Short Form Order

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SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Wayne Doran and Lisa Doran,

Plaintiffs,

-against-

JP Walsh Realty Group, LLC,
Harbor Building Corp.,
McAvoy Construction Corp.
and Granite Hill Construction Corp.,

Defendants.

Index No.: 26178/2012

Motion Sequence No.: 006; MG
Motion Date: 12/18/17
Submitted: 2/21/18

Motion Sequence No.: 007; MG
Motion Date: 1/17/18
Submitted: 2/21/18

Motion Sequence No.: 008; MG
Motion Date: 1/26/18
Submitted: 2/21/18

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Clerk of the Court

Upon the following papers read on this application by defendant McAvoy Construction Corp. for an order dismissing the plaintiffs' complaint pursuant to CPLR 3211 (a)(1) and (7) and for summary judgment pursuant to CPLR 3212; Notice of Motion dated November 17, 2017, affirmation dated November 17, 2017, affidavit sworn to on October 22, 2013 and exhibits annexed thereto (Motion Sequence 006); Answering Affidavits of plaintiff Wayne Doran dated February 5, 2018 and plaintiffs' counsel dated February 8, 2018 and exhibits annexed thereto (Motion Sequence 006); Reply Affirmation of counsel for defendant McAvoy Construction Corp. dated February 16, 2018

(Motion Sequence 006); upon the papers read on the application by defendant Harbor Building Corp. for an order granting it summary judgment pursuant to CPLR 3212; Notice of Motion dated December 13, 2017, affirmation dated December 13, 2017 and exhibits annexed thereto (Motion Sequence 007); Answering affidavits of plaintiff Wayne Doran dated February 5, 2018 and plaintiffs' counsel dated February 7, 2018 and exhibits annexed thereto (Motion Sequence 007); Reply Affirmation of counsel for defendant Harbor Building Corp. dated March 2, 2018 (Motion Sequence 007); upon the papers read on the application by defendant JP Walsh Realty Group, LLC for an order granting it summary judgment pursuant to CPLR 3212; Notice of Motion dated January 3, 2018, affidavit dated December 28, 2017, and affirmation of counsel for defendant JP Walsh Realty Group, LLC (Motion Sequence 008); Answering affidavits of plaintiff Wayne Doran dated February 5, 2018 and plaintiffs' counsel dated February 7, 2018, and exhibits annexed thereto (Motion Sequence 008); it is

ORDERED that the motions of the respective defendants (Motion Sequences 006, 007 and 008) are being consolidated for purposes of a determination herein; and it is further

ORDERED that the motion by defendant McAvoy Construction Corp. pursuant to CPLR 3211 (a)(1) and (a)(7) and CPLR 3212 is granted, as set forth more fully herein; and it is further

ORDERED that the motion by defendant Harbor Building Corp. pursuant to CPLR 3212 is granted, as set forth more fully herein; and it is further

ORDERED that the motion by defendant JP Walsh Realty Group, LLC pursuant to CPLR 3212 is granted, as set forth more fully herein.

PROCEDURAL HISTORY

By the filing of a summons and complaint on August 24, 2012 and a supplemental summons and amended verified complaint served on May 14, 2013, plaintiffs Wayne Doran ("plaintiff Doran" or "Doran") and Lisa Doran commenced this action seeking recovery for personal injuries allegedly sustained by plaintiff Doran as a result of a trip and fall accident which occurred on March 8, 2012 at approximately 7:15 a.m. at 367 Lake Avenue, St. James, New York (the "subject property"). The complaint alleges, *inter alia*, singularly, collectively, and in the alternative, that each defendant was the general contractor, construction manager, and agent of the owner in connection with the construction, erection and/or renovation being performed at the subject property, had prepared or caused to be prepared the plans and specifications for the work being performed at the subject property, and had hired and retained various contractors and subcontractors who performed work at the site. The complaint further alleges that each defendant supervised, inspected, directed, and controlled the construction, erection and/or renovation being performed at the subject property. It also is alleged that each defendant hired and retained Russ Tree Service to provide labor and services in connection with tree removal work at the subject property. Plaintiff Wayne Doran ("Doran") alleges that he was working for Russ Tree Services on March 8, 2012 and was caused to sustain personal injuries as a result of the negligence of defendants and as a result of the violation by defendants of sections 200 and 241 (6) of the Labor Law of the State of New York ("Labor Law"). In regards to the section 241 (6) claim, plaintiffs allege violations of the Industrial Code, specifically, 12 NYCRR 23-1.7 (d) and 12 NYCRR 23-1.7 (e)(1) and (e)(2).

Defendant McAvoy Construction Corp. ("McAvoy Construction") served its answer on or about October 30, 2013, Defendant Harbor Building Corp. ("Harbor Building") served its answer on or about December 17, 2013, and defendant JP Walsh Realty Group, LLC ("JP Walsh") served its answer on or about January 24, 2014. Granite Hill Construction Corp. was a named defendant until plaintiffs discontinued the action against it because it had no connection to the subject property. Plaintiffs served their verified bill of particulars on September 26, 2013 and a supplemental verified bill of particulars on January 7, 2016. On November 2, 2015, the examination before trial of each plaintiff was held. On March 9, 2017, the examination before trial of Harbor Building and McAvoy Construction, by owner Kenneth McAvoy, was held and on May 15, 2017 the examination before trial of JP Walsh sole member Joseph McGorry ("McGorry") was held. Plaintiffs filed a note of issue and certificate of readiness on September 18, 2017. Defendants now move for summary judgment and defendant McAvoy Construction also moves pursuant to CPLR 3211 (a)(1) and (a)(7) to dismiss the complaint as against it.

THE SUMMARY JUDGMENT MOTIONS

In support of its motion for summary judgment pursuant to CPLR 3212 and its motion to dismiss pursuant to CPLR 3211 (a)(1) and (7), defendant McAvoy Construction submits an affirmation of counsel, the affidavit of Kenneth McAvoy, owner of McAvoy Construction, the pleadings, including the supplemental summons and amended verified complaint, the verified bill of particulars, the supplemental verified bill of particulars, the deposition transcripts of plaintiffs, defendant McAvoy Construction by Kenneth McAvoy, and defendant JP Walsh by Joseph McGorry, copies of the filed deeds to the subject property, and the decision of this Court in regards to the prior motion of defendant McAvoy Construction to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7).

The affidavit of Kenneth McAvoy states, and it is undisputed, that he is the vice president and principal owner of defendant McAvoy Construction and president of Harbor Building, and that Harbor Building is the owning entity of the subject property where the accident occurred. The property deeds to the subject property submitted herein confirm that defendant Harbor Building owns the property where the accident occurred and that defendant McAvoy Construction has no ownership interest. Kenneth McAvoy states that as president of defendant Harbor Building, he hired Russ Tree Service to remove a tree behind the subject property on March 8, 2012 and that defendant McAvoy Construction had no connection at all to the work performed and did not hire or retain Russ Tree Service to provide labor and services at the subject property. Defendant McAvoy Construction argues that it had no connection whatsoever to the subject property or the tree removal work performed on the date of the accident and therefore, it cannot be liable under any theories of negligence or violations of section 200 or 241 (6) of the Labor Law.

In support of its motion for summary judgment, Harbor Building submits an affirmation of counsel, the pleadings, including the summons and complaint, the supplemental summons and amended verified complaint, the verified bill of particulars, the supplemental verified bill of particulars, the deposition transcripts of plaintiffs and defendant Kenneth McAvoy, on behalf of defendant Harbor Building, and a copy of the note of issue. Defendant Harbor Building asserts that any alleged dangerous condition alleged by plaintiff Doran was created by plaintiff Doran in failing to supervise the tree removal work being performed on the subject property. Defendant Harbor

Building further avers that the accident was caused by the manner in which the tree was being removed by the co-worker of plaintiff Doran and that defendant Harbor did not supervise or control the tree removal work at the subject property and thus, is not liable under any negligence theory or section 200 of the Labor Law. Defendant Harbor further alleges that section 241 (6) of the Labor Law does not apply herein because the tree removal work was not part of any ongoing construction, excavation, or demolition at the subject property.

