UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WALTER CARBERRY and RITA CARBERRY Plaintiffs v. INTEGRAL CONSTRUCTION CORP., FIDUCIARY TRUST CO., INC. AND THOMAS C. BAER, INC., Defendants INTEGRAL CONSTRUCTION CORP., Third-Party plaintiff v. J.P. FOREST ELECTRIC CORP., Third-Party Defendant J.P. FOREST ELECTRIC CORP. Second Third-Party Plaintiff v. HALCON CORPORATION Second Third-Party Plaintiff	94 Civ. 7911 (BSJ) **MEMORANDUM & ORDER**

Barbara S. Jones, United States District Judge:

Defendants Integral Construction Corporation ("Integral") and Fiduciary Trust Company ("Fiduciary") have moved for summary judgment on plaintiff's claims asserted under common law and under New York labor law §§ 200, 240, and 241(6). For the reasons stated below, defendants' motion is granted.

BACKGROUND

Plaintiff stands 6'2" tall and weighs 280 pounds. On May 6, 1994, plaintiff was employed as an electrician by third-party defendant J.P. Forest Electric Corporation ("Forest"), and was asked to install task lighting for secretarial stations in offices leased by Fiduciary. The lights were to be located under shelves that hang over individual desks.

Fiduciary had hired Integral as general contractor to renovate its offices. Part of the renovations included provision of lighted secretarial stations that were manufactured by second third-party defendant Halcon Corporation ("Halcon") and assembled by defendant Thomas C. Baer, Inc. ("Baer"). Integral, in turn, had subcontracted with Forest to install the station lighting.

To install the lighting over a particular desk, plaintiff laid on the desk with his back, and placed his arms under the light shelf. Deposition of Walter Carberry, taken May 10, 1995, at pp. 27, 36-37, 90-92 ("Carberry Dep."). The desk collapsed and fell to the ground with plaintiff still on top of it. Carberry Dep., at pp. 27, 97.

Plaintiff contends that the desk collapsed either because (i) plaintiff's weight exceeded the desk's design limitations, (ii) the desk was improperly assembled, or (iii) some combination of these factors.

Plaintiff filed this suit on November 2, 1994, claiming that defendants Integral and Fiduciary were negligent and failed to provide protective devices and a reasonably safe workplace pursuant to New York Labor Law §§ 200, 240(1), and 241(6). Integral and Fiduciary have moved for summary judgment on these claims; Baer and Halcon did not join in the motion.

DISCUSSION

I. Summary Judgment Standards

Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The movant bears the burden of establishing the absence of any genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986. "In determining whether there is a genuine issue as to any material fact, the court is required to resolve all ambiguities and draw all inferences in favor of the party against whom summary judgment is sought." LaFond v. General Physics Services Corp., 50 F.3d 165, 175 (2d Cir.1995). With these principles in mind, this Court turns to plaintiff's various Labor Law claims.

II. Labor Law § 240(1)

Plaintiff has filed suit under Labor Law § 240(1), which requires that all contractors and owners who contract for the "erection [or] altering ... of a building or structure" must furnish necessary scaffolds or devices so constructed as to give proper protection to those working. N.Y. Lab. Law § 240(1).

As an initial matter, defendants maintain that plaintiff's activity did not constitute "erection" or "alteration" within the meaning of the statute. This Court, however, finds to the contrary. Plaintiff was installing lights on secretarial stations, which constituted part of the overall office renovation. Pl.Ex. C. Thus, plaintiff's work was "erection" or "alteration" within the purview of

Labor Law § 240.[1]

