

At IAS Part 6 of the Supreme Court of the State of New York, Kings County, on the 23<sup>rd</sup> day of December, 2009.

**PRESENT: Hon. JAMES G. STARKEY, JSC**

GLENN GROSS and ADRIENNE GROSS,

*Plaintiff(s)*

- against -

FLATBUSH OWNERS COMPANY, LLC.,

*Defendant(s)*

**SHORT FORM ORDER**

Index No. 29306/2007

Cal. No. (12/16/2009) 23 & 24

The following papers numbered 1 to 9 read on this motion	Papers Numbered
Notice of Motion - Order to Show Cause and Affidavits (Affirmations) Annexed	1-2
Answering Affidavit/Notice of Cross Motion	3, 4-5
Reply Affirmations	6
Filed Papers	7, 8 & 9

Plaintiff's motion for summary judgment on the issue of liability pursuant to Labor Law § 240(1) is granted. The concrete sidewalk which adjoined the pit, although on ground level, was being used by plaintiff to perform his work and was the functional equivalent of a scaffold. See *BeHarry v. Public Storage*, 36 A.D.3d 574, 828 N.Y.S.2d m458 (2<sup>nd</sup> Dept. 2006); *De Jara v. 44-14 Newtown Road Apartment Corp.*, 307 A.D.2d 948, 763 N.Y.S.2d 654 (2<sup>nd</sup> Dept. 2003). Its unexplained collapse establishes a prima facie case of liability under the statute. *Ibid.*

Defendant's cross motion seeking summary judgment pursuant to CPLR § 3212 based upon § 11 and § 29 of the Worker's Compensation Law is granted to the extent that defendant may amend its answer to include the defense pursuant to CPLR § 3025 provided its representative appears for a further deposition concerning this defense within forty five days of service of a copy of this order with notice of entry. Summary judgment is denied insofar as plaintiff has raised a triable issue of fact concerning the applicability of this defense.

For Clerks use only

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Motion Seq. # 003 604

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HON. JAMES G. STARKEY, JSC

**JAMES G. STARKEY  
J.S.C.**

  
KINGS COUNTY CLERK  
2009 DEC 29 AM 9:25

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