In support of its motion for summary judgment, defendant JP Walsh submits an affirmation of its attorney, an affidavit of McGorry, and it incorporates by reference the exhibits and arguments raised by defendant Harbor Building in support of its motion for summary judgment. McGorry avers, and it is not disputed, that defendant JP Walsh owns the property located at 369 Lake Avenue, St. James, New York, not the subject property located at 367 Lake Avenue, St. James, New York where the plaintiff's accident occurred. He further states, and it is not disputed, that defendant JP Walsh never hired Russ Tree Service, had no connection to the tree removal services being performed at the subject property on the date of plaintiff's accident, and did not direct, supervise, or control the tree removal work at the subject property.

SUMMARY JUDGMENT STANDARD

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141 [1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once a *prima facie* showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*). However, conclusory allegations unsupported by competent evidence are insufficient to defeat a summary judgment motion (***Alvarez,*** *supra*, 68 N.Y.2d at 324-325, 508 N.Y.S.2d 923, 501 N.E.2d 572). Further, a party may not, through an affidavit submitted on summary judgment, contradict his or her own deposition testimony in order to feign an issue of fact (***Freiser v Stop & Shop Supermarket Co., LLC***, 84 AD3d 1307, 923 NYS2d 732 [2d Dept 2011]; ***Andrew T.B. v Brewster Cent. School Dist.***, 67 AD3d 837, 889 NYS2d 240 [2d Dept 2009]; ***Knox v United Christian Church of God, Inc.***, 65 AD3d 1017. 884 NYS2d 866 [2d Dept 2009]; ***Abramov v Miral Corp.***, 24 AD3d 397, 805 NYS2d 119 [2d Dept 2005]). Where a feigned factual issue is designed to avoid the consequences of an earlier admission (*see* ***McGuire v. Quinnonez***, 280 A.D.2d 587, 720 N.Y.S.2d 812 [2001]), it is insufficient to defeat summary judgment (*see* ***Israel v. Fairharbor Owners, Inc.***, 20 A.D.3d 392, 798 N.Y.S.2d 139 [2005]).

PREMISES LIABILITY LAW

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]). Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (*see* ***Rodriguez v 5432-50 Myrtle Ave., LLC***, 148 AD3d 947, 50 NYS2d 99 [2d Dept 2017]; ***Russo v Frankels Garden City Realty Co.***, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]; ***Ellers v Horwitz Family Ltd. Partnership***, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]). With regard to an 'out -of-possession landlord,' he "can be held liable for injuries that occur on its premises only if the landlord has retained control over the premises and if the landlord is contractually or statutorily obligated to repair or maintain the premises or has assumed a duty to repair or maintain the premises by virtue of a course of conduct" (***Mendoza v Manila Bar & Rest. Corp.,*** 140 AD3d 934, 935, 33 NYS3d 448 [2d Dept 2016], quoting ***Duggan v Cronos Enters., Inc.,*** 133 AD3d 564, 564, 18 NYS3d 555 [2015]).

However, a landowner is not an insurer of the safety of others using its property (*see* ***Maheshwari v. City of New York***, 2 NY3d 288, 778 NYS2d 442 [2004]) and to impose liability upon a defendant in a trip and fall action, there must be evidence that the defendant either created the condition or had actual or constructive notice of it (*see* ***Gordon v. American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Hayden v. Waldbaum, Inc.***, 63 AD3d 679, 880 NYS2d 351 [2d Dept 2009]; ***Denker v. Century 21 Dept. Stores, LLC***, 55 AD3d 527, 866 NYS2d 681 [2d Dept 2008]; *see also* ***Barretta v. Glen Cove Prop., LLC***, 148 AD3d 1100, 50 NYS3d 520 [2d Dept 2017]; ***Scoppettone v. ADJ Holding Corp.***, 41 AD3d 693, 839 NYS2d 116 [2d Dept 2007]; ***Bradish v. Tank Tech Corp.***, 216 AD2d 505, 628 NYS2d 807 [2d Dept 1995]; ***Gaeta v. City of New York***, 213 AD2d 509, 624 NYS2d 47 [2d Dept 1995]). A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident so that it could have been discovered and remedied (*see* ***Gordon v. American Museum of Natural History***, 67 NYS2d 836, 501 NYS2d 646 [1986]; ***Marchese v. St. Martha's R.C. Church, Inc.,*** 106 AD3d 881, 881-882, 965 NYS2d 557 [2d Dept 2013], *quoting* ***Arzola v. Boston Props. Ltd. Partnership,*** 63 AD3d 655, 656, 880 NYS2d 352 [2009]); ***Perez v. New York City Housing, Auth.***, 75 AD3d 629, 906 NYS2d 299 [2d Dept 2010]; ***Bolloli v. Waldbaum, Inc.***, 71 AD3d 618, 619, 896 NYS2d 400, 402 [2d Dept 2010] [internal quotation marks omitted]; ***Villano v. Strathmore Terrace Homeowners Assn., Inc.***, 76 AD3d 1061, 908 NYS2d 124 [2d Dept 2010]; ***Valdez v. Aramark Serv.***, 23 AD3d 639, 804 NYS2d 811 [2d Dept 2005]; ***Curiale v Sharrotts Woods, Inc.***, 9 AD3d 473, 781 NYS2d 47 [2d Dept 2004]; ***Gordon v. American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [2d Dept 1986]; ***Bykofsky v. Waldbaum's Supermarkets, Inc.***, 210 AD2d 280, 619 NYS2d 760 [2d Dept 1994])). Liability can be predicated only on failure of the defendant to remedy the danger after actual or constructive notice of the condition (*see* ***Piacquadio v. Recine Realty Corp.***, 84 NY2d 967, 622 NYS2d 493 [1994]). A defendant who moves for summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it neither created the dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see* ***Mercedes v City of New York***, 107 AD3d 767, 968 NYS2d 519 [2d Dept 2013]). This burden, however, cannot be satisfied by merely pointing to gaps in the plaintiff's case (*see* ***Valdez v. Aramark Serv.***, *supra* 23 AD3d 639).

Nevertheless, a landowner does not have a duty to warn or protect against a condition that is open and obvious, or that is not inherently dangerous (*see* ***Losciuto v. City Univ. of N.Y.***, 80 AD3d 576, 914 NYS2d 296 [2d Dept 2011]; ***Weiss v. Half Hollow Hills Cent. School Dist.***, 70 AD3d 932, 893 NYS2d 877 [2d Dept 2010]; ***Bretts v. Lincoln Plaza Assoc., Inc.***, 67 AD3d 943, 890 NYS2d 87 [2d Dept 2009]; ***Murray v. Dockside 500 Mar., Inc.***, 32 AD3d 832, 821 NYS2d 608 [2d Dept 2006]; ***Rose v. A. Servidone, Inc.,*** 268 AD2d 516, 702 NYS2d 603 [2d Dept. 2000]). An owner or general contractor has no duty to protect workers against a condition that may be readily observed (*see* ***Rose v. A. Servidone, Inc.,*** 268 AD2d 516, 702 NYS2d 603 [2d Dept. 2000];***Bombero v. NAB Construction Corp.,*** 10 AD3d 170, 780 NYS2d 333 [1st Dept. 2004]; ***McGrath v. Lake Tree Vill. Assocs***., 216 AD 2d 877, 877, 629 N.Y.S.2d 358, 359 [4th Dept.1995]) *citing* ***Gasper v. Ford Motor Co.***, 13 N.Y.2d 104, 110, 242 N.Y.S.2d 205, 192 N.E.2d 163 [1963]; *cf* ***Grasso v. New York State Thruway Authority,*** 159 AD3d 674, 679, 71 NYS3d 604 [2d Dept. 2018]); ***McAdam v. Sadler***, 170 A.D.2d 960, 566 N.Y.S.2d 130 [4th Dept. 1991], *lv. denied* 77 N.Y.2d 810, 571 N.Y.S.2d 913, 575 N.E.2d 399 [1991]). Moreover, a property owner will not be held liable for trivial defects, not constituting a trap or nuisance, over which one might merely stumble, stub his or her toes, or trip (*see* ***Miller v. Costco Wholesale Corp.,*** 125 AD3d 828, 4 NYS3d 281 [2d Dept. 2015]; ***Ambriose v New York City Tr. Auth.***, 33 AD3d 573, 826 NYS2d 261 [2d Dept 2006]; ***Fairchild v J. Crew Group, Inc.***, 21 AD3d 523, 800 NYS2d 735 [2d Dept 2005]; ***Hagood v. City of New York***, 13 AD3d 413, 785 NYS2d 924 [2d Dept 2004]; ***Germain v. Hegedus,*** 289 AD2d 443, 735 NYS2d 426 [2d Dept. 2001]). The court, in determining if the defect is trivial, is required to examine all the facts presented, including the "width, depth, elevation and irregularity, and appearance of the defect along with the 'time, place and circumstance' of the injury" (***Trincere v. County of Suffolk***, 90 NY2d 976, 978, 665 NYS2d 615 [1997]; *see* ***Wasserman v. Genovese Drug Stores***, 282 AD2d 447, 723 NYS2d 191 [2d Dept 2001]; ***Sanna v. Wal-Mart Stores***, 271 AD2d 595, 706 NYS2d 156 [2d Dept 2000]).