The next issue concerns plaintiff's argument that determination of the scope and applicability of § 240(1) is a jury question. This, too, is incorrect. The law is clear that the court should decide "whether the circumstances surrounding plaintiff's work subjected him to the sort of risk which section 240(1) was intended to obviate." Rocovich, 78 N.Y.2d at 514-15, 577 N.Y.S.2d 219, 583 N.E.2d 932 (on motion for directed verdict).[2] See, e.g., Elezaj v. P.J. Carlin Construction Company, 225 A.D.2d 441, 639 N.Y.S.2d 356, 358 (App.Div.1996) (at summary judgment stage, court determined whether § 240 applied based on engineer's opinion and evidence in the record); White v. Sperry Supply and Warehouse, Inc., 225 A.D.2d 130, 649 N.Y.S.2d 236, 238 (App.Div.1996) (on motion for summary judgment, court distilled whether § 240 was intended to protect against particular type of hazard encountered by plaintiff); Lawrence v. HRH Construction Corp., 165 Misc.2d 690, 629 N.Y.S.2d 976, 978 (App.Div.1995) (on summary judgment motion, court determined that plaintiff's fall was not within the purview of § 240); Brooks v. City of New York, 212 A.D.2d 435, 622 N.Y.S.2d 757, 758 (App.Div.1995) (on summary judgment motion, court determined plaintiff was not exposed to elevation related risk);

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[1] Defendants' argument to the contrary is unavailing. Defendants rely on cases that involve mere maintenance of an employer's premises, rather than projects connected to ongoing construction or renovation as in the case at bar. See Giambalvo v. National Railroad Passenger Corp., 850 F.Supp. 166 (E.D.N.Y.1994) (replacement of lightbulb in spot light); Smith v. Shell Oil Co., 85 N.Y.2d 1000, 630 N.Y.S.2d 962, 654 N.E.2d 1210 (1995) (changing lightbulb); Cosentino v. Long Island Railroad, 201 A.D.2d 528, 607 N.Y.S.2d 720 (App.Div.1994) (splicing cables for celebration at subway station); Manente v. Ropost, Inc., 136 A.D.2d 681, 524 N.Y.S.2d 96 (App.Div.1988) (replacing lightbulb).

[2] Once it is determined that § 240(1) applies, however, there lies a question of fact as to whether the device used provided proper and sufficient protection. See. e.g., Gange v. Tilles Investment Co., 220 A.D.2d 556, 632 N.Y.S.2d 808, 810 (App.Div.1995).

Smith v. Artco Industrial Laundries, Inc., 222 A.D.2d 1028, 635 N.Y.S.2d 884 (App.Div.1995) ("The court properly determined that the work involved a risk related to differences in elevation under Labor Law § 240(1)."); Soles v. Eastman Kodak Company, 162 Misc.2d 406, 616 N.Y.S.2d 871, 873 (Sup.Ct.1994) ("[W]hether or not a given fact pattern gives rise to section 240(1) liability has always--properly--been determined by the court."), aff'd 629 N.Y.S.2d 610 (App.Div.1995). See also Rodriguez v. Margaret Tietz Center for Nursing Care, Inc., 84 N.Y.2d 841, 843-44, 616 N.Y.S.2d 900, 640 N.E.2d 1134 (1994) (reversing damages award and determining that plaintiff was not exposed to extraordinary elevation risk).[3] This Court now turns to decide the applicability of § 240(1).

Section 240(1), known as the "Scaffolding Law," requires contractors and owners to "furnish or erect, or cause to be furnished or erected for the performance of [erection or alteration of a structure], scaffolding ... and other devices" to give proper protection to workers at the site. N.Y. Lab. Law § 240(1). The

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[3] Authorities cited by plaintiff offer no help. In both Kennedy v. McKay, 86 A.D.2d 597, 446 N.Y.S.2d 124 (App.Div.1982), and Vincenty v. Davis, 43 A.D.2d 534, 349 N.Y.S.2d 376 (App.Div.1973), the courts assumed or decided that § 240(1) was applicable; they held only that questions concerning the quality of devices provided by owners are for the jury. In Kennedy, the elevation risk was clear because a ladder had been provided; the jury was to determine whether the plaintiff had to stand on a box top rather than on a ladder. Similarly, in Vincenty the jury was to determine whether the "scaffolding" furnished was safe. To the extent that Carnicelli v. Miller Brewing Company, 191 A.D.2d 980, 594 N.Y.S.2d 925, 926 (App.Div.1993) holds that applicability of § 240(1) is a question of fact, the decision has been criticized and has never been followed for this proposition. See Soles, 616 N.Y.S.2d at 873 (noting that the facts were not disputed in Carnicelli and refusing to conclude that "the Fourth Department intended to submit such questions of law to the finders of fact"). Finally, in Reale v. H.B.S.A. Industries, Incorp., 649 N.Y.S.2d 564 (App.Div.1996), cited by plaintiff, the factual dispute pertained to how the accident itself happened: plaintiff testified that he fell almost four feet while co-workers testified the fall was only 12 or 18 inches. Reale, 649 N.Y.S.2d at 554.

