SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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RYAN RODRIGUEZ and LISA LOPEZ,

Plaintiffs,

-against- Index No.: 158806/2012

TOYS R US-DELAWARE, INC. i/s/h/a FAO SCHWARTZ CO., 767 FIFTH INTERIM PARTNERS LLC., 767 FIFTH PARTNERS LLC., BOSTON PROPERTIES, INC., KERNER ENTERTAINMENT CO., JORDAN KERNER, COLUMBIA PICTURE INDUSTRIES, INC., and SONY PICTURES ANIMATION,

Defendants.

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JOAN A. MADDEN, J.:

Plaintiff Ryan Rodriguez (plaintiff) moves for an order (1) granting summary judgment as to liability on their claims against defendants Toys R Us-Delaware Inc. i/s/h/a FAO Schwartz Company (Toys R Us), 767 Fifth Partners LLC. (767 Partners), Boston Properties, Inc. (Boston Properties), Kerner Entertainment Company (Kerner Entertainment),[1] Columbia Pictures Industries, Inc. (Columbia), and Sony Pictures Animation (SPA) (together "the defendants"), for common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6), and (2) striking defendants' affirmative defense that plaintiffs' action is barred based on the exclusivity of workers' compensation benefits. (motion sequence 002)[2]. Defendants Toys R Us, 767 Partners, Boston Properties, Kerner Entertainment, Columbia, and SPA oppose the motion and cross-move for an order granting them summary judgment dismissing plaintiffs' complaint and

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[1]Plaintiff does not seek relief from defendant Jordan Kerner and there is no affidavit of service in efiled showing that he was served.

[2]While the motion was initially made on behalf of both plaintiffs Ryan Rodriguez and Lisa Lopez, by stipulation dated April 23, 2015, the action was discontinued with respect to the claims by Ms. Lopez.

permanently sealing the "Personnel Services Agreement" submitted in connection with the motion and cross motion.

Plaintiffs separately move, pursuant to CPLR 3025, to amend the complaint to add causes of action for gross negligence and punitive damages. Defendants oppose the motion. (motion sequence 003).[3]

BACKGROUND

Plaintiff was involved in an accident on May 20, 2010, at approximately 6:30 a.m. at 767 Fifth Avenue, New York City, New York ("the property"), which is owned by 767 Partners. Boston properties owns an indirect interest in 767 Partners. At the time of the accident, the property was leased by Toys 'R Us for use as a toy store. Plaintiff was employed as a unionized electrician/technician during the filming of "The Smurfs" movie (hereinafter, "the movie"). The movie was produced by Kerner Entertainment, Jordan Kerner ("Kerner"), Columbia and SPA. Prior to the filming, Columbia and 767 Partners entered into a location agreement dated May 11, 2010 ("767 Location Agreement"), which granted Columbia permission to use the property for the movie between May 17, 2010 and June 30, 2010. Columbia and Toys 'R Us also entered into a location agreement dated May 7, 2010, which allowed filming at the store ("Toys 'R Us Location Agreement").

At his deposition, plaintiff testified that since 2003, he has been a member of Local 52, the International Alliance of Stage and Theater Employees and has worked a a free lance electrician (Plaintiff's tr at 17-18) . At the time of the accident, he was working as a "best boy" which is a term of art in the entertainment industry meaning a foreman electrician, who works on a television or movie set as "the chief electrician's right hand." (Id at 18-19). He was not a

[3]Motion sequence numbers 002 and 003 are consolidated for disposition.

licensed electrician (Id at 18). Plaintiff's duties as a best boy included delegating work to electricians and ensuring that lighting duties were performed, both inside near the set and outside on the street (Id at 33). He also testified that he "would set up the light or run any electrical needs to any lighting or any department that needed any electrical work" (Id at 38). Plaintiff answered "yes" when asked whether he had discretion as to which things he did physically as opposed to things he would delegate to other electricians, but also testified that the gaffer, who is the head lighting electrician, would have input into these decisions (Id at 19, 39).

When ask how the different workers on the set were hired, plaintiff testified that, in general, the production company contacts the union hall to hire the gaffer, "who is hired first, and the gaffer hires the best boy," and the supporting crew (Id at 24). The gaffer at the movie was John Velez ("Velez"), and plaintiff would speak with Velez to discuss the location of the scene, where to run power, and where to set up the lights (Id at 34). Plaintiff testified that he believed that he and Velez worked for Entertainment Partners (Id). He also testified that, aside from the actors, directors, and writers, the workers on the set, including electricians, set constructors, and costumers, all worked for Entertainment Partners and Columbia, and that the movie was a Columbia enterprise (Id at 34-36). Plaintiff's paychecks indicated they were from Entertainment Partners, Columbia Pictures (Id at 35). Plaintiff testified that he had not heard of SPA and had not seen anyone from this company on the set (Id at 37). According to plaintiff he was supervised by, and take orders from, Velez or the cinematographer/director of photography, who plaintiff later identified as Philip Maheux ("Maheux") (Id at 49, 52).

Plaintiff testified that the gaffer decided what equipment was needed on the set and he had no input into the decision (Id at 42). However, plaintiff testified that if a lift for a shoot located on a higher level was needed, the instruction for the lift would either come from the

cinematographer, (i.e. Maheux) or the director, who plaintiff later identified as Raja Gosnell (Id at 45-46). Plaintiff testified that Pride Rental Company ("Pride") provided the lifts, including the Genie lift involved in the accident and he had previously received training on using lifts from Pride (Id at 43, 54) According to plaintiff, at the time of the accident, he was not wearing any protective equipment such as a hard hat, special shoes, safety vest or jacket (Id at 59), and there were no other safety devices such as ropes, ties, safety belts connected the lift at the time of the accident (Id at 61).

Plaintiff testified as follows regarding the call for work which he received that before the accident:

> "it was a general call by John Velez, the Gaffer, who had been instructed by the cinematographer, may have been instructed by a director to tweak a light that was pre-rigged on the column. I answered a call, that I was in the general vicinity and a few folks helped with the lift, dragging it over to the intended column."

(Id at 78).

Plaintiff testified that the call was for a light which "needed to be focused ... ." (Id at 61). At the time of his accident, plaintiff was utilizing a lift manufactured by "Genie" (Id at 55). Surrounding the lift was a guardrail which appeared to be secure (Id at 68). At the time of his accident, plaintiff was working with Don Schreck, another electrician working on the set (Id at 65). Plaintiff testified that the light had been placed by a "rigging crew," possibly a couple of days before the accident (Id at 74, 116-117). Plaintiff also testified that he was "to tweak" a lighting fixture which was approximately 10 pounds, and was strapped to a column, with hardware that allowed the light to clip into it (Id at 113). He described the hardware as a "racheting strap," which goes around the column to hold the light there and testified that no drilling was needed to attached the light to the column (Id at 113-115). Plaintiff did not know

who attached the light to the column (Id at 117).

Plaintiff testified that neither Richard Baretta, who served as the film's production manager, nor Jordan Kerner, the producer, nor Bonita Alan, the assistant director, provided him with any directions, instructions, or supervision (Id at 86-87). Plaintiff testified that the lift was set up by Don (Schreck) and people from the grip department and that they all worked for Entertainment Partners (Id at 79). Plaintiff further testified that, after the lift was brought over to where it was to be utilized, he stepped into the bucket, outriggers, which he described as "legs to attached to the Genie lift," were secured to the ground in order to stabilize the base, and the lift proceeded to elevate. However, the outriggers were subsequently removed in order for plaintiff to reach the light, which was attached to a column in a tight space between the escalators (Id at 94).

