At an IAS Term, Part 66 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 10th day of SEPTEMBER, 2019.

PRESENT:
HON. RICHARD VELASQUEZ
Justice.

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SEVERIANO MARTINEZ,

Plaintiff,

Index No.: 509608/2016

-against-

Decision and Order

NEW YORK CITY HOUSING AUTHORITY AND TDX CONSTRUCTION CORPORATION,

Defendants.

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The following *papers* numbered 74 to 127 read on this motion:

Papers	Numbered
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed	74-87;104-121
Opposing Affidavits (Affirmations)	100-103; 124-125
Reply Affidavits (Affirmations)	126-127

After oral argument and a review of the submissions herein, the Court finds as follows:

Plaintiff, SEVERIANO MARTINEZ, moves for an order granting (A) partial summary judgment on the issue of liability against the defendants pursuant to Labor Law 240(1) and 241(6); (B) striking defendants answer for failing to exchange the construction contracts and material relevant to this action; (C) setting this case down for a trial on damages only. Defendants oppose the same.

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#4,6

Defendants, NEW YORK CITY HOUSING AUTHORITY (hereinafter NYCHA) AND TDX CONSTRUCTION CORPORATION (hereinafter TDX), move by cross-motion for an order granting the defendant summary judgment pursuant to 3212 dismissing plaintiff's Labor Law 200, 240(1), 241(6) and general negligence claims. Plaintiff opposes the same.

FACTS

This action arises from an alleged incident occurring on December 3, 2015 between 8:30 am and 8:45 am on a sidewalk bridge erected in front of 303 Vernon Avenue in Brooklyn, New York, an apartment building owned by the defendant NYCHA. It is alleged that the incident took place when plaintiff fell ten feet from the top of the sidewalk bridge that was in the process of being dismantled. It is alleged that the accident itself occurred as the plaintiff was removing braces that attached the plywood panels to the bridge, two of the eight-foot-long panels fell. It is alleged that as the panels fell the plaintiff grabbed onto them, in an attempt to prevent them from falling, and as held on to then the weight of the panels pulled him of the bridge, and he fell ten feet to the sidewalk. At the time of the accident plaintiff was wearing a safety belt with a lanyard, however there was nothing to attach the lanyard to.

It is undisputed that NYCHA had a contract with defendant TDX whereby TDX acted as the construction manager for repairs made to the façade of numerous buildings that were owned by NYCHA. NYCHA also had a contract with Roma Scaffolding Inc. to perform repairs to the façade of the buildings it owned including 303 Vernon Avenue. It is undisputed that the plaintiff is a member of Carpenter's Union 1556 since 2015 and was employed by Roma Scaffolding Inc., at the time of the accident. It is alleged that pursuant to the contract with NYCHA Roma Scaffolding erected a sidewalk bridge around the

perimeter of 303 Vernon and made the repairs. While work was being performed TDX was administering the job and supervising the work that was being performed. It is alleged that the plaintiff was not provided with any safety device on the date of the accident. It is alleged that the plaintiff was wearing his own personal safety harness, however there was nothing at the site for him to attach the lanyard to. It is further alleged that at no time prior to the accident was the plaintiff provided with a safety device nor any other protection to prevent a fall while working at this site, nor was there anything placed under the sidewalk bridge to break his fall.

ARGUMENTS

Plaintiff contends the owner and general contractor failed to provide plaintiff proper protection; defendants violated 240(1) and 241(6) by failing to provide the plaintiff with any safety devices to protect him from an elevation related risk of injury and; that the violation of these statutes was the proximate cause of the plaintiff's injuries.

Defendants NYCHA & TDX contend they did not supervise or control the work and as such are entitled to summary judgment on the Labor Law 200 and 240(1) claims. Defendants further contend that TDX did not supervise, direct, or control the work as per their contract and as a result they cannot be liable under Labor Law claim. Defendants also contend that the plaintiff was the sole proximate cause of his fall and injuries because he jumped from the bridge. Additionally, defendants contend Plaintiff is unable to establish the safety device was defective, or that the scaffolding he fell from was defective and as such is not entitled to Labor Law 241(6) claims.

ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate

the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trial of the action. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.

A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party". CPLR 3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." *Id.* A motion for summary judgment is a drastic measure and to be used sparingly (*Wanger v. Zeh,* 45 Misc2d 93 [Sup Ct, Albany County], aff'd 26 AD2d 729 [3rd Dept 1965]). Summary judgment is proper when there are no issues of triable fact (*Alvarez v. Prospect Hospital,* 68 NY2d 320, 324 [1986]). Issue finding rather than issue determination is its function (*Sillman v. Twentieth Century Fox Film Corp.,* 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against (*Weiss v. Garfield,* 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. The moving party must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. (*Zuckerman v. City of New York,* 49 NY2nd 557 [1990]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v. Algaze,* 84 NY2d 1019 [1995]).

Labor Law § 200 & Common Law Negligence

"Labor Law 200(1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work" (*Ortega v. Puccia*, 57 AD3d 54, 60, 866 NYS2d 323). "[W]hen a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work" (*id.* at 61, 866 NYS2d 323); *quoting Goodwin v. Dix Hills Jewish Center,* 144 AD3d 744, 41 NYS3d 104, 2016 NY Slip Op. 07293. "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" (*Ortega v. Puccia*, 57 AD3d at 62, 866 NYS2d 323). "[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" (*Austin v. Consolidated Edison, Inc.*, 79 AD3d 682, 684, 913 NYS2d 684; see *Cambizaca v. New York City Tr. Auth.*, 57 AD3d 701, 871 NYS2d 220).

In the present case, defendants, have failed to establish prima facie entitlement to judgment as a matter of law dismissing the causes of action alleging violations of Labor Law 200 and common-law negligence insofar as asserted against it because there is a question of fact as to whether they had the authority to supervise or control the manner in which the plaintiff, performed its work; whether they had notice of the condition; or whether they created the condition (*see Allan v. DHL Exp. (USA), Inc.,* 99 AD3d 828, 952 NYS2d 275*; Comes v. New York State Elec. & Gas Corp.,* 82 NY2d 876, 877, 609 NYS2d 168, 631 NE2d 110; *Russin v. Louis N. Picciano & Son,* 54 NY2d 311, 317, 445 NYS2d

127, 429 NE2d 805; *Pilato v. 866 U.N. Plaza Assoc., LLC,* 77 AD3d at 646, 909 NYS2d 80; *Jenkins v. Walter Realty, Inc.,* 71 AD3d 954, 898 NYS2d 56; *Enos v. Werlatone, Inc.,* 68 AD3d 712, 888 NYS2d 902; *Ortega v. Puccia,* 57 AD3d at 62–63, 866 NYS2d 323). Additionally, the defendant's, have not submitted anything establishing that they were not an agent of NYCHA and that they did not control the means, methods, and manner of work. On the other hand, the plaintiff submits the contract between the defendants, which seems to establish TDX controlled the means and methods of the project as the Construction Manager. Although, paragraph 4.1.2 of the contract specifically states that this contract does not deem Construction manager "assumption of responsibility for the constructions means, methods, techniques, or sequences at the Site all of which are and remain the responsibility of the Construction Contractors". However, that clause begins by stating "except as expressly set forth herein". Specifically, in the scope of services section on page 2 the paragraph numbered 2 and titled Scope of Services states "NYCHA requires the professional expertise of a Construction manager (in this case TDX) to provide professional services to act on behalf of, and as an "agent" for NYCHA for Pre-Construction, Construction, and Post-Construction Phase Services"; which clearly states TDX was an agent of NYCHA not to mention the contract goes on to discuss numerous duties all of which demonstrate TDX had the authority to control the means and methods of the work at this site. Therefore, at the very least the contract itself and the contradictory language contained therein creates issues of fact as to; who is in charge of the worksite; what is to be done at the worksite. Additionally, the contract also raises questions of fact as to who had 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 who controlled the means and methods. Accordingly, defendant request for

summary judgment as to Labor Law 200 and common-law negligence is denied, with leave to renew, as questions of fact exist.

