At an IAS Term, Part 9 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 28th day of March, 2023.

P R E S E N T:
HON. DEBRA SILBER, Justice.

- X

JULIO TENEMAZA,

Plaintiff,

- against -

PS 488 GROUP LLC, GALIL PS 488 LLC,
HAPPY LIVING DEVELOPMENT LLC,
and PARK SLOPE 488 DEVELOPMENT LLC,

Defendants.

- X

PS 488 GROUP LLC, GALIL PS 488 LLC, and
HAPPY LIVING DEVELOPMENT LLC,

Third-Party Plaintiffs,

- against -

HYBRID FRAMING & INTERIORS INC.,

Third-Party Defendant.

- X

HYBRID FRAMING & INTERIORS INC.,

Second Third-Party Plaintiff,

- against -

JDS CARPENTRY CORP.,

Second Third-Party Defendant.

- X

DECISION/ORDER

Index No. 512605/2018

Motion Sequence No. 7

The following papers read herein:	NYSCEF Documents
Notice of Motion and Affidavits (Affirmations) Annexed and Exhibits	142-170
Opposing Affidavits (Affirmations) and Exhibits	171-172
Reply	174

Upon the foregoing papers, plaintiff moves, in mot. seq. 7, for an order, pursuant to CPLR 3212, granting him partial summary judgment on the issue of liability against defendants PS 488 Group LLC, Galil PS 488 LLC, and Happy Living Development LLC, pursuant to Labor Law §240(1) and §241(6), and against Happy Living Development LLC pursuant to Labor Law §200 and common law negligence. The plaintiff previously obtained a default judgment order against the fourth defendant, Park Slope 488 Development LLC, which states that the inquest should be held at the time of trial [Doc 149].

Background

Plaintiff commenced the instant action on June 19, 2018 by electronically filing a summons and verified complaint. Plaintiff claims therein that defendants PS 488 Group LLC (hereafter "PS 488") and Galil PS 488 LLC (hereafter "Galil") were the co-owners of the premises known as 488 Fourth Avenue, Brooklyn, NY, at all relevant times, and that the other defendant, Happy Living Development LLC (hereafter "Happy Living") was the owner, and/or the lessee and/or the lessor and/or the managing agent and/or the construction manager and/or the general contractor.[1] On the date of the subject accident, plaintiff was employed by JDS Carpentry Corp., which had been hired by one of defendant Happy Living's subcontractors, Hybrid (third-party defendant) for work on a new building being constructed at the location, a ten-story residential condominium with commercial space on the ground floor. Plaintiff alleges that defendants failed to provide him with a safe place to work, and failed to offer proper equipment and/or safety devices so as to prevent him from being injured

[1] The NYC Dept. of Buildings' website indicates that the general contractor was Happy Living Development, on the building permit issued for the new building construction, #321177604-01-NB. The recorded condominium declaration on the ACRIS website indicates that the other two defendants, PS 488 and Galil, were the co-owners of the property until the declaration was recorded to create the condominium form of ownership in November 2019, recorded 12/31/19.

at the worksite. Specifically, he alleges that he fell from a four-foot step ladder. The complaint asserts causes of action pursuant to Labor Law sections 240(1), 241(6) and 200, as well as for common law negligence.

Plaintiff alleges that on March 23, 2018, while he was working for non-party (the former second third-party defendant) JDS Carpentry Corp. (hereafter "JDS") at the subject premises, he was "caused to fall from an elevated height, off a dangerous, defective A-frame ladder, to the unfinished, uneven debris-covered ground below, and sustain serious physical injuries [Doc 143 ¶3]. Plaintiff also claims that at all relevant times, he was engaged in work within the scope of the Labor Law.[2]

Defendants (other than Park Slope 488 Development LLC) subsequently interposed an answer [Doc 2] on August 15, 2018, generally denying plaintiff's allegations. Plaintiff then moved for a default judgment order against Park Slope 488 Development LLC in Motion Sequence #1, which was granted. Defendants (other than Park Slope 488 Development LLC) subsequently interposed an amended answer on September 8, 2020, [Doc 68] without leave of court. As it was not rejected, it shall stand as defendants' answer. On April 22, 2019, defendants commenced a third-party action against Hybrid Framing & Interiors Inc., (hereafter "Hybrid,") and then amended it as of right on May 1, 2019 [Doc 30]. The third-party defendant then interposed a third-party answer on June 17, 2019 [Doc 36]. Plaintiff then filed a note of issue on May 22, 2020. On March 2, 2021, third-party defendant Hybrid commenced a second third-party action against second third-party defendant JDS Carpentry Corp. [Doc 73]. The second third-party defendant has not answered the second third-party

[2] Work within the scope of the vicarious liability provisions of Labor Law §240(1) is commonly referenced as "protected" activities, tasks or work. Workers covered by the statute are commonly referenced as "protected" workers.

complaint, and more than a year has passed since its default. Thus, the second third-party action has been abandoned and, accordingly, is dismissed [see CPLR 3215(c)].

On April 29, 2022, a motion in CCP was decided by J. Knipel which denied defendants' (untimely) motion (Motion Seq. 6) filed March 29, 2022, to vacate the note of issue. On July 8, 2022, after the instant motion (# 7) was filed, J. Knipel granted defendants' motion for reargument (Motion Seq. 8) and, *inter alia*[3], vacated the note of issue, making this motion, untimely filed on May 9, 2022, timely, albeit retroactively. On September 16, 2022, defendants submitted an attorneys' affirmation in opposition to plaintiff's motion, and on November 8, 2022, plaintiff filed his affirmation in reply. The motion was submitted for decision on November 10, 2022. On January 23, 2023, plaintiff filed a note of issue with a demand for trial by jury, certifying that discovery was complete and that this matter is ready for trial.

