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 5th day of MAY, 2020

PRESENT:
HON. RICHARD VELASQUEZ
Justice.

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WILFRED O'CONNOR,

Plaintiff,

-against-

Index No.: 505888/2017
Decision and Order

OTTS OCEAN LLC, CHESS BUILDERS LLC,
And HEADQUARTERS MECHANICAL INC.,

Defendants,

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OTTS OCEAN LLC and CHESS BUILDERS LLS,

Third-Party Plaintiff,

-against-

M.R. ELECTRICAL MAINTENANCE INC.,

Third-Party Defendants,

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HEADQUARTERS MECHANICAL INC.,

Second Third-Party Plaintiff,

-against-

M.R. ELECTRICAL MAINTENANCE INC,

Second Third-Party Defendants,

----------X

HEADQUARTERS MECHANICAL INC.,

Third Third-party Plaintiff,

-against-

TRISTATE FIRE SPRINKLER INC.,

Third Third-Party Defendants,

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The following *papers* numbered 89 to 177 read on this motion:

Papers	Numbered
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed	89-107;110-130; 131-145
Opposing Affidavits (Affirmations)	147-148; 151;153-156; 158; 163; 175
Reply Affidavits (Affirmations)	174; 176; 177
Memorandum of Law	159-162; 164; 173

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

Plaintiff, WILFRED O'CONNOR (hereinafter Plaintiff) moves pursuant to CPLR 3212 for an order granting summary judgment on the issue of liability against defendant OTTS OCEAN LLC and CHESS BUILDERS LLC, pursuant to Labor Law 240(1) and setting the matter down for a trial on damages. Defendants oppose the same. (MS#4)

Defendants, OTTS OCEAN LLC (hereinafter OTTS) and CHESS BUILDERS LLC (hereinafter CHESS), moves by pursuant to CPLR 3212 for an order granting summary judgment dismissing all claims and plaintiff's complaint in its entirety with respect to Labor Law 200, 240(2) and 241(6) including all 12 NYCRR 23 claims. Plaintiff opposes the same. (MS#5)

Third-Party Defendants, M.R. ELECTRICAL MAINTENANCE INC. (hereinafter M.R.), move pursuant to CPLR 3212 for an order granting summary judgment dismissing the plaintiff's complaint and all cross-claims and dismissing the defendants/third-party plaintiff's OTTS OCEAN, LLC and CHESS BUILDERS third-party complaint. Plaintiff opposes the same. (MS#6)

Plaintiff, WILFRED O'CONNOR (hereinafter Plaintiff) moves pursuant to CPLR 3025(b) and (c) for an order granting plaintiff leave to amend his Bill of Particulars. Defendants oppose the same. (MS#7).

FACTS

This action arises from an alleged incident occurring on February 10, 2017, when Plaintiff allegedly fell from an unsecured ladder at a jobsite located at 1326 Ocean Avenue, Brooklyn, New York. It is alleged that at the time of the accident the plaintiff was directed to install sprinkler heads on the sixth floor and was instructed to use the ladder plaintiff allegedly fell from. It is alleged that at the time of the accident plaintiff was attempting to climb the ladder utilizing three points of contact and once he reached the fourth rung, the plaintiff allegedly felt the ladder move/shake underneath him, causing him and the ladder to fall to the ground below. It is undisputed that no one was holding the ladder at the time of the accident. It is undisputed that the ladder was not secured to anything at the time of the accident. It is undisputed that the ladder at issue is a six foot tall A-frame metallic ladder supplied by his employer. It is undisputed defendant OTTS owns the premises where the work was being completed. It is undisputed that defendant CHESS was the general contractor for the worksite. It is undisputed M.R. was plaintiff's employer and they were hired to perform construction work/sprinkler hanging at the job site. It is alleged that the foreman of OTTS witnesses the accident.

ARGUMENTS

Plaintiff contends the owner and general contractor failed to provide plaintiff proper protection; defendants violated 240(1) by failing to provide the plaintiff with any safety devices to protect him from an elevation related risk of injury was the proximate cause of the plaintiff's injuries. In opposition the defendant OTTS and CHESS contend there are

issues of fact at to whether or not the plaintiff fell off of the ladder, and issues of fact as to whether the plaintiff was the sole proximate cause of his fall. Defendants M.R. contend that absent proof of defect in ladder plaintiff cannot prevail under Labor Law 240(1).