According to plaintiff, he was about 35 feet in the air when he proceeded to tweak and refocus the light for about two minutes (Id at 97). While plaintiff testified that when he went up in the lift he had a small tool pouch with him that he carried every day, he answered "yes" when asked if no tools were needed to tweak the light (Id at 99). The accident happened plaintiff "was done focusing the light" (Id at 95). He testified that when "it's time to come down, I get pulled back a bit, so I could clear the items on the column. The base, it's physically moved [about] a foot not even two. And that's when I went over" (Id at 98). When asked why the lift went over, plaintiff responded "[b]ecause the outriggers were not in place" (Id at 100).

Velez testified that he worked on the movie set and was hired by Phil Meheux, the cinematographer (Velez tr at 10). Velez's union negotiated for his pay (Id at 12). His direct supervisor was unit production manager, Richard Baretta (Id at 29). Velez testified that the production staff, including Kerner, was at the property at the time of the accident (Id). Velez retained plaintiff to serve as the "best boy" for the movie (Id at 16). In this position, plaintiff

worked as "a foreman to work with other electricians" (Id). Velez also hired Dereck Murphy, a rigging gaffer, who was to set up cabling and stage equipment, hang lights, and restore the premises when the job was completed (Id). Velez testified that, because the set had lighting requirements on both levels, lifts were required, and that the "grip department handles the lift process" (Id at 17-19) .

At the time of plaintiff's accident, Velez was located on the second floor of the store, performing set lighting for a scene (Id at 22). When asked how was it that plaintiff used the lift, Velez answered "[h]e was instructed to adjust a light for me" (Id at 23). When asked how he instructed him, Velez responded "through the radio, we said can you remove, I think it was removing the diffusion on the light. I don't remember exactly what were the particulars of tweaking that light" (Id). Velez did not direct anyone to work with plaintiff to adjust the light and had not previously utilized the subject lift (Id at 26). Velez did not believe that the lift was tied off in anyway (Id at 27). He could not see from his vantage point if the lift had outriggers on it (Id). He believed that the lift could not have been moved if its outriggers were on it and down (Id). When Velez last saw plaintiff he was up in the lift and was not tied off, and he did not see plaintiff use any type of safety device and estimated that plaintiff was about 22 feet off of the ground before his accident (Id at 32-33). After the accident, Velez observed that the lift was on its side and plaintiff was partially in and partially out of the basket (Id at 34).

At his deposition, Meheux testified that on the date of plaintiff's accident, he was employed by Columbia and was working as the director of photography for the movie. Meheux testified that plaintiff "was not adjusting, to my knowledge a light on the set we were working on. He was working in an area that we had just vacated and, as far as I can remember was fixing a lamp that was not performing correctly" (Meheux tr at 12). Meheux was not present when the

light was installed and that the lamp was part of the filming equipment, and that "the light was put up to last throughout the entire shooting period in the building" (Id at 14).

Meheux testified:

> "[m]y understanding - - my recollection is that the lamp had ceased to work and I approached the chief electrician (Velez) and said is there anything we can do . . . about that, and I left it with him to decide what he wanted to do. If they came back to me and said we cannot get to it or it is too dangerous to fix it or whatever, I would then probably go back and say let me try and do it another way."

(Id at 16). The lamp was powered by a cable suspended in the air (Id at 16-17). Meheux testified that Velez and his crew would be in charge of obtaining lifts for use on the set (Id at 18). According to Meheux, Entertainment Partners is a service and payroll company employed by Columbia to deduct taxes (Id at 22-23). Meheux testified that Velez reported to him, but that Velez was his own supervisor as he ran his own department (Id at 24-25).

John DeSimone (DeSimone), who was also deposed, is a member of Local 161 and was employed for the movie as a production coordinator. According to DeSimone, he was employed by Columbia, "but technically the employer of record is Entertainment Partners known as EP." DeSimone tr at 7. DeSimone oversaw the coordination of different departments, made sure that the department heads spoke to one another, ordered equipment, and disseminated paperwork (Id at 8-9). DeSimone testified that the rigging grip department is responsible for making sure the lights were placed properly whereas the electrical department places orders and provides lighting (Id at 19).

DeSimone testified that if production coordinator asked him for a lift, he may have passed the order along to Mike Hyde, the transportation coordinator (Id at 22-23). When equipment would arrive from Pride, it would be unloaded by someone from Pride or by the grip department (Id at 26). DeSimone was informed of plaintiff's accident by email or by phone and saw

photographs of the lift following the accident (Id at 27).

Raja Gosnell ("Gosnell"), the director of the movie, testified that he was hired by SPA (Gosnell tr at 11-12). He later testified, however, that he was not sure whether his agreement was with SPA or Columbia (Id at 18). According to Gosnell, he worked with Sony, Columbia and Kerner on the movie (Id at 11-13). He also testified that he "believed his paychecks came from Entertainment Partners, but I don't know if it is strictly a paycheck clearing house...I know [Entertainment Partners] were not involved creatively" (Id at 21). He also testified that "high ups" from FAO Schwarz regularly visited the set during filming (Id at 55).

At his deposition, Donald Schreck (Schreck) testified that he works as an electrician setting up and operating electrical systems and lighting equipment which are used in the production of films and television shows. Schreck testified that Entertainment Partners was the payroll company for the job, and that it did not have actual people working at the property (Id at 40). On the date of plaintiff's accident, Schreck was working as a balloon lighting technician (Id at 10). Before plaintiff's accident, he was performing electrical work involving power distribution, and setting up and focusing lights (Id at 20). When Schreck arrived, there were already lights which were pre-rigged on existing building columns on the ceiling for the production (Id at 23-24).

According to Schreck, at the time of the accident he was at the base of the lift and was trying to back the lift away from the column (Id at 27-28). Schreck was the only persons at the base of the lift when the accident happened (Id at 27-28, 31). He and plaintiff had a discussion in which plaintiff had mentioned that he was "going to focus the light" (Id at 28). The light focusing did not have anything to do with the work Schreck was doing on the project, but Schreck, who had nothing else to do at the time, went over to help, even though it was not part of

his duties (Id at 29). No one else was present within at least ten feet of the lift (Id at 29-30). There were no tie offs or ropes or safety nets, nor were safety belts provided (Id at 33-34). Schreck assisted plaintiff by pushing the lift closer to a column where the light was located (Id at 32-33) Schreck testified that outriggers were not used because the lift needed to be moved (Id at 34). Just before the accident, Schreck was at the base of the lift and was attempting to help back the lift away from a column so that plaintiff could descend, when it tipped over (Id at 45).