Labor Law § 240(1)

Labor Law 240(1) provides:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, 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 a person so employed."

Defendants, NYCHA and TDX, contend that Plaintiff's cause of action as to violations of Labor Law 240(1) should be dismissed because the accident was not the result of an elevation related risk, but a result of the plaintiff's own actions, contending the plaintiff jumped off of the sidewalk bridge.

> Section 240(1) of Labor Law provides; "Scaffolding and other devices for use of employees. "1. All contractors and owners and their agents, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure **shall furnish or erect, or cause to be furnished or erected for the performance of such labor, 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 a person so employed.** *Haimes v. New York Tel. Co.*, 46 NY2d 132, 138, 385 NE2d 601 (1978).

"Liability under Labor Law 240(1) depends on whether the injured worker's task creates an elevation-related risk of the kind that the safety devices listed in section 240(1)

protect against". (*Salazar v. Novalex Contracting Corp.,* 18 NY3d 134, 139 [2011].) "Labor Law 240(1) 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."* (*Runner v. New York Stock Exchange,* 13 NY3d 599, 604 [2009] *[quoting Ross v. Curtis–Palmer Hydro–Elec. Co.,* 81 NY2d 494, 501 (1993)].) In determining the applicability of the statute, the "relevant inquiry" is "whether the harm flows directly from the application of the force of gravity to the object." (*See Runner v. New York Stock Exchange,* 13 NY3d at 604.) "The dispositive inquiry ... does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker." (*Runner v. New York Stock Exchange,* 13 NY3d at 603.) **"Rather, the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." (*Id.*)**

"The purpose of the strict liability statute is to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction work site elevation differentials, and, accordingly, that there will be no liability under the statute unless the injury producing accident is attributable to the latter sort of risk." (*See Runner v. New York Stock Exchange,* 13 NY3d at 603; *see also Davis v. Wyeth Pharmaceuticals, Inc.,* 86 AD3d 907, 909 [3d Dept 2011].) To prevail on a Labor Law § 240(1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*see Berg v. Albany Ladder Co.,* 10 N.Y.3d 902, 904, 861 NYS2d 607, 891 NE2d 723; *Blake v. Neighborhood Hous. Servs. of N.Y. City,* 1 NY3d 280, 287, 771 NYS2d 484, 803 NE2d 757; *Martinez v. Ashley Apts Co., LLC,* 80

AD3d 734, 735, 915 NYS2d 620). "[W]here a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability" (*Cahill v. Triborough Bridge & Tunnel Auth.,* 4 NY3d 35, 39, 790 NYS2d 74, 823 NE2d 439; *see Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.,* 1 NY3d at 290, 771 NYS2d 484, 803 NE2d 757).

In the present case, the plaintiff does assert a cause of action under Labor Law § 240 (1) because he had been exposed to an "elevation-related risk" arising from the inadequacy of the protective device (180 AD2d, at 390); *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499, 618 NE2d 82 (1993). In the present case it is undisputed that the plaintiff was not provided with any safety device at all, while working from a sidewalk bridge which is an elevated risk. **It is by now well established that the duty imposed by Labor Law § 240 (1) is nondelegable and that an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work** (*see, e.g., Haimes v New York Tel. Co.*, 46 NY2d 132, 136-137); *quoting Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500, 618 NE2d 82 (1993). The defendants contend that the plaintiff jumped from the sidewalk bridge and therefore was the cause of the accident.

