

**Tucker v Tishman Construction Corp.**

2005 NY Slip Op 30320(U)

April 29, 2005

Supreme Court, New York County

Docket Number: 110235/02

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD  
*Justice*

PART 35

Tucker, Thomas

INDEX NO. 110235/02

MOTION DATE 4/6/05

MOTION SEQ. NO. 003

MOTION CAL. NO. \_\_\_\_\_

- v -

Tishman Construction Corp.

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

**FILED**

MAY - 3 2005

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of third-party defendant Brawnmade Construction's motion pursuant to CPLR 3212 for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) causes of action in plaintiffs' underlying complaint is granted; and it is further

ORDERED that the branch of third-party defendant Brawnmade Construction's motion pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint of Tishman Construction Corp. of New York is denied; and it is further

ORDERED that Tishman Construction Corp.'s cross-motion for summary judgment granting indemnification from Brawnmade, including attorney fees and expenses is denied; and it is further

ORDERED that counsel for third-party defendant Brawnmade Construction shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 4/29/05

**HON. CAROL EDMEAD** J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

REFERENCE

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

\_\_\_\_\_  
THOMAS TUCKER and NANCY TUCKER, X

Plaintiffs,

Index No. 110235/02

-against-

TISHMAN CONSTRUCTION CORP. OF NEW YORK  
and GENEVOSE ASSOCIATES, INC.,

DECISION/ORDER

Defendants.

\_\_\_\_\_  
TISHMAN CONSTRUCTION CORP. OF NEW YORK, X

Third-Party Plaintiff

-against-

Index No. 590932/03

MANHATTAN STRUCTURES and  
BRAWNMADE CONSTRUCTION,

Third-Party Defendants.

\_\_\_\_\_  
EDMEAD, J.S.C. X

MEMORANDUM DECISION

Third-party defendant Brawnmade Construction (“Brawnmade”) moves pursuant to CPLR 3212 for summary judgment dismissing two causes of action in the underlying complaint of Thomas Tucker (“plaintiff”), and dismissing the third-party complaint of Tishman Construction Corp. of New York (“Tishman”), in its entirety.

According to the verified complaint, plaintiff was injured on February 28, 2002, while working as an employee of third-party defendant Manhattan Structures, at the premises located at Third Avenue and 37<sup>th</sup> Street, New York, New York, on the fourteenth floor (the “subject site”). Plaintiff alleges that while he was at the subject site, he stepped on an unsecured piece of steel

and other debris, which moved, causing him to trip and fall sustaining serious and severe injuries. Plaintiff alleges that defendants Tishman and Genovose Associates, Inc. violated sections 200, 240 and 241(6) of the Labor Law of the State of New York; Rule 23 of the Industrial Code, specifically but not limited to 23-1.7, 23-1.30, 23-2.1, and other regulations, as well as Article 1926 of OSHA.

On or about August 14, 2003, Tishman commenced the instant third-party action against Brawnmade, in which Tishman claims, *inter alia*, that if plaintiff sustained the injuries as alleged, it was the fault of Brawnmade. Further, prior to plaintiff's accident, Brawnmade entered into an agreement to perform certain work for Tishman. On the date of plaintiff's accident, said agreement was in full force and effect. Pursuant to said agreement, prior to commencing work, at Brawnmade's own expense, Brawnmade was required to obtain and maintain insurance on its own behalf, and naming Tishman as an additional insured. Brawnmade failed and neglected to obtain such insurance, thereby breaching the contract between Brawnmade and Tishman.

In support of its motion for dismissal of the third-party complaint, Brawnmade argues that New York General Obligations Law ("NYGOL") 5-322.1 prohibits agreements that exempt owners and contractors from liability for their own negligence relative to the construction, alteration, repair or maintenance of a building. Further, agreements that purport to indemnify a promisee against its own negligence are void and unenforceable only where the promisee is found negligent, to the extent of that negligence. According to Brawnmade, its agreement with Tishman contains an indemnification clause in which Brawnmade agreed to indemnify and defend the "Construction Manager's Representative [Tishman] harmless against and from all claims . . . arising out of . . . the Services except only for claims [and] damages . . . arising out of

Construction Manager's Representative's [Tishman's] negligence . . . ." According to Brawnmade, the deposition testimony establishes that Tishman was responsible for overseeing the work on the subject jobsite, and therefore, bears at least some (if not all) of the negligence, if any is found, for the plaintiff's accident. Therefore, since there is evidence of negligence on the part of Tishman, and NYGOL 5-322.1 precludes a party from seeking indemnification for its own negligence, Tishman is not entitled to indemnification by Brawnmade.

