SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: PAULA J. OMANSKY Justice PART 47

0112748/2000

MCCARTHY, THERESA
VS
390 TOWER ASSOCIATES LLC.

SEQ 009

INDEX NO. _____

MOTION DATE 1/12/04

MOTION SEQ. NO. _____

MOTION CAL. NO. 98

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum d/ on

FILED
MAR 26 2004
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 3/23/04

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORR: IAS PART 47

----------X

THERESA McCARTHY

Plaintiff,

against -

390 TOWER ASSOCIATES L.L.C., STRUCTURE TONE, INC., UNISUL, INC. and CERTAINTEED d/b/a UNSIL and COMMODORE CONSTRUCTION GROUP, INC. and NEIL BUCKLEY

Defendants.

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Index No. 112748/00

DECISION AND ORDER

PAULA J. OMANSKY, J.:

In this action for personal injuries, defendants 390 Tower Associates, LLC ("Tower Associates"), Structure Tone, USA ("Structure Tone"), and Commodore Construction Group ("Commodore") (collectively, the "Moving Defendants") move to dismiss plaintiff Theresa McCarthy's common-law negligence and Labor Law causes of action and to dismiss co-defendants' cross-claims.

FACTS

Tower Associates owned the building for which Structure Tone was the "Contractor for General Construction hired by the tenant Alcoa, a non-party, to renovate floors 9 through 13. Structure Tone, hired Commodore to do the fireproofing on the renovation project. Structure Tone's contract with Commodore has not been submitted on this application In turn, Commodore hired Polar Installation, a/k/a defendant Neil Buckley to do the actual installation work. Commodore's contract with Polar Installation provided that the latter was to supply equipment and labor necessary to spray existing steel with "Cafco fireproofing."

Certainteed and Certainteed d/b/a Unisul, Inc. ("Unisul, Inc.") are allegedly the manufacturer, designer or the seller of the fiberglass/mixing spraying machine which is the subject of this action .

Plaintiff alleges that she sustained personal injuries on May 4, 2000, between 5:00 p.m. to 5:30 p.m. at 390 Park Avenue, 11th floor, New York, New York, as a result of using a fiberglass mixer/sprayer. At the time of the accident, plaintiff was allegedly working for her brother-in-law, defendant Neil Buckley. She had never worked for Buckley before May 1, 2000 nor had she ever worked in construction before May 1, 2000, the day she was allegedly hired to replace a worker who did not show up for work on the project.

Plaintiff states that Buckley supplied her with a hazard suit and gloves. Plaintiff also was given a hard hat and goggles but does not know which contractor supplied those items. Buckley, who worked near plaintiff controlling the spraying nozzle, did not give plaintiff any instructions on the loading of the fireproofing machine other than "to cut the bag with a box cutter, throw the stuff into the machine, and give a pat down." Plaintiff was allegedly aware that cottony fiberglass (fireproofing) was not supposed to go above the machine's hopper and that she was not supposed to fill up the hopper which contained an axle with spokes. Plaintiff compared the revolving motion of axle and spoke to a

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The viability of claims relating to product liability, breach and negligent design (second third, fourth and fifth causes of actioon) have not been raised in this application.

rotisserie except that the spokes would break up the fiberglass which then mixes with water and falls down into a "snake" which is located at the bottom of the hopper. The snake helps to push out the fireproofing material into the hose line and the fireproofing is sprayed onto building surfaces.

According to plaintiff, she encountered no problems loading the mixer on Monday, May 1, 2000 or on Tuesday, May 2, 2000. Plaintiff testified that if the mixer portion of the machine clogged, Buckley would come over and unclog the equipment. However, on Wednesday, May 3, 2000, Buckley allegedly removed the mixing/sprayer unit to work on another job site on Wall Street. Buckley allegedly brought the same unit back to the Park Avenue work site on Thursday. Plaintiff stated that she was pushing the material down with her gloved hands when she felt a tug on her hands. According to plaintiff, she tried pulling back in order to remove the glove but was unable to free herself since the machine kept reeling her in. She claims that she grabbed between the spokes with her left hand to stop the machine. However, one of the spokes allegedly went through her left arm and twisted it around the axle, pulling her chest against the edge of the machine. Plaintiff screamed in pain and Buckley came over and stopped the machine.

