Clark v FC Yonkers Assoc., LLC
2016 NY Slip Op 33200(U)
September 22, 2016
Supreme Court, Kings County
Docket Number: Index No. 501496/14
Judge: Debra Silber
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of September, 2016.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

- -X

JONATHAN CLARK and DANA WERDANN CLARK,

Plaintiffs,

- against -

FC YONKERS ASSOCIATES, LLC and FOREST CITY RATNER, and WORTH CONSTRUCTION COMPANY, INC., and WHITING-TURNER, and U.W. MARX CONSTRUCTION COMPANY, and RECREATION EQUIPMENT INC., d/b/a REI,

Defendants.

- -X

DECISION / ORDER

Index No. 501496/14

Motion Seq. # 4

The following papers numbered 1 to11 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-8
Opposing Affidavits (Affirmations)	9-10
Reply Affidavits (Affirmations)	11
___________Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendants Forest City Ratner Companies, LLC, i/s/h/a Forest City Ratner (Forest City), FC Yonkers Associates, LLC (FC Yonkers), Whiting-Turner as well as Recreation Equipment Inc. d/b/a REI (REI) move for an order pursuant to CPLR 3212 dismissing plaintiffs' causes of action against defendants FC Yonkers, Forest

City, Whiting-Turner and REI under Labor Law §§200, 240 (1) and 241 (6); dismissing the plaintiffs' common law negligence causes of action against said defendants; and dismissing the cross-claims of defendants U.W. Marx Construction Company (Marx) and Worth Construction Company (Worth).

Background

Plaintiff Jonathan Clark was employed as a construction supervisor for IBEX Construction Company at a construction project located in Yonkers, New York. The project was known as Ridge Hill and involved the construction of a shopping center. FC Yonkers was the owner of the property and Forest City was the developer of the project. FC Yonkers contracted with Whiting-Turner to serve as the program manager for the project. FC Yonkers had a contract with Worth for the construction of the core and shell of Building A-1 and four additional buildings in the shopping center. Several stores were to be constructed within Building A-1 including a REI. FC Yonkers contracted with plaintiff's employer, IBEX, to serve as the general contractor for constructing or "building-out" or "fitting out" the REI space.

On the morning of February 25, 2011, IBEX had hired a fire-proofing subcontractor to spray fireproofing on the beams inside the REI store. Plaintiff states that this fire-proofing work needed to be completed on this specific date as the City of Yonkers Building Inspector was scheduled to come to the site to approve the fireproofing so that the next phase of the work could commence. Plaintiff notes that it was winter-time and the workspace was exposed to the elements. Plaintiff states that in order to perform the fireproofing, the

subcontractor required a water supply. It appears that only a limited number of water meters were issued by the City of Yonkers to the Ridge Hill project and Whiting-Turner coordinated and controlled the various contractor's access to the water meters. Plaintiff claims that a water meter had previously been located on a fire hydrant located outside the REI store but had been removed on the date in question. Plaintiff states that he called Joe Natella, the Forest City site superintendent, who he saw on the site every day, to find out how to best obtain the needed water and was told to call Dan, the assistant project manager for Whiting-Turner. Plaintiff states that Dan informed him that the meter had been moved to the hydrant outside of the loading dock near the movie theater and that it had to stay connected to that hydrant. Dan told plaintiff that in his opinion, there was enough hose length to reach from that hydrant to the REI store to perform the fireproofing.

Plaintiff states that he then walked down to the loading dock area where the hydrant was located, which was approximately 15 feet below the level of the REI store. He claims that there he encountered a few hundred feet of hose, which was coiled up, and probably weighed more than one hundred pounds. The plaintiff maintains that the hose was firmly attached to the hydrant and he had no means to detach it. He then determined that he had to get this hose up to the level of the REI store, 15 feet above. He claims he had to bring the hose up 15 feet from the area outside the movie theater exit, which was directly below the REI and then run it along the walkway to the location of the REI store. Plaintiff states that the hose was not long enough for him to walk it in through the building or around the parking lot to get it to the area where it was needed which was located 15 feet above. He asserts that,