Brawnmade further argues that plaintiff's Labor Law § 240(1) claim should be dismissed because his accident in tripping over a rebar placed on the ground did not involve an elevation-related accident that 240(1) is intended to guard against.

In addition, plaintiff's Labor Law 241(6) claim predicated on an alleged violation of Industrial Code, New York Code Rules and Regulations sections 23-1.7, 23-1.30, and 23-2.1 should be dismissed because such provisions are inapplicable to the case at bar.

It is argued that section 23-1.7 is inapplicable to the case at bar, as there is no evidence that the area in which plaintiff was injured was a passageway. According to Brawnmade, plaintiff's testimony indicates that he was not walking through a hallway or an area that was meant as a corridor at the time of the accident, and that the floor was "open." Thus, the area could not be a corridor, which is closed on both sides or a passageway.

Nor can it be said that the area had an accumulation of debris that was inconsistent with the work being performed at the time. The rebar over which plaintiff fell was an integral part of pouring the concrete, and was consistent with the work being performed at the time of the accident.

As to section 23-1.30, which prescribes the manner in which the work area shall be

illuminated, there is no testimony that plaintiff was unable to see where he was going at the time of his accident or that there was insufficient illumination of the subject area.

Further, as to section 23-2.1, Brawnmade contends that plaintiff's accident did not arise out of the storage of material or equipment and disposal of debris so as to fall under the scope of section 23-2.1.

And, Brawnmade contends, since only those regulations found in Part 23 of the Industrial Code may support a Labor Law 241(6) claim, alleged violations of OSHA regulations, which do not impose any duty on an owner or contractor, cannot be used as a predicate for liability under 241(6).

In response, Tishman opposes that part of Brawnmade's motion which seeks to dismiss Tishman's third-party complaint, and cross moves for summary judgment granting indemnification from Brawnmade, including attorney fees and expenses with regard to this matter.

Tishman argues that Brawnmade's contention that Tishman was responsible for site safety is without merit and contradicted by Brawnmade's vice-president's deposition testimony. Tishman points out that Brawnmade incorrectly referred to Brawnmade as the "general contractor" for the subject project. Rather, and as per the contract between Tishman and Brawnmade dated December 3, 2001, Tishman served as the construction manager's representative. As such, Tishman did not hire the subcontractors, including plaintiff's employer Manhattan Structures, to work on the site. Instead, and as indicated by Brawnmade's vice-president at his deposition, Brawnmade, as the construction manager, contracted with Manhattan Structures to perform the contract work at the subject project. Brawnmade's vice-president also

testified that Brawnmade hired the sole safety supervisor to provide the required site safety personnel for the subject project.<sup>1</sup> As the sole party who contracted with plaintiff's employer and with the site safety personnel on this project, Brawnmade was properly named as a third-party defendant.

Moreover, contrary to Brawnmade's contention, Brawnmade's contract with the owner of the building, dated January 1, 2002, namely Articles 1.4, 2.3, 2.7.2, and 2.7.11, demonstrates that Brawnmade agreed to supervise all labor and equipment, provide construction management, meet with the owner on the progress of the work, and prepare and maintain daily reports indicating, *inter alia*, the subcontractors on site, work being performed by each trade, weather conditions, and any special circumstances.

In addition, the indemnification clause is consistent with GOL § 5-322.1. Although full indemnification agreements are voidable, the indemnification clause here calls for partial indemnification of the general contractor for personal injuries partially caused by its negligence, to the extent permitted by law, and is thus enforceable. Also contained in the contract between Tishman and Brawnmade is an insurance provision, in which Brawnmade agreed to procure general liability insurance naming Tishman as an additional insured "with respect to any acts performed by it within the scope of this agreement." Thus, pursuant to this provision, Brawnmade owes Tishman a defense and indemnification in this matter, and Tishman's cross-motion for indemnification should be granted.

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<sup>1</sup> Tishman's demand, dated October 12, 2004, upon all parties for the contract between Brawnmade and Exterior Wall and Building Consultants, and letter for same to Brawnmade, dated November 11, 2004, went unanswered. However, according to Brawnmade, Tishman was informed that there was no written contract. Tishman disputes ever being told that there was no contract.

