NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

SHAHAZAD M. RASHEED,

Plaintiff,

- against-

35 W. 54 REALTY CORP. and PERIMETER BRIDGE & SCAFFOLD CO., INC.,

Defendants.

35 W. 54 REALTY CORP.,

Third- Party Plaintiff,

- against -

G.R. CONSTRUCTION, INC., GEIGER CONSTRUCTION, LLC, GEIGER RESTORATION, LLC, GEIGER CONSTRUCTION COMPANY, INC., KG BUILDING MAINTENANCE, INC., and GEIGER ROOFING COMPANY, INC.,

Third-Party Defendants.

Index No. 3343/12

Motion Date January 16, 2014

Motion Cal. No. 107

Motion Seq. No. 4

The following papers numbered 1 to 27 read on this motion by plaintiff, Shahazad M. Rasheed, for an order granting summary judgment against defendant 35 W. 54th Realty Corp. on his claim for a violation of Labor Law § 240 (1). Defendant, Perimeter Bridge & Scaffold Co., Inc., cross-moves for an order granting summary judgment dismissing plaintiff's complaint and all cross claims. Defendant 35 W. 54th Realty Corp. cross-moves in opposition to plaintiff, Rasheed's motion and seeks an order granting summary judgment dismissing plaintiff's complaint and all cross claims and counterclaims.

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Upon the foregoing papers, the motion and cross motions are determined as follows:

Background

Plaintiff, Shahazad M. Rasheed, alleges that he sustained personal injuries during the course of his employment on August 3, 2011, at 35 West 54th Street, New York, when he fell from a sidewalk bridge. He alleges injuries to his back, neck, and left knee. He has not been able to work since the accident.

35 W. 54 Realty Corp. (Realty), the owner of a ten-unit cooperative residential apartment building located at 35 West 54th Street, New York, entered into an agreement, dated September 7, 2010, with Geiger Construction Co. Inc. (Geiger), whereby Geiger agreed to cut and point defective brick and stone joints, and to clean the brick and stone masonry, using, among other things, high pressure water on the building's front facade and east and west return walls. Geiger further agreed to perform certain work with respect to the building's windows, window grills, and railing on the fourth floor balcony. Geiger agreed to provide the labor and materials, and to provide a sidewalk shed with the necessary permits, as well as a standing scaffold "from top if sidewalk shed is going up to 4th floor balcony with 1 tower of stairs."

Geiger entered into an agreement with Perimeter Bridge & Scaffold Co., Inc. (Perimeter), dated June 1, 2011, whereby Perimeter agreed "to furnish, erect and dismantle a heavy duty sidewalk bridge to the following spec: -32 LF @ 12' high x 33' wide" and "to furnish, erect and dismantle a steel frame scaffold to the following spec: -22 LF x 48' high." The agreement specifically excluded "maintenance."

Plaintiff commenced this action against Realty and Perimeter on February 15, 2012, with causes of action for negligence, violations of Labor Law §§ 200, 240 and 241, and violation of Rule 23 of the Industrial Code of the State of New York. Issue has been joined as to these defendants.

Plaintiff's counsel states that Realty impleaded third-party defendants, G.R. Construction, Inc., Geiger Construction LLC, Geiger Restoration, LLC, Geiger Construction Company Inc. (Geiger), KG Building Maintenance, Inc. (KG), and Geiger Roofing Company Inc., by filing and serving a third-party summons and complaint, dated August 21, 2012. A review of the court files reveals that a third-party answer was filed with the court on May 2, 2013. The court's file, however, does not contain a copy of the third-party summons and

complaint, and the copy of the third-party summons submitted does not specify the date of filing with the Clerk of the Court, as required by CPLR 305 (a). The court notes that Realty's notice of impleader pursuant to CPLR 3402 (b) is dated August 21, 2012. CPLR 3402 (b) is only applicable when the note of issue has already been filed. It does not appear that the note of issue in this action was filed prior to the purported commencement of the third-party action. As the court is unable to determine when the third-party action was commenced, no relief shall be granted at this time with respect to the third-party action.

