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PRELIMINARY STATEMENT

This is an action in which plaintiff-appellant, Miguel Reyes, ("plaintiff"), seeks common-law negligence/Labor Law §200 and §241(6) recovery for personal injuries allegedly sustained in February, 2012 while plaintiff, an employee of the third-party defendant/respondent, Big Moose Builders, Inc., ("Big Moose"), was performing framing and demolition work for the general contractor, the defendant/third-party plaintiff-respondent, Sligo Construction Corp., ("Sligo"). The premises owner was defendant/respondent, Equity Trust Company, Custodian FBO Paul Joseph Davey IRA, ("Equity"), which purchased the subject property on "spec" for the purpose of renovating and re-selling same. The subject project entailed the gutting of the first floor premises down to the studs, the addition of a second floor with dormers, and the construction of a new garage.

Big Moose submits the within respondents brief in opposition to plaintiff's instant appeal from those portions of the Order of the Supreme Court, Suffolk County, (Hon. Justice Reilly), dated September 25, 2019, which summarily dismissed plaintiff's Labor Law §241(6) cause of action, and granted Sligo summary judgment and dismissal of plaintiff's common-law negligence/Labor Law §200 claim(s). [1]

[1] Plaintiff has not appealed from that portion of the underlying decision which summarily dismissed his Labor Law §240(1) cause of action; hence, plaintiff's scaffold law claim has been abandoned.

SYNOPSIS OF LEGAL ARGUMENTS

Where a premises condition is at issue, property owners/general contractors may be held liable for a violation of Labor Law §200 if they either created the dangerous condition that caused the accident, or if they had actual or constructive notice as concerns its existence. By contrast, where - *as here* - a construction accident arises out of the means and methods of plaintiff's work, liability for common-law negligence or under Labor Law §200 may be imposed against an owner or general contractor only if it actually exercised supervisory control over the injury-producing work, and/or had the authority to direct the means and methods through which it was accomplished – i.e., where the owner/general contractor had not merely the authority to tell the subcontractor what to do, but how to do it.

In this matter, plaintiff asserts, *ad nauseam*, that "Sligo directed and controlled Plaintiff's work," such that plaintiff has a viable Labor Law §200/common-law negligence claim against Sligo.[2] However, scrutiny of Sligo Vice President, Paul Davey's, affidavit - upon which plaintiff predicates his entire Labor Law § 200/common-law negligence claim – reveals that Sligo's 'control' extended no further than the sequencing of Big Moose's work, which is a patently insufficient predicate for the imposition of Labor Law §200/common-law negligence liability.

[2] See plaintiff's appellate brief, at 7.

To recover under Labor Law § 241(6), a plaintiff must establish the violation of an Industrial Code provision which sets forth safety standards which are both specific and applicable to the facts of the action, in connection with construction, demolition, or excavation work.

In this matter, upon appeal plaintiff argues that he has a viable Labor Law §241(6) cause of action predicated upon defendants' violation(s) of: 12 NYCRR § 23-1.7(a)(1); 12 NYCRR § 23-1.8(c)(1); 12 NYCRR § (b)(3); and 12 NYCRR § 23-3.3(c). As set forth below, plaintiff's reliance upon these Industrial Code provisions is misplaced.

12 NYCRR § 23-1.7(a)(1) provides that "[e]very 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…consisting of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength." In this case, scrutiny of the testimonial, contract and photographic evidence shall show that there is only one credible version of plaintiff's accident – that proffered by his brother, Jorge Reyes, Jr. - who informed that same occurred when a 2x4 being used by a co-worker to pry a window out of its frame snapped, propelling a piece of same into plaintiff's forehead. Under these facts, it would be the height of absurdity to argue that the defendants should have provided "tightly laid sound planks at least two inches thick

full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength," to protect against this injury. By its express terms (a)(1) only applies where there is evidence that the situs of plaintiff's accident was normally exposed to falling material or objects, and in this matter there is a total and complete absence of any such evidence. Thus, plaintiff's reliance upon §23-1.7(a)(1) is misplaced.

Section 23-1.8 (c)(1) states that "[e]very person required to work or pass within any area where there is a danger of being struck by falling objects or materials, or where the hazard of head bumping exists, shall be provided with and shall be required to wear an approved safety hat," and it is settled law that, in order to prevail on a Labor Law §241(6) cause of action predicated upon a purported violation of this Industrial Code provision, the plaintiff must establish that the job was a 'hard hat' job - a showing which cannot be made where, *as here*, the object which struck plaintiff and the plaintiff were located at the same level.

Section 23-3.3(b)(3) provides that "[w]alls, chimneys and other parts of any building or other structure shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration." See N.Y. Comp. Codes R. & Regs. tit. 12, § 23-3.3(b)(3). The thrust of section 23-3.3(b)(3) is to ensure that during the demolition process walls and other parts of the structure

are protected from collapse as the result of forces such as wind pressure or vibration, as opposed to force being applied to the very object of the demolition process.

In this case, plaintiff predicates his §23-3.3(b)(3) violation contention upon his assertion that, "under Plaintiff's account of the accident," "the force of the vibrations from the demolition work being performed above him on the second floor caused a five-foot long piece of 2x4, which was vertically connected to the wall prior to the accident, to dislodge and strike Plaintiff in the head."[3] Scrutiny reveals counsel's argument to be without merit. First, the testimonial, contract and photographic evidence establishes that there was no second floor. Second, as plaintiff explicitly testified that neither before, during nor subsequent to his accident did he actually see the 2x4 which struck him, his 'vibration/falling 2x4' contention is mere speculation. Accordingly, as the only credible version of the subject incident is that testified to by plaintiff's brother, Jorge Reyes, Jr., and as it is settled law that where, *as her*e, the hazard arose from the actual performance of the demolition work itself § 23-3.3(b)(3) is not implicated, there can be no Labor Law §241(6) recovery herein predicated upon the alleged violation of this Industrial Code provision.

§23-3.3, sub-section c, provides that, "[d]uring hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors

[3] See appellant's brief, at 36.

or walls or from loosened material." See N.Y. Comp. Codes R. & Regs. tit. 12, §23-3.3(c). This regulation requires continuing inspections against hazards which are created by the progress of the demolition work itself, rather than inspections of how demolition would be performed. Thus, as with 23-3.3(b)(3), this regulation is inapplicable where - *as here* - the hazard which injured the plaintiff was the byproduct of the actual performance of the demolition work, not structural instability caused by the progress of the demolition.

FACTS OF THE CASE

a. Testimony of Sligo Vice-President, Paul Davey

On the date of Reye's accident a construction project, entailing the construction of a "second story addition" and garage second story to the single-story residential home, was underway at the premises located at 40 Sugar Maple Rd., Levittown, New York. (R, 101-103). As originally constructed, this premises was a single story "cape" consisting of a kitchen, half bathroom, living room and one or two bedrooms. (R, 61).

Big Moose was one of the "variety of subcontractors" retained by the general contractor, Sligo, to work upon this project. (R, 103, 105-107).

Contained within the Record on Appeal at pages 175-176 is an authenticated copy of the contract between Sligo and the owner of subject residence, Equity. (R, 125-128). The terms of this agreement, in their entirety, are as follows:

> Sligo Construction Corp. agrees to secure building permits, serve as project manager and select contractors for the "for the construction of 2nd story dormer [and] one car attached garage at 40 Sugar Maple Rd., Levittown, NY 11971."

(R, 175). Nowhere within this agreement is Sligo delegated the authority to exercise supervisory control over the means and methods utilized by any subcontractor in the performance of its work.

Plaintiff places great import upon Sligo Vice-President, Paul Davey's, statement that he "always retained the ultimate authority to – and did – make decisions and tell the subcontractors, including Big Moose, what to do and what not to do."[4] Plaintiff neglects to mention, however, that when asked if, "with the understanding that the subcontractors were responsible for supervising their own men, [he had] the authority to direct and control their work," Davey answered:

> "I would say the answer is no, that I can't tell the plumbers how to do plumbing and I can't tell the electricians how to do electrical work. It's not something within my scope."

(R, 108-109).

In addition, when asked "who, if anyone, enforced safety standards on this project," Reyes answered that "[e]ach trade was policed and supervised by their own foreman." (R, 119).

[4] See Reyes appellate brief, at 14, (emphasis in original), *quoting* Reyes affidavit, (R, 1020).

b. Testimony of Big Moose President, Stephen Musso

On or about January 20, 2012, Big Moose agreed to provide rough framing, labor and materials to frame a new garage and a second story 'dormer' on an existing single story 'cape' located at 40 Sugar Maple Rd. (R, 392).

A copy of the Sligo-Big Moose contract is contained in the Record at page 391. This agreement provides, in its entirety, as follows:

> Big Moose Builders, Inc., will provide rough framing and materials to frame new garage and second story at the above location for $33,500 – Thirty Three Thousand and five hundred dollars.

(R, 391).