LIABILITY UNDER THE LABOR LAWS

Generally, to impose liability under the Labor Law, plaintiff must establish that the statute was violated and that the violation was the proximate cause of his injuries (*see* ***Cahill v. Triborough Bridge & Tunnel Auth.***, 4 NY3d 35, 823 NE2d 439 [2004]; ***Blake v. Neighborhood Hous. Servs. of N.Y. City***, 1 NY3d 280, 803 NE2d 757 [2003]). Labor Law 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (***Comes v. New York State Elec. & Gas Corp.***, 82 NY2d 876, 877 [1993]; *see also* ***Jock v Fien***, 80 NY2d 965, 590 NYS2d 878 [1992]). "It is well settled that an implicit precondition of the duty of an owner of contractor to maintain a safe construction site is that the party to be charged with that obligation 'have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition"(***Rizzuto v. L.A. Wenger Contracting Co.,*** 91 NY2d 343, 352, 693 NE2d 1068, 1073 [1988] and cases cited therein). Labor Law section 200 applies to owners, contractors, or their agents (*see* ***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]), who exercise control and supervision over the work, or who created or had actual or constructive notice of the alleged dangerous condition that caused the plaintiff's injuries (*see* ***Lombardi v Stout***, 80 NY2d 290, 590 NYS2d 55 [1992];***Yong Ju Kim v Herbert Constr. Co.***, 275 AD2d 709, 713 NYS2d 190 [2d Dept 2000]). It is firmly established that a worker cannot hold a landowner liable under provisions of the Labor Law where an accident is not caused by a dangerous condition but by the manner in which the work is undertaken and where there is no

evidence that the property owner exercised supervisory control over the work (*see* ***Lombardi v. Stout***, 80 NY2d 290, 590 NYS2d 55 [1992]; ***Begor v. Mid-Hudson Hardwoods, Inc.,*** 301 Ad2d 550, 754 NYS2d 57 [2d Dept. 2003]). As such, if the accident arose from the manner in which the work was performed, and the defendant exercised no supervision or control over the work, then it cannot be liable under section 200 of the Labor Law. (*see* ***Radoncic v. Indep. Garden Owners Corp.,*** 67 A.D.3d 981, 982, 890 N.Y.S.2d 555, 556–57 [2d Dept. 2009]; ***Ortega v. Puccia***, 57 A.D.3d 54, 61, 866 N.Y.S.2d 323[2d Dept. 2008] ; ***DeGennaro v. Long Island R.R.***, 258 A.D.2d 496, 496–97, 685 N.Y.S.2d 266, 267 [2d Dept.1999]; *see also* ***Comes v. New York State Elec. & Gas Corp.,*** 82 N.Y.2d 876, 609 N.Y.S.2d 168, 631 N.E.2d 110 [1993]; ***Lombardi v. Stout***, 80 N.Y.2d 290, 590 N.Y.S.2d 55, 604 N.E.2d 117 [1992]; ***Rojas v. Schwartz***, 74 A.D.3d 1046, 1046, 903 N.Y.S.2d 484 [2d Dept. 2010], *quoting* ***Gallello v. MARJ Distribs., Inc.,*** 50 A.D.3d 734, 735, 855 N.Y.S.2d 602 [2008] and ***Chowdhury v. Rodriguez***, 57 A.D.3d 121, 127–128, 867 N.Y.S.2d 123[2d Dept. 2008]). If, however, the plaintiff's injuries are not caused by the manner in which the work was performed but rather from an unsafe or dangerous condition on the premises, then a defendant will be liable under section 200 of the Labor Law if it had control over the work site and had either actual or constructive notice of the unsafe or dangerous condition (*see, e.g.,* ***Keating v. Nanuet Board of Education,*** 40 AD3d 706, 835 NYS2d 705 [2d Dept. 2007]; ***Payne v. 100 Motor Parkway Associates, LLC,*** 45 AD3d 550, 846 NYS2d 211 [2d Dept. 2007]; ***Mendoza v. Highpoint Assoc., IX, LLC***, 83 AD3d 1, 9 [1st Dept. 2011])(internal quotation marks and citations omitted). In that instance, a plaintiff need not prove defendant had supervision and control over the actual work being performed (*see* ***Rojas v. Schwartz***, 74 A.D.3d at 1047, *supra*, *quoting* ***Ortega v. Puccia***, 57 A.D.3d 54, 61, *supra*). Rather, the defendant must prove that it did not cause and had no actual or constructive notice of the unsafe or dangerous condition that caused the alleged injury (*see* ***Wejs v. Heinbockel,*** 142 AD3d 990, 37 NYS3d 569 [2d Dept. 2016]; ***Giovanniello v. E.W. Howell, Co., LLC***, 104 A.D.3d 812, 813–14, 961 N.Y.S.2d 513, 516 [2d Dept. 2013] *citing* ***Reyes v. Arco Wentworth Mgt. Corp.,*** 83 A.D.3d 47, 52, 919 N.Y.S.2d 44 [2d Dept. 2011]).

Labor Law section 241 (6) provides, in relevant part, that "[a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places." The Court of Appeals has held that section 241 (6) will only apply to work being performed as part of an ongoing construction plan (*see* ***Lombardi***, *supra,* 80 NY2d at 296). Notably, tree cutting, by itself, falls outside of the construction or renovation context and is not covered activity under section 241 (6) (*see* ***Radoncic v. Indep. Garden Owners Corp.,*** 67 A.D.3d 981, 982, 890 N.Y.S.2d 555, 556–57 [2d Dept. 2009]); ***Burr v. Short***, 285 A.D.2d 576, 728 N.Y.S.2d 741 [2d Dept. 2001]; ***Crosett v. Wing Farm, Inc.***, 79 AD3d 1334, 912 NYS2d 751 [3d Dept. 2010]). Moreover, it is well settled that to maintain an action under Labor Law section 241 (6), plaintiffs much allege a violation of a specific provision of the Industrial Code (*see* ***Ross v. Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 501-502 [1993]; ***O'Sullivan v. IDI Constr. Co. Inc.,*** 28 AD3d 225 [1st Dept. 2006] *aff'd*, 7 NY3d 805 [2006]; ***Cun–EnLin v. Holy Family Monuments,*** 18 AD3d 800 [2d Dept. 2005]; ***Burkoski v. Structure Tone, Inc.,*** 40 AD3d 378 [1st Dept.2007]; ***Maynard v. DeCurtis***, 252 A.D.2d 908 [3d Dept. 1998]). As alleged herein, section 23-1.7 (d) of the Industrial Code (12 NYCRR 23-1.7 (d)) prohibits employers from allowing employees to use " a floor, passageway, walkway, scaffold, platform or other elevated working surface [which has] any...foreign substance which may cause slippery footing" and 23-1.7 (e) of the Industrial Code (12 NYCRR 23-1.7 (e)) requires

