At an IAS Term, Part 8 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25th day of September, 2010.

P R E S E N T:

HON. BERT A. BUNYAN,

Justice.

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DIMITRI VORVOLAKOS,

Plaintiff,

- against -

Index No. 22715/07

SALTRU ASSOCIATES ET AL.,

Defendants.

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SALTRU ASSOCIATES, ET AL.,

Third-Party Plaintiffs,

- against -

Third-Party
Index No. 76072/08

NORWEGIAN CRUISE LINE, ET AL.,

Third-Party Defendants.

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The following papers numbered 1 to 6
read on this motion and cross motion:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1. 2
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	6
Supporting Affidavits (Affirmation)	3, 4, 5
Other Papers	

Upon the foregoing papers, defendants/third-party plaintiffs Saltru Associates (Saltru), Caesar's Bazaar L.P. (Caesar's), Toys 'R' Us New York LLC, Toys 'R' Us US Delaware, Inc. (collectively, Toys 'R' Us), Maria D. Cirillo, Patricia N. Cirillo, Joan J. Cirillo (collectively, the Cirillos), and Monica Rippa (Rippa) move, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's claims in all respects, and (2) plaintiff Dimitri Vorvolakos (Vorvolakos) cross-moves for an order granting partial summary judgment in his favor on the issue of liability and setting this matter down for a trial on the assessment of plaintiff's damages.

BACKGROUND AND CONTENTIONS

On January 19, 2006, plaintiff was employed by Phoenix Marine, Inc. (Phoenix) as a dockbuilder. Pursuant to a construction agreement dated May 2005 (the Agreement) between Phoenix and Saltru, a New York general partnership and the lessee of the property where plaintiff's accident occurred,[1] Phoenix agreed to perform substructure pier rehabilitation work at property known as the Toys 'R' Us Bay Parkway Facility, located at the end of Bay Parkway at Gravesend Bay in Brooklyn, New York (the property). A portion of the property extends over the waters of Gravesend Bay and is supported by pier pilings which extend up from the bottom of Gravesend Bay.

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[1]At the time of the accident the property where plaintiff's accident occurred was owned by the Cerillos and Rippa. Toys 'R' Us Delaware, Inc. owns a 50% interest in Saltru, along with Caesar's.

The pilings were in deteriorated condition, with chipped, flaking and crumbling concrete. The construction project involved demolishing deteriorated concrete from the pier support pilings above the water line and then re-encasing the pilings with new concrete. According to plaintiff's deposition testimony, the demolished concrete was allowed to fall directly into the water, and no safety devices were provided to protect workers from falling concrete. "Float stages" or "work floats," also referred to as "mats," which consisted of four or five 20-feet long 12-inch by 12-inch timbers bolted together, tied to a barge at one end and floating on the surface of the water, were used as platforms by Phoenix Marine's workers to perform their work under the pier. The float stages had no railings or other protective devices, and no ropes or tie lines were used to prevent rolling or shifting of the float stages.

The accident

At approximately 8:00 a.m. on January 19, 2006, plaintiff was standing on a work float, under the pier, using a jackhammer/rivet buster to remove deteriorated concrete from a vertical pile. According to the deposition testimony of plaintiff, as well as that of plaintiff's foreman Larry Danielson (Danielson) and co-worker Timothy Corbett (Corbett), several large waves, purportedly caused by the passing cruise ship "Norwegian Spirit," which was owned and operated by third-party defendant Norwegian Cruise Line, suddenly rolled into the worksite from Gravesend Bay. These waves caused the barge to rise up out of the water, creating a "catapult effect," which, in combination with waves washing under the pier, caused all the work floats, including that upon which plaintiff was standing, to shift and roll.

The shifting of the work float caused plaintiff to be lifted up several feet. At the same time, according to plaintiff's testimony, a slab of falling concrete struck him. Plaintiff then fell approximately 6 to 8 feet, striking his body against the work float and then falling into the water up to his ribs. According to plaintiff and Danielson, and as reflected in a United States Coast Guard Form 2692 ("Report of Marine Accident, Injury or Death") dated February 5 2006, several other workers were also thrown into the water. In addition, extensive damage caused by the barges striking the pier structure, was done to Phoenix Marine's floating equipment and the pier itself.

