SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY** IAS PART 16
Justice

LOUIS MARTINEZ and CATHERINE MARTINEZ,	INDEX NO. 22346/2004
Plaintiffs,	MOTION DATE November 27, 2007
- against -	
ALLIED BUILDING PRODUCTS CORPORATION, et al.,	MOTION CAL. NO. 14 & 30
Defendants.	MOT. SEQ. NUMBER

The following papers numbered 1 to 16 read on this motion by the defendant Allied Building Products Corporation for summary judgment dismissing the plaintiffs' complaint. The defendant Charles Parks d/b/a Parks Electric moves for summary judgment dismissing the plaintiffs' complaint.

	PAPERS NUMBERED
Notice of Motion/Affid(s)-Exhibits.....	1 - 4
Notice of Motion/Affid(s)-Exhibits.....	5 - 8
Affid(s) in Opp.-Exhibits.....	9 - 10
Affid(s) in Opp.-Exhibits.....	11 - 12
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Replying Affirmation.....	14
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Upon the foregoing papers the motion is determined as follows:

In this action, the plaintiff seeks to recover for injuries allegedly sustained in an accident that occurred on March 26, 2004. On that day, the plaintiff was employed by Sal's United Service that had been engaged by the defendant Allied Building Products Corporation ("Allied") to construct a mansard on the exterior of its premises. The construction generally consisted of the assembly of metal stud framing that was then covered by plywood sheeting.

The plaintiff testified at his deposition that, on the day of the accident, he and his supervisor were installing plywood on metal framing that had been erected the day before. At the same time, the defendant Charles Parks d/b/a Parks Electric ("Parks") was at the premises for the purpose of installing recessed lighting into the mansard. The plaintiff testified that Parks cut four or five sections out of the metal studs to create spaces that would contain the lighting. Parks testified at his deposition that he only cut two studs and that the pieces he removed did

not fall to the ground, but were placed by him into a dumpster at the premises.

Just prior to his accident, the plaintiff was descending from working on the mansard in a scissor jack man-lift. As the plaintiff was alighting from a ladder attached to the lift attempting to reach the ground, he avers that he stepped on a piece of metal framing material that was on the ground, was caused to fall and was injured as a result.

The plaintiffs assert as against both defendants two causes of action based upon sections 241[6] and 200 of the Labor Law.

With respect to Labor Law §241[6] claim, the plaintiffs assert in their bill of particulars and in opposition papers that the defendants violated sections 23-1.7 and 23-2.1 of the Industrial Code [22 NYCRR].

Turning to the code sections individually, it is clear section 23-2.1[a] of the Industrial Code does not apply to the facts of this case. Moreover, section 23-2.1[b] of the Industrial Code can not form a foundation for liability against Parsons as it merely sets forth a general safety standard (See, Salinas v Barney Skanska Construction Co., 2 AD3d 619, 622).

Section 23-1.7[d] is not applicable to the facts of this case because it does not involve a "slipping hazard" (See, Heizman v Long Island Lighting Co., 251 AD2d 289). In addition, section 23-1.7[e][1] is not applicable to this case since the plaintiff's accident did not occur in a "passageway".

However, contrary to the defendants' assertions, the location of the plaintiff's accident was a "working area" as defined under section 23-1.7[e][2] of the Industrial Code. That section apples to "floors, platforms and similar areas where persons work or pass" and the area where the plaintiff fell, even though outside the premises, qualifies as a "working area" (See, Smith v Hines GS Props., Inc., 29 AD3d 433; Maza v Univ. Ave. Dev. Corp., 13 AD3d 65; Canning v Barney's N.Y., 289 AD2d 32). The defendants' argument that the plaintiff may not rely on this section because the alleged debris, a piece of metal stud framing, was integral to the work being performed is unavailing as it is apparent from the testimony adduced that the material at issue was not part of the work the plaintiff was performing that day (See, Arenas v The Bon-Ton Department Stores, Inc., 35 AD3d 1025; Maza v Univ. Ave. Dev. Corp., supra; cf., Solis v 32 Sixth Ave. Co. LLC, 38 AD3d 389). Specifically, the plaintiff testified that he and his co-worker had finished utilizing metal stud framing a day earlier and that all debris from work they performed was removed from the work area by them each day.