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

The court shall address the motions requesting summary judgment dismissing the plaintiff's Labor Law 200 claims. A cause of action sounding in violation of Labor Law § 200 or common-law negligence may arise from either dangerous or defective premises conditions at a work site or the manner in which the work is performed (*see Ortega v. Puccia*, 57 A.D.3d 54, 61, 866 NYS2d 323). In the present case, the plaintiff's injury "did not arise from a defective condition inherent on the ... property, but rather, arose as a result of the allegedly defective 'means' utilized by him to perform his work" (*Duarte v. State of New York*, 57 AD3d 715, 716, 869 NYS2d 602; *see McKee v. Great Atl. & Pac. Tea Co.*, 73 AD3d 872, 905 NYS2d 601; *Jenkins v. Walter Realty, Inc.*, 71 AD3d 954, 954, 898 NYS2d 56; *Radoncic v. Independence Garden Owners Corp.*, 67 AD3d 981, 982, 890 NYS2d 555; *Gomez v. City of New York*, 56 AD3d 522, 523–524, 867 NYS2d 200). Where, as in the present case, "a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery ... 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" (*Ortega v. Puccia*, 57 AD3d at 61, 866 NYS2d 323; *see Radoncic v. Independence Garden Owners Corp.*, 67 AD3d 981, 890 NYS2d 555 [internal quotation marks omitted]). "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); *quoting*, *Pilato v. 866 U.N. Plaza Assocs., LLC*, 77 AD3d 644, 645–46, 909 NYS2d 80, 82 (2010). In the present case, there is conflicting testimony regarding who was responsible for the manner in which the work is performed. Therefore, there are issues of fact as to who among the defendants had the authority to supervise or control the work for purposes of Labor Law § 200. Accordingly, defendants request for summary judgment dismissing Labor Law 200 claims are hereby denied as issues 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."

"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 Plaintiff moves for summary judgment on their labor Law 240(1) claim contending the undisputed evidence in the record establishes the plaintiff was not provided proper protection and/or equipment for the task the plaintiff was instructed to complete. Plaintiff further contends there are no witnesses, testimony or other evidence proffered by any party to rebut the uncontroverted testimony of the plaintiff of what happened as there are no witnesses to the accident. Plaintiff further contends the uncontroverted testimony proves that the unsecured ladder shifted giving rise to the presumption that the proper protection was not provided and that such shifting of the ladder was the proximate cause of the accident and the unopposed testimony establishes the plaintiff's case as a matter of law. The burden now shifts to defendant to establish they did provide proper protection.

In opposition, defendant, OTTS and CHESS contend there are numerous issues of fact for the jury to consider. In addition, Defendant contends that the foreman did witness the accident and there is an issue of fact as to whether the plaintiff even fell from the ladder.

The legislative purpose underlying Labor Law § 240 (1) was to place "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor" *(Bland v Manocherian,* 66 NY2d 452, 459, quoting 1969 NY *Legis Ann*, at 407) instead of on workers, who "are scarcely in a position to protect themselves from accident." *(Koenig v Patrick Constr. Corp.*, 298 NY 313, 318.) To that end, **"the Legislature determined that owners or contractors shall be liable for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure. Liability is not predicated on fault: it is imputed to the owner or contractor by**

statute and attaches irrespective of whether due care was exercised and without reference to principles of negligence" *(Zimmer v Chemung County Performing Arts,* 65 NY2d 513, 521-522; *Crawford v Leimzider,* 100 AD2d 568, 569). A violation of the statute is not the equivalent of negligence and does not give rise to an inference of negligence. *Brown v. Two Exch. Plaza Partners*, 76 NY2d 172, 178–79, 556 NE2d 430 (1990). "**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).