The note of issue and statement of readiness was filed in this action on May 2, 2013. The parties' time in which to move for summary judgment was extended to October 25, 2013. Plaintiff's motion and the cross motions are all timely and will be considered by this court on the merits.

Deposition Testimony

Plaintiff testified at his deposition that was employed by "Geiger" (Tr at 31) since 2009; that he was paid by check, but did not recall who issued the check, and that either Kevin Geiger or "Junior," a supervisor, would give him his work assignments. He stated that, in the morning, he would go to the office of "Geiger Construction," on First Avenue in Manhattan, to get his assignments, and that a foreman would drive him and other workers in a "Geiger" van to the assigned workplace. Rasheed stated that at times he was provided with, or used, a "motor pulley" to lift "stuff" and that at other times he would use a rope and manually lift items onto a sidewalk bridge. He stated that at the "Geiger shop", there was a pulley that he had used once to hoist materials at other job sites.

Rasheed stated that about a week prior to his accident, he and another worker Andrew, delivered the power washer to the subject site, and used ropes to hoist it up to the sidewalk bridge. He averred that, at that time, the ropes did not rub against the wood as the machine was being raised; that they had to hoist the machine up and put it on the bridge and that neither the machine nor their bodies made contact with the wooden rail (perimeter) in doing so. Rasheed stated that they were not provided with any mechanical equipment, pulleys, or wenches for lifting or lowering the pressure washer. He stated that the sidewalk shed was approximately 17 feet above the sidewalk.

On the day of the accident, Rasheed and Andrew were working at another job site, and at approximately 4:00 p.m., their foreman, Kumar, instructed them to retrieve the power washer from the sidewalk shed of the building. He stated that Kumar drove him and several other workers in a "Geiger" van to the building; that he, Andrew and another worker used a ladder to access the scaffold bridge; that he attached two ropes to the power washer; that the three of them lifted the power washer and tried to hoist it over the perimeter, and that when they set the power washer down on the top of the railing, for a second or two, the wall came down, and he and Andrew both fell into the road bed. He testified that he fell onto his back in the road bed, and felt something fall onto his hip; and although he did not see Andrew fall, he saw that

Andrew was on the ground.

Philip Walker, the president and sole employee of Chancellor Realty Limited, (Chancellor) was deposed on behalf of Realty.[1] Walker stated that Chancellor manages Realty, on behalf of the shareholders, pursuant to a management agreement. Walker stated that the building has six stories and basement, and in early 2010, Realty's Board of Directors decided that work had to be performed on the facade of the building; Walker selected Geiger to perform said work, as he had a 30-year business relationship with that entity. He stated that the work to be performed included pointing the brickwork, re-caulking and painting windows, cleaning the limestone facade of the building, removing iron work from the top floor, painting the iron work in front of the building, leader and gutter work. He stated that Geiger submitted a proposal which was accepted, and that some of the work was added on at a latter date. Walker stated that Geiger was owned by Karl Geiger, and that Walker dealt with Geiger's office manager, Gordon Puran. He stated that Geiger had changed its name from Geiger Roofing Company prior to the date of the accident, but did not know when this occurred. He stated that Geiger was responsible for hiring someone to erect the sidewalk shed and scaffold. He knew that Perimeter erected the sidewalk shed. Mr. Walker stated he was not present when the sidewalk shed was erected and that, to his knowledge, no one from Realty was present or supervised its erection. He stated that after the sidewalk shed or scaffolding was erected, neither he nor anyone from Realty inspected it.

