At an IAS Term, the Settlement Conference Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 10th day of September, 2008.

P R E S E N T:

HON. DAVID I. SCHMIDT,

Justice.

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ERIC HANSON AND DOROTHY HANSON,

Index No. 17062/03

Plaintiffs,

- against -

TURNER CONSTRUCTION COMPANY AND PLATO GENERAL CONSTRUCTION/EMCO TECH CONSTRUCTION JV, LLC,

Defendants.

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TURNER CONSTRUCTION COMPANY,

Index No. 75398/06

Third-Party Plaintiff,

- against -

PLATO GENERAL CONSTRUCTION/EMCO TECH CONSTRUCTION, JOINT VENTURE LLC, AND SOMPO JAPAN INSURANCE COMPANY F/K/A YASUDA FIRE AND MARINE INSURANCE COMPANY,

Third-Party Defendants.

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The following papers number 1 to 11 read on this motion:

| | Papers Numbered |
|---|---|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed | 1-2, 4-5 |
| Opposing Affidavits (Affirmations) | 6, 7, 9 |
| Reply Affidavits (Affirmations) | 8, 11 |
| Affidavits (Affirmations) | |

Upon the foregoing papers, defendant and third-party plaintiff Turner Construction Company ("Turner Construction") moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint plaintiffs[1] Eric Hanson and Dorothy Hanson, and declaring that Turner Construction is an insured of third-party defendant Sompo Japan Insurance Company ("Sompo Insurance"), formerly known as Yasuda Fire and Marine Insurance Company ("Yasuda Insurance") pursuant to a policy issued to defendant and third-party defendant Plato General Construction/Emco Tech Construction, Joint Venture LLC ("P/E Construction"). P/E Construction and Sompo Insurance (together, the "Sompo Defendants") also move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint and the third-party complaint.

***Procedural History***

Plaintiff commenced the first-party action by filing a summons and complaint on May 7, 2003. Issue was joined shortly thereafter. Turner Construction commenced the third-party action by filing a third-party summons and complaint on April 28, 2006. Third-party defendants then interposed an answer on October 19, 2006.

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[1] The claims pleaded on behalf of plaintiff Dorothy Hanson derivative to those pleaded on behalf of Eric Hanson, the physically injured plaintiff. All singular references to plaintiff hereafter are to Eric Hanson and exclude Dorothy Hanson.

By the terms of this court's order dated December 6, 2007, all discovery was to be completed by February 24, 2008. Defendants and third-party defendants now seek summary judgment.

***Facts and Allegations***

Plaintiff was injured on June 5, 2001, while performing construction work in the structure known as the LaGuardia building on the campus of Brooklyn College. Plaintiff was employed by non-party Roy Kay as a sheet metal worker. Roy Kay was hired by the Dormitory Authority of the State of New York ("DASNY") to replace existing heating, ventilating and air conditioning systems in the subject building.

On the date of the accident, plaintiff entered an attic or crawl space in the subject building. The entrance to the subject space was approximately three-and-a-half feet below a hallway above the fourth floor. Plaintiff entered the subject space in order to take measurements that were to be used in the design of an air duct leading through the space. After plaintiff took the measurements, he attempted to step up from the lower attic space by placing his right foot on the hallway floor and using his right leg to push up his body. His left leg was then caught between the edge of the raised hallway and a protruding piece of iron. Plaintiff suffered injuries to his back as a consequence.

Plaintiff alleges that defendants are either contractors hired by DASNY to complete the subject construction project, or agents of the owner or contractors. The complaint further alleges that defendants, by the actions and omissions of their agents, breached their common-law duty to maintain a safe construction site, and violated sections 240, 241 and 200 of the

Labor Law. Lastly, the complaint asserts that these breaches of the common-law duty and violations of the Labor Law were the proximate cause of the accident, and defendants are thus vicariously liable for plaintiff's injuries.[2]

***Arguments Advanced by Turner Construction***

Turner Construction advances various arguments in support of its motion. Initially, Turner Construction asserts that plaintiff does not have a viable claim against it pursuant to either Labor Law § 200 or a common-law negligence theory. Turner Construction states that it is undisputed that its agents did not direct or control any of the work done (including the work done by plaintiff) at the site. Turner Construction further states that it did not provide any equipment to plaintiff. Lastly, Turner Construction claims that it did not have actual or constructive notice of any dangerous condition near the area where plaintiff suffered his accident.