Plaintiff testified that as a result of being struck by the falling slab of concrete, he sustained a hairline fracture to his shoulder, among other injuries.

Plaintiff commenced the instant lawsuit against the named defendants by filing a summons and complaint dated June 20, 2007, claiming violations of Labor Law §§ 240(1), 241(6) and 200. Following joinder of issue, defendants impleaded the owner and operator of the Norwegian Spirit. Discovery appears to be complete.

Defendants' motion

As an initial matter, defendants assert that plaintiff did not lack any safety equipment. Citing Danielson's deposition testimony, they claim that at the time of the incident, plaintiff was wearing a hard hat, safety glasses, a respirator, life preserver, rain jacket and rain pants. They aver that according to plaintiff's own testimony, the timber on which plaintiff was standing was not slippery, and plaintiff had no problem maintaining his footing.

Defendants assert that plaintiff's testimony demonstrates that his injuries did not result from a fall from a height, but rather from a falling object. As such, they aver that plaintiff has failed to meet his burden of proving that the accident resulted from the special hazards associated with gravity-related hazards covered by Labor Law § 240(1), since there is no showing that anything above plaintiff was in the process of being moved, hoisted, suspended or secured. They further argue that no work was being performed on the underside of the pier at the time of the accident, citing plaintiff's testimony that he was using the pneumatic hammer to chip concrete at "torso level." Further asserting that the condition of the overhead piling above plaintiff was good, solid and not deteriorated or corroded, defendants argue that neither plaintiff's employer nor defendants had reason to expect or foresee that a slab of concrete would fall, or take measures to prevent such a "freak occurrence." In any event, they note that both the eyewitnesses and plaintiff himself attributed the accident to the sudden impact of the waves and not to the absence or deficiency of safety equipment on the job site.

In further support of their position, defendants provide the affidavit of John Keeley (Keeley), President and sole stockholder of Phoenix. Keeley states that he is familiar with the portion of the Toys 'R' Us property in which Phoenix's work was performed, including the offshore portion of the property. After describing the nature of Phoenix's, and plaintiff's, work on the pilings as set forth above, Keeley states that the underside of the pier would have been like a ceiling over plaintiff's head, the overhead height of which

would depend on the state of the tide, but that no part of Pheonix's work, or the work performed by plaintiff, involved the underside of the pier. Further describing the concrete-jacketed steel pilings beneath the pier as being surmounted, overhead, by a rectangular concrete pile "cap" located between the tops of the pilings and the underside of the pier structure, Keeley avers that plaintiff's work did not involve any such cap. Keeley states that no concrete fell from the underside of the pier or any pile cap during Phoenix's work at the property, or at any time prior to plaintiff's accident, and further denies that (1) there was any work underway over plaintiff in the area beneath the pier where he was working at the time of the accident; (2) anything was hanging over plaintiff at the time of the accident; or (3) anything was being hoisted, or required hoisting, at that time.

Defendants further move for summary judgment on plaintiff's Labor Law § 241(6) cause of action, contending, as to each section of the Industrial Code cited by plaintiff, that the evidence fails to show that any such section was violated.

Finally, in support of that branch of their motion for summary judgment dismissing plaintiff's Labor Law § 200 cause of action, defendants proffer the affidavit of Steven Waxman (Waxman) in support of their argument that they were not present and that they did not exercise supervision or control over conditions or activities at the job site.

Plaintiff's cross-motion

In support of his cross- motion, plaintiff contends that summary judgment is warranted because: (1) his 6 to 8 foot fall into Gravesend Bay from a work float that lacked

any adequate safety protection constitutes a violation of the provisions of Labor Law § 240(1); and (2) the falling concrete qualifies as a falling object pursuant to Labor Law § 240(1). Plaintiff further contends that several provisions of the New York State Industrial Code, to be detailed below, were violated, thus entitling him to summary judgment on his Labor Law § 241(6) claim.

