SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

RENE A. ORTEGA,

Plaintiff,

- against -

PANTHER SIDING & WINDOWS, INC.,

Defendant.

TRIAL/IAS PART 33
NASSAU COUNTY

Index No.: 610155/18
Motion Seq. No.: 01
Motion Date: 07/17/19
XXX

PANTHER SIDING & WINDOWS, INC.,

Third-Party Plaintiff,

- against -

GOLDEN HAMMER CONSTRUCTION GROUP, CORP.,

Third-Party Defendant.

The following papers have been read on this motion:

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

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

Defendant/third-party plaintiff moves, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint. Plaintiff opposes the motion.

Plaintiff commenced the instant action with the filing of a Summons and Verified Complaint on or about July 31, 2018. *See* Defendant/Third-Party Plaintiff's Affirmation in Support Exhibit A. Issue was joined by defendant/third-party plaintiff on or about September 28, 2018. *See* Defendant/Third-Party Plaintiff's Affirmation in Support Exhibit B. Defendant/third-party plaintiff filed and served an Amended Third Party Summons and Amended Third-Party Complaint on or about October 10, 2018. *See* Defendant/Third-Party Plaintiff's Affirmation in Support Exhibit C.

Counsel for defendant/third-party plaintiff submits, in pertinent part, that "[t]he grounds for this motion are that: (1) In violation of the pleading specificity requirements of *CPLR 3013*, plaintiff has only misidentified, conflictingly identified, and never actually and specifically identified, the location of his alleged accident and correspondingly, that PANTHER was the general contractor thereat; (2) even assuming plaintiff could accurately identify the location of his accident and that PANTHER was the general contractor on the project, he nevertheless cannot establish, for all of the reasons discussed below, PANTHER'S liability pursuant to *Labor Law Sections 240(1), 241(6), 200* and/or common law negligence; and (3) PANTHER did not perform any work in the town where plaintiff testified his accident occurred (Valley Stream, New York) on the date of the alleged accident. The instant personal injury action seeks recovery of damages for injuries the plaintiff RENE ORTEGA allegedly sustained on **January 18, 2017** during the course of his employment doing roofing work for Golden Hammer Construction Company (one of moving defendant PANTHER'S roofing subcontractors).... Plaintiff's

Complaint ... alleges (*sic*) the accident occurred when he fell while performing roofing work at a construction site in Queens, New York, where PANTHER was either the owner of, or general contractor at the property.... The Complaint, however, does not provide any specific address within the Borough of Queens where the alleged accident occurred. According to the plaintiff's single-count Complaint, PANTHER is liable to him for being negligent with respect to his accident, and for violating Sections *240(1), 241(6), 200* of New York's Labor Law. With regard to his *Labor Law 241(6)* claim, the Complaint does not indicate any specific safety provisions of the Administrative Code of the State of New York that PANTHER allegedly violated. A violation of a Code provision of this nature is a necessary predicate for establishing liability under *Labor Law 241(6)*; this statute is not self-executing.... Plaintiff has never supplemented or amended his Bill of Particulars in order to identify the location where he suffered his alleged injuries." *See* Defendant/Third-Party Plaintiff's Affirmation in Support Exhibit E.

In support of the motion, counsel for defendant/third-party plaintiff submits the transcript from plaintiff's Examination Before Trial ("EBT") testimony. *See* Defendant/Third-Party Plaintiff's Affirmation in Support Exhibit F. Counsel asserts that,"[i]n relevant part, and in contrast to his Complaint (which alleges the accident occurred at a construction site in Queens), plaintiff testified at his deposition that the accident actually occurred at a residence in Valley Stream (mid-Nassau County, Long Island, New York).... Plaintiff could not remember the address in Valley Stream where the accident allegedly occurred, but testified that he is familiar with his employer, Golden Hammer's, record-keeping methods, and that upon completion of every job, Golden Hammer would have submitted an inventory to PANTHER that would have stated the dates Golden Hammer worked, as well as the address where the work was performed.... Those invoices are saved in a computer at Golden Hammer's offices ... and on a