Turner Construction also asserts that it is not liable to plaintiff pursuant to Labor Law § 241 (6). Initially, Turner Construction states that it is not an "owner" or "contractor" as those words are defined by the Labor Law and decisions interpreting it. Turner Construction asserts that it is a construction manager hired by DASNY to perform only administrative tasks and did not have any supervisory authority over the contractors (including Roy Kay, plaintiff's employer). Therefore, concludes Turner Construction, it is not subject to Labor Law § 241 (6) liability, since that statute applies only to property owners and contractors.

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[2] By order dated May 22, 2008, this court stayed summary judgment with respect to plaintiff's Labor Law § 240 (1) causes of action pending the determination of the issues discussed herein.

In the alternative, Turner Construction argues that plaintiff's Labor Law § 241 (6) claims must be dismissed because plaintiff has not cited an applicable provision of the Industrial Code (12 NYCRR ch. 1, subch. A) that is sufficiently specific.

Lastly, Turner Construction asserts that it is entitled to a judgment declaring that it is an "additional insured" pursuant to the insurance policy issued by Yasuda Insurance (now, third-party defendant Sompo Insurance) to third-party defendant P/E Construction. Turner Construction asserts that P/E Construction and Sompo Insurance were defendants in an action (the "Gerbasio Action") commenced by Michael Gerbasio in the United States District Court for the Eastern District of New York seeking damages for personal injuries sustained by Michael Gerbasio in an accident that occurred on the same worksite. Subsequently, Turner Construction was awarded summary judgment on its third-party claim in the Gerbasio Action for a judgment declaring that it was an "additional insured" of the subject policy issued by Yasuda Insurance. Turner Construction reasons that since Sompo Insurance is the successor in interest of Yasuda Insurance, and since Yasuda Insurance had an opportunity to litigate in federal court the issue of whether Turner Construction is an "additional insured" of the subject policy, the doctrine of collateral estoppel applies and this court should summarily declare that Turner Construction is an "additional insured" under the subject policy.

***Arguments Advanced by the Sompo Defendants***

The Sompo Defendants advance various arguments in support of their motion. Initially, they argue that P/E Construction is not subject to liability under the Labor Law because P/E Construction is a contractor that did not supervise, direct or control plaintiff or the work performed by plaintiff. They note that the Labor Law applies only to "owners" and "contractors". Since it did not own the subject premises, P/E Construction argues that it may be subject to Labor Law liability only as a "contractor"—however, that term applies only to entities that supervised, directed or controlled the injured party or the work performed by the injured party. P/E Construction contends that since it did not supervise, direct or control plaintiff or plaintiff's work, it is not subject to liability under the Labor Law.

The Sompo Defendants also argue separately concerning plaintiff's Labor Law § 200 and common-law negligence claims. The Sompo Defendants assert that since P/E Construction did not supervise, direct or control plaintiff or plaintiff's work, it is subject to liability under Labor Law § 200 and common-law negligence only if its agents either created or had notice of an applicable hazardous condition. The Sompo Defendants claim, however, that there is no evidence that P/E Construction employees ever worked in or near the subject attic space where plaintiff suffered injuries, and thus did not create or have notice of any applicable dangerous condition. Therefore, maintain the Sompo Defendants, plaintiff does not have any viable Labor Law § 200 or common-law negligence claims against P/E Construction.

The Sompo Defendants also assert that plaintiff's Labor Law § 241 (6) claims must be dismissed. They state that any Labor Law § 241 (6) claim must be supported by citing a section of the Industrial Code that applies to the subject facts and contains a specific command. The Sompo Defendants conclude that plaintiff's Labor Law § 241 (6) claims must be dismissed because plaintiff has not cited an applicable Industrial Code provision to support his claims.

The Sompo Defendants also assert arguments concerning the third-party claims made by Turner Construction regarding defense and indemnity. Initially, the Sompo Defendants state that they are entitled to summary judgment dismissing the third-party claims asserted by Turner Construction because Turner Construction did not provide timely notice of the subject accident. The Sompo Defendants assert that the applicable policy required Turner Construction to notify Sompo Insurance (or, its predecessor, Yasuda Insurance) of the existence of an "occurrence" (as that term is defined in the subject policy) as soon as practicable. However, state the Sompo Defendants, Sompo Insurance did not receive such notice until May of 2003, almost two years after the accident occurred. The Sompo Defendants contend that Sompo Insurance timely disclaimed coverage, and, as such, the third-party claims of Turner Construction against them should be dismissed on the ground of late notice.