passageways to be "kept free from accumulations of dirt and debris and from any other obstructions or conditions which may cause tripping" and requires those parts of "floor, platforms and similar areas where persons work or pass through [to] be kept free from accumulations of dirt and debris." Sections 23-1.7 (d) and (e), however, do not apply to tree cutting that occurs outside of a construction, demolition or excavation project *(see* ***Morales v. Westchester Stone Co., Inc.***, 63 A.D.3d 805, 881 N.Y.S.2d 456 [2d Dept. 2009]; ***Rivera v. Santos***, 35 A.D.3d 700, 701–702, 827 N.Y.S.2d 222 [2d Dept. 2006]; ***Burr v. Short***, 285 A.D.2d 576, 728 N.Y.S.2d 741 [2d Dept. 2001]; ***DeGennaro v. Long Is. R.R.***, 258 A.D.2d 496, 685 N.Y.S.2d 266 [2d Dept. 1999]) nor do those sections of the Industrial Code apply to construction site accidents that occur in open areas, open yards, or areas between buildings that are exposed to the elements (*see, e.g.*, ***Spence v. Island Estates at Mt. Sinai II LLC***, 79 AD3d 936, 914 NYS2d 203 [2d Dept. 2010]; ***Roberts v. Worth Construction, Inc.,*** 21 A.D. 3d 1074, 802 NYS 2d 177 [2nd Dept. 2005](temporary roadway in open area at ground level was not a passageway, walkway or other elevated working surface); ***Rose v. A. Servidone, Inc.,*** 268 AD2d 516, 702 NYS2d 603 [2d Dept. 2000]) *(*open-area construction site was not passageway covered under 12 NYCRR 23-1.7 (e) (1) or floor, platform or similar area covered by 12 NYCRR 23-1.7 (e)(2); ***O'Gara v. Humphreys & Harding, Inc.,*** 282 A.D. 2d 209,723 NYS 2d 25 [1st Dept. 2001](muddy ground in an open area exposed to the elements not covered by 23-1.7 (d); ***Muscadelle v. Herbert Construction Co., Inc.,*** 265 A.D. 2d 264,697 NYS 2d 35 [1st Dept. 1999]; ***Merlin v. New York Post,*** 30 AD3d 309, 817 NYS2d 279 [1st Dept. 2006], ***Thomson v. Linwood Central School District,*** 19 Misc. 3d 1112(A), 862 NYS 2d 818 (Supreme Court, Suffolk Cty. 2008); ***Baird v. Ladle, Inc.,*** 210 A.D.2d 577, 619 NYS 2d 800 [3d Dept. 1994]; ***Samian v. New York State Elec. & Gas Corp.,*** 199 A.D.2d 796, 605 NYS 2d 51 [3d Dept. 1993]; ***Stairs v. State St. Assocs. L.P.,*** 206 A.D.2d 817, 818, 615 NYS 2d 478, 479–80 [3d Dept. 1994](12 NYCRR 23-1.7 (d) and (e)(2) apply to defined walkways, passageways or paths, not to common areas or an open yard in front of or between buildings); ***Jennings v. Lufkin Partnership***, 250 A.D.2d 388, 673 NYS 2d 85, 85 [1st Dept. 1998](holding that an open area between two high-rise buildings was not a passageway); ***McGrath v. Lake Tree Vill. Assocs.,*** 216 A.D.2d 877, 629 NYS 2d 358, 359 [4th Dept. 1995](concluding that an open yard in front of or between buildings is not a passageway); ***Scarupa v. Lockport Energy Assoc., L.P.,*** 245 A.D. 2d 1038, 667 NYS 2d 561 [4th Dept. 1997](muddy ground was common area or open yard and not a foreign substance but rather ground exposed to the elements); ***Stairs v. Street Assocs. L.P.,*** 206 A.D.2d 817, 615 NYS 2d 478, 479–80 [3d Dept. 1994](same); ***Homola v. Praxair, Inc.,*** 412 F. App'x 397, 400 [2d Cir. 2011]("the consistent holding of New York courts has been that an open yard between buildings is not a passageway or walkway"). Further, liability cannot be found under section 241 (6) of the Labor Law where the object that caused the plaintiff to trip and fall was an integral part of the work being performed or where the foreign substance alleged by he plaintiff to have caused his accident was created by nature and exposed to the elements (*see* ***O'Sullivan v. IDI Const. Co., Inc.,*** 7 N.Y.3d 805, 822 N.Y.S.2d 745, 855 N.E.2d 1159, 1159 [2006] (pipe integral part of work site); ***Homola v. Praxair, Inc.,*** 412 F. App'x 397, 400 (2d Cir. 2011)(fence);***Castillo v. Starrett City, Inc.,*** 4 AD3d 320, 772 NYS2d 74 [2d Dept. 2004] (small piece of insulation); ***Salinas v. Barney Skanska Constr. Co.,*** 2 AD3d 619, 769 NYS2d 559 [2d Dept. 2003] (demolition debris); ***Schroth v. New York State Thruway Auth.,*** 300 A.D.2d 1044, 752 NYS2d 478 [4th Dept. 2002] (sandblasting hose); ***Harvey v. Morse Diesel Intl.,*** 299 A.D.2d 451, 749 NYS2d 893[2d Dept. 2002], *lv denied* 99 N.Y.2d 508 [2003] (6–inch piece of electrical cable); ***Scarupa v. Lockport Energy Assoc., L.P.,*** 245 A.D. 2d 1038, 667 NYS 2d 561 [4th Dept. 1997](muddy ground not foreign substance); ***Sharrow v. Dick Corp.,*** 233 A.D.2d 858, 649 NYS2d 281 [4th Dept.1996], *lv denied* 89 N.Y.2d 810 [1997] (Genie hoist)).

THE TESTIMONY OF THE PARTIES

Plaintiff Doran testified at his deposition that on the date of his accident he was employed as a part-time supervisor by Russ Tree Service. On March 8, 2012, his boss, Russ Bresson ("Bresson"), told him to pick up a log truck from Russ Tree Service's yard and then meet him at a private home located at 14 Torlen Court, Hauppauge, New York. When Doran was at the Torlen Court job, Bresson and Kenneth McAvoy told Doran to go to the subject property and take down the biggest tree behind the building as well as another tree. Plaintiff Doran testified that he arrived at the subject property at about 10:00 a.m., that he was the supervisor for the tree removal work at the subject property, that he was an expert in tree removal projects, that the only workers who were at the subject property were the four Russ Tree Service crew members, and that all of the equipment used on the date of the accident belonged to Russ Tree Service, not McAvoy Construction or any other defendant. Doran testified that a written work order prepared by him prior to the tree removal job stated "remove [sic] trees and stumps behind building at 367 Lake Avenue, number 2 was cut back over building south side property and then clean up the job." While Doran testified that Kenneth McAvoy was present at the subject property on the date of the accident, this was prior to any tree work being performed and Kenneth McAvoy did not give him any instructions as to how the trees were to be taken down or trimmed nor did anyone else tell Doran how the tree work should be accomplished. Doran testified that there was no construction work taking place or underway, there were no other trade laborers or contractors at the subject property, and there were no renovations of any kind in progress at the time of the accident at the subject property. Plaintiff Doran testified that he gave the members of the Russ Tree Service crew instructions as to how the trees were to be taken down, what equipment and trucks would be used, and how the equipment would be used. Plaintiff Doran instructed the Russ Tree Service crew where to put the truck, what branches to take down first, and where to put the rope around the branches of the tree so that the branches could be lowered properly. Doran further testified that someone should be at the other end of the rope so that the branches are gradually lowered to the ground. Regarding the actual tree removal that took place on the date of the accident, plaintiff testified "we were taking down big limbs, so when the limbs come down and go on to the ground, the guy unties the rope, then I would take the log loader and slide the whole branch to where I needed it. The guy would cut a piece of wood, I would put it in the log loader, spin the rest of the branch around and should have it into the other truck that was backed into the job. So we were using the equipment to do the job." Prior to the accident, plaintiff testified that about fifteen branches were cut, and the crew started taking out about fourteen, sixteen-inch long branches with rope on them. He testified that another worker was using a chain saw to cut the individual limbs with a safety line. During this time, plaintiff testified that he was telling the worker when to lower the rope, when to tighten on the rope, when to cut the wood, and when to cut the branches. He further testified that a portion of the rope is up in the tree and/or connected to the branch that is being taken down and the rest of the rope is in a coil at the bottom of the tree with a "roper" who coils the rope at the bottom of the tree. Plaintiff Doran testified that you have to have control of the coiled rope, "you need to know where it is." He testified that prior to he accident, he went to move his log truck and at that time a member of the crew was holding the end of the rope at the ground level. He further testified that when he pulled the truck up and got out of the truck and turned, he was facing the job and was about eighty feet away from the tree. He then walked to the left on an angle between gravel and weeds "to where the guy was holding the rope" and one of the other workers was holding the rope "but he wasn't in the right spot...he was towards the left...he moved the rope" and the rope then was about thirty feet from the tree and he saw the man