Big Moose President, Stephen Musso, confirmed Sligo Vice-President, Paul Davey's, testimony that, as originally constructed, the "cape" being renovated consisted of a living room and dining room/kitchen area in the front of the house, and two bedrooms and a half bathroom in the rear. (R, 224). There were two bay windows in the first floor front dining/living room, a window in each of the two bedrooms, a window in the bathroom, and a window in the kitchen. (R, 224). As part of its work Big Moose removed the two bay windows in the dining/living room. (R, 393).

Musso also confirmed Davey's testimony that there was no existing second story on the premises under renovation, and the testimony of both Musso and Davey is confirmed by the photographic evidence, with photographs of this home as

originally constructed located in the Record at pages 1329-1332. (R, 214, 1329-1332). These "Google Map" photographs were taken in August, 2011, and were annexed to plaintiff's motion papers in the underlying proceedings. (R, 1322). That these photographs fairly and accurately depict the subject premises on the date of plaintiff's accident was confirmed by Paul Davey. (R, 1018-1019, 1021).

No Sligo personnel were on-site on the date of Reye's accident, and Sligo: (1) did not provide Big Moose with either tools and/or equipment; and/or (2) "instruct [Big Moose's] crew on how to perform their work." (R, 316-317). In this regard, when asked: "[d]id Paul Davey ever tell your workers what to do or how to do their job," Musso answered: "[n]o." (R, 354).

On the date of Reyes' accident "[t]here was no second story yet" – "[Big Moose] started with the first floor," "[Big Moose] start[ed] from the ground up," "[t]hat's how [they] [did] it." (R, 215). The second story was constructed during the week following Reyes' accident. (R, 215).

At the time of Reyes' accident Big Moose employee, Elcius Campos, was attempting to remove one of the front bay windows, the bottom sill of which was located 2 and a half feet, 30 inches, maybe" above the floor. (R, 237, 361-362). Typically, such windows are removed through the use of a "cat's paw" to "pull nails out" and a sawsall, "which is used to cut either the framework of the window or the nails that are securing it… to the framework." (R, 319-320). However, this particular

window "was installed improperly" – "it was [not] a standard situation." (R, 322). Specifically, "[t]his particular window was put in by a homeowner and he had caulked with silicone caulking the window to the frame. So [the Big Moose workers] took the nails out and the window still would not come out." (R, 320). "That was the impetus for using leverage to try and free it from its berth." (R, 320).

Musso was not present at the time of plaintiff's accident. However, immediately after its occurrence Elcius Campos conveyed to him the following information concerning this incident:

> "He told me [Reyes] was standing around doing nothing while he was removing a window and he was using a piece of 2 x 4 in order to pry the window out of its lodging and the 2 x 4 snapped and that's the piece of wood that struck [plaintiff] in the head."

(R, 235-236). That the accident occurred as described above was thereafter confirmed to Musso by Big Moose employee, Felez Mendajar. (R, 327-328).

Finally, addressing plaintiff's father's contention, (discussed, *infra*), that the 2x4 fell from the second floor of the subject premises, Musso testified that, "[a]s there was no pre-existing second story at this premises, it would have been physically impossible for any of [his] workers to have been demolishing/removing existing windows on the (non-existent) second floor of this premises at the time of plaintiff's accident." (R, 393).

c. Testimony of Plaintiff's Brother, Jorge Reyes, Jr.

On the date of his brother's accident, Jorge Reyes, Jr., ("Jorge"), was employed by Big Moose as a carpenter and working upon the subject 40 Sugar Maple Road renovation project. (R, 402-405). At such time plaintiff, Miguel Reyes, and plaintiff's father, Jorge Reyes, Senior, were employed as "helper[s]." (R, 405). When asked to describe "the nature of the work" underway at this location Jorge responded that "[i]t was like a dormer. They throw the roof out and then throw a second floor on the house." (R, 406).

Jorge confirmed that his brother's accident occurred in essentially the manner described by Musso. In this regard, Jorge testified that, in the front room of the house, located approximately six feet from one another, were "two big [bay] windows," and that he was in the process of removing one while his co-worker, Elcius Campos, was removing the other. (R, 411-412, 415, 443, 462-463). To do so Elcius first used a Sawsall to cut around all four sides of the window, after which, to dislodge the window from the wall/frame, Elcius "whack[ed] it with a two-by-four." (R, 412-413, 470). Jorge saw this occur, and saw the window fall to the floor as a result thereof – "[Jorge] saw the window going down…The window was on the wall and the window went out. [Jorge] saw that with [his] own eyes… [b]ig window, bay window." (R, 470, 472, 480). According to Jorge, the window involved in this incident was "probably three to four feet high," and four feet wide, with "the bottom

of the window [ ] about four feet higher than the outside ground. (R, 506). The only difference in the testimonial account of the subject accident is that Musso testified that the 2x4 was being used as a lever, while Jorge testified that it was being used by Campos more like a hammer, or bat.

Jorge did not witness plaintiff's accident, and thus could not answer whether it was the window or the "piece of two-by-four" which struck his brother. (R, 413-416). He did confirm, however, that the demolition work that day was confined to the first floor, and that no roof demolition was performed until after the first floor demolition was completed. (R, 423-424). Please consider the following colloquy with regard to this issue:

> Q. On the date of your brother's accident, you would doing the demolition work on the first floor; is that correct?
>
> A. Yeah.
>
> Q. Do you know whether or not there had been any demolition work done on the second floor before you started the first floor?
>
> A. Nothing.
>
> Q. There was nothing, no work done?
>
> A. I said nothing, no work.

(R, 442).

Although, eventually, the Big Moose workers "remove[d] the roof of the house" because they "had to throw a second floor on the house," "[t]hat was all performed *after* the date of [Jorge's] brother's accident." (R, 442-443).

d. Testimony of Plaintiff, Miguel Reyes

Although Reyes could not state whether Big Moose did "carpentry work, demolition, or something else," he did testify that his job involved "cleaning work" - he "would pick up the sheet rock and the lumber." (R, 707). When asked if he had a supervisor or boss while working for Big Moose, plaintiff answered: "[n]o," (R, 707-708).

On the morning of his accident, upon arrival at the subject premises Reyes' brother, Jorge/George Reyes, told him the work that he would be performing that day - "just to pick up the wood, and pick up the sheet rock, and throw it away." (R, 717). That day, no one besides plaintiff's Big Moose co-workers instructed plaintiff concerning how he should perform his work. (R, 722-723).

According to plaintiff, the 40 Sugar Maple Road premises was a two story residence – "[t]wo floors the house had" – with the second floor consisting of a "room and a bathroom." (R, 716, 732). Reyes further alleges that, on the date of his accident, he spent part of the morning 'going up and down' the staircase between the first and second floor, removing trash consisting of "wood and sheetrock." (R, 719-720). Reyes' contentions are false, and not entitled to consideration. First, this

Court is again referred to the pre-renovation photographs of the subject premises, contained in the Record at pages 1329-1332. As opposed to witnesses, photographs cannot lie, and the photographic evidence shows that this was a single story structure. (R, 1329-1332). Second, the Equity-Sligo contract provides "for the construction of 2nd story dormer,"[5] not the expansion of an existing second story floor. Third, Big Moose President, Stephen Musso, and plaintiff's brother, Jorge Reyes, Jr., both testified that the second story had yet to be constructed on the date of Reyes' accident, and while Musso is an interested witness, Reye's brother, Jorge Reyes – who no longer works for Big Moose[6] and obviously loves his brother[7] – is not, and has no reason to be deceitful.

When asked if he was "inside when the accident happened – inside the house," Reyes answered: "[y]es, inside the house" on the "[l]ower" floor, "[i]n the kitchen." (R, 730, 736). At such time Reyes was "[o]n the side of the [kitchen] window," bending down and "picking up trash."[8] (R, 738). As testified to by Reyes:

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[5] R, 175-176.

[6] As of the date of his deposition Jorge worked as a carpenter for "Deluca." (R, 492).

[7] Jorge and plaintiff, Miguel Reyes, live together, and it was Jorge who got Reyes a job with Big Moose. (R, 426-427, 491). As concerns the subject incident, immediately after its occurrence Jorge went to his co-worker, Elsius Campose, and said: "Elsius, what the fuck you did (*sic*)." (R, 481). When deposed, Jorge said to the questioning attorney: "I'm sorry for the language but … [y]ou would do the same thing if you brother get hit (sic)…[y]ou think you will (*sic*) be happy?" (R, 481).

[8] When subsequently asked if anyone else was in the kitchen with him at the time of his accident Reyes answered that he "wasn't in the kitchen, [he] was somewhere else." (R, 739). When

> "I was bending down picking up trash, and all I know next was (*sic*) a big – a big stick falls on top of me."

Reyes testified that the 2x4 which struck him had been "connected to the wall" but "loosen[ed]" when "they threw down" a window from the second floor.[9] (R, 745).

According to Reyes, at the time of his accident the kitchen ceiling – which was made of "[w]ood" – was "fine." (R, 741). When asked if he was "standing in the kitchen and [ ] looked up [he] could see the floor above" Reyes answered "[n]o, because there is another floor on the top." (R, 752-753). In other words, Reyes would "see the sub floor, the plywood of the second level." (R, 817-818).

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immediately asked thereafter: "Mr. Reyes, what room were you in when the accident happened," Reyes answered: "[i]n the kitchen." (R, 739).

