SUPREME COURT OF THE STATE OF NEW YORK **Index No.: 100748/11**
COUNTY OF RICHMOND DCM PART 3 **Motion No.: 001**

DOUGLAS FRANKS,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

SI-HOUSING PARTNERSHIP DEVELOPMENT FUND COMPANY, INC., STAPLETON SENIOR OWNERS, LLC, and BFC PARTNERS, L.P.,

Defendants

The following items were considered in the review of the following motion for summary judgment.

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Notice of Cross Motion	2
Affirmation in Reply	3
Affirmation in Further Support	4
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Plaintiff Douglas Franks moves for an order pursuant to CPLR § 3212 granting him summary judgment based on Labor Law §§ 200, 240 [1] and 241[6]. Defendants SI-Housing Development Fund Company, Inc. and BFC Partners, L.P. cross move for an order pursuant to CPLR § 3212 grant dismissing all causes of action set forth by the plaintiff. Defendant Stapleton Senior Owners LLC moves for an order pursuant to CPLR § 3212 dismissing plaintiff's claims under Labor Law §§ 240[1] and 241[6]. The motions and cross motions are granted in part and denied in part.

Facts

On or about November 9, 2009, plaintiff Douglas Franks was injured when a scaffold collapsed onto him at the construction site known as 180 Broad Street, Staten Island, New York. At the time of the incident, he was employed as a laborer for Broad Street Builders ("Broad Street").

Broad Street was the general contractor tasked with constructing the Stapleton Senior Center, located at the 180 Broad Street location. The ownership of the building is somewhat complex: defendant SI-Housing Development Fund Company ("SI-Housing") is a corporation organized to facilitate the development of the building, and acquired the property from the New York City Housing Authority as a "nominee" of defendant Stapleton Senior Owners LLC ("Stapleton"). As a result, SI-Housing owned the legal title to the property but Stapleton owned equitable title. Defendant BFC Partners ("BFC") is alleged to be the general contractor of 180 Broad Street in plaintiff's complaint.

At the time of the incident, plaintiff was certified as an asbestos worker but went to the job site in order to seek work as a laborer since he was unable to obtain asbestos related employment. He began work with Broad Street on or around the end of October, 2009 and had only been working for about two weeks prior to his injury. Broad Street did conduct weekly safety meetings which covered generalized construction concepts in order to prevent injury. As a result of his short tenure, plaintiff only attended one or two of these meetings. As a laborer, plaintiff was responsible for assisting the masons by stacking concrete blocks, carrying materials and whatever else they needed. According to plaintiff's deposition testimony, his work space would change dependant on where the masons were working inasmuch as he would be positioned on the floor below the scaffold in order to efficiently deliver materials to the workers on the scaffold.

On or about November 9, 2009, plaintiff reported to 180 Broad Street at about 7:00 A.M. and was in the process of laying down cinder blocks for the masons so they could build a new wall. The plaintiff was standing on the same level as the base of the scaffold since that was located on the fourth floor. While the particular type of scaffold involved in the accident had attachments for wheels, they were not utilized at this job site. Instead, the workers would manually deconstruct the scaffold and reassemble it at the desired location. The plaintiff was unaware of when the scaffold was constructed, but did testify that there had not been any prior incidents with any scaffold at the construction site. The plaintiff further testified that before the scaffold was taken apart, cross bars, planks and four cinder blocks were supporting the structure. While the plaintiff engaged in the regular scope of his work, the remaining portions of the scaffold fell down and struck him on the left

side of his head and left shoulder. He testified that he did not lose consciousness as a result of the incident. Although there were two co-workers tasked with disassembling the scaffold, there is no witness testimony explaining exactly what occurred.