Commodore's Safety Manager, Patrick McDonagh, examined the mixer/sprayer after the accident noting that there were no guards on the machine. He also prepared an accident report which indicated that plaintiff's sleeve was caught in the blades of the

machine as she was feeding fireproofing material, and that her arm was pulled into the device. The machine was again examined by Structure Tone's project manager Andrew Shea, and superintendent Ed Colbert. Colbert informed Shea that the mixer/sprayer did not have a protective grating covering the appliance.

The Moving defendants also allege that the grating allegedly required under the regulation cited by plaintiff would still have an opening large enough for her hand to fit.

Plaintiff states in her bill of particulars that she suffered open fractures of the left radius and ulna as well as multiple ragged skin lacerations over the left forearm. Plaintiff also required surgical intervention and alleges that, as a result of her injury, she has suffered, inter alia, permanent scarring and "incomplete anatomic alignment."

CertainTeed and Unisul, Inc., which are not defendants to Labor Law causes of action, have raised cross claims of common-law and contractual indemnification, apportionment, contribution and contributory negligence against the Moving Defendants.

DISCUSSION

I. Labor Law §240(1)

Contrary to Moving Defendants' arguments, plaintiff does not raise a claim under section 240(1) of the Labor Law in either her amended complaint nor in her supplemental bills of particulars. Instead, plaintiff limits her causes of action to violation of sections 200 and 241(6) of the Labor Law, as well as sections 23-1.3, 23-1.5, 23-1.7, 23-1.12, 23 9.2, 23-9.11, 19.1, 19.2, 19.7,

and 19.8 of the Industrial Code . Nothing in the pleadings and record suggests that plaintiff even believed that she was working at height or that she was subject to a height differential. Moreover, plaintiff never stated that the safety devices enumerated in section 240(1) of the Labor Law would have protected her from mishap.

However, plaintiff agrees that she has no viable claim under section 240 and does not oppose the present application to dismiss. None of the other co-defendants objects to dismissal of this claim. Accordingly, that branch of the Moving Defendants' motion for summary judgment and to dismiss any claim for violation of section 240(1) of the Labor Law is granted on consent.

II. Labor Law §241(6)

Section 241(6) of the Labor Law requires owners and contractors to provide reasonable and adequate protection for workers and to comply with specific safety rules and regulations promulgated by the Commissioner of the Department of Labor and the provisions of the Industrial Code (Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494, 501-502 [1993]). In order to succeed on her claims against the moving defendants, plaintiff must ultimately show that her injuries were proximately caused by a violation of an Industrial Code provision which is applicable given the circumstances of the accident, and which sets forth a concrete rather than a mere reiteration of common-law principles (Padilla v

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[1]Plaintiff also alleges violations of OSHA regulations but Moving Defendants do not address that portion of the complaint in their application to dismiss.

Frances Schervier Housing Development Fund Corp., 303 AD2d 194, 196 [1st Dept 2003]; Sikorska v City of New York, 2003 WL 22849784 [Sup Ct, Kings County 2003], citing Ross v Curtis-Palmer Hydro-Electric Co., supra, 81 NY2d, at 502 [remaining citations omitted]).

a. Covered Worker

In order to come under the protections of the Labor Law, plaintiff must show that she was permitted to work on a construction site and that she was hired by someone be it an owner, a contractor or its agent (Whelan Warwick Valley Civil & Social Club, 47 NY2d 970, 971 [1979] ["A volunteer who offers his service gratuitously cannot claim the protection afforded by the 'flat and unvarying duty' flowing to special class ..." [citation omitted]).

Moving Defendants maintain that plaintiff is not a covered worker within the meaning of section 2(5) of the Labor Law which provides that term "employee" refers to "a mechanic, workingman, or laborer working for hire," claiming that plaintiff was never paid and acted merely as a volunteer to help her brother-in-law. In particular, moving defendants note that plaintiff has never worked in construction and that she is a former detective from the New York City Police Department who retired from the force on a disability pension as a result of injuries received in the line of duty on May 7, 1997. According to moving defendants, plaintiff began collecting the pension on November 30, 1999 and this is her means of support.

