

**Morgado v Commack Union Free School Dist.**

2012 NY Slip Op 32617(U)

October 1, 2012

Sup Ct, Suffolk County

Docket Number: 05-4605

Judge: John J.J. Jones Jr

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SHORT FORM ORDER

INDEX No. 05-4605

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 - SUFFOLK COUNTY

**P R E S E N T :**

Hon. JOHN J.J. JONES, JR.  
Justice of the Supreme Court

MOTION DATE 8-31-11  
ADJ. DATE 4-18-12  
Mot. Seq. # 002 - MotD

-----X  
JOSEPH FERNANDO MORGADO and ANNA  
MARIA MORGADO,  
  
Plaintiff,  
  
- against -  
  
COMMACK UNION FREE SCHOOL  
DISTRICT and PAV-LAK CONTRACTING,  
INC. and EAST END CONCRETE, CORP.,  
  
Defendants.

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-----X  
COMMACK UNION FREE SCHOOL  
DISTRICT, PAV-LAK CONTRACTING, INC.  
and EAST END CONCRETE CORP.,  
  
Third-Party Plaintiffs,  
  
- against -  
  
PRECISION CONCRETE CORP.,  
  
Third-Party Defendant.  
-----X

HAMMILL, O'BRIEN, CROUTIER, DEMPSEY,  
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Upon the following papers numbered 1 to 34 read on this motion for partial summary judgment; Notice of Motion/  
Order to Show Cause and supporting papers 1 - 26; Notice of Cross Motion and supporting papers   ; Answering Affidavits  
and supporting papers 27 - 29; 30 - 32; Replying Affidavits and supporting papers 33 - 34; Other   ; ~~(and after hearing~~  
~~counsel in support and opposed to the motion)~~ it is,

**ORDERED** that the branch of the motion by the plaintiffs which seeks partial summary  
judgment on the issue of the defendants' liability pursuant to Labor Law §240 (1) is granted, and the  
motion is otherwise denied.

In this action, the plaintiffs seek to recover damages for personal injuries which were purportedly sustained by plaintiff Jose Fernando Morgado (hereinafter the injured plaintiff), and derivatively by plaintiff Anna Maria Morgado, on March 29, 2004, when the injured plaintiff fell from a scaffold while performing concrete work at a construction site owned by defendant Commack Union Free School District (hereinafter Commack). Commack hired defendant Pav-Lak Contracting, Inc. (hereinafter Pav-Lak) to act as general contractor with respect to the construction of an extension to its high school building. Pav-Lak subcontracted the concrete work to defendant East End Construction Corp. (hereinafter East End). East End, thereafter, employed third-party defendant Precision Concrete Corp. (hereinafter Precision) to perform this work. The injured plaintiff was performing work on behalf of Precision at the time of his accident. In this action, the plaintiffs seek recovery against the defendants based on the defendants' purported violation of Labor Law §§ 240, 241 and 200, as well as common law negligence. The defendants have commenced a third-party action against Precision.

The plaintiffs now move for partial summary judgment on the issue of the defendants' liability pursuant to Labor Law §§ 240 (1) and 241 (6). Specifically, the plaintiffs contend that the defendants are liable, as a matter of law, pursuant to Labor Law § 240 (1) where the injured plaintiff's accident was proximately caused by the dangerous and defective condition of the scaffolding and ladder which he was provided to perform his work and by the defendants' failure to provide him with any other safety devices or fall protection. The plaintiffs further contend that the defendants are liable, as a matter of law, pursuant to Labor Law § 241 (6) because they violated the Industrial Code Regulations found at 12 NYCRR §§ 23-5.13 (d), 23-1.7 (b) (1) (iii) (c), 23-1.21(b)(4)(i) and 23-1.21(b)(4)(ii), and such violations were a proximate cause of the injured plaintiff's injuries.

The proponent of a summary judgment motion must make *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*). Once this showing has been made, 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 (*see Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*).