Plaintiff testified at his EBT, held on April 20, 2021, that he started working for JDS about a year before his accident. He completed a 10-hour OSHA course about six months before his accident [Doc 155 Page 27]. His supervisors were Oscar and Jorge, and they were the only people who instructed him with regard to his work [id.]. When he started working at 488 4th Avenue, they had completed eight of the floors. He started working at this job site about two weeks before his accident. He worked as a carpenter, installing door and window molding. JDS had two aluminum ladders, and he was given gloves, a hardhat, hooks and a knee brace [Page 33]. Masks were available [Page 40]. One ladder was an A-frame that was about four feet, and the other one was about six feet. He used the smaller one, as his boss

[3] This order also granted defendants additional discovery, including a further EBT of plaintiff with regard to additional injuries alleged in his Sixth Supplemental Bill of Particulars, and IMEs of plaintiff.

Jorge used the bigger one. It was not working right, as "it moved, and the thing, it was, like, loose." The brackets (spreaders) would not lock in place, they were loose [Page 36]. He complained to Jorge. One of the legs of this smaller ladder did not have its rubber foot [id]. Jorge did not do anything. Plaintiff used this ladder for the entire two weeks he was working at this job site up to the date of the accident. He most recently complained about it two days before the accident. Jorge said "well, this is what we have at the time, so use what we have, and if you don't you can go home" [Pages 54-55].

On the date of plaintiff's accident, he testified that there were three workers from JDS at the job site in addition to himself, Jorge, plaintiff, Oscar, and another worker whose name he could not remember. There were also workers from other trades. The plaintiff's accident occurred while plaintiff was nailing molding around the doors on the seventh or eighth floor. He arrived at work at 7:00 a.m. and then proceeded to work. One worker cut the moldings and he was nailing them into place. His accident took place around noon, when he was nailing molding around the doorway for a closet. He was inside the closet, installing the molding around the inside of the doorframe. The ladder was entirely inside the closet [Page 46]. He went up and down the ladder once or twice after he set the ladder up inside the closet before the accident happened [id.]. He had the molding in his left hand and a nail gun in the right hand. He said "I was placing the mold on the top part of the closet door. The [cement] floor was uneven. I did whatever I could. The [wood] floor was not placed yet, and the person in charge wanted the work to be done as soon as possible. I was on top of the ladder. I was placing the mold when the legs of the ladder opened. I fell towards my left with pistol and all to the floor" [Page 50]. Plaintiff elaborated that the ladder broke during his accident, one of

the legs bent and the brackets (spreaders) in the middle came off [Page 56]. He said "the A-frame ladder that I was on, on the leg that did not have the piece of rubber on it, and since the floor was uneven, the, it didn't have the rubber, and there was garbage on the floor. That's what caused the accident" [Page 55]. Jorge was in another room and did not witness the accident. Asked about the debris, plaintiff said it contributed to the accident, as "The garbage from the Sheetrock, all of that was, yes, awful that, yes, the garbage, the unleveled floor, and the ladder." He continued [Page 58] that [the garbage from the sheetrock] "It was everywhere. The closet that I was working in was not clean, and the apartment, it was very narrow because there was Sheetrock, there was many things in the apartment." The attorneys explored this further, and plaintiff testified "The floor was dirty. I did the best I could to clean the closet floor to be able to place the ladder in the closet." He was asked "So when you placed the ladder on the closet floor, were you able to place it where it wasn't on top of any debris or Sheetrock" and he answered "I did everything possible, but the floor was too dirty. I did everything possible to be able to work inside the closet." He added [Page 61] "There was small pieces, big pieces, (of sheetrock) there was cement. And the uneven cement floor also contributed to the accident." Plaintiff's counsel summarizes "Plaintiff landed on the floor, partially inside the closet and partially outside of it. His left knee, left ankle, left shoulder, left elbow, lower back, head and neck struck the floor; his left foot hit the ground first, and twisted" [Doc 143 ¶58].

Plaintiff claims, with regard to Labor Law §240(1), that defendants "breached their non-delegable duty under Labor Law §240(1) in failing to provide Plaintiff with the proper equipment and/or safety devices so as to protect him against elevation-related hazards,

specifically a fall from a dangerous, defective A-frame ladder located on unfinished, uneven debris-covered flooring, which failure was a proximate cause of Plaintiff's incident and resulting injuries" [Doc 143 ¶5]. With regard to Labor Law §241(6), plaintiff claims that defendants "violated Labor Law §241(6) as a matter of law, specifically New York State Industrial Code §23-1.7(e)(2), prohibiting the accumulation of dirt and debris in working areas, and §§23-1.21(b) and (e), addressing the safety requirements for ladders in general and stepladders specifically, which also proximately caused Plaintiff's incident and resulting injuries" [id.]. With regard to Labor Law §200, plaintiff claims defendant Happy Living "breached its duty pursuant to Labor Law §200 and common law negligence in permitting a dangerous condition to exist and remain at the Premises despite having both the authority to control the injury producing activity and, at a minimum, constructive notice of the dangerous condition which proximately resulted in Plaintiff's injuries" [id.].

Plaintiff asserts that these Labor Law violations and breaches of the common-law duty of care proximately caused his injuries.