Although the plaintiff was wearing a hard hat, he sustained a cut on the bridge of the nose. As a result of the accident, the plaintiff sought out Mr. Steven Capoccia, a supervisor at the site, in order to fill out an accident report. This report is a one page document attached to plaintiff's papers as Exhibit I. It contains a description of the accident, location, witnesses and possible prevention techniques. Mr. Capoccia testified that he previously had instructed his employees to refrain from disassembling a scaffold if they were "working over the top" of other employees, but added it was normal practice to disassemble scaffolds even if workers are on the same floor. After speaking with Mr. Capoccia, plaintiff felt well enough to continue working and did so until approximately 12:30 P.M. when he left the job site and returned home. At approximately 7:00 P.M. on November 9, 2009, he experienced severe headaches and went to the emergency room at St. Vincent's Medical Center for treatment.

Plaintiff filed the instant action on February 8, 2011 based on violation of Labor Law §§ 200, 240[1] and 241[6]. With respect to Labor Law § 200, plaintiff alleges that the defendants failed to provide a safe work environment. His claim under §240[1] is based on a failure to protect against elevation related risks, and his claim under §241[6] is based on a myriad of Industrial Code Regulations. Defendant Stapleton refutes each claim individually based on the plaintiff's failure to meet his burden with respect to summary judgement. Defendant SI-Housing claims all prongs of the complaint should be dismissed as against them inasmuch as they cannot be considered an "owner" as it is used in the provisions of the Labor Law cited by plaintiff. To this end, they submit the sworn affidavit of Shelia S. Martin who is the Vice President of SI-Housing wherein she testified that SI-Housing never had any right to control the method of work at the job site since it only was the record owner of title and retained no equitable interest in the property. Defendant BFC makes a similar argument to dismiss all claims against them and supports this argument with the sworn affidavit of Brandon Baron, a partner with BFC. He testified that defendant Stapleton entered into

a general contracting agreement with Broad Street and not BFC as alleged in the complaint. As a result, BFC contends there cannot be liability under any applicable section of the Labor Law.

Discussion

To obtain summary judgment it is necessary that the movant establish his position by submitting admissible evidentiary proof sufficient to allow the court to direct judgment in their favor.[1] "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion."[2] Summary judgment is an extraordinary remedy and only appropriate where a full examination of the facts indicates no triable issues of fact or arguable issues.[3] On a motion for summary judgment, the function of the court is issue finding, and not issue determination.[4] In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.

Labor Law Sec. 200

Labor Law § 200 states: "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."[5] It further provides that all of the "machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."[6] This provision is designed

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[1] CPLR 3121[b]; *Friends of Animals, Inc., v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 [1979].

[2] *Marine Midland Bank, N.A., v. Dino, et. Al.*, 168 A.D.2d 610 [2d Dept. 1990].

[3] *American Home Assurance Co., v. Amerford International Corp.,* 200 A.D.2d 472 [1st Dept 1994*]; Rotuba Extruders v. Ceppos,* 46 N.Y.2d 223 [1978]*; Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept. 2003].

[4] *Weiner v. Ga-Ro Die Cutting,* 104 A.D.2d 331 [2d Dept. 1984] *Aff'd* 65 N.Y.2d 732 [1985].

[5] N.Y. Lab. Law § 200[1].

[6] *Id.*

to codify common-law theories of negligence and impose a duty "upon an owner or general contractor to provide construction site workers with a safe place to work."[7]

The Appellate Division, Second Department has determined that cases involving Labor Law § 200 fall into two general categories that should be analyzed in the disjunctive: 1) cases where workers are injured as a result of dangerous conditions at the worksite; and 2) cases involving how the work is performed.[8] Liability is imputed in premises condition cases if the defendant created the dangerous condition that ultimately caused the accident or otherwise had actual or constructive notice of such a condition.[9] By contrast, *"*mere general supervisory authority at a worksite for the purpose of overseeing the progress of work and inspecting the work product is insufficient to impose liability."[10] A defendant "must have authority to exercise supervision and control over the work" in order to be held liable for injuries arising out of the manner in which work is performed.[11]

The duty to provide a safe work environment is not breached "through negligent acts of the subcontractor occurring as a detail of the work" and "a subcontractors failure to provide safe appliances does not render the 'premises' unsafe or defective."[12] As stated by the *Ortega* court, an allegedly defective scaffold should "be viewed as a device involving the methods and means of the work."[13] Therefore, absent evidence of a defendant's authority to supervise or control the work method, liability under § 200 would be inappropriate. "An owner or employer does not supervise or control the performance of work . . . merely by presenting ideas and suggestions, making

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[7] *Ortega v. Puccia*, 57 A.D.3d 54, 60 [2d Dept. 2008].

