

Tyczynski v 973 Fifth, LLC
2019 NY Slip Op 31464(U)
April 4, 2019
Supreme Court, Kings County
Docket Number: 512390/2016
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 4th day of April, 2019.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

-----X
ANDREJ TYCZYNSKI,
Plaintiff,

- against -

973 FIFTH, LLC, and WESTCHESTER CUSTOM
KITCHENS, INC. d/b/a BEECH ASSOCIATES,
Defendants.
-----X

Index No.: 512390/2016

DECISION AND ORDER

Motions Sequence #~~4~~, #5 + 6

Corrected
[Signature]
5/14/19

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed.....	<u>1/2, 3/4,</u>
Opposing Affidavits (Affirmations).....	<u>5, 6, 7,</u>
Reply Affidavits (Affirmations).....	<u>8, 9, 10, 11,</u>
Memorandum of Law.....	<u>12, 13, 14, 15</u>

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This is an action to recover damages for personal injuries allegedly sustained by the Plaintiff Andrzej Tyczynski (hereinafter "the Plaintiff") on June 25, 2014, while he was working at a property owned by Defendant 973 Fifth, LLC (hereinafter "Defendant 973"), located at 974 Fifth Avenue, New York, N.Y. (hereinafter "the Property" or "Premises"). At the time of the alleged incident the Plaintiff was employed by non-party SM Painting and was at the Property as a part of his employment. The Plaintiff alleges that he was plastering a wall at the Property and could not continue to plaster because he could not reach his work area with the assistance of the ladder he had, when his supervisor allegedly instructed him to utilize the wooden fireplace frame to reach the area at issue. The Plaintiff alleges that shortly after he moved from the ladder to the fireplace frame he lost his balance, fell and was injured.

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Defendants Westchester Custom Kitchens, Inc. d/b/a Beech Associates (hereinafter “Defendant Beech”) move (motion sequence #4) move for an order pursuant to CPLR 3212 granting summary judgment in their favor and dismissing all causes of action against them. Specifically, Defendant Beech argues that the Plaintiff’s Labor Law §200 and common law negligence claims should be dismissed as Defendant Beech contends that it did not have supervisory control over the Plaintiff and did not have notice of the alleged dangerous condition that led to the incident at issue. As to the Plaintiff’s Labor Law §241(6) claim Defendant Beech contends that it should be dismissed given that the claims made pursuant to Industrial Code 12 NYCRR 23-1.5, 1.7, 1.8, 1.15, 1.16, 1.17, 1.19, 1.30, 2.1 and 2.6 were either not supportive of a Labor Law §241(6) claim or unfounded given the facts at issue.

Defendant 973 also moves (motion sequence #5) for an order pursuant to CPLR 3212, granting summary judgment in its favor and dismissing all causes of action against it. Defendant 973 contends that the claims of the Plaintiff and any and all cross-claims by Co-Defendant Beech should be dismissed given that Defendant 973 is entitled to the so called “homeowner’s exemption” to the Plaintiff’s Labor Law §§ 240(1) and 241(6) claims, because the home is a single family residence and Defendant 973 did not control the Plaintiff’s work. Defendant 973 alleges that it is an LLC wholly owned by the principals, David Leuschen and Alexia Lueschen (husband and wife), and the Premises is a single family residence. Defendant 973 contends that the defendant’s corporate status is irrelevant to establishing its *prima facie* burden and that what is significant is that Defendant 973 are owners of a one family dwelling and that they did not direct or control the work at issue. As to the Plaintiff’s Labor Law §200 and common law negligence claims, Defendant 973 contends that these claims should be dismissed as Defendant 973 did not control or have a supervisory role over the Plaintiff’s work.

“Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact.’” *Koltivas v. Kirchoff*, 14 AD3d 493 [2nd Dept, 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; see *Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Homeowners Exemption

“An owner of a one- or two-family dwelling is exempt from liability under Labor Law §§ 240(1) and 241(6) unless he or she directed or controlled the work being performed.” *Ferrero v. Best Modular Homes, Inc.*, 33 A.D.3d 847, 849, 823 N.Y.S.2d 477, 479 [2nd Dept, 2006]; *Ortega v. Puccia*, 57 A.D.3d 54, 59, 866 N.Y.S.2d 323, 328 [2nd Dept, 2008]. “The fact that title to an otherwise qualifying one- or two-family dwelling is held by a corporation rather than an individual homeowner does not, in and of itself, preclude application of the exemption.”

Assevero v. Hamilton & Church Properties, LLC, 131 A.D.3d 553, 556, 15 N.Y.S.3d 399, 402 [2nd Dept, 2005]; *Castellanos v. United Cerebral Palsy Ass'n of Greater Suffolk, Inc.*, 77 A.D.3d 879, 909 N.Y.S.2d 757 [2nd Dept, 2010]; *Parise v. Green Chimneys Children's Servs., Inc.*, 106 A.D.3d 970, 971, 965 N.Y.S.2d 608, 609 [2nd Dept, 2013]. However, the Defendant must also show that it did not “direct or control the work being performed.” *Garcia v. Pond Acquisition Corp.*, 131 A.D.3d 1102, 1103, 16 N.Y.S.3d 755, 756 [2nd Dept, 2015].

Turning to the merits of the application by Defendant 973, the Court finds that it has met its *prima facie* burden. In support of its application for dismissal of the Plaintiff's Labor Law §§240(1) and 241(6) claims, Defendant 973 relies on the deposition testimony and an Affidavit of David Leuschen, a member 973 Fifth, LLC, the deposition testimony of the Plaintiff, and the deposition testimony of Ludovit Gondkovsky, a former employee of Defendant Beech. In his Affidavit (Defendant 973 Motion, Exhibit J, Paragraph 3) David Leuschen states that “the only use of the premises has been solely as a one family home for the residence of my immediate family.” When asked whether anyone from 973 Fifth LLC supervised or controlled the work performed at the premises, Mr. Lueschen testified at his deposition (Defendant 973 Motion, Exhibit P, Paage 21) “not that I'm aware of” and “that the answer stays no.” See *Kosinski v. Brendan Moran Custom Carpentry, Inc.*, 138 A.D.3d 935, 937, 30 N.Y.S.3d 237, 239 [2nd Dept, 2016]. As a result, Defendant 973 satisfies its *prima facie* burden on whether it qualifies for the “homeowners exemption” in as much as it is a one family home not used for commercial purposes and the testimony of David Leuschen in both his deposition testimony and his affidavit contends that neither he nor Alexia Lueschen, his spouse, were directing or controlling the work being performed at the Premises. See *Sandals v. Shemtov*, 138 A.D.3d 720, 721, 29 N.Y.S.3d 448, 449 [2nd Dept, 2016]; *Kosinski v. Brendan Moran Custom Carpentry, Inc.*, 138 A.D.3d 935, 937, 30 N.Y.S.3d 237, 239 [2nd Dept, 2016].

The Court also finds that the Plaintiff has not raised a material issue of fact as to whether Alexia Leuschen did in fact direct or control the work being performed, sufficient to overcome the homeowner's exemption from liability. In opposition to the application by Defendant 973, the Plaintiff does not challenge the fact that the property is a one or a two family home, but contends that Defendant 973 is not the appropriate entity to be covered by the "homeowners exemption." The Plaintiff contends that the exemption was not intended to protect, the principal members of Defendant 973 because they "are not unsophisticated homeowners". However, this is not the standard. A defendant must only establish "evidence showing that the home was used solely as a residence and not to operate a business or generate income, and that the defendant did not direct or control the work being performed." *Garcia v. Pond Acquisition Corp.*, 131 A.D.3d 1102, 1103, 16 N.Y.S.3d 755, 756 [2nd Dept, 2015].