In support of their motion for summary judgment, the plaintiffs submit, *inter alia*, the affidavit of the injured plaintiff, the expert affidavit of Kathleen Hopkins, a subcontractor agreement dated September 12, 2002 between East End and Precision, a subcontractor agreement between Pav-Lak and East End, the deposition testimonies of the injured plaintiff, the deposition testimony of Louis L. Santosus on behalf of Pav-Lak, the deposition testimony of Rui Marques on behalf of East End, and the deposition testimony of Joel Portela on behalf of Precision.

As is relevant to this motion, the contents of the injured plaintiff's deposition testimonies and affidavit are substantially similar. The injured plaintiff testified that at the time of the incident he was working as a concrete laborer for Precision at the subject job site. Precision and East End were, in

effect, the same company except one was a union company and one was not. Throughout the years he had worked for both companies. He had been working for Precision at the subject job site for approximately two weeks. The accident occurred when he fell from a scaffold that was at least eight feet above the bottom of an excavation. The scaffold was constructed by carpenters employed by Precision the day prior. The scaffold consisted of two platforms, one platform, approximately eight feet above the ground, and one platform approximately fourteen feet above the ground. The platform which was located approximately eight feet above the ground did not have a safety railing. In the injured plaintiff's experience working with Precision and East End, railing was not always placed around the eight foot platform level. A straight ladder was leaning against the eight foot platform for the purpose of descending from the scaffold to the bottom of the excavation. This ladder extended only two inches above the platform. The feet of the ladder were resting on the sand at the base of the excavation. Ladders were supposed to be tied to the scaffolds, and generally were, but the plaintiff was unable to tell from the scaffold whether the subject ladder was, in fact, secured. It was the injured plaintiff's intent to descend down the ladder in order to complete the task he was performing. Because the ladder did not extend much past the platform, he was required to kneel down on both knees and bend forward to test the ladder. He checked the ladder with his right hand, the ladder was not secured to the scaffold in any way, the ladder shifted and his entire body fell forward. The injured plaintiff testified that the ladder was defective in that it was not wired to the scaffold and was too short. In his affidavit, the injured plaintiff averred that if the ladder had been properly secured to the platform that he would not have fallen forward. When asked, during his deposition, if the lack of railing caused his fall, the injured plaintiff testified that it had not caused his fall, but that the unsecured ladder had caused his fall. In his affidavit, he stated that he was never asked whether the presence of a railing could have prevented his fall and that the presence of such a railing would have, in fact prevented his fall because he would have had something to hold onto. The injured plaintiff testified that he was not provided with a harness, safety belt, life line, tail line or any additional safety device. During his deposition he testified, that nobody wore harnesses at the job site because they were required to move around in order to perform their work. In his affidavit, he averred that if he had been provided with an additional safety device such as safety belt, he would not have fallen to the ground below.

In her expert affidavit, Kathleen Hopkins avers that she is a licensed certified site safety manager with an expertise in construction industry standards and practice as well as good and accepted construction safety practices. Based on her review of the deposition testimony and various accident reports, Hopkins concludes, to a reasonable degree of professional site safety certainty, that the two carpenters' portable bracket scaffolds involved in the accident required safety railings. She avers that safety railings are required at the outboard side on both ends of the scaffold platform with an opening for a ladder or other safe means used as access to and egress from the scaffold platform. Hopkins concludes that the injured plaintiff was not provided with adequate, proper and safe elevation/fall protection and that the defendants' failure to provide such protection was a direct, substantial and proximate cause of plaintiff's accident and injuries. In addition, she opines that the injuries sustained by the injured plaintiff resulted from the defendants' negligence as well as their noncompliance with Labor Law §§ 240 (1), 241 (6) and 200 and Industrial Code Regulations 12 NYCRR §§ 23-1.7 (b) (1) (i), 23-1.7 (b) (1) (iii) (c), 23-1.7 (f), 23-1.21 (b) (4) (i), 23-1.21 (b) (4) (ii), 23-5.1 (h); 23-5.1 (j) (1) and 23-5.13 (d). She avows that the Labor Law and Industrial Code violations were individually and collectively the substantial, direct and proximate cause of the injured plaintiff's accident and injuries.