[8] *Id.* at 61.

[9] *Azad v. 270 5th Realty Corp.*, 46 A.D.3d 728 [2d Dept. 2007].

[10] *Id.* at 62.

[11] *Rojas v. Schwartz*, 74 A.D.3d 1046 [2d Dept. 2010].

[12] *Persichilli v. Triborough Bridge & Tunnel Auth.*, 16 N.Y.2d [1965].

[13] *Ortega*, 57 A.D.3d at 62.

observations and inquires, and inspecting the work."[14] Some reported cases have required the *actual* exercise of control to impute liability,[15] some have only required authority to control,[16] while some have blended the two standards.[17] The Second Department has normally applied the authority to control standard which is satisfied when a defendant who is able to "avoid or correct an unsafe condition"[18] inherent in the performance of the work fails to do so.

Summary judgement on Labor Law § 200 claims is inappropriate if there are genuine questions of material fact with respect to whether a defendant had the authority to control the manner in which their employees utilized the instrumentality or otherwise performed their work.[19] Here, in his verified complaint, plaintiff alleges defendants SI-Housing and Stapleton and BFC operated, maintained, managed and controlled the building, scaffold and premises. Plaintiff further alleges the defendants were negligent inasmuch as they improperly maintained, owned or controlled the scaffolding equipment at issue. A review of the record does not indicate the existence of a genuine issue of material fact with respect to whether any of the named defendants had the authority to control the manner in which the scaffolding at the worksite was assembled or disassembled. Plaintiff does not specifically address this point in his motion papers, but instead relies on his supporting exhibits. Exhibit J is a standard form agreement between defendant Stapleton and contractor Broad Street Builders, but only contains clauses which refer to payment, contract sum, substantial performance and termination. There is no language which embodies Stapleton, much less *any* defendant with the obligation of, or even authority to, control the manner in which the work is

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[14] *Comes v. New York State Elec. And Gas Corp.*, 82 N.Y.2d 876, 877 [1993].

[15] *See, e.g., Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494 [1993].

[16] *See, e.g., Rizzuto v. L.A. Wenger Contr. Co., Inc.*, 91 N.Y.2d 343 [1998]; *Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311 [1981]; *Gallello v. MARJ Distributors, Inc.*, 50 A.D.3d 734 [2d Dept. 2008].

[17] *See, e.g., Lombardi v. Stout*, 80 N.Y.2d 290 [1992].

[18] *Hurtado v. Interstate Materials Corp.*, 56 A.D.3d 722, 723 [2d Dept. 2008].

[19] *See, e.g., Delvano v. Racanelli Const. Co., Inc.*, 86 A.D.3d 550 [2d Dept. 2011].

performed. Furthermore, defendant's notice of cross motion contains sworn affidavits from Brandon Baron, a partner of BFC, and Sheila Martin, a vice president of SI-Housing whereby they both deny their respective companies had any ability to maintain or control the scaffolding on the job site. Therefore, the plaintiff failed to meet his *prima facie* burden to demonstrate the entitlement to a judgment as a matter of law pursuant to Labor Law § 200.

Labor Law Sec. 240 [1]

This section of the Labor Law imposes a nondelegable duty "on all contractors and owners and their agents ... in the ... erecting ... of a building or structure" who do not "furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding" which fails to provided "proper protection to a person so employed."[20] First, an injured plaintiff must "demonstrate that he was both permitted or suffered to work on a building or structure was hired by someone" to work at the site.[21] Liability under this section further 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."[22] The type of accident covered by Labor Law § 240[1] is one which will sustain the allegation that a properly deployed "scaffold, hoist, stay, ladder or other protective device" would have "shield[ed] the injured worker from harm directly flowing from the application of the force of gravity to an object or person."[23] "Where a plaintiff's own actions are the sole proximate cause of the accident,"[24] or if a different type of hazard contemplated by the statue causes injury, imposing liability is inappropriate.[25] Thus, in order to substantiate a claim under this section, a plaintiff must "establish that the statute was violated and that the violation was a proximate cause of his or her

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[20] Labor Law § 240 [1].