Further, Walker stated that he was not personally involved in the Geiger work performed at the building; that no one from Realty was involved in the work; and that Realty did not direct, supervise or control any of the work being performed by Geiger's "people" or employees (Tr at 27). He stated that he visited the job site twice before August 3, 2011. On his first visit, the scaffolding was being erected, and Realty's Board had concerns regarding the safety of the cooperative's residents. He stated that he met with Geiger and Perimeter in order to determine whether they were doing whatever was needed to prevent someone from accessing the building by climbing up, or getting up, on the sidewalk shed (Tr at 29). On his second visit, Walker checked on the progress of the work being performed. He stated that on August 3, 2011, at approximately 2:00 p.m., he went to the building and spent about an hour on the sidewalk shed with the field supervisor, Junior Deopaul, an employee of Geiger. Walker stated that he accessed the scaffold on the fifth floor through the windows of one of the apartments; that the facade had been cleaned; and that he visually inspected the pointing work. He stated that there were two workmen present, but that he did not recall seeing any equipment, including a power washer, on the shed platform. He stated that the workmen used a ladder to access the sidewalk shed, and that he used the ladder to descend from the shed to the sidewalk. Walker did not witness plaintiff's accident; was not aware of anyone who witnessed the accident; and was

[1]Walker was deposed in the action commenced by Andrew Gonsalves against Realty and Perimeter under Index No. 22346/2011. On January 24, 2014, the Hon. Jeremy Weinstein, directed that the action be jointly tried with the Gonsalves action.

notified by two different residents about the accident.

Edmund Kirsch testified at his deposition[2] that he formerly was the president of Perimeter, and that the corporation had been sold to S & E Bridge and Scaffold LLC, in January 2012. Kirsch stated that Perimeter installed a heavy duty sidewalk bridge [shed], with a pipe scaffold on top of the bridge at the subject building. He stated that a proposal to install the sidewalk bridge and scaffold was prepared for, and accepted by, Geiger. He stated that Geiger was a regular customer of Perimeter, and that he dealt with someone named Gordon and had never dealt with Mr. Geiger, himself. He stated that plans were drawn for the scaffold and sidewalk shed; that Perimeter secured permits for the scaffold and sidewalk shed; and that the scaffold and sidewalk shed were erected pursuant to said plans. Kirsch stated that once the scaffold and sidewalk bridge were erected, Perimeter's workmen left the site, and that Perimeter did not have any responsibility to maintain the sidewalk shed and scaffold. He stated that he never visited the subject job site, and that he received a telephone call from either Geiger or someone from the building about the accident.

Kirsch stated that the sidewalk bridge's parapet consisted of a vertical boards, "made typically a half inch sheet of plywood with a two by three frame around the parameter [sic]," that they are "typically" sized 8' x 4', and are not designed to carry any sort of load (Tr at 43). He stated that the plywood sheets used for the parapet of the subject sidewalk bridge were 8' x 4'. Perimeter replaced the broken board after the accident occurred. Kirsch stated that a typical sidewalk bridge is designed to hold 300 pounds per square feet, per the City code, and that a ultra heavy duty sidewalk bridge is designed to hold 600 pounds per City code (Tr at 45). He stated that Geiger did not inform him that it intended to work on top of the sidewalk bridge or that it would be storing materials on top of the bridge; that a permit was required for the storage of materials on the bridge; and that Geiger did not request such a permit. He stated that if Perimeter knew materials were to be stored on the bridge, Perimeter would have built a 600 pound per square foot bridge. However, Kirsch averred that the sidewalk bridge's deck was sufficient to bear the weight of the power washer.

Kirsch stated that the "City code" only pertained to the decking and that the "City does not have a code for the load support for a parapet" (Tr at 46). He stated that the subject parapet was not designed and constructed to handle a load; that it was not designed for a person to lean against or as a point against which a rope might be placed to raise and lower equipment from the street; that the parapet wall could not support the load of a power washer as it was being raised to, or lowered from, the bridge; and that, to the best of his knowledge, Geiger never told him that they were going to use the bridge to store a power washer (Tr at 48-50). Kirsch stated that the plywood perimeter sheet was modified to fit properly; that it was held in place by a brace that ran from the backside of the parapet to the deck and would be either nailed in or screwed in place; that the braces were usually installed every eight feet, and were made of either

[2]Kirsch was deposed in the *Gonsalves* action.

angle iron or a 2 x 4. He stated that the parapet was "not part of the 300 pound square foot rating. A parapet is there in case a small tool is dropped and/or in case something comes off the building, a small brick, to deflect the materials back onto the decking so that it doesn't bounce out into the street and injure somebody" (Tr at 74).