The Plaintiff has also failed to raise a material issue of fact as to whether Defendant 973 directed or controlled the work. In his deposition testimony, David Lueschen testified (Defendant 973 Motion, Exhibit P, Page 23) that Alexia Leuschen "ran a reasonable-sized design firm in her previous life, and I think met Ray [Beech] through that." While the Plaintiff also points to the deposition testimony of Ludovit Gondovsky, who was a former employee of Defendant Beech, who testified that (Defendant 973's Motion, Exhibit O, Page 53) he saw Alexia Leuschen at the job site several times, his testimony states that when she was there she spoke to the contractors "about like painting, choosing the color of the paint and stuff like that, and was probably toward the end of '14." "A homeowner's involvement in these areas reflects typical homeowner interest in the ongoing progress of the work and does not constitute the kind of direction or control necessary to overcome the homeowner's exemption from liability." *Chowdhury v. Rodriguez*, 57 A.D.3d 121, 127, 867 N.Y.S.2d 123, 128 [2nd Dept, 2008]; *see also Affri v. Basch*, 45 A.D.3d 615, 616, 846 N.Y.S.2d 270, 271 (2007), *aff'd*, 13 N.Y.3d 592, 921 N.E.2d 1034 [2nd Dept,

2009]; *Edgar v. Montechiari*, 271 A.D.2d 396, 397, 706 N.Y.S.2d 117, 118 [2nd Dept, 2000]. As a result, Defendant 973's application for summary judgment as to the Plaintiff's Labor Law §§240(1) and 241(6) claims is granted and those claims are dismissed as to Defendant 973.

Labor Law § 200

Liability under Labor Law § 200, for injuries arising from the manner in which work is performed, must be premised upon one having the authority to exercise supervision and control over the work. *See Lombardi v Stout*, 80 NY2d 290, 295 [1992]; *Hernandez v Pappco Holding Co.*, 136 AD3d 981, 982 [2nd Dept, 2016]; *Torres v City of New York*, 127 AD3d 1163, 1165 [2nd Dept, 2015]; *Gallelo v MARJ Distribs. Inc.*, 50 AD3d 734, 735 [2nd Dept, 2008]. "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed." *Torres v Perry St. Dev. Corp.*, 104 AD3d 672, 676 [2nd Dept, 2013] quoting *Ortega v Puccia*, 57 AD3d 54, 62 [2nd Dept, 2008]. "[T]he 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." *Banscher v Actus Lend Lease, LLC*, 132 AD3d 707, 709 [2nd Dept, 2015], quoting *Gasques v State of New York*, 59 AD3d 666, 668 [2009], *affd.* 15 NY3d 869 [2010].

Turning to the merits of Defendant Beech's application in relation to the Plaintiff's Labor Law §200 claim, the Court finds that Defendant Beech has not provided sufficient evidence to meet their *prima facie* burden in relation to the dismissal of Plaintiff's claim. Defendant Beech argues that they cannot be held liable for the Plaintiffs' injuries pursuant to Labor Law §200 given that they contend that they did not supervise or control the work of the Plaintiff. "When the methods or materials of the work are at issue, 'recovery against the owner or general contractor

cannot be had ... unless it is shown that the party to be charged had the authority to supervise or control the performance of the work.” *Messina v. City of New York*, 147 A.D.3d 748, 749, 46 N.Y.S.3d 174, 176 [2nd Dept, 2017], quoting *Ortega v. Puccia*, 57 A.D.3d 54, 866 N.Y.S.2d 323 [2nd Dept, 2008]. In support of their application, Defendant Beech relies primarily on the Plaintiff’s deposition testimony and the deposition testimony of his supervisor at SM Painting, Raphael Szkutnik, that the Plaintiff received his daily instructions from his supervisor. However, in the deposition testimony of Ludovit Gondkovsky, a former employee of Defendant Beech, Mr. Gondosvsky acknowledges that Defendant Beech had authority to supervise or control the performance of the work. First, Mr. Gondovsky testified (Defendant Beech Motion, Exhibit L, Page 18) that Defendant Beech “required for everybody who worked on the site to undergo a 10 hour course OSHA [sic] , because they were working in the heights.” Mr. Gondovsky also testified (Page 23) that Mr. Beech, the owner of Defendant Beech, would be at the job site “once a week.” Mr. Gondovsky also stated (Page 23) that Mr. Beech “dealt with the head of the subcontractor, the representative of the subcontractor.” Mr. Gondovsky also testified (Page 40) that if he had witnessed any of the laborers for the subcontractors acting in a dangerous manner he would “tell him to do it the right way, or they cannot continue like that.” As a result, the Court finds that Defendant Beech has failed to meet its *prima facie* burden and accordingly, its application in relation to Labor Law 200 and common law negligence is denied. *See Niewojt v. Nikko Const. Corp.*, 139 A.D.3d 1024, 1025, 32 N.Y.S.3d 303, 306 [2nd Dept, 2016].