Plaintiff's decision to do manual labor rather than security-related work, which would be more consistent with her police

background, is not relevant to this action. Moving Defendants' unsupported assertion that plaintiff would work for free so as not to not lose her pension benefits is in dispute (see, New York State Retirement and Social Security Law § 102[b]New York City Administrative Code § 13-254). Moreover, any issue concerning the legality of plaintiff's pension status and whether she violated her right to a disability pension is not properly before this court. The question of plaintiff's pension status is only relevant to the extent that a prior physical disability, if any, is relevant to the question of causation of the alleged injuries and to computation of of damages, in the event plaintiff proves her claim.

Moving Defendants also assert that plaintiff has admitted her volunteer status on the basis of the following testimony:

> Q: Were you paid before the accident by Mr. Buckley?
>
> A: No.
>
> Q: Did Mr. Buckley pay you after the accident?
>
> A: No.
>
> Q: What was your agreement or understanding with Mr. Buckley before your started work on Monday in terms of payment?
>
> A: There was no agreement.

(see, McCarthy, 6/18/2002, EBT at 22, lines 10-19).

The fact that plaintiff did not discuss the terms of her salary with her brother-in-law does not warrant an automatic conclusion that she agreed to work for free. Plaintiff never stated in the record that she agreed to volunteer to be a construction worker; rather she always referred to her activity as

"work" (cf., McNulty v Executive Kitchens, Ltd., 294 AD2d 411, 412 [2d Dept 2002]). Plaintiff also points out that she was never asked at the deposition how much she expected to be paid. Plaintiff states that she was replacing a paid regular employee and expected to be paid at the same rate for the same work .

That plaintiff had not yet received a pay check is not dispositive in this instance since subsection 191(1)(a)(i) of the Labor Law requires, in pertinent part, that "[a] manual worker shall be paid weekly and not later than seven calendar days after the end of the week in which the wages are earned..." . Plaintiff could not have received a pay check prior to the alleged accident since she was not working a week before she was injured.

Also the underlying circumstances of the employment do not support a finding that plaintiff was a volunteer. Plaintiff, the lone woman at the site, was not a casual volunteer since she worked more than five hours a day for four days moving, lifting and loading bags of fireproofing materials into a mixing/sprayer machine. Moreover, plaintiff was engaged in the exact same construction work as the men installing fireproofing on the site. In order to shield herself from the toxicity of the substance she was loading into the hopper, plaintiff was required to wear the same hazard suit, goggles, gloves and hard hat, as the men with

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[1]Aileen McCarthy Buckley alleges that her husband informed her that she was going to pay plaintiff $800. Buckley, himself, has not filed an affidavit and is allegedly in Ireland.

[1]Parties to an employment contract may agree to other periods of payment provided that the payment is not less frequent than "semi-monthly,"

whom she was working. Nothing in the record refutes plaintiff's statement that she knew from the inception of her employment that she was replacing a worker who had been paid (Lysiak v Murray Realty Co., 227 AD2d 746, 747 [3d Dept 1996]; Goslin v La Mora, 137 AD2d 941, 942 [3d Dept 1988]). There is no history of family members working for free since Buckley also employed other close relatives at the site all of whom were paid regular wages (cf., Alver v Durante, 90 AD2d 182 [3d Dept 1982]). Furthermore, there is no evidence that there were any other construction volunteers at the site. This was not a building project run by a non-profit organization to renovate a community space (Whelan v Warwick Valley Civil & Social Club, supra) 47 NY2d, at 971[*]. On the contrary, this was a commercial construction site where the workers were creating new office space for a profit-making business. Accordingly, there is no issue of fact which would compel this court to have a hearing on whether plaintiff was in fact a volunteer rather than a paid construction worker.

b. Scope of Owner's and Contractor's Duty

The duty of an owner or general contractor to provide proper protection and equipment is non-delegable under section 241(6) of the Labor Law (Leon v J&M Peppe Realty Corp, 190 AD2d 400 [1st Dept 1993]). Therefore, the issue of whether Moving Defendants actually contracted for the fireproofing work or had actual control over the

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Carpenter assisted without pay in the construction of a home belonging to his daughter and son-in-law.

[*] Volunteer fell from ladder while working gratuitously on a civil club.

site is not relevant because building owners, general contractors, and their agents are vicariously liable under section 241(6) for the negligent failure of a contractor or subcontractor to maintain the construction site in a reasonably safe condition where that factor was a proximate cause of plaintiff's injury (Kane v (Coundorous, 293 AD2d 309, 312 [1st Dept 2002]).