[21] *Mordkofsky v. V.C.V. Dev. Corp.*, 76 N.Y.2d 573, 576-77 [1990].

[22] *Broggy v.Rockefeller Group, Inc.*, 8 N.Y.3d 675, 681 [2007].

[23] *Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 604 [2009].

[24] *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 39 [2004].

[25] *See, e.g. Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513 [1991].

injuries."[26] If a plaintiff successfully meets his burden, liability is absolute as to the general contractor or owner.[27]

The Court of Appeals has spent the previous two decades "defining the category of special injuries that warrant the special protection of Labor Law § 240[1]."[28] The generalized occurrence underlying the statute is that a defendant's failure to provide its employees adequate protection against "reasonably preventable, gravity-related accidents" should result in liability.[29] Initially, the focus on "gravity-related" led the Court to define the contemplated hazards as those "related to the effects of gravity," i.e. whether a difference between the elevation level of the employee and the required work or materials being loaded caused injury.[30] This standard was further refined in *Ross v. Curtis-Palmer Hydro-Electric Company* where the Court of Appeals limited the reach of Labor Law § 240[1] to "specific gravity-related accidents" such as an employee falling from an elevated height or being struck by an improperly hoisted or secured object.[31] This analytical framework led to the Court of Appeals denying recovery to employees injured by glass falling from a nearby window pane,[32] as well as injuries suffered when a firewall collapsed on an employee.[33] The uniting theme buttressing the conclusions of the Court of Appeals was the fact that the accidents were merely generalized perils associated with construction and not ones which would otherwise have been prevented by properly placed scaffolding equipment.

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[26] *Allan v. DHL Exp. (USA), Inc.*, 99 A.D.3d 828, 833 [2d Dept. 2012].

[27] *See, e.g. Jock v. Fien*, 80 N.Y.2d 965, 967-68 [1992].

[28] *Wilinski v. 334 East 92nd Housing Development Fund Corp.*, 18 N.Y.3d 1, 7 [2011].

[29] *Id.*

[30] *Rocovich* 78 N.Y.2d at 514.

[31] *Ross v. Curtis-Palmer*, 81 N.Y.2d at 501.

[32] *Narducci v. Manhasset Bay Associates*, 96 N.Y.2d 259 [2001].

[33] *Misseritti v. Mark IV Const. Co., Inc.*, 86 N.Y.2d 487 [1995].

Despite the Court of Appeals reluctance to expand the protections of Labor Law § 240[1], adopting a categorical rule against "same level" incidents is inopposite to the intent of the statute. Liability does not depend on "the precise characterization of the device employed or upon whether the injury resulted from a fall."[34] Instead, "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."[35] A "physically significant" elevation differential differs from a "de minimis" differential in the amount of force generated by the falling object over its descent when taking into account the position and relative heights of the employee and object.[36] Thus, it is incumbent on the plaintiff to demonstrate there was a physically significant elevation differential and that his injury was a "direct consequence of [defendants'] failure to provide adequate protection" against risks as a result of such a differential in order to sustain his burden regarding summary judgment.[37]

Here, plaintiff contends that the scaffold was an insufficient safety device since it did not have wheels and that the cinder blocks atop the scaffold were improperly secured. The plaintiff argues that while he was located on the same plane as the base of the scaffold in question, his injuries were the direct result of the imposition of gravity on the scaffold. Moreover, plaintiff contends that defendants failure to provide adequate measures to prevent the scaffold from falling led to his injuries. The defendants argue the plaintiff is unable to demonstrate how, if at all, his injury could have been obviated. As stated in the facts, the scaffold was being disassembled when it fell, causing it and the cinder blocks located on the scaffold to hit the plaintiff. It is clear the plaintiff was an employee entitled to work on the job site and would thus be entitled to the statute's protection if he can demonstrate a violation of the statute which proximately caused his injuries. The lack of a difference in elevation is not fatal to plaintiff's claim since the scaffold and cinder blocks were able to generate sufficient physical force as to pass muster under a *Runner* analysis.