In the alternative, the Sompo Defendants argue that Turner Construction is not entitled to indemnity or contribution. The Sompo Defendants assert that common-law contribution or indemnity exists only when the party against which contribution or indemnity is sought

would be liable to the injured plaintiff. Here, claim the Sompo Defendants, there is no evidence that plaintiff was injured as a consequence of the actions or omissions of the agents of P/E Construction, and thus Turner Construction has no common-law right of contribution or indemnity against P/E Construction. Moreover, the Sompo Defendants state that the applicable contractual indemnity provisions apply only when a party is injured as a result of work performed by employees of P/E Construction. Since, according to the Sompo Defendants, there is no indication that plaintiff was injured as a consequence of work performed by P/E Construction employees, Turner Construction is not entitled to either common-law or contractual contribution or indemnity in this matter. Lastly, according to the Sompo Defendants, Turner Construction is not entitled to contribution or indemnity even if Turner Construction is an "additional insured" under the applicable policy. The Sompo Defendants assert that the definition of "additional insured" does not include Turner Construction because the terms of the policy limit such coverage to the extent that the injuries are a result of work performed by employees of P/E Construction. For these reasons, the Sompo Defendants conclude that this court should dismiss all third-party claims asserted by Turner Construction against them.

***Arguments Advanced in Opposition***

In opposition to the motion of the Sompo Defendants, Turner Construction argues that it did in fact provide prompt notice of the subject claim to Sompo Insurance. Turner Construction states that it first learned of the claim when plaintiff commenced the instant action in May of 2003. Turner Construction asserts that Sompo Insurance was notified of

the action by letter on May 22, 2003. According to Turner Construction, notice of the claim to Sompo Insurance by the May 22, 2003 letter was notice given as soon as practicable.

Turner Construction also contends that, counter to the argument advanced by the Sompo Defendants, an "additional insured" clause is applicable even when the injured party was not engaged in the work of the named insured. Turner Construction argues that the "additional insured" clause applies in the instant matter, notwithstanding the fact that plaintiff was not injured while performing work related to P/E Construction—the named insured in the subject policy.

The Sompo Defendants contend that the subject policy requires prompt notice of an "occurrence". The Sompo Defendants argue that the subject accident was an "occurrence" as that term is defined in the subject policy and therefore, Turner Construction had notice of the "occurrence" on June 5, 2001. The Sompo Defendants assert that the notice of the accident contained in the May 22, 2003 letter was not provided "as soon as practicable" and, as such, Turner Construction did not comply with the condition precedent contained in the subject policy. For this reason, Sompo Insurance claims that it properly denied coverage—specifically, the defense of this action—to Turner Construction. Lastly, Sompo Insurance argues that, notwithstanding the argument of Turner Construction, the issue of whether denial of coverage is proper, because Turner Construction did not provide notice of the occurrence as soon as practicable, was not litigated in the Gerbasio Action, and is thus not subject to the doctrine of collateral estoppel.

Plaintiff also makes various claims in opposition. Initially, plaintiff claims that Turner Construction[3] has not made a prima facie showing that demonstrates the absence of triable issues of fact. Plaintiff asserts that the condition of the subject attic space constituted a dangerous condition, of which agents of Turner Construction had notice.

Plaintiff also asserts that, contrary to its assertion, Turner Construction is in fact subject to liability under the Labor Law as an agent of the owner, DASNY. Plaintiff claims that agents of Turner Construction directed and controlled virtually all the work performed at the job site, rendering Turner Construction an agent of DASNY for the purposes of the Labor Law. With respect to Labor Law § 241 (6), plaintiff contends that sections 23-1.7 (f) and 23-2.7 (b) of the Industrial Code apply to the instant facts and that each contains a specific command. Also, with respect to Labor Law § 200 and common-law negligence, plaintiff asserts that Turner Construction agents supervised and controlled both plaintiff and the subject attic space.