customarily, he would utilize a rope or hoist to lift something from one level to another, but he did not have such materials on hand as the day before the water meter had been placed on a fire hydrant which was on the same elevation as REI. He states that neither Whiting-Turner, nor any other entity affiliated with the project, provided him with a rope or hoist or any equipment to get the hose from the elevation of the hydrant to the elevation of the work site. Plaintiff claims that he did not have sufficient time to leave the premises to get a rope or hoisting equipment because the fireproofing subcontractor was threatening to leave, and this work had to be completed before the building inspector came to approve it. He states that if the fireproofing was not completed that day, there would have been adverse consequences to IBEX and to his employment as an IBEX construction supervisor. Plaintiff claims that he had no other IBEX workers at the site that day and that the fireproofing subcontractor refused to provide him with any laborers to assist him with moving the hose. Thus, plaintiff undertook to move the hose himself. He states that he determined he needed to do this by attempting to throw 25-30 foot coils of the hose, weighing approximately 30 pounds, up to the next level. As he tried to throw the coil of hose, he immediately felt a sudden burning in his neck and shoulder and the sensation of pins and needles in his hands, which he now claims was caused by a severe herniation in his neck from attempting to throw the hose up to the higher level. Plaintiff commenced the instant action alleging violations of Labor Law §§240 (1), 241 (6), 200 and common law negligence. His wife Dana Clark asserts a claim of loss of consortium.

Defendants' Motion

Defendants Forest City, FC Yonkers, Whiting-Turner and REI move for an order pursuant to CPLR 3212 dismissing all of plaintiffs' causes of action as asserted against defendants FC Yonkers, Forest City, Whiting-Turner and REI under Labor Law §§200, 240 (1) and 241 (6); dismissal of the plaintiffs' common law negligence cause of action against said defendants; and dismissal of the cross-claims of defendants U.W. Marx Construction Company and Worth Construction Company. Initially, defendants argue that Whiting-Turner is not subject to the Labor Law because it was not an owner or general contractor. They claim Whiting-Turner was merely an independent contractor retained by FC Yonkers as a program manger, to act as an advisor to FC Yonkers, and whose authority was limited to specific services. Next, defendants contend that plaintiff's accident did not result from any hazard which the extraordinary protections under Labor Law §240 (1) are designed to protect against. Defendants further maintain that there is no Labor Law §200 or common law liability because, on the basis of his description of how he was injured, it was the result of the means and methods he chose to utilize to perform his work which caused his injury, and therefore he cannot demonstrate that defendants exercised actual supervision and control over plaintiff's work activity. Finally, defendants maintain that the Industrial Code provision plaintiff cites to support his Labor Law §241 (6) claim is inapplicable to the facts of the instant case and thus there is no violation.

In support of the motion, defendants submit various affidavits. John Bigham, project manager for Worth Construction, affirms that Worth was hired pursuant to a written contract with FC Yonkers to, among other things, build the core and shell of building A1 which included the shell of REI. He claims that Worth was not hired to construct the REI space and did not have any role in directing, supervising or controlling the work performed by plaintiff or his employer IBEX. Thus Worth seeks dismissal of plaintiffs' claims as against Worth. Worth's motion was granted, without opposition, at oral argument on April 7, 2016, as was Marx's motion (Mot. Seq. 2 and 3).

Anthony Messina, the Senior Project Manager for Whiting-Turner submits an affidavit in which he states that Whiting -Turner had no contract with REI. He affirms that it did not direct or control the work IBEX performed and did not supervise the means and methods IBEX and its workers chose to perform its work. He maintains that Whiting-Turner had no authority under its contract with FC Yonkers to direct or control IBEX's work. Mr. Messina further affirms that such authority and duty was given by FC Yonkers solely to IBEX. He claims that Whiting-Turner's role as a program manager for the project was essentially administrative in nature and involved scheduling and monitoring the progress of the work performed by the various prime and subcontractors. In support of this, he points to Articles 2 (1), 14 (18) and 4 (t) of Whiting-Turner's agreement with FC Yonkers to demonstrate that Whiting-Turner was not an agent or employee of FC Yonkers, that it did not have control over the trade contractors and is not liable for the acts or omissions of the trade contractors and that it had the authority to stop

a trade contractor's work only "with Owner's written approval." Mr. Messina submits a second affidavit in which he refers to various photographs to explain the manner in which he claims plaintiff was able to leave the REI store and walk along the sidewalk to the rear exit of the door of the theater building without a need for any stairway, ramp or runway. Thus, he argues there was no violation of the Industrial Code provision plaintiff asserts to support his Labor Law §241 (6) claim.