Louis L. Santosus, a corporate safety manager for Pav-Lak, testified that Pav-Lak was the general contractor at the job site and did not perform any of the work at the job site itself, but subcontracted all of the work out. Pav-Lak subcontracted the concrete work to East End. Commack hired a construction manager, Park East, to oversee Pav-Lak and all of the subcontractors. The construction manager was responsible for daily safety inspections. Pav-Lak also performed its own safety inspections. According to Santosus, Pav-Lak had a safety plan in effect setting forth safety requirements to be followed by all of the subcontractors, including safety with respect to scaffolds and ladders, and each subcontractor was provided with a copy of the safety plan. Santosus testified that his duties with respect to the subject job included overseeing the subcontractors' safety programs to make sure they were compliant and making occasional visits to the job site. Santosus visited the job site approximately two times a month during the period from January 1, 2004 through March 29, 2004. According to Santosus, Brabant, the job superintendent, held daily toolbox meetings and performed daily walkthroughs on behalf of Pav-Lak in reference to the work to be performed at the site and personal protective equipment. If either he or Brabant saw that a subcontractor was not in compliance with the safety regulations, they would bring it to the subcontractors attention and require that they correct the violation. A noncompliance report would be filled out on the first occasion of noncompliance, and the worker or contractor would be removed from the job site if noncompliance continued. Santosus testified that the work East End was contracted to do included work that was below ground level and required the placement of hanging scaffolding. This scaffold, which consisted of two levels, was attached to the top of forms, and did not rest on the ground. It was required that the scaffolds have guardrails. A ladder was needed for workers to obtain access to the scaffold from the ground level. Ladders were required to reach three feet above the scaffold and to be affixed to the scaffold with wire ties. According to Santosus, it was East End's responsibility to place the scaffold in place, to provide ladders, to ensure the ladders were three feet above the platform, and to attach the ladder to the scaffold using wire ties. He testified that safety belts, harnesses and fall arrest systems were made available to the concrete workers by East End and that on his last visit to the job site, two weeks prior to the accident, he observed such equipment being utilized. Santosus admitted that he was not present at the job site on the date of the plaintiff's accident. He did not know if the scaffold involved in the plaintiff's accident had guardrails or railings, he did not know if the ladder was three feet above the platform, he did not know if the ladder was affixed to the scaffold, and he did not know if any fall protection system was in place. Santosus testified that workers were not allowed to use the scaffolds and ladders until they had been inspected, and that he did not believe that there was an inspection of the subject scaffold before the accident took place.

Rui Marques, President of East End, testified that Pav-Lak subcontracted the concrete work at the subject job site to East End. East End, a nonunion company, did not perform any of the work at the subject job site but subcontracted all of the work out to Precision, a union company. The plaintiff was working for Precision at the subject job site. Marques testified that he visited the job site once a week to talk to the general contractor because it was his job. However, neither he nor anyone on behalf of East End attended meetings or were in charge of safety issues. East End had no responsibility to inspect the scaffold to ensure its safety. Rather safety was the responsibility of Precision and the construction manager. Marques was unaware of whether there was any safety training at the job site. Marques testified that the subject scaffold was likely approximately ten feet high and that workers were required to use a ladder to get to the scaffold. Marques did not know how the ladder was attached to the scaffold. He did not know if any type of fall protection equipment like belts or harnesses were given to Precision

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workers, but testified that harnesses, lifelines and taillines were not required at the subject job site. Marques was not present on the job site on the date of accident and was not aware of any witnesses to the injured plaintiff's accident.