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[34] *Runner*, 13 N.Y.3d at 603.

[35] *Id.*

[36] *See, e.g. Wilinksi*, 18 N.Y.3d at 10.

[37] *Runner*, 13 N.Y.3d at 603.

Nonetheless, plaintiff has not provided enough information to justify summary judgement. Aside from plaintiff's deposition which reveals uncertainty as to what caused the scaffold to fall, there is no definitive evidence which would suggest the injury could have been avoided with the application of a missing safety device. However, plaintiff's also rely on the report prepared by Steven Cappocia after the accident which suggested the scaffold should have been taken down prior to beginning any work in the area. Plaintiff also relies on the fact that there were cinder blocks placed atop the scaffold which contributed to the injury. There is no definitive evidence supporting this motion inasmuch as there were no eyewitnesses to the incident. But the deposition testimony of Mr. Cappocia at least suggests that cinder blocks had been previously used in such a manner, and the testimony of plaintiff suggests such blocks were part of the scaffold at this site. Based on the totality of the record, it is at arguable plaintiff's injuries were caused by a failure to provide adequate safety measures. However, there is not enough evidence supporting either position to justify imposing summary judgement on their respective motions. As such, both motions seeking summary judgement on § 240[1] are denied.

Labor Law § 241[6]

Labor Law § 241[6] requires that all areas in which construction work is being performed "[to] be so constructed, shored, equipped, guarded arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein." The statute imposes a "nondelegable duty on owners, contractors, and their agents to provide reasonable and adequate protection for works" as well as comply with regulations promulgated by the Commissioner of the Department of Labor.[38] A violation of the statute will only lead to liability where "a specific, positive command or a concrete ... [safety] regulation" has been violated.[39] Thus, in order for the plaintiff to substantiate a summary judgement motion, he must allege which provisions of the Industrial Code

[38] *White v. Village of Port Chester*, 92 A.D.3d 872, 977 [2d Dept. 2012].

[39] *Toefer v. Long Is. R.R.*, 4 N.Y.3d 399, 409 [2005].

were violated and prove that violation proximately caused his injury.[40] Contrarily, a defendant must show the alleged violation was not a proximate cause of the accident in order to be entitled to summary judgement.[41]

Plaintiff's verified bill of particulars alleges violations of the Industrial Code (12 NYCRR) under section 23 - 1.5 (general responsibility of employers), 1.7 (generalized hazards), 1.8 (personal protective equipment), 1.11 (lumbar and nail fastenings), 1.15 (safety railings), 1.19 (catch platforms), 1.32 (imminent danger), 1.33 (protections of persons passing), 2.6 (catch platforms), and 3.3 (demolition by hand). In addition, plaintiff alleges violations of paragraph 27-1021[a][6] of the New York City Building Code, as well as "the rules of the Occupational Safety and Health Administration." However, in his papers, plaintiff relies solely upon alleged violations of 12 NYCRR §§ 23-1.7[a][1] (overhead hazards), 1.7[e][2] (tripping hazards), 2.1[a][2] (maintenance), 3.3 [c] (demolition by hand), 3.3[f] (inspections of floors) and 5.6[f] (pole scaffold removal).

Initially, this Court finds that plaintiff's reliance upon any violations of provisions provided by OSHA is misplaced as they are not applicable to employers only and not owners or general contractors.[42] Furthermore, violations of OSHA regulations or the New York City Building Code do not support a cause of action under Labor Law § 241[6].[43] Therefore, the court will only consider the Industrial Code violations alleged in plaintiff's subsequent opposition papers and disregard those of OSHA and the New York City Building Code alleged in the bill of particulars.

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[40] *Rosado v. Briarwoods Farm*, 19 A.D.3d 396 [2d Dept. 2005].