Plaintiff's Arguments Supporting His Partial Summary Judgment Motion

Labor Law 240(1)

In support of his motion with respect to Labor Law §240(1) against all three defendants, plaintiff first notes that this statute subjects owners, contractors and their agents to a nondelegable duty to provide adequate protection to workers against the risk of elevation-related construction site accidents. Plaintiff points out that if the duty to provide adequate protection is breached, owners, contractors and their agents are vicariously liable for injuries that are proximately caused by the breach. Here, plaintiff claims, for Labor Law purposes,

the first two defendants were co-owners and Happy Living was the general contractor. Further, Happy Living hired third-party defendant Hybrid Framing & Interiors to perform all framing and carpentry work, and they did not do any work but instead subcontracted with several subcontractors, including JDS, plaintiff's employer. Plaintiff's counsel argues that the statute required defendants herein to furnish workers such as plaintiff with adequate safety devices that provide proper protection against elevation-related risks. Counsel avers that JDS gave plaintiff a broken and defective ladder to use, and did not provide plaintiff with any fall protection or any equipment which plaintiff could have tied off his ladder to [Doc 143 ¶45]. Plaintiff argues that defendants "failed to provide Plaintiff with the proper equipment and/or safety devices so as to protect him against injuries proximately caused by falling from an elevated work site, specifically a dangerous and defective ladder located on an unfinished, uneven, debris-covered floor. This failure, which proximately caused Plaintiff's fall and resulting injuries, violated Labor Law § 240(1) and therefore, summary judgment with respect to liability is warranted as a matter of law" [Doc 143 ¶64]. Plaintiff reasons that all three defendants are thus subject to absolute vicarious liability under Labor Law §240(1).

Plaintiff also argues that he could not have been the sole proximate cause of his injuries, and "even if Defendants argue that Plaintiff's actions may have contributed to incident, the fact remains that Defendants failed to provide him with an adequate safety device in the first instance, instead requiring him to utilize a dangerous, defective ladder on uneven, debris-covered flooring, which proximately caused Plaintiff's fall and resulting injuries" [id. ¶73].

Defendants produced one witness for deposition, as only one transcript is provided. It was Ms. Leah Balkany of Happy Living. The deposition was held on May 27, 2021 on Zoom. Plaintiff provides the transcript at Doc 156. Plaintiff also provides the EBT transcript of Cheskel Goldberger, who testified for third-party defendant Hybrid Framing, which was held on November 18, 2021, at Document 157.

Ms. Balkany testified that she works for her brother, Levi Balkany, who is the principal of Happy Living, and she is his executive assistant. For the project at 488 Fourth Avenue, Happy Living was the general contractor [Doc 156 Page 13]. Her brother Levi is also the managing member of PS 488 Group, and [Page 14] she said "we hired ourselves. It was our development project, and we served as the general contractor as well." Galil was also an owner of the property, but she testified that she did not know who the principals are [Page 28]. Happy Living hired Hybrid Framing to do the framing and carpentry work for the job [Page 19]. At some point in time, she was made aware that Hybrid Framing had hired JDS to perform work at the job site [Page 26]. Ms. Balkany said there was a project manager for this project, and a site safety manager, but she could not remember who they were. Shown a document, she was able to say that Rooplall Shivdayal was the site safety manager. She said the site safety manager kept daily logs, but not the project manager [Page 50]. There was a third employee of Happy Living at the job site regularly, a laborer, who did cleanup. She visited the job site about once a month. The attorneys tried to obtain job descriptions for the three employees of Happy Living assigned to this project, but Ms. Balkany was not really able to answer the questions. She said that none of these employees still worked for Happy Living on the date of the deposition [Page 61].

Ms. Balkany testified that she did not know plaintiff, or about his accident. She has never seen any accident report or any photos of the accident location. Happy Living did not take any progress photos [Page 63]. They did not have a form for accident reports to be used if there was an accident [Page 64]. The property owners never had any of their principals on site [Page 70]. She heard that an employee of Hybrid had an accident on the date of the plaintiff's accident from another Happy Living employee, but did not know that Hybrid had subcontracted work to JDS on that date [Page 72]. The site safety manager wrote on his daily log that there were eight Hybrid employees on the job site on the date of the plaintiff's accident, but she did not know who these people worked for if they did not work for Hybrid. She did not learn of any details of the plaintiff's accident, and did not conduct any investigation [Page 73]. She called Hybrid, and spoke to Mendel Goldberger [Page 74]. She could not remember what he said. She did not speak with the project manager or the site safety manager to find out anything about the accident [Page 76]. She eventually received some paperwork about Hybrid's insurance and sent it to Happy Living's lawyers.

The other EBT transcript plaintiff submits with his motion is that of Cheskel Goldberger, who testified on November 18, 2021 for Hybrid Framing. He testified that he has taken an OSHA course, but he could not remember which one. On the date of his deposition, he said that he is employed in sales at a company called CMG Improvements [Doc 157 Page 14], which does renovations. He started working for them "a few years ago", and before that, he worked for Hybrid. He could not say if he worked for Hybrid on the date of the plaintiff's accident, as he did not remember [Page 16]. He testified that he was and is the sole owner of Hybrid, and that he did not know if it is a corporation or an LLC. He said "there

is no active business in that company" [Page 17]. Asked about Mendel Goldberger, he said he is his brother, and he was "the estimator" for the company, and was not an employee of Hybrid [Page 18]. Asked how many employees Hybrid had, he said he did not remember whether it had any, or if it did, how many [Page 39]. They had no equipment at the site [Page 85]. Mr. Goldberger testified that Hybrid did not perform any actual construction work, and subcontracted all of its work to others [Page 103]. He testified that he was hired by Happy Living to work at the project at 488 4th Avenue, but he was unable to authenticate the contract between Happy Living and Hybrid which was shown to him. He did not know who signed it for Hybrid, and said it was neither his nor his brother's signature. He no longer has any files or records for Hybrid. JDS was a subcontractor he hired, and he thought there were three to five other subcontractors, but could not remember [Page 45]. Then he said JDS was hired for the "trim" work, and another subcontractor was hired for the sheetrock work. He was asked if JDS' workers came with their own ladders to the job site, and he said "yes" [Page 110]. Happy Living did not have a right to approve the subcontractors he selected [Page 71]. Mr. Goldberger did not know the answers to most of the remaining questions asked of him at the deposition. He either did not remember, or never knew the information. He did not know how many workers JDS had on the site on the date of the plaintiff's accident, or at any time. He did not know how many people employed by Happy Living were on the job site, or their names. He could not remember what JDS was hired by him to do. He was asked if he had "ever received any documentation reflecting that any specific employee of your subcontractor was provided with [a safety] orientation" and he said "not that I recall" [Page 87]. He did not know who maintained the records of safety meetings. He did not maintain any daily logs