[9] Inexplicably, Reyes testified that it was <u>not</u> a Big Moose worker who 'threw down' the subject window. Please consider the following colloquy with regard to this issue:

> Q. Was Big Moose removing windows on the date of the accident?
> A. No.
> Q. Were other companies at the house removing windows on the date of the accident?
> A. Yes, they were doing demolition that day. I don't know what company did that, or why they would have thrown it without telling anyone else.

(R, 745-746).

Reyes also testified that at no time on the date of his accident did he observe "any demolition of the windows on the second floor." (R, 747). When then asked: "[o]kay. You did not see any demolition of the windows on the second floor prior to the accident," Reyes responded: "[y]es, I had seen them a day before, but on the other side [of the house]." (R, 747). However, when then asked if he "[h]ad been to the house prior to the date of the accident" Reyes answered "[n]o," only to thereafter state that he had "been there four days before." (R, 747-748). Finally, Reyes then testified that during the two weeks that he worked on site he had previously observed these unidentified workers removing other windows from the second floor – "they would take them off and throw them out." (R, 751).

Reyes testified: (1) that the 2x4 which struck him was "attached to the wall," "[t]he kitchen wall" – it was attached to "the same wall that the window was on," on "[t]he side of the window;" and (2) that he was "[a]bout three feet" away "from the window when the accident happened." (R, 757, 760). However, when asked: "[h]ad you seen this two-by- four prior to your accident… Had you seen it before the accident," plaintiff answered: "[n]o, I had not seen it." (R, 745). Likewise, plaintiff did not observe the 2x4 falling toward him immediately prior to his accident. (R, 827). Finally, as a result of this incident plaintiff was knocked out, and at no point after he awoke did he see the 2x4 which struck him. (R, 850-851). *In other words, at no point either before, during, or after his accident did Reyes actually observe the 2x4 by which he was struck.*

According to Reyes, at the time of his accident workers were on the second floor using hammers to "destroy[] the wall to throw it out," which he knew because "[he] could feel the hits above [him]" he could "feel the hammers, they, were with the hammers (*sic*) above [him]." (R, 759-759). This 'hammering' was, purportedly, "affecting the portions of the wall facing the street that was on the first floor" – "that is what the problem was." (R, 819). Curiously, however, when asked if he could feel vibrations from the purported hammering plaintiff answered that he "didn't feel anything," and when asked if this demolition work "somehow affected that stick or piece of wood [i.e., the 2x4]," plaintiff responded: "I don't know." (R, 819, 821).

*e. **Testimony of Jorge Reyes, Senior***

When asked if the subject renovation project was upon a "one-story house, or a two-story house," Senior answered: "two," and, according to Senior, at the time of the subject occurrence Jorge Reyes, Jr., and Elcius, (whom Sr. identified as "Caspar"), were each removing "big windows" located "on the side of the wall," "upstairs" on the second floor. (R, 560, 562, 572). However, *as* set forth above: (1) the contract between Sligo and Equity establish that this project entailed "the construction of 2nd story dormer [and] one car attached garage" to an existing *single story* cape; (2) the photographic evidence establishes that this was a single story structure; and (3) both Big Moose President, Stephen Musso, and plaintiff's brother, Jorge Reyes, explicitly testified that: (a) as of the date of plaintiff's accident the framing of the second story had not yet begun; and (b) at the time of plaintiff's accident Jorge Reyes and Elcius Campos were each in the process of removing two pre-existing *first floor* bay windows. Indeed, plaintiff himself confirmed that his brother was working upon the first floor at the time of the subject occurrence.[10]

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[10] Please consider the following colloquy with regard to this issue:

> Q. Okay. Where was your brother working in the house just prior to the accident; if you know?
> A. He was like over there, at the corner (indicating).
> Q. Okay. How many feet away from you was he?
> A. I don't know how to explain it.
> Q. Was it approximately ten feet, something more, something less?
> A. Maybe a little bit more than that.

According to Senior, "when the accident happened" he and plaintiff were inside the house - "[plaintiff] and I were in the inside; we were carrying a can of trash, each of us, when the accident happened." (R, 563-564). However, as set forth above, plaintiff testified that when his accident took place he was alone in the kitchen, picking up trash.

As concern s plaintiff's accident, Senior purportedly personally observed the two-by-four - which was "[t]he one holding the window"- detach from the wall "in the front of the house," "on the second level above the kitchen," and fall "at the same time that the window fell," only to land first and thereafter be struck by the window, causing the two-by-four to "rebound" up into the kitchen and strike plaintiff, causing plaintiff to fall out of the kitchen, into the yard, and strike the window. (R, 562, 568, 651-652, 654, 656). Of course, Senior's assertion is in direct contradiction: (1) to Newton's Second Law, which teaches that if air resistance is not a factor, (which, in this matter, it is not), two objects of different weight fall at the same rate;[11] and (2) the contract, photographic and testimonial evidence, discussed above.

(R, 754).

[11] The acceleration of an object is directly proportional to force and inversely proportional to mass. Increasing force tends to increase acceleration while increasing mass tends to decrease acceleration. Thus, the greater force on more massive objects is offset by the inverse influence of greater mass. Subsequently, all objects free fall at the same rate of acceleration, regardless of their mass.
https://www.physicsclassroom.com/class/1DKin/Lesson-5/The-Big-Misconception.

LEGAL ARGUMENTS

POINT I

LABOR LAW §200/COMMON-LAW NEGLIGENCE

"Cases involving Labor Law §200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises condition at a worksite, and those involving the manner in which the work is performed." Ortega v. Puccia, 57 A.D.3d 54, 61-62, 866 N.Y.S.2d 323, 329 – 330 (2d Dept. 2008). "These two categories should be viewed in the disjunctive." Id.

Where a premises condition is at issue, property owners/general contractors may be held liable for a violation of Labor Law §200 if they either created the dangerous condition that caused the accident, or if they had actual or constructive notice as concerns its existence. See Azad v. 270 5th Realty Corp., 46 A.D.3d 728, 730, 848 N.Y.S.2d 688 (2d Dept. 2007); Giambalvo v. Chemical Bank, 260 A.D.2d 432, 687 N.Y.S.2d 728 (2d Dept. 1999).

By contrast, where a construction accident arises out of the means and methods of plaintiff's work, liability for common-law negligence or under Labor Law §200 cannot be had against an owner/general contractor based upon that party's general supervisory authority at the worksite to oversee the progress of the work, and/or inspect the work product. Perri v. Gilbert Johnson Enters., Ltd., 14 A.D.3d 681, 683, 790 N.Y.S.2d 25 (2d Dept. 2005) ("[g]eneral supervisory authority at a

work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability for common-law negligence and under Labor Law § 200") *quoting* Dos Santos v. STV Engrs., 8 A.D.3d 223, 224, 778 N.Y.S.2d 48 (2d Dept. 2004), *lv. denied* 4 N.Y.3d 702, 790 N.Y.S.2d 648, 824 N.E.2d 49 (2004).[12] The authority to review safety at the site, ensure compliance with safety regulations and contract specifications, and to stop work for observed safety violations is also insufficient to impose liability. See Austin v. Consol. Edison, Inc., 79 A.D.3d 682, 913 N.Y.S.2d 684 (2d Dept. 2010) (property owner's right to generally supervise work, stop contractor's work if safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under general workplace safety statute or for common-law negligence); McLeod v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter Day Saints, 41 A.D.3d 796, 798, 839 N.Y.S.2d 164, 166 (2d Dept. 2007) ("[c]ontrary to the plaintiffs' contention, the defendant's liability did not arise from the defendant's general duties to oversee work and to ensure compliance with

[12] See also Fucci v. Plotke, 124 A.D.3d 835, 3 N.Y.S.2d 67 (2d Dept. 2015) ("[t]o the extent that the defendants had general supervisory authority over the work, this was insufficient in itself to impose liability under the Labor Law"); Griffiths v. FC-Canal, LLC, 120 A.D.3d 1100, 992 N.Y.S.2d 518 (1st Dept. 2014) (general contractor's general supervisory authority over subcontractors, under parties' contract, did not rise to level of supervision or control necessary to hold it liable, under general workplace safety statute, for injuries sustained by employee of subcontractor while removing ice pursuant to his supervisor's instruction); Ferreira v. City of New York, 85 A.D.3d 1103, 1106, 927 N.Y.S.2d 100, 103 (2d Dept. 2011) ("[g]eneral supervisory authority for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability").

safety regulations"). Rather, "[w]here, as here, a construction accident arises out of the means and methods of plaintiff's work**,** liability for common-law negligence or under Labor Law §200 may be imposed against an owner or general contractor [only] if it 'actually exercised supervisory control over the injury-producing work,'" Suconota v. Knickerbocker Properties, LLC, 116 A.D.3d 508, 508, 984 N.Y.S.2d 27, 28 (1st Dept. 2014) *quoting* Cappabianca v. Skanska USA Bldg. Inc., 99 A.D.3d 139, 144, 950 N.Y.S.2d 35 (1st Dept. 2012), *meaning that the owner/general contractor instructed the worker concerning not merely what needed to be done, but how to do it.* See Paz v. City of N.Y., 85 A.D.3d 519, 519, 925 N.Y.S.2d 453, 454 (1st Dept. 2011) ("[t]he court correctly dismissed plaintiff's cause of action under Labor Law §200 on the ground that defendants had no supervisory control over this injury-producing work. There is no evidence that the owner or site engineer gave anything more than general instructions on what needed to be done, not how to do it"); Talarico v. N.Y., 2019 NYLJ LEXIS 68 (N.Y. Sup. 2019) ("[d]efendants have demonstrated that they did not actually exercise supervisory control over the injury-producing work. [Contractor's] safety manager testified that [general contractor's] representative told [contractor] what had to be done, but not how to do it"); Pelaez v. Turner Constr. Co., 2014 NY Slip Op 31974(U), (N.Y. Sup. 2014) ("the record does not reveal any evidence that [general contractor] 'gave anything more than general instructions on what needed to be done, not how to do it, and monitoring and

oversight of the timing and quality of the work is not enough to impose liability under [Labor Law] section 200'") (citations omitted); Dwyer v. Goldman Sachs Headquarters LLC, 819 F. Supp. 2d 320, 329 (S.D.N.Y. 2011) ("[g]eneral supervisory authority alone is insufficient to establish supervisory control; the defendant must have controlled the specific manner in which the plaintiff performed his work").