"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 Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287-289 [2003]). **"In a case ... involving a fall from a ladder, this showing may be made by demonstrating** that the subject ladder was defective **or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries"** (*see Singh v City of New York*, 113 AD3d 605 [2014]), quoting, *Robinson v. Bond St. Levy, LLC*, 115 AD3d 928, 928–29, 983 NYS2d 66 (2014).

In the present case, it is uncontroverted that Plaintiff was descending a ladder when the ladder shifted causing the plaintiff to fall and the plaintiff was not given any type of equipment to secure the ladder. Thus, creating a presumption that the ladder was not properly secured, because there was nothing to secure the ladder provided. Furthermore, on the question of whether the violation was the proximate cause of the accident.

Plaintiff's account of the accident in which he states that the ladder shifted as he was descending is sufficient to establish that defendants breach was a contributing factor to the accident. In the present case, "the plaintiff established the absence of adequate safety devices to protect the injured plaintiff from falling (*see Perez v NYC Partnership Hous. Dev. Fund Co., Inc.*, 55 AD3d 419 [2008]; *Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251 [2008]; *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173 [2004]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289 [2002]) and that such violation of Labor Law § 240 (1) was a proximate cause of his injuries" (*see Poracki v St. Mary's R.C. Church*, 82 AD3d 1192, 1194 [2011]). In opposition, the defendants "failed to raise a triable issue of fact as to whether the injured plaintiff's actions were the sole proximate cause of the accident" (*see Canas v Harbour at Blue Point Home Owners Assn., Inc.*, 99 AD3d 962 [2012]; *Leconte v 80 E. End Owners Corp.*, 80 AD3d 669 [2011]; *Sniadecki v Westfield Cent. School Dist.*, 272 AD2d 955 [2000]), quoting, *Robinson v. Bond St. Levy, LLC*, 115 AD3d 928, 929, 983 NYS2d 66 (2014). There has been no testimony that plaintiff misused the equipment provided to him, in any way. Here, there is no view of the evidence that supports a finding that plaintiff's actions were the sole proximate cause of his accident.

Moreover, contrary to defendant's contention that the foreman allegedly witnessed the accident and the plaintiff was the sole proximate cause if the plaintiff fell at all is unavailing. The foreman's EBT does state that he witnessed a person stumble over his own feet on the floor. However, in this EBT the foreman explicitly states that he cannot say that this was the plaintiff, or that he knows who the plaintiff even is. As such, this testimony does not establish that the foreman witnesses the accident at hand. The foreman does claim there was an additional witness to the accident and alleged elevator

operator whom he does not know and no party has produced for EBT's or any affidavits from the alleged witness. In the present case, the plaintiff's account of the accident is the only version of how this accident happened, which remains uncontroverted.

In the present case, there are no facts in dispute. Although the defendants contend there is an issue of fact as to whether the plaintiff fell at all, and that such fall was caused by plaintiff own misbalance, such contentions have no basis as there is no one who witnessed the accident. The contractor who claims he may have witnessed the someone (that he cannot identify as the plaintiff) stumbling backwards on the floor is not testimony that establishes he witnessed the plaintiff's accident. There is nothing in the record to establish anything other than what plaintiff testified to. Moreover, "It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law 240(1)" *Robinson v. Bond Street Levy, LLC* ,115 AD3d 928, 983 NYS2d 66 (2nd Dep't 2014). There is not a scintilla of evidence that proper protection and/or equipment for the task at was provided to the plaintiff, nor is there any evidence that plaintiff was the sole proximate cause of this accident. As such, there is no circumstance under which a jury could rationally find that the plaintiff was provided with proper equipment or that the plaintiff misused the equipment provided to him. Accordingly, the court finds that Labor Law 240 subsection (1) was violated because proper protection was not provided to the plaintiff, and the plaintiff is entitled to summary judgment. 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.