\* 7 ]

Plaintiff argues that defendants clearly violated Labor Law § 241(6) and Industrial Code §§ 23-1.7(e)(1) and (2), and 23-2.1.<sup>2</sup> In support of his claim under Industrial Code § 23-1.7(e)(1) and (2), plaintiff contends that the accident occurred when plaintiff tripped over loose rebar/steel pipes that were in his work area and passageway where he was walking in order to do his work duties. According to plaintiff, the rebar/steel should have been placed in a manner that it would not constitute an obstruction and tripping hazard. Additionally, it is argued that Industrial Code § 23-2.1 is sufficient to sustain plaintiff's Labor Law § 241(6) claim, since plaintiff tripped over building materials that were strewn over the worksite and the materials were stored in a manner that would obstruct passageways or cause tripping hazards.

In reply to Tishman's opposition and in opposition to Tishman's cross-motion, Brawnmade argues that while Brawnmade's contract with the owner (who is not a party) contains language that Brawnmade was to act as the construction manager, these responsibilities were transferred contractually to Tishman pursuant to their contract dated December 3, 2001. According to Brawnmade, the contract (Schedule A, para. (1)) states that Tishman's responsibilities are to "Provide experienced personnel on-site responsible for day to day administration of the Project." Brawnmade's witness testified at a deposition that Tishman was specifically hired to run the construction site and that Brawnmade "relied on Tishman to run construction." Furthermore, Tishman was the general contractor for the project; while Tishman may have been referred to as "Construction Managers Representative," Tishman's duties under the contract could easily be construed to be the duties of a general contractor (with the exception

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<sup>2</sup> Although plaintiff states that defendants also violated Industrial Code § 23-1.30 (illumination), unlike plaintiff's treatment of §§ 23-1.7(e)(1) and (2), and 23-2.1, plaintiff fails to set forth any arguments in support of its allegation concerning § 23-1.30.

of the responsibility for entering into contracts). It is argued that Tishman was hired to run the construction site, and there is no evidence that Brawnmade had any type of active role in the construction, management or supervision of the jobsite. In this regard, Brawnmade's vice-president testified that he only visited the site occasionally as an interested owner to observe the progress of the building. Brawnmade also points out that Tishman's Superintendent admitted that Tishman was exclusively in control of the jobsite and that Tishman's role was to "build this building; to supervise and manage construction." Therefore, Tishman's claim that it did not perform duties similar to that of a general contractor or that Tishman did not have an active role in the construction of the building lacks merit. Further, plaintiff's accident did not occur until four months after Tishman was on the site. Moreover, without the benefit of the contract between Brawnmade and the site safety company (Exterior Wall Building Consultants), it is unclear what specific role the site safety company played at the jobsite, when it was required to be there, and what its responsibilities were.

Brawnmade further asserts that its contract with Tishman specifically excludes indemnity for losses arising out of Tishman's negligence. And, as there is no evidence that Brawnmade was responsible for the day-to-day operation of the jobsite, Brawnmade is not required to indemnify Tishman.

In reply to plaintiff's opposing arguments, Brawnmade asserts that plaintiff testified that he did not trip over debris, but over the rebar that "was part of the concrete deck of each floor...." The deck was described as flat area, composed on a plywood base with steel on top and rebar steel on top of the deck. Clearly, Brawnmade argues, plaintiff fell over a "condition" that was part of the work he was hired to perform. Therefore, the rebar was not "debris" or "scattered

materials” but material used in the actual task he was performing. As plaintiff also testified that the rebar was part of the material of the concrete floor, the rebar was intentionally placed there to reinforce the floor and thus a typical construction site hazard compensable under Workers Compensation.

In further support of its cross-motion, Tishman asserts that despite the foregoing, it is clear that Tishman was not the general contractor, and nowhere in its contract with Brawnmade does it state that Brawnmade’s original responsibilities as outlined in Brawnmade’s contract with the owner were transferred to Tishman. Tishman’s contract with Brawnmade simply states that Tishman would make available to Brawnmade “its knowledge, skills, ideas, experience and abilities. . . .” The assertion that Tishman’s duties could be easily construed to be the duties of the general contractor is speculative. And, Exterior Wall Building’s role is not unclear; they were hired to provide site safety.