To illustrate, in Boody v. El Sol Contracting & Constr. Corp., 180 A.D.3d 863, 116 N.Y.S.3d 586 (2d Dept. 2020) "plaintiff was employed as a construction worker for… a subcontractor hired by the defendant general contractor [ ] to install temporary scaffolding for a repair project on [a bridge]." Id. "In order to complete its work, [plaintiff's employer] in turn retained the defendant [ ] to provide tug boats and work barges, which transported [plaintiff's employer's] employees, supplies, and equipment around the work site." Id. "The plaintiff allegedly was injured while he was attempting to cross between two barges positioned on either side of a pier supporting the bridge. The plaintiff alleged that as he was walking, one of the mooring lines from the tug-barge combination tightened and caught his leg, pinning it against the pillar next to which he was walking." Id., 180 A.D.3d 863, 116 N.Y.S.3d at 587. After noting that "[w]here 'a claim arises out of alleged defects or dangers arising from a subcontractor's methods or materials, recovery against the owner or general contractor cannot be had unless it is shown that the party to be

charged exercised some supervisory control over the operation,'" Id., 180 A.D.3d 863, 116 N.Y.S.3d at 587-88, *quoting* Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 505, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993), the court dismissed plaintiff's common-law negligence/Labor Law §200 claim, noting that the defendant "established that it did not exercise supervision or control over the performance of the work giving rise to the accident." Id.

Likewise, in Pchelka v. Southcroft, LLC, 178 A.D.3d 836, 115 N.Y.S.3d 382 (2d Dept. 2019) "[t]he plaintiff, a plumber's assistant, was injured… while working for nonparty [plumbing contractor] in an apartment building which was undergoing conversion into condominium units.' Id. "The plaintiff testified… that after he arrived at the job site on [ ] his foreman instructed him to change a drain pipe that was going to be connected to a bathroom sink in a unit on the 15th floor." Id. "Working alone, the plaintiff completed the replacement of the drain pipe within 15 minutes." Id. "Although he was not instructed to do so, the plaintiff then inspected the hot and cold water lines." Id. "Caps were screwed onto 'nipples' at the ends of the hot and cold water lines." Id. "The plaintiff grabbed the cap on the hot water line with his left hand to make sure that it was secure." Id. "He testified that as soon as he grabbed the cap, it 'exploded' off under strong water pressure, and his left hand was burned by hot water." Id. Dismissing plaintiff's common-law negligence/Labor Law §200 claim, the court held that "the defendants [ ] established, prima facie, that

they did not exercise supervision or control over the performance of the work giving rise to the accident," Id., 178 A.D.3d at 838, 115 N.Y.S.3d at 385, as "plaintiff testified at his deposition that he received instructions only from [his employer's] employees and did not receive instructions from anyone else." Id.

In Fisher v. WNY Bus Parts, Inc., 12 A.D.3d 1138, 785 N.Y.S.2d 229 (4th Dept. 2004) "[p]laintiff commenced [a] common-law negligence and Labor Law action seeking damages for injuries he sustained when the forks on a forklift truck pinned his left foot against stacked steel." Id. "Plaintiff and his coworker were assisting in unloading the steel from a flatbed trailer and plaintiff's foreman was attempting to lift the steel from the trailer using the forklift." Id. "Plaintiff was standing on the bed of the trailer when his foreman moved the forks forward and pinned plaintiff's foot." Id. Holding that the trial court committed error in not granting the general contractor's motion for summary judgment, the court held, in pertinent part, as follows:

> Defendant established that the dangerous condition resulted from the subcontractor's method of unloading the steel, and defendant did not supervise or control that work. Unloading the steel was the subcontractor's responsibility, and plaintiff's foreman used a forklift owned by the subcontractor to unload the steel. Although defendant exercised general supervisory control over the project and had the authority to correct unsafe practices, there is no evidence that defendant actually supervised plaintiff's actions on the day of the accident…We therefore modify the order by dismissing the Labor Law §200 cause of action against defendant.

Id., 12 A.D.3d at 1139-40, 785 N.Y.S.2d at 229-30.

Finally, in Carlineo v. Akins, 71 A.D.3d 1535, 898 N.Y.S.2d 386 (4th Dept. 2010) plaintiff commenced a personal injury action, seeking damages for injuries he sustained when, while he was a passenger in his employer's dump truck, it tipped over as it was descending a steep hill on an unpaved road. Holding that the defendant, which contracted with plaintiff's employer to its maintain gas wells, could not be found liable for plaintiff's injuries, the court noted that plaintiff "failed to raise an issue of fact whether [defendant] controlled the 'method and means by which the work [was] to be done," noting that "[a]lthough [defendant's] employee met each day with [plaintiff's employer] or members of his work crew to inform them what work was to be performed that day, [defendant's] employee did not control the method and means of the work that [plaintiff's employer] was responsible to perform." Id., 71 A.D.3d at 1535, 898 N.Y.S.2d at 387. In coming to this conclusion, the court reasoned, in pertinent part, as follows:

> On the day of the accident, [defendant's] employee instructed [plaintiff's employer's] work crew to transport the unused gravel from one well site to the remaining well sites and to fill the well sites. He did not, however, direct the work crew how that work was to be performed, nor did he specify which person was to perform particular functions.

Id., 71 A.D.3d at 1535-36, 898 N.Y.S.2d at 386-87.

In this matter, plaintiff asserts that Sligo may be held liable herein upon a theory of Labor Law §200/common-law negligence liability, as Sligo Vice-President Davey "always retained the ultimate subcontractors, including authority to - and did – make decisions and tell the subcontractors, including Big Moose, what to do and what not to do."[13] Plaintiff's argument is without merit. As stated, *supra*, to be held liable under Labor Law §200/common-law negligence for an accident resulting from the means and methods of a plaintiff's/plaintiff's employer's work, there must be proof not merely that the general contractor told the plaintiff/plaintiff's employer what to do, but how to do it. See Burkoski v Structure Tone, Inc., 40 A.D.3d 378, 836 N.Y.S.2d 130 (1st Dept. 2007) (dismissing plaintiff's Labor Law §200/common-law negligence claim(s), as plaintiff testified that defendant did not tell plaintiff's employer or its employees how to perform its work and defendant testified that it did not supervise subcontractors' work and did not tell them how to do it**)**; Castellon v. Reinsberg, 82 A.D.3d 635, 636, 920 N.Y.S.2d 62, 64 (1st Dept. 2011)("as it was undisputed that defendant did not tell plaintiff how to do his work, plaintiff's Labor Law §200 claim should have been dismissed").

In this matter, while Davey may have had the authority to tell Big Moose what work to perform, he explicitly testified that did not have the authority- or expertise – to instruct the subcontractors concerning how they should perform their work, and

[13] See appellant's brief, at 14, (emphasis in original).

the evidence establishes that no Sligo personnel were on-site on the date of Reye's accident and that Sligo did not instruct Big Moose's crew on how to perform their work. Accordingly, the trial court correctly granted Sligo summary judgment and dismissal of plaintiff's Labor Law §200/common-law negligence claim(s).

POINT II

LABOR LAW §241(6)

Plaintiff Has Failed to Allege the Violation of a Specific and Applicable Industrial Code Provision

To recover under Labor Law §241(6), a plaintiff must establish the violation of an Industrial Code provision which sets forth safety standards, which are both specific and applicable to the facts of the action, in connection with construction, demolition, or excavation work. See Ross v. Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d at 502, 618 N.E.2d at 86, 601 N.Y.S.2d at 53; see also Walker v. Metro-N. Commuter R.R., 11 A.D.3d 339, 340-41, 783 N.Y.S.2d 362, 364 (1st Dept. 2004) (to state a claim under Labor Law § 241(6), a plaintiff must identify a specific Industrial Code provision mandating compliance with concrete specifications); Mahoney v Madeira Associates et al, 32 A.D.3d 1303, 822 N.Y.S.2d 190 (4th Dept. 2006) ("[i]n order to support a cause of action under labor Law §241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable given the circumstances of the accident,

and sets forth a concrete standard of conduct rather than a mere reiteration of common law principals").

