SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

MAREL DEJESUS VARGAS ROJAS,

Plaintiff,

- against -

BARRETT BONACCI & VAN WEELE, P.C., ABOVE ALL EQUITIES, INC., UNIQUE FITNESS CENTER CORP., LS STEEL, INC. and ABOVE ALL STOREFRONTS, INC.,

Defendants.

TRIAL/IAS PART 33
NASSAU COUNTY

Index No.: 609551/18
Motion Seq. No.: 02
Motion Date: 11/12/19

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR § 3212, for an order granting partial summary judgment with respect to liability as to defendants Above All Equities, Inc. ("AAE") and LS Steel, Inc. ("LSS"). Defendants AAE and LSS oppose the motion.

The Court notes that this action has been discontinued against defendant Barrett Bonacci & Van Weele, P.C. and defendant Unique Fitness Center Corp.

Plaintiff commenced the instant action with the filing of a Summons and Verified Complaint on or about July 17, 2018. *See* Plaintiff's Affirmation in Support Exhibit A. Plaintiff served a Supplemental Summons and Amended Verified Complaint on or about August 3, 2018. *See id.* Plaintiff served a Second Supplemental Summons and Second Amended Verified Complaint on or about December 7, 2018. *See id.* Defendant LSS served a Verified Answer to the Amended Verified Complaint on or about September 28, 2018. *See* Plaintiff's Affirmation in Support Exhibit B. Defendant LSS served a Supplemental Answer to the Amended Verified Complaint on or about November 14, 2018. *See id.* Defendant LSS served a Verified Answer to the Second Supplemental Summons and Second Amended Verified Complaint on or about February 13, 2019. *See id.* Defendant AAE served a Verified Answer to the Amended Verified Complaint on or about November 19, 2018. *See* Plaintiff's Affirmation in Support Exhibit C. Defendant AAE served a Verified Answer to the Second Supplemental Summons and Second Amended Verified Complaint on or about February 13, 2019. *See id.*

In support of the motion, counsel for plaintiff submits, in pertinent part, "[t]hat on June 26, 2018 Plaintiff suffered serious, severe and permanent personal injuries when he fell three (3) stories from a building under construction situate (*sic*) at 4890 Veterans Memorial Highway, Holbrook, NY (hereinafter referred to [as] 'premises') causing him to sustain personal injuries. At the time of the subject occurrence the subject building was partially constructed and only the skeletal structure had been erected thereat. That prior to the subject accident, the owner of the subject premises, Defendant, ABOVE ALL EQUITIES, INC. (hereinafter referred to as 'AAE') endeavored to construct a building on the subject premises to be used as a fitness center and/or gym. That prior to the subject accident and in furtherance of the commencement of the construct (*sic*) of the subject building Defendant, AAE hired and entered into an agreement with

numerous sub-contractors to perform the labors necessary to construct the subject building. The Defendant, AAE entered into an agreement with Defendant, LS Steel (hereinafter referred to as 'DEFENDANT, LSS') to fabricate, erect and install the 'skeletal' steel structure of the subject building. That in order to satisfy its obligations to Defendant, AAE, Defendant, Defendant (*sic*), LSS sub-contracted with a company known as Romco wherein Romco was to provide the materials and labor necessary to fabricate, erect and install the aforementioned 'skeletal' steel structure at the subject premises. That at the time of the subject accident and prior thereto, Plaintiff was a laborer and employed by Romco. That on June 26, 2018 Plaintiff was working, in the course of his employment for Romco, at the subject premises and more specifically on the third floor of the partially constructed building thereat, when, while in the process of installing pieces of metal laminate decking, he fell approximately thirty-five (35) feet to the ground below. That at the time of the subject accident, Plaintiff was wearing a harness and tether, but there was no safety cable installed on the level Plaintiff was working to attach his aforementioned safety gear to."

In support of the motion, counsel for plaintiff submits the transcript from plaintiff's Examination Before Trial ("EBT") testimony. *See* Plaintiff's Affirmation in Support Exhibit F. Counsel for plaintiff also submits the transcript of the EBT testimony of Steve Smith, who testified on behalf of defendant AAE, the transcript of the EBT testimony of Michael Stanick, who testified on behalf of defendant LSS, and the transcript of the EBT testimony of non-party witness Elser Gamaliel Saavedra Mata. *See* Plaintiff's Affirmation in Support Exhibits G, K and M.