[Page 90], and he has not seen any of Happy Living's daily logs [id.]. Happy Living was responsible for housekeeping at the job site [id.]. He did not take any photographs of the job and he does not know if JDS did [id.]. He didn't learn of plaintiff's accident until this lawsuit was started. He testified that the procedure if there was an accident was that "[t]he site safety was supposed to be notified, and he was -- if there was an injury, he was supposed to call an ambulance and report it to DOB and report it on his daily logs if there's any injury" [id.].

Labor Law 241(6)

Next, plaintiff asserts that he is entitled to partial summary judgment against all three defendants with respect to his Labor Law §241(6) claim. Plaintiff points out that, like §240(1), §241(6) imposes absolute vicarious liability without regard to fault against owners, contractors and their agents for any violations of the Industrial Code (12 NYCRR ch. 1, subch. A) that proximately cause injuries to workers.

Here, plaintiff argues, the applicable Industrial Code provisions are §23-1.7(e)(2), and 23-1.21(b)(3) and (b)(4) and (e)(2). He asserts that §23-1.7 (e)(2), which addresses tripping hazards, provides a sufficiently specific predicate for Labor Law §241(6) liability. It provides, in pertinent part, that "[t]he parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris … insofar as may be consistent with the work being performed."

Plaintiff claims that defendants' failure to ensure compliance with these provisions violated the Industrial Code, proximately caused his injuries, and establishes a prima facie Labor Law §241(6) claim. Counsel avers that "the uncontroverted evidence establishes that the unfinished flooring throughout the apartment, including the interior of the closet, was

uneven and covered in cement and sheetrock debris of varying sizes (Exhibit "J" at pp. 50-51, 57-59, 61). Although Mr. Tenemaza did everything possible to clean the area before setting the ladder up, the ladder legs still were in contact with that debris (id., at pp. 59, 61-62). Thus, Defendants' failure to ensure that Plaintiff's work area inside the closet was free from accumulations of dirt and debris as would be required to set up a stable, secure ladder was a direct violation of Industrial Code §23-1.7(e)(2) and, accordingly, a prima facie violation of Labor Law §241(6).

The sections which plaintiff's counsel relies on, which he asserts that defendants violated, are Industrial Code §23-1.21 Ladders, subsections (b)(3) and (4) and (e)(2), which provide:

"(b) General requirements for ladders.

(3) *Maintenance and replacement.* All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist:

(i) If it has a broken member or part.
(ii) If it has any insecure joints between members or parts.
(iii) If it has any wooden rung or step that is worn down to three-quarters or less of its original thickness.
(iv) If it has any flaw or defect of material that may cause ladder failure.

(4) *Installation and use.*

* * * * * * *

(ii) All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings.

* * * * *

(e) Stepladders.

(2) *Bracing.* Such bracing as may be necessary for rigidity shall be provided for every stepladder. When in use every stepladder shall be opened to its full position and the spreader shall be locked.

Plaintiff's counsel argues that "it is undisputed that the A-frame ladder provided to Plaintiff was defective: its brackets were loose and did not lock in place, and one of its legs was missing its rubber foot (Exhibit "J" at pp. 35-36). Mr. Tenemaza had problems with the ladder from the first time he used it and, although he complained to his boss, Jorge, as recently as two days prior to the incident, that the brackets on the ladder would not lock in place, no other ladder was ever made available; Plaintiff was told to use what they had or go home (id., at pp. 36, 54-55). It is also undisputed that the footings of Plaintiff's ladder were not firm; not only was it missing the rubber foot on one of its legs, but he had no choice but to place the ladder on unfinished, uneven, debris-covered flooring in order to accomplish his assigned task (id., at pp. 35-36, 50-51, 57-59, 61). Thus, there is no dispute that Defendants failed to provide Plaintiff with a ladder meeting the requirements of §§ 23-1.21(b)(3) and (4) and 23-1.21(e)(2). Plaintiff's use of a broken ladder without proper bracing or firm footing, on debris-covered flooring, proximately resulted in the ladder failure that caused his fall and resulting injuries, thereby establishing Defendants' prima facie violation of Labor Law § 241(6)" [Doc 143 ¶¶81-83].

Movant's counsel also avers that "since an owner or general contractor's vicarious liability under section 241(6) is not dependent on its personal capacity to prevent or cure a dangerous condition, the absence of actual or constructive notice sufficient to prevent or cure [is] irrelevant to the imposition of Labor Law §241(6) liability. Accordingly, it is of no consequence whether Defendants were aware of the defective condition of the ladder, or the debris-covered condition of the work site; they nevertheless had a non-delegable statutory obligation to cure the hazards" [Doc 7143at ¶84].

Plaintiff concludes that his motion under Labor Law §241(6) should thus be granted insofar as it seeks partial summary judgment on liability against all three defendants.

Labor Law §200

Plaintiff seeks summary judgment on his Labor Law §200 and common law negligence claims solely as against defendant Happy Living. He argues that "Happy Living had the authority to control the injury-producing work which proximately led to Plaintiff's incident and resulting injuries, as well as constructive, if not actual, notice of the hazardous condition" [id. ¶86].