The interpretation of an Industrial Code regulation, and the determination as to whether a particular condition is within the scope of the regulation, present questions of law for the court. Messina v. City of New York, 300 A.D.2d 121, 752 N.Y.S.2d 608 (1st Dept. 2002).

Upon appeal, plaintiff argues that he can predicate a Labor Law §241(6) cause of action upon the defendants' purported violation(s) of §23-1.7(a)(1); §23-1.8(c)(1); §23-3.3(b)(3); and §23-3.3(c). Each such alleged Industrial Code violation shall be addressed below.

12 NYCRR §23-1.7(a)(1)

Plaintiff's reliance upon §23-1.7(a)(1) is misplaced. §23-1.7(a)(1) provides as follows:

> (a) Overhead hazards.
>
> (1) 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. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot.

12 NYCRR § 23-1.7(a)(1) sets forth standards for overhead protection for work in passage areas "normally exposed to falling material or objects," and, "[a]s plainly expressed… only applies to places normally exposed to falling material or objects." Buckley v. Columbia Grammar & Prepatory, 44 A.D.3d 263, 271, 841 N.Y.S.2d 249, 257 (1st Dept. 2007); see Parrales v Wonder Works Const. Corp., 55 A.D.3d 579, 864 N.Y.S.2d 325 (2d Dept. 2008) (§23-1.7(a)(1) applicable where worker removing debris from bottom of old elevator shaft - from which the car had been removed - used as a chute for disposal of debris, was injured by piece of wood that fell from higher floor).

To illustrate, in Zuluaga v. P.P.C. Constr., LLC, 45 A.D.3d 479, 847 N.Y.S.2d 30 (1st Dept. 2007) plaintiff brought an action, seeking, *inter alia*, Labor Law §241(6) recovery for personal injuries allegedly sustained when, while performing asbestos removal work on a building's first floor, "he was struck by a six-foot-long pipe that fell from several floors above where other workers were performing demolition work, including the cutting and removal of pipes from the pipe chase." Id., 45 A.D.3d at 480, 847 N.Y.S.2d at 31. "The record evidence established that no safety devices were provided, other workers had been injured in the same manner and plaintiff had complained to his supervisor and to a representative of [the defendant] about the danger posed." Id. The court held that plaintiff had a viable Labor Law §241(6) claim based upon defendants' violation of §23-1.7(a)(1),

"requiring that workers be provided with suitable overhead protection in areas where there is risk of falling debris." Id., 45 A.D.3d at 480, 847 N.Y.S.2d at 32.

Where, however, "an object unexpectedly falls on a worker in an area not normally exposed to such hazards, the regulation does not apply." Buckley v. Columbia Grammar & Prepatory, *supra;* see Mercado v. TPT Brooklyn Associates, LLC, 38 A.D.3d 732, 733, 832 N.Y.S.2d 93, 94 (2d Dept. 2007) (§23-1.7(a)(1) not applicable in accident wherein plaintiff was struck by a piece of ceiling which collapsed and struck him while he was performing interior demolition work, as the area was not "normally exposed to falling material or objects"); Portillo v. Roby Anne Dev., LLC., 32 A.D.3d 421, 819 N.Y.S.2d 566 (2d Dept. 2006) (23–1.7(a)(1) not applicable to accident in which unsecured steel beam fell on demolition contractor's employee at demolition site, inasmuch as area in which employee was injured was not one where workers were normally exposed to falling objects); Tafelski v. Buffalo City Cemetery, Inc., 68 A.D.3d 1802, 891 N.Y.S.2d 779 (4th Dept. 2009) (work site where plywood panel was dropped into place over the area the worker was working, thereby causing worker to lose his balance and slip several rungs down scaffold, was not work area "normally exposed" to falling materials or objects, thus §23-1.7(a)(1) was not applicable); McLaughlin v Malone & Tate Builders, Inc., 13 AD3d 859, 787 NYS2d 157 (3d Dept. 2004) (§ 23-1.7(a)(1) not applicable to mason being supplied with concrete blocks by laborers on next level

of scaffold, injured by block accidentally pushed from fourth to third level of scaffold, as mason was not normally exposed to falling objects).

To illustrate, in Timmons v. Barrett Paving Materials, Inc., 83 A.D.3d 1473, 920 N.Y.S.2d 545 (4th Dept. 2011) *leave to appeal dismissed in part, denied in part*, 17 N.Y.3d 843, 954 N.E.2d 1163 (2011) plaintiff brought an action seeking, *inter alia*, Labor Law § 241(6) recovery for personal injuries allegedly sustained when he was struck by a catwalk while working upon a construction project. Dismissing plaintiff's Labor Law §241(6) claim, the court reasoned, in pertinent part, that "12 NYCRR 23-1.7 (a) does not apply here because there [was] no evidence that the area in which [plaintiff] was working was 'normally exposed to falling material or objects' within the meaning of that section." Id., 83 A.D.3d at 1475, 920 N.Y.S.2d at 548.

In Perillo v. Lehigh Const. Group, Inc., 17 A.D.3d 1136, 795 N.Y.S.2d 808 (4th Dept. 2005) a demolition worker brought an action, seeking recovery for personal injuries allegedly sustained when a piece of a partition wall that had been partially demolished from an upper floor fell and struck him. Holding that plaintiff could not predicate a Labor Law §241(6) cause of action upon the defendants' purported violation of §23-1.7, the Appellate Division reasoned as follows:

> We [] conclude [] that the court should have dismissed the section 241(6) claim insofar as it is predicated on the alleged violation of 12 NYCRR 23–1.7(a)… [§]23–

> 1.7(a)(1) is inapplicable because plaintiff's worksite was not "normally exposed to falling material or objects."

Id., 17 A.D.3d at 1138, 795 N.Y.S.2d at 810, (citations omitted).

Finally, in in Marin v. AP-Amsterdam 1661 Park LLC, 60 A.D.3d 824, 875 N.Y.S.2d 242 (2d Dept. 2009) "[t]he plaintiff allegedly was injured while installing a vertical line of drainpipe on the exterior of a six-story apartment building." Id., 60 A.D.3d at 825, 875 N.Y.S.2d at 244. "The plaintiff was working approximately eight feet above ground level, using metal brackets to affix the pipe to the building's brick exterior, when one such bracket, which had been attached near the top of the building, became dislodged and fell, striking the plaintiff's head." Id. "There was no overhead protection, and the plaintiff had not been provided, and was not wearing, a safety hat." Id. "Prior to the accident, the plaintiff had informed his supervisor that the brackets were the wrong size, and earlier that day, two other brackets had fallen from the building." Id. The Second Department nevertheless held that "[t]he Supreme Court [ ] properly granted that branch of the defendants' motion which was for summary judgment dismissing so much of the Labor Law §241(6) cause of action as was predicated on a violation of section 23-1.7(a)(1) of the Industrial Code," Id., 60 A.D.3d at 826, 875 N.Y.S.2d at 245, holding that "[t]he fact that two brackets had fallen from the building prior to the plaintiff's accident was not a sufficient basis for a finding that the plaintiff's work site was 'normally exposed' to falling brackets." Id., 60 A.D.3d at 826, 875 N.Y.S.2d at 245.

As demonstrated above, 12 NYCRR 23–1.7(a)(1)'s remedial purpose is to protect workers from being struck by objects falling from a higher elevation, in work areas normally exposed to falling material or objects. As expanded upon below, 23–1.7(a)(1) is not meant to apply where – *as in this matter* – the worker and the 'falling object' are at the same level.

Illustrative is Klien v. Cty. of Monroe, 219 A.D.2d 846, 632 N.Y.S.2d 343 (4th Dept. 1995). In that case, "[plaintiff] was injured while working at a construction site when he was struck by a metal window curtain frame." Id. "Before the accident plaintiff and two coworkers had placed the metal window curtain frame on a three-foot concrete wall where it was to be installed." After noting that "the metal window curtain was at the same level as the work site," Id., the court held that "[p]laintiffs' Labor Law §241(6) cause of action was also properly dismissed," Id., 219 A.D.2d at 847, 632 N.Y.S.2d at 344, stating as follows:

> Plaintiffs alleged in support of that cause of action that defendants violated Industrial Code (12 NYCRR) §23-1.7 (a)(1) by failing to provide overhead planking to protect workers. That regulation applies to areas where workers are normally exposed to falling objects and, therefore, does not apply to this case.

Id.

Likewise, in Quinlan v. City of N.Y., 293 A.D.2d 262, 739 N.Y.S.2d 706 (1st Dept. 2002) plaintiff brought an action, seeking recovery for personal injuries allegedly sustained when a piece of metal inside a wall separating two rooms

dislodged and fell on his hand as he prepared to patch a large hole that had been cut in the wall in order to bring a bathtub into the bathroom of an apartment being renovated. Denying plaintiff's motion to amend his bill of particulars, the Appellate Division noted that there was no evidence that plaintiff was working in or frequenting an area that was "normally exposed to falling material or objects" and thus determined plaintiff's proposed claim based on 12 NYCRR 23–1.7(a)(1) to be without merit. Id., 293 A.D.2d at 262–63, 739 N.Y.S.2d at 707.