Turning to the merits of the Defendant 973’s application in relation to the Plaintiff’s Labor Law §200 claim, the Court finds that Defendant 973 has provided sufficient evidence to meet its *prima facie* burden in relation to the dismissal of Plaintiff’s claim. Defendant 973 argues that it cannot be held liable for the Plaintiff’s injuries pursuant to Labor Law §200 given that it contends that it did not supervise or control the work of the Plaintiff. In support of this position,

Defendant 973 relies on the deposition testimony and Affidavit of David Leuschen, a member 973 Fifth, LLC, the deposition testimony of the Plaintiff, and the deposition testimony of Ludovit Gondkovsky, a former employee of Defendant Beech. As stated above, when the Plaintiff's claim involves the method of the work, then a defendant's *prima facie* burden will relate to "whether they had the authority to supervise and control the work." *Chowdhury v. Rodriguez*, 57 A.D.3d 121, 129, 867 N.Y.S.2d 123, 129–30 [2nd Dept, 2008]. In the instant proceeding, the Court finds that the evidence provided by Defendant 973 shows that they did not supervise or control the work at the Premises and as a result they have met their *prima facie* burden. *See Small v. Gutleber*, 299 A.D.2d 536, 537, 751 N.Y.S.2d 49, 50 [2nd Dept, 2002]. In opposition, the Plaintiff has failed to raise a material issue of fact as to whether Defendant 973 supervised or controlled the work at the Premises in order to hold it liable under Labor Law §200. As a result, Defendant 973's application in relation to Labor Law §200 and common law negligence is granted.¹

Labor Law § 241(6)

Labor Law § 241 (6) imposes on owners and contractors a non-delegable duty "to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed." *Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 [2nd Dept, 2015]; *Lopez v New York City Dept. of Env'tl. Protection*, 123 AD3d 982, 983 [2nd Dept, 2014]. To establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of

¹ Defendant Beech's application for summary judgment against Defendant 973's counterclaims for indemnification, contribution are denied as academic given the dismissal of the claims against Defendant 973. *See Fajardo v. Mainco Elevator & Elec. Corp.*, 143 A.D.3d 759, 40 N.Y.S.3d 121 [2nd Dept, 2016]. However, the Court does grant that aspect of Defendant Beech's application for summary judgment as against Defendant 973's counterclaims for breach of contract, which was otherwise unopposed by Defendant 973 in its Affirmation in Opposition.

an Industrial Code provision mandating compliance with concrete, or clear, specifications. *See Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]; *La Veglia v St. Francis Hosp.*, 78 AD3d 1123 [2nd Dept, 2010]; *Pereira v Quogue Field Club of Quogue, Long Is.*, 71 AD3d 1104 [2nd Dept, 2010]. Within that context, “12 NYCRR 23–4.2(k) provides a sufficient predicate for a Labor Law § 241(6) cause of action.” *Cunha v. Crossroads II*, 131 A.D.3d 440, 441, 15 N.Y.S.3d 153, 155 [2nd Dept, 2015]; *see also Torres v. City of New York*, 127 A.D.3d 1163, 1166, 7 N.Y.S.3d 539, 543 [2nd Dept, 2015]. What is more, it is not necessary for the Plaintiff to have been in a trench at the time of the injury to make a claim based upon 12 NYCRR 23–4.2(k) and a Plaintiff can state a claim after being injured working on a retaining wall. *See Garcia v. Silver Oak USA, Ltd.*, 298 A.D.2d 555, 555, 748 N.Y.S.2d 674, *opinion amended on reargument sub nom. Garcia v. Silver Oak USA, Ltd.*, 754 N.Y.S.2d 549 [2nd Dept, 2002].

