plumbing & Heating Corp., Liberty Plumbing & Heating Corp. and the Third-Party Defendant, Bove Industries, Inc., all used PVC pipe in the performance of their contracted for work with the Defendant, Eastport Home & Land Company, LLC, at the subject construction site.

At sometime after the subject accident, the Defendant, Eastport Home & Land Company, LLC, tendered its defense and indemnity to the insurance carrier for L.P. Stair & Rail, Inc. To the return date of the motions and cross-motions herein, the said insurance carrier has not assumed the defense and indemnity of Eastport Home & Land Company, LLC, with respect to the subject accident.

In the instant action, the Plaintiff asserts causes of action grounded in common law negligence and violations of the New York State Labor Law Sections 200, 240 and 241. The Plaintiff's Labor Law Section 241 claim is predicated upon alleged violations of the New York State Industrial Code Provisions 12 NYCRR Sections 23-1.5, 23-1.7, 23-1.8, 23-1.15 and 23-1.16.

On March 31, 2010, counsel for all parties herein appeared before this Court and entered into and executed a Certification Order of the same date.

This Court's March 31, 2010, Certification Order herein provided in pertinent part:

"This matter is hereby certified for trial and plaintiff(s) is directed to file a Note of Issue within 90 days. If plaintiff does not file a Note of Issue within 90 days, this action is deemed dismissed without further order of the Court. (CPLR 3216).

A copy of this order must accompany the Note of Issue.

* * *

Motions for summary judgment must be filed within 90 days of the filing of the Note of Issue . . ."

On June 30, 2010, this Court "Dismissed Pre-Note" the instant action.

On June 30, 2010, the Plaintiff filed with the Court a Note of Issue together with this Court's hereinabove described Certification Order herein.

Counsel for the Plaintiff avers that the Note of Issue, together with the Certification Order herein, were served by mail upon all counsel for the Defendants and Third-Party Defendant on June 30, 2010.

Determinations of the Motions

Rule 3216 of the CPLR (cited in this Court's Certification Order herein) provides in pertinent part:

"(a) Where a party . . . unreasonably fails to serve and file a Note of Issue, the Court on its own initiative or upon motion may dismiss the party's pleadings on terms.

(b) No dismissal shall be directed under any portion of subdivision (a) of this Rule and no Court initiative shall be taken or motion made thereunder unless the following conditions precedent have been complied with:

* * *

(3) The Court or party seeking such relief, as the case may be, shall serve have served a written demand by registered or certified mail requiring the party against whom such notice is sought . . . to serve and file a Note of issue within 90 days after receipt of such demand, and further stating that the default of the party upon whom such notice is served in complying with such demand within said day period will serve as a basis for a motion by the party serving said demand for dismissal as against him for unreasonable neglecting to proceed."

There is no dispute that the hereinabove set forth conditions precedent of Rule 3216 of the CPLR were not complied with.

Assuming, *arguendo*, that this Court's Certification Order constituted a valid 90 day demand pursuant to Rule 3216 of the CPLR (*see Wasif v Khan*, 82 AD3d 1084 [2nd Dept 2011]) to date, no formal or administrative order dismissing the instant action has been entered herein (*see Cadichon v Vacelle*, 18 NY3d 230 [2011]).

Accordingly, the Plaintiff's motion for an order of this Court restoring the instant action to the active or trial calendar of this Court (motion sequence number 2) is granted.

Upon the remaining motions, each Defendant and the Third-Party Defendant seek summary judgment dismissal of the Plaintiff's Complaint and Third-Party Complaint in their entirety together with the dismissal of all cross-claims asserted against the movants.

To grant summary judgment, the Court must find that there are no material triable issues of fact, that the movants have established their defense sufficiently to warrant the Court, as a matter of law, to direct judgment in their favor and that the proof tendered is in admissible form (*Menekou v Crean*, 222 AD2d 419 [2nd Dept 1955]). If the movant tenders sufficient admissible evidence to demonstrate that there are no material issues of fact, the burden shifts to the opponent to produce admissible proof of establishing a

material issue of fact (*Id.* at 420).

Initially, based upon the hereinabove set forth findings of fact, the Plaintiff's reliance upon Industrial Code Provisions 12 NYCRR Sections 23-1.5, 23-1.7, 23-1.8, 23-1.15 and 23-1.16 all fail to support his Labor Law Section 241 claim.

New York Labor Law Section 241 provides in pertinent part:

"6. All 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 the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Specifically, 23 NYCRR Section 23-1.5, General Responsibilities of Employers, provides in pertinent part:

"(a) Health and safety protection required. . . . No employer shall suffer or permit an employee to work under working conditions which are not in compliance with the provisions of this Part (rule), or to perform any act prohibited by any provision of this Part (rule).

*

*

*

(c) Condition of equipment and safeguards.

(1) No employer shall suffer or permit an employee to use any machinery or equipment which is not in good repair and in safe working condition.

(2) All load-carrying equipment shall be designed, constructed and maintained throughout to safely support the loads intended to be imposed thereon.

(3) All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged."

12 NYCRR Section 23-1.7, Protection from General Hazards, provides for (a) overhead hazards, (b) falling hazards; (c) drowning hazards, (d) slipping hazards, (e) tripping and other hazards, (f) vertical passage, (g) air-contaminated or oxygen deficient work areas and (h) corrosive substances.

12 NYCRR Section 23-1.8, Personal Protective Equipment, provides for (a) Eye Protection, (b) Respirators, (c) Protective Apparel and (d) Cleanliness of personal protective equipment.