Next the court shall address, Defendants OTTS and CHESS's request to dismiss plaintiff's claim sounding in Labor Law 240(2). Labor Law 240(2) states in relevant part; "(2) Scaffolding or staging more than twenty feet from the ground or floor, swung or

suspended from an overhead support or erected with stationary supports, except scaffolding wholly within the interior of a building and covering the entire floor space of any room therein, shall have a safety rail of suitable material properly attached, bolted, braced or otherwise secured, rising at least thirty-four inches above the floor or main portions of such scaffolding or staging and extending along the entire length of the outside and the ends thereof, with only such openings as may be necessary for the delivery of materials. Such scaffolding or staging shall be so fastened as to prevent it from swaying from the building or structure." NY Lab Law 240 (McKinney). It is clear that Labor Law 240(2) would not apply to the present case because the testimony establishes the ladder was a six foot A frame ladder and could not be more than twenty feet from the ground. As such, defendants OTTS and CHESS request to dismiss plaintiff Labor Law 240(2) claim is hereby granted.

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 defendants move for summary judgment dismissing the plaintiff's claims in violations of the following Industrial Codes 23-1.5(a); 1.5(c)(1)(3); 1.6; 1.7; 5.1(b)-(d); 5.1(f); 5.1(j); 5.2; 5.3; 5.4; 5.5;5.6; 5.7; 5.8; 5.9; 5.10; 5.13(a)-(d); 5.18(b), (f)-(g).

Plaintiff contends defendants violated Industrial Code Section 23-1.5(a); 1.5(c)(1)(3). Defendants contend Industrial Code Section 23-1.5(a); 1.5(c)(1)(3) is a

regulation that relates to general safety standards and, as such does not provide a basis for liability under Labor Law 241(6). Section 23-1.5(a); 1.5(c)(1)(3)provides:

> "These general provisions shall not be construed or applied in contravention of any specific provisions of this Part (rule). (a) Health and safety protection required. All places where employees are suffered or permitted to perform work of any kind in construction, demolition or excavation operations shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection for the lives, health and safety of such persons as well as of persons lawfully frequenting the area of such activity. To this end, all employers, owners, contractors and their agents and other persons obligated by law to provide safe working conditions, personal protective equipment and safe places to work for persons employed in construction, demolition or excavation operations and to protect persons lawfully frequenting the areas of such activity shall provide or cause to be provided the working conditions, safety devices, types of construction, methods of demolition and of excavation and the materials, means, methods and procedures required by this Part (rule). No employer shall suffer or permit an employee to work under working conditions which are not in compliance with the provisions of this Part (rule), or to perform any act prohibited by any provision of this Part (rule). ... (c) Condition of equipment and safeguards. (1) No employer shall suffer or permit an employee to use any machinery or equipment which is not in good repair and in safe working condition. (2) All load carrying equipment shall be designed, constructed and maintained throughout to safely support the loads intended to be imposed thereon. (3) All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged." N.Y. Comp. Codes R. & Regs. tit. 12, § 23-1.5.

In the present case, Industrial Code Section 23-1.5(a); 1.5(c)(1)(3) is a general provision and as such is not a basis for liability under labor Law 241(6). Accordingly, the branch of defendants, motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §23-1.5(a); 1.5(c)(1)(3) 23-1.5(a); 1.5(c)(1)(3) 23-1.5(a); 1.5(c)(1)(3) 23-1.5(a); 1.5(c)(1)(3) is Granted.

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

> "Protection from general hazards Vertical passage. (f) Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided. N.Y. Comp. Codes R. & Regs. tit. 12, § 23-1.7(f).

In the present case this section of the Industrial Code does not apply. Accordingly, the branch of defendant's, motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §23-1.7(f) is granted.

Plaintiff contends defendants violated Industrial Code Section 5.1(b)-(d); 5.1(f); 5.1(j). Defendants contend Industrial Code Section 5.1(b)-(d); 5.1(f); 5.1(j) does not provide a basis for liability under Labor Law 241(6) because it applies to scaffolding and plaintiff was not on scaffolding. In the present case, defendants contention is correct this section of the Industrial Code applies to scaffolding and plaintiff was not on scaffolding. Accordingly, the branch of defendant's, motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §5.1(b)-(d); 5.1(f); 5.1(j) is granted.