computer at Golden Hammer's owners's (Oscar Maldonado's) home, which is the home where plaintiff himself lived on and for quite some time after the accident date (as he was married to Mr. Maldonado's daughter at the time).... Although plaintiff has not, during the course of discovery, produced any invoice from Golden Hammer to PANTHER, indicating the address where he alleges his accident occurred, and proving that PANTHER was the general contractor for that project, plaintiff believes that PANTHER was the general contractor for the job where he allegedly suffered injury, because, according to his testimony, one or two days before the accident, PANTHER sent a fax to Golden Hammer with an address to perform roofing work.... Oscar Maldonado (the owner of Golden Hammer, and the plaintiff's former father-in-law) then told plaintiff the day before the accident to report to the accident site with a crew in order to remove old roofing materials and replace them with new material.... On the day of the accident, plaintiff, who was the foreman for the job, drove to the Golden Hammer office to pick up his crew (three other men) and supplies, which included roofing materials, tools, harnesses, helmets, hammers, air hoses, ladders and other items/equipment they would need for the job.... He testified that Golden Hammer owned all of these tools, materials and equipment. The first thing the men did after arriving at the job site and unloading their tools and equipment from the Golden Hammer truck, was to go up onto the roof in order to set up their system of hooks and ropes that they attached to a metal plate they had nailed into a wooden, structural portion of the roof (at its peak). Once the metal plate, which had a ring/loop on it, was properly secured to the roof, the men each attached their hooks to the ring/loop, put their ropes through the hooks, and then attached their ropes to the harnesses they each wore.... Plaintiff testified that he connected his own hook and rope onto the loop attached to the roof structure the men had created as a base for their ropes (the above-referenced, foot-long metal plate they had nailed unto a wooden roof rafter, and which had a metal loop attached to it that accommodated each worker's hook), and

then connected the rope to his harness, so that he could get started on his work.... He testified that it felt secure to him at that time.... He then began his work of scraping off the old roof with a roof rake.... He was working on the roof for about 40 minutes when the accident occurred.... The accident occurred the first time he tried to stand up from a sitting position.... At that time, his harness came unhooked from the loop attached to the metal plate on the rooftop.... He testified that the hook has a lock and is made of steel.... According to his testimony, he then saw the detached hook right beside him, and knew at that time that he was going to fall (because his harness and rope were no longer hooked to the top of the roof).... He then fell backwards off of the roof and onto the grass below.... When asked 'Do you know how the hook detached from the raft?', plaintiff responded, 'To this day, I still don't. It looks like it just became unhooked. It looks like the lock just gave up.'... Next, plaintiff testified that just before the accident, he did not hear any snapping or breaking sounds as the hook became detached from the loop on the metal plate that was nailed into/affixed (*sic*) the roof rafter.... Additionally, he did not see any broken pieces of their safety equipment.... Rather, everything appeared intact. According to the plaintiff: 'I saw that the whole thing was still in place. It didn't seem that the rope came loose from the hook. It didn't seem the metal plate came loose from the roof at all.' Additionally, the rope did not tear, and the harness the plaintiff was wearing remained intact as well.... Moreover, the hood did not have any broken pieces.... Plaintiff reiterated that he did not know how the hook became detached ... and that he did not see the roof-top metal plate after his accident because it was still attached to the roof.... While at the emergency room, plaintiff advised the staff that he fell from a ladder while he was at home.... He claims he said this at the request of his father-in-law, who was concerned that his workers compensation insurance premiums would go up if the plaintiff told the nurse that he had fallen in a work-related accident.... In addition to telling the hospital staff that he fell from a ladder at home, plaintiff also told the chiropractor he started to see during the

months following the accident that he fell from a ladder while at home.... In addition to the foregoing, plaintiff testified that he never advised PANTHER, at or around the time of the accident, that he had been in an accident, while working on a PANTHER job.... Furthermore, no accident report was ever prepared with regard to the plaintiff's accident.... Moreover, no photographs were taken at/around the time of the alleged accident, and plaintiff does not know what happened to the hook or to any of the other tools and equipment he was using on the accident date, other than that Golden Hammer usually keeps its equipment.... At the time of his deposition, he did not know whether Golden Hammer still had the hook.... At his deposition, plaintiff was also asked about a contract ... between PANTHER and his employer Golden Hammer. He testified that he was familiar with the agreement and that the relationship between Golden Hammer, as subcontractor and PANTHER as general contractor commenced in 2015.... This contract is a general agreement that does not identify any specific roofing jobs, locations or dates. It also was not an exclusive subcontract; it contains no provisions stating that Golden Hammer agreed to work as a subcontractor solely for PANTHER and to refrain from entering into contracts with other GC's in the area. Nor does this contract state Golden Hammer would be PANTHER'S exclusive roofing subcontractor." *See id. See also* Defendant/Third-Party Plaintiff's Affirmation in Support Exhibit G.