#### Analysis

#### Good Cause for Delay in Filing Motion for Summary Judgment

At the outset, the Court finds that Brawnmade has established good cause for the delay in filing the instant motion for summary judgment. The record establishes that on January 27, 2004, the Court ordered plaintiff to provide discovery to defendants and third-party defendant by February 17, 2004, depositions of all parties to commence on March 1, 2004, and plaintiff file the Note of Issue by April 19, 2004. Plaintiff failed to comply, and on April 13, 2004, the Court directed plaintiff to provide discovery, and directed that depositions commence on June 17, 2004, and that plaintiff file the Note of Issue by July 30, 2004. As a consequence of a pending motion for default judgment, discovery was delayed, and the parties were therefore directed, on August

24, 2004, to complete depositions and that the Note of Issue be filed by September 14, 2004, which was prior to the completion of depositions. It is undisputed that the Court directed that the note of issue be filed notwithstanding the need for further party discovery, and that the Court would permit the parties to conclude discovery after the filing of the note of issue. It is further established that Brawnmade could not file this instant motion until after its receipt of the deposition transcripts in December, 2004. The instant motion was filed February 5, 2005. Therefore, as a result of the delay caused in large part by plaintiff's failure to comply with discovery, and the fact that deposition transcripts were not available until three months after the filing of the Note of Issue, it cannot be said that the five-month delay in the filing of the instant motion was solely attributable to Brawnmade.

Good cause exists for the delay in filing this motion for summary judgment, pursuant to CPLR 3212(a), as the court acquiesced in, and had actual knowledge of, ongoing discovery subsequent to the filing of the Note of Issue (*see Quizhpi v Lochinvar Corp.*, 12 AD3d 252, 785 NYS2d 431 [1st Dept 2004]; *cf. Brill v City of New York*, 2 NY3d 648, 781 NYS2d [2004]). This was confirmed in an Order, dated August 24, 2004. Under such circumstances, the Court's tacit consent to consideration of the motion falls within its discretion (*Id.*).

#### Indemnification

General Obligations Law § 5-322.1(1) provides, in pertinent part:

A . . . promise [or] agreement . . . in connection with . . . a contract or agreement relative to the construction, alteration, repair or maintenance of a building . . . purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee . . . whether such negligence be in whole or in part, is against public policy and is void and unenforceable.

General Obligations Law § 5-322.1 prohibits the enforcement of an indemnification clause to the extent that the party seeking indemnification was negligent (*Castrogiovanni v Corporate Property Investors*, 276 AD2d 660 [2d Dept 2000]). “Simply put, . . . unlimited agreements are unenforceable by a negligent indemnitee” (*Bush v City of New York*, 195 Misc 2d 882 [Sup Ct NY County 2003]). However, in *Dutton v Charles Pankow Builders* (296 AD2d 321 [1st Dept 2002]), the First Department recognized the principle of “partial indemnification,” which consists of an indemnification agreement that purportedly seeks indemnity that does not run to the negligent conduct of the owner or general contractor (indemnitee) (*Bush v City of New York*, 195 Misc 2d 882, *supra*). Thus, indemnity agreements can pass muster in two ways: by including the “to the extent permitted by law” modifier [as held in *Bray v C & D Fireproof* (Supreme Court, Rockland County, Index No. 1225/94, Nov. 11, 1997, *supra*,)] or “(the court phrased this in the disjunctive) by limiting the subcontractor's obligation to its own negligence [as held in *Dutton, supra*]” (*Bush v City of New York*, 195 Misc 2d 882, citations omitted; *Mannino v J.A. Jones Const. Group, LLC*, 792 NYS2d 32 [1st Dept 2005] [holding that the contract provision allowing for partial indemnification does not run afoul of GOL § 5-322.1, since it contains the requisite language limiting third-party defendant's obligation to that permitted by law]).

The “Site Supervision Agreement” between Tishman and Brawnmade, upon which Tishman's indemnification claim rests, indicates that the “Construction Manager” is third-party defendant Brawnmade, and the “Construction Manager's Representative” is third-party plaintiff Tishman. The Site Supervision Agreement further provides, in pertinent part, that:

To the extent permitted by law, [Brawnmade] will indemnify, defend, hold [Tishman]

harmless against and from all claims [and] damages . . . arising out of, or in connection with, the Services except only for claims [and] damages . . . arising out of [Tishman's] negligence . . . .