Joel Portela, Vice President and Field Project Manager of Precision Concrete, testified that Precision performed all of the concrete work at the subject job site. He assumed, but was not sure, that East End bid on and was awarded the job, and then hired Precision to perform the work. He did not recall if he had regular contact with someone from East End during the course of the project, but recalled that he had daily contact with the Pav-Lak's job superintendent at which time they discussed the work to be performed by Precision. Portela testified that he would visit the job site at least once a day, met with Precision employees daily to discuss the scope of the work to be performed and would inspect the work of Precision employees throughout the day. According to Portela, no one from Precision was responsible for safety at the subject job site, he did not know who was authorized to put the scaffolding in place, and he did not know of anyone on behalf of Precision who would perform inspections of the scaffolds constructed at the job sites. Portela testified that the plaintiff was employed by and performing work on behalf of Precision at the subject job site. Portela was in the job site trailer at the time of the plaintiff's accident. After learning of the accident, he went to the location. He did not recall if he observed scaffolding or a ladder in place in the area. He did not recall if any scaffolding that was present had a railing, but testified that it was general practice that workers would not be permitted on top of the platform if no railing was in place. Generally, if he saw scaffold work being performed without a safety railing he would stop the work. Portela testified that workers were not given fall protection equipment, such as harnesses, because it was not required. Where a railing was present on a scaffold of this height a harness was unnecessary. Portela testified that on some jobs the ladders and scaffolds were provided by Precision and on some jobs they were provided by East End. Notwithstanding the foregoing, if the job was being performed by Precision, Precision would be the one to erect whatever scaffolds or ladders necessary for the scope of their work.

At the outset, the evidence submitted demonstrates that the defendants are all parties that were responsible for compliance with the statutory mandates of Labor Law §§ 240 (1) and 241 (6). These provisions apply to an "owner," "general contractor," or "agent" of the owner or general contractor. It is, thus, undisputed that these provisions are applicable to Commack as "owner" of the subject work site and are applicable to Pav-Lak by virtue of its role as "general contractor" at the subject work site. The evidence submitted also establishes that the statutes are applicable to East End by virtue of its position as an "agent" of the general contractor. "A prime contractor hired for a specific project is subject to liability under Labor Law §§ 240 and 241 as a statutory agent of the owner or general contractor only if it has been delegated the . . . work in which plaintiff was engaged at the time of his injury, and is therefore responsible for the work giving rise to the duties referred to in and imposed by [the statute]" (*Nasuro v PI Assoc.*, 49 AD3d 829, 858 NYS2d 175 [2d Dept 2008]; *Coque v Wildflower Estates Dev.*, 31 AD3d 484, 488, 818 NYS2d 546 [2d Dept 2006]; see *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318, 445 NYS2d 127 [1981]; cf. *Pino v Irvington Union Free School Dist.*, 43 AD3d 1130, 843 NYS2d 133 [2d Dept 2007]). In this case, it is undisputed that the concrete work in which the injured plaintiff was engaged at the time of his accident was contracted to East End, and that East End in turn subcontracted this work to the plaintiff's employer, Precision. Since East End was the prime contractor for the concrete work on the project, and thereby delegated the authority to supervise and control the

particular work in which the injured plaintiff was engaged at the time of his accident, it is liable under Labor Law §§ 240 (1) and 241 (6) as a statutory agent of the general contractor (*see Weber v Baccarat, Inc.*, 70 AD3d 487, 896 NYS2d 12 [1st Dept 2010]; *Inga v EBS N. Hills*, 69 AD3d 568, 893 NYS2d 562 [2d Dept 2010]; *Pacheco v Kew Garden Hills Apt. Owners*, 73 AD3d 578, 906 NYS2d 3 [1st Dept pt 2010]; *Tomyuk v Junefield Assoc.*, 57 AD3d 518, 868 NYS2d 731 [2d Dept 2008]; *see also Kilmetis v Creative Pool & Spa*, 74 AD3d 1289, 904 NYS2d 495 [2d Dept 2010]; *Domino v Professional Consulting, Inc.*, 57 AD3d 713, 869 NYS2d 224 [2d Dept 2008]). Moreover, “[o]nce an entity becomes an agent under the Labor Law it cannot escape liability to an injured plaintiff by delegating the work to another entity” (*McGlynn v Brooklyn Hosp.-Caledonian Hosp.*, 209 AD2d 486, 619 NYS2d 54 [2d Dept 1994]; *see Tomyuk v Junefield Assoc.*, *supra*; *Nasuro v PI Assoc.*, *supra*). Thus, East End remains statutorily liable despite the fact that it had contracted the concrete work to the plaintiff’s employer, Precision.