Also in support of the motion, counsel for defendant/third-party plaintiff submits the transcript from the EBT testimony of Ronnie DiRusso ("DiRusso"), Manager of defendant/third-party plaintiff corporation. *See* Defendant/Third-Party Plaintiff's Affirmation in Support Exhibit H. Counsel asserts that DiRusso testified, in pertinent part, that, "he has been the office manager for PANTHER since 2001.... His duties in this role include sales, managing the progress of jobs, managing subcontractors, and the day-to-day operations of the business.... DeRusso (*sic*) testified that PANTHER is a residential construction company that subcontracts

most of its work, and Golden Hammer is one of its subcontractors.... He testified that PANTHER does not maintain individual subcontracts for each job but that it gets annual contracts (like the one identified at the plaintiff's deposition) signed between itself and each of its subcontractors.... Mr. DeRusso (*sic*) testified about PANTHER'S record-keeping processes and indicated that it maintains in its files invoices for all jobs, that include the address where work was performed by its subcontractors, and that a search for all jobs being performed in January of 2017 would retrieve invoices that contained the address of where the job was performed.... He testified that he did not recall any projects going on in Valley Stream in January of 2017.... Consistent with his memory, a search of his phone, that plaintiff's counsel requested he perform during DeRusso's (*sic*) deposition, of photographs taken of PANTHER projects that were under construction in January of 2017, disclosed three different construction sites.... None of them involved exterior roofing work.... With regard to tools and equipment, Mr. DeRusso (*sic*) testified, consistently with the plaintiff, that Golden Hammer only uses its own tools and supplies when it does roofing work as a subcontractor for PANTHER and further, that aside from not providing any tools and equipment to its subcontractors, PANTHER also did not supervise or direct any of their subcontractors' work, including that of Golden Hammer.... Indeed, it did not visit the work sites or have any employees at the job locations but rather, its only function was to secure and schedule the work.... Additionally, consistent with the testimony of the plaintiff, DeRusso (*sic*) testified that neither the plaintiff nor Oscar Maldonado of Golden Hammer ever contacted him at/around the time of the alleged accident, and that he first learned of it when PANTHER was served with the suit papers for this lawsuit." *See id.*

Defendant/third-party plaintiff also submits the Affidavit of Katelyn Corliss ("Corliss"), a secretary with defendant/third-party plaintiff. *See* Defendant/Third-Party Plaintiff's Affirmation in Support Exhibit I. Counsel for defendant/third-party plaintiff asserts that Corliss affirms, in

pertinent part, that, "part of her duties as secretary is maintaining records. The records include the address where Golden Hammer's work for Panther was performed. Ms. Corliss (*sic*) affidavit further avers that Golden Hammer did not perform any work for PANTHER in January 2017,... Ms. Corliss (*sic*) affidavit makes (*sic*) clear that Golden Hammer did not perform any work for PANTHER in Valley Stream, New York on the date of the alleged accident or any time in January 2017." *See id.*

Counsel for defendant/third-party plaintiff argues, in pertinent part, that, "[t]he plaintiff's failure to accurately identify the location of the accident and correspondingly connect PANTHER to that job site in its capacity as general contractor, is fatal to the plaintiff's lawsuit. As it currently stands, the plaintiff's Complaint alleges the accident occurred in Queens, his Bill of Particulars fails to identify the accident location at all, he testified at his deposition that the accident happened at a residence in Valley Stream, and he told hospital personnel and his chiropractor that the accident occurred at his home in Hempstead. Further, the admissible and credible evidence demonstrates that Golden Hammer did not perform work for PANTHER in Valley Stream, New York (where plaintiff testified his accident occurred) on the date of loss or anytime in January 2017. In light of all the foregoing, the record is devoid of any proof that PANTHER had subcontracted to Golden Hammer the work that gave rise to the plaintiff's injury, wherever it occurred. Absent a scintilla of proof that the plaintiff's injuries occurred while he was working at a job where PANTHER was the general contractor, plaintiff cannot establish the existence of either a duty of care at common law that could give rise to a cause of action for negligence, or prove that PANTHER violated any provision of the Labor Law that could give rise to Labor Law liability. Furthermore, even assuming, *arguendo*, that plaintiff had proffered any evidence that somehow established with sufficient particularity where his accident occurred, and that PANTHER was the general contractor on that project, all of his claims in any event fail, as a

matter of law."