Scaffolding Law was adopted to provide protection against certain risks--those created by differences in elevation that are:

> inherent in the particular task because of the relative elevation at which the task must be performed or at which materials or loads must be positioned or secured. The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured.

Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509, 514, 577 N.Y.S.2d 219, 583 N.E.2d 932 (1991). The statute evinces a clear legislative intent to provide "exceptional protection" against "special hazards" that "are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured." Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 501, 601 N.Y.S.2d 49, 618 N.E.2d 82 (1993).

Plaintiff was not injured while using a scaffold or device constructed to assist him with work at a different elevation. Rather, he was lying on the very furniture that he was hired to renovate. Neither Integral nor Fiduciary provided the desk as a tool of plaintiff's work. As plaintiff himself stated, he was never instructed to lay across the desk to install the lighting. Carberry Dep., at pp. 43, 96. Roy Lundquist, plaintiff's supervisor at Forest, explained that he did not demonstrate a particular method for installation, and that he left it "up to the individual electrician" to determine a procedure. Deposition of Roy Lundquist, taken June 12, 1995, at pp. 17, 30 ("Lundquist Dep.").

The facts in this case are similar to those in Pennacchio v. Tedmick Corp., 200 A.D.2d 809, 606 N.Y.S.2d 448 (App.Div.1994), in which plaintiff was injured while walking on a permanent stairway that

collapsed. Assembling the stairway was part of the overall construction job for which plaintiff was hired. The court distinguished between a temporary ladder and a permanent but defective device, and concluded that § 240(1) did not apply: "[t]he permanent nature of the stairway at issue here precludes its consideration as the functional equivalent of a ladder or as a tool of plaintiff's work." Pennacchio, 606 N.Y.S.2d at 449. See also Monroe v. N.Y. State Electric & Gas Corp., 186 A.D.2d 1019, 588 N.Y.S.2d 483, 484 (App.Div.1992) (§ 240(1) does not apply where plaintiff falls on a permanently installed stairway); Cliquennoi v. Michaels Group, 178 A.D.2d 839, 577 N.Y.S.2d 550, 551 (App.Div.1991) (permanent staircase not a tool for purposes of § 240(1)).

Moreover, the New York Court of Appeals has repeatedly held that § 240(1) does not encompass every hazard, danger or peril connected in some tangential way to the effects of gravity. Mosher v. County of Rensselaer, 649 N.Y.S.2d 94, 95 (App.Div.1996). Plaintiff was installing a light fixture on a shelf that was, at most, five feet from the ground. To do so, he lay across a desk standing approximately three feet high. Carberry Dep., at pp. 23, 38. This work did not require—nor did any supervisors specifically advise-- plaintiff to ascend any heights. Other electricians had installed the lights by standing, sitting, or squatting down. Lundquist Dep. at p. 30; Deposition of M. Marsale, taken September 20, 1995, at p. 99 ("Marsale Dep."). See Rodriguez, 84 N.Y.2d at 83-84, 614 N.Y.S.2d 972, 638 N.E.2d 511 (worker placing beam onto the ground from seven inches above his head was "not faced with the special elevation risks contemplated by [§ 240]."); Brooks, 622 N.Y.S.2d at 758 (plaintiff not exposed to elevation-related risks contemplated by § 240(1) when required to reach 10 and 1/2 inches above his head to grout tile); Klien v. County of Monroe, 219 A.D.2d 846, 632 N.Y.S.2d 343, 344 (App.Div.1995) (§ 240(1) inapplicable where

metal window curtain fell from concrete wall three feet high, because it was "at the same level as the work site").[4]

Accordingly, because the desk was not a tool to assist plaintiff in completing work at a different elevation, Labor Law § 240(1) does not apply. Defendants' motion for summary judgment on plaintiff's claim asserted under Labor Law § 240(1) is granted.