David Esterman, the co-director of Legal Affairs for Forest City, also submits an affidavit in which he states that Forest City was merely the developer of the Ridge Hill project and was not an owner and had no written contract with FC Yonkers or any of the other contractors working on the project. Thus, he states Forest City did not supervise, direct, control or coordinate FC Yonkers or any of the contractors retained by FC Yonkers. Accordingly, Forest City seeks dismissal of plaintiffs' claims as asserted against it.

Scott Smith, the Project Manager for REI, submits an affidavit in which he states that REI entered into a lease agreement with FC Yonkers for future occupancy of store space at the Ridge Hill project. He states that FC Yonkers retained IBEX to build out the space for REI's occupancy and at no time did REI have a contract with Ibex. He affirms that although he visited the space on several occasions to view the progress and quality of the work being performed by Ibex , REI did not supervise, direct, control or coordinate the work performed by IBEX, or the means and methods by which Ibex performed its work, nor did it have the authority to do so.

Theron Russell, project manager for FC Yonkers for the Ridge Hill project, submits an affidavit in which he states that FC Yonkers retained various contractors to construct the buildings and structures on the site, including Ibex. He states that Ibex was retained as a general contractor to "fit-out" a portion of the building for the future occupancy by REI. He affirms that pursuant to its contract, Ibex was required to perform all work, including supervision of its workers, and provide all supplies, equipment, tools and other items needed to complete its work, and was solely responsible for the methods and means of construction and the safe performance of the work. He cites various portions of the contract relating to safety, including that "Ibex shall be responsible for the safe condition of its work and the safety and protection of its own workforce" (General Conditions Article 2, Section 1.13.1 (a)). Mr. Russell states that FC Yonkers did not exercise direction, control or supervision over plaintiff or the means and methods by which he chose to throw the water hose when the alleged incident occurred.

Defendants specifically argue that Whiting-Turner is not subject to the Labor Law because it was not an owner or general contractor but was merely an independent contractor retained by FC Yonkers as a program manger to act as an advisor to FC Yonkers, and whose authority was limited to specific services. Defendants claim that the agreement between FC Yonkers and Whiting-Turner provided that Whiting-Turner shall not have control over the trade contractors and shall not be liable for the acts or omissions of the trade contractors. Moreover, defendants contend that FC Yonkers, pursuant to its contract with Ibex, made Ibex solely responsible for the methods and means of the work

and for the safe performance of the work and directed that Ibex not use any methods or means of work that could endanger any person and placed responsibility for the safe condition of the work and safety and protections of its workforce on Ibex. Defendants maintain that Whiting-Turners's role was essentially advisory and administrative and that it had no authority to control the work of Ibex or the means and methods that Ibex chose to use and had no authority to stop Ibex's work unless FC Yonkers gave it written permission to do so. Defendants point to various provisions in the contract between Whiting-Turner and FC Yonkers to demonstrate that Whiting-Turner was not an agent of FC Yonkers and had no authority over Ibex's work including Article 2, section 1 which states "[t]he PM ("Whiting-Turner") is an independent contractor, not an agent or employee of Owner."

In opposition, plaintiff argues that Whiting-Turner is a general contractor or agent of the owner regardless of its label as a "program manger" and contends that, notwithstanding the explicit language contained in the contract between FC Yonkers and Whiting-Turner, stating that it is not an agent of the owner, an agency has in fact been created. Plaintiff maintains that Whiting-Turner is the owner's representative for the purpose of managing the work of various trade contractors and had the authority to immediately discharge a worker that disobeyed a rule as dictated by Whiting-Turner. Moreover, plaintiff claims that he and his co-workers were contractually obligated to heed any and all safety concerns of Whiting-Turner. Plaintiff argues that even though Messina affirms that Whiting-Turner did not exercise its authority, the determining factor

is that it had the right to insist that proper safety practices were followed, not whether it actually exercised such right.

In reply, defendants reiterate that plaintiff's injury arose from an ordinary risk at the site or a peril only connected in some tangential way to the effects of gravity thus not subject to the protections of Labor Law §240 (1). They note that plaintiff's description of how his accident occurred reveals that he did not fall from a height, nor was he struck by an object that was either being hoisted or which fell from a height due to improper securing. Moreover, defendants note that there was no protective device proved to be inadequate to shield plaintiff from harm directly flowing from the application of the force of gravity to a person or object. Finally, defendants maintain that all of the cases cited by plaintiff are distinguishable and do not support his claim.