holding the rope and he saw the rope. Plaintiff testified that the bottom of the rope should have been with the worker who was holding the rope. He indicated that the bottom of the rope was not with the worker and "that's where the whole problem came in." He testified that he did not make any observation of the rope along the ground as there were weeds, debris (branches, little twigs, sawdust, weeds, vines), chips, branches and gravel on the ground and he was about fifty or sixty feet away from the bottom of the rope. He testified that he started walking towards the worker with the rope because "he wasn't doing the right thing and he couldn't hear me. I wanted to stop him." Doran testified that the worker "took the wraps off the tree" and he could not see any portion of the rope still wrapped around the tree..."the wrap wasn't there...I assumed the rope was with him, when he moves, you're supposed to take the rope with you, but the guy, he didn't do that...he's suppose to take the whole coil, so you have control of the rope. And he didn't do that. He just grabbed the rope and ran across the property, and the rope was left live, and as I was walking over, I didn't see it like that, and I don't know if it coiled around my leg or a stick grabbed it and it grabbed my leg...the rope grabbed my leg." "I never saw the bottom of the rope, and I just saw what he was doing, and it was going to be a problem...I never saw the end of the rope...the coil and the bottom of the rope." "Usually the rope is with the man, whoever is controlling the job and the lowering controls the rope. And , you know, the rope is with you. That's the job, you know, that's the job safety, you never leave a live rope." Doran testified that the rope grabbed the bottom of his right leg and flipped him upside down onto his head and then he rolled flat on his back. He further testified that at the time of the accident he was standing in debris, weeds, twigs, wood chips, branches, vines, "you know, there is debris. when you take a tree down, there is stuff all over." Weeks after the accident plaintiff Doran said he spoke with the workers about how the rope should have been coiled next to the worker and asked them "why was it a live rope?" According to Doran, the worker had unwrapped the rope from the tree and had moved away from the coiled rope. Doran testified that the co-worker who was holding the rope prior to the accident was not following proper procedure and it was that precise rope that plaintiff Doran says caused him to fall.

Kenneth McAvoy testified on behalf of defendant Harbor Building and McAvoy Construction, as the principal of both entities. He testified that the subject property was owned by Harbor Building and operated as Harbor Building's mailing address. Kenneth McAvoy further testified that in March of 2012, Harbor Building hired Russ Tree Service by verbal agreement to remove one tree in the back of the building located at the subject property. Kenneth McAvoy testified that he retained Russ Tree Services on behalf of defendant Harbor Building, not defendant McAvoy Construction and that there was no other contracting work being performed at the subject property other than the removal of that one tree. Kenneth McAvoy further testified that neither McAvoy Construction nor Harbor Building directed, supervised, or controlled the tree removal work at the subject property on the date of the accident.

Joseph McGorry testified on behalf of defendant JP Walsh. He testified that JP Walsh owned 369 Lake Avenue, St. James, not the property located at 367 Lake Avenue, St. James where the accident occurred. He further testified that the property owned by JP Walsh was leased to the company that owned The Irish Viking and that he had not been to the premises for at least one to two years prior to the date of the accident.

DEFENDANTS' PRIMA FACIE ENTITLEMENT TO SUMMARY JUDGMENT

Defendants established their prima facie entitlement to judgment as a matter of law. Specifically, defendants JP Walsh and McAvoy Construction make a prima facie showing that there was no duty on their part to plaintiff Doran under any theory of negligence or liability under Labor Law sections 200 or 241 (6). Defendant JP Walsh did not own the property, did not contract with Russ Tree Services, and did not supervise, direct, or control any of the tree removal work conducted at the subject property on the date of Doran's accident. JP Walsh was an 'out-of-possession' landlord even of its own property, which was located next to the subject property. Being that defendant JP Walsh did not own or control the subject property, did not hire Russ Tree Service, and did not supervise or control any of the tree removal work which gave rise to the injury, JP Walsh has made a prima facie showing of its entitlement to summary judgment dismissing the negligence claims (*see* ***Minott v. City of New York***, 230 AD2d 719, 645 NYS2d 879 [2d Dept. 1996]); ***Balsam v. Delma Engineering Corp.***, 139 AD2d 292, 532 NYS2d 105, 108 [1st Dept. 1988]) and the Labor Law claims (*see* ***Sabato v. New York Life Ins. Co.***, 259 AD2d 535, 686 NYS2d 465 [2d Dept.1999](negligence and Labor Law §§200, 240 (1) and 241 (6) claims dismissed as defendants did not exercise any degree of supervisory control over project); ***Headen v. Progressive Painting Corp.,*** 160 AD2d 319, 320, 533 NYS2d 401 [1st Dept. 1990]; *see also* ***Russin v. Picciano & Sons,*** 54 NY2d 311, 445 NYS2d 127 [1981]). Similarly, defendant McAvoy Construction had no connection to the subject property, did not hire Russ Tree Services, did not supervise, direct, or control any of the tree removal work, and was not involved in the tree removal services performed at the subject property on the date of Doran's accident and because defendant McAvoy Construction did not own the subject property and did not supervise or control any of the tree removal work which gave rise to the injury, it too has made a prima facie showing of its entitlement to summary judgment dismissing the negligence claims (*see* ***Minott v. City of New York***, 230 AD2d 719, 645 NYS2d 879 [2d Dept. 1996]); ***Balsam v. Delma Engineering Corp.***, 139 AD2d 292, 532 NYS2d 105, 108 [1st Dept. 1988]) and the Labor Law claims (*see* ***Sabato v. New York Life Ins. Co.***, 259 AD2d 535, 686 NYS2d 465 [2d Dept. 1999](negligence and Labor Law §§200, 240 (1) and 241 (6) claims dismissed as defendants did not exercise any degree of supervisory control over project); ***Headen v. Progressive Painting Corp.***, 160 AD2d 319, 320, 533 NYS2d 401 [1st Dept. 1990]; *see also* ***Russin v. Picciano & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]).