In reply to defendants' motion, plaintiff contends the facts compel granting his cross-motion, irrespective of whether plaintiff's claim sets forth a "falling object" or "falling worker" cause of action under Labor Law § 240(1). He argues that defendants overlook that part of the record which establishes that waves were a contributing factor in the accident, having caused him to fall from a height. Plaintiff refers to his amended bill of particulars, where he stated,"[p]laintiff was performing pier construction/demolition work while on a work float floating on the water. The work float had no railings, guardrails or other protective devices. Plaintiff was struck by falling overhead debris, knocking him down and off the work float into the water causing [his] injuries. Waves/wake contributed to the incident." In addition, plaintiff maintains that he repeatedly testified that the waves contributed to his accident ("[t]hey say the waves came–a huge wave came out of nowhere"), and Corbett's testimony supported that of plaintiff ("[r]ogue waves which were later determined to be from the cruise ship...All of a sudden rollers started coming in"). Suggesting that the court take judicial notice that waves have height and depth and created an elevation differential between the surface of the water and the work at hand, plaintiff,

citing what he contends is controlling authority, asserts that he fell due to an elevation differential and the forces of gravity, and that summary judgment is appropriate on his Labor Law § 240(1) cause of action.

In addition, plaintiff, in reply, refers to his deposition testimony concerning his being struck by falling concrete ("I was standing on the float working, and waves came out of nowhere, and at the same time a piece of–a slab of concrete just came down on me and smashed and lay me flat. It knocked me halfway into the water...."), as well as that of Danielson and Corbett to the effect that although they did not observe the concrete fall on plaintiff, they observed concrete debris in the area around him on the work float, and challenges defendants' assertion that no liability attaches because there is no showing that the concrete was in the process of being hoisted.

DISCUSSION

The burden on a motion for summary judgment rests initially upon the moving party to come forward with sufficient proof in admissible form to enable a court to determine that it is entitled to judgment as a matter of law. If this burden cannot be met, the court must deny the relief sought (CPLR 3212; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). However, once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148

AD2d 493 [1989]; *see also Zuckerman,* 49 NY2d at 562). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat the motion (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]).

Plaintiff's Labor Law § 240(1) cause of action

Labor Law § 240 (1) provides in pertinent part that:

> "All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Labor Law § 240 (1) was enacted to "prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). In order to accomplish this goal, the statute places the responsibility for safety practices and safety devices on owners and general contractors and their agents who "are best situated to bear that responsibility" (*id.* at 500; *see also Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280 [2003]; *Zimmer v Chemung County Perf. Arts*, 65 NY2d 513, 520

[1985]). Moreover, "the duty imposed by Labor Law § 240 (1) is nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (*Ross*, at 500; *see also Haimes v New York Tel. Co.*, 46 NY2d 132, 136-137 [1978]). Finally, the statute is to be construed as liberally as possible in order to accomplish its protective goals (*see Blake*, 1 NY3d at 284-285; *Martinez v City of New York*, 93 NY2d 322, 326 [1999]).

Plaintiff's falling object contention

Under Labor Law § 240(1), liability may be imposed where an object or material that fell, causing injury, was "a load that required securing for the purposes of the undertaking at the time it fell" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]; *see Ross*, 81 NY2d at 494; *Orner v Port Auth. of N.Y. & N.J.*, 293 AD2d 517 [2002]; *Baker v Barron's Educ. Serv. Corp.*, 248 AD2d 655, 656 [1998]). The fact that plaintiff's testimony fails to show that the concrete was in the process of being hoisted does not, *ipso facto*, preclude the protections afforded under the statute, since it is now well established that "'falling object' liability under the statute is not limited to objects that are in the process of being hoisted or secured (*see Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758-759 [2008]), but extends also to objects that "require[ ] securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]). Here, the overhead object that purportedly fell on the plaintiff occurred during the course of the construction/demolition process,

obligating defendants, under Labor Law § 240(1), to use appropriate safety devices to secure same (*see Bornschein v Shuman,* 7 AD3d 476, 478 [2004]).