Kevin Willis Flynn (Flynn), who works as a grip in the film industry, described his job as facilitating the movement of the cameras and the lighting of movies. Flynn was contacted by Thomas Pratte who hired him for the position as the "key rigging grip" (Flynn tr at 7). His duties were "rigging lifts and rigging light positions" (Id at 8). Flynn did not believe he was present at the time if the accident (Id at 12). He testified that he went to the store prior to the filming to determine what equipment was needed (Id at 13). He testified that he was involved in securing the lifts that were used for the film as well as in the decision making process to pick the subject lift, although he testified that he did not believe he was involved in choosing the specific genie lift involved in the accident for the job (Id at 14). Flynn testified that he was aware that there was going to be film shooting near the escalator and that a lift would be needed in the area and then, apparently contradicting his earlier testimony, he testified that he was involved in the decision to use the genie lift (Id). He testified that, in order for the lift to rise, outriggers would have to be used, and that outriggers are not unscrewed to move the machine while someone is up in the air (Id at 16). He also testified that the area where plaintiff was working was "too narrow to get the Genie Lift in with outriggers on it" (Id at 16). He also testified that there other lifts were available in the industry which could have been used that would be able to move in such an area (Id at 17).

According to Flynn, he put the light up the day before shooting and used the lift the day before plaintiff's accident to rig the lighting in the exact area where plaintiff was injured (Id at 19-20). Flynn maintains that he had put up the bracket that was holding the lamp which plaintiff was sent to adjust (Id at 20). When Flynn had used the lift the day earlier, there were four members on the crew assisting him, with one worker on the back pushing the lift, two workers standing on the base under the bucket, and one worker in the bucket (Id at 21). When asked if this counterbalanced the lift, he answered "[i]t put ballast on the base, yes" (Id at 22). According to Flynn, "the back outriggers were left on but the front-outriggers were removed" (Id). Flynn utilized the lift to be elevated about 30 feet (Id). When asked whether he was concerned at all when you were going to be moved around in the lift, Flynn responded "yes" and when asked if he addressed this concern, he responded "jokingly yes" (Id at 24). And when asked what he meant by the term "jokingly," he stated "like, saying, woo, this is scary or something like that " (Id at 24-25). Flynn responded no when asked whether he discussed "this scary situation" with a supervisor, director, any producer executives" (Id at 25). He also responded "no" when asked if he ever brought to anyone's attention that it may have been the wrong lift for the project (Id at 25).

Plaintiff argues that he is entitled to summary judgment against defendants on his claims under Labor Law § 200 and for common law negligence, asserting that the evidence demonstrates that defendants had actual or constructive notice of a dangerous condition, and had the ability to supervise and control the worksite. Plaintiff also argues that summary judgment as to liability is warranted on his Labor Law 240(1) claim against defendants as the record shows that their failure to provide safety devices in violation of the statute and was a proximate cause of plaintiff's injuries. With respect to the Labor Law § 241(6) claim, plaintiff argues that he is

entitled to summary judgment under this statute since the record demonstrates as a matter of law that defendants provided plaintiff with a defective lift in violation of Industrial Code § 23-5.18 (manually propelled mobile scaffolds) and 23-9.6 (aerial baskets), and of certain provisions of the Administrative Code of the City of New York, and that such violations proximately caused plaintiff's injuries

Defendants oppose the motion, and cross move to dismiss the complaint in its entirety. With respect to the Labor Law § 200 and the common law negligence claims against Toys R Us, 767 Partners, and Boston Properties (hereinafter "the Building defendants"), defendants argue that the record establishes that these defendants did not supervise or control the means and methods of plaintiff's work and therefore these claims must be dismissed against them. In further support of their position, defendants submit the affidavit of Patrick J. Dolan (Dolan), the property manager of the property, and Mindy Clements (Clements), the vice president of Flagship Stores of Toys R Us. Dolan states that the property was utilized by Columbia for the purpose of filming the movie pursuant to a location agreement between Toys R Us and Columbia. Dolan states that, during the filming at the store, neither 767 nor Boston Properties controlled, supervised, or managed plaintiff or any members of the movie production crew. Clements states during the relevant period, Toys R Us operated the subject FAO Schwartz store, and that in May of 2010, the store was leased by Columbia for the purpose of filming the movie and a location agreement was entered into with Columbia. She states that during the subject filming, Toys R Us did not control, supervise, or manage any members of the movie production crew, including plaintiff.

As for Columbia, defendants argue that the record shows that plaintiff was its "special

employee" and thus plaintiffs' claims against it, including those for common law negligence and under Labor Law § 200, are barred as workers' compensation is plaintiff's sole remedy. As for the claims under 240(1) and 241(6), defendants argue that such claims fail as at the time of the accident plaintiff was not engaged in any of the activities covered under these statutes.

With respect to the claims against SPA, defendants argue they must all fail as the record shows that SPA did not manage the activities on the set, and had no involvement in the supervision of the crew. In further support of their position, defendants submit the affidavit of Pam Marsden (Marsden), the executive vice president of SPA, who states that SPA was not present on the set of the movie and did not have any day-to-day responsibilities on the set. Instead, according to Marsden, SPA had certain responsibilities for items such as budget, scripts, and early visual development, and had input regarding casting and some aspects of the filming. Marsden further states that SPA did not have any role in deciding or managing how the shoots would physically take place; did not decide which type of equipment would be used; did not hire the production crew members; did not control, direct or supervise the work of production crew members on the set; and did not have production crew members on the set report to SPA.

As for Kerner Entertainment, defendants argue, based on the affidavit of its shareholder and president Jordan Kerner (Kerner), that it was not involved in the day-to-day operation of the production but, instead, merely loaned Kerner's services to Columbia for the purpose of producing the movie. Kerner states that he held overall creative control of the movie, while Columbia, through its employees, had operational control of technical personnel and facilities, and that Kerner Entertainment did not control, direct, or supervise the work of the production crew. Kerner also states that Columbia directed, supervised, and controlled plaintiff's activities

on the set, determined his time and place of work, and assigned his work.

DISCUSSION

'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent "to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

Labor Law § 200 and common law negligence

It is well settled that Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe construction site" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]). "[A]n implicit precondition to this duty is that the party to be charged with that obligation have the *authority to control the activity bringing about the injury to enable it to avoid* or correct an unsafe condition" (*id.* [internal quotation marks and citation omitted]). The duty is twofold: to make and keep the place of work safe (*see Zucchelli v City Constr. Co.*, 4 NY2d 52, 56 [1958]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]). Generally, "[t]hese two

categories should be viewed in the disjunctive" (*id.*).

Where a premises condition is at issue, "a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]). In addition, an owner who supplies a defective or unsafe ladder, scaffold or other device may be liable under Labor Law § 200 if it caused the dangerous condition or had actual or constructive notice of such condition (*see Cevallos v Morning Dun Realty, Corp.*, 78 AD3d 547, 549 [1st Dept 2010]; *Chowdhury v Rodriguez*, 57 AD3d 121, 130 [2d Dept 2008]; *Higgins v 1790 Broadway Assoc.*, 261 AD2d 223, 225 [1st Dept 1999]; *see also* NY PJI 2:216).

In contrast, where the worker is injured as the result of the manner in which the work is performed, including dangerous or defective equipment provided by the plaintiff's employer, "liability under section 200 only attaches where the owner or contractor had the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012][internal citation and quotation omitted]; *see also Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). In this connection, "the duty to provide a safe place to work is not breached when the injury arises out of a defect in the subcontractor's own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work" (*Persichilli v Triborough Bridge & Tunnel Auth.*, 16 NY2d 136, 145 [1965], *rearg denied* 16 NY2d 883 [1965]). In *Persichilli*, the Court of

Appeals reasoned that, although a subcontractor must furnish safe ladders and scaffolds to its employees, a subcontractor's failure to provide safe appliances does not render the "premises" unsafe or defective (*id.* at 146).