Andrew Gonsalves testified at his deposition in the action he commenced under Index No. 22346/2011, that he was employed by "Geiger Construction." Gonsalves stated that Kevin Geiger was his boss, and that he began working as a laborer for "Geiger Construction" in April 2011. He stated that the manager, "Budhran," would give him his job assignments, and that on August 1, 2011, Gonsalves was sent to the subject building to "pull up pressure washer" (Tr at 63), along with "Kumar," the foreman, who drove a van bearing the name "Geiger Construction," and a co-worker "Rasheed." Gonsalves stated that they transported the power washer, or pressure washer, which was already in the van to the subject building. He stated that the pressure washer weighed more than 100 pounds, was 2' x 2' and was approximately 30 inches high. He stated that he and two co-workers lifted it out of the van and placed it on the ground, and then took a ladder from the van and placed it on the sidewalk up against the sidewalk bridge. Gonsalves stated that Kumar directed him and Rasheed to remove the power washer from the platform of the sidewalk bridge. He stated that they used the ladder to access the bridge, and that they each took one end of the two ropes with them; that there was no pulley system on the platform; and that the platform was 15-20 feet above the sidewalk. He stated that the ropes were tied to the handles of the power washer, and that they manually pulled the power washer up from the sidewalk to the level of the rail; that the ropes rubbed against the plywood wood perimeter or railing around the sides of the platform as they pulled up the power washer; and that when the power washer was level with the side of the platform they lifted it up and over the side rail with their hands and left the machine on the platform. Gonsalves stated that he and his co-workers descended by ladder from the platform and left the site to perform work at another site.

Gonsalves further stated that on August 3, 2011, after working at another site, Kumar told him that they had to return to the subject building, "to get the washing machine down"(Tr at 84), so that it could be used at another location. He stated that they arrived at said building at approximately 5:00 p.m., and that there were no other workers on the platform at that time. Gonsalves stated that he, Kumar, Rasheed, Anthony, and another co-worker all went to the subject building. Gonsalves, Rasheed, and the other co-workers, were all laborers. Gonsalves stated that Kumar told him, Rasheed, and a third co-worker to retrieve the power washer from the sidewalk shed platform; that they used a ladder to ascend to the platform; and that he and Rasheed carried ropes up with them. He stated that the power washer was about five feet away from the perimeter wall of the platform, and that the three of them physically moved it with their hands to about two feet from the edge of the platform. Gonsalves averred it was Rasheed's decision to tie the ends of the rope to the handles of the power washer, so that they could manually lower it from the platform to the sidewalk. He stated that after Rasheed tied the ropes to the machine's handles, they decided to lift the machine above the perimeter, and that he and Rasheed were standing "in front" (Tr at 101) on either side of the machine, in order to "lift

it above the perimeter height and put it over" (Tr at 101). He stated that the other co-worker stood about five or six feet behind them and held the end of the two ropes, while Gonsalves and Rasheed manually lifted the machine. Gonsalves stated that they lifted the machine with both hands and placed it on top of the perimeter board for a "split second"; that the plywood perimeter board broke away; and that he and Rasheed fell off the platform. Plaintiff stated that he landed on his arm and back in the road bed.

Legal Standards

The standards for summary judgment are well-settled, that movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" *(Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once such proof has been offered, to defeat summary judgment "the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR 3212, subd. [b])" (*Zuckerman,* 49 NY2d at 562).