Turning to the merits of the Defendants’ motion for summary judgment in relation to the Plaintiffs’ remaining claim made pursuant to Labor Law §241(6), the Court finds that Defendant Beech has met its *prima facie* burden.² In his Verified Bill of Particulars (Beech Defendant’s Motion, Exhibit G, Paragraph 12), the Plaintiff provides a list of the sections of the Industrial Code that the Defendant Beech allegedly violated, which includes Industrial Code 12 NYCRR 23-1.5, 1.7, 1.8, 1.15, 1.16, 1.17, 1.19, 1.30, 2.1, and 2.6. Defendant Beech contends that the Plaintiff’s Labor Law §241(6) should be dismissed given that the sections of the Industrial Code referenced are either too general to give rise to the duty imposed by Labor Law 241(6), that the provisions of the Industrial Code are inapplicable to the facts of the case, or that the alleged

² The summary judgment application by Defendant 973 in relation to the Plaintiff’s Labor Law 241(6) was previously granted herein.

violation was not a proximate cause of the Plaintiff's injuries. *See Robinson v. Cty. of Nassau*, 84 A.D.3d 919, 920, 923 N.Y.S.2d 135, 137 [2nd Dept, 2011]. In support of its application, Defendant Beech relies primarily on the deposition of the Plaintiff, who testified (Defendant Beech Motion, Exhibit J, Pages 42-44) that he was allegedly injured after falling while he was plastering a wall at the Property and could not continue to plaster because he could not reach the work area with the assistance of the ladder he had, at which time his supervisor allegedly instructed him to utilize the wooden fireplace frame to reach the area at issue, in order to continue his work.

First, Industrial Code 12 NYCRR 23-1.5, "merely sets forth a general standard of care for employers, and thus cannot serve as a predicate for liability pursuant to Labor Law § 241(6)." *Ulrich v. Motor Parkway Properties, LLC*, 84 A.D.3d 1221, 1224, 924 N.Y.S.2d 493, 496 [2nd Dept, 2011]; *Rau v. Bagels N Brunch, Inc.*, 57 A.D.3d 866, 868, 870 N.Y.S.2d 111, 113 [2nd Dept, 2008]. Industrial Code 12 NYCRR 23-2.1, has also been found to set forth a general standard of care for employers, and thus cannot serve as a basis for liability for a violation of the Industrial Code. The rule lacks the specificity required to support a cause of action under Labor Law § 241(6). *See Longo v. Long Island R.R.*, 116 A.D.3d 676, 677, 983 N.Y.S.2d 579, 580 [2nd Dept, 2014]; *Madir v. 21-23 Maiden Lane Realty, LLC*, 9 A.D.3d 450, 452, 780 N.Y.S.2d 369, 371 [2nd Dept, 2004]. 12 NYCRR 23-2.1(a) is also not applicable, as the Plaintiff's injury did not occur as a result of improperly stored building material or disposal of debris. *See Moisa v. Atl. Collaborative Const. Co.*, 83 A.D.3d 675, 676, 922 N.Y.S.2d 405, 407 [2nd Dept, 2011]; *Rau v. Bagels N Brunch, Inc.*, 57 A.D.3d 866, 868, 870 N.Y.S.2d 111, 113 [2nd Dept, 2008].