Here, plaintiff's claims made pursuant to Labor Law § 200 relate to the manner in which plaintiff's work was performed, specifically the use of the lift, as oppose to a dangerous condition at the workplace (*see Lombardi v. Stout*, 80 NY2d 290, 295 [1992][plaintiff's accident was not caused by a dangerous condition on the premises but the manner in which a tree branch was removed]). Moreover, defendants have come forth with evidence showing that the Building defendants, SPA and Kerner did not own, supply, or operate the lift at issue or have actual or constructive notice that it was defective (*compare* Higgins *v. 1790 Broadway Assocs.*, 261 AD2d at 223 [owner of building may be liable under Labor Law § 200 where defective ladder causing plaintiff's injuries was provided by the building and there is evidence that it knew about the ladder's defective condition]). Instead, the record shows that lift was rented by Columbia from non-party Pride. There also is no evidence that these defendants participated in, or were aware of, the decision to remove the outriggers meant to stabilize the lift were removed to enable it to fit in a tight space, or were responsible for setting up the lift.

Thus, the issue is whether these defendants "exercised supervisory control over the injury-producing work" (*Cappabianca*, 99 AD3d at 144), and not whether they created or had notice of the alleged condition (*Lombardi v. Stout*, 80 NY2d at 294-295). Under these circumstances, general supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed" (*Hughes*, 40 AD3d at 306).

Moreover, notice of the injury producing condition resulting from the manner in which the work is performed is insufficient to impose liability for a plaintiff's injuries under section 200 or for common law negligence (*Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]; *Lombardi v. Stout*, 80 NY2d at 295).

Here, the Building defendants, SPA and Kerner Entertainment have made a prima facie entitling them to summary judgment based on evidence that they did not supervise or control plaintiff's work. This evidence includes testimony from the plaintiff that he was supervised and directed exclusively by Velez, an employee of Columbia, who received direction from the cinematographer, Maheux, another employee of Columbia. Moreover, neither the location agreement between Columbia and 797 Partners, nor the location agreement with Toys R Us, gave these defendants any right to supervise the film or its crew.

With respect to SPA and Kerner Entertainment, defendants have provided evidence that these defendants did not control, direct, or supervise the work of production crew members, including plaintiff. In fact, plaintiff testified that he had not heard of SPA and had not seen anyone from this company on the set, and that he did not receive any direction from Kerner.

In opposition, plaintiff has failed to controvert this showing by coming forth with evidence that these defendants supervised and/or controlled plaintiff's work. First, contrary to plaintiff's argument, that City of New York issued violations to 767 Partners arising out of the accident does not raise triable issues of fact as to whether 767 Partners had the authority to supervise and control the injury producing work. Moreover, the violations at issue,

Administrative Code §§ 28-3301.2[4] and 28-301.1,[5] which provide general safety measures and responsibilities of the owners and contractors in providing equipment, do not constitute proof that 767 Partners is liable to plaintiff (*see Plung v. Cohen*, 250 AD2d 430 [1st Dept 1998][Administrative Code provisions "which merely require an owner to maintain a building in a safe condition do not impose liability in the absence of a breach of a specific statutory provision"]). In fact, in general, the violations of the Administrative Code of the City of New York are insufficient, standing alone, to give rise to a claim for common law negligence (*see Elliott v City of New York*, 95 NY2d 730, 734 (2001)(["[a]s a rule, a violation of a State statute

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[4] The violation indicates that Administrative Code § 27-1009(a) was violated, but was amended and renumbered effective July 2008, as § 28-3301.2, entitled, Safety measures and safeguards, and provides that:

> Contractors, construction managers, and subcontractors engaged in construction or demolition operations shall institute and maintain all safety measures required by this chapter and provide all equipment or temporary construction necessary to safeguard the public and property affected by such contractor's operations.

[5] § 28-301.1, entitled "Owner's responsibilities," provides that:

> All buildings and all parts thereof and all other structures shall be maintained in a safe condition. All service equipment, means of egress, materials, devices, and safeguards that are required in a building by the provisions of this code, the 1968 building code or other applicable laws or rules, or that were required by law when the building was erected, altered, or repaired, shall be maintained in good working condition. Whenever persons engaged in building operations have reason to believe in the course of such operations that any building or other structure is dangerous or unsafe, such person shall forthwith report such belief in writing to the department. The owner shall be responsible at all times to maintain the building and its facilities and all other structures regulated by this code in a safe and code-compliant manner and shall comply with the inspection and maintenance requirements of this chapter.

that imposes a specific duty constitutes negligence per se, or may even create absolute liability. By contrast, violation of a municipal ordinance constitutes only evidence of negligence") (internal citations omitted).

With regard to SPA, plaintiff relies on invoices produced with respect to the lift to argue that the lift was "sold to Sony." (Affirmation of George Sacco ¶ 56). However, as defendants point out, there is documentary evidence showing that the lift was paid for by Columbia, and, in any event, the invoice relied on by plaintiff indicates that it was issued to Sony Pictures Entertainment, a parent company of Columbia, and not SPA. Moreover, plaintiff's reliance on Velez's deposition testimony that members of the production staff who generally ordered equipment and made arrangement to have it picked up worked for Sony, is insufficient to raise an issue of fact, particularly in the absence of evidence that SPA had actual or constructive notice of any defect in the lift, placed the lift, or participated in removal the outriggers (*see Lioce v. Theatre Row Studios*, 7 AD3d 493, 494 [2d Dept 2004][dismissing Labor Law § 200 claim against defendant on ground that it had no actual or constructive notice of defective condition of ladder]). Moreover, testimony that Sony's Vice President for production was on the set at the time of the accident does not raise an issue of fact as to SPA's control or supervision of the injury producing work (*see Putnam v. Karaco Industries Corp.*, 253 AD2d 457, 459 [2d Dept 1998]["a defendant's mere presence at the worksite is insufficient to give rise to questions of fact as to the defendant's direction and control]). In addition, Desimone's testimony that "Sony is Columbia Pictures," is insufficient alone to raise factual questions, as to SPA's role at the worksite, particularly as Columbia is affiliated with various Sony companies, including Sony Pictures Entertainment, which is Columbia's parent company, and there are no allegations or evidence

which would warrant ignoring the distinctions among these corporate entities.

As for Toys R Us, plaintiff argues that triable issues of fact exist as to its involvement on the set based on a provision in the Toys R Us Location Agreement, requiring Columbia to designate a person from Toys R Us to be present at all times for the shooting of the movie, and a filming plan attached to the Location Agreement requiring the use of two drivable genie lifts to hang and adjust lights on the pillars in the main area, and that a walk through would take place of the filming areas. Plaintiff also points to Gronell's deposition testimony that the set was regularly visited by FAO Schwarz "higher ups." However, as indicated above, the mere presence of a defendant on the work site is insufficient to provide a basis for liability under Labor Law § 200 or for common law negligence, and the other evidence cited by plaintiff fails to raise an issue of fact as to whether anyone from Toys R Us exercised supervision or control over plaintiff's work, or supplied the lift (*see Hughes v Tishman Constr. Corp.*, 40 AD3d at 307). Similarly, evidence that Kerner was present at the work site, and allegations that he was "pushing" the director to speed up the process of filming are also insufficient to controvert defendants' showing that Kerner Entertainment did not supervise or control plaintiff's work.