In order to establish liability for common-law negligence or a violation of Labor Law § 200, where, as here, "a claim arises out of the means and methods of the work, a [defendant] may be held liable for common-law negligence or a violation of Labor Law § 200 only if he or she had 'the authority to supervise or control the performance of the work'" (*Gonzalez v Perkan Concrete Corp*., 110 AD3d 955, 958-959 [2d Dept 2013], *quoting Forssell v Lerner*, 101 AD3d 807, 808 [2d Dept 2012], *quoting Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). "General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common-law negligence and under Labor Law § 200" (*Dos Santos v STV Engrs*., *Inc.*, 8 AD3d 223, 224 [2004], *lv denied* 4 NY3d 702 [2d Dept 2004]). Further, the authority to review safety at the site is insufficient if there is no evidence that the defendant actually controlled the manner in which the work was performed (*see Hugo v Sarantakos*, 108 AD3d 744, 744-745 [2d Dept 2013]; *Loiacono v Lehrer McGovern Bovis*, 270 AD2d 464, 465 [2d Dept 2000]).

"'Labor Law § 240 (1) imposes upon owners and general contractors, and their agents, a non-delegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites' " (*Probst v 11 W. 42 Realty Invs., LLC*, 106 AD3d 711 [2d Dept 2013], *quoting McCarthy v Turner Constr., Inc*., 17 NY3d 369, 374 [2011]). "To prevail on a cause of action alleging a violation of Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries' " (*Gaspar v Pace Univ.,* 101 AD3d 1073, 1074 [2d Dept 2012], *quoting Lopez-Dones v 601 W. Assoc., LLC*, 98 AD3d 476, 479 [2d Dept 2012]). In addition to owners and general contractors, Labor Law § 240 (1) imposes liability upon agents of the property owner who have the ability to control the activity which brought about the injury (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864

[2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]; *Arto v Cairo Constr., Inc.*, 109 AD3d 852, 853 [2d Dept 2013]).

The "exceptional protection" provided for workers by Labor Law § 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 (*see Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d at 501; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513 [1985]). The legislative purpose behind Section 240 (1) is to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs on the owner and general contractor instead of on workers who are "scarcely in a position to protect themselves from accident" (*see Rocovich v Consolidated Edison*, 78 NY2d at 513). Although the "special hazards" contemplated "do not encompass any and all perils that may be connected in some tangential way with the effects of gravity" (*see Ross v Curtis-Palmer Hydro-Electric Co., supra; Rodriguez v Tietz Center for Nursing Care*, 84 NY2d 841 [1994]), the statute's purpose of protecting workers "is to be liberally construed" (*Ross v Curtis-Palmer Hydro-Electric Co., supra* at 500).

The statutory protection afforded by Labor Law § 240 (1) is intended to encompass only elevation-related hazards which result in injury to workers as a result of inadequate or missing safety equipment (*see Bland v Manocherian*, 66 NY2d 452, 457–459 [1985]). The reach of Section 240 (1), however, is not limited to work performed on an actual construction site, but includes work being performed at the time of the accident as part of the construction contract, and is "necessitated by and incidental to the construction and involve[s] materials being readied for use in connection therewith" (*Brogan v International Bus. Machs. Corp.*, 157 AD2d 76, 79 [3d Dept 1990]). The court notes that when determining whether an injured worker is engaged in an activity to be protected under Labor Law § 240 (1), it is inappropriate to "isolate the moment of injury and ignore the general context of the work," because the "intent of the statute [is] to protect workers employed in the enumerated acts, even while performing duties ancillary to those acts" (*Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003].