[41] *Ferrero v. Best Modular Homes, Inc.*, 33 A.D.2d 847 [2d Dept. 2009].

[42] *Pellescki v. City of Rochester*, 198 A.D.2d 762, 763 [4th Dept. 1993].

[43] *Greenwood v. Shearson, Lehman & Hutton*, 238 A.D.3d 311, 313 [2d Dept. 1997]; *Samaroo v. Patmos Fifth Real Estate, Inc.*, 32 Misc. 3d 1209(A) [Sup. Ct, Kings County 2011].

NYCRR § 23-1.7[a][1]

Industrial Code § 23-1.7[a][1] provides that "every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection."[44] It then expands on the minimum requirements for such protection. Since the subsection provides specific standards required for overhead planking, alleging a violation is sufficient to sustain a cause of action under Labor Law § 241[6]. The Industrial Code provision is otherwise applicable to the facts of the instant case.[45] However, although the violation of an Industrial Code provision provides some evidence of negligence, it is incumbent upon the plaintiff to demonstrate how such a violation proximately caused his injuries. Otherwise, it is for a jury to determine "whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances."[46] Neither party has provided any evidence which would allow this court to affirmatively find or deny proximate causation. As a result, summary judgement cannot be granted to either party on an alleged violation of this provision.

NYCRR § 23-1.7[e][2]

Industrial Code § 23-1.7[e][2] requires that "the parts of floors, platforms and similar areas where person work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections."[47] Although plaintiff correctly identifies § 23-1.7[e][2] as sufficiently specific to support a Labor Law § 241[6] claim, this court finds it factually inapplicable to this action inasmuch as the evidence supports plaintiff's allegations that his injuries were purportedly caused by the falling scaffold, and not by tripping

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[44] 12 NYCRR 23-1.7[a][1].

[45] *See, e.g. Zervos v. City of New York*, 8 A.D.3d 477, 480 [2d Dept. 2004]; *Belcastro v. Hewlett-Woodmere Union Free School Dist. No. 14*, 286 A.D.2d 744, 747 [2d Dept. 2001].

[46] *Rizzuto*, 91 N.Y.2d at 351.

[47] 12 NYCRR 23-1.7[e][2].

over any debris located at the worksite.[48] Therefore, the portion of defendant's motion that seeks dismissal of plaintiff's Labor Law § 241[6] claim predicated on § 23-1.7[e][2] is granted and plaintiff's cross motion as to the same provision is denied as moot.

NYCRR § 23-2,1[a][2]

Industrial Code § 23-2.1[a][2] provides, in pertinent part that, "material and equipment shall not be placed or stored so close to the edge of a floor, platform or scaffold as to endanger any person beneath such edge."[49] § 23-2.1[a][2] has been held to contain the concrete specifications required to sustain a claim under Labor Law § 241[6].[50] Thus, to be entitled to summary judgement on this claim, defendants are required to make a prima facie showing that the alleged violation of the Industrial Code was not a proximate cause of the accident. Here, plaintiff testified that the scaffold had concrete blocks on its edge which, along with the scaffold, hit him when the structure collapsed. Plaintiff also testified that the concrete blocks were on the pole of the scaffold and as such, connected to the scaffold. Mr. Capoccia testified he had previously witnessed concrete blocks used as supporting weight at other job sites but claimed that method was not used at the Broad Street site. This court finds that this provision of the Industrial Code is factually relatable to plaintiff's accident and that there is sufficient evidence to raise a triable issue of material fact as to whether the alleged violation proximately caused injury. Consequently, defendant's motions to dismiss the Labor Law § 241[6] must be denied to the extent plaintiff relies on this section.

NYCRR § 23-3,3[c]

Industrial Code § 23-3.3[c] provides, in pertinent part that continuing inspections shall be made during hand demolition operations as to "detect any hazards to any person resulting from

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[48] *Vieira v. Tishman Constr. Corp.*, 255 A.D.3d 235; *Romeo v. Property Owner (USA) LLC*, 61 A.D.3d 491, 492 [1st Dept. 2009].