In further opposition, plaintiff argues that Labor Law §240 (1) is applicable and the fact that he did not actually fall or get struck by an object is not relevant because he was injured as a result of harm directly flowing from the application of the force of gravity to an object and that defendants failed to provide and place proper equipment to enable him to perform his work safely. Plaintiff maintains that defendants' failure to furnish a hoist or rope was a violation of Labor Law §240 (1).

Labor Law §240 (1)

It is well-settled that the only entities subject to liability under Labor Law §§ 240 (1), 241 (6), and 200 are owners, general contractors, and their agents (*Russin v Louis N. Picciano & Son*, 54 NY2d 311 [1981]). 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 (*Bennett v Hucke*, 131 AD3d 993, 994 [2015]). Thus, Labor Law §§ 240 (1), 241 (6), and 200 liability may not be assessed against a subcontractor which did not control the work that caused the plaintiff's injury (*Giovanniello v E.W. Howell, Co., LLC*, 104 AD3d 812, 814 [2013]; *White v Village of Port Chester*, 92 AD3d 872, 876-877 [2012]). However, a subcontractor that does not control or supervise the plaintiff's work may still be held liable under a common-law negligence theory where its employees created an unreasonable risk of harm that caused or contributed to the accident (*Poracki v St. Mary's Roman Catholic Church*, 82 AD3d 1192, 1195 [2011]).

Labor Law § 240 (1) requires property owners and contractors to provide workers with "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection' to the workers" (*Flossos v Waterside Redevelopment Co.*, L.P., 108 AD3d 647, 649 [2d Dept 2013], quoting Labor Law § 240 [1]). In this regard, "[t]he purpose of the statute is to protect against 'such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured'" (*id.*, quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). It is well settled that the extraordinary protections of Labor Law § 240 (1) extend only to a narrow class of special hazards, and do 'not encompass any and all perils that may be connected in some tangential way with the effects of gravity' " (*Nieves*

v Five Boro A.C. & Refrig. Corp., 93 NY2d 914, 915-916 [1999], *quoting Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *see Melo v Consolidated Edison Co. of N.Y.*, 92 NY2d 909, 911 [1998]). Rather, the statute "was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*Ross*, 81 NY2d at 501; *see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

Here plaintiff injured himself when he attempted to throw a hose up to another level in the building. He was not working at a height, nor was he struck by a falling object, but, rather, he was injured as a result of his attempt to throw a 35-40 pound coil of hose up 15 feet. The court finds that, although plaintiff's injury was tangentially related to the effects of gravity upon the coils he was lifting, "it was not caused by the limited type of elevation-related hazards encompassed by Labor Law § 240 (1)" *(Aloi v Structure-Tone, Inc.*, 2 AD3d 375, 376 [2003]. Similarly, in *Cardenas v BBM Constr. Corp.*, (133 AD3d 626, 627-628 [2d Dep't 2015]), the court held that there was no Labor Law §240 (1) violation where plaintiff suffered a back injury while lifting a 500-pound beam, that had previously been hoisted, approximately one and a half feet to attach it to a wall. The court noted that "the extraordinary protections of Labor Law § 240 (1) extend only to a narrow class of special hazards, and do 'not encompass any and all perils that may be connected in some tangential way with the effects of gravity' " (citations omitted) and that the plaintiff's injury was not caused by the elevation-related hazards encompassed by

Labor Law § 240 (1); see *Zdunczyk v Ginther*, 15 AD3d 574, 574-575 [2005] [where the court held that the fact that the force of gravity was involved is not enough, by itself, to support the plaintiff's Labor Law §240 (1) claim where he allegedly sustained injuries to his hand when, while assisting a coworker in lowering a bucket of construction debris, and the coworker suddenly released the rope which the bucket was attached to].

In opposition, plaintiff has failed to raise a triable issue of fact that his injury arose from an elevation-related risk within the contemplation of the statute, rather than from the usual and ordinary dangers of a construction site (see *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490-491 [1995]; *Rodriguez v Tietz Ctr. for Nursing Care*, 84 NY2d 841, 843 [1994]; *Volpicelli v New York City Tr. Auth.*, 309 AD2d 858, 859 [2003]). The mere fact that the force of gravity was involved is not enough, by itself, to support the plaintiff's claim (see *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 270 [2001]; *Melo v Consolidated Edison Co. of N.Y.*, 92 NY2d 909, 911 [1998]). Based upon the foregoing, plaintiffs' claim alleging a violation of Labor Law 240 (1) is dismissed as against all defendants.