Plaintiff argues that "By its own admission, Happy Living was responsible for making sure the trades on site were doing their jobs (Exhibit "K" at p. 36). It is undisputed that Happy Living (a) was responsible for hiring all subcontractors for the project, (Exhibit "K" at pp. 18-19, 58, 68-69); (b) had an interior office at the Premises with a full-time project manager and site safety manager on site every day, including the day of the incident in question, from 7:00 or 8:00 A.M. to 4:00 P.M (id., at pp. 33-36); (c) coordinated with the trades and inspected their work (id., at pp. 36-39, 41- 42, 55-56); (d) performed daily walkthroughs of all floors of the Premises (id., at pp. 37-39, 41- 42, 55-56); and (e) had full authority to stop any unsafe work and have any unsafe conditions rectified (id., at pp. 40, 42). The foregoing plainly establishes that Happy Living had the authority to oversee and control the work of the various on-site contractors with respect to the means and methods of their work. Accordingly, Plaintiff is entitled to summary judgment with respect to both his Labor Law § 200 and his common law negligence claims against Defendant Happy Living as a matter of law" [Doc 143 ¶¶88-89].

Plaintiff also avers that, if the accident did not arise from the means and methods of the work, but from a hazardous premises condition, that "the hazards presented by the unfinished, uneven, debris-covered flooring on which Plaintiff was required to place his ladder, Defendant Happy Living is further liable because it had, at a minimum, constructive notice of the hazardous conditions which proximately led to Plaintiff's incident and resulting injuries. . . . given that Happy Living admitted it bore responsibility for garbage and debris removal, there can be no argument that it did not also have, at a minimum, constructive notice of the presence of sheetrock debris in Plaintiff's workspace. It is undisputed that Happy Living's responsibilities at the Premises included general housekeeping, cleaning, garbage and debris removal and that, on the day of the incident in question, it had someone performing general housekeeping, including cleaning and sweeping (Exhibit "K" at pp. 34, 52-54; see also Exhibit "O"). Thus, Happy Living could and should have remedied the hazardous conditions that resulted in Plaintiff's injuries. Yet despite that admitted obligation, Happy Living failed to clear the hazardous debris from Plaintiff's workspace" [id. ¶92].

Defendants' Arguments in Opposition

In opposition to plaintiff's partial summary judgment motion, defendants only submit an attorney's affirmation, erroneously called an "affirmation in support" [Doc 171], and an attorney's response to plaintiff's statement of material facts [Doc 172].

The court notes that the same law firm represents all three defendants and they do not argue that any of them is not a proper labor law defendant.

First, counsel for defendants argues that "Plaintiff attributes his accident to multiple inconsistent causes, which should raise an issue of fact as his Labor Law 240(1) and 241(6)

claims. Plaintiff testified that his accident was caused by: debris, an unfinished floor and the lack of rubber feet on one leg of the ladder. Those are all different unrelated reasons as to how his accident occurred and it is well settled that when an injured worker's version of the accident is inconsistent with his previous account, a question of fact is presented" [Doc 171 ¶¶10-12].

Next, counsel addresses Labor Law §240(1) and avers that plaintiff was the sole proximate cause of his accident and also that "Since there is an issue of fact as to whether Plaintiff refused to use available safety devices, there is a question of fact as to whether the statute was violated" as "Plaintiff testified that there were scaffolds available at the site from other trades and he never inquired if he was prohibited from using them" [id. ¶¶13, 15].

With regard to Labor Law §241(6), defendants' attorney states that "plaintiff has also failed to meet his burden to be entitled to summary judgment as a matter of law. Industrial Code 23-1.7(e) involve accumulations of debris, however, plaintiff testified that he did not actually notice whether the ladders legs were on top of debris, as such there are questions of fact related to this provision. Industrial Code 23-1.21 involves the conditions of ladders, however, as previously noted, there were scaffolds on the site and plaintiff never even inquired if he could use them. As such, issues of fact exist as to whether Plaintiff should have tried to use an alternative safety device, precluding summary judgment on his Labor Law 241(6) claims" [id. ¶¶16-19].

Finally, with regard to Labor Law §200, counsel argues that "The only conditions identified by plaintiff were an "uneven floor" and debris. The "uneven floor" was his term for an unfinished cement floor, which is not a dangerous condition but rather the existing

condition of the floor at the time of the work. The debris was identified as touching the ladder, yet nowhere in the testimony does plaintiff explain how the debris actually caused his accident. In fact, he stated that he did not notice whether the ladder legs had been placed on debris. Further, the debris, which was discarded pieces of sheetrock is not a dangerous condition either" [id. ¶22].

Summary Judgment Standards

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY3d941 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]). Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v*

Waldbaums Supermarkets, 304 AD2d 531, 532 [2d Dept 2003]). If a movant fails to do so, summary judgment should be denied without reviewing the sufficiency of the opposition papers (*Derise v Jaak 773, Inc.*, 127 AD3d 1011, 1012 [2d Dept 2015], citing *Winegrad*, 64 NY2d 851).

If a movant meets the initial burden, parties opposing the summary judgment motion must demonstrate evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324, citing *Zuckerman*, 49 NY2d at 562). Parties opposing a summary judgment motion are entitled to "every favorable inference from the parties' submissions" (*Sayed v Aviles*, 72 AD3d 1061, 1062 [2d Dept 2010]; *see also Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]). Indeed, in deciding a summary judgment motion, the court must accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas*, 305 AD2d at 385; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; *see also Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]). Furthermore, "[i]n all but the most extraordinary instances, whether a defendant has conformed to the standard of conduct required by law is a question of fact necessitating a trial" (*St. Andrew v O'Brien*, 45 AD3d 1024, 1028 [3d Dept 2007] [internal quotations omitted]; *see also Ferrer v Harris*, 55 NY2d 285, 291-292 [1982]; *Andre*, 35 NY2d at 364; *Nandy v Albany Med. Ctr. Hosp.*, 155 AD2d 833, 833 [3d Dept 1989];

Kiernan v Hendrick, 116 AD2d 779, 781 [3d Dept 1986]). Lastly, "[a] motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112, 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; *see also Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

Discussion

Labor Law §240(1)

Labor Law §240(1) states, in relevant part, that:

> "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 . . ."