Moreover, with respect to the competing allegations concerning injuries resulting from a falling slab of concrete, plaintiff's testimony establishes, as a *prima facie* matter, that defendants' violation of the statute was a proximate cause of his injuries. In this regard, plaintiff testified:

Q: Tell me about your accident. What happened?

A: Where I was standing–I was standing on the float working, and waves came out of nowhere, and a the same time...a slab of concrete just came down on me and lay me flat. And it knocked me halfway into the water and halfway submerged on top of the mat....

Q: Were you unconscious?

A: At that time I don't know what happened...It was dark for me and then they helped me up.

Q: You said there was a slab of concrete that came down?

A: Yes.

Q: Where did it come from, do you know?

A: On top, right off the ceiling.

Q: Did you actually look up?

A: I don't know what hit me. I didn't know how big it was, what hit me. They told me it was a huge slab.

Q: You didn't actually see it come down on you?

A: No.

Q: You didn't actually see the piece of concrete that fell on you?

A: No. Because they threw it right in the water. I was on the mat–I was submerged, pinned underneath, halfway on, halfway off in the water.

* * * *

Q: Who assisted you, who's the first one there?

A: Larry was there.

* * * *

Q: What is it that caused your accident, do you know?

A: They say the waves came–a huge wave came out of nowhere.

* * * *

Q: So your head did not hit the top of the pier?

A: No, I was smashed by. . .a slab of concrete.

Danielson testified that he was working near plaintiff, who was using a jackhammer on a concrete pile, when he too was thrust into the water as a result of the wave,[2] but that when he got up, he observed plaintiff on the "mat", having already been pulled up. Upon further questioning, Danielson stated that he was "almost positive" that plaintiff fell into the water, but that although he was wet, "part of him might have went into the water."

[2]Danielson testified that three waves came into contact with the work float.

Furthermore, Danielson, who indicated that 10 to 15 seconds passed between the time the third wave struck until the time he saw again saw plaintiff, did not testify that he observed a slab of concrete anywhere in the vicinity of where plaintiff was positioned, or anything on him–rather, he observed debris, consisting of broken concrete, which came from the "cap" on top of the pile he was demolishing.

Corbett testified that he was working with plaintiff on the day of the accident, but was not working "directly side by side" with him. He was unable to remember whether plaintiff's accident occurred in the morning or afternoon. He testified that everyone was working under the pier, when suddenly a wave started to roll in, raising a barge very high. He jumped off the "mat" onto a dive station adjacent to the location where he was working. He then observed plaintiff lying on a "mat", approximately fifty or sixty feet away, apparently partially in the water, in the process of crawling out. He observed concrete debris along the mat where plaintiff had been working, but not on plaintiff. Plaintiff appeared to Corbett to be conscious but disoriented.

Plaintiff's contentions regarding his fall from an elevation

Floating workplace accidents that are caused by wakes or waves created by passing vessels are recognized as falling within the ambit of elevation-related hazards, affording workers who are thereby injured protection under the provisions of Labor Law § 240(1) (*see Dooley v Peerless Importers, Inc.*, 42 AD3d 199 [2007]. In *Dooley*, plaintiff was injured while working on a platform, or stage, that floated on the surface of Newtown Creek and

which gave him access to a bulkhead. The platform lacked any railings, and was described as flimsy. At some point, the platform shifted beneath the plaintiff, leaving him hanging by one hand above the chest-deep water before he fell, causing injury. With respect to the differential in elevation, the Appellate Division, noting that a sufficient number of lines and/or a guardrail could have prevented the accident, observed that there was no difference between a platform which floated on water, and a scaffold that shifted and lacked adequate safety devices (*id.* at 203; *see also Keane v Chelsea Piers,* 71 AD3d 593 [2010] [liability under § 240(1) found where plaintiff injured while working under a pier when action of waves caused the floating stage on which he was kneeling to drop while plaintiff was sawing a board, causing the board to fall on top of him: "[g]iven that the swing in elevation of the stage due to tides and waves was understood by all as a risk of this particular construction site, and the accident could not have occurred without the differential in elevation between the plaintiff (in the wave's trough) and the board above him, the injuries caused by the falling board were plainly contemplated by § 240(1)"]).