<u>Labor Law 200</u>

Defendants next contend that there is no Labor Law §200 or common law negligence liability because the work activity that plaintiff was performing at the time that he sustained his injury arose out of the means, method and manner in which he chose to perform it and that in order to impose liability it must be shown that defendants exercised actual supervision and control over the work being performed by plaintiff. Defendants

argue that the sole responsibility, direction, supervision and control of the means and methods that plaintiff chose to use were given to, and agreed to be performed by, Ibex alone, pursuant to its contract with FC Yonkers. Defendants maintain that the affidavits submitted on behalf of Forest City, REI, Whiting-Turner and FC Yonkers establish that none of these entities exercised supervision, direction or control over the means and methods plaintiff utilized when tossing the water hose up to a higher landing.

In opposition, plaintiff argues that there are issues of fact as to whether Whiting-Turner was negligent in violation of Labor Law §200 because he contends that Whiting-Turner created the situation on the premises that required plaintiff to move a hose weighing more than 100 pounds up a 15-20 foot elevation and also because it controlled the placement of the water meter and had moved it away from the REI store where it had been located just the prior day. The plaintiff contends that Whiting-Turner controlled the meter, the hose, the work site where the hydrant and meter were located and undertook the responsibility to coordinate all hoisting activities. Plaintiff maintains that Whiting-Turner created the condition which caused plaintiff to sustain his injury.

In reply, defendants contend that there is no merit to plaintiff's claim that his injuries arose out of a dangerous condition on the premises and that defendants exercised supervision and control over the means and methods of the work. Defendants argue that they have submitted sworn affidavits on behalf of each of the defendants which establish that they did not exercise supervision or control over the method that plaintiff chose to utilize that morning to lift the hose to the upper level. Moreover, defendants point out

that there was no dangerous condition on the premises and that the relocation of the water meter created a reason the hose needed to be moved, but was not a cause of his injury, and, thus is not actionable under a common law theory of negligence. Defendants argue that the proximate cause of plaintiff's injury was not a dangerous condition on the premises but rather the choice he made as to the method he utilized to perform his task. Thus, they contend, he fails to rebut their prima facie showing that defendants did not exercise supervision or control over the means and methods the plaintiff chose to perform his work. Finally, defendants maintain that plaintiffs' contention that the relocation of the water meter created a dangerous condition which caused plaintiff's injury lacks merit.

"Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Torres v St. Francis Coll.*, 129 AD3d 1058, 1060 [2d Dept 2015]). "'To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed at a work site, an owner or manager of real property must have authority to exercise supervision and control over the work at the site'" (*Banscher v Actus Lend Lease, LLC*, 132 AD3d 707, 709 [2d Dept 2015], quoting *Gallello v MARJ Distribs., Inc.*, 50 AD3d 734, 735 [2008]). "However, 'the right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence'" (*id.,* quoting *Gasques v State of New York*, 59 AD3d 666, 668 [2d Dept 2009], *affd* 15 NY3d 869 [2010]). Further, [w]here a plaintiff's injuries stem not

from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a [defendant] may be liable under Labor Law § 200 if it either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition" (*id.* [internal citations and quotations omitted]).

Here, the course of action chosen by plaintiff, his attempt to throw the hose upward rather than leave the site to obtain proper equipment to accomplish this task safely, was a decision of his own free choice and was not directed by any of the defendants, specifically not by Whiting-Turner. Plaintiff's own affidavit reveals that he chose not to leave the premises to obtain hoisting equipment from another Ibex site because it would have taken too much time and possibly resulted in the fireproofing not being completed before the building inspector arrived, and also because he was afraid the fireproofing contractor might leave the site. He states that this would have resulted in "adverse consequences" to his employment as an Ibex construction supervisor. Plaintiff claims that neither Whiting-Turner, nor any other entity, provided him with hoisting equipment. However, the court notes that Ibex's contract with FC Yonkers specifically required Ibex to furnish all equipment needed to perform its work. Thus, the manner in which plaintiff's accident occurred was the result of the means and methods he undertook to perform this task. While it may be true that Whiting-Turner caused the water meter to be moved from the hydrant that was located directly outside of the REI Store, this "merely furnished the condition or occasion for the occurrence of the event but was not one of its causes" (*Ortiz v Jimtion Food*, 274 AD2d 508, 508 [2000], *quoting Shatz v Kutshers*

Country Club, 247 AD2d 375 [1998]). As none of the defendants exercised the requisite degree of supervision or control over plaintiff, nor created the condition which caused plaintiff to sustain his injury, the branch of defendants' motion seeking dismissal of plaintiffs' Labor Law §200 and common law negligence claims as asserted against all defendants is granted.

Labor Law §241 (6)

Finally, defendants argue that there is no Labor Law §241 (6) liability because the Industrial Code provision plaintiff alleges was violated, §23-1.7 (f), is inapplicable. Defendants note that plaintiff maintains that he had no way to get to the landing at the exit door of the movie theater and thus this provision was violated because there was no staircase, ramp or runway leading to the landing. In support of the motion, defendants point to the affidavit of Anthony Messina and the photographs he references in said affidavit, to contend that the landing described by plaintiff is part of the sidewalk that allows movie theatergoers to exit the theater onto the sidewalk landing and walk along such sidewalk in front of the REI store. Thus, he contends that all plaintiff needed to do to get to the landing was to walk out of the REI store with his hose and proceed along the sidewalk to the end of the landing and lower the hose from there to the hydrant. As the entire walkway area was on grade, there was no need for a stairway, ramp or runway.

In opposition, plaintiff argues that the failure to provide a vertical passage was a violation of Labor Law §241 (6), specifically a violation of Industrial Code §23-1.7 (f) which states "Vertical Passage. Stairways, ramps or runways shall be provided as the

means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided." Plaintiff states that the elevation of the REI site was one to two stories above the location of the hydrant and that the hose was not long enough for him to walk it through the building or around the parking lot and that there was no available vertical passage for him to use. Moreover, he notes that Whiting-Turner created the need to run the hose by moving the water meter, and had control over the water meter.

In reply, defendants argue that there already was a means to access the landing, which thus makes the vertical passage regulation embodied in section 23-1.7 (f) inapplicable and that the alleged violation was not a proximate cause of his injury. Rather, defendants maintain that the proximate cause of plaintiff's injury was his choice to take a short cut, and instead of bringing the coils of hose up onto the landing and then lowering one section down at a time, to reach the hydrant, he instead tried to throw the hose upward.

Labor Law § 241 (6) provides, in pertinent part, that:

> "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 persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety

protections, places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code (*Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 501-501 [1993]). Accordingly, "the cause of action must be based upon violations of specific codes, rules, or regulations applicable to the circumstances of the accident" (*Reyes v Arco Wentworth Mgt. Corp*., 83 AD3d 47, 53 [2d Dept 2011]).

Defendants argue that plaintiff's negligence was the sole proximate cause of his injury, noting that he was the site superintendent for Ibex who was responsible for fulfilling Ibex's contractual obligations in a safe manner. Defendants maintain that plaintiff had a safe alternative method to perform this task. Defendants note that all he had to do was to walk from the REI Store along the sidewalk with a hose which had one end inside the REI Store over to the rear exit door of the theater and then unravel the hose and lower it down the 15 feet to the ground so he could connect one end to the hydrant on the sidewalk outside the movie theater exit door.

The court finds that, inasmuch as there was a means by which plaintiff could access the landing outside of the REI store, the Industrial Code provision he cites is not sufficient to support his Labor Law §241 (6) claim and, thus, there has been no violation of such provision which proximately caused plaintiff's injuries. Accordingly that branch of defendants' motion seeking dismissal of plaintiff's Labor Law §241 (6) claim is granted and said claim is hereby dismissed as against all defendants.

In conclusion, defendants' motion seeking dismissal of plaintiffs' claims as based upon violations of Labor Law §§240 (1), 241 (6), 200 and common law negligence is granted in its entirety and said claims are hereby dismissed. As the plaintiff's claims are dismissed, his spouse's loss of consortium claims, which are derivative, are also dismissed.

The branch of the motion seeking dismissal of Worth's and Marx's cross-claims is also granted. Worth and Marx moved for summary judgment dismissing all claims and cross-claims as to them, which motion was granted by order dated April 7, 2016. As they are no longer party defendants, their cross-claims must be dismissed.

The foregoing constitutes the decision, order and judgment of the court.

E N T E R,

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court

NANCY T. SUNSHINE
Clerk