Although this indemnification clause may be read as an agreement by Brawnmade to indemnify Tishman for claims and damages arising out of the Services arising from Tishman's negligence, it contains the language "to the extent permitted by law." Given that the indemnification clause at issue contains the requisite language limiting Brawnmade's obligation to that permitted by law, such agreement does not run afoul of GOL § 5-322.1 (*Mannino v J.A. Jones Const. Group, LLC*, 792 NYS2d 32, *supra*; see *Landgraff v 1579 Bronx River Ave., LLC*, 15 AD3d 200 [1st Dept 2005]). Therefore, the indemnification clause herein is not void as a matter of law.

Brawnmade contends that Tishman was the entity that supervised and coordinated the trades at the jobsite, and therefore, negligently caused plaintiff's accident; Brawnmade was not negligent in any manner. Therefore, since Tishman was the negligent party responsible for plaintiff's accident, and the indemnification clause does not cover damages arising from Tishman's negligence, indemnification of Tishman is not warranted.

According to the testimony of Mr. Waddell, the superintendent for Tishman, Tishman's role was to "build this building" and "supervise and manage construction." However, Mr. Waddell also testified that plaintiff's employer, Manhattan Structures, was at the job site pursuant to its contract with *Brawnmade*. Brawnmade's vice-president also testified that Brawnmade contracted with Manhattan Structures to do the concrete work at the subject project, and contracted with Exterior Building Wall Building Construction to provide safety personnel for the project in question. The record also includes a "subcontract" made on December 1, 2001,

indicating that Manhattan Structures, the “Subcontractor” and “554-556 Third Avenue . . . including its Construction Manager, BrawnMade . . . designated [as] the Owner,” agreed that Manhattan Structures perform work at the site.

The January 1, 2002 “Agreement” between the Owner and Brawnmade, as “Construction Manager,” indicates that Brawnmade agreed to “provide, perform and supervise all of the labor, equipment, and materials necessary for the construction, renovation and completion of the Work . . . .” (Art. 1.4). “Work” included, without limitation, the “furnishing and performing of everything necessary in the preparation, prosecution and full completion of the Work in conformity with the Contract Documents . . . .” (Id.). Brawnmade further agreed to provide “overall construction management in connection with the construction of the Work, and such other services as may be described herein . . . .” Additionally, Brawnmade agreed to “cause to be performed any work and furnish and install any materials and equipment which Construction Manager deems reasonably necessary during an emergency endangering life or property . . . [and] shall review and coordinate the programs of the Subcontractors who shall have the primary obligation for Project safety.” (Art. 2.7.5).

Brawnmade insists that the Site Supervision Agreement specifically excludes indemnity for losses arising out of Tishman’s negligence, and that there is no evidence that Brawnmade or any other entity was responsible for the day to day operation of the jobsite. However, Brawnmade has failed to establish these contentions as a matter of law. It cannot be said that Tishman was solely responsible for overseeing the work on the jobsite as a matter of law. Issues of fact as to the degree of negligence, if any, attributable to Brawnmade and/or Tishman precludes summary relief in favor of Tishman or Brawnmade at this juncture.

In light of the above, whether Brawnmade owes Tishman a defense and indemnification pursuant to the Site Supervision Agreement's provision requiring that Brawnmade maintain insurance naming Tishman as an additional insured is premature at this juncture.

Plaintiff's Labor Law §§ 240(1) and 241(6) Claims

As it is uncontested that plaintiff's accident did not involve an elevation-related accident that section 240 (1) is intended to guard against, plaintiff's Labor Law § 240(1) claim is dismissed.

It is uncontested that in order to sustain a cause of action under Labor Law § 241(6), plaintiff must allege and prove that defendants violated a rule or regulation of the Commissioner of Labor that sets out a specific concrete standard of conduct as opposed to general safety standards (*see Adams v Glass Fab, Inc.*, 212 AD2d 972 [4th Dept 1995]; *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502-504 [1993]; *see Ross*, 81 NY2d 494 [holding that a plaintiff must rely on a specific administrative rule, *i.e.* an Industrial Code violation, which establishes specific requirements to sustain a Labor Law §241(6) action]; *Amato v State of New York*, 241 AD2d 400, 402; *see also Gonzalez v United Parcel Service*, 249 AD2d 210, 211 [1st Dept 1998]).