Counsel for plaintiff argues, in pertinent part, that, "[a]s concerns the happening of the subject occurrence it is undisputed that Defendant, AAE owned the subject premises and that

(*sic*) structure situate (*sic*) at the subject premises upon which Plaintiff worked at the time of the subject occurrence was a building which Defendant, AAE intended to use for commercial purposes and (*sic*) namely a fitness center and therefore Defendant, AAE cannot seek shelter from liability under the single and two family dwelling exception to the New York State Labor (*sic*). Further, it is undisputed that at the time of the subject accident, Plaintiff was wearing a harness and tether, but there was no safety cable installed on the level Plaintiff was working to attach his aforementioned safety gear. Accordingly, Defendant, AAE is liable pursuant to the New York State Labor Law section 240 to Plaintiff for the happening of the subject occurrence."

Counsel for plaintiff further asserts, in pertinent part, that, "[a]s previously set forth herein it is undisputed that Plaintiff fell 35 feet from a building under construction because he was not provided the proper protection from height related risks associated with his construction work. Further, it is abundantly clear from the testimony taken herein that Defendant, LSS was the general contractor as concerns its relationship with plaintiff's employer (Romco) and/or directed and controlled the work of Romco.... Stanick testified that as concerns the relationship between Defendant, LSS and Romco concerning the subject premises and building, that Romco was the 'sub-contractor' and Defendant, LSS was the 'contractor'. Further, Stanick himself (who has been in the business for 20 years ...) testified ... "when working on the upper deck (as was Plaintiff) of the structure at the subject premises workers should wear a harness and lanyard which in turn should be connected to a safety cable'.... Stanick testified that it was the job of Defendant, LSS to ensure that Romco performed the work set forth in the contract in a 'prompt' and 'diligent' manner and 'the work rendered had to be of a level of acceptable workmanship'.... Stanick testified that to ensure Romco's work was of an (*sic*) acceptable workmanship he did 'visual inspections', 'walked the job to see their progress' and 'compared the work to the architect plans'.... Stanick testified that if the work was non-compliant with the contract terms

and/or the architect plans he would advise Charlie and ask that the same be corrected.... Stanick testified that Romco had to answer to Defendant, LSS as concerns the standards of its workmanship." *See* Plaintiff's Affirmation in Support Exhibits K and L.

Counsel for plaintiff also argues, in pertinent part, that, "in *Zhao v. Qualico Improvement, Inc.*, [citation omitted] Plaintiff sustained personal injuries when he fell from (*sic*) roof of a building while installing a new roof. The property owner original (*sic*) contracted with Defendant Qualico Improvement, Inc. who in turn sub-contracted the work to Plaintiff. Subsequently, Plaintiff brought a case of action as against, inter alia, Defendant, Qualico Improvement, Inc. who claimed that it was not liable to Plaintiff pursuant to the NYS Labor Law section 240 as it was not the general contractor. The court granted Plaintiff's application for summary judgment.... As in *Zhao* where the property owner contracted with Qualico who then contracted with Plaintiff here Defendant, AAE, the property owner contracted with Defendant, LSS who in turn contracted with Romco, Plaintiff's employer and as such Defendant, LSS, as in *Zhao*, is strictly liable to Plaintiff. Based upon the testimony of the parties herein is it (*sic*) clear that Defendant, AAE owned the subject premises and Defendant, LSS was the general contractor on the date of the subject occurrence as concerns the construction project at the subject premises. At the time of the subject occurrence Plaintiff was within the employment of Romco, who Defendant, LSS sub-contracted with after contracting with Defendant, AAE and therefore is within the class of persons sought to be protected by the NYS Labor Law.... Likewise, at the time of the subject occurrence Plaintiff was working on a commercial property assembling the steel structures. As such the labor performed by Plaintiff clearly constitutes 'erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure' [citation omitted]. Additionally, it is undisputed that Defendant failed to afford Plaintiff any type of safety devices at an elevated height to guard against the happening of the subject occurrence and therefore violated that