***Standards for Summary Judgment***

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should only be employed when there is no doubt as to the absence of triable issues (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361,

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[3] Plaintiff apparently does not oppose the arguments of the Sompo Defendants with respect to the complaint. As plaintiff has not offered any argument with respect to his claims against P/E Construction, he has failed to demonstrate the existence of material issues of fact regarding this defendant (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The assertions by the Sompo Defendants are thus deemed admitted by plaintiff (*see e.g. Mascoli v Mascoli*, 129 AD2d 778 [1987]) and, therefore, the dismissal of the causes of action against P/E Construction are conceded by plaintiff.

364 [1974]). The proponents of a motion for summary judgment must first demonstrate entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]). If the existence of an issue of fact is even arguable, summary judgment must be denied (*Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [1989]). Also, parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions of the parties (*Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2003]; *see also Akseizer v Kramer*, 265 AD2d 356 [1999]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [1976]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1990]). Indeed, the trial court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Henderson v City of New York*, 178 AD2d 129, 130 [1991]; *see also Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [1976]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1990]). Lastly, any party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense, rather than by

pointing to gaps in the an opponent's proof (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2003]).

***Insurance Coverage Dispute Between Sompo Insurance and Tower Construction***

The court denies both the motion by Tower Construction and the motion by the Sompo Defendants with respect to the insurance coverage dispute between Tower Construction and Sompo Insurance. The court first rejects the allegation of Tower Construction that it is entitled to a summary declaration that it is an "additional insured" of the policy between Sompo Insurance and P/E Construction. The doctrine of collateral estoppel, or issue preclusion, "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party...whether or not the tribunals or causes of action are the same" (*Parker v Blauvelt Volunteer Fire Co., Inc.*, 93 NY2d 343, 349 [1999] [internal quotations omitted]; *see also Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). Collateral estoppel applies when the party had a full and fair opportunity to fully litigate the identical issue (*Jeffreys v Griffin*, 1 NY3d 34, 39 [2003]; *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]). Preclusive effect may be given to an issue only when it is clear that the issue was necessarily decided in the prior proceeding (*Jeffreys*, 1 NY3d at 39). Here, other issues of fact, such as whether plaintiff's work triggered the "additional insured" clause, and whether notice of the occurrence—required to trigger coverage in the first instance—was timely, are separate issues that were apparently not litigated in the Gerbasio Action, and thus, collateral estoppel

does not apply (*see e.g. Sneddon v Koeppel Nissan, Inc.*, 46 AD3d 869 [2007]). Therefore, the court denies the application of Turner Construction for a summary declaration that it is an "additional insured" under the subject policy issued by Sompo Insurance to P/E Construction.

Also, issues of fact preclude this court from awarding summary judgment to Sompo Insurance. There is an issue of fact whether the late notice of the occurrence provided by Turner Construction to Sompo Insurance was reasonable. The parties' submissions indicate that Turner Construction had notice of the subject accident shortly after it occurred but did not provide Sompo Insurance with notice of the accident until the instant action was served on Turner Construction.

Turner Construction, as an additional insured under the subject policy, had a duty to provide Sompo Insurance with notice as soon as practicable of both the "occurrence"—specifically, the subject accident (*see e.g. City of New York v St. Paul Fire & Mar. Ins. Co.*, 21 AD3d 978, 981 [2005]; *Ambrosio v Newburgh Enlarged City School Dist.*, 5 AD3d 410, 412 [2004]; *Sayed v Macari*, 296 AD2d 396, 397 [2002]; *City of New York v Certain Underwriters at Lloyd's of London*, 294 AD2d 391 [2002]; *Structure Tone v Burgess Steel Prods. Corp.*, 249 AD2d 144, 145 [1998]; *Ell Dee Clothing Co. v Marsh*, 247 NY 392, 396 [1928]). Compliance with this obligation is a condition precedent to the duty of the insurer to defend or indemnify the insured (*White by White v City of New York*, 81 NY2d 955, 957 [1993]; *see also Kreger Truck Renting Co., Inc. v American Guar. & Liab. Ins. Co.*, 213 AD2d 453 [1995]; *Government Empls. Ins. Co. v Fasciano*, 212 AD2d 579

[1995], *lv denied* 85 NY2d 812 [1995]; *Zadrima v PSM Ins. Cos.*, 208 AD2d 529 [1994], *lv denied* 85 NY2d 807 [1995]; *Smalls v Reliable Auto Serv., Inc.*, 205 AD2d 523 [1994]; *Town of Smithtown v National Union Fire Ins. Co.*, 191 AD2d 426 [1993]; *Allstate Ins. Co. v Grant*, 185 AD2d 911 [1992]). Absent a valid excuse for a delay in furnishing notice, failure to satisfy the notice requirement vitiates coverage (*Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742 [2005]; *Eagle Ins. Co. v Zuckerman*, 301 AD2d 493 [2003]).