Labor Law § 240 (1), commonly known as the “scaffold law,” creates a duty that is nondelegable and an owner, general contractor, or agent thereof, who breaches that duty may be held liable in damages regardless of whether it had actually exercised supervision or control over the work (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49 [1993]). The “exceptional protection” provided for workers by § 240 (1) is aimed at “special hazards” and is limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (*Ross v Curtis-Palmer Hydro-Elec. Co.*, *supra* at 501; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514, 577 NYS2d 219 [1991]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 493 NYS2d 102 [1985]). Specifically, Labor Law § 240 (1) requires that owners, contractors and their agents furnish or erect or cause to be furnished or erected safety devices which shall be so “constructed, placed and operated as to give proper protection to a worker” (*Klein v City of New York*, 89 NY2d 833, 834, 652 NYS2d 723 [1996]; *see Auriemma v Biltmore Theatre*, 82 AD3d 1, 917 NYS2d 130 [1st Dept 2011]; *Martinez v Ashley Apts Co.*, 80 AD3d 734, 915 NYS2d 620 [2d Dept 2011]). A violation of this duty which proximately causes injuries to a member of the class for whose benefit the statute was enacted renders the owner, general contractor, or an agent thereof, strictly liable (*see Crespo v Triad, Inc.*, 294 AD2d 145, 742 NYS2d 25 [2002]; *Crawford v Leimzider*, 100 AD2d 568, 473 NYS2d 498 [2d Dept 1984]). It is not a defense to liability pursuant to Labor Law § 240 (1) that the plaintiff’s fault contributed to the accident, unless it can be said that the plaintiff’s conduct was the sole proximate cause of the accident as a matter of law (*see Balzer v City of New York*, *supra*; *see also Gallagher v New York Post*, 14 NY3d 83, 896 NYS2d 732 [2010]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290-291, 771 NYS2d 484 [2003]).

In order to prevail upon a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his injuries (*see Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880 [1985]; *Treu v Cappelletti*, 71 AD3d 994, 897 NYS2d 199 [2d Dept 2010]; *Caballero v Benjamin Beechwood, LLC*, 67 AD3d 849, 889 NYS2d 630 [2d Dept 2009]; *Sprague v Peckham Materials Corp.*, 240 AD2d 392, 658 NYS2d 97 [2d Dept 1997]; *see also Blake v Neighborhood Hous. Servs. of N.Y. City*, *supra*; *Martinez v Ashley Apts Co.*, *supra*). The evidence submitted here establishes the plaintiffs’ *prima facie* entitlement to summary judgment on the issue of the defendants’ liability pursuant to Labor Law § 240 (1) (*see Poracki v St. Mary’s Roman Catholic Church*, 82 AD3d 1192, 920 NYS2d 233 [2d Dept 2011]; *Ortiz v 164 Atl. Ave.*, 77 AD3d 807,