Plaintiff contends defendants violated Industrial Code Section 5.2. Defendants contend Industrial Code Section 5.2 does not provide a basis for liability under Labor Law 241(6) because it applies to scaffolding and plaintiff was not on scaffolding. In the present case, defendants contention is correct this section of the Industrial Code applies to scaffolding and plaintiff was not on scaffolding. Accordingly, the branch of defendant's, motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §5.2 is granted.

Plaintiff contends defendants violated Industrial Code Section 5.3. Defendants contend Industrial Code Section 5.3 does not provide a basis for liability under Labor Law 241(6) because it applies to scaffolding and plaintiff was not on scaffolding. In the present

case, defendants contention is correct this section of the Industrial Code applies to scaffolding and plaintiff was not on scaffolding. Accordingly, the branch of defendant's, 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 5.4. Defendants contend Industrial Code Section 5.4 does not provide a basis for liability under Labor Law 241(6) because it applies to scaffolding and plaintiff was not on scaffolding. In the present case, defendants contention is correct this section of the Industrial Code applies to scaffolding and plaintiff was not on scaffolding. 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 5.5. Defendants contend Industrial Code Section 5.5 does not provide a basis for liability under Labor Law 241(6) because it applies to scaffolding and plaintiff was not on scaffolding. In the present case, defendants contention is correct this section of the Industrial Code applies to scaffolding and plaintiff was not on scaffolding. Accordingly, the branch of defendant's, motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §5.5 is granted.

Plaintiff contends defendants violated Industrial Code Section 5.6. Defendants contend Industrial Code Section 5.6 does not provide a basis for liability under Labor Law 241(6) because it applies to scaffolding and plaintiff was not on scaffolding. In the present case, defendants contention is correct this section of the Industrial Code applies to

scaffolding and plaintiff was not on scaffolding. Accordingly, the branch of defendant's, motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §5.6 is granted.

Plaintiff contends defendants violated Industrial Code Section 5.7. Defendants contend Industrial Code Section 5.7 does not provide a basis for liability under Labor Law 241(6) because it applies to scaffolding and plaintiff was not on scaffolding. In the present case, defendants contention is correct this section of the Industrial Code applies to scaffolding and plaintiff was not on scaffolding. Accordingly, the branch of defendant's, motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §5.7 is granted.

Plaintiff contends defendants violated Industrial Code Section 5.8. Defendants contend Industrial Code Section 5.8 does not provide a basis for liability under Labor Law 241(6) because it applies to scaffolding and plaintiff was not on scaffolding. In the present case, defendants contention is correct this section of the Industrial Code applies to scaffolding and plaintiff was not on scaffolding. Accordingly, the branch of defendant's, motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §5.8 is granted.

Plaintiff contends defendants violated Industrial Code Section 5.9. Defendants contend Industrial Code Section 5.9 does not provide a basis for liability under Labor Law 241(6) because it applies to scaffolding and plaintiff was not on scaffolding. In the present case, defendants contention is correct this section of the Industrial Code applies to scaffolding and plaintiff was not on scaffolding. Accordingly, the branch of defendant's, motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §5.9 is granted.

Plaintiff contends defendants violated Industrial Code Section 5.10. Defendants contend Industrial Code Section 5.10 does not provide a basis for liability under Labor Law 241(6) because it applies to scaffolding and plaintiff was not on scaffolding. In the present case, defendants contention is correct this section of the Industrial Code applies to scaffolding and plaintiff was not on scaffolding. Accordingly, the branch of defendant's, motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §5.10 is granted.

Plaintiff contends defendants violated Industrial Code Section 5.13(a)-(d). Defendants contend Industrial Code Section 5.13(a)-(d) does not provide a basis for liability under Labor Law 241(6) because it applies to scaffolding and plaintiff was not on scaffolding. In the present case, defendants contention is correct this section of the Industrial Code applies to scaffolding and plaintiff was not on scaffolding. Accordingly, the branch of defendant's, motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §5.13(a)-(d) is granted.

Plaintiff contends defendants violated Industrial Code Section 5.18(b), (f)-(g). Defendants contend Industrial Code Section 5.18(b), (f)-(g) does not provide a basis for liability under Labor Law 241(6) because it applies to scaffolding and plaintiff was not on scaffolding. In the present case, defendants contention is correct this section of the Industrial Code applies to scaffolding and plaintiff was not on scaffolding. Accordingly, the branch of defendant's, motion for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §5.18(b), (f)-(g) is granted.