Labor Law § 241 (6) imposes a non-delegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]). In order to establish his Labor Law § 241 (6) claim, plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code regulation that is applicable given the circumstances of the accident, and which sets forth a concrete or "specific" standard of conduct, rather than a provision which merely incorporates common-law standards of care (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 503-505; *Ares v State*, 80 NY2d 959, 960 [1992]; *Fair v 431 Fifth Avenue Assocs.*, 249 AD2d 262, 263 [1998]; *Vernieri v Empire Realty Co.*, 219 AD2d 593, 597 [2d Dept 1995]; *Adams v Glass Fab*, Inc., 212 AD2d 972, 973 [2d Dept 1995]). Further, plaintiff must present some factual basis from which a court may conclude that the regulation was in fact violated (*Herman v St. John's Episcopal Hospital*, 242 AD2d 316, 317 [2d Dept

1997]; *Creamer v Amsterdam H.S.*, 241 AD2d 589, 591 [3d Dept 1997]).

Liability under Labor Law § 241 (6) is limited to accidents in which the work being performed involves "construction, excavation or demolition *work" (see Toefer v Long Island R.R.*, 4 NY3d 399 [2005]; *Peluso v 69 Tiemann Owners Corp.*, 301 AD2d 360 [1st Dept 2003]). Construction work is further defined by regulation as "all work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures, whether or not such work is performed in proximate relation to a specific building or other structure" (12 NYCRR 23-1.4 [b] [13]; *see Mosher v State*, 80 NY2d 286 [1992]; *Peluso v 69 Tiemann Owners Corp., supra*). Tasks comprising "routine maintenance" are not protected under Labor Law § 241 (6) *(see Radoncic v Independence Garden Owners Corp*., 67 AD3d 981 [2d Dept 2009]).

"A party is deemed an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured" (*Linowsky v City of New York*, 33 AD3d 971,974-975 [2d Dept 2006]; *see Walls v Turner Constr. Co.*, 4 NY3d at 863-864; *Russin v Louis N. Picciano & Son*, 54 NY2d at 317-318; *Esteves-Rivas v W2001Z/15CPW Realty, LLC*, 104 AD3d 802, 804 [2d Dept 2013]; *Perez v 347 Lorimer, LLC*, 84 AD3d 911, 912 [2d Dept 2011]). To impose such liability, the defendant must have the authority to supervise and control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition (*see Linkowski v City of New York*, 33 AD3d 971, *supra*; *Damiani v Federated Dept. Stores, Inc.*, 23 AD3d 329, 331-332, 804 NYS2d 103 [2005]). It is not a defendant's title that is determinative, but the degree of control or supervision exercised (*see generally Aranda v Park E. Constr*., 4 AD3d 315, 316 [2d Dept 2004]; *see also Armentano v Broadway Mall Props., Inc*., 30 AD3d 450 [2d Dept 2006]; *Loiacono v Lehrer McGovern Bovis*, 270 AD2d 464, *supra*).

Discussion

In the case at bar, contrary to Realty's contention, plaintiff was engaged in a protected activity under Labor Law § 240 (1) at the time he fell from the sidewalk bridge. Although he was not engaged in pointing the brick or stone facade, or power washing, he was authorized to be on the sidewalk bridge at the time of the fall, and was engaged in removing machinery that was essential to the work performed by Geiger. This work was part of the overall project, and was performed at an elevated level, thus requiring proper protection from falling off the bridge.

It is noted that in a proceeding before the Workers' Compensation Board, Rasheed's employer was identified as GR Restoration Inc. The Board, however, made no determination as to whether plaintiff was also an employee, special employee, or a borrowed employee, of Geiger Construction. Although GR Restoration Inc. was nominally Rasheed's employer at the time of accident, Rasheed was performing work in the furtherance of Geiger Construction's business. It is undisputed that plaintiff was part of a team of laborers who were acting at the direction of Geiger Construction's employee, Kumar. Therefore, the court finds that plaintiff, in retrieving

the power washer, was involved in an activity integral to the renovation and power cleaning of defendant, Realty's building, for which defendant, Realty, as the owner, was obligated to provide devices necessary to ensure proper protection under Labor Law § 240 (1) (*see generally Augustyn v City of New York*, 95 AD3d 683, 684-685 [1st Dept 2012]; *Morales v Spring Scaffolding, Inc*., 24 AD3d 42, 48 [1st Dept 2005]; *Ageitos v Chatham Towers,* 256 AD2d 156 [1st Dept 1998]; *see also Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 881-882 [2003]; *see also D'Alto v 22-24 129th Street, LLC*, 76 AD3d 503 [2d Dept 2010]).