The purpose of Labor Law §240(1) is to protect construction workers "from the pronounced risks arising from construction work site elevation differentials" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see also Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Therefore, Labor Law §240(1) is implicated in an injury that directly flows from the application of the force of gravity to an object or to the injured worker performing a protected task (*Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62

AD3d 785, 786 [2d Dept 2009], *lv dismissed* 13 NY3d 857 [2009]; *see also Ienco v RFD Second Ave., LLC*, 41 AD3d 537 [2d Dept 2007]; *Ortiz v Turner Constr. Co.*, 28 AD3d 627 [2d Dept 2006]; *Lacey v Turner Constr. Co.*, 275 AD2d 734, 735 [2d Dept 2000]; *Smith v Artco Indus. Laundries*, 222 AD2d 1028 [4th Dept 1995]). The duty to provide "proper protection" against elevation-related risks is nondelegable; therefore, owners, contractors and their agents are liable for violations even if they have not exercised supervision and control over either the subject work or the injured worker (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [owner or contractor is liable for Labor Law §240(1) violation "without regard to . . . care or lack of it"]).

However, Labor Law §240(1) does not apply to "any and all perils that may be connected in some tangential way with the effects of gravity" (*Ross v Curtis-Palmer Hydro-Elec. Co,* 81 NY2d 494 at 501 [1993]). Instead, "Labor Law §240(1) should be construed with a commonsense approach to the realities of the workplace at issue" (*Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 140 [2011]). "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law §240(1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Harrison v State of New York*, 88 AD3d 951, 952 [2d Dept 2011], quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2d Dept 2001]; *see also Gutman v City of New York*, 78 AD3d 886, 887 [2d Dept 2010]). A successful cause of action pursuant to Labor Law §240(1) requires that the plaintiff establishes both "a violation of the statute and that the violation was a proximate cause of his injuries" (*Skalko v Marshall's Inc.*,

229 AD2d 569, 570 [2d Dept 1996], citing *Bland v Manocherian*, 66 NY2d 452 [1985]; *Keane v Sin Hang Lee*, 188 AD2d 636 [2d Dept 1992]; *see also Rakowicz v Fashion Inst. of Tech.*, 56 AD3d 747 [2d Dept 2008]; *Zimmer*, 65 NY2d 513 at 524).

Here, the court finds that plaintiff does not make a prima facie case for summary judgment on his Labor law §240(1) claim. His motion papers include the pleadings, plaintiff's EBT transcript, Ms. Balkany's EBT transcript (Happy Living), Cheskel Goldberger's EBT transcript (third-party defendant), copies of contracts between the parties and one page of Happy Living's daily log, for the day of plaintiff's accident, which does not reflect that his accident was reported to Happy Living.

Plaintiff avers that Labor Law 240(1) was violated because defendants failed "to provide Plaintiff with the proper equipment and/or safety devices so as to protect him against elevation-related hazards, specifically a fall from a dangerous, defective A-frame ladder located on unfinished, uneven debris-covered flooring, which failure was a proximate cause of Plaintiff's incident and resulting injuries" [Doc 143 ¶5].

However, the court finds that plaintiff has not established that, as a matter of law, the reason that he fell was because the ladder was defective. Specifically, when asked whether the debris had contributed to his accident, plaintiff testified that "The garbage from the Sheetrock, all of that was, yes, awful that, yes, the garbage, the unleveled (concrete) floor, and the ladder" [Doc 155 Page 57]. Plaintiff said the garbage "was everywhere. The closet that I was working in was not clean, and the apartment, it was very narrow because there was Sheetrock, there was many things in the apartment" [id. Page 58]. He continued "The floor was dirty. I did the best I could to clean the closet floor to be able to place the ladder in the

closet." Asked "when you placed the ladder on the closet floor, were you able to place it where it wasn't on top of any debris or Sheetrock?" He replied "I did everything possible, but the floor was too dirty. I did everything possible to be able to work inside the closet" [id. Page 59]. Asked "Do you know if any of the legs were on top of any debris before the accident happened?" Plaintiff responded, "Honestly, I did not notice" [Page 60].

This testimony does not establish plaintiff's prima facie case under Labor Law §240(1). If the cause of his fall was the debris and not a defective ladder, summary judgment under this statute is unavailable. This is because "the plaintiff's injuries must be caused by an elevation-related risk, "the type of extraordinary peril section 240(1) was designed to prevent" and not a "usual and ordinary danger at a construction site," in order to permit recovery under §240(1). (see *Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 100, n 3 [2015], citing *Nieves v Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914 [1999]). In N*ieves*, where the plaintiff attributed his accident to an unnoticed or concealed object on the floor which he said caused his ladder to fall, the court found that his accident was not due to a "true elevation-related risk." Thus, "[w]here an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no section 240(1) liability exists (*id.; see also Melber v 6333 Main St.*, 91 NY2d 759, 763-764).

The court notes that defendants' argument that plaintiff could have somehow put another trade's scaffold inside of the closet to stand on is not reasonable or logical, and the court does not rely on that analysis in reaching its conclusion.

Labor Law §241(6)

Labor Law §241 states, in applicable part, as follows:

> "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."