Plaintiff's Labor Law § 241(6) claim is based on Industrial Code § 23-1.7(e), which requires removal of tripping hazards from "passageways" (paragraph 1) and "working areas" (paragraph 2). Section 23-1.7(e) provides the following:

(1) Passageways. All 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.

(2) Working areas. The parts of floors, platforms and similar 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.

As to the location of plaintiff's accident, *Canning v Barney's New York* (289 AD2d 32 [1<sup>st</sup> Dept 2001]) is instructive in determining whether the area in which plaintiff fell constituted a "passageway" or "work area." In *Canning*, plaintiff fell while carrying an electrical conduit to his work site, located on the main floor of a building under construction. The concrete floors of the subject building had been poured and the surface on which plaintiff fell was a "floor" contained within the outer wall of the structure. The location where plaintiff fell was in constant use as a work site for the loading and unloading of construction material and debris. The Court found that although the accident did not occur in plaintiff's own work area, there was no question that plaintiff was required to "pass" through the area in which he fell in order to reach his work area. At his deposition, plaintiff stated that the path from the materials shed to the room in which he was assigned to work was essentially a straight line. The Court held that the subject area constituted an open "working area" subject to the operation of paragraph (2), as opposed to a "passageway" governed by the more stringent requirements of paragraph (1).

Plaintiff herein described the area in which he fell as "exposed" and testified that the area was not covered, but open (EBT pp. 36-37). The deck on which plaintiff was working was a "flat area where they're going to pour the concrete" (EBT p. 65). The flat area was composed of "plywood underneath with the steel on, rebar steel on top of the deck" (EBT 65-66). There is no evidence in the record indicating that the "deck" area in which plaintiff fell was closed on both sides. Based on the caselaw cited above, Brawn made sufficiently established that the area in which plaintiff fell was not a "passageway." As plaintiffs failed to raise an issue of fact on this

issue, plaintiffs may not rely on Industrial Code § 23-1.7(e) (1) to support its Labor Law § 241 (6) claim (*see also Adams v Glass Fab, Inc.*, 212 AD2d 972 [4th Dept 1995] [holding that where plaintiff exited the truck to operate the cement pouring equipment, and tripped on wire mesh that had been placed on the floor area where concrete was to be poured, plaintiff was not in a passageway]). However, the location of plaintiff's accident falls squarely within the operation of Industrial Code § 23-1.7 (e)(2).

Given that the area in which plaintiff fell falls within paragraph (2) of Industrial Code § 23-1.7(e), the Court must determine whether the "loose" rebar steel upon which plaintiff fell constituted an accumulation of dirt and debris, scattered tools and materials, or a sharp projection within the contemplation of paragraph (2) of Industrial Code § 23-1.7 (e), or an integral part of the work being performed, as Brawnmade contends.

In *Canning v RFD 82nd St., LLC* (285 AD2d 439, *supra*), plaintiff was walking in a clear path between an exposed open edge of the building on his left and a pile of "stringers" on his right, when he tripped over a piece of "re-bar" *sticking out of the edge of the building*, fell, and broke his wrist (emphasis added). According to the plaintiff, the re-bar had been bent 90 degrees inward, so that the top portion of the re-bar extended horizontally across his path. The Court held that plaintiff's testimony presented issues of fact as to whether the defendants violated Industrial Code § 23-1.7 (e), and thus are liable pursuant to Labor Law § 241(6) (*Boss v Integral*, 294 AD2d 214 [1<sup>st</sup> Dept 1988] [holding that the piece of sheetrock upon which plaintiff fell constituted "debris" and "scattered materials" within the meaning of 23-1.7(e)(2)]; *see also Scannell v Mt. Sinai Med. Ctr.*, 256 AD2d 214 [1<sup>st</sup> Dept 1998] [where plaintiff tripped over building materials strewn over the worksite, 23-1.7 (e)(1) applied]).