[49] 12 NYCRR 23-2.1[a][2].

[50] *Rosado,* 19 A.D.3d at 397 (*quoting Flihan v. Cornell Univ.*, 280 A.D.2d 994 [4th Dept. 2001]).

weakened or deteriorated floors or walls or from loosened material."[51] Even though it has been found to be "sufficiently specific" to serve as a predicate for a claim under Labor Law § 241[6], this provision is inapplicable to the facts of the case as it only seeks to prevent workers from "structural instability caused by the progress of demolition."[52] The undisputed facts reveal this was not a demolition operation, but rather the exact opposite. The plaintiff has not alleged any facts which would establish any evidence of a structural instability which would be the proximate cause of his injuries. As a result, defendant's motion as to this provision of the Industrial Code is granted.

NYCRR § 23-3,3[f]

Industrial Code § 23-3.3[f] provides that there shall be safe access "to and egress from every building or other structure in the course of demolition."[53] This court finds this provision inapplicable to the instant case inasmuch as there was no on-going demolition work of the building.

NYCRR § 23-5.6[f]

Industrial Code § 23-5.6[f] provides that in the course of pole scaffold erection or removal "the existing platform shall be left undisturbed until the new working level is framed."[54] It further states that "as the scaffold is abandoned with the progress of the work, all supporting members shall be left intact," and the sequence of removal "shall be in reverse of that used in the erection of such scaffold."[55] In the course of the courts research, only *Miles v. Great Lakes Cheese of New York,*[56] which the plaintiff has cited to, has examined the applicability of Labor Law § 241[6] to this

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[51] 12 NYCRR 23-3.3[c].

[52] *Bennett v. SDS Holdings*, 309 A.D.2d 1212 [4th Dept. 2003]; *Smith v. New York City Housing Auth.*, 71 A.D.3d 985 [2d Dept. 2010].

[53] 12 NYCRR 23-3.3[f].

[54] NYCRR 23-5.6[f].

[55] *Id.*

[56] *Miles v. Great Lakes Cheese of New York, Inc.*, 103 A.D.3d 1165 [4th Dept. 2013].

provision of the Industrial Code. *Miles* involved a plaintiff who was injured when he was struck by two scaffold planks as he and a coworker were in the process of raising the planks to a new level. The factual circumstances underpinning *Miles* are not squarely in line with the facts presented in the instant case. Nonetheless, in order to sustain a summary judgement motion under Labor Law § 241[6], a defendant must show that an alleged violation was not the proximate cause of injury. Here, there are no witnesses to explain why or how the scaffold fell. It is possible that the workers who were disassembling the scaffold did so in a manner which would run afoul of the Industrial Code. Defendants do not otherwise establish that this regulation does not apply to the facts, or that it was not violated. The only argument provided is that the plaintiff fails to explain why § 23-5.6[f] is applicable. As such, defendants have not met their burden. However, neither has plaintiff inasmuch his papers merely contain a citation to *Miles* and the language of § 23-5.6[f]. Therefore, neither party is entitled to summary judgment on this issue and this court finds there is a genuine issue of material fact as to whether there was a violation and whether that violation proximately caused plaintiff injury.

Accordingly, it is hereby:

ORDERED, that the plaintiff's motion for summary judgment is denied in its entirety; and it is further

ORDERED, that the defendant's motion for summary judgment is granted to the extent that plaintiff's claims pursuant to Labor Law § 241(6), that are predicated on violations of OSHA regulations, the New York City Building Code and Industrial Code §§ 23-1.7[e][2]; 23-3.3[c]; 23-3.3[f] and that it is denied in all other respects; and it is further

ORDERED, that this action is hereby transferred to **JCP8, 18 Richmond Terrace, Staten Island, New York, on February 24, 2014**; and it is further

ORDERED, that parties must supply a list of HIPAA compliant authorizations that will be needed for trial to opposing counsel at the time the case first appears on the JCP8 calendar. Thereafter, HIPAA authorizations are to be served within 60 days.

ENTER,

DATED: January 14, 2014

Joseph J. Maltese
Justice of the Supreme Court