portion of the statute that provided (*sic*) owners and general contractors 'shall furnish or erect, or cause to erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pullups, braces irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.'... Plaintiff herein fell because he could not attach his harness and tether to a safety cable and accordingly Defendants are strictly liable to Plaintiff pursuant to New York State Labor Law section 240.... Defendant, AAE and Defendant, LSS are strictly liable to Plaintiff for the happening of the subject occurrence. Defendant, AAE was the owner of the subject premises and Defendant, LSS was the general contractor and directed and controlled the work of the sub-contractor and namely Plaintiff and Plaintiff's employer. Further, Plaintiff sustained a gravity related injury when he fell approximately 35 feet from the steel skeleton of (*sic*) building under construction. Prior to the happening of the subject occurrence Defendant, AAE contracted with Defendant, LSS to fabricate and assemble the steel structure of the subject premises and Defendant, LSS in turn sub-contracted these duties to Romco who employed Plaintiff to carry out the labor. At the time of the subject occurrence Plaintiff was assembling the roof of the subject premises when he fell through the same because he was unable to attach his harness and lanyard to a safety cable as it has not been installed at the time of the subject occurrence. Accordingly, Defendants are strictly liable to Plaintiff for the happening of the subject accident pursuant to New York State Labor Law section 240."

Counsel for plaintiff further asserts, in pertinent part, that, "NYS Labor (*sic*) section 241(6) provides that 'All areas in which construction excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.... [I]t is undisputed that the situs of the subject occurrence was

devoid of any lifelines to which Plaintiff could have attached his tail line to which would have prevented the happening of the subject occurrence. Accordingly, Defendants, LSS & AAE violated New York State Labor Law section 241(6) by failing to comply with section 23-1.16(E) of the industrial code. Likewise, Defendants violated New York State Labor Law section 241(4) which provides 'if the floor beams are of iron or steel, the entire tier of iron or steel beams on which the structural iron or steel work is being erected shall be thoroughly planked over, except spaces reasonably required for proper construction of the iron or steel work, for raising or lowering of materials or for stairways and elevator shafts designated by the plans and specifications.' In the matter at hand Plaintiff fell through the surface he was standing on because the flooring thereat was not secure (*sic*) its position.... Plaintiff testified that at the moment of the subject occurrence he had pulled a piece of laminate off the stack, took a step on a piece of laminate and then fell from the top of the structure (3 stories up) against the ground below. Had Defendants placed planks, as required by this section of the Labor Law, the subject accident would not have occurred." *See* Plaintiff's Affirmation in Support Exhibit F.

In opposition to the motion, counsel for defendants AAE and LSS argues, in pertinent part, that, "counsel for plaintiff asserts that Labor Law Section 240(1) is a 'strict liability' statute. Despite plaintiff's counsel's characterization of Labor Law Section 240(1) as a 'strict liability' statute, it is well settled that the mere fact that a construction worker fell from a height is insufficient to establish liability under this section of the Labor Law. While Section 240 (1) imposes a duty (upon owners and general contractors) to provide proper protection to workers, the mere fact that a worker claims to have fallen from a ladder or other elevated height is insufficient, by itself, to establish a claim under Labor Law Section 240 (1). [citations omitted].... Furthermore, it is well settled that a cause of action may not be maintained under Labor Law Section 2401(1) when the injured worker has been provided with a safety device and the plaintiff

has been injured by virtue of the plaintiff's own intentional misuse of the safety device or failure to use a safety device. [citation omitted]. In this case, while it is undisputed that plaintiff fell from a height, a significant question of fact exists as to whether plaintiff made use of the safety devices that were available to him at the job site. In this regard, the testimony of the witnesses creates a question of fact as to whether a 'Yo-Yo' was on site that plaintiff could have (and should have) attached his harness to. At the time of his non-party deposition, plaintiff's co-worker, Elser Gamaliel Saavedra Mata (herein after (*sic*) 'Mr. Mata') testified that prior to the date of the accident, he was hooking his harness into an object known as a 'Yo-Yo'.... When asked to describe what a 'Yo-Yo' is he stated that it is something that construction workers can hook their harness into to prevent them from falling to the ground. It can also be moved around the job site.... Significantly, while Mr. Mata testified that there were 'Yo-Yo's' on site for use by the construction workers, at the time of plaintiff's deposition he denied that there was a 'Yo-Yo' for him to hook his harness into.... Thus while the plaintiff claims that he was caused to fall because there was nothing at the construction site for him to hook into, a question of fact exists as to whether a 'Yo-Yo' was on site that, if used by plaintiff, would have prevented him from falling to the ground below. It should also be noted that Mr. Mata also testified that '**normally, we, when we put the decks in place, we don't latch onto something because the same thing we're carrying is going to push us down in the back**'... In other words, while plaintiff claims that he fell because he was not provided with something to hook his harness into, his co-worker appears to indicate in his testimony that the workers simply elected not to hook their harnesses up to anything. Furthermore, plaintiff has testified that the job of setting up a wire to hook the harness into is a job that is performed by ROMCO workers.... Accordingly, a significant question of fact exists as to whether plaintiff's accident occurred because of his own failure to use a Yo-Yo to hook his harness into. Furthermore, as plaintiff admits that is was the job of the