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909 NYS2d 745 [2d Dept 2010]; *Treu v Cappelletti*, *supra*; *Caballero v Benjamin Beechwood, LLC*, *supra*; *see also Tapia v Mario Genovesi & Sons*, 72 AD3d 800, 899 NYS2d 303 [2010]; *Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 823 NYS2d 416 [2d Dept 2006]; *Brandl v Ram Builders, Inc.*, 7 AD3d 655, 777 NYS2d 511 [2d Dept 2004]; *Justyk v Treibacher Schleifmittel Corp.*, 4 AD3d 882, 771 NYS2d 615 [4th Dept 2004]; *compare Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 937 NYS2d 157 [2011]; *Karas v M.A. Angeliades, Inc.*, 304 AD2d 716 [2d Dept 2003]; *Ampolini v Long Island Lighting Co.*, 186 AD2d 772, 589 NYS2d 76 [2d Dept 1992]; *Miller v Long Island Lighting Co.*, 166 AD2d 564, 560 NYS2d 847 [2d Dept 1990]). The injured plaintiff's injuries were clearly the result of the type of elevation-related risk that Labor Law § 240 (1) was intended to guard against (*see Clark v Fox Meadow Builders*, 214 AD2d 882, 624 NYS2d 685 [3d Dept 1995]). It is equally clear that, at the time of the accident, the injured plaintiff was not provided with safety devices which were so constructed and placed as to provide him with adequate protection for the elevation-related work that he was instructed to perform (*see McCallister v 200 Park, L.P.*, 92 AD3d 927, 939 NYS2d 538 [2d Dept 2012]). These circumstances establish, as a matter of law, that Labor Law § 240 (1) was violated (*see Flansburg v Merritt Meridian Constr. Corp.*, 191 AD2d 756, 594 NYS2d 421 [3d Dept 1993]). Likewise, the evidence submitted establishes, as a matter of law, that the failure to provide the injured plaintiff with adequate safety equipment was a proximate cause of his accident (*see Riffo-Velozo v Village of Scarsdale*, 68 AD3d 839, 891 NYS2d 418 [2d Dept 2009]; *Robinson v NAB Constr. Corp.*, 210 AD2d 86, 620 NYS2d 337 [1st Dept 1994]; *cf. Ventimiglia v Thatch, Ripley & Co., LLC*, 96 AD3d 1043, 947 NYS2d 566 [2d Dept 2012]; *compare Delmar v TerraStruct Corp.*, 249 AD2d 259, 670 NYS2d 915 [2d Dept 1998]). Contrary to the defendants' contention, the evidence submitted was sufficient to demonstrate the plaintiffs' *prima facie* entitlement to summary judgment despite the fact that his accident was unwitnessed. In this regard, the Court notes that the record fails to indicate any issues of fact with respect to the injured plaintiff's version of events or his credibility (*see Rodriguez v 3251 Third Ave. LLC*, 80 AD3d 434, 914 NYS2d 142 [1st Dept 2011]; *cf. Robinson v NAB Constr. Corp., supra*).

The burden thus shifts to the defendants to raise a triable issue of fact as to whether there was a statutory violation or as to whether the injured plaintiff's own acts or omissions were the sole proximate cause of the accident (*Blake v Neighborhood Hous. Servs. of N.Y. City, supra*; *Squires v Robert Marini Bldrs.*, 293 AD2d 808, 809, 739 NYS2d 777, *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]). The defendants failed to meet this burden (*see Treu v Cappelletti, supra*). The affidavit of defendants' expert, Herbert Heller, Jr., P.E., fails to provide a basis for denial of summary judgment as the opinions provided in his affidavit are both speculative and conclusory (*Robinson v NAB Constr. Corp., supra*). In any event, Heller's affidavit fails to indicate that the plaintiff was, in fact, provided with adequate safety devices for the performance of his work. Heller's affidavit also fails to establish that the lack of adequate safety devices was not a proximate cause of the injured plaintiff's injuries (*compare Silva v FC Beekman Assoc., LLC, supra*).

Lastly, the Court rejects the defendants' contention that there exists a triable issue of fact as to whether the injured plaintiff's own negligence was the sole proximate cause of his accident. Assuming, *arguendo*, that the evidence submitted established that additional safety equipment was available to the injured plaintiff at the job site, it is nonetheless well settled that the failure to use available safety equipment will not be deemed the sole proximate cause of a worker's injuries unless there were adequate

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safety devices available, the worker knew both that they were available and that he was expected to use them, and that he chose for no good reason not to do so (*see Gallagher v New York Post, supra; Auriemma v Biltmore Theatre, supra; Ortiz v 164 Atl. Ave., supra; Ritzer v 6 E. 43rd St. Corp.*, 57 AD3d 412, 871 NYS2d 26 [1st Dept 2008]). Here, the record is devoid of any evidence that adequate safety devices were available at the job site, that the injured plaintiff knew that he was expected to use such safety devices and that he chose for no good reason not to do so (*see Tounkara v Fernicola*, 80 AD3d 470, 914 NYS2d 161 [1st Dept 2011]; *Murray v Arts Ctr. & Theater of Schenectady*, 77 AD3d 1155, 910 NYS2d 187 [3d Dept 2010]; *see also Guaman v New Sprout Presbyt. Church of N. Y.*, 33 AD3d 758, 822 NYS2d 635 [2d Dept 2006]; *Moniuszko v Chatham Green*, 24 AD3d 638, 808 NYS2d 696 [2d Dept 2005]).