Accordingly, the Building defendants and SPA and Kerner Entertainment are entitled to summary judgment dismissing the claims against them under Labor Law § 200 and for common law negligence.

The remaining issue is whether Columbia is potentially liable under Labor Law § 200 and for common law negligence. While the record contains evidence that Columbia had the authority to supervise and/or control the injury producing work, including renting the lift, defendants argue that Columbia is entitled to summary judgment dismissing these and all other claims

against it on the ground that workers' compensation law is plaintiffs' exclusive remedy since plaintiff was its "special employee."

The exclusive remedy of workers' compensation applies when a plaintiff is the general employer of one employer but also the so-called special employee of another employer (*Thompson v. Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]). "A special employee is one who is transferred for a limited time of whatever duration to the service of another" (id [citation omitted]) Whether a person can be fairly categorized as a special employee is "usually a question of fact" (*Id* at 557). However, "the determination of special employment status may be made as a matter of law where particular, undisputed critical facts compel that conclusion and present no triable issues of fact." (*Id* at 558)

"Principal factors in determining the existence of a special employment relationship include who has the right to control the employee's work, who is responsible for the payment of wages and the furnishing of equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer's or general employer's business" *(Ugijanin v. 2 West 45th Street Joint Venture*, 43 AD3d 911, 913 [2d Dept 2007]). In *Thompson,* the Court of Appeals wrote that "[w]hile not determinative, a significant and weighty feature has emerged that focuses on who controls and directs the manner, details and ultimate result of the employee's work" (*Thompson v. Grumman Aerospace Corp.*, 78 NY2d at 558; *see also Warner v Continuum Health Care Partners, Inc.*, 99 AD3d 636, 636 [1st Dept 2012]).

"'A finding of special employment is justified only where the special employer exerts complete and exclusive control over the purported special employee, as to whom the general employee has relinquished all control' " (*Fox v. Brozman-Archer Realty Services, Inc.*, 266 AD2d

97, 98 [1st Dept 1999][internal citations omitted]). However, the special relationship is not defeated solely by the fact that the general employer is responsible for paying the employee's wages and workers' compensation benefits (*Adams v. North-Star Constr. Co., Inc.*, 249 AD2d 1001, 1002 [4th Dept 1998]).

In support of their argument that plaintiff is a special employee of Columbia, defendants point to the deposition testimony of plaintiff and Velez and his co-workers, that plaintiff was hired by Velez, who is an employee of Columbia, and that his work was supervised by Velez and Maheux, another employee of Columbia. Defendants also rely on evidence, including deposition testimony and the affidavit of Kerner indicating that while Entertainment Partners issued plaintiff's paychecks (and those of other Columbia employees), and paid plaintiff's workers' compensation benefits, it had no role in directing or supervising plaintiff's activities on the set.

In addition, defendants submit a "Personnel Services Agreement" ("PSA") between Columbia and Entertainment Partners, under which Columbia contracted with Entertainment Partners for services of certain personnel. Under the PSA, Columbia was responsible for the "[d]ay-to-day supervision of all personnel" and designated Columbia as "the Special Employer," and Entertainment Partners as "the General Employer," of all personnel (PSA, Section 8). The PSA also placed responsibility for work place safety on Columbia (Id., Section 9). The PSA, which defines Columbia as "PRODUCER" and Entertainment Partners and its subsidiaries as "EMPLOYER, " states:

> "EMPLOYER shall have the right to direct, control and supervise the Personnel supplied hereunder; provided, however, that such direction, control, and supervision shall be consistent with and subject to any instructions or

> requirements of the PRODUCER as hereinafter provided and consistent with the applicable collective bargaining agreements and/or personal services contracts, and provided further, that in the event of disagreement, PRODUCER'S decision shall be final. Day-to-day supervision and direction of Personnel in the performance of their services for the benefit of the PICTURE shall be the responsibility of the PRODUCER. In this regard, PRODUCER shall be the "Special Employer' of all Personnel paid by the EMPLOYER pursuant to this Agreement, and EMPLOYER shall be the "General Employer" of all such Personnel."

(Id., Section 8).

Furthermore, defendants point out that Columbia was identified as an employer by the Occupational Safety and Health Administration (OSHA) in connection with OSHA's issuance of a citation against Columbia arising out of plaintiff's accident.

In opposition, plaintiff submits his affidavit in which he which states:

> "I am a freelance electrician and a member of the Local 52 International Alliance of Stage and Theater Employees. At the time of the accident, I was employed by Entertainment Partners only and not by any of the defendants."

Moreover, plaintiff points out that while the PSA identifies that Columbia as a "Special Employer," it also states that Entertainment Partners retains a right to direct, control, or supervise its personnel, which would include plaintiff. Plaintiff also submits his tax returns and W-2 statements for 2010 and his workers' compensation records, and pay stubs which all identify Entertainment Partners as his employer. In addition, plaintiff points to his deposition testimony that he worked as a freelance electrician and that Entertainment Partners employed him and Velez.

It is undisputed that Entertainment Partners was plaintiff's general employer and issued plaintiff's paychecks and provided him with workers' compensation coverage. At issue here,

however, is whether it can be said, as a matter of law, that Columbia was plaintiff's special employer. As a preliminary matter, that the PSA identified Columbia as the "Special Employer," of all personnel involved in the filming is not dispositive of this issue, particularly as the PSA also provides that Entertainment Partners shall retain the right to direct, control and supervise its personnel (*see Thompson v. Grumman Aerospace Corp.*, 78 NY2d at 558, [noting that when a plaintiff is not a party to an agreement between employers, "such agreement may not been determinative of the issue of special employment....[so as] to displace judicial assessment of the employee's actual relationship with [a defendant]").

Next, based on plaintiff's deposition testimony, and the statements in his affidavit that he was a freelance electrician and that his employer was Entertainment Partners, factual questions exist as to whether plaintiff was aware of, and consented to, a special employee relationship with Columbia (*see Bellamy v Columbia Univ.*, 50 AD3d 160, 166 [1st Dept 2008]). Specifically, as the Appellate Division, First Department has written:

> "employment, like any other contract, presupposes understanding. The new relation cannot be thrust upon the servant without knowledge or consent. He must understand that he is submitting himself to the control of a new master . . . Understanding may be inferred from circumstances, but understanding there must be. *Common-law rights and remedies are not lost by stumbling unawares into a new contractual relation.* There can be no unwitting transfer from one service to another.
>
> * * *
>
> While there are, of course, cases in which a finding of special employment may be made on summary judgment, the highly fact-sensitive nature of the issue, combined with the presumption that general employment continues and the formidable burden placed on a summary judgment movant to demonstrate the absence of any triable issue of fact, militate against summary adjudication. Circumspection is also appropriate since a finding of special employment may function to deprive an injured plaintiff of a common-law remedy for negligence

> based on a categorization having nothing to do with the merits of the plaintiff's claim."

Id. at 166-169, 169 (citations and quotations omitted).