Labor Law § 240 requires that sidewalk bridges be built "so as to provide workers with proper protection" (*Jablonski v Everest Constr. & Trade Corp.,* 264 AD2d 381, 382, 693 NYS2d 229 [2d Dept 1999]). Clearly, the subject bridge failed in this regard, as a matter of law. Furthermore, the fact that plaintiff, Rasheed, and his co-worker momentarily rested the power washer on top of the parapet does not relieve the owner of liability. It is well-settled that the doctrine of comparative negligence is inapplicable in cases involving a violation of Labor Law § 240 (1). "The policy purpose underlying Labor Law § 240 is to impose a 'flat and unvarying' duty upon the owner and contractor despite any contributing culpability on the part of the worker" (*Bland v Manocherian*, 66 NY2d at 461 [1985], *quoting Zimmer v Chemung County Performing Arts*, 65 NY2d at 521).

Accordingly, plaintiff's motion for summary judgment against Realty on the issue of liability on the third cause of action, for a violation of Labor Law § 240, is granted, and Realty's cross motion to dismiss this cause of action is denied.

That branch of Realty's motion which seeks to dismiss plaintiff's claims for common law negligence and for a violation of Labor Law § 200, is granted, as there is no evidence that Realty had the authority to supervise or control the performance of the work performed by Rasheed.

That branch of Realty's motion which seeks to dismiss plaintiff's claim for a violation of Labor Law § 241 (6), on the ground that plaintiff was not employed by Geiger Construction and was not performing construction work at the time of his injury, is denied. Labor Law § 241 provides, in pertinent part, that "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*." (Emphasis supplied). Plaintiff Rasheed was acting at the behest of Geiger Construction and was a person "lawfully frequenting" the sidewalk shed where the accident occurred. It is undisputed that the work performed by Geiger Construction at the site constituted "construction work" within the meaning of the statute and governing regulations.

Plaintiff, in his bill of particulars, alleges violations of 12 NYCRR § 23-1.5, 23-1.7, 23-1.15, 23-1.16, 23-1.18 and 23-2.6. With respect to the claim of a violation of Labor Law § 241 (6), 12 NYCRR § 23-1.5 merely sets forth general safety standards, which is an

insufficient predicate for liability under Labor Law § 241 (6) (*see Gasques v State of New York*, 59 AD3d 666 [2d Dept 2009]; *Maday v Gabe's Contr., LLC*, 20 AD3d 513 [2d Dept 2005]; *Sparkes v Berger*, 11 AD3d 601 [2d Dept 2004]; *Madir v 21-23 Maiden Lane Realty, LLC*, 9 AD3d 450 [2d Dept 2004]). With respect to 12 NYCRR 23-1.7, this section is inapplicable here, as plaintiff's accident did not arise out of any of the general hazards enumerated therein. 12 NYCRR § 23-1.15 is inapplicable, as plaintiff's accident did not involve a safety railing. 12 NYCRR § 23-1.16 is inapplicable, as it is undisputed that plaintiff was not provided with safety belts, harnesses, tail lines or lifelines. 12 NYCRR § 23-2.6 is inapplicable as plaintiff's accident did not arise out of a failure of a catch platforms along the face of the building.

However, 22 NYCRR § 23-1.18 is applicable here, as plaintiff's accident involved the failure of the sidewalk shed, and an issue of fact exists as to whether said shed was properly constructed. Plaintiff, thus, has properly alleged a claim against Realty for a violation of Labor Law § 241 (6).

To the extent that Realty seeks the dismissal of all cross claims and counterclaims, this request is denied, as Realty has failed to state what, if any, cross claims and counterclaims were asserted against it, and the basis for dismissal of any such cross claims and counterclaims.