Contrary to the defendant's contention, the alleged statements regarding the plaintiff jumping from the sidewalk bridge were not made by the plaintiff nor were they made by someone who witnessed the accident and as such are hearsay not within any exception. "In personal injury litigation, the defendant's case often is bolstered, if not made, by out-of-court statements of the plaintiff that are contrary to the plaintiff's version of events. These out-of-court statements present a hearsay issue; but if sufficient proof is offered that the statements were actually made, they almost always are admissible against the plaintiff as party admissions (admissible for their truth), and, if the plaintiff

testifies, both as party admissions and prior inconsistent statements (admissible to impeach credibility). Anyone who heard the plaintiff make the statements can testify, on the basis of personal knowledge, that the statements were made. However, the statements are often embedded in a hospital record, and there is no live witness available (e.g., nurse, physician or hospital attendant) who knows or remembers what the plaintiff said. The defendant, in such cases, will seek to admit the plaintiff's statements through the medium of the hospital record." This introduces an additional layer of hearsay, presenting a problem of "double hearsay" or "hearsay within hearsay." See *People v. Ortega*, 2010, 15 N.Y.3d 610, 620-21, 917 N.Y.S.2d 1, 7-8, 942 N.E.2d 210, 216-17.

"These points were the basis of the holding of the Court of Appeals in its 1955 decision in *Williams v. Alexander*, 1955, 309 N.Y. 283, 129 N.E.2d 417 (original Commentary C4518:4). The Court made it clear that before any statement by an outsider recorded in a hospital record can be admitted into evidence through the hospital record, it must have been part of the hospital's business to record the statement in question, even if the statement, viewed by itself, would qualify for admissibility as an independent hearsay exception or as nonhearsay." "**In *Williams*, this meant that a patient-plaintiff's statement explaining to hospital personnel the details as to how an auto accident happened, as recorded in the hospital record, should not have been admitted into evidence against the plaintiff, and the judgment was reversed as a consequence**."... "Even though the statement was the admission of a party-opponent and/or a prior inconsistent statement of the plaintiff, it was not part of the hospital's business to record such statements. The business of a hospital is treatment and diagnosis of patients, not exploring the cause of auto accidents." In *Robles v. Polytemp, Inc.*, 127 A.D.3d 1052, 7 N.Y.S.3d 441 (2d Dep't), the court wrote: "A hearsay entry in a hospital record is

admissible under the business records hearsay exception to the hearsay rule only if the entry is germane to the diagnosis or treatment of the patient.... However, if the entry is inconsistent with a position taken by a party at trial, it is admissible as an admission by that party, *even if it is not germane to diagnosis or treatment,* **as long as there is 'evidence connecting the party to the entry.**" See also *Barris v. One Beard Street, LLC,* 2015, 126 A.D.3d 831, 6 N.Y.S.3d 262 (2d Dep't)(same); See also N.Y. C.P.L.R. 4518 (McKinney).

In the present case, all the statements contained in the medical records clearly state that the statements recorded regarding the plaintiff jumping off of the sidewalk bridge did not come from the plaintiff but from the plaintiff's friend who did not witness the accident. The defendant's claim that these documents should nevertheless be considered is without merit, since the defendants demonstrated no excuse whatsoever for failing to meet the "strict requirement of tender in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see Merriman v Integrated Bldg. Controls, Inc.*, 84 AD3d 897, 899 [2011]). Additionally, all statements in the EBT's as well as the accident reports that include the assertion that the plaintiff jumped from the sidewalk bridge are all made by people who did not witness the accident nor had any first-hand knowledge and as such those statements are hearsay and have no probative value. Moreover, it is clear, that the plaintiff's injuries were "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential", *quoting Runner v. New York Stock Exchange*, 13 NY3d at 603. Accordingly, Plaintiff's motion for summary judgment on the issue of liability as to Plaintiffs' Labor Law 240(1) cause of action is hereby granted. And defendants, cross-motion for summary judgment on the issue of liability as to Plaintiffs' Labor Law 240(1) cause of action is denied.