III. Labor Law § 241(6)

To establish a prima facie cause of action under Labor Law § 241(6), plaintiff is required to show that defendants violated a specific Industrial Code rule or regulation "mandating compliance with concrete specifications." Ross, 81 N.Y.2d at 505, 601 N.Y.S.2d 49, 618 N.E.2d 82. Plaintiff points to Industrial Code § 23-5.1, "General provisions for all scaffolds," which requires, inter alia, that all scaffolding have the ability to bear four times the maximum weight to be placed on it. 12 N.Y.Comp.Codes R. & Regs. § 23- 5.1. While this regulation contains a specific, positive command, it is inapplicable to plaintiff's case. The desk--a piece of office furniture--is not a scaffold.

The Industrial Code defines a scaffold as a "temporary elevated

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[4] The cases cited by plaintiff, in contrast, involve employees who were required or instructed to work on elevated platforms in order to complete their assigned tasks. For example, in Fernandez v. Broadway Plaza Assoc., 215 A.D.2d 217, 626 N.Y.S.2d 166, 167 (App.Div.1995), plaintiff stood on an inverted five gallon pail to remove 12-foot high window inlets. Similarly, in Laterra v. Rockville Centre Union Free School District, 186 A.D.2d 789, 589 N.Y.S.2d 87, 87 (App.Div.1992), plaintiff fell from a boiler on which he was standing to remove the ducts above it. In Kennedy v. McKay, 86 A.D.2d 597, 446 N.Y.S.2d 124, 125- 26 (App.Div.1982), plaintiff had to climb atop a walk-in refrigerator box standing eight to nine feet high to remove the wiring that ran across the box's top at that height. Finally, in Vincenty v. Davis, 43 A.D.2d 534, 349 N.Y.S.2d 376, 377 (App.Div.1973), plaintiff's employer had instructed plaintiff to hang a partition above a freezer and to stand on the freezer to do the work.

working platform and its supporting structure including all components." 12 N.Y.Comp.Codes R. & Regs. § 23-1.4. The desk is not a "working platform"; it was not constructed or provided as a means to complete the renovation. Rather, the desk and its lighted shelf were ends of the renovation project.

In addition, the desk is not "elevated." The desk and light fixture shelf could be reached from ground level. As stated infra, other electricians installed the task lights by standing, sitting or kneeling on the floor.

Plaintiff, therefore, has failed to establish a violation of a specific Industrial Code regulation. Accordingly, defendants' motion for summary judgment with respect to plaintiff's claim asserted under Labor Law § 241(6) is granted.

IV. Common Law Negligence and Labor Law § 200(1)

Plaintiff also claims that defendants were negligent in failing to provide him with a safe place to work. By reason of such alleged negligence, plaintiff also asserts a claim pursuant to Labor Law § 200(1), which codifies the common law duty of owners and general contractors to maintain a safe worksite. Ross, 81 N.Y.2d at 505, 601 N.Y.S.2d 49, 618 N.E.2d 82.

Liability under § 200(1) and at common law does not attach unless the defendant owner or general contractor exercised "the requisite degree of supervision and control over the portion of the work that led to [plaintiff's] injury." Ross, 81 N.Y.2d at 505, 601 N.Y.S.2d 49, 618 N.E.2d 82. See also Lombardi v. Stout, 80 N.Y.2d 290, 590 N.Y.S.2d 55, 604 N.E.2d 117 (1992).