Next, evidence that plaintiff was hired by Velez, who had autonomy over his own work, and supervised and controlled plaintiff, including with respect to the injury producing work, also raises issues of fact as to whether plaintiff was Columbia's special employee. (*see Bautista v. David Frankel Realty, Inc.*, 54 AD3d 549 [1st Dept 2008]). In *Bautista*, the First Department reversed the trial court's grant of summary judgment in favor of the defendant managing agent, holding that the record did not establish that the plaintiff, who was a porter in the building, was the managing agent's special employee as a matter of law, where the record showed that plaintiff reported to the building's superintendent. While the record contained evidence that the defendant supervised and controlled the superintendent's work, the court found that evidence that the superintendent exercised autonomy in performing his job, including his testimony that he supervised seven other men, including the porter, raised issues of fact as to whether the superintendent, and by extension the plaintiff, were special employees of the managing agent.

Here, like the superintendent in *Bautista*, there is evidence that Velez was given authority over his own work and that of plaintiff, including testimony from Meheux that although Velez reported to him, Velez was his own supervisor as he ran his own department, and evidence that Velez hired plaintiff. Moreover, with regard to the work performed by plaintiff on the accident date, while Meheux testified that he told Velez to address problems with the subject light, he also testified that he "left it with him (i.e. Velez) to decide what he wanted to do." The record also shows that Velez alone instructed plaintiff on the date of the accident to "tweak" the

light, which was attached to a column approximately thirty feet off the ground.

Under these circumstances, the court finds that issues of fact exist as to whether Columbia "control[led] and direct[ed] the manner, details, and ultimate result," of Velez's work such that it was his special employer and therefore the special employer of plaintiff. *(Bautista v. David Frankel Realty, Inc.*, 54 AD3d at 553 [internal citation quotation omitted]).

Accordingly, as it cannot be said that plaintiff was a special employee of Columbia as a matter of law, that part of plaintiff's motion seeking to grant summary judgment on their claims for common-law negligence and violation of Labor Law § 200 as against Columbia, and to strike its workers' compensation defense is denied, as is that part of defendants' cross motion seeking to dismiss the claims for common-law negligence and violation of Labor Law § 200 against Columbia.

Labor Law § 240 (1)

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

> [a]ll 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.

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-

225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

The threshold question here concerns whether at the time of the accident plaintiff was engaged in "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure," as provided by the statute (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 880-881 [2003]; *Panek v County of Albany*, 99 NY2d 452, 457 [2003]). The word "'structure,' for purposes of Labor Law § 240(1), as any production or piece of work artificially built up or composed of parts joined together in some definite manner. " (*Joblon v Solow*, 91 NY2d 457, 464 [1998][internal citation and quotation omitted]). Defendants do not dispute that there was work performed on a structure. However, they assert that the work performed by plaintiff did not involve "altering" or "repair" or any of the other activities enumerated under Labor Law § 240(1).

With respect to whether the work performed by plaintiff falls within the statute's definition of "altering," "the court must examine the totality of the work done on the project to determine whether it resulted in a significant physical change to the building or structure. Where the work does not involve a significant or permanent physical change, dismissal of a Labor Law § 240 (1) claim is appropriate" (*Maes v. 408 W. 39, LLC*, 24 AD3d 298, 300 [1st Dept 2005], *lv denied* 7 NY3d 716 [2006]). Thus, when a plaintiff's activities result in a change to outward appearance, it is more akin to "a cosmetic maintenance or a decorative modification," than to altering for the purposes of Labor Law § 240(1) (*Munoz v. DJZ Realty, LLC*, 5 NY3d 747, 748 [2005]).

Here, defendants have made a prima facie showing that plaintiff's activity did not result significant physical change to a building or structure, such as to constitute an altering for the

purposes of Labor Law § 240(1). Specifically, they point to evidence that at the time of the accident, plaintiff was adjusting a previously installed light and that his work did not involve any tools and took only a few minutes. Plaintiffs have not controverted this showing with any evidence suggesting that plaintiff's work entailed any change to a building or structure. Accordingly, it cannot be said that the work performed by plaintiff as the time of the accident constituted "an alteration" under Labor Law § 240(1) (*see Royce v. DIG EH Hotels,* LLC, 139 AD3d 567 [1st Dept 2016][plaintiff, a lighting engineer, who fell off a ladder while attempting to replace a gel that altered the color of one light on a temporary lighting stand in connection with assembling staging and lighting equipment in a hotel ballroom was not covered by Labor Law where there was no evidence that the work "altered or caused a substantial or, indeed any, physical change to the building"]; Adair *v. Bestek Lighting and Staging Corp.*, 298 AD2d 153, 153 [1st Dept 2002][holding that the activity performed by plaintiff stagehand when she was injured while focusing lights above a stage in preparation for a performance when the "man-lift" on which she was standing fell over did not constitute the "'erection' or 'altering' of a structure since there was no "physical change in the composition of the... structure"][internal citations and quotations omitted]); *Lioce v. Theatre Row Studios*, 7 AD3d at 493[plaintiff injured when he fell from unsecured ladder as he was installing a light was covered under Labor Law § 240(1) as activity "did not constitute the alteration of a building']); *Tanzer v Terzi Prods.*, 244 AD2d 224 [1st Dept 1997][plaintiff, who was injured when standing on a ladder while "temporarily decorating a building by attaching scenery and other objects" to change its appearance for making a television film, was engaged in work that not covered by the Labor Law as it "did not affect the structural integrity of the building']).

As for whether plaintiff was "repairing" within the meaning of the statute at the time of the accident, the court notes that "although repairing is among the enumerated activities, [courts] have distinguished this from 'routine maintenance,'" which falls outside the purview of the statute (*Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003] [citation omitted]; *Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 53 [2004]; *Prats v Port Auth of N.Y. & N.J.*, 100 NY2d at 882)."'[T]o constitute a "repair' under Labor Law § 240(1), there must be proof that the . . . object being worked upon was inoperative or not functioning properly" (*Kostyo v. Schmitt and Behling,* 82 AD3d 1575, 1576 [4th Dept 2011], quoting *oad v Southern Elec. Intl.*, 263 AD2d 654, 655 [3rd Dept 1999]). Moreover, work that involves merely "replacing components that require replacement in the course of normal wear and tear" constitutes "routine maintenance," not "repair" *(Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]). Thus, it has been held that changing a light bulb on an illuminated sign is not "repairing" within the meaning of the Labor Law since "[a]n illuminated sign with a burnt out lightbulb is not broken and does not need repair" (*Smith v. Shell Oil Co.*, 85 NY2d 1000, 1002 [1995]). On the other hand, an electrician was found to have been engaged in "repairing" when his "work, viewed in its totality ...involved much more than simply changing a lightbulb; it required replacement of a photocell, dismantlement of lamp housings and their ultimate rebuilding, replacement of ballasts and bulbs, and the disconnection and reconnection of termination wiring to power sources" (*Caban v. Maria Estela Housing Associates, L.P.*, 63 AD3d 639 [1st Dept 2009][internal citation omitted]).

In this case, defendants have made a prima facie case that plaintiff not engaged in repair of the light at the time of the accident, based on evidence, including plaintiff's testimony, that at

the time of the accident plaintiff was "refocusing" or "tweaking" the light and/or "removing the diffusion on the light" and that no tools were required for this work, which took about a minute or two (*see Saint v. Syracuse Supply Co.*, 25 NY3d 117, 126 [2015][noting that cases finding that an injured working was not covered under section 240(1) find that the worker's activity involved "routine maintenance" or "simple tasks, involving minimal work"]; *Downes v. Boom Studio, Inc.*, 248 AD2d 150 [1st Dept 1998][plaintiff, who fell off a ladder while adjusting a paper backdrop and was injured was not engaged in altering or repairing a building or structure]).