In opposition to the motion, counsel for plaintiff argues, in pertinent part, that, "[t]he defendant's application is frivolous and should be denied because A) Panther Siding was the general contractor who hired the plaintiff's employer, non-party GOLDEN HAMMER CONSTRUCTION GROUP, INC. (hereinafter 'Golden Hammer'), B) Panther Siding violated Labor Law sections 240(1) and 241(6) in causing the plaintiff's fall off a roof, and C) the defendant did not affirmatively prove that they were not the general contractor at the residential construction site where the plaintiff was injured.... Mr. Ortega cannot recall the exact address of the residential home where he was working when the accident happened. He was only there one day. However, he was clear that he was working for Golden Hammer and that Golden Hammer was hired by defendant Panther Siding to work at the residential home in question where the accident happened when the accident happened. These facts were confirmed by Mr. Ortega's ex-Father-in-Law, Oscar Maldonado, who was the manager for Golden Hammer (he also did not know the address in question). It is un-disputed that the plaintiff fell off the roof of a residential home in question to the ground below when his harness, lanyard, and hook failed. He hit into a gutter while falling and damaged the gutter. He fell off the roof to the ground fifteen (15) feet below. Mr. Maldonado went to the accident location right after the fall, saw the plaintiff on the ground, saw the damaged gutter, and brought him to the hospital. It is un-disputed that the plaintiff was unsure of the accident location, but believed that it happened in Valley Stream and Mr. Maldonado was also unsure of the accident location, but believed that it happened either in Valley Stream or near Valley Stream, possibly in Queens.... The defendant's motion should be denied because they did not affirmatively prove that they were not the general contractor for the residential construction site in question. Rather, they have only submitted contradicted (*sic*) evidence indicating that they were not the general contractor for a construction project in Valley

Stream, New York only. Furthermore, the accident happened due to the defendant's violation of Labor Law sections 240(1) and 241(6). The defendant hired the plaintiff's employer to perform the roofing work in question. The plaintiff's safety devices (harness, lanyard, and hook) failed causing him to slide down the roof, hit into the gutter, damage the gutter, and fall one story to the ground below."

Counsel for plaintiff further contends, in pertinent part, that, "Panther Siding hired the plaintiff's employer, Golden Hammer, and, as such, is responsible to Mr. Ortega under Labor Law sections 240(1) and 241(6) as the general contractor for the residential construction site in question.... The defendant's motion papers do not rebut that they were the general contractor who hired the plaintiff's employer. Rather, their motion papers only claim that they were not working in Valley Stream at the time of the accident. The plaintiff was unsure of the exact location and Mr. Maldonado explained that it was Valley Stream or nearby, possibly in Queens. The defendant has refused to provide any information in response to discovery demands regarding any location other than in Valley Stream. Their claim that they were not the general contractor should be disregarded because their only proof is that they were not working in Valley Stream at the time of the accident and A) Mr. Ortega testified that the accident happened in Valley Stream (a question of fact), B) Mr. Ortega confirmed that Golden Hammer was hired by Panther Siding, C) Mr. Maldonado confirmed that Golden Hammer was only hired by Panther Siding and the (*sic*) Mr. Ortega was injured at a construction site where Golden Hammer was hired by Panther Siding and D) Panther Siding has not submitted any proof that Golden Hammer was not working for them (*sic*) at the time of the accident at any location other than Valley Stream, New York. Therefore, the defendant, Panther Siding, was the general contractor who hired the plaintiff's employer for the construction project where Mr. Ortega was injured."