Labor Law §241(6) imposes a nondelegable duty on owners and contractors to comply with the specific safety rules and regulations set forth in the Industrial Code in connection with construction, demolition or excavation work (*Ascencio v Briarcrest at Macy Manor, LLC*, 60 AD3d 606, 607 [2d Dept 2009], citing *Rizzuto*, 91 NY2d at 348; *Ross*, 81 NY2d at 501-502; *Nagel v D & R Realty Corp.*, 99 NY2d 98, 102 [2002]; *Valdivia v Consolidated Resistance Co. of Am., Inc.*, 54 AD3d 753, 754 [2d Dept 2008]).

A sustainable Labor Law §241(6) claim requires the plaintiff to demonstrate that defendants violated a provision of the Industrial Code that contains "concrete specifications" (*Ramcharan v Beach 20th Realty, LLC*, 94 AD3d 964, 966 [2d Dept 2012], citing *Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *see also Ross*, 81 NY2d 494 [1993]) and "mandates a distinct standard of conduct, rather than a general reiteration of common-law principles" (*Rizzuto*, 91 NY2d at 351). "To support a cause of action under Labor Law §241(6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the accident" (*Rivera v Santos*,

35 AD3d 700, 702 [2d Dept 2006], citing *Ross*, 81 NY2d at 502; *Ares v State of New York*, 80 NY2d 959, 960 [1992]; *Adams v Glass Fab*, 212 AD2d 972 [4th Dept 1995]).

Moreover, even if a violation of the Industrial Code has been established, such a violation is merely some evidence of negligence, and it is for the trier of fact to determine the cause of plaintiff's injury (*Rizzuto*, 91 NY2d at 351). Indeed, "such a violation . . . does not conclusively establish a defendant's liability as a matter of law, but constitutes some evidence of negligence and thereby reserve[s], for resolution by a jury, the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances" (*Seaman v Bellmore Fire Dist.*, 59 AD3d 515, 516 [2d Dept 2009] [internal quotes omitted], quoting *Rizzuto*, 91 NY2d at 351; *see also Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982]; *Daniels v Potsdam Cent. School Dist.*, 256 AD2d 897, 898 [3d Dept 1998]). Additionally, the question of whether a violation of the Industrial Code proximately caused injury to a worker lies with the trier of fact (*Rizzuto*, 91 NY2d at 351; *see also Johnson v Flatbush Presbyt. Church*, 29 AD3d 862 [2d Dept 2006]; *Reinoso v Ornstein Layton Mgt., Inc.*, 19 AD3d 678, 679 [2d Dept 2005]; *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684 [2d Dept 2005]).

Plaintiff seeks summary judgment on his claim under Labor Law 241(6). In particular, plaintiff claims defendant violated Industrial Code sections 23-1.7(e)(2) and 23-1.21(b)(3) and (b)(4) and (e)(2). Plaintiff relies on just these sections. As he has abandoned his arguments based on the other sections in his bill of particulars,[4] the court need not address them.

[4] Paragraph 21 of his bill of particulars states "Defendants violated (including all sub sections) 23-1.5(a-c); 23-1.7; 23-1.16; 23-1.17; 23-1.21; 23-1.21(b)(3)(4); and 23-2.1."

Plaintiff claims defendants violated "Industrial Code §23-1.7(e)(2), prohibiting the accumulation of dirt and debris in working areas, and §§23-1.21(b) and (e), addressing the safety requirements for ladders in general and stepladders specifically, which also proximately caused Plaintiff's incident and resulting injuries" [Doc 143 ¶77], each of which constitute a prima facie violation of Labor Law §241(6). Counsel continues that "since an owner or general contractor's vicarious liability under section 241(6) is not dependent on its personal capacity to prevent or cure a dangerous condition, the absence of actual or constructive notice sufficient to prevent or cure [is] irrelevant to the imposition of Labor Law §241(6) liability. Accordingly, it is of no consequence whether Defendants were aware of the defective condition of the ladder, or the debris-covered condition of the work site; they nevertheless had a non-delegable statutory obligation to cure the hazards" [Doc 143 ¶84].

12 NYCRR 23-1.7 (e)(2) provides:

> §23-1.7 Protection from general hazards
> (e) Tripping and other hazards.
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

12 NYCRR 23-1.21(b)(3) and (b)(4) and (e)(2) provide, in relevant part:

> § 23-1.21 Ladders and ladderways
>
> (b) General requirements for ladders.
> (3) Maintenance and replacement. All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist:
> (i) If it has a broken member or part.
> (ii) If it has any insecure joints between members or parts.

(iii) If it has any wooden rung or step that is worn down to three-quarters or less of its original thickness.
(iv) If it has any flaw or defect of material that may cause ladder failure.

(4) Installation and use.

(ii) All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings.

(e) Stepladders.

(2) Bracing. Such bracing as may be necessary for rigidity shall be provided for every stepladder. When in use every stepladder shall be opened to its full position and the spreader shall be locked.

The court finds that Industrial Code sections 23-1.7 (e)(2) and §§ 23-1.21(b)(3) and (4) and (e)(2) are sufficiently specific and concrete to support a Labor Law §241(6) cause of action and they apply to the plaintiff's description of how this accident occurred in this case (*see Harsch v City of New York*, 78 AD3d 78, 783 [2010]). Plaintiff's deposition testimony that the floor of the apartment where he was working, including the closet, was covered with debris is sufficient to make a prima facie case that 12 NYCRR 23–1.7(e)(2) was violated, and that said violation was a substantial cause of plaintiff's accident (*see Lelek v Verizon N.Y., Inc.*, 54 AD3d 583, 585 [2008]). In addition, his testimony that the stepladder was missing a rubber foot and that the spreaders were loose and did not lock is sufficient to make a prima facie case that 12 NYCRR 23–1.21(b)(3) and (b)(4) as well as (e)(2)were violated, and that said violations were a substantial cause of plaintiff's accident. Thus, plaintiff makes a prima facie case for summary judgment on his Labor Law §241(6) cause of action. It is noted that the issue of plaintiff's comparative negligence is left for the trier of fact to determine. The plaintiff is not required to demonstrate his freedom from comparative fault to obtain summary

judgment pursuant to this cause of action (see *Ortega v R.C. Diocese of Brooklyn, NY*, 178 AD3d 940 [2d Dept 2019]).