In this matter the contract and photographic evidence establish that the home under renovation was a single story structure, which was confirmed by Sligo Vice-President, Paul Davey, Stephen Musso of Big Moose, and plaintiff's brother, Jorge Reyes, Jr. And while plaintiff has erroneously claimed that the 40 Sugar Maple Road premises was two stories, he has nevertheless confirmed that the 2x4 which struck him fell from the *first floor* wall. The only 'evidence' that the 2x4 came from the second floor is the outlier testimony of plaintiff's father, which is at irreconcilable variance with the documentary and photographic evidence, and the testimony of every other deponent in this case. Moreover, and just as important, even crediting Senior's testimony, there is a total and complete absence of any evidence that the situs of plaintiff's accident was "normally" exposed to falling objects. "Normally" has been defined as "according to rule, general custom, etc.; as a rule, ordinarily;

usually."[14] To argue that the purported removal of a single second story window raises a question of fact concerning whether, 'as a rule,' 'ordinarily' and/or 'usually,' the subject worksite was exposed to falling materials or objects, such as to require the provision of "tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength," see 12 NYCRR § 23-1.7(a)(1), along with "a supporting structure capable of supporting a loading of 100 pounds per square foot," Id., is non-meritorious to the point of being frivolous. Accordingly, Big Moose submits, scrutiny reveals that the trial court's determination that § 23-1.7(a)(1) is not applicable to the facts of this action was correct.

12 NYCRR § 23-1.8(c)(1)

Plaintiff's reliance upon §23-1.8(c)(1) is misplaced. Section 23-1.8 (c) (1) states that "[e]very person required to work or pass within any area where there is a danger of being struck by falling objects or materials or where the hazard of head bumping exists shall be provided with and shall be required to wear an approved safety hat." N.Y. Comp. Codes R. & Regs. tit. 12, § 23-1.8.

In order to prevail on a Labor Law § 241(6) cause of action premised upon a purported violation of 12 NYCRR 23-1.8(c)(1), the plaintiff must establish that a job is a 'hard hat' job, and that the plaintiff's failure to wear the hard hat is a proximate

[14] See https://www.dictionary.com/browse/normally.

cause of his or her injury." Seales v. Trident Structural Corp., 142 A.D.3d 1153, 1153, 38 N.Y.S.3d 49, 51 (2d Dept. 2016); see McLean v. 405 Webster Ave. Assocs., 98 A.D.3d 1090, 1095, 951 N.Y.S.2d 185, 190 (2d Dept. 2012) ("12 NYCRR 23-1.8 (c) [ ]] requires proof that the job was a 'hard hat' job, and that the plaintiff's failure to wear a hard hat was a proximate cause of his injury").

As expanded upon below, §23-1.8(c)(1) is not applicable where - *as here* – plaintiff and the object which struck him/her were at the same work level.

To illustrate, in Sikorski v. Burroughs Drive Apartments, Inc., 306 A.D.2d 844, 762 N.Y.S.2d 718 (4th Dept.) a construction worker brought an action, seeking recovery for personal injuries allegedly sustained when a gust of wind caught a piece of drywall he was holding, and he either stepped off or fell off a board that was two to two and a half feet above the ground. Holding that the trial court committed error in denying defendant's motion for summary judgment and dismissal of plaintiff's Labor Law §241(6) claim, the court reasoned that §23-1.8(c)(1) was "*not applicable here because plaintiff was not working below the area from which the drywall fell.*" *Id*., 306 A.D.2d at 844, 762 N.Y.S.2d at 720 (emphasis added).

Likewise, in Spiegler v. Gerken Bldg. Corp., 57 A.D.3d 514, 868 N.Y.S.2d 712 (2d Dept. 2008) plaintiff brought an action, recovery for personal injuries allegedly sustained while working in an electrical room in the basement of the building, installing a new electrical box. Specifically, while plaintiff and a co-

worker were in the process of installing an approximately 10-foot-long mounting channel, vertically from the ground to the ceiling against the wall - which was approximately 10 to 15 feet high - plaintiff was allegedly injured while he was securing the mounting channel to the ground when it struck him in the head. Holding that the trial court should have dismissed plaintiff's Labor Law §241(6) cause of action, the Appellate Division reasoned, in pertinent part, that §23-1.8(c)(1) "did not apply to the facts of this case because this was not a 'hard-hat' job." *Id.*, 57 A.D.3d at 515-16, 868 N.Y.S.2d at 713-14.

In Modeste v. Mega Contracting, Inc., 40 A.D.3d 255, 835 N.Y.S.2d 156 (1st Dept. 2007) plaintiff brought an action, seeking recovery for personal injuries sustained by plaintiff's decedent when he was thrown from the roof of a piece of heavy machinery called a "Bobcat" (a skid loader, with a forklift attachment) when the machine lurched. The Bobcat was not being used to facilitate access to a different elevation level for the decedent or his materials, but rather to transport materials from one work location to another. Holding that the trial court correctly dismissed that part of plaintiff's Labor Law §241(6) claim predicated upon defendants alleged violation of §23-1.8(c)(1), the Appellate Division reasoned that "the decedent's injuries were not caused by a falling object or material or other head-bumping hazard." *Id.*, 40 A.D.3d at 255, 835 N.Y.S.2d at 157.

In Palomeque v. Capital Improvement Servs., LLC, 145 A.D.3d 912, 43 N.Y.S.3d 483 (2d Dept. 2016) "the plaintiff [ ] was allegedly injured when he was struck in the head with a pipe while working as an electrician at a construction site." Id. "According to the deposition testimony of [ ], an employee of [the plumbing subcontractor], as [he] was descending from a ladder, he swung a pipe that he was holding and hit the injured plaintiff, whom [he] did not realize was standing near him. The court held §23-1.8(c)(1) inapplicable to the facts of the case. Id., 145 A.D.3d at 914, 43 N.Y.S.3d at 486.

In Rodriguez v. D & S Builders, LLC, 29 Misc. 3d 1217(A), 1217A, 918 N.Y.S.2d 400, 400 (Queens Sup. 2008) the decedent was fatally injured while standing on a flatbed truck when a bundle of concrete forms lying on the floor of the truck fell on him, causing him to fall to the ground below. The forms had been used in pouring the concrete foundation and were then removed. The forms were then stacked in groups of fifteen, bound together, and lifted by a Caterpillar 320 machine out of the foundation hole and onto the flatbed truck. There were six bundles of concrete forms that had to be lifted. Each bundle contained 15 concrete forms that were tied with two metal straps on each side. Decedent attached two nylon straps on each bundle and then signaled to his co-worker to release the tension of the arm of the Caterpillar 320 machine. Once the tension was released, decedent would release the caterpillar arm and remove the nylon straps. The accident occurred with

the fourth bundle. The decedent climbed on the flatbed truck and examined the bundle to make sure it was secure. He then signaled to his co-worker, as he had done with the three prior bundles. Decedent's co-worker then released the tension and was moving the Caterpillar arm away from the flatbed trailer. As he was moving the arm of the Caterpillar 320 machine and thus was not looking at the flatbed trailer or at decedent, he heard a noise. He turned around and saw decedent lying on the ground, with the forms on top of him.

Upon the facts as thus presented, the court dismissed plaintiff's Labor Law §241(6) claim, holding that the "provision on helmets is inapplicable since the evidence in the record indicates that the decedent was not working below the area from which the bundle of forms fell." Id.

Finally, in Mikcova v. Alps Mech., Inc., 34 A.D.3d 769, 825 N.Y.S.2d 130 (2d Dept. 2006) plaintiff brought an action seeking, *inter alia*, Labor Law §241(6) recovery for personal injuries allegedly sustained while working as a licensed asbestos handler in the school. "While working in the basement, metal barriers which were part of a 10- to 12-foot high scaffold standing on the ground next to the plaintiff tipped over and fell on her." Id. 34 A.D.3d at 769-70, 825 N.Y.S.2d at 131. This Court held that "[t]he Supreme Court should have dismissed the Labor Law §241 (6) cause of action, which was predicated upon alleged violations of Industrial Code, 12 NYCRR 23-1.7 (a), 23-1.8 (c) (1), and 23-2.1[,] [as] [these] regulations

upon which the plaintiff relied do not apply to the facts of this case." Id., 34 A.D.3d at 770, 825 N.Y.S.2d at 131.