Labor Law § 200 is a codification of the common law duty imposed on an owner or general contractor to provide construction site workers with a safe place to work. *See Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 609 N.Y.S.2d 168 (1993). Liability for common law negligence and violation of Labor Law § 200 is limited, however, to those who exercise supervision or control over the plaintiff's work or have actual or constructive notice of the unsafe condition that caused the underlying accident. *See Aranda v. Park E. Const.*, 4 A.D.3d 315, 772 N.Y.S.2d 70 (2d Dept. 20014). When a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery cannot be had under Labor Law § 200 unless it can be shown that the party to be charged had the authority to supervise or control the work. *See Rodriguez v. Trades Const. Servs. Corp.*, 121 A.D.3d 962, 997 N.Y.S.2d 78 (2d Dept. 2014). There is, however, no liability under the common law or Labor Law § 200 unless the owner or general contractor exercised supervision or control over the work performed. No liability attaches under Labor Law § 200 when the injury arises as a result of the contractor's method of operation. It is "well settled that the duty to provide a safe place to work is not breached when the injury arises out of a defect in the subcontractor's own plant, tools and methods, or through negligent acts of the subcontractor [contractor] occurring as a detail of the work." *Persichilli v. Triborough Bridge & Tunnel Auth.*, 16 N.Y.2d 136, 262 N.Y.S.2d 476 (1965).

Labor Law § 200, which mandates that all workplaces be so constructed, equipped, arranged, operated and conducted as to provide "reasonable and adequate protection" to the persons employed there, is a codification of the common law duty of an owner or general contractor to provide and maintain a safe construction site. *See* Labor Law § 200(1); *Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 670 N.Y.S.2d 816 (1998); *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 609 N.Y.S.2d 168 (1993). As such, liability can be imposed under Labor Law § 200 only if the party charged with violating it was negligent; that is, the

defendant cannot be held liable unless it knew or should have known of the condition or work practice in issue and had the ability or authority to correct it. *See Ortiz v. I.B.K. Enters., Inc.*, 85 A.D.3d 1139, 927 N.Y.S.2d 114 (2d Dept. 2011).

Generally, Labor Law § 200 claims fall into two (2) broad categories; to wit, those involving injuries arising from an allegedly defective and dangerous premises condition and those involving injuries arising from the manner in which the work is performed. *See Ventimiglia v. Thatch, Ripley & Co., LLC*, 96 A.D.3d 1043, 947 N.Y.S.2d 566 (2d Dept. 2012).

In the instant matter, plaintiff has failed to provide any evidence, whatsoever, that defendant, as a general contractor, exercised supervision or control over plaintiff's work, had actual or constructive notice of the unsafe condition that caused the underlying accident and/or knew or should have known of the condition or work practice in issue and had the ability or authority to correct it. In fact, as argued by defendant, and demonstrated in the papers before the Court, plaintiff has failed to provide ***any evidence*** that defendant was indeed the general contractor on the alleged project where plaintiff was injured, since plaintiff does not have any information, at all, concerning the alleged work site where the injury took place (emphasis added). Consequently, it is mere conjecture on the part of plaintiff that defendant was the general contractor involved in the subject project.

Accordingly, plaintiff's claims under Labor Law § 200 are without merit and must be dismissed.

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, plaintiff has failed to demonstrate that defendant failed to provide the required protection at the subject construction site. Besides the fact that, as previously discussed, plaintiff is unable to provide any evidence that the defendant was in fact the general contractor of the subject construction site, plaintiff also testified that there were safety devices in place such as a metal plate secured to the roof with a ring/loop on it to which the workers attached their hooks to the ring rings, put their ropes through the hooks and then attached their ropes to the harnesses they each wore. *See* Defendant/Third-Party Plaintiff's Affirmation in Support Exhibit F.

Accordingly, plaintiff's claims under Labor Law § 240(1) are without merit and must be dismissed.

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 failed to plead any specific, applicable, implementing regulation of the Industrial Code which sets forth specific safety standards that defendant allegedly violated. By providing a list in his opposition papers of the alleged Industrial Codes he claims defendant violated, plaintiff does not cure the defect in his pleadings. Plaintiff not only failed to plead these alleged Codes in his Verified Complaint, but also did not provide said list in his Verified Bill of Particulars.

Accordingly, plaintiff's claims under Labor Law § 241(6) are without merit and must be dismissed.

Therefore, based upon the above, defendant/third-party plaintiff's motion, pursuant to CPLR § 3212, for an order granting summary dismissing plaintiff's Verified Complaint, is hereby **GRANTED**.

This constitutes the Decision and Order of this Court.

ENTER:

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

Dated: Mineola, New York
January 9, 2020