Labor Law 241(6)

"**Labor Law 241(6)** imposes a nondelegable duty of reasonable care upon an owner or general contractor to provide reasonable and adequate protection to workers, and a violation of an explicit and concrete provision of the Industrial Code by a participant in the construction project constitutes some evidence of negligence for which the owner or general contractor may be held vicariously liable ." (*Fusca v. A & S Construction,* LLC, 84 AD3d 1155, 1156 [2d Dept 2011]). In the present case the plaintiff alleges violations of the Industrial Code 23-1.7 (a)(b); 1.15; 1.16(a-f); 1.17; 1.18(b)(1)(2)(3)(c); 1.21(b); 1.22; 2.1(a)(1)(2); 2.1(b); 3.2; 3.3; 5.1; 5.3; 5.4; 5.5; 5.8(a)(c); 5.9; 5.10; 5.18.

Plaintiff contends defendants violated Industrial Code Section 23-1.7. Defendants contend Industrial Code Section 23-1.7 and all its subsections are inapplicable to this case. Section 23-1.7 provides:

> "Protection from general hazards (a) Overhead hazards. (1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot. (2) Where persons are lawfully frequenting areas exposed to falling material or objects but wherein employees are not required to work or pass, such exposed areas shall be provided with barricades, fencing or the equivalent in compliance with this Part (rule) to prevent inadvertent entry into such areas. (b) Falling hazards. (1) Hazardous openings. (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule). (ii) Where free access into such an opening is required by work in progress, a barrier or safety railing constructed and installed in compliance with this Part (rule) shall guard such opening and the means of free access to the opening shall be a substantial gate. Such gate shall swing in a direction away from the opening and shall be kept latched except for entry and exit. **(iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows (a) Two-inch planking, full size, or material of equivalent strength installed not more than one floor or 15 feet, whichever is less,**

beneath the opening; or (b) An approved life net installed not more than five feet beneath the opening;..." N.Y. Comp. Codes R. & Regs. tit. 12, § 23-1.7.

In the present case defendant contends that the plaintiff was in the process of removing the sidewalk bridge and that the testimony from the plaintiff himself is that he removed the barrier that is required by the code. Although the undisputed facts do allege the plaintiff was removing a barrier it is clear that this industrial code provides in section "(iii) where employees are required to work close to an opening... (a) Two-inch planking, full size, or material of equivalent strength installed not more than one floor or 15 feet, whichever is less, beneath the opening; **or** (b) An approved life net installed not more than five feet beneath the opening"; which is clearly the case here because the plaintiff was tasked with dismantling the sidewalk bridge, and it is undisputed that the plaintiff was not provided either suggested protection. Accordingly, the branch of defendant's, cross-motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §23-1.7 is denied. Plaintiff's Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §23-1.7(iii)(b) request for summary judgment is hereby granted as to this industrial code, as there was no life net installed.

Plaintiff contends defendants violated Industrial Code Section 23-1.11. Defendant contends Industrial Code 23-1.11 is inapplicable. Industrial Code 23-1.11 is titled " Lumber and nail fastenings". In the present case, there has been nothing in the record that substantiates a claim under this industrial code. There is no allegation regarding the lumber used to make the sidewalk bridge. Accordingly, the branch of defendant's, cross-motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §23-1.11 is hereby granted as this Industrial Code Section is inapplicable to the present case.

Plaintiff contends defendants violated Industrial Code Section 23-1.15. Defendant contends Industrial Code 23-1.15 is inapplicable. Industrial Code Section 23-1.15 is applicable to safety railings on a job site. In the present case, this section of the industrial code was not violated. It is the plaintiff's testimony that he was removing the safety railing of the sidewalk bridge when the accident occurred. Therefore, this statement alone establishes that there was safety railing provided. The fact that the plaintiff was charged with disassembling the same does not create a violation of the industrial code. Accordingly, the branch of defendant's, cross-motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §23-1.15 is hereby granted as this Industrial Code Section is inapplicable to the present case.