Ordinary subcontractors do not have the same statutory liability, under section 241(6) of the Labor Law, for the actions of a subcontractor (Rosenbaum v LeFrak Corp., 80 AD2d 337, 341 [1st Dept 1981], appeal dismissed 54 NY2d 904 [1981]). However, an ordinary contractor is deemed the "statutory agent" of the owner or general contractor if the contractor had actual control over the work which leads to the worker's injury (Sikorska v The City Of New York, supra, 2003 WL 22849784, *3, citing Russin v Louis N. Picciano & Son, 54 NY2d 311, 318 [1981]).

Commodore is not the general contractor and the present record does not contain sufficient evidence for this court to find that Commodore is Structure Tone's statutory agent despite the fact that Commodore is the entity which allegedly agreed to do fireproofing work. The present submissions do not contain a copy of Commodore's contract with Structure Tone or any other documentary evidence or testimony which would indicate that Structure Tone (or some other entity) delegated its authority to Commodore to supervise and control Buckley's fire proofing work. There is also no evidence that Commodore provided Buckley with mixing/spraying equipment or that the former directly supervised plaintiff's installation work.

In fact, Commodore's agreement with Polar Installation/Buckley indicated that the latter was to supply all equipment and labor . Plaintiff's failure to raise an issue of fact concerning Commodore's authority to control Buckley's installation work at the time of the plaintiff's accident, requires dismissal of her claims against that entity (Vieira v Tishman Contr. Corp., 255 AD2d 235 [1st Dept 1998]). Accordingly, that branch of the Moving Defendants' motion for summary judgment and to dismiss plaintiff's section 241(6) claims (the sixth cause of action) and all related cross-claims against Commodore is granted

c. Plaintiff's Alleged Fault

Here, plaintiff alleges that the mixer/sprayer machine was defective because it lacked, inter alia, the safety device required by section 23-9.11(e) of the Industrial Code which provides that

> [t]he revolving blades of trough or batch type mixing machines shall be guarded with a substantial iron grating consisting of crossbars of one half inch round stock or its equivalent, spaced not to exceed five inches between bars and located at least five inches above the blades.

Moving Defendants have not discussed whether the sections of the Industrial Code cited by plaintiff in her Bill of Particulars are applicable to this case. However, they argue that even if section 23-9.11 of the Industrial Code, which deals with the safety standards for mixing machines, were applicable to the facts herein, plaintiff would still not be entitled to damages. According to Moving Defendants, plaintiff's action, namely the pushing down on the fireproofing material, was the sole proximate cause of the injury.

Generally the "sole proximate cause" defense is applied to strict or absolute liability claims under section 240(1) of the Labor Law when there is no evidence of a statutory violation and when the facts show that plaintiff's own actions were the sole cause of the accident (Blake v Neighborhood Services of New York City, 1 NY3d 280, 290 [2003]). In Blake, the Court of Appeals held that the owner and general contractor were not liable for the collapse of the ladder (which would be prima facie evidence of the failure of statutorily mandated safety device) since the plaintiff misused the ladder by failing to lock the extension clips, a safety device designed to prevent slippage. The ladder in Blake was not defective since it had working safety clips. Rather, the collapse and the resulting injuries was caused solely by the worker's unintentional omission.

However, the liability under section 241(6) differs from that found in section 240(1) of the Labor Law in that section 241(6) relies on a separate administrative code for the standards governing the work place. Proof of violation of a provision of the Industrial Code does not necessarily mandate a finding of liability against the owner or general contractor as a matter of law Violation of

> a rule of an administrative agency or an ordinance of a local government is merely some evidence to be considered on the question of a defendant's negligence and lacks the force and effect of a substantive legislative enactment. Thus, "unlike a violation of the explicit provisions of

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Slippage, by any means whatsoever, constitutes a violation of section 240(1) of the Labor Law as a matter of law (Meade v Rock-McGraw, Inc., 307 AD2d 156 [1st Dept 2003]).

> a statute proper, a breach of an administrative rule *** does not establish negligence as a matter of law, [thus it] does not render a plaintiff's own negligence irrelevant and, therefore, unacceptable as a defense" [citations omitted].