In their opposition, defendants do not overcome plaintiff's prima facie case. They do raise issues of plaintiff's comparative negligence, however.

Labor Law §200 and Common-Law Negligence

Labor Law §200 states, in applicable part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment and devices in such places shall be so placed, operated, guarded and lighted as to provide reasonable and adequate protections to such persons."

Labor Law §200 codifies the common-law duty of an owner or general contractor to provide workers with a safe place to work (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 850 [2d Dept 2006]; *Brown v Brause Plaza, LLC*, 19 AD3d 626, 628 [2d Dept 2005]; *Everitt v Nozkowski*, 285 AD2d 442, 443 [2d Dept 2001]; *Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [2d Dept 1999]). "It applies to owners, contractors, or their agents who exercise control or supervision over the work, or either created the allegedly dangerous condition or had actual or constructive notice of it" (*Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2d Dept 2000], citing *Russin v Picciano & Son*, 54 NY2d 311 [1981]; *Lombardi*, 80 NY2d 290 at 294-295; *Jehle v Adams Hotel Assocs.*, 264 AD2d 354 [1st Dept 1999]; *Raposo*

v WAM Great Neck Assn. II, 251 AD2d 392 [2d Dept 1998]; *Haghighi v Bailer*, 240 AD2d 368 [2d Dept 1997]).

Labor Law §200 and common-law negligence liability "will attach when the injury sustained was a result of an actual dangerous condition, and then only if the defendant exercised supervisory control over the work performed on the premises or had notice of the dangerous condition which produced the injury" (*Sprague v Peckham Materials Corp.*, 240 AD2d 392, 394 [2d Dept 1997], citing *Seaman v Chance Co.*, 197 AD2d 612 [2d Dept 1993]).

Here, plaintiff's allegation in support of the branch of his motion which is for summary judgment on these claims solely as against defendant Happy Living is that he has "established a prima facie entitlement to summary judgment with respect to liability as against this defendant pursuant to Labor Law §200 and common law negligence because Happy Living had the authority to control the injury-producing work which proximately led to Plaintiff's incident and resulting injuries, as well as constructive notice, if not actual notice of the hazardous conditions" [Doc 143 ¶86].

However, the record establishes that Happy Living did not direct plaintiff's work; in fact, plaintiff testified that his supervisors Oscar and Jorge alone determined the manner in which he worked. Accordingly, plaintiff has no viable Labor Law §200 or common-law negligence claims against this defendant (*see e.g. Bright v Orange Rockland Utils., Inc.*, 284 AD2d 359, 360 [2d Dept 2001]; *see also Lamar v Hill Intl., Inc.*, 153 AD3d 685, 686 [2d Dept 2017] ["The parties' deposition testimony also demonstrated that the defendants did not have control or a supervisory role over the plaintiff's day-to-day work and that they did not assume responsibility for the manner in which that work was conducted"]).

Moreover, the court notes that "[t]he retention of general supervisory control, presence at a work site, or authority to enforce safety standards is insufficient to establish the control necessary to impose liability" in common-law negligence claims or under Labor Law §200 (*Biance v Columbia Washington Ventures*, LLC, 12 AD3d 926, 927 [3d Dept 2004], citing *Shields v General Elec. Co.*, 3 AD3d 715, 716-717 [3d Dept 2004]; *Sainato v City of Albany*, 285 AD2d 708, 709 [3d Dept 2001]; *see also Putnam v Karaco Indus. Corp.*, 253 AD2d 457, 459 [2d Dept 1998] ["A defendant's mere presence at the worksite is insufficient to give rise to a question of fact as to the defendant's direction and control"]). Since no defendant was involved in supervising or controlling plaintiff's work, plaintiff's Labor Law §200 claims are unsustainable (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 620 [2008] [no Labor Law §200 liability if accident arose from methods of plaintiff's employer and defendants exercise no supervisory control over the work],citing *Peay v New York City School Constr. Auth.*, 35 AD3d 566, 567 [2006]). Accordingly, the court denies the branch of plaintiff's motion for summary judgment with regard to his claims of common law negligence and Labor Law §200 which he has asserted against defendant Happy Living.

Conclusion

Accordingly, it is

ORDERED that the branch of plaintiff's motion, mot. seq. #7, for an order awarding him partial summary judgment on the issue of liability pursuant to Labor Law §240(1) against all of the defendants is denied; and it is further

ORDERED that the branch of plaintiff's motion for an order awarding him partial summary judgment on the issue of liability pursuant to Labor Law §241(6) against all of the defendants is granted; and it is further

ORDERED that the branch of plaintiff's motion for an order awarding him partial summary judgment on the issue of liability pursuant to Labor Law §200 and common law negligence solely as against defendant Happy Living is denied; and it is further

ORDERED that the caption, which is incorrectly stated on almost all of the papers in the court file, is hereby amended to read as follows:

- X
JULIO TENEMAZA,

Plaintiff,

Index No. 512605/2018

- against -

PS 488 GROUP LLC, GALIL PS 488 LLC,
HAPPY LIVING DEVELOPMENT LLC,
and PARK SLOPE 488 DEVELOPMENT LLC,

Defendants.
- X
PS 488 GROUP LLC, GALIL PS 488 LLC, and
HAPPY LIVING DEVELOPMENT LLC,

Third-Party Plaintiffs,

- against -

HYBRID FRAMING & INTERIORS INC.,

Third-Party Defendant.
- X

The foregoing constitutes the decision and order of the court.

E N T E R,

Hon. Debra Silber, J.S.C.