Plaintiff contends defendants violated Industrial Code Section 23-1.16. Industiral Code Section 23-1.16 provides:

> "Safety belts, harnesses, tail lines and lifelines (a) Approval required. Safety belts, harnesses and all special devices for attachment to hanging lifelines shall be approved. (b) Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet. (c) Instruction in use. Every employee who is provided with an approved safety belt or harness shall be instructed prior to use in the proper method of wearing, using and attaching such safety belt or harness to the lifeline. (d) Tail lines. The length of any tail line shall be the minimum required in order for an employee to perform his work, but in no case shall be longer than four feet. Such tail line shall be attached to a hanging lifeline or to a substantial structural member at a point no lower than two feet above the working platform or working level. Tail lines shall be first grade manila or synthetic fiber rope at least one-half inch in diameter with a breaking strength of not less than 4,000 pounds or shall be fabricated of other approved materials. (e) Lifelines. Any hanging lifeline required by this Part (rule) shall be not more than 300 feet in length from the point of suspension to grade, building setback or other surface. Every hanging lifeline shall be securely attached to a sufficient anchorage. Every

hanging lifeline shall be provided with padding, wrapping, chafing gear or similar means of protection from contact with building edges or other objects which may cut or abrade such lifeline. Lifelines shall be fabricated of wire rope at least five-sixteenths inch in diameter or first grade manila or synthetic fiber rope at least one-half inch in diameter with a breaking strength of not less than 4,000 pounds. (f) Inspection and maintenance. (1) Every safety belt, harness, tail line and lifeline shall be inspected by a designated person prior to each use. Employers shall not suffer or permit any employee to use any such equipment which shows any indication of mildew, broken fiber or fabric, excessive wear or any other damage or deterioration which could materially affect the strength of such safety belts, harnesses, tail lines or lifelines. Any such equipment found to be unsafe shall be removed from the job site. (2) When not in use, safety belts, harnesses, tail lines and lifelines shall be stored in such areas and in such a manner as to prevent their deterioration and to protect them from being damaged." N.Y. Comp. Codes R. & Regs. tit. 12, § 23-1.16

Defendant contends Industrial Code 23-1.16 is inapplicable Defendant fails to articulate why Industrial Code 23-1.16 does not apply, but instead give a general conclusion that it does not apply. A bare conclusion is insufficient to establish that this industrial code is not applicable to the present case. In the present case it has been established that there were no safety harnesses provided, nor were there any lifelines or tail lines provided as required by this section of the code. Plaintiff's Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §23-1.16 request for summary judgment is hereby granted as to this industrial code, as there was no lifeline or tail lines available to the plaintiff.

Plaintiff contends defendants violated Industrial Code Section 23-1.17. Defendant contends Industrial Code 23-1.17 is inapplicable. Industrial Code Section 23-1.17 provides specific requirements regarding life nets being utilized on construction sites. In the present case there were no life nets provided or available for use therefore this section of the code is not applicable. Accordingly, the branch of defendant's, cross-motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the

violation of 12 NYCRR §23-1.17 is hereby granted as this Industrial Code Section is inapplicable to the present case.

Plaintiff contends defendants violated Industrial Code Section 23-1.18. Defendant contends Industrial Code 23-1.18(b)(1)(2)(3)(c) is inapplicable. Industrial Code Section 23-1.18 is applicable to sidewalk sheds and barricades. In the present case the plaintiff fails to articulate how this section of the Industrial Code has been violated. Moreover, as mentioned above, it is undisputed that it is the plaintiff's testimony he was removing the safety railing of the sidewalk bridge when the accident occurred. Therefore, this statement alone establishes that there was safety railing provided in accordance with the Industrial Code. The fact that the plaintiff was charged with disassembling the same does not create a violation of the industrial code. Accordingly, the branch of defendant's, cross-motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §23-1.18(b)(1)(2)(3)(c) is hereby granted as this Industrial Code Section is inapplicable to the present case.