Plaintiff has failed to raise an issue of fact in this regard. While Maheux testified that at the time of the accident, "plaintiff was fixing a lamp that was no longer performing correctly [and that] my recollection is that the lamp had ceased to work," such testimony is insufficient to show that plaintiff was engaged in "repair" work when he fell, particularly as his general description of plaintiff works including his testimony that plaintiff was sent to "adjust" the light is not inconsistent with plaintiff's more detailed description of his work, as adjusting and tweaking the light.

Moreover, as the record is devoid of evidence that plaintiff's work was part of ongoing set construction, contrary to plaintiff's position, it cannot be said that work performed by plaintiff can be considered a repair since it was necessary to larger construction project (*see Adair v. Bestek Lighting and Staging Corp.*, 298 AD2d at 153, n.1 [focusing stage lights in preparation for a performance on a fully constructed stage cannot be said to be integral part of construction of a stage]; *compare Melendez v. Abanno Bldg. Maintenance, Inc.*, 17 AD3d 147 [1st Dept 2005][plaintiff's inspection work fell within the purview of Labor Law section 240(1) where it was necessary to ongoing construction]). Nor is there evidence that plaintiff's work on the light

was part of a larger assignment related to its repair (*compare Fitzpatrick v. State of New York*, 25 AD3d 755, 757 [2d Dept 2006][holding that where plaintiff's replacement of a photo cell "was contemporaneous with the replacement of the lighting fixture and performed by the same party... it would not be consistent with the spirit of the statute to isolate the work being performed by [plaintiff] at the moment of his injury (replacement of the photo cell) and ignore the general context of his work, which encompassed activity protected under the statute"]). Instead, the record shows that plaintiff's adjustment of the light was a discrete task related to the routine maintenance of lights on a movie set.

As the activity performed by plaintiff at the time of the accident does not fall within the purview of the statute, defendants are entitled to summary judgment dismissing the claims against them under Labor Law § 240(1), and plaintiff's motion for summary judgment as to liability on this claim must be denied.

Labor Law § 241(6)

Plaintiff also asserts a claim based on the violation of Labor Law § 241 (6). Labor Law § 241 (6) provides, in pertinent part:

> "[a]ll contractors and owners and their agents, . . . 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 . . . ."

Claims under Labor Law § 241 (6) are properly dismissed where plaintiff's work "was not done in the context of construction, demolition or excavation work" (*Rajkumar v Budd*

Contr. Corp., 77 AD3d 595, 595 [1st Dept 2010] [plaintiff's Labor Law § 241 (6) claim dismissed where the work involved the manufacture and hanging of a 300-pound mirror in a hotel lobby]). The Court of Appeals has held that when looking to determine whether the work being conducted constitutes "construction, excavation, or demolition" pursuant to Labor Law § 241 (6), the court should look at the definition of "construction work" as defined by the Industrial Code (*Saint v Syracuse Supply Co.*, 25 NY3d at 129).

The Industrial Code defines "construction work" as:

> "[a]ll work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures, whether or not such work is performed in proximate relation to a specific building or other structure and includes, by way of illustration but not by way of limitation, the work of hoisting, land clearing, earth moving, grading, excavating, trenching, pipe and conduit laying, road and bridge construction, concreting, cleaning of the exterior surfaces including windows of any building or other structure under construction, equipment installation and the structural installation of wood, metal, glass, plastic, masonry and other building materials in any form or for any purpose."

12 NYCRR 23-1.4 (b) (13).

The Court of Appeals has stated that "[t]he Industrial Code definition of 'construction work,' which includes maintenance, must be construed consistently with this Court's understanding that section 241(6) covers industrial accidents that occur in the context of construction, demolition and excavation" (*Nagel v. D& R Realty Corp.*, 99 NY2d 98, 103 [2002]; *see also Caban v. Maria Estela Houses I Associates, L.P.*, 63 AD3d at 640 (noting that "[t]he Industrial Code definition of 'construction work' [12 NYCRR 23–1.4(b)(13)], which includes maintenance [and repair], must be construed consistently with this Court's understanding that section 241(6) covers industrial accidents that occur in the context of construction, demolition and excavation"][internal citations and quotations omitted]).

As plaintiff was not performing construction work, including altering or repairing a building or structure at the time of his injuries or performing demolition or excavation work, defendants are entitled to summary judgment dismissing plaintiffs' Labor Law § 241(6) claim (*see Lioce v. Theatre Row Studios*, 7 AD3d at 493-494 [finding that plaintiff, who was hired to design a lighting plan and install lights for a theatrical production, and was injured as he was installing a light for the production was not engaged in "construction work," as defined by the Industrial Code (12 NYCRR 23-1.4 [b] [13]), nor was he engaged in demolition or excavation work"]). Thus, plaintiff's motion for summary judgment as to liability on this claim must be denied.

Plaintiff's Motion to Amend

Plaintiff moves, pursuant to CPLR 3025, to amend the complaint to include causes of action for gross negligence and punitive damages based primarily on the testimony of Flynn, who, as indicated above, was the rigger grip in charge of cameras and lighting for the movie. Plaintiff notes that Flynn's deposition was taken four months after he moved for summary judgment. In support of its motion to amend, plaintiff relies on, Flynn's testimony that he was knew when he visited the site before the filming of the movie that lights would need to be placed near the escalators, in an area too narrow for the genie lift, that a counterbalance was needed for the lift during his use, and that outriggers should not be removed and the lift should never be moved while someone is on it, and that a different kind of lift could have accommodated the narrow area where plaintiff was working. Plaintiff also cites the testimony of Velez that the crews were working through the night in an effort to complete the movie, as well as other evidence that the movie was on a tight schedule. Based on this evidence, plaintiff argues that

defendants knew or should have been aware that the lift was not the proper lift for the task, "but proceeded to use it due to filming restraints and knowingly placed plaintiff's safety at risk" (Affirmation of George Sacco in Support Motion to Amend ¶ 23) .

Plaintiff also points to various evidence that he argues demonstrates that defendants were grossly negligent in permitting him to use the lift, which was the only kind available on the set, including, inter alia, the filming plan which called for the use of drivable lifts instead of the "push around Genie lifts" like the one used by plaintiff, proof that scissor lifts were ordered after plaintiff's accident, and the statement in the genie lift's operating manual that the lift should not be moved while the platform is raised, and that the outriggers were not to be adjusted or removed when the platform was occupied.

"Leave to amend a pleading should be 'freely given' (CPLR 3025[b]) as a matter of discretion in the absence of prejudice or surprise" (*Zaid Theatre Corp. v. Sona Realty Co.*, 18 AD3d 352, 355-356 [1st Dept 2005][internal citations and quotations omitted]). That being said, however, "in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted" (*Eighth Ave. Garage Corp. v. H.K.L Realty Corp.*, 60 AD3d 404, 405 [1st Dept], *lv dismissed*, 12 NY3d 880 [2009]). At the same time, leave to amend will be granted as long as the proponent submits sufficient support to show that proposed amendment is not "palpably insufficient or clearly devoid of merit"(*MBIA Ins Corp. v. Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010][citation omitted]). Here, the court finds that there is no prejudice from any delay in seeking the amendment. Accordingly, the only issue concerns whether the record is sufficient to permit the addition of a cause of action for gross negligence and a demand for punitive damages.