Here, plaintiff states in his affidavit that he was lifted up several feet by the waves that rolled under the pier and which caused the work float to shift and roll, in turn causing him to fall approximately 5 to 8 feet and strike the side of the work float. He further states that other than tielines at either end of the work float, there were no tielines in the area where he was working which would have minimized the movement of the work float, nor

were there any guardrails which would have afforded him something to hold onto to prevent the fall.

Under both theories, plaintiff has demonstrated his entitlement to judgment as a matter of law on his Labor Law § 2401(1) cause of action. The burden thus shifts to defendants to raise a material issue of fact in order to defeat plaintiff's motion. Defendants have failed to do so.

Defendants fail to raise any issue of fact in opposition to that branch of plaintiff's claim which is based upon his falling into the water (*see Dooley,* 42 AD3d at 199), or with respect to the applicability of the statutory protections to the circumstances involving his having been struck by the falling concrete slab.

In his affidavit, Keeley indicates that he is familiar with the area where plaintiff was working, as well as the purpose of his company's work and "the equipment, means and methods" which plaintiff was using to do his job at the time and location of his accident, and further states that he was working under the direct supervision of Danielson, Phoenix's foreman. However, nowhere does Keeley state that he was present at the time of the accident. Accordingly, any attempt to refute that version of the accident proffered by plaintiff, Danielson and Corbett is clearly speculative.

Similarly unavailing is defendants' argument that Labor Law § 240(1) is inapplicable because the concrete was not in the process of being hoisted or secured at the time it purportedly fell on plaintiff, or that the elevation differential between it and plaintiff was

de minimus (*see Runner v New York Stock Exchange, Inc.*, 13 NY3d 599 [2009] ["the causal connection between the object's inadequately regulated descent and plaintiff's injury was, as noted, unmediated"]; *see also Salinas v Barney Skanska Construction Co.*, 2 AD3d 619 [2003]). Based upon the foregoing, the court grants plaintiff's cross-motion for partial summary judgment on his cause of action alleging violation of Labor Law § 240(1), and denies defendants' motion for summary judgment with respect to said cause of action.

Plaintiff's Labor Law § 241(6) cause of action

Labor Law §241 (6) provides in pertinent part that:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

Labor Law § 241 (6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety

protections, places a nondelegable duty upon owners and general contractors and their agents to comply with the specific safety rules set forth in the Industrial Code (*Ross*, 81 NY2d at 501-502). Accordingly, in 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 (*Ross* at 502; *Ares v State*, 80 NY2d 959, 960 [1992]; *see also Adams v Glass Fab*, 212 AD2d 972, 973 [1995]).

In his bill of particulars, plaintiff alleged violation of the following provisions of the Industrial Code: 12 NYCRR 23-1.30; 12 NYCRR 23-1.7(a)(1) and (a)(2); 12 NYCRR 23-1.7(b)(1), (c), (d), and (e)(2); 12 NYCRR 23-1.16;12 NYCRR 23-1.22(c)(2); 12 NYCRR 23-2.1(b); 12 NYCRR 23-8.1 and 12 NYCRR 23-8.2. He now abandons his claims pursuant to sections 12 NYCRR § 23-1.30 (illumination), 23-1.7(b)(2) (c)(drowning hazards), 23-1.7(e)(2) (tripping hazards), 23-2.1(b) (disposal of debris), and 23-8.1 and 23-8.2 (mobile cranes, tower cranes and derricks). Defendants contend that none of the remaining afore-cited sections of the Industrial Code apply to plaintiff's accident. In opposition, and in support of his cross- motion, plaintiff contend that said sections are, in fact, applicable, and are valid predicates to support a claim under § 241(6).