12 NYCRR Section 23-1.15, Safety Railing.

12 NYCRR Section 23-1.16, Safety Belts, Harnesses, Tail Lines and Lifelines.

While it is settled that these provisions of the Industrial Code are specific enough to sustain a cause of action under Labor Law Section 241(6) for their violation (*see generally Rizzutto v LaWenger Contracting Co.*, 91 NY2d 343 [1998]), the Plaintiff's Labor Law Section 241 claims predicated upon the hereinabove set forth sections of the Industrial Code are nonetheless unsubstantiated by the record herein.

In order for a defendant to be liable under Labor Law Section 241(6), a plaintiff must establish that the defendant violated a specific Industrial Code provision that is applicable to the circumstances of the accident and demonstrate that their injuries were proximately caused by a violation of an Industrial Code regulation that is applicable to the circumstances of the accident (*Ross v Curtis-Palmer Hydro Elec. Co.*, 81 NY2d 494 [1993]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513 [1985]).

Accordingly, each Defendants' and Third-Party Defendant's motion that seeks summary dismissal of the Plaintiff's Labor Law Section 241 cause of action is dismissed.

With respect to the Plaintiff's remaining causes of action, premised upon common law negligence and Sections 200 and 240 of the Labor Law, summary judgment is a drastic remedy which should be granted only when there is no clear triable issues of fact presented. Even the color of a triable issue of fact should foreclose this remedy. Therefore, in deciding a summary judgment motion, the evidence submitted must be scrutinized carefully in the light most favorable to the party opposing the motion (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2nd Dept 1990]). Issue finding rather than issue determination is the key to the proper resolution of a summary judgment motion (*see Rudnitsky v Robbins*, 191 AD2d 488 [2nd Dept 1993]; *Triangle Fire Protection Corp. v Manufacturer's Hanover Trust Co.*, 172 AD2d 658 [2nd Dept 1991]).

Again, on a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement, in admissible form, to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v Congress Financial Corp.*, 4 NY3d 384 [2005]; *Andre v Pomeroy*, 35 NY2d 361 [1974]). The movant's failure to meet their burden of proof requires the denial of summary judgment regardless of the sufficiency or lack thereof, of opposing papers (*Liberty Taxi Management, Inc. v Gincherman*, 32 AD3d 276 [1st Dept 2006]).

Labor law Section 200 is a codification of the common law duty of an owner or general contractor to provide and maintain a safe construction site (*Rizzutto v LaWenger Contracting Co.*, *supra*, at 352; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]). That is Labor Law Section 200 claims fall into two broad categories: those involving injuries arising from allegedly defective or dangerous premises conditions and those involving injuries arising from the manner in which work is performed (*Chowdhury v Rodriguez*, 57 AD3d 121 [2nd Dept 2008]; *Ortega v Puccia*, 57 AD3d 54 [2nd Dept 2008]).

It is apparent that the Plaintiff's claims in the instant action, *i.e.*, a trip and fall over an exposed piece of buried PVC pipe, originate under the former class of cases. Thus, to prevail on such a claim, the Plaintiff must show that the Defendants either created the dangerous condition or had actual or constructive notice of the condition (*Ortega v Puccia*, *supra*; *Slikas v Cyclone Realty, LLC*, 78 AD3d 144 [2nd Dept 2010]).

In that respect, each Defendant herein has *prima facie* established that they did not create the dangerous condition and further they did not have notice, actual or constructive, of the specific condition that injured the Plaintiff.

In the light of the Defendant's showing of entitlement to judgment as a matter of law, the burden shifts to the Plaintiff, as the party opposing the motion, to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial (*Alvarez v Propsect Hosp.*, 68 NY2d 320 [1986]).

In opposition, counsel for the Plaintiff baldly argues that the Defendants had a non-delegable duty to enforce safety on the job site by contract and/or law.

Additionally, counsel for the Plaintiff posits that the fact the Defendants, Quintal Contracting Corp., Acura Plumbing & Heating Corp. and the Third-Party Defendant, Bove Industries, Inc., all used PVC pipe in the performance of their contracts with the Defendant, Eastport Home & Land Company, LLC, at the construction site creates an issue of fact sufficient to defeat the Defendants' motion for summary judgment.

Accordingly, in the absence of any evidence by the Plaintiff that any named Defendant installed and/or placed the PVC pipe over which the Plaintiff tripped and fell or had either actual or constructive notice of the existence of the condition of the premises which caused the Plaintiff to trip and fall, the Plaintiff's Labor Law Section 200 and common law claims against all Defendants are herewith dismissed.

Finally, based upon this Court's hereinabove set forth findings of fact, the prophylactic provisions of Labor Law Section 240 (scaffolding and other devices for use of employees) are not applicable to the subject construction site accident.

Therefore, the Plaintiff's Labor Law Section 240 claims against all Defendants are herewith dismissed.

The Plaintiff's Complaint having been dismissed in its entirety renders the Defendants' cross-claims, counterclaims and third-party claims moot.

Further, the cross-motion of the Third-Party Defendant is also denied as moot.

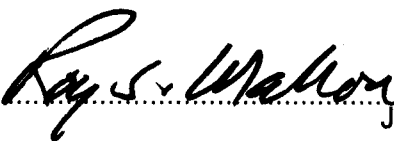
All applications not specifically addressed are herewith denied.

This shall constitute the decision and order of this Court.

Settle judgment on notice.

DATED:

4/18/2012

.....

 J.S.C.

ENTERED

APR 24 2012

**NASSAU COUNTY
 COUNTY CLERK'S OFFICE**