Plaintiff contends defendants violated Industrial Code Section 23-1.21. Defendant contends Industrial Code 23-1.21 is inapplicable. Industrial Code 23-1.21 is titled Ladders and Ladderways. This case does not involve a ladder therefore this Industrial Code Section does not apply to the following case. Accordingly, the branch of defendant's, cross-motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §23-1.21 is hereby granted as this Industrial Code Section is inapplicable to the present case.

Plaintiff contends defendants violated Industrial Code Section 23-1.22. Defendant contends Industrial Code 23-1.22 is inapplicable. Industrial Code Section 23-1.22 is titled Structural runways, ramps and platforms. The plaintiff fails to articulate how this industrial

code applies to the facts of this case. This court is unable to determine from the facts of this case how this industrial code applies to the facts of this case. Accordingly, the branch of defendant's, cross-motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §23-1.22 is hereby granted as this Industrial Code Section is inapplicable to the present case.

Plaintiff contends defendants violated Industrial Code Section 23-2.1. Defendant contends Industrial Code 23-2.1 is inapplicable. The plaintiff fails to articulate how this industrial code applies to the facts of this case. This court is unable to determine from the facts of this case how this industrial code applies to the facts of this case. Accordingly, the branch of defendant's, cross-motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §23-2.1 is hereby granted as this Industrial Code Section is inapplicable to the present case.

Plaintiff contends defendants violated Industrial Code Section 23-3.2. Defendant contends Industrial Code 23-3.2 is inapplicable on its face because it concerns demolition operations and the plaintiff was not engaged in demolition work. Industrial Code Section 23-3.2 is titled "Preparations for the demolition of any building or other structures". Contrary to defendant's contention the plaintiff was engaged in dismantling (demolishing) the sidewalk bridge, which can be considered demolition, as such this section of the code does apply to the facts of this case. However, the plaintiff fails to articulate how this industrial code applies to the facts of this case. This court is unable to determine from the facts of this case how this industrial code applies to the facts of this case or how it was violated. Accordingly, the branch of defendant's, cross-motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR

§23-3.2 is hereby granted as this Industrial Code Section is inapplicable to the present case.

Plaintiff contends defendants violated Industrial Code Section 23-3.3. Defendant contends Industrial Code 23-3.3 is inapplicable. Industrial Code 23-3.3 is titled "Demolition by hand". In the present case the plaintiff was engaged in demolition by hand. However, the court is unable to determine how is section of the code was violated and the plaintiff fails to state the same. Accordingly, the branch of defendant's, cross-motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §23-3.3 is hereby granted as this Industrial Code Section is inapplicable to the present case.

Plaintiff contends defendants violated Industrial Code Section 23-5.1. Defendant contends Industrial Code 23-5.1 is inapplicable. Industrial Code Section 23-5.1 is titled "General Provisions for all scaffold". In the present case the plaintiff was on a scaffold at the time of the accident. However, the court is unable to determine how is section of the code was violated and the plaintiff fails to specifically state the same. Accordingly, the branch of defendant's, cross-motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §23-5.1 is hereby granted as this Industrial Code Section is inapplicable to the present case.

Plaintiff contends defendants violated Industrial Code Section 23-5.3. Defendant contends Industrial Code 23-5.3 is inapplicable. Industrial Code Section 23-5.3 is titled "General Provisions for Metal scaffold". In the present case the plaintiff was on a scaffold at the time of the accident. However, the court is unable to determine how is section of the code was violated and the plaintiff fails to specifically state the same. Accordingly, the branch of defendant's, cross-motion for summary dismissal of Plaintiffs' Labor Law

§241(6) cause of action premised upon the violation of 12 NYCRR §23-5.3 is hereby granted as this Industrial Code Section is inapplicable to the present case.

Plaintiff contends defendants violated Industrial Code Section 23-5.4. Defendant contends Industrial Code 23-5.4 is inapplicable. Industrial Code Section 23-5.4 is titled "Tubular welded frame scaffolds". In the present case the plaintiff was on a scaffold at the time of the accident. However, the court is unable to determine how is section of the code was violated and the plaintiff fails to specifically state the same. Accordingly, the branch of defendant's, cross-motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §23-5.4 is hereby granted as this Industrial Code Section is inapplicable to the present case.