Reflecting the active tone underlying these words in Ross, recent Appellate Division cases hold that mere contractual retention of

general supervisory power is insufficient to hold owners or general contractors liable under § 200(1).[5] See Jackson v. Williamsville Central School District, 645 N.Y.S.2d 202, 204 (App.Div.1996) (retention of contractual right to inspect or monitor insufficient to impose liability on owner); Enderlin v. Hebert Industrial Insulation, Inc., 224 A.D.2d 1020, 638 N.Y.S.2d 262, 263-64 (App.Div.1996) (neither general contractor's retention of general supervisory authority, nor its authority to enforce general safety standards sufficient to establish actual control or supervision); Balaj v. Equitable Life Assurance Society of the U.S., 211 A.D.2d 487, 621 N.Y.S.2d 320, 321 (App.Div.1995) (owner's retention of general supervisory powers insufficient to result in vicarious liability); Tambasco v. Norton Company, 207 A.D.2d 618, 615 N.Y.S.2d 539, 542 (App.Div.1994) (owner's retention of general supervisory powers does not create a question of fact sufficient to defeat summary judgment on the issue of control); Nation v. Morse Diesel, Inc., 214 A.D.2d 494, 625 N.Y.S.2d 555, 556 (App.Div.1995) (fact that general contractor undertook responsibility for safety at job site insufficient, by itself, to hold it liable under

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[5] Several courts have read Ross to require an even more active role in order to impose vicarious liability under § 200(1). See Brown v. New York City Economic Development Corporation, 650 N.Y.S.2d 213, 213 (App.Div.1996) ("Labor Law § 200 and common law negligence claims must be dismissed in the absence of proof of the owner's actual control, notwithstanding the existence of questions of fact regarding an owner's contractual right of control."); Panetta v. Beltrone Construction Co., 640 N.Y.S.2d 675, 676 (App.Div.1996) (although general contractor exercised general supervisory control, including coordination of subcontractors' work and direction of performance of assignments, no § 200 liability where general contractor had nothing to do with plaintiff's actual work methods); Walsh v. Amherst Construction Company, 641 N.Y.S.2d 777, 777 (App.Div.1996) (requiring actual supervision or control over plaintiff's work); Elezaj v. P.J. Carlin Construction Company, 639 N.Y.S.2d 356, 359 (record must establish that general contractor exercised actual control over use of machinery at work site, beyond mere contractual control); Mamo v. Rochester Gas and Electric Corp., 209 A.D.2d 948, 619 N.Y.S.2d 426, 428 (App.Div.1994) (requiring actual supervision at the work site).

§ 200); Brezinski v. Olympia & York Water Street Company, 218 A.D.2d 633, 631 N.Y.S.2d 23, 25 (App.Div.1995) (owner's retention of inspection privileges and general supervisory power insufficient to impose liability under § 200); Warsaw v. Eastern Rock Products, Inc., 210 A.D.2d 883, 621 N.Y.S.2d 254, 254 (App.Div.1994) (retention of right to inspect does not amount to supervision); Dewitt v. Pizzagalli Construction Company, 183 A.D.2d 991, 583 N.Y.S.2d 596, 598 (App.Div.1992) (general contractor's retention of general supervisory powers insufficient to establish control to make it liable under § 200(1)).[6]

Plaintiff contends only that the defendants had contractual supervisory authority over Forest employees. Goldhirsh Aff., at ¶¶ 6-12. Integral retained only general supervisory power--the power to supervise work, to ensure compliance with safety standards, and to keep

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[6] In Ross, the court refused to grant summary judgment where the general contractor retained general supervisory power and responsibility for compliance with safety standards by contract. The court, however, specifically noted that discovery had been halted and that plaintiff had not yet deposed the defendants' representatives on the exercise of actual supervision or control over the worksite. Ross, 81 N.Y.2d at 506, 601 N.Y.S.2d 49, 618 N.E.2d 82. In contrast, Fiduciary and Integral representatives have already been deposed.

Violette v. Armonk Assoc., L.P., 849 F.Supp. 923 (S.D.N.Y.1994), is similarly unavailing for plaintiff. In Violette, testimony indicated that the defendant directed plaintiff as to where to work, suggested a particular method to perform his job, and gave him permission to employ the method that eventually injured him. Violette, 849 F.Supp. at 929. Evidence also indicated that another defendant was "supposed to be on the job daily monitoring what we did and directing us in what sequence they wanted it done." Violette, 849 F.Supp. at 930.