In this matter, plaintiff's co-worker, Elcius Campos, plaintiff's brother, Jorge Reyes, and plaintiff himself all testified that the 2x4 which struck plaintiff 'fell' from the first floor, such that, as every case cited above, §23-1.8(c)(1) is "not applicable here because plaintiff was not working below the area from which the [2 x 4] fell." Sikorski v. Burroughs Drive Apartments, Inc., 306 A.D.2d at 844, 762 N.Y.S.2d at 720. In this regard, while plaintiff's father testified that the 2x4 which struck his son fell from the non-existent second floor, it shall be shown below that this assertion is insufficient to raise a question of fact, as plaintiff's father's testimony is incredible as a matter of law.

a. Plaintiff's Father's 'Second Story Falling 2x4' Assertion is Incredible as a Matter of Law

"'[I]nsufficient' evidence is, in the eye of the law, no evidence." Blum v. Fresh Grown Pres. Corp., 292 N.Y. 241, 245, 54 N.E.2d 809, 811 (1944). Accordingly, "testimony ''which is incredible and unbelievable, that is, impossible of belief because it is manifestly untrue,[15] physically impossible,[16] contrary to common-sense

[15] See Cruz v. N.Y.C. Transit Auth., 31 A.D.3d 688, 689, 821 N.Y.S.2d 97, 97 (2d Dept. 2006) ("[t]he jury's verdict was predicated on testimony that was manifestly untrue and contrary to common experience. The testimony was incredible as a matter of law and should not have been afforded any evidentiary value").

[16] See Ardolic v. New Water St. Corp., 26 Misc. 3d 145(A), 907 N.Y.S.2d 435 (N.Y. App. Term. 2010) (elevator repairer established, *prima facie,* that it was not negligent by showing that it was

and/or experience,[17] or self-contradictory,[18] is to be disregarded as being without evidentiary value, even though it is not contradicted by other testimony or evidence introduced in the case.'" Malanga v. City of New York, 300 A.D.2d 549, 550, 752 N.Y.S.2d 391, 393 (2d Dept. 2002), *quoting* People v. Garafolo, 44 A.D.2d 86, 88, 353 N.Y.S.2d 500 (2d Dept. 1974).

When "[t]he credible proof negates plaintiff's contention as to how the accident occurred," McCarthy v. Port of New York Auth., 30 A.D.2d 111, 114, 290 N.Y.S.2d 255, 258 (1st Dept. 1968) the court is "'not required to give credence to a

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mechanically impossible for the accident to have occurred in the manner alleged by plaintiff); Williams v. Port Auth. of New York & New Jersey, 247 A.D.2d 296, 669 N.Y.S.2d 285 (1st Dept. 1998) (escalator rider could not recover in negligence action in which she alleged that she fell when escalator suddenly reversed direction, as un-contradicted evidence showed that her theory was an utter impossibility); Stone v. Great E. Stages, 256 A.D. 822, 8 N.Y.S.2d 673, 673 (2d Dept. 1939) *aff'd,* 280 N.Y. 762, 21 N.E.2d 524 (1939) (evidence adduced by plaintiff as to manner in which accident happened was physically impossible and thus incredible as matter of law and raised no issue).

[17] See Sullivan v. Pilevsky, 281 A.D.2d 410, 721 N.Y.S.2d 396, 396-97 (2nd Dept., 2001) (rejecting plaintiff's testimony that she was caused to fall by particles of styrofoam dust which entered her eye as contrary to "common sense and common knowledge"); Connolly v. City of New York, 26 A.D.2d 921, 274 N.Y.S.2d 818 (1st Dept. 1966) (plaintiff's testimony that while he was dozing off in back seat of automobile, surrounded by three other passengers in back and three more in front, while automobile was traveling between 50 and 55 miles per hour, he saw hole in pavement which allegedly caused automobile to lurch into trolley tracks, was incredible as matter of law and could not be accepted as evidence that depression was proximate cause of accident); Feinstein v. New York City Transit Auth., 17 Misc. 2d 45, 46, 190 N.Y.S.2d 304, 305 (App. Term 1958) (verdict properly set aside, as " the testimony of plaintiff-husband that on the day preceding the accident he saw the 'jelly spot' on which his wife claims to have slipped was too pat to be worthy of belief").

[18] See Hacker v. City of New York, 26 A.D.2d 400, 403, 275 N.Y.S.2d 146, 151 (1st Dept., 1966) *aff'd,* 20 N.Y.2d 722, 229 N.E.2d 613 (1967) ("the case as presented by plaintiff is so obscured by contradictions, evasions and inherent improbability as to warrant rejection as incredible").

story [which is] inherently improbable.'" Id., *quoting* Hacker v. City of New York, 26 A.D.2d 400, 403-04, 275 N.Y.S.2d 146, 151 (1st Dept. 1966) aff'd, 20 N.Y.2d 722, 229 N.E.2d 613 (1967) *citing* Bottalico v. City of New York, 281 App. Div. 339, 341, 119 N.Y.S.2d 704, 706 (1st Dept. 1953).

The Court of Appeals has clearly enunciated the standard for the direction of judgment when the only opposing evidence is incredible:

> "When we say that there is no evidence to go to a jury, we do not mean that there is literally none, but that there is none that ought reasonably to satisfy a jury that the fact sought to be proved is established."

Blum v. Fresh Grown Preserve Corp., 292 N.Y. 241, 246, 54 N.E.2d 809 (1994).

b. Plaintiff's Father's Two Story Residence Assertion is Belied by the Contract and Photographic Evidence.

Applying the above standard, the courts have rejected testimony which is at irreconcilable variance with the documentary evidence. See Matter of Harnischfeger v. Moore, 79 A.D.3d 1706, 1708, 914 N.Y.S.2d 482, 484 (4th Dept. 2010) (rejecting testimony which "was contradicted by documentary evidence in the record"); Buckley v. Collyer, 147 N.Y.S. 1101 (App. Term 1914) (issuing reversal, as "plaintiff's testimony is so contradicted by the documentary evidence… that it appears quite evident that the jury's verdict is not founded upon a proper consideration of the evidence").

Photographs may also be relied upon to demonstrate that a party's testimony is, as a matter of law, unworthy of belief. Walker v. Murray, 255 A.D. 815, 7 N.Y.S.2d 336 (2d Dept. 1938) *aff'd*, 280 N.Y. 709, 21 N.E.2d 209 (1939) ("[t]he plaintiff was not entitled to recover for injuries sustained in fall on stairs leading to train level at defendant's subway station, where photographs, including plaintiff's exhibit, showed without doubt that his testimony concerning condition of stairway was incredible as matter of law"). Indeed, the court so recently ruled in Weinert-Salerno v. Stefanski, 170 A.D.3d 1601, 1603, 94 N.Y.S.3d 496, 498 (4th Dept. 2019). In that case, plaintiff commenced an action seeking damages for injuries that she allegedly sustained when the vehicle she was operating was involved in a series of collisions with three other vehicles. Rejecting plaintiff's testimony that one of the defendant driver's vehicles was "positioned at a 90-degree angle to plaintiff's vehicle when the two vehicles collided," Id., 170 A.D.3d at 1603, 94 N.Y.S.3d at 498, the court noted that "[t]he photographic evidence submitted in support of and in opposition to the motion [ ] establish[ed] that plaintiff's testimony to that effect [was] incredible as a matter of law." Id.

In this matter, the photographic evidence establishes that the 40 Sugar Maple Road premises was, as originally constructed, a single story 'cape,' which is confirmed by not only the contract documents but also the testimony of Sligo Vice-President, Paul Davey, Big Moose President, Stephen Musso, and plaintiff's brother,

Jorge Reyes, Jr. Thus, plaintiff's father's testimony - that the 2x4 fell from the second story of the subject premises - is incredible as a matter of law.

c. Plaintiff's Father's Contention – That the 2x4 and Window Simultaneously Detached and Fell from the Second Floor, after which the 2x4 Landed First and was Thereafter Struck by the Window, Causing the 2x4 to Rebound up into the Kitchen and Strike plaintiff, Causing Plaintiff to Fall out of the Kitchen, into the Yard, and Strike the Window – is Patently Unworthy of Belief.

As stated above, testimony "'which is incredible and unbelievable, that is, impossible of belief because it is manifestly untrue, physically impossible, contrary to experience, or self-contradictory, is to be disregarded as being without evidentiary value, even though it is not contradicted by other testimony or evidence introduced in the case.'" Malanga v. City of N.Y., 300 A.D.2d at 550, 752 N.Y.S.2d at 93 (citations omitted).

To illustrate, in Sullivan v. Pilevsky, 281 A.D.2d 410, 721 N.Y.S.2d 396, (2d Dept. 2001) plaintiff brought an action, seeking recovery for personal injuries sustained in a trip-and-fall accident. "At her deposition, the plaintiff testified that the accident occurred as she was walking down the street after she had left a T.J. Maxx store in Staten Island. She testified that she stopped walking immediately after she felt a particle or particles of styrofoam enter her eye. She testified that she did not take another step before she tripped. When asked to identify the obstruction on which she tripped, she replied, 'Nothing. I just fell.'" Id., 281 A.D.2d at 410, 721

N.Y.S.2d at 397. Upon appeal, counsel argued that "there [was] an issue of fact as to whether [plaintiff] was caused to fall by the particle or particles of styrofoam dust which entered her eye." Id. The court rejected this argument, holding that "[n]o rational jury could accept the plaintiff's argument that she was caused to fall to the ground by a particle or particles of styrofoam dust," id., as "[t]o accept this hypothesis, a jury would have to "'discard common sense and common knowledge' " and give credit to testimony " 'which is incredible and unbelievable, that is … contrary to experience.'" Id., (citations omitted).