The defendant Parks argues that the plaintiffs' Labor Law §241[6] and §200 claims must be dismissed since he was neither an owner nor a general contractor on the project and since he asserted no control over

how the plaintiff accomplished the tasks he was assigned to complete. That argument overlooks the thrust of the plaintiffs' claim against Parks which is that he created the condition that caused him to fall. Under general common law principles, creation of a dangerous condition is a predicate for liability in negligence, which is the functional equivalent of a claim under Labor Law §200 (See, Farduchi v United Artists Theatre Circuit, Inc., 23 AD3d 610; Brown v Brause Plaza, LLC, 19 AD3d 626). Moreover, a contractor, even a sub-contractor, is the statutory agent of the owner or general contractor for those activities within the scope of the work delegated (See, Russin v Louis N. Picciano & Son, 54 NY2d 311, 318). As such, in the case at the bar, since Parks was hired to install lighting in the mansard at the premises, if the piece of metal stud framing the plaintiff claims caused him to fall was, in fact, created by Parks he can be liable under Labor Law §241[6](See, Everitt v Nozkowski, 285 AD2d 442). Therefore, to create a prima facie case for dismissal of both claims here, Parks was required to proffer evidence that he did not create the condition at issue.

Similarly, Allied argues that the plaintiff's Labor Law §200 cause of action fails as against it since there is no proof that it exercised the requisite control over the activities of the plaintiff or Parks at the work site. This contention is based upon the erroneous premise that the accident arose out of the method or manner in which the contractors Allied hired performed their work, rather than, as the plaintiff alleges, a dangerous condition at the work site. On the issue of debris at the construction area, Allied's employee Alexander D. Gourd ("Gourd") acknowledged at his deposition that his duties on this project included ensuring that "everything was kept in a clean manner" and that "no debris was lying around". Gourd further averred that cleanliness at the work site was "a big thing" and his supervisor instructed him "to make sure that nothing was lying on the ground" since the work was proceeding in an area where many people passed. Clearly, debris at the work area, the very foundation of the plaintiffs' claim, was something that was within Allied's control. Thus, for Allied to demonstrate a prima facie case, it was necessary for it proffer evidence that it lacked actual or constructive notice of the condition that the plaintiff claims caused him to fall.

Parks' deposition testimony that he cut two pieces from the metal framing, carried each piece down the ladder he was utilizing and placed the debris in a dumpster on the site establishes his entitlement to judgment as a matter of law. Likewise, Gourd also established a prima facie case for Allied with his statement that he did not observe any debris on the ground when Parks completed making his cuts and the plaintiff returned to the area.

In opposition, although the plaintiff acknowledged that he did not know what Parks did with the four or five pieces he claimed Parks cut from the mansard, the plaintiffs adduced sufficient circumstantial evidence to establish an issue of fact on these motions. Specifically, the plaintiff expressly claims that he tripped on a piece of metal stud framing similar in size to the pieces that were cut by Parks, the deposition testimony indicates that neither the plaintiff nor his supervisor cut metal framing materials that day, Parks was working in

the vicinity of the plaintiff's accident that day and that the work site was clear of debris at the beginning of the work day. Moreover, Gourd was physically present at the work site prior to and at the time the accident occurred and would have had the opportunity to observe any offending conditions in the area. While the proferred testimony offers sharp disputes of fact as to the physical condition of the area, as well as the actual happening of the alleged accident, resolution of these issues lie within the purview of a trier of fact and not the court on a summary judgment motion.

Accordingly, after considering the evidence in a light most favorable to the plaintiffs (Kelly v Media Services Corp, 304 AD2d 717; Krohn v Felix Industries, 302 AD2d 499), the defendants' motions for summary judgment dismissing the plaintiffs' Labor Law §241[6] claim are granted only to the extent that all their claims under the Industrial Code are dismissed except that based upon 23-1.7[e][2]. The branches of the motions for summary judgment dismissing the plaintiffs' claims based upon Labor Law §200 are denied.

Dated: February 13, 2008

Peter J. Kelly, J.S.C.