(Zimmer v Chemung County Performing Arts Inc., 65 NY2d 513, 521-522 [1985], quoting Long v Forest Fehlhaber, 55 NY2d 154, 160, reargument denied 56 NY2d 805 [1982]). If the subcontractor does not violate a provision of the Industrial Code, or where the alleged violation is not the proximate cause of the injury, there is no basis for holding the owner or general contractor vicariously liable under section 241(6) of the Labor Law (Reilly v Newireen Assocs., 303 AD2d 214 [1st Dept], lv denied 100 NY2d 508 [2003][*]).

Absent proof of a violation which proximately caused the injury, the jury would have no need to reach the issue of plaintiff's own negligence. Unlike the plaintiff in Blake v Neighborhood Services of New York City, (supra, 1 NY3d, at 290), the plaintiff in this action alleges that she was using a device which had no safety coverings which could have prevented her hand from coming into contact with the turning axle. Although the Moving Defendants do not admit that the mixing/spraying device was defective in violation of the Industrial Code, they acknowledge that the machine had no protective covering over the hopper. As a result there was no physical barrier to act as deterrent or to warn of danger, even if, as the Moving Defendants suggest, the openings in the grating required by the Industrial Code would still be large

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[*] Worker's heart attack caused by medical condition and not due to overexertion caused by malfunctioning hoist.

enough to permit a woman to thrust her hand into the moving parts. Accordingly, plaintiff's actions are not the sole proximate cause since she would not have been able to place her hand in the hopper absent the alleged defect (Weininger v Hagedorn & Co., 91 NY2d 958, rearg denied 92 NY2d 875 [1998][i]; cf., Plass v Solotoff, ___ AD2d ___, 2004 WL 383338, *1 [2s Dept 2004][ii], Storms v Dominican College of Blauvelt, 308 AD2d 575, 576 [2d Dept 2003][iii]; Fajardo v Trans World Equities, Co., 286 AD2d 271 [1st Dept 2001][iv]). Moreover, there is no evidence that plaintiff failed to employ safety procedures (cf., Sopha v Combustion Engineering, Inc., 261 AD2d 911, 912 [4th Dept 1999][v]).

This court also rejects Moving Defendants' argument that the court should apply the recalcitrant worker defense to plaintiff's claim under section 241(6) of the Labor Law. The recalcitrant worker defense is limited to situations in which a worker has ignored safety instructions or has refused to use supplied safety

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[i] Issue of fact as to whether plaintiff's positioning of his feet on rungs of ladder while pulling wire through the "canal" was the sole proximate cause of his injury.

[ii] The decision of an injured worker, who was the owner of the subcontracting business and who decided to use only one plank on the scaffold, was the sole proximate cause of his injury.

[iii] Issue of fact as to whether defendants provided plaintiff, who removed a bracing bracket, with enough safety feature so as to protect him from the risks associated with working on an elevated scaffolding.

[iv] Issue of fact as to whether plaintiff was compelled to forgo use of inadequate safety device.

[v] Worker ignored instruction not to use scaffold as a means of egress despite the availability of near-by stairs.

devices (Haqins v State of New York, 81 NY2d 921, 922-923 [1993]).

Here, plaintiff complied with all safety directives by wearing the hazard suit and other supplied protective gear (Vacca v Landau, ____ AD2d ____ WL 283308, *1 [1st Dept 2004]). There is also no evidence that the plaintiff failed to follow instructions in how to use the mixer/sprayer machine (ibid.). Instead, the record shows that plaintiff's supervisor specifically instructed plaintiff to push the fiberglass down with her hand into the hopper.

Recalcitrant worker defense is also unavailing where there were no safety devices (Arno v Litte Rapids Corp., 301 AD2d 698 [3d Dept 2003]). Moving defendants do not allege, and the record does not support a claim that plaintiff herself removed any safety device or that she modified the fiberglass installation machine in any way. Plaintiff was given a mixing/spraying machine without a safety grill which would have prevented her from putting her hand in the device while it was in operation (Grant v Gutchess Timberlands, Inc., 214 AD2d 909, 910 [3d Dept 1995]).

However, Moving Defendants may still raise claim of comparative negligence defense in an action brought under section 241(6) of the Labor Law (Rizzuto v L. A. Wenger Contracting Co. Inc., 91 NY2d 343, 349 [1998]; Zimmer v Chemung County Performing Arts Inc., supra, 65 NY2d, at 521; see, Musillov v Marsit College, 306 AD2d 782, 784 [3d Dept 2003]). Accordingly, Moving Defendants are entitled to raise questions concerning plaintiff's role, if any, in the alleged subcontractor's negligence (see, Hernandez v 151 Sullivan Tenant Corp., 307 AD2d 207, 208 [1st Dept 2003]).