In this matter, as concern s plaintiff's accident, Senior purportedly personally observed the two-by-four - which was "[t]he one holding the window"- detach from the house and fall "at the same time that the window fell," only to land first and thereafter be struck by the window, causing the two-by-four to "rebound" up into the kitchen and strike plaintiff, causing plaintiff to fall out of the kitchen, into the yard, and strike the window.[19] The contract and photographic evidence, however, establishes that there was no second floor. Moreover, as stated above, Senior's assertion is in direct contradiction to Newton's Second Law, which teaches that if air resistance is not a factor, (which, in this matter, it is not), two objects of different weight fall at the same rate.[20] It has been held that "[e]ven without the advantage of

[19] R, 568, 651-652, 654, 656.

[20] The acceleration of an object is directly proportional to force and inversely proportional to mass. Increasing force tends to increase acceleration while increasing mass tends to decrease

seeing the witness, a court is not required to give credence to a story so inherently improbable as to leave no doubt that it is not true." Marti v. N.Y.C. Hous. Auth., 192 A.D.2d 443, 444, 597 N.Y.S.2d 9, 10 (1st Dept. 1993). In this case, with Senior's account of the purported 'facts' of plaintiff's accident being contrary to common sense and everyday experience, and having all of the complexity of a Rub Goldberg machine,[21] Big Moose submits that this is such a case.

12 NYCRR §23-3.3(b)(3)

§23-3.3(b)

Plaintiff cannot predicate a Labor Law §241(6) cause of action upon any purported violation of §23-3.3(b). Section 23-3.3(b)(3) provides:

> Demolition of walls and partitions:
>
> (3) Walls, chimneys and other parts of any building or other structure shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration.

N.Y. Comp. Codes R. & Regs. tit. 12, § 23-3.3.

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acceleration. Thus, the greater force on more massive objects is offset by the inverse influence of greater mass. Subsequently, all objects free fall at the same rate of acceleration, regardless of their mass. https://www.physicsclassroom.com/class/1DKin/Lesson-5/The-Big-Misconception.

[21] A Rube Goldberg machine, named after American cartoonist Rube Goldberg, is a machine intentionally designed to perform a simple task in an indirect and overly complicated way. https://en.wikipedia.org/wiki/Rube_Goldberg_machine.

> (3) Walls, chimneys and other parts of any buuilding or other structure shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration.

N.Y. Comp. Codes R.& Regs. tit. 12, §23-3-3.

"[T]he thrust of section 23-3.3(b)(3) is to ensure that during the demolition process walls and other parts of the structure are protected from collapse as the result of forces (such as wind pressure or vibration) other than the force being applied to the very object of the demolition process." Steinman v. Morton Int'l, Inc., 756 F. Supp. 2d 314, 327 (W.D.N.Y. 2010). Thus, where, *as here*, the hazard arose from the actual performance of the demolition work itself - as opposed to structural instability caused by the progression of the demolition - there can be no Labor Law §241(6) recovery predicated upon the alleged violation of this Industrial Code provision. See Garcia v. Mkt. Assocs., 123 A.D.3d 661, 664, 998 N.Y.S.2d 193, 197 (2d Dept. 2014) ("[t]he construction defendants each demonstrated, prima facie, that the provisions of 12 NYCRR 23-3.3 (b) (3); (c) and 23-3.4 (b) and (c), relied on by the plaintiffs, are inapplicable, as the hazard arose from the injured plaintiff's actual performance of the demolition work itself, rather than from structural instability caused by the progress of the demolition").

To illustrate, in Maldonado v. AMMM Props. Co., 107 A.D.3d 954, 968 N.Y.S.2d 163 (2d Dept. 2013) "plaintiff was employed to demolish an interior partition wall in a commercial building. The bottom portion of the wall consisted of

sheetrock, while a single glass pane, approximately five feet wide by six feet high, had been installed in a metal frame in the wall about four feet from the floor on top of the sheetrock. The plaintiff was holding the glass pane while a coworker attempted to dislodge it from the metal frame by the use of pliers, when the glass pane cracked and fell, causing the plaintiff to sustain injuries." Id., 107 A.D.3d at 954, 968 N.Y.S.2d at 164-165. Holding that the trial court should have granted the defendants summary judgment and dismissal of plaintiff's Labor Law §241(6) cause of action, the Appellate Division reasoned, in pertinent part, as follows:

> The defendants demonstrated that the provisions of 12 NYCRR 23-3.3 (b) (3) and (c), relied on by the plaintiff, are inapplicable, as the hazard arose from the plaintiff's actual performance of the demolition work itself, rather than from structural instability caused by the progress of the demolition.

Id., 107 A.D.3d at 955, 968 N.Y.S.2d at 165.

In this matter, arguing that defendants may be held statutorily liable predicated upon an alleged violation of this Industrial Code provision, plaintiff reasons as follows:

> Here, Defendants failed to establish, prima facie, that the hazard did not arise from the structural instability caused by the progress of the demolition work. In this regard, and under Plaintiff's account of the accident, Plaintiff testified that the force of the vibrations from the demolition work being performed above him on the second floor caused a five-foot long piece of 2x4, which was vertically connected to the wall prior to the accident, to dislodge and strike Plaintiff in the head. Specifically, Plaintiff testified

> that prior to the accident, he could feel the "hits" from the hammering above him, which "shook" him, and that the impact from the hammering caused the 2x4 on the wall to fall and strike him in the head.[22]

Counsel's argument does not withstand scrutiny. First, unlike witnesses, photographs do not lie, and the photographic evidence - corroborated by the contract documents as well as the testimony of Sligo Vice-President, Paul Davey, Big Moose President, Stephen Musso, and plaintiff's own brother - establishes that this was a single story 'cape;' hence, there was no second floor. Second, scrutiny reveals plaintiff's contention to be mere conjecture, as plaintiff testified that he never actually saw the subject 2x4 either before, during, or subsequent to his accident. The only credible version of the subject incident is that testified to by plaintiff's brother, Jorge Reyes, Jr., who informed that his brother's accident occurred when a 2x4 that co-worker, Elcius Campos, was utilizing to pry a window out of its frame snapped, propelling the 2x4 onto plaintiff's head. Thus, as it is settled law that where, *as here*, the hazard arose from the actual performance of the demolition work itself - as opposed to structural instability caused by the progression of the demolition – § 23-3.3(b)(3) is not implicated, there can be no Labor Law §241(6) recovery predicated upon the alleged violation of this Industrial Code provision.

12 NYCRR §23-3.3(c)

[22] See appellant's brief, at 37.

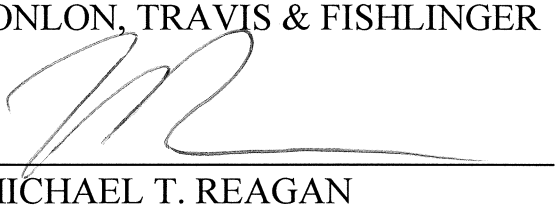
Counsel's argument - that the defendants' failed to establish, *prima facie*, that there was no §23-3.3(c) violation - is without merit. §23-3.3, sub-section c, provides that, "[d]uring hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material." Id. This "regulation requires 'continuing inspections against hazards which are created by the progress of the demolition work itself,' rather than inspections of how demolition would be performed." Campoverde v. Bruckner Plaza Assocs., L.P., 50 A.D.3d 836, 837, 855 N.Y.S.2d 268, 269 (2d Dept. 2008) *quoting* Monroe v City of New York, 67 A.D.2d 89, 100, 414 N.Y.S.2d 718 (2d Dept. 1979). Thus, as with 23-3.3(b)(3), this regulation is inapplicable where - *as here* - "the hazard which injured the plaintiff was the actual performance of the demolition work, not structural instability caused by the progress of the demolition." Id.

CONCLUSION

For all of the foregoing reasons, the third-party defendant/respondent, Big Moose Builders, Inc., submits that those portions of the Order of the Supreme Court, Suffolk County, (Hon. Justice Reilly), dated September 25, 2019, which summarily dismissed plaintiff-appellant, Miguel Reyes', Labor Law §241(6) cause of action, and granted the defendant/third-party plaintiff-respondent, Sligo Construction Corp., summary judgment and dismissal of plaintiff-appellant, Miguel Reyes', common-law negligence/Labor Law §200 claim(s), should be affirmed.

Respectfully submitted,

CONGDON, FLAHERTY, O'CALLAGHAN,
REID, DONLON, TRAVIS & FISHLINGER

By: 

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR 1250.8(b)(6) & (J), the undersigned counsel certifies that the Respondent's Brief of third-party defendant/respondent, Big Moose Builders, Inc., is in Times New Roman proportionally spaced typeface, 14-point size (Microsoft Office Word 2013), and that the entire Brief, excluding Point headings and footnotes, is double-spaced, that the footnotes are spaced typeface in 12 point size (Microsoft Office Word 2013), and that the Brief contains 12,814 words as computed by Microsoft Office Word 2013.

Dated: Uniondale, New York.
August 6, 2020.