Section 23-1.7(a) addresses overhead hazards. It provides that: "(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. (2) Where persons are lawfully frequenting areas exposed to falling material or objects but wherein employees are not required to work or pass, such exposed areas shall be provided with barricades, fencing or the equivalent in compliance with this Part (rule) to prevent inadvertent entry into such areas." Plaintiff's reliance on these Rules is misplaced. Plaintiff, in testifying that no concrete or other material had fallen previously from the underside of the pier where he was working when the accident occurred, and that the condition of the overhead above the plaintiff was good, solid and not deteriorated, undermines any argument that the area was, in fact, one which was normally exposed to falling material or objects. 23-1.7(a)(2) is plainly inapplicable, since it sets requirements for passers-by (not workers) at a work site. Finally, there is no evidence in the record establishing the existence of a hazardous opening so as to trigger the applicability of Rule 23-1.7(b)(1). Plaintiff's reliance on *Dooley*, 42 AD3d at 206 to support his strained and conclusory assertion that

Gravesend Bay was the hazardous opening, is entirely misplaced, since the *Dooley* court, noting that the plaintiff there raised said Rule for the first time on appeal, rejected same (*see Wells v British American Development Corp.*, 2 AD3d 1141,1143 [2003]).

12 NYCRR 23-1.7(d) (Slipping hazards) provides that "[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing." Plaintiff, who testified that nothing wet or slippery contributed to the accident, has failed to show, *prima facie*, that such Rule is applicable (*see Pastor v RAC Mechanical*, 15 Misc 3d 1125[A] [2007]).

Plaintiff's reliance on Section 23-1.16 ("Safety Belts, Tail Line and Harnesses) is misplaced, since, by its terms, the provisions set forth only apply where such devices have been provided to workers. Here, the evidence shows that plaintiff was not provided with a safety belt, harness or rope (*see Smith v. Cari, LLC,* 50 AD3d 879, 881 [2008]).

Rule 23-1.22(c)(2) (Platforms) provides: "[e]very platform more than seven feet above the ground, grade, floor or equivalent surface shall be provided with a safety railing constructed and installed in compliance with this Part (rule) on all sides

except those used for loading and unloading...." Here, there is no testimony that the "mat" was more than seven feet above the surface, rendering such section inapplicable.

In view of the foregoing, plaintiff has failed to show, *prima facie*, that his cause of action based upon violations of Labor Law §241(6) is meritorious, or raise an issue of fact in opposition to defendants' motion seeking summary judgment dismissing same. Accordingly, the court grants defendants' motion and dismisses plaintiff's cause of action based upon Labor Law § 241(6).

Plaintiff's Labor Law § 200 cause of action

Labor Law § 200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2000]). In order for an owner or contractor to be held liable under a Labor Law § 200 cause of action, there must be evidence that the owner or contractor controlled and supervised the manner in which the underlying work was performed, or that it created or had notice of the alleged dangerous condition which caused the accident (*see Kim* at 712; *Kanarvogel v Tops Appliance City, Inc.*, 271 AD2d 409, 411 [2000]; *see also Perri v Gilbert Johnson Enterprises, Ltd.*, 14 AD3d 681, 683 [2005], quoting *Singleton v Citnalta Constr. Corp.*, 291 AD2d 393, 394 [2002] ["general 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"]). Where the defect or dangerous condition arises from the worker's own methods, and the owner or contractor exerted no supervisory control over the work, no liability attaches to these parties (*see Ruccolo v City of New York*, 278 AD2d 472, 474 [2000]).

Plaintiff has not opposed that branch of defendants' motion for summary judgment dismissing his Labor Law § 200 cause of action. In any event, defendants have demonstrated, through the affidavit of Steven Waxman, director of facilities and property management for Toys 'R' Us-Delaware, Inc., that none of the defendants had any supervisory control over plaintiff's work, or exercised any control over the area where plaintiff was working or the tools he was using. Accordingly, the court grants that branch of defendants' motion for summary judgment dismissing plaintiff's Labor Law § 200 cause of action.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. BERT A. BUNYAN
JUSTICE N.Y.S. SUPREME COURT