Plaintiff contends defendants violated Industrial Code Section 23-5.5. Defendant contends Industrial Code 23-5.5 is inapplicable. Industrial Code Section 23-5.5 is titled "Tube and coupler metal scaffolds". In the present case the plaintiff was on a scaffold at the time of the accident. However, the court is unable to determine how is section of the code was violated and the plaintiff fails to specifically state the same. Accordingly, the branch of defendant's, cross-motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §23-5.4 is hereby granted as this Industrial Code Section is inapplicable to the present case.

Plaintiff contends defendants violated Industrial Code Section 23-5.8. Defendant contends Industrial Code 23-5.8 is inapplicable. Industrial Code Section 23-5.8 is titled "All suspended scaffolds". In the present case the plaintiff was on a scaffold at the time of the accident. However, the court is unable to determine how is section of the code was violated and the plaintiff fails to specifically state the same. Accordingly, the branch of defendant's, cross-motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause

of action premised upon the violation of 12 NYCRR §23-5.8 is hereby granted as this Industrial Code Section is inapplicable to the present case.

Plaintiff contends defendants violated Industrial Code Section 23-5.9. Defendant contends Industrial Code 23-5.9 is inapplicable. Industrial Code Section 23-5.9 is titled "Two-point suspension scaffolds". In the present case the plaintiff was on a scaffold at the time of the accident. However, the court is unable to determine how is section of the code was violated and the plaintiff fails to specifically state the same. Accordingly, the branch of defendant's, cross-motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §23-5.9 is hereby granted as this Industrial Code Section is inapplicable to the present case.

Plaintiff contends defendants violated Industrial Code Section 23-5.10. Defendant contends Industrial Code 23-5.10 is inapplicable. Industrial Code Section 23-5.10 is titled "Multiple-point suspension scaffolds". In the present case the plaintiff was on a scaffold at the time of the accident. However, the court is unable to determine how is section of the code was violated and the plaintiff fails to specifically state the same. Accordingly, the branch of defendant's, cross-motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §23-5.10 is hereby granted as this Industrial Code Section is inapplicable to the present case.

Plaintiff contends defendants violated Industrial Code Section 23-5.18. Defendants contend Industrial Code 23-5.18 is inapplicable. Industrial Code Section 23-5.18 is titled "Manually-propelled mobile scaffolds". In the present case the plaintiff was on a scaffold at the time of the accident. However, the court is unable to determine how is section of the code was violated and the plaintiff fails to specifically state the same. Accordingly, the branch of defendants, cross-motion for summary dismissal of Plaintiffs' Labor Law

§241(6) cause of action premised upon the violation of 12 NYCRR §23-5.18 is hereby granted as this Industrial Code Section is inapplicable to the present case.

Accordingly, Defendant's, motion for summary judgment and dismissal based on Common Law 200 cause of action is denied, as questions of fact exist. Plaintiff's motion for summary judgment as to Labor Law 240(1) is hereby granted for the reasons stated above. Plaintiff's, motion for summary judgment for violation of Labor Law §241(6) cause of action premised on Industrial Code Sections 23-1.7 & 1.16 are Granted for the reasons stated above; the branch of defendant's, motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of Industrial Code Sections 1.17; 1.18(b)(1)(2)(3)(c); 1.21(b); 1.22; 2.1(a)(1)(2); 2.1(b); 3.2; 3.3; 5.1; 5.3; 5.4; 5.5; 5.8(a)(c); 5.9; 5.10; 5.18 are granted, for the reasons stated above.

This constitutes the Decision/Order of the Court.
Date: SEPTEMBER 16, 2019

RICHARD VELASQUEZ, J.S.C.

SEP 10 2019 So Ordered
Hon. Richard Velasquez

FILED
JAN 01 2020
KINGS COUNTY CLERK'S OFFICE