However, an insured's failure to give timely notice is excused where the insured had a reasonable basis for a belief that no claim will be asserted against him (*SSBSS Realty v Public Serv. Mut. Ins. Co.*, 253 AD2d 583, 584 [1998]; *White v City of New York*, 81 NY2d 955, 957 [1993]; *see also 875 Forest Ave. Corp. v Aetna Cas. & Sur. Co.*, 37 AD2d 11, 12 [1971], *affd* 30 NY2d 726 [1972]). Thus, the question of whether such a delay is reasonable under the circumstances is one of fact and is reserved for the trier of fact (*Argentina v Otsego Mut. Fire Ins. Co.*, 86 NY2d 748, 750 [1995]). Lastly, the court rejects the argument by the Sompo Defendants that they are entitled to summary judgment dismissing the third-party claims of Turner Construction because Turner Construction has not made the necessary showing for indemnity or contribution. Summary determinations regarding indemnity or contribution are proper only when proximate cause of an injury or liability are established as a matter of law (*see e.g. Benedetto v Carrera Realty Corp.*, 32 AD3d 874, 875-876 [2006], citing *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2005]; *Iurato v City of New York*, 18 AD3d 247, 248 [2005]; *Brennan v R.C. Dolner, Inc.*, 14 AD3d 639 [2005]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [2004]; *Hernandez*

*v Two E. End Ave. Apt. Corp.*, 303 AD2d 556, 557-558 [2003]; *Toledo v Long Is. Jewish Med.Ctr.*, 309 AD2d 921, 922 [2003]; *Russin v Picciano & Son*, 54 NY2d 311 [1981]; *Wysocki v Balalis*, 290 AD2d 504, 505 [2002]; *Reilly v DiGiacomo & Son*, 261 AD2d 318 [1999]; *Maxwell v Toys "R" Us*, 258 AD2d 630 [1999]; *cf. De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [2003]). Here, there is no basis for this court to determine liability and proximate cause summarily (*see e.g. Ragone v Spring Scaffolding, Inc.*, 46 AD3d 652, 655 [2007]; *Saleh v Saratoga Condominium*, 10 AD3d 645 [2004]). Accordingly, this court denies both the motion by Turner Construction and the motion by the Sompo Defendants as related to the third-party claims asserted by Turner Construction.

***Labor Law § 200 and Common-Law Negligence***

The court also denies the motion by Turner Construction insofar as it seeks an order dismissing plaintiff's claims based on Labor Law § 200 and common-law negligence. Labor Law § 200 states, in applicable part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment and devices in such places shall be so placed, operated, guarded and lighted as to provide reasonable and adequate protections to such persons."

Labor Law § 200 codifies the common-law duty of an owner or general contractor to provide a safe place to work (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]). "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 work" (*Aranda v Park East Constr.*, 4 AD3d 315, 316 [2004]; *see also Lombardi v Stout,* 80 NY2d 290, 295 [1992]). General supervisory authority for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose Labor Law § 200 liability (*see e.g. Dos Santos v STV Engrs., Inc.*, 8 AD3d 223, 224 [2004]); however, an entity given authority by an owner or contractor to supervise and control the activity that produced the injury is subject to liability (*see e.g. Ryder v Mount Loretto Nursing Home Inc.*, 290 AD2d 892, 893-894 [2002]).

Turner Construction maintains that its agents are not liable under common-law negligence or Labor Law § 200 because its agents did not supervise, direct or control the work that produced the injury. However, the witness produced by Turner Construction for examination before trial—Steven Quinones—testified that on the morning of the accident (but prior to the accident occurring), Turner Construction directed Roy Kay—plaintiff's employer—to "safeguard" and provide a safe means of ingress and egress into the subject attic space.[4] This testimony establishes that Turner Construction had the authority to control the activity that caused the injury and avoid or correct the unsafe condition (*Russin v Louis*

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[4] Examination before trial of Defendant Turner Construction, pp. 56-57. Notably, when asked if he had asked Roy Kay to safeguard the area, Steven Quinones replied, "I don't know".