Moving Defendants are not, however, entitled to summary judgment on the issue of plaintiff's alleged negligence since the record does not show, as a matter of law, that the mixer/sprayer had all the required safety devices (see, Rapp v Zandri Construction Corp, 165 AD2d 639, [3d Dept 1991]''). A jury should also weigh whether plaintiff, as a reasonable person, (given the underlying circumstances, including the fact that plaintiff was working as instructed and her lack of prior construction experience), knew or should have known that putting her hand into the unguarded hopper would lead to injury (Snowden v New York City Transit Authority, 248 AD2df 235, 236 [1st Dept 1998] ; Drago v New York City Transit Authority, 227 AD2d 372, 373 [2d Dept. 1996] ; cf., De Groat v Consolidated Rail Corp., 298 AD2d 273, 274 [1st Dept 2002]'').

Accordingly, Moving Defendants' motion to dismiss that portion of the plaintiff's first cause of action against Tower Associates and Structure Tone which alleges violation of section 241(6) of the

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''Issue of fact as to whether it was foreseeable that staple gun could discharge and injure someone not wearing safety glasses.

Issue of fact as to whether mats provided effective insulation and whether plaintiff was negligent in his placement of mats.

''Plaintiff's knowing decision to continue the installation of new cable only feet away form the live old cable creates an issue of fact as to plaintiff's comparative negligence.

Issue of fact as to whether using a hand or foot to raise a "dog" or moving device, which is unable to rise by itself, is obvious and whether manufacturer should have anticipated the use of hands and feet and issued a warning against such a practice.

Labor Law is denied (DeSimone v Structure Tone, Inc., 306 AD2d 90 [1st Dept 2003]).

III. Labor Law § 200

Section 200 of the Labor Law is not a strict liability statute but a "negligence statute" codifying the landowner's or a general contractor's common-law duty to maintain a safe work place (Comes v New York State Elec. and Gas Corp., 82 NY2d 876, 877 [1993]). Unlike sections 240 and 241(6) of the Labor Law, liability will only be imposed upon an owner or general contractor under section 200 of the Labor Law where the worker's injuries were sustained as a result of a dangerous condition at the work site, and then only if the defendant exercised supervisory control over the work performed at the site, or had sufficient authority to control the activity bringing about the injury in order to enable that defendant to avoid or correct an unsafe condition (Rizzuto v L.A. Wenger Contr. Co., Inc., supra, 91 NY2d, at 352; Lombardi v Stout, 80 NY2d 290, 295 [1992]).

Tower Associates, the owner, had no supervisory authority since it did not hire the general contractor, contractor, or the subcontractors. There is no documentary evidence which suggests that Alcoa, Inc. the party which actually hired Structure Tone was acting as an agent of, or at the direction of, Tower Associates. Section 200 of the Labor Law does not obligate Tower Associates to supervise the construction workers at the site, nor does the statute make Tower Associates responsible for the sufficiency of the prime contractor's or subcontractor's tools and methods

(Zucchelli v City Constr. Co., Inc., 4 NY2d 52, 55 [1958]). Moreover, Tower Associates is not held statutorily negligent under section 200 of the Labor Law for the Buckley's alleged lack of safety equipment, even if Tower Associates had notice that Buckley lacked such devices or procedures (Comes v New York State Elec. and Gas Corp., supra, 82 NY2d, at 877; Reilly v Newireen Assocs., supra, 303 AD2d, at 214). Accordingly, that portion of plaintiff's first cause of action which alleges that Tower Associates violated section 200 of the Labor Law is dismissed.

There is no evidence that Tower Associates supplied any defective equipment to plaintiff's (Masciotta v Morse-Diesel Int'l., Inc., supra, 303 AD2d, at 311). Plaintiffs' common-law negligence claim against Tower Associates must also be dismissed because there is no evidence that this defendant had actual or constructive notice of any unsafe condition or practice which allegedly caused the accident (Comes v New York State Elec. and Gas Corp., supra).