Although several cases have held that contractual authority may be sufficient to impose vicarious liability under § 200, these cases primarily pre-date the active language in Ross. See Carter v. Vollmer Assoc., 196 A.D.2d 754, 602 N.Y.S.2d 48, 49 (App.Div.1993); Samiani v. New York State Electric & Gas Corp., 199 A.D.2d 796, 605 N.Y.S.2d 516, 517 (App.Div.1993); Rapp v. Zandri Construction Corp., 165 A.D.2d 639, 569 N.Y.S.2d 994, 996 (App.Div.1991); LaFleur v. Power Test Realty Company Limited Partnership, 159 A.D.2d 691, 553 N.Y.S.2d 50, 51 (App.Div.1990); Mancini v. Cappiello Realty Corp., 144 A.D.2d 154, 534 N.Y.S.2d 481, 483 (App.Div.1988); Nowak v. Smith & Mahoney, 110 A.D.2d 288, 494 N.Y.S.2d 449, 450 (App.Div.1985).

a superintendent at the work site. Pl.Ex. A, at ¶¶ 14, 15. Fiduciary retained even less authority--the power to hire or fire the superintendent. Pl.Ex. A, at ¶ 15. Such general supervisory power is insufficient to hold the defendants vicariously liable under § 200(1) or under common law. An examination of the facts cannot resuscitate plaintiff's claim that Integral or Fiduciary exercised the requisite degree of control. With respect to Integral, Forest supervisor Roy Lundquist stated that no one from Integral instructed him or his employees regarding how to install the lighting. Lundquist Dep., at pp. 60-61. This is corroborated by plaintiff himself, who recounted that no one from Integral directed him as to how to do his job or to lie on the desk. Carberry Dep., at p. 43.

With respect to Fiduciary's control, Madeline Marsale, Fiduciary's project manager for the renovation, viewed the construction progress daily and inspected with an Integral representative on a weekly basis. Marsale Dep., at pp. 81-82. However, Ms. Marsale stated that no one from Fiduciary instructed or directed Forest employees in the manner in which they installed the lights. Marsale Dep., at pp. 53, 88. Mr. Lundquist similarly explained that Fiduciary had no representative supervising or directing the electrical work. Lundquist Dep., at pp. 81-82.

Although Fiduciary or Integral representatives may have been present and inspecting at the Fiduciary offices, there is simply no evidence that they exercised control over the method or manner in which Forest and its employees installed the desk lighting. See Walsh v. Amherst Construction Company, 641 N.Y.S.2d 777, 777 (App.Div.1996) (university not liable under § 200 where its personnel visited the job site but did not actually supervise or control the activity that injured plaintiff); Enderlin, 638 N.Y.S.2d at 264 (App.Div.1996) (fact

that defendant's inspectors visited job site to inspect for compliance with safety standards insufficient to establish liability under § 200(1)); Balaj, 621 N.Y.S.2d at 321 (App.Div.1995) (owner's inspection of contractor's work insufficient to hold owner vicariously liable); Mamo v. Rochester Gas and Electric Corp., 209 A.D.2d 948, 619 N.Y.S.2d 426, 428 (App.Div.1994) (although defendant's inspectors visited the job site, defendant not liable in absence of proof that it actually supervised the activity that injured plaintiff); Comes v. N.Y. State Electric and Gas Corp., 189 A.D.2d 945, 592 N.Y.S.2d 478, 479 (App.Div.1993) (fact that defendant's representative noted job site accidents in daily construction 14 report and informed superintendent of safety violations did not constitute sufficient control of plaintiff's activity).

Accordingly, this Court finds there is no dispute of fact concerning whether defendants assumed the requisite degree of control to hold them vicariously liable under § 200(1) or under common law. Defendants' motion for summary judgment with respect to plaintiff's negligence and Labor Law § 200(1) claims is granted.

V. Conclusion

For the above stated reasons, defendants' motion for summary judgment is granted. The remaining parties are directed to contact the Court to arrange a conference to schedule the further conduct of this action.

So ordered.

Barbara S. Jones
United States District Judge

Dated New York, New York
March 3, 1997