Moreover, defendant Harbor Building has made a prima facie showing of judgment as a matter of law on plaintiffs' claims of common law negligence and under section 200 of the Labor Law. The evidence demonstrates Doran supervised the tree removal project, not Harbor Building, and the alleged dangerous condition (the coiled rope that plaintiff testified he tripped over) arose from the method by which a co-worker, supervised and controlled by Doran, performed the tree removal work, which was the proximate cause of Doran's injuries (*see* ***Comes v. New York State Electric & Gas Corp.,*** 82 NY2d 876, 609 NYS2d 168 [1993]; ***Bailey v. Hammedani,*** 241 AD2d 645, 660 NYS2d 85 [3d Dept. 1997]). The dangerous condition was created by Doran's co-worker and his improper usage or placement of the rope, which dangerous condition was not caused, created by or known to defendant Harbor Building (*see* ***Peralta v. Henriguez***, 100 NY2d 139, 790 NE2d 1170 [2003]); ***Mercer v. City of New York***, 223 AD2d 688, 637 NYS2d 456 [2d Dept. 1996]); ***Comes v. New York State Elec. and Gas Corp.***, 82 NY2d 876, 609 NYS2d 168 [1993]; ***Lewis v. Metropolitan Transp. Auth.***, 99 AD2d 246, 472 NYS2d 368 [1st Dept. 1984]); ***Schuler v. Corrugated Paper Machinery Co.***, 38 AD3d 1345, 832 NYS2d 708 [4th Dept. 2007]). Moreover,

the weeds, twigs, and branches, which Doran claims he was standing on at the time of the accident, were visible to him and were not inherently dangerous (*see* ***Rose v. A. Servidone, Inc.,*** 268 AD2d 516, 702 NYS2d 603 [2d Dept. 2000]). Thus, where, as here, the alleged accident arises from the subcontractor's manner of work, rather than an unsafe or defective condition, and the owner exercised no supervisory control over the method and manner of the work, no liability attaches to the owner under either common law negligence or Labor Law §200 (*see* ***Comes v. New York State Elec. & Gas Corp.***, 82 NY2d 876, 877, 609 NYS2d 168 [1993]; ***Olarte v. Morgan,***148 Ad3d 918, 49 NYS3d 532 [2d Dept. 2017]; ***Ferraro v. Best Modular Homes, Inc.,*** 33 AD3d 847, 823 NYS2d 477 [2d Dept. 2006]; ***Mas v. Kohen***, 283 AD2d 616, 725 NYS2d 90 [2d Dept 2001]).

Defendant Harbor Building also has made a prima showing of judgment as a matter of law on plaintiffs' Labor Law §241 (6) claims, as defendant Harbor Building established, prima facie, that Doran's injuries did not occur in connection with any ongoing construction, demolition, or excavation work (*see* ***Nagel v. D & R Realty Corp.,***99 NY2d 98, 752 NYS2d 581 [2002]; ***Olarte v. Morgan,***148 Ad3d 918, 49 NYS3d 532 [2d Dept. 2017]; ***Egos v. Werlatone,*** 68 AD3d 713, 890 NYS2d 109 [2d Dept. 2009]; ***Burr v. Short,*** 285 AD2d 576, 728 NYS2d 741 [2d Dept. 2001]; ***Begor v. Mid-Hudson Hardwoods, Inc.,*** 301 Ad2d 550, 754 NYS2d 57 [2d Dept. 2003]); ***Gonzalez v. Woodbourne Arboretum, Inc.,*** 100 AD3d 694, 954 NYS2d 113 [2d Dept. 2012](accident did not occur in connection with construction, demolition or excavation work and thus Labor Law § 241 (6) did not apply);***Crossett v. Wing Farm, Inc.,*** 79 AD3d 1334, 912 NYS2d 751 [3d Dept. 2010]. Defendant Harbor Building clearly proved that the tree removal work arose outside of a construction or renovation context (*see* ***Morales v. Westchester Stone Co., Inc.,*** 63 A.D.3d 805, 805–806, 881 N.Y.S.2d 456 [2d Dept. 2009]). Defendant Harbor Building has set forth sufficient evidence that the only work being performed on the date of the accident was the tree removal work being performed by plaintiff Doran and the co-workers under his supervision and control, thus establishing prima facie its entitlement to summary judgment in its favor on the section 241 (6) Labor Law claim.

PLAINTIFFS' BURDEN OF PROOF

The burden now shifts to plaintiffs to raise a triable issue of fact in order to defeat summary judgment in favor of defendants. Plaintiffs first raise two procedural issues. Plaintiffs allege that defendant McAvoy Construction is precluded from making a second summary judgment motion because this Court denied its prior motion. However, the prior motion by defendant McAvoy Construction was pursuant to CPLR 3211, not CPLR 3212. Further, plaintiffs assert that the within motion by McAvoy Construction refers to plaintiff's complaint and not the amended complaint and thus, is procedurally defective. However, plaintiffs' supplemental summons and amended complaint were attached to the motion papers submitted by defendant McAvoy Construction. As such, the motion by defendant McAvoy Construction is appropriately before the Court.

Plaintiffs next contend that there are two issues of fact, one concerning whether McAvoy Construction hired Russ Tree Service to do the tree removal work at the subject property or whether Harbor Building hired Russ Tree Service for this work. The second issue of fact claimed by plaintiffs is whether there was ongoing construction work being done at the subject property. Plaintiffs assert there was ongoing construction at the subject property and that this is a case falling within the purview of sections 200 and 241 (6) of the Labor Law.

On the first issue, plaintiff claims that McAvoy Construction, not Harbor Building hired Russ Tree Service to do two projects on the date of the accident, one of which was the tree removal work where the accident occurred in St. James, New York and the other was at a location in Hauppauge, New York. This is a collateral issue, not a material issue, and the resolution of this issue has no impact upon whether or not the defendants owed a duty to plaintiff Doran or whether there was any negligence on the part of the defendants. Notwithstanding, plaintiffs contend, in conclusory fashion, that both projects were for McAvoy Construction, as Kenneth McAvoy's phone number was listed on the Russ Tree Service invoices for both of the tree removal projects on the date of the accident. Plaintiff Doran admits that he put the phone number of Kenneth McAvoy on both of those invoices, not Bresson, the owner of Russ Tree Service, and a reading of Doran's testimony reveals that he only believed both projects were for McAvoy Construction, based solely upon his understanding as to who requested the work. Plaintiff testified that he was told by Russ Bresson that they were doing tree work for a contractor named McAvoy, meaning Kenneth McAvoy. To support plaintiffs' theory that it was McAvoy Construction that hired Russ Tree Service for both projects, plaintiff Doran submits an affidavit and refers to blurry photographs taken one to two weeks after the accident of a white box truck purportedly owned by McAvoy Construction, which photographs counsel for McAvoy Construction asserts were not exchanged during discovery. Plaintiff Doran claims in his affidavit that at the Hauppauge location where the first tree removal job was taking place on the date of the accident, he noticed a white box truck which bore the name McAvoy Construction and that he saw the same white box truck with the name McAvoy Construction at the subject property two weeks after the accident.[1] Plaintiff Doran's speculation and inconclusive evidence on this collateral issue of what company owned by Kenneth McAvoy hired Russ Tree Service is wholly insufficient and does not create a material issue of fact. Furthermore, the statements made by plaintiff Doran in this regard conflict with his deposition testimony. The admissible evidence reveals that there is no dispute that Kenneth McAvoy is the owner of both McAvoy Construction and Harbor Building and that there is no company listed on either of the work orders prepared by Doran for the tree removal work to be completed by Russ Tree Service on the date of the accident. Kenneth McAvoy testified that the tree removal work at the subject property was for Harbor Building and Harbor Building also is the owner of the subject property. Kenneth McAvoy further testified that he was briefly at the subject site in his capacity as president of Harbor Building prior to the tree removal work to confirm with Doran which trees were to be removed, and then Kenneth McAvoy left the site. Doran has offered no evidence in admissible form to refute Kenneth McAvoy's testimony that Harbor Building hired Russ Tree Service for the tree removal work at the subject property. Nevertheless, this collateral issue does not create a triable issue of fact.