Liability under section 200 of the Labor Law only attaches to the general contractor if it directly oversees and controls the method of the work in which the worker was engaged at the time of injury (DeSimone v Structure Tone, Inc., supra, 306 AD2d, at 90).

Although paragraphs 8.1[1] and 8.2[2] of the contract between Alca, Inc. and Structure Tone grant the latter broad authority over the creation of safety programs and the implementation of Alcoa, Inc.'s safety directives, these general supervisory powers are insufficient to trigger liability under section 200 of the Labor law (Vasiliades v Lehrer McGovern & Bros., 3 AD3d 400, 771 NYS2d 27, 30 [1st Dept 2004]). There is no evidence in the record that Structure Tone was directly supervising fireproofing at the site or that it supplied any defective equipment to plaintiff (Ross v Curtis-Palmer Hydro Electric Co., 295 AD2d 723 [3d Dept 2002]; Gray v Balling Construction Co., __ AD2d ____, 659 NYS2d 630 [4th Dept 1997]).. Accordingly, plaintiff's claims against Structure Tone for common law negligence and that portion of her first cause of

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[1] "[t]he safety of the Seller and their representatives, agents, employee and invitees, while on the Work site, or of any other person who enters upon the Work site with the consent of the Seller and their representatives, agents, employees or invitees for reasons relating to the Contract, shall be the sole responsibility of Seller. Seller shall at all times maintain good order among its employees and shall not employ, for purposes of the Contract, any persons unfit or not skilled in the Work assigned.

[2] Paragraph 8.2 of the Alcoa contract provides in pertinent part that safety procedures

> shall include, but shall not be limited to, recommending all safeguards and warnings necessary (i) to protect all persons against any condition, including exposure to health hazards, on the Work site which could be dangerous and (ii) to prevent accident of any kind whenever the Work is being performed, particularly where the Work is being performed in proximity to any moving or operating machinery, equipment or facilities, whether such machinery, equipment or facilities are the property of or are being operated by, Seller, their subcontractors, or other persons.

action for violation of section 200 of the Labor Law are dismissed (DeSimone v Structure Tone, Inc., supra, 306 AD2d at 90).

For the same reasons plaintiff's common-law negligence claim and her sixth cause of action for violation of section 200 of the Labor Law are also dismissed against Commodore since that entity did not directly supervise its subcontractor Buckley (ibid.). Since all causes of action have been dismissed against Commodore, Certainteed and Unisul, Inc. cross claims against Commodore are also dismissed.

The moving defendants do not state the specific basis for their application to dismiss Certainteed and Unisul, Inc.'s cross claims against Tower Associates and Structure Tone. Since a cause of action for violation of section 241(6) of the Labor Law remains against the Tower Associates and Structure Tone, this branch of the Moving Defendant's motion to dismiss the remaining cross-claims is denied.

Accordingly, it is

ORDERED that the branch of Moving Defendants' motion for summary judgment and to dismiss plaintiff's cause of action arising under section 240(1) of the Labor Law is granted on consent. This claim is severed and dismissed against Tower Associates, Structure Tone, and Commodore; and it is further

ORDERED that the branch of the Moving Defendants' motion for summary judgment and to dismiss plaintiff's cause of action arising under section 241(6) of the Labor Law is granted only as to

defendant Commodore. That portion of the sixth cause of cause of action is severed and dismissed against this defendant only; and it is further

ORDERED that the branches of Moving Defendants' motion for summary judgment and to dismiss plaintiff's claims of common-law negligence and for violation of section 200 of the Labor Law is granted; and those portions of the first and sixth causes of action are severed and dismissed against Tower Associates, Structure Tone and Commodore; and it is further

ORDERED that Certainteed and Unisul, Inc.'s cross-claims against Commodore for contributory negligence, common-law, contractual indemnification and contribution and apportionment are dismissed; and it is further

ORDERED that the branches of Moving Defendants' motion for summary judgment and to dismiss the cross claims against Tower Associates and Structure Tone are denied; and it is further

ORDERED that the remaining portions of the action shall continue; and it is further

ORDERED that the parties are directed to appear for a pre-trial conference on April 7, 2004, at 11:00 a.m. at 71 Thomas Street, Room 205, New York, N.Y.

DATED: March 23, 2004

ENTER:

PAULA J. OMANSKY
J.S.C.

FILED
MAR 26 2004
COUNTY CLERK'S OFFICE
NEW YORK