What is more, "[t]he regulations set forth at 12 NYCRR 23-1.15, 23-1.16, and 23-1.17, which set standards for safety railings, safety belts, and life nets, respectively, are inapplicable here because the plaintiff was not provided with any such devices." *Kwang Ho Kim v. D & W*

Shin Realty Corp., 47 A.D.3d 616, 619, 852 N.Y.S.2d 138, 143 [2nd Dept, 2008]; *Smith v. Cari, LLC*, 50 A.D.3d 879, 881, 855 N.Y.S.2d 245, 248 [2nd Dept, 2008]; *Dzieran v. 1800 Bos. Rd., LLC*, 25 A.D.3d 336, 337, 808 N.Y.S.2d 36, 37 [1st Dept, 2006]. The Plaintiff's testimony supports the position that he was not provided with any of this safety devices and as a result these Industrial Code provisions are not applicable in the instant matter.

A review of the remaining Industrial Code sections listed by the Plaintiff in his Verified Bill of Particulars (NYCRR 23-1.7, 1.8, 1.19, 1.30, 2.6) show they do not relate to the facts of the alleged incident as described by the Plaintiff during his deposition. NYCRR 23-1.7 relates to Protection from general hazards (overhead hazards, falling hazards, drowning hazzards, slipping hazards) and does not relate to the facts at issue in the instant proceeding. See *Rau v. Bagels N Brunch, Inc.*, 57 A.D.3d 866, 868, 870 N.Y.S.2d 111, 113 [2nd Dept, 2008]. NYCRR 23-1.8 relates to protective equipment (eye protection, respirators, protective apparel) and does not relate to the facts at issue in the instant proceeding. See *Guryev v. Tomchinsky*, 87 A.D.3d 612, 613, 928 N.Y.S.2d 574, 576 [2nd Dept, 2011], *aff'd*, 20 N.Y.3d 194, 981 N.E.2d 273 [2012]. Both NYCRR 23-1.19 and 23-2.6 relate to catch platforms, with 23-2.6 relating to work conducted over 35 feet from the ground, and they do not relate to the facts at issue. See *Fried v. Always Green, LLC*, 77 A.D.3d 788, 790, 910 N.Y.S.2d 452, 454 [2nd Dept, 2010]. Finally, NYCRR 23-1.30 relates to protective illumination and does not relate to the facts at issue. See *Honeyman v. Curiosity Works, Inc.*, 154 A.D.3d 820, 821, 62 N.Y.S.3d 183, 185 [2nd Dept, 2017]. In opposition, the Plaintiff fails to raise a material issue of fact in relation to the Industrial Code sections. In fact, the Plaintiff failed to address any of the Industrial Code sections with any specificity. See *Zaino v. Rogers*, 153 A.D.3d 763, 764, 59 N.Y.S.3d 770, 772 [2nd Dept, 2017].

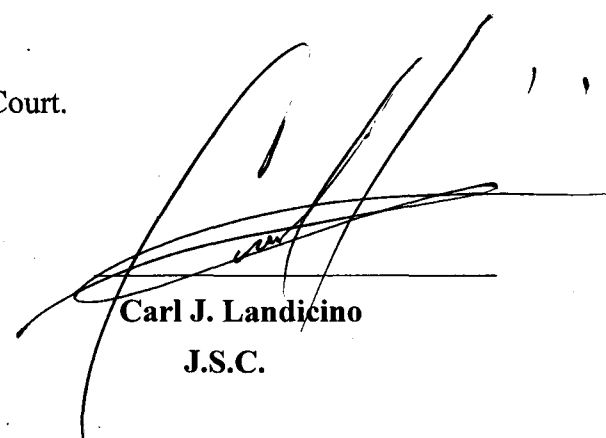
Based upon the foregoing, it is hereby Ordered that:

Defendant Beech's motion (motion sequence #~~5~~⁵) is granted solely to the extent that the Plaintiff's Labor Law §241(6) claim is dismissed as against Defendant Breech. Any cross-claims by Defendant 973 as against Defendant Beech are dismissed as academic.

Defendant 973's motion (motion sequence #6) is granted. All claims and cross-claims as against Defendant 973 are hereby dismissed.

This constitutes the Decision and Order of the Court.

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Carl J. Landicino

J.S.C.

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