ROMCO workers (of which he was one) to set up a wire for the purpose of attaching a harness, a question of fact exists as to whether plaintiff's own actions were the sole proximate cause of his accident. For the foregoing reasons, summary judgment under Labor Law Section 240(1) should be denied to all defendants." *See* Defendants AAE and LSS's Affirmation in Opposition Exhibits A and B.

Counsel for defendants AAE and LSS further contends, in pertinent part, that, "summary judgment should be denied as against defendant LS STEEL under Labor Law Section 240(1) as LS STEEL was neither the owner of the property nor the general contractor. LS STEEL was one of several contractors that was retained by ABOVE ALL EQUITIES to perform work at the job site in question. While LS STEEL was retained to fabricate and install structural steel members, LS STEEL did not supervise, direct and/or control the work of the various trades working at the job site. Furthermore, while LS STEEL subcontracted a portion of the job to plaintiff's employer, ROMCO, LS STEEL did not supervise, direct or control the means and methods of plaintiff's work.... In this regard, at the time of his deposition, plaintiff testified that when he reported to work at the job site he was supervised by a ROMCO foreman named 'Tommy'. Plaintiff further testified that nobody other than 'Tommy' told him what to do at the job site.... Additionally, Michael Stanick testified that when the structural steel was being erected, he was not on the job site on a daily basis. Rather, he would simply stop by the job site approximately once or twice a week for the purpose of checking up on the progress of ROMCO's work.... Furthermore, Mr. Stanick testified that ROMCO was responsible for installing safety devices for the protection of its workers.... In fact, the contract between LS STEEL and ROMCO specifically provides in paragraph '5' that 'the subcontractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance with its work'... Additionally, the contract between ABOVE ALL EQUITIES and LS STEEL is devoid of

any reference to LS STEEL being retained as a general contractor with respect to the subject project. As such, while LS STEEL was hired by ABOVE ALL EQUITIES, they were not hired to serve as the General Contractor, nor was LS STEEL directing the means and methods of plaintiff's work. Thus as LS STEEL was neither the property owner nor the general contractor, plaintiff should not be awarded summary judgment against LS STEEL under Labor Law Section 240(1). [citations omitted]." *See* Defendants AAE and LSS's Affirmation in Opposition Exhibits B-E.

Counsel for defendants AAE and LSS also argues, in pertinent part, that "Section 241(6) imposes upon owners and general contractors a duty to comply with specific safety provisions contained within the Industrial Code. However, Labor Law Section 241(6) is inapplicable to subcontractors, such as LS STEEL, unless a showing can be made that the subcontractor had authority to supervise and control the work in question. [citations omitted]. LS STEEL was neither the owner nor the general contractor. Additionally, the means and methods of plaintiff's work were supervised and directed by the ROMCO foreman 'Tommy'. As such, plaintiff should not be awarded summary judgment under Labor Law Section 241(6) as against defendant LS STEEL. Additionally, summary judgment should not be awarded as against defendant, ABOVE ALL EQUITIES. In order to establish liability under Labor Law Section 241(6), plaintiff must establish both that the defendant violated a specific provision of the Industrial Code and that the alleged violation was a proximate cause of plaintiff's accident. In this case, plaintiff's claim under Labor Law Section 241(6) is based upon an alleged violation of Industrial Code Section 23-1.16. This section related to the condition of lifelines and taglines (*sic*) that are in use at the job site. In this case, however, plaintiff does not allege that either a lifeline or a tag line (*sic*) that was provided to him failed to comply with the provisions of Industrial Code Section 241(6) (*sic*). Rather, he claims that no life line (*sic*) or tag line (*sic*) was provided. As

such, the provisions of Industrial Code Section 23-1.16 are not applicable to the facts of this case. [citations omitted]."