Plaintiff contends defendants Sections 1926.501; 1926.502 of 29 CFR 1926 that pertain the general safety code violations. The OSHA standards and regulations are not a basis for a 241(6) Labor Law violation. Accordingly, the branch of defendant's, motion

for summary dismissal of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of Sections 1926.501; 1926.502 of 29 CFR 1926 is granted.

Finally the court will address plaintiff's request to amend his bill of Particulars to include violations of Industrial Code Sections 1.21(4)(i)-(ii); 1.21(b)(4)(i). It is well settled that the Appellate Division 2 Department has "held that the failure to identify the specific Code provision allegedly violated in support of a Labor Law § 241 (6) cause of action either in the complaint or in the bill or supplemental bills of particulars is not necessarily fatal. Rather, leave to amend the pleadings to so identify the relevant Code provision may properly be granted, even after the note of issue has been filed, where the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant" (*see Dowd v City of New York,* 40 AD3d 908 [2007]; *Latino v Nolan & Taylor-Howe Funeral Home,* 300 AD2d 631 (2002); *Kelleir v Supreme Indus. Park,* 293 AD2d 513 (2002);quoting, *Galarraga v. City of New York*, 54 AD3d 308, 310, 863 NYS2d 47 (2008). In the present case, the plaintiff fell off a ladder and this industrial code is the code that is applicable, the amendment involves no new factual allegations, and raises no new theories of liability, and causes no prejudice to the defendant. Accordingly, plaintiff's request to amend his Bill of Particulars to include Industrial Codes Section 1.21(4)(i)-(ii); 1.21(b)(4)(i) is hereby granted.

Plaintiff contends defendants violated Industrial Codes 1.21(4)(i)-(ii); 1.21(b)(4)(i) applies to ladders. Defendants contend these Industrial Codes are not applicable because the plaintiff previously used the ladder without incident. This argument is unavailing. The plaintiff was on a ladder at the time of his accident which was not properly secured. Accordingly, the branch of defendant's, motion for summary dismissal of

Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR §11.21(4)(i)-(ii); 1.21(b)(4)(i) in the event the courts grants plaintiff leave to amend his Bill of Particulars is hereby denied as these Industrial Codes are applicable to the present case.

Accordingly, Plaintiff's motion for summary judgment as to Labor Law 240(1) is hereby granted for the reasons stated above (MS#4). Defendants, OTTS OCEAN LLC (hereinafter OTTS) and CHESS BUILDERS LLC (hereinafter CHESS), motion for an order granting summary judgment dismissing all claims and plaintiff's complaint in its entirety with respect to Labor Law 200, 240(2) and 241(6) including all 12 NYCRR 23 claims is hereby granted to the extent that Labor Law 240(2); and 241(6) 12 NYCRR 23-1.5(a); 1.5(c)(1)(3); 1.6; 1.7; 5.1(b)-(d); 5.1(f); 5.1(j); 5.2; 5.3; 5.4; 5.5;5.6; 5.7; 5.8; 5.9; 5.10; 5.13(a)-(d); 5.18(b), (f)-(g) claims his hereby dismissed, all other relief is denied, for the reasons stated above. (MS#5). Third-Party Defendants, M.R. ELECTRICAL MAINTENANCE INC. motion for an order granting summary judgment dismissing the plaintiff's complaint and all cross-claims and dismissing the defendants/third-party plaintiff's OTTS OCEAN, LLC and CHESS BUILDERS third-party complaint is hereby denied, issues of fact. (MS#6). Plaintiff's, motion for an order granting plaintiff leave to amend his Bill of Particulars to include violations of 12 NYCRR §11.21(4)(i)-(ii); 1.21(b)(4)(i) is hereby granted. (MS#7).

This constitutes the Decision/Order of the Court.

Date: MAY 5, 2020

RICHARD VELASQUEZ, J.S.C.

So Ordered
Hon. Richard Velasquez

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