At an IAS Term, Part 25 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of July, 2004

P R E S E N T:

HON. MARK I. PARTNOW
Justice.

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ANDRZEJ GIZA,

Plaintiff,

- against - Index No. 2810/99

THE NEW YORK CITY BOARD OF EDUCATION, et ano.,

Defendants.

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THE NEW YORK CITY BOARD OF EDUCATION, et ano.,

Third-Party Plaintiffs,

-against- Index No. 76085/02

NATIONAL ENVIRONMENTAL SAFETY COMPANY, INC.,

Third-Party Defendant.

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The following papers numbered 1 to 8 read on this motion:

| | Papers Numbered |
|---|---|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed | 1-2 |
| Opposing Affidavits (Affirmations) | 3-4 |
| Reply Affidavits (Affirmations) | 5, 6-7, 8 |
| Affidavit (Affirmation) | |
| Other Papers | |

Upon the foregoing papers, defendants New York City Board of Education (the Board) and City of New York (City) (collectively, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Andrzej Giza's (plaintiff) complaint.

***Background***

On March 18, 1997, City contracted non-party O'Brien Kreitzberg, Inc. (OKI) to serve as the "construction manager" on a renovation project involving Public School 297 in Brooklyn (the school). On June 30, 1998, OKI subcontracted third-party defendant National Environmental Safety Company, Inc. (NES) to perform masonry work on the project. Thereafter, NES sub-subcontracted out a portion of this masonry work to plaintiff's employer, Ted Kulmacz Construction, Inc. (TKC).

On August 20, 1988, plaintiff and approximately 20 other TKC workers were replacing bricks around the school's windows. Part of this work involved periodically mixing mortar in "dishes" in a small parking lot adjacent to the school. Once the mortar was mixed, plaintiff and his co-workers carried the dishes to window areas and laid the new bricks. There were numerous sheets of plywood intentionally placed in the parking lot in order to protect the asphalt from the ongoing masonry work. The accident occurred as plaintiff was carrying a 50 pound dish of newly mixed mortar from the parking lot to the window area, approximately 60 feet away. Specifically, as plaintiff carried this dish, he tripped and fell over the edge of a piece of plywood that was raised approximately three inches above the asphalt due to warping.

By summons and complaint dated January 14, 1999, plaintiff brought the instant action against the New York City School Construction Authority (SCA), the Board, and City alleging violations of Labor Law §§ 200, 240 (1), 241 (6), 241-a, as well as common-law negligence. Subsequently, plaintiff discontinued his action against SCA. On or about October 7, 2002, defendants brought a third-party action against NES seeking common-law and contractual indemnification.

On or about April 1, 2004, defendants filed the instant motion seeking summary judgment dismissing plaintiff's complaint. Defendants also sought summary judgment under their third-party contractual indemnification claim against NES. However, in a letter dated June 11, 2004, defendants advised the court that they had reached an agreement with NES and were discontinuing their third-party action and withdrawing that branch of their motion which sought contractual indemnification against NES.

***Plaintiff's Claims Against the Board***

Initially, defendants maintain that there is no basis for plaintiff's claims against the Board inasmuch as the Board had no involvement with the underlying renovation project. In support of this argument, defendants have submitted an affidavit by Chris Dickerson, an "Insurance Claim Specialist" employed by City. In his affidavit, Mr. Dickerson avers that the Board did not own the school or have any employees present during the project. Mr. Dickerson further avers that the Board did not begin to operate the school until after the renovation work had been completed.

The uncontroverted evidence before the court demonstrates that the Board did not own the school, contract for, or otherwise control the underlying work. Consequently, there is no basis for plaintiff's claims against the Board (*Hernandez v Board of Educ.*, 264 AD2d 709, 710 [1999]; *Kowalska v Board of Educ.*, 260 AD2d 546 [1999]). Under the circumstances, that branch of the defendants' motion which seeks to dismiss plaintiff's complaint against the Board is granted.