Counsel for defendants AAE and LSS also adds, in pertinent part, that, "[s]ummary judgment is also inappropriate with respect to plaintiff's claim asserted under Labor Law Section 241(4) as a question of fact exists that should preclude the granting of this portion of plaintiff's motion. While Labor Law Section 241(4) provides for the use of planking in the erection of structural steel, this section contains a significant exception to the planking requirement. In this regard, planking is required **except over spaces reasonably required for proper construction of iron or steel work**. In this case, plaintiff does not allege that he stepped into an opening that was un-planked. Rather, he simply claims that he slipped and fell off of the 3rd deck. To the extent plaintiff's counsel now seeks to claim plaintiff may have fallen through an opening located on the third deck (which was in the process of being installed), plaintiff's counsel has not presented any evidence that any such opening was no one that was reasonably necessary for the performance of the structural steel work in question. In fact, plaintiff's counsel has not presented any evidence on this issue."

Labor Law § 240(1) provides, in pertinent part, as follows:

> "All contractors and owners and their agents,... 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 caused to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, swings, 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."

The statute seeks to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured." *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 601 N.Y.S.2d 49 (1993); *Rau v. Bagels*

N Brunch, Inc., 57 A.D.3d 866, 870 N.Y.S.2d 111 (2d Dept. 2008). A violation of Labor Law § 240(1) mandates the imposition of "absolute liability" and is deemed to create a statutory cause of action unrelated to questions of negligence. *See Striegel v. Hillcrest Heights Development Corporation*, 100 N.Y.2d 974, 768 N.Y.S.2d 727 (2003); *Zimmer v. Chemung County Performing Arts, Inc.*, 65 N.Y.2d 513, 493 N.Y.S.2d 102 (1985).

The aim of this statute is to protect workers by imposing liability for the failure to supply required safety devices at construction sites upon those best situated to mandate and implement their use. *See Zimmer v. Chemung County Performing Arts*, *supra* at 520. This duty has been held to be non-delegable and may subject contractors, owners or their agents (except for owners of one and two family dwellings who do not direct the work) to liability for their breach whether or not any of them actually control or supervise the work in which the employee was engaged at the time of the accident. *See Ross v. Curtis-Palmer Hydro-Electric Co.*, *supra* at 500.

The statute is also self-defining; that is, it spells out those activities to which it applies. Those activities are "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." *See* Labor Law § 240(1).

Ultimately,"[i]n order to prevail on a cause of action pursuant to Labor Law § 240(1), a plaintiff must establish a violation of the statute and that such violation was a proximate cause of his or her injuries." *Rakowicz v. Fashion Inst. of Tech.*, 56 A.D.3d 747, 868 N.Y.S.2d 283 (2d Dept. 2008); *Chlebowski v. Esber*, 58 A.D.3d 662, 871 N.Y.S.2d 652 (2d Dept. 2009); *Rudnik v. Brogor Realty Corp.*, 45 A.D.3d 828, 847 N.Y.S.2d 141 (2d Dept. 2007). *See also Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003); *Robinson v. Bond Street Levy, LLC*, 115 A.D.3d 928, 983 N.Y.S.2d 66 (2d Dept. 2014); *Carrion v. City of New York*, 111 A.D.3d 872, 976 N.Y.S.2d 126 (2d Dept. 2013); *Hugo v. Sarantakos*, 108 A.D.3d

744, 970 N.Y.S.2d 245 (2d Dept. 2013).

The statute is violated when a plaintiff is exposed to an elevation related risk while engaged in an activity covered by the statute and the defendant fails to provide a safety device adequate to protect the plaintiff against the elevation-related risk entailed in the activity or provides an inadequate one. "[T]he 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." *Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 895 N.Y.S.2d 279 (2009).