On the second issue, plaintiffs assert that the tree removal work done at the subject location was part of an overall or ongoing construction project. Plaintiff Doran asserts in his affidavit that when he arrived at the subject location to supervise the tree removal project, there was "construction debris strewn about" and that "it is obvious that McAvoy Construction was performing renovations and/or construction work at the subject location." These assertions, however, contradict plaintiff's deposition testimony. Plaintiff Doran testified at his deposition that the "debris" at the subject

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[1]Plaintiff admittedly states that his affidavit is meant to "supplement" his deposition testimony. However, a careful and thorough review of his deposition testimony reveals that his affidavit contains several inconsistencies and contradictions.

location consisted of weeds, branches, twigs, sawdust, and vines and plaintiff further testified that sawdust, twigs, and branches were the product of his fellow worker using a chain saw to remove the branches from a tree on the subject property. Notably, plaintiff Doran makes no mention of "*construction* debris" during his deposition. Plaintiff Doran further states in his affidavit that the dumpsters located at the back of the subject property were "partially filled with construction debris including roofing material, siding and sheet rock" and that when he went back to the property a week or two after the accident he noticed the white McAvoy Construction box truck, which was the same truck he saw at the Hauppauge property prior to going to the subject location on the morning of the accident. Again, the issue of the white box truck being at the Hauppauge location contradicts his deposition testimony. Also, plaintiff testified at his deposition to photographs he took with a portable camera he purchased at 7-Eleven one to two weeks after the subject accident, which photographs were identified at his deposition. However, plaintiff made no mention of the white box truck photographs during his deposition and again, according to counsel for McAvoy Construction, those photographs were never disclosed during discovery, although requested. Thus, the Court disregards the assertions in Doran's affidavit regarding the photographs of the white box truck taken by him with a portable camera purchased at 7-Eleven one to two weeks after the subject accident. Moreover, photographs taken one to two weeks after the accident are not relevant in regards to the conditions that existed at the subject property on the date of the accident. Further, there is no evidence in admissible form which connects the alleged construction debris in the dumpsters at the subject property on the date of the accident with McAvoy Construction or any other defendant. Such pure speculation and conjecture on the part of plaintiffs does not create a question of fact concerning whether McAvoy Construction was performing any type of ongoing construction at the time of the subject accident. Plaintiff Doran provides no proof in admissible form that this purported debris in the dumpster was generated by McAvoy Construction. Plaintiff further states in his affidavit that Kenneth McAvoy told him that "he was almost done with the two buildings at 367 Lake Avenue in St. James." However, plaintiff was asked at his deposition of conversations he had with Kenneth McAvoy and his affidavit contradicts his prior testimony. In that regard, plaintiff Doran testified at his deposition that he heard Kenneth McAvoy "saying [to Russ Bresson] he *was going to renovate* the whole place....[and] wanted the trees taken down so they could renovate the business and clean the place up and reopen..*they're going to redo the place*, we've got to get these dead trees down."

Here, although section 241 (6) defines "construction work" to include "alterations of a structure," the testimony reveals that there was no construction work taking place at the subject location at the time of the accident, other than the removal of trees. As stated by the Second Department "the protections of Labor Law §241 (6) do not apply to claims arising out of maintenance of a building or structure outside of the construction context. Since the injured plaintiff was not involved in construction, Labor Law §241 (6) does not apply" (***Hatfiled v. Bridgedale, LLC,*** 28 AD3d 608, 814 NYS2d 659 [2d Dept. 2006]). Indeed "tree cutting is not one of the activities" covered by Labor Law §241 (6)(***Radoncic v. Independence Garden Owners Corp.,*** 67 AD3d 981, 982, 890 NYS2d 555 [2d Dept. 2009]; *see also* ***Egos v. Werlatone,*** 68 AD3d 713, 890 NYS2d 109 [2d Dept. 2009]). Furthermore, the sections of the Industrial Code relied upon by plaintiffs, specifically, 12 NYCRR 23–1.7 (d) and (e)(1) are limited in application to passageways and 12 NYCRR 23–1.7(e)(2) relates to "[t]he parts of floors, platforms and similar areas where persons work or pass". An out-of-doors worn dirt pathway is not a floor, platform, passageway or similar working surface within the purview of the cited regulations (*see* ***Spence v. Island Estates at Mt. Sinai II LLC,*** 79 AD3d 936, 914 NYS2d 203 [2d Dept. 2010]; ***Roberts v. Worth Construction, Inc.,***

21 A.D. 3d 1074, 802 NYS 2d 177 [2nd Dept. 2005](temporary roadway in open area at ground level was not a passageway, walkway or other elevated working surface); ***McGrath v. Lake Tree Vil. Assocs.,*** 216 A.D.2d 877, 878, 629 N.Y.S.2d 358 [4th Dept. 1995]; ***Stairs v. State St. Assocs.,*** 206 A.D.2d 817, 818, 615 N.Y.S.2d 478 [3d Dept. 1994]). Thus, the regulations cited by plaintiffs do not apply to this case, as the accident occurred outdoors in an open area exposed to the elements (*see, e.g.,* ***Spence v. Island Estates at Mt. Sinai II LLC,*** 79 AD3d 936, 914 NYS2d 203 [2d Dept. 2010]; ***Roberts v. Worth Construction, Inc.,*** 21 A.D. 3d 1074, 802 NYS 2d 177 [2nd Dept. 2005](temporary roadway in open area at ground level was not a passageway, walkway or other elevated working surface); ***Rose v. A. Servidone, Inc.,*** 268 AD2d 516, 702 NYS2d 603 [2d Dept. 2000] (open-area construction site was not passageway covered under 12 NYCRR 23-1.7 (e) (1) or floor, platform or similar area covered by 12 NYCRR 23-1.7 (e)(2)); ***O'Gara v. Humphreys & Harding, Inc.,*** 282 A.D. 2d 209,723 NYS 2d 25 [1st Dept. 2001](muddy ground in an open area exposed to the elements not covered by 23-1.7 (d)); ***Muscadelle v. Herbert Construction Co., Inc.,*** 265 A.D. 2d 264,697 NYS 2d 35 [1st Dept. 1999]; ***Merlin v. New York Post,*** 30 AD3d 309, 817 NYS2d 279 [1st Dept. 2006], ***Thomson v. Linwood Central School District,*** 19 Misc. 3d 1112(A), 862 NYS 2d 818 (Supreme Court, Suffolk CTY. 2008); ***Baird v. Ladle, Inc.,*** 210 A.D.2d 577, 619 N.Y.S.2d 800 [3d Dept. 1994]; ***Samian v. New York State Elec. & Gas Corp.,*** 199 A.D.2d 796, 605 N.Y.S.2d 51 [3d Dept. 1993]; ***Stairs v. State St. Assocs. L.P.,*** 206 A.D.2d 817, 818, 615 N.Y.S.2d 478, 479–80 [3d Dept. 1994] (12 NYCRR 23-1.7 (d) and (e)(2) apply to defined walkways, passageways or paths, not to common areas or an open yard in front of or between buildings). Furthermore, weeds, branches, twigs, and sawdust are not foreign substances nor are they slippery conditions contemplated by 12 NYCRR 23-1.7 (d)(*see* ***Rose v. A. Servidone, Inc.,*** 268 AD2d 516, 702 NYS2d 603 [2d Dept. 2000]) and herein, with the exception of the alleged weeds, all were caused by and resulted from the tree removal being undertaken by plaintiff Doran and his co-workers at the subject property.

Therefore, based upon plaintiff Doran's deposition testimony admissions, no ongoing construction or construction work was in process at the time of the accident. Plaintiff Doran merely speculates in conclusory fashion that the tree removal work at the subject property was part of a construction project already underway by McAvoy Construction. According to Doran's deposition testimony, any alleged construction referred to by Kenneth McAvoy was to occur in the future. Plaintiffs are attempting to create a question of fact based upon a theory that if McAvoy Construction hired Russ Tree Service to perform the tree removal work and there was construction debris in the dumpsters at the subject property, that somehow McAvoy Construction was in the process of renovating the buildings thus making defendant McAvoy Construction liable under the Labor Law. However, plaintiffs theory is not supported with any evidence in admissible form. Kenneth McAvoy testified that it was Harbor Building not McAvoy Construction who hired Russ Tree Service to perform the tree work on the property owned by Harbor Building, which is undisputed and any alleged connection with purported construction debris in a dumpster on the subject property is insufficient to link McAvoy Construction to the alleged debris. Moreover, as stated, plaintiff Doran's deposition testimony contradicts and is inconsistent with this purported theory alleged by Doran in his affidavit. As such, plaintiffs have not submitted any evidence in admissible form to create a triable question of fact.