***Plaintiff's Labor Law §§ 240(1) and 241-a Claims***

Defendants move to dismiss plaintiff's Labor Law §§ 240(1) and 241-a claims. In so moving, defendants argue that these statutes are inapplicable in this case because plaintiff's accident was not gravity-related and did not involve a fall down an elevator shaft, hatchway, or stairwell. Plaintiff has failed to submit any opposition to this portion of defendants' motion.

It is well-settled that Labor Law § 240 (1) only applies when the force of gravity is a direct factor in the accident such as when a worker falls from a height or is struck by a falling object (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513) [1991]. Here, plaintiff's accident was clearly not gravity-related inasmuch as he merely tripped and fell on a piece of plywood in a parking lot. Accordingly, that branch of defendants' motion which seeks to dismiss plaintiff's Labor Law § 240 (1) cause of action is granted.

Labor Law § 241-a requires that sound planking be laid across elevator shafts, hatchways, and stairwells in order to protect workers from falling into these spaces. Here, plaintiff's accident did not involve an elevator shaft, hatchway, or stairwell. Consequently, plaintiff's Labor Law § 241-a claim must be dismissed since the statute does not apply in this case.

***Plaintiff's Labor Law § 241 (6) Claim***

Defendants move to dismiss plaintiff's Labor Law § 241 (6) cause of action. In so moving, defendants maintain that the New York State Industrial Code provisions alleged by plaintiff to have been violated are either too general to support a Labor Law § 241 (6) claim, or inapplicable given the circumstances of the accident. In particular, defendants point out that 12 NYCRR 23-1.5 has been ruled to be a general safety provision. Furthermore, defendants maintain that 23-1.7 (e) (1) is not applicable because the accident did not occur in a "passageway." Similarly, defendants argue that 23-1.7 (e) (2) is not applicable because the accident did not occur in a "working area." In addition, defendants claim that 23-1.7 (e) (1) and (2) are inapplicable since the plywood that plaintiff tripped over was intentionally placed in the parking lot in order to protect the asphalt and was therefore an integral part of the underlying work.

In opposition to this branch of defendants' motion, plaintiff argues that the parking lot where the accident took place constituted a working area inasmuch as it was the place where the mortar used on the project was mixed. Plaintiff also argues that the plywood that

caused him to trip and fall was not an integral part of the work that he was performing at the time of the accident.

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

> "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 persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and contractors to comply with the specific safety rules set forth in the Industrial Code (*Ross*, 81 NY2d at 501-502). Accordingly, it is well settled that, in order to support a cause of action under Labor Law § 241 (6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable given the circumstances of the accident, and set forth a concrete standard of conduct rather than a mere reiteration of common-law principals (*Ross* at 502; *Ares v State*, 80 NY2d 959, 960 [1992]; *see also Adams v Glass Fab*, 212 AD2d 972, 973 [1995]).

12 NYCRR 23-1.5 "merely establishes a general safety standard that is insufficient to give rise to the nondelegable duty imposed under Labor Law § 241 (6)" *(Mancini v Pedra Constr.*, 293 AD2d 453, 454 [2002]). Accordingly, this regulation may not serve as a basis for plaintiff's claim under Labor Law § 241 (6) cause of action.

12 NYCRR 23-1.7 (e) (1) provides that "[a]ll passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered." Although this regulation prescribes a specific safety standard, it is not applicable in this case because plaintiff's accident occurred in an open working area rather than a "passageway." (*Castillo v Starrett City, Inc.*, 4 AD3d 320 [2004]). Consequently, this regulation may not serve as a basis for plaintiff's Labor Law § 241 (6) claim.

12 NYCRR 23-1.7 (e) (2), which deals with tripping hazards, provides that "[t]he . . . areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed." This regulation is sufficiently specific to support a Labor Law § 241 (6) claim. Furthermore, contrary to defendants' argument, the parking lot in which plaintiff tripped and fell was a work area inasmuch as plaintiff and his co-workers mixed the mortar for the bricks in this area. Indeed, the sheets of plywood were laid down in the parking lot to protect the asphalt from this work.