Based on the foregoing, the motion by the plaintiffs is granted to the extent that it seeks partial summary judgment on the issue of the defendants' liability under Labor Law § 240 (1).

Turning to the branch of the plaintiffs' motion seeking summary judgment on the issue of the defendants' liability pursuant to Labor Law § 241 (6), such provision imposes a nondelegable duty of reasonable care upon an owner, general contractor, or agent to provide reasonable and adequate protection to workers. Pursuant to this provision, a violation of an explicit and concrete provision of the Industrial Code by a participant in the construction project constitutes some evidence of negligence for which the owner or general contractor may be held vicariously liable (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348, 670 NYS2d 816 [1998]; *Melchor v Singh*, 90 AD3d 866, 935 NYS2d 106 [2d Dept 2011]; *Fusca v A & S Constr., LLC*, 84 AD3d 1155, 924 NYS2d 463 [2d Dept 2011]; *Forschner v Jucca Co.*, 63 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]). In order to recover damages on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards and that such violation was a proximate cause of the accident (*see Rizzuto v L.A. Wenger Contr. Co., supra; Ross v Curtis-Palmer Hydro-Elec. Co., supra; Hricus v Aurora Contrs.*, 63 AD3d 1004, 883 NYS2d 61 [2d Dept 2009]; *Fitzgerald v New York City School Constr. Auth.*, 18 AD3d 807, 808, 796 NYS2d 694 [2d Dept 2005]). The rule or regulation alleged to have been breached must be a specific, positive command and must be applicable to the facts of the case (*see, Forschner v Jucca Co., supra; Cun-En Lin v Holy Family Monuments, supra*). Once it has been alleged that a concrete specification of the Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused plaintiff's injury (*Rizzuto v L.A. Wenger Contr. Co., supra*). If proven, the general contractor, owner, or agent thereof, is vicariously liable without regard to his or her fault (*see Rizzuto v L.A. Wenger Contr. Co., supra*). An owner or general contractor may, of course, raise any valid defense to the imposition of vicarious liability under section 241 (6), including contributory and comparative negligence (*Fusca v A & S Constr., LLC, supra; Edwards v C&D Unlimited, Inc.*, 295 AD2d 310, 743 NYS2d 876 [2d Dept 2002]; *compare Treu v Cappelletti, supra; see also Long v Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132 [1982]).

The evidence submitted was insufficient to demonstrate the plaintiffs' *prima facie* entitlement to summary judgment on the issue of the defendants' liability pursuant to Labor Law § 241 (6) (*see Fusca v A & S Constr., LLC*, 84 AD3d 1155, 924 NYS2d 463 [2d Dept 2011]; *Riffo-Veloza v Village of*