In determining whether it is appropriate to include a claim for gross negligence the court must consider whether is sufficient proof "that would support a finding that defendants' conduct evinced a "conscious disregard of the rights of others or [was] so reckless as to amount to such disregard" (*Wing Wong Realty Corp. v Flintlock Const. Services, LLC*, 71 AD3d 537 [1st Dept 2010]). Here, the record does not provide a basis for amending the complaint to include a claim for gross negligence. Specifically, while the lift was used before at the site, there is no evidence that it previously malfunctioned or tipped, that workers were knowledgeable that plaintiff would be injured if he utilized it, or that discussions took place with anyone in which they were warned that the lift was the wrong one for the project and which safety precautions were disregarded. Thus, in view of the absence of evidence of that defendants consciously appreciated the risk posed by the lift, the motion to amend to add a claim for gross negligence must be denied.

With respect to the proposed amendment to add a demand for punitive damages, the Court of Appeals has held that "the purpose of punitive damages is solely to punish the offender and to deter similar conduct on the part of others. Punitive damages are not intended to compensate or reimburse the plaintiff" (*Zurich Ins. Co. v Shearson Lehman Hutton*, 84 NY2d 309, 316 [1994][citations omitted]). Claims for punitive damages require "evidence of conduct demonstrating such a high degree of moral turpitude and wanton dishonesty as to imply criminal indifference to civil obligations which is aimed at the public, generally" *(Lavanant v General Accident Ins. Co.*, 212 AD2d 450, 451 [1st Dept 1995]). As there is no evidence of "misconduct by evidence of misconduct by the [defendants] that would meet the very high threshold of moral culpability... required for an award of punitive damages" (*Heller v. Louis Provenzano, Inc.*, 303 AD2d 20, 25 [1st Dept 2003]), plaintiff's request to add a demand for punitive damages must be

denied.

Defendants' Request to Seal

Defendants seek to permanently seal the "Personnel Services Agreement" ("PSA") entered into between Entertainment Partners and Columbia on the ground that public dissemination of this document may presents "a potential business injury to Columbia." The agreement was exchanged under the terms and conditions of a "Stipulation and Order for Production and Exchange of Confidential Documents." Moreover, by order dated June 24, 2015, the court restricted access to the document which is filed under document numbers 72 and 88 pending decision on defendants' motion to permanently seal the document.

Defendants argue that the PSA should be sealed as it is "a highly confidential document containing competitively sensitive business strategies of both contracting parties [and] contains financial information and strategies" (Defendants' Memorandum of Law, at 47). Defendants assert that therefore "the disclosure of the document may have a drastically harmful effect on Columbia because it can be used by its competitors or other vendor companies in future negotiations" (Id). Defendants further maintain that, while " the proprietary terms and conditions of this agreement are important to the contracting parties, the public does not have any strong interest in having any access to [the document]" (Id at 47-48).

Under New York law, there is a broad presumption that the public is entitled to access to judicial proceedings and court records (*see Mancheski v Gabelli Group Capital Partners*, 39 AD3d 499, 501 [2d Dept 2007]; *Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.*, 28 AD3d 322, 324 [1st Dept 2006]). However, the public's right to access, is not absolute (*See Danco Labs v Chemical Works of Gedeon Richter*, 274 AD2d 1, 6 [1st Dept 2000]).

Section 216.1 (a) of the Uniform Rules for New York State Trial Courts states, in relevant part:

> "[e]xcept where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interest, of the public as well as of the parties."

22 NYCRR 216.1 (a).

"[A] sealing order should clearly be predicated upon a sound basis or legitimate need to take judicial action" *(Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.*, 28 AD3d at 325) "A finding of 'good cause' presupposes that public access to the documents at issue will likely result in harm to a compelling interest of the movant" *(Mancheski v Gabelli Group Capital Partners*, 39 AD3d at 502).

Of relevance here it has been held that "[p]roprietary information, in the nature of current or future business strategies which are closely guarded by a private corporation, is akin to a trade secret, which, if disclosed, would give a competitor unearned advantage." (*Mancheski v Gabelli Group Capital Partners*, 39 AD3d at 503. Moreover, the First Department has recognized that "[t]he common-law right to inspect and copy judicial records is not absolute, particularly where such records are a source of business information which might harm a litigant's competitive standing, and the determination of whether access to such records is appropriate is best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case" (*In the Matter of Crain Communications, Inc. v. Hughes*, 135 AD2d 351, 351 [1st Dept 1987], *aff'd* 74 NY2d 626 [1989)][internal citations omitted]. However, a motion to seal will be denied in the absence of an affidavit or other proof to support a

finding that "as to why the documents are so confidential or sensitive that public access to them should be restricted" (*Mosallem v. Berenson*, 76 AD3d at 350).

Under this standard, the motion to seal is denied, with leave to renew upon an affidavit from a personal with knowledge demonstrating a basis for finding that disclosure of the PSA would be harmful to competitive advantage of one or both the contracting parties and/or that the PSA contains proprietary information akin to a trade secret. In this regard, the court notes that a good cause basis for sealing is not evident from a review of the PSA, which appears to be a standard personnel agreement, and its attachment as to billing rates is extensively redacted. Therefore, as defendants fail to demonstrate the required good cause for the sealing of the PSA, their cross motion to seal it is denied, although without prejudice to renewal, as directed below.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion seeking summary judgment as to their causes of action for negligence and violations of Labor Law §§ 240 (1), 200, and 241 (6) is denied; and it is further

ORDERED that plaintiff's motion to amend the complaint is denied; and it is further

ORDERED that defendants Toys R Us-Delaware Inc. i/s/h/a FAO Schwartz Company, 767 Fifth Partners LLC., Boston Properties, Inc., Kerner Entertainment Company, and Sony Pictures Animation's cross motion for summary judgment seeking to dismiss the cause of action for common law negligence and a violation Labor Law § 200 is granted, except as to Columbia against which the action shall continue; and it is further

ORDERED that defendants Toys R Us-Delaware Inc. i/s/h/a FAO Schwartz Company,

767 Fifth Partners LLC., Boston Properties, Inc., Kerner Entertainment Company, Columbia Pictures Industries, Inc., and Sony Pictures Animation's cross motion seeking summary judgment dismissing the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6) is granted; and it is further

ORDERED defendants' cross motion for an order permanently sealing the "Personnel Services Agreement" is denied with leave to renew upon an affidavit of person(s) with knowledge to support their assertion that the information contain in the agreement would be harmful to the contracting parties as its release would result in the disclosure of sensitive business information or otherwise harm their competitive advantage such that would warrant sealing; and it is further

ORDERED that such motion to renew must be made, by order to show cause, within 45 days of efiling this order, or an order will be issued directing that the documents be unsealed; and it is further

ORDERED that the court's June 24, 2015 order directing that access be restricted to document numbers 72 and 88 shall remain in effect pending further order of the court; and it is further

ORDERED that the time for plaintiff to file his note of issue is extended to August 15, 2016, and upon filing the note of issue, the parties are directed to proceed to mediation forthwith.

Dated: July 25, 2016

J.S.C.
HON. JOAN A. MADDEN
J.S.C.