The question of whether or not the plywood that caused plaintiff to trip was an "integral part" of the underlying work presents a closer issue. As defendants point out, when a worker trips over an object that is an integral part of the work he or she is performing, 12 NYCRR 23-1.7 (e) (2) is not applicable. Thus, for example, when a person performing demolition work trips over demolition debris, the regulation may not serve to support a Labor

Law § 241 (6) claim (*Salinas v Barney Skanska Constr.* Co., 2 AD3d 619 [2003]). Similarly, this regulation was held to be inapplicable when an electrician tripped over a piece of electrical cable with which she had been working (*Harvey v Morse Diesel Intl.*, 299 AD2d 451, 453 [2002]).

Here, an argument can be made that the plywood which caused plaintiff to trip was an integral part of the work because it was intentionally placed in the parking lot in order to protect the asphalt from the mortar mixing and transporting work that plaintiff was performing. However, the court finds this argument unpersuasive. Plaintiff did not merely trip over a piece of plywood. He tripped over a piece of plywood that was warped to the point that its edge was elevated three inches above the surface of the parking lot. It was the warped nature of the plywood that presented the tripping hazard, and while the work might have required the use of plywood, it did not require the use of warped plywood. Accordingly, the court finds that plaintiff has a viable Labor Law § 241 (6) cause of action against City to the extent that this claim is based upon a violation of 12 NYCRR 23-1.7 (e) (2).

***Plaintiff's Labor Law § 200/Common-Law Negligence Claim***

Defendants move to dismiss plaintiff's Labor Law § 200/common-law negligence claim against them. In so moving, defendants point out that they did not direct or control plaintiff's work. Defendants also argue that they did not create or otherwise have notice of the warped piece of plywood that caused plaintiff to trip.

In opposition to this branch of defendants' motion, plaintiff argues that there is a question of fact as to whether or not defendants had constructive notice of the warped piece of plywood. In support of this argument, plaintiff points out that a representative of the City visited the site once or twice a week. Plaintiff has also submitted an expert affidavit by Stanely H. Fein, a Professional Engineer, in which he avers that it would take at least six weeks in normal weather conditions for a piece of standard plywood to warp three inches.

Labor Law § 200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2000]). Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the plaintiff's work, or who have actual or constructive notice of an accident-causing unsafe condition (*Aranda v Park East Constr.*, 4 AD3d 315 [2004]; *Akins v Baker*, 247 AD2d 562, 563 [1998]).

Here, it is undisputed that City did not control or supervise plaintiff's work. Furthermore, it is clear that City did not create or have actual notice of the dangerous condition that caused the accident. Finally, Mr. Fien's speculative and conclusory claim that the plywood would take six weeks to warp three inches is insufficient to raise an issue of fact regarding constructive notice. Mr. Fien, who never examined the subject piece of plywood, "failed to establish the foundation or the source of the standards underlying [his] conclusion" (*David v County of Suffolk*, 1 NY3d 525, 526 [2003]). Thus, his affidavit is without

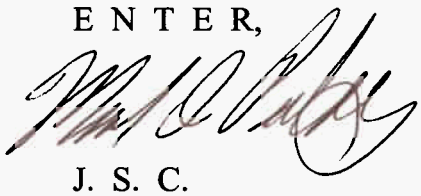
probative value and there is no basis for plaintiff's Labor Law § 200/common-law negligence claim.

***Summary***

In summary, the court rules as follows: (1) that branch of defendants' motion which seeks to dismiss plaintiff's complaint against the Board is granted; (2) that branch of defendants' motion which seeks to dismiss plaintiff's Labor Law § 240 (1) claim is granted; (3) that branch of defendants' motion which seeks to dismiss plaintiff's Labor Law § 241-a claim is granted; (4) that branch of defendants' motion which seeks to dismiss plaintiff's Labor Law § 241 (6) cause of action against City is denied to the extent that this claim is based upon a violation of 12 NYCRR 23-1.7(e)(2); and (5) that branch of defendants' motion which seeks to dismiss plaintiff's Labor Law § 200/common-law negligence claim is granted.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

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