Perimeter cross-moves for summary judgment dismissing the complaint on the ground that it cannot be liable to the plaintiff under any theory set forth in the complaint, and also seeks to dismiss all cross claims against it. Geiger Construction, in opposition, asserts that said cross motion is premature, as none of the third-party defendants have been deposed, and it had not had an opportunity to depose the plaintiff. Geiger Construction, however, has failed to establish that a deposition of plaintiff, Rasheed, would raise a triable issue of fact with respect to Perimeter. In addition, Geiger Construction has not established that the third-party action was properly commenced, and has not established that the deposition of any of the purported third-party defendants would raise a triable issue of fact with respect to Perimeter. Nor has counsel for Geiger Construction specified what discovery demands remain outstanding with respect to Perimeter. Consequently, Geiger Construction, has not established any basis for denying Perimeter's cross motion pursuant to CPLR 3212 (f).

Perimeter was hired by Geiger Construction to erect and install the scaffold and sidewalk bridge. It was not an owner or general contractor, and as it left the job site upon the completion of the sidewalk bridge and scaffold and was not scheduled to return until completion of the restoration of the facade, and then only to dismantle the bridge and scaffold, it does not qualify as an agent under Labor Law § 240 (1) and § 241. At the time of the accident, Perimeter had no control over the use of the sidewalk bridge or, as shown by its contract with Geiger, any responsibility for its maintenance and, indeed, it was not even present at the job site (*see e.g. Brown v Two Exch. Plaza Partners*, 146 AD2d 129, 136 [1st Dept 1989], *aff'd* 76 NY2d 172 [1990]; *see also Holt v Welding Servs*., 264 AD2d 562, 564 [1st Dept 1999], *lv dismissed* 94 NY2d 899[2000]; *Calogrides v Spring Scaffolding, Inc.*, 89 AD3d 434 [1st Dept 2011]; *Morales v Spring Scaffolding Inc*., 24 AD3d 42 [1st Dept 2005]). Therefore, as Perimeter may not be

held liable under Labor Law § 240 (1) or § 241, those branches of the cross motion which seek to dismiss plaintiff's causes of action for violations of Labor Law §§ 240 (1) and 241 (6), are granted.

With respect to the causes of action for common law negligence and its statutory counterpart of Labor Law § 200, based upon improper construction and erection of the sidewalk bridge leading to the collapse of the parapet wall, the evidence presented is insufficient to establish that the parapet walls were properly constructed. Although Kirsch stated that said walls were "typically" made of "a half inch sheet of plywood with a two by three frame," he provided no testimony as to the board in question. 12 NYCRR § 23-18 (b) (2) provides, in pertinent part, that "[t]he outside edge and ends of the deck of every sidewalk shed shall be provided with a substantial enclosure at least 43 inches in height, consisting of boards not less than one inch thick laid close...". Therefore, as an issue of fact exists as to whether the parapet walls were the requisite thickness, those branches of Perimeter's motion which seek to dismiss the negligence and Labor Law § 200 claims, are denied.

To the extent that Perimeter seeks the dismissal of all cross claims, this request is denied, as Perimeter has failed to state what, if any, cross claims were asserted against it, and the basis for dismissal of any such cross claims.

Conclusion

Accordingly, plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240 claim against Reality is granted. Defendant, Realty's cross motion to dismiss the complaint and all cross claims and counterclaims, is denied as to plaintiff's Labor Law § 240 claim, and is granted as to plaintiff's negligence and Labor Law § 200 claims. The remainder of the cross motion is denied. Defendant, Perimeter's cross motion to dismiss the complaint, and all cross claims, is granted solely to the extent that plaintiff's Labor Law §§ 240 (1) and 241 (6) claims are dismissed. The remainder of Perimeter's motion is denied.

Dated: April 23, 2014

DARRELL L. GAVRIN, J.S.C.