However, in *Harvey v Morse Diesel Int'l* (299 AD2d 451 [2d Dept 2002]), the Court held that 23-1.7 (e)(2) did not apply where plaintiff tripped over a six-inch piece of cable. In *Harvey*, the plaintiff, an electrician, was required to pull certain cable through a ceiling, cut the cable from a spool once it had been pulled through the ceiling, and affix the cable to the ceiling. At the time of the accident, the plaintiff was descending a ladder after installing the cable. The six-inch piece of cable on which plaintiff tripped, was the type of cable with which she was working. The Court held that 23-1.7 (e)(2) did not apply because “the object on which [the] plaintiff tripped ... was an integral part of the work [she] was performing” (*see also Cooper v Sonwil Distribution Center, Inc.*, 15 AD3d 878 [4<sup>th</sup> Dept 2005] [holding that defendant is not liable for violating that regulation where, as here, plaintiff “tripped over demolition debris created by him and his coworkers, which was an integral part of the work being performed”]; *Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619 [2d Dept 2003]; *Sharrow v Dick Corp.*, 233 AD2d 858 [4th Dept 1996] [holding that section 23-1.7(e)(2) did not apply because the object on which plaintiff tripped, the Genie hoist, was an integral part of the work he was performing]).

In the case at bar, immediately before the accident occurred, plaintiff and his co-workers were waiting for the concrete to be brought up in a bucket by crane. When the foreman called for masons, plaintiff proceeded in his direction. As he was walking, plaintiff slipped and fell on “loose” rebar steel. The concrete was poured into the steel rebar which was shaped “like a square box.” The record indicates that plaintiff was injured as the result of falling over “loose” rebar that was located on a “floor” where plaintiff was required to pass in the course of his work. More importantly, plaintiff also testified that he did not fall on debris, but on “untied rebar steel that was part of the concrete pour that is part of the concrete deck of each floor from top to

bottom. The steel was not tied down in that area that caused me to fall.” Based on plaintiff’s deposition testimony, the “loose” rebar upon which plaintiff fell was not “sticking out of” any structure, but was an integral part of the work being performed. Therefore, plaintiff may not rely on Industrial Code § 23-1.7 (e)(2) to support his Labor Law § 241(6) claim.

Plaintiff’s reliance on Industrial Code § 23-2.1(a)(1) (Storage of Material or Equipment) is also insufficient to sustain plaintiff’s Labor Law § 241(6) claim. Although Industrial Code § 23-2.1(a)(1) is specific enough to support a Labor Law § 241(6) cause of action (*Cafarella v Harrison Radiator Div. of General*, 237 AD2d 936 [4th Dept 1997] citing *Lehner v Dormitory Auth. of State of New York*, 221 AD2d 958, 959), the Court concludes that it does not apply because, as stated above, the area in which plaintiff fell does not constitute a passageway, walkway or other thoroughfare.

Further, although Industrial Code § 23-2.1 (a)(2), which concerns “Storage of material or equipment” is specific enough to support a Labor Law § 241(6) cause of action (*Flihan v Cornell University*, 280 AD2d 994 [4th Dept 2001] citing see, *Herman v St. John's Episcopal Hosp.*, 242 AD2d 316, 316-317), the Court concludes that it does not apply herein because there is no evidence in the record indicating that plaintiff’s injury was the result of the improper storage of the rebar.

Finally, Industrial Code § 23-2.1(b) which addresses “disposal of debris,” does not avail plaintiff, since it “does not sufficiently set forth ‘a specific standard of conduct as opposed to a general reiteration of common-law principles’ for its violation to qualify as a predicate for a Labor Law § 241(6) cause of action” (*Quinlan v City of New York*, 293 AD2d 262 [1st Dept 2002]).

The Court also notes that it is uncontested that the alleged violations of OSHA are insufficient to support plaintiff's Labor Law § 241(6) claim.

Accordingly, based on the foregoing, it is hereby

ORDERED that the branch of third-party defendant Brawnmade Construction's motion pursuant to CPLR 3212 for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) causes of action in plaintiffs' underlying complaint is granted; and it is further

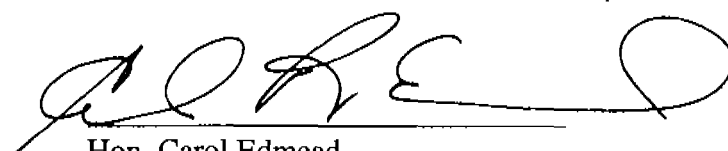
ORDERED that the branch of third-party defendant Brawnmade Construction's motion pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint of Tishman Construction Corp. of New York is denied; and it is further

ORDERED that Tishman Construction Corp.'s cross-motion for summary judgment granting indemnification from Brawnmade, including attorney fees and expenses is denied; and it is further

ORDERED that counsel for third-party defendant Brawnmade Construction shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: April 29, 2005

  
Hon. Carol Edmead

**FILED**  
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COUNTY CLERK'S OFFICE