*N. Picciano & Son*, 54 NY2d 311, 317 [1981]; *see also Candela v City of New York*, 8 AD3d 45 [2004]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Moreover, this testimony could lead a trier of fact to rationally conclude that agents of Turner Construction had notice of a dangerous condition in or around the subject attic space (*see e.g. Keating v Nanuet Board of Educ.*, 40 AD3d 706, 708-709 [2007]; *Thomas v Claffee*, 24 AD3d 749, 751 [2005]). Accordingly, the application by Turner Construction for an order dismissing plaintiff's claims based on Labor Law § 200 and common-law negligence is denied.

***Labor Law § 241 (6)***

The court also denies the motion by Turner Construction insofar as it seeks an order dismissing plaintiff's claims based on Labor Law § 241 (6). Labor Law § 241 states, in applicable part, as follows:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:"
>
> "6. 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 the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work,

except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

A Labor Law § 241 (6) claim is established if the defendants violated a provision of the Industrial Code which contains concrete specifications with which the defendants must comply under Labor Law § 241 (6) (*Donovan v S & L Concrete Constr. Corp., Inc.*, 234 AD2d 336, 337 [1996]; *see also Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494 [1993]). The Industrial Code provision relied on to support a Labor Law § 241 (6) must contain a specific command and not general regulatory criteria such as "adequate", "effective" and "proper" (*Ross*, 81 NY2d at 501-504). A violation of an Industrial Code provision that "mandates a distinct standard of conduct" rather than a mere reiteration of common-law principles serves to establish vicarious liability of an owner or contractor under Labor Law § 241 (6) (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 351 [1998]; *see also Adams v Glass Fab*, 212 AD2d 972, 973 [1995]; *Ares v State*, 80 NY2d 959, 960 [1992]).

The court initially rejects the assertion of Turner Construction that it is not subject to Labor Law § 241 (6) liability because it is not a "contractor" as that term is defined in the Labor Law. First, the title of an entity that performs work in a construction context is not relevant since the entity may still be subject to Labor Law liability as an agent of the owner (*see e.g Chimborazo v WCL Assocs., Inc.*, 37 AD3d 394, 396 [2007], citing *Aranda v Park E. Constr.*, 4 AD3d 315, 316 [2004]; *Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *see also Natoli v City of New York*, 32 AD3d 507 [2006]; *Ewing v ADF Constr.*

*Corp.*, 16 AD3d 1085 [2005]; *Sherbourne v Murrane Building Contractors, Inc.*, 28 AD3d 1151 [2006]; *Falsitta v Metropolitan Life Ins. Co., Inc.*, 279 AD2d 879 [2001]). Indeed, as stated above, Turner Construction had "the ability to control the activity which brought about the injury" (*Chimborazo*, 37 AD3d at 396) and is thus subject to Labor Law liability as an agent of DASNY, the owner of the property.

Moreover, plaintiff's Labor Law § 241 (6) is properly predicated on 12 NYCRR 23-1.7 (f) ("vertical passage"). This section properly supports a Labor Law § 241 (6) claim (see e.g. *Conklin v Triborough Bridge & Tunnel Auth.*, 49 AD3d 320 [2008]; *Betke v Archwood Estates*, 261 AD2d 427 [1999]) and states that "[s]tairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided". Here, plaintiff was injured while emerging from a space three-and-a-half feet lower than the nearest floor. No "ladder or other safe means of access" was provided. Thus, there are material questions of fact as to whether plaintiff herein was provided safe means for access to the attic or crawl space. Also, it appears that no temporary stairways were constructed, as required by 12 NYCRR 23-2.7 ("stairway requirements during the construction of buildings") (*see e.g. Fuller v Catalfamo*, 223 AD2d 850, 852 [1996]). For these reasons, the application by Turner Construction for an order dismissing plaintiff's claims based on Labor Law § 200 and common-law negligence is denied.

***Summary***

For the foregoing reasons, the motion by defendant and third-party plaintiff Turner Construction Company is denied. The motion by third-party defendant Sompo Japan Insurance Company, formerly known as Yasuda Fire and Marine Insurance Company and defendant and third-party defendant Plato General Construction/Emco Tech Construction, Joint Venture LLC is granted solely to the extent that the complaint is dismissed as against defendant Plato General Construction/Emco Tech Construction, Joint Venture LLC, and is otherwise denied.

The foregoing constitutes the decision, order and