THE FINDINGS OF THE COURT

The Court finds, as a matter of law, that the subject accident and Doran's alleged injuries were caused by the manner in which the tree removal work was performed by Doran's co-worker, under Doran's supervision, and that the dangerous condition was the improper use and/or placement of the coiled rope, which was an integral part of the tree removal work, which was not created, caused by, or known to Harbor Building or any other defendant. Further, defendant Harbor Building is not liable for any alleged debris on the subject property, which according to plaintiff's deposition testimony consisted of weeds, twigs, and branches, as such debris was open and obvious (***Rose v. A. Servidone, Inc.,*** 268 AD2d 516, 702 NYS2d 603 [2d Dept. 2000]) and as to the twigs and branches, those were created by the tree removal work being performed.

Based upon the above, this Court awards summary judgment to defendants on the negligence and section 200 Labor Law claims, as plaintiff Doran supervised the tree removal project, not defendants, any alleged dangerous condition arose from the method by which a worker, who was supervised and controlled by plaintiff Doran, performed the tree removal, which was the proximate cause of Doran's injuries (*see* ***Comes v. New York State Electric & Gas Corp.,*** 82 NY2d 876, 609 NYS2d 168 [1993]; ***Bailey v. Hammedani,*** 241 AD2d 645, 660 NYS2d 85 [3d Dept. 1997]). Similarly, summary judgment in favor of defendants on plaintiffs' § 200 Labor Law claims is appropriate, where, as here the accident occurred as a result of plaintiff's method of operation and defendants did not exercise supervision or control over the plaintiff's work (*see* ***Olarte v. Morgan,***148 Ad3d 918, 49 NYS3d 532 [2d Dept. 2017](accident arose from manner in which tree removal was performed and defendants had not authority to supervise or control methods of plaintiff's work entitling defendants to summary judgment on Labor Law §200 claim); ***Ferraro v. Best Modular Homes, Inc.,*** 33 AD3d 847, 823 NYS2d 477 [2d Dept. 2006])(defendants entitled to summary judgment on Labor Law §200 claim where accident was a result of manner in which tree removal work was performed and plaintiff failed to offer any evidence that defendants exercised supervisory control over work performed or any input into how trees were to be removed); ***Quintavalle v. Mitchell Backhoe Service, Inc.,***306 AD2d 454, 761 NYS2d 841 [2d Dept. 2003]).

The Court further finds as a matter of law that section 241 (6) of the Labor Law does not apply to this case, as the location of plaintiff Doran's fall was not a construction site, being that Doran testified that there was no construction work in progress and no construction workers present at the subject property on the date of the accident other than the Doran and the Russ Tree Service crew. Further, the location of the accident was not a "passageway" or other area within the ambit of Industrial Code section 23-1.7 (e) (1) and (e) (2) but rather was an open and common area not covered by the regulations (*see* ***Bopp v. A.M. Rizzo Elec. Contractors Inc.,*** 19 AD3d 348 [2d Dept. 2005]; ***Laboda v. V.J.V. Dev. Corp.,*** 296 A.D.2d 441 [2d Dept. 2002]; ***Rose v. A. Servidone, Inc.,*** 268 A.D.2d 516, 702 NYS2d 603 [2d Dept. 2000]; ***Morra v. White,*** 276 A.D.2d 536 [2d Dept. 2000]; ***Burkoski v. Structure Tone, Inc.,*** 40 AD3d 378 [1st Dept. 2007]; ***Muscadelle v. Herbert Constr. Co., Inc.,*** 265 A.D.2d 264 [1st Dept. 1999]; ***Thomson v. Linwood Cent. Sch. Dist.,*** 19 Misc. 3d 1112(A), 862 N.Y.S.2d 818 [Suffolk County 2008]). Moreover, the weeds, branches, and/or twigs alleged by plaintiff Doran to have obstructed his view of the coiled rope are not a foreign substance nor a slippery condition contemplated by 12 NYCRR 23-1.7 (d)(*see* ***Kowalik v. Lipschutz,*** 81 AD3d 782, 917 NYS2d 251 [2d Dept. 2011]); ***Salinas v. Barney Skanska Construction Co.,*** 2 AD3d 619, 769 NYS2d 559 [2d Dept. 2003]; ***Rose v. A. Servidone, Inc.,*** 268 AD2d 516, 702 NYS2d 603 [2d

Dept. 2000]). And, the coiled rope, being the alleged tripping hazard, was an integral part of the work being performed precluding liability under 12 NYCRR 23-1.7 (e)(2)(*see* ***Salinas v. Barney Skanska Construction Co.,*** 2 AD3d 619, 769 NYS2d 559 [2d Dept. 2003]; ***Cooper v. Sonwil Distribution Center, Inc.,*** 15 AD3d 878, 789 NYS2d 583 [4th Dept. 2005]). Thus, defendants are entitled to summary judgment on the §241 (6) Labor Law claim as defendants established prima facie that plaintiff Doran's injuries did not arise from construction, excavation, or demolition work and plaintiff Doran failed to raise a triable issue of fact in this regard (***Nagel v. D & R Realty Corp.,***99 NY2d 98, 752 NYS2d 581 [2002]; ***Olarte v. Morgan,***148 Ad3d 918, 49 NYS3d 532 [2d Dept. 2017](summary judgment awarded defendants on Labor Law 241 (6) claim);***Egos v. Werlatone,*** 68 AD3d 713, 890 NYS2d 109 [2d Dept. 2009];). ***Burr v. Short,*** 285 AD2d 576, 728 NYS2d 741 [2d Dept. 2001]; ***Begor v. Mid-Hudson Hardwoods, Inc.,*** 301 Ad2d 550, 754 NYS2d 57 [2d Dept. 2003]); ***Gonzalez v. Woodbourne Arboretum, Inc.,*** 100 AD3d 694, 954 NYS2d 113 [2d Dept. 2012](accident did not occur in connection with construction, demolition or excavation work and thus Labor Law § 241 (6) did not apply); ***Crossett v. Wing Farm, Inc.,*** 79 AD3d 1334, 912 NYS2d 751 [3d Dept. 2010](Labor Law §241 (6) claim dismissed where tree removal was not an integral part of construction, excavation or demolition work)).

Summary judgment is appropriate where, as here, the movants satisfy their initial burden of proof and the nonmovant's opposition to the motion for summary judgment is "entirely conjectural and there is no genuine issue [of fact] to be resolved" (***Cassidy v. Valenti***, 211 A.D.2d 876, 877, 621 N.Y.S.2d 405 [3d Dept. 1995]). The affidavit submitted by plaintiff Doran in opposition to the summary judgment motions contains allegations inconsistent with his prior deposition testimony and to that extent, it must be rejected by this Court (***Irizarry v. The Rose Bloch 107 Univ. Place Partnership***, 12 Misc. 3d 733, 736, 819 N.Y.S.2d 398, 402 [Kings CTY. 2006]). Plaintiffs' reliance upon speculation, conjecture, contradictions, and inconsistencies is merely an attempt to create feigned issues of fact, which are insufficient to defeat defendants' motions for summary judgment (*see* ***Soussi v. Gobin***, 87 A.D.3d 580, 581–582, 928 N.Y.S.2d 80 [2d Dept. 2001]***; Freiser v Stop & Shop Supermarket Co., LLC***, 84 AD3d 1307, 923 NYS2d 732 [2d Dept 2011]; ***Andrew T.B. v Brewster Cent. School Dist.,*** 67 AD3d 837, 889 NYS2d 240 [2d Dept 2009]; ***Knox v United Christian Church of God, Inc.,*** 65 AD3d 1017. 884 NYS2d 866 [2d Dept 2009]; ***Makaron v. Luna Park Housing Corporation***, 25 A.D.3d 770, 809 N.Y.S.2d 520 [2006]; ***Abramov v Miral Corp.,*** 24 AD3d 397, 805 NYS2d 119 [2d Dept 2005]). The Court has considered plaintiffs' remaining contentions and finds them to be without merit.

Accordingly, summary judgment in favor of defendants McAvoy Construction, Harbor Building, and JP Walsh is granted.

Dated: 7/16/2018

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

__X__ FINAL DISPOSITION_____ NON-FINAL DISPOSITION