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*Scarsdale*, *supra*; *Edwards v C&D Unlimited, Inc.*, *supra*; compare *Melchor v Singh*, *supra*; *Davidson v E.Q.K. Green Acres, LP*, 298 AD2d 546, 749 NYS2d 47 [2d Dept 2002]; *Beckford v 40th St. Assocs. (NY P'ship)*, 287 AD2d 586, 731 NYS2d 755 [2d Dept 2001]). In support of this branch of their motion, the plaintiffs' rely on the defendants' purported violation of the Industrial Code Regulations found at 12 NYCRR §§ 23-5.13 (d), 23-1.7 (b) (1) (iii) (c), 23-1.21(b)(4)(i) and 23-1.21(b)(4)(ii). However, the evidence submitted was insufficient to demonstrate, as a matter of law, that the defendants' violated 12 NYCRR 23-1.7 (b) (1) (iii) (c), 12 NYCRR 23-1.21(b) (4) (i) or 23-1.21 (b) (4) (ii). 12 NYCRR 23-1.7 (b) (iii) (c) applies not to elevated hazards but to the required safety devices for hazardous openings (*see Forschner v Jucca Co.*, *supra*). The evidence submitted here fails to demonstrate, as a matter of law, that the injured plaintiff was working near a "hazardous opening" as defined by this statute (*see Savillo v Greenpoint Landing Assoc., L.L.C.*, 2010 NY Slip Op 32470U [NY Sup Ct Sept. 7, 2010]; *cf. Scarso v M.G. Gen. Constr. Corp.*, 16 AD3d 660, 792 NYS2d 546 [2d Dept 2005]; compare *Ortiz v 164 Atl. Ave., LLC*, *supra*). Indeed, the requirements of this regulation, that employees must be protected by planking installed not more than one floor or 15 feet beneath the opening, a life net five feet underneath the hole, or a safety belt with a lifeline, calls into question such provisions applicability to the facts of this case (*cf. Rice v Bd. of Educ.*, 302 AD2d 578, 755 NYS2d 419 [2d Dept 2003]; *Alvia v Teman Elec. Contr., Inc.*, 287 AD2d 421, 731 NYS2d 462 [2d Dept 2001]). The evidence submitted is also insufficient to demonstrate the applicability of 12 NYCRR 23-1.21 (b) (4) (i) to the facts of this case. Such regulation provides, in pertinent part, certain requirements for "any portable ladder used as a regular means of access between floors or other levels in any building or other structure." Here, the evidence presented fails to demonstrate that the ladder at issue was being used as a regular means of access between floors or other levels in a building or other structure (*cf. Egan v Monadnock Constr., Inc.*, 43 AD3d 692, 841 NYS2d 547 [1st Dept 2007]; *Arigo v Spencer*, 39 AD3d 1143, 834 NYS2d 805 [4th Dept 2007]; *Amantia v Barden & Robeson Corp.*, 38 AD3d 1167 [4th Dept 2007]; *Spenard v Gregware Gen. Contr.*, 248 AD2d 868, 669 NYS2d 772 [3d Dept 1998]). Similarly, the evidence submitted fails to establish, as a matter of law, the applicability of 12 NYCRR § 23-1.21 (b)(4) (ii) which provides, in pertinent part, that all ladder footings shall be firm. In this regard, the evidence submitted fails to support a finding that the ladder at issue was placed on a slippery or unstable surface (*see Artoglou v Gene Scappy Realty Corp.*, 57 AD3d 460, 869 NYS2d 172 [2d Dept 2008]; *Arigo v Spencer*, *supra*; compare *Melchor v Singh*, *supra*).

Whereas the evidence submitted was sufficient to demonstrate the applicability of 12 NYCRR 23-5.13 (d), which provides that "where the working platform of any carpenters' portable bracket scaffold is elevated more than seven feet above the ground, grade, floor or equivalent surface, such platform shall be provided with a safety railing" the evidence submitted fails to establish, as a matter of law, that the defendants' failure to comply with this provision was a proximate cause of the accident (*cf. Egan v Monadnock Constr., Inc.*, *supra*).

In any event, the evidence submitted on the motion was insufficient to demonstrate the plaintiffs' *prima facie* entitlement to summary judgment on the issue of the defendants' liability pursuant to Labor Law § 241 (6) as there exist triable issues of fact as to the injured plaintiff's comparative negligence (*cf. Harinarain v Walker*, 73 AD3d 701, 900 NYS2d 364 [2d Dept 2010]). In this regard, the Court notes that Santosus testified that workers were not allowed to use the scaffolds and ladders until they had been inspected, and that he did not believe that there was an inspection of the subject scaffold before the


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accident took place. Santosus further testified that safety belts, harnesses and fall arrest systems were made available to the concrete workers and that on his last visit to the job site, two weeks prior to the accident, he observed such equipment being utilized. Additionally, the Court notes that a breach of a duty imposed by a rule in the Code is merely some evidence for the fact finder to consider on the question of a defendant's negligence (*Riffo-Veloza v Village of Scarsdale, supra*).

In light of the plaintiffs' failure to establish a *prima facie* entitlement to partial summary judgment on the issue of the defendants' liability pursuant to Labor Law 241 (6), the branch of the motion seeking such relief is denied without consideration of the defendants' opposition papers.

Dated: \_\_\_\_\_

1 Oct. 2012

  
\_\_\_\_\_  
U.S.C.

\_\_\_\_ FINAL DISPOSITION     X  NON-FINAL DISPOSITION