Ultimately entitlement to recovery under Labor Law § 240(1) requires a demonstration of two things: (1) that a violation of the statute – *i.e.*, a failure of the defendant to provide the required protection at a construction site – proximately caused the plaintiff's injury; ***and*** (2) that the "injury sustained is the type of elevation related hazard to which the statute applies" in the first place (emphasis added). *See Wilinski v. 334 East 92nd Hous. Dev. Fund Corp.*, *supra*; *Blake v. Neighborhood Hous. Servs. of N.Y. City*, *supra*; *Degen v. Uniondale Union Free Sch. Dist.*, 114 A.D.3d 822, 980 N.Y.S.2d 790 (2d Dept. 2014); *Schwartz v. Valente*, 112 A.D.3d 809, 977 N.Y.S.2d 319 (2d Dept. 2013). Where there is no statutory violation, or where the plaintiff is the sole cause of his own injuries, there can be no recover under Labor Law § 240(1). *See Garcia v. Market Associates*, 123 A.D.3d 661, 998 N.Y.S.2d 193 (2d Dept. 2014).

In the instant matter, the Court finds that plaintiff has demonstrated that defendants AAE and LSS failed to provide the required protection at the subject construction site, specifically the fact that no "yo-yos" were provided, nor any other device to which plaintiff could attach his harness and tether, and demonstrated that the "injury sustained is the type of elevation related hazard to which the statute applies" in the first place. The Court does not agree with counsel for

defendants AAE and LSS's interpretation of non-party witness Elser Gamaliel Saavedra Mata's EBT testimony. *See* Plaintiff's Affirmation in Opposition Exhibit A. The Court also does not find merit in counsel for defendants AAE and LSS's assertion that defendant LSS was not a contractor or agent of the agent.

Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers. *See Gonzalez v. Perkan Concrete Corp.*, 110 A.D.3d 955, 975 N.Y.S.2d 65 (2d Dept. 2013). The statute, however, is not self-executing. In order to show a violation of the statute and withstand a defense motion for summary judgment, plaintiffs must show that defendants violated a specific, applicable, implementing regulation of the Industrial Code which sets forth specific safety standards, rather than a provision containing only generalized requirements for worker safety. *See Jara v. New York Racing Assn., Inc.*, 85 A.D.3d 1121, 927 N.Y.S.2d 87 (2d Dept. 2011).

Section 241(6) of the Labor Law provides:

> § 241. Construction, excavation and demolition work
> 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, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:...
> 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

Thus, while the statute does not impose "absolute liability," it does impose a "nondelegable duty upon an owner or general contractor to respond in damages for injuries sustained due to another party's negligence in failing to conduct their construction, demolition or excavation operations so as to provide for the reasonable and adequate protection of the persons employed therein." *Rizzuto v. L.A. Wenger Contracting Co., Inc.*, *supra*. Therefore, once it is established that any construction site participant either caused or negligently allowed a condition violative of any of the "concrete" specifications of the Industrial Code (*see Ross v. Curtis-Palmer Hydro-Elec. Co.*, *supra*; *Morrison v. City of New York*, 5 A.D.3d 642, 774 N.Y.S.2d 763 (2d Dept. 2004)), then the owner or general contractor is vicariously liable, subject to comparative negligence, irrespective of whether said defendant had notice of the condition.

In the instant matter, plaintiff has pled that defendants AAE and LSS violated Industrial Code § 23-1.16 by not providing a lifeline to which plaintiff could attach his harness and lanyard. The Court further does not find merit in the argument that defendant LSS was not a contractor who had authority to supervise and control the work in question. *See* Plaintiff's Affirmation in Support Exhibits K and L.

Section 241(4) of the Labor Law provides:

> § 241. Construction, excavation and demolition work
> 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, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:...
> 4. If the floor beams are of iron and steel, the entire tier of iron and steel beams on which the structural iron or steel work is being erected shall be thoroughly planked over, except spaces reasonably required for proper construction of the iron or steel work, for raising or lowering of materials or for stairways and elevator shafts designated by the plans and specifications.

The Court finds that plaintiff's has not provided sufficient evidence to establish summary judgment under this section of the Labor Law.

Therefore, based upon the above, plaintiff's motion, pursuant to CPLR § 3212, for an order granting partial summary judgment with respect to liability as to defendants AAE and LSS, is hereby **GRANTED as respect to plaintiff's causes of action pursuant to New York Labor Law §§ 240(1) and 241(6) and DENIED as respect to plaintiff's causes of action pursuant to New York Labor Law §§ 241(4)**.

The remaining parties shall appear for a Certification Conference in IAS Part 33, Nassau County Supreme Court,100 Supreme Court Drive, Mineola, New York, on March 17, 2020, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
February 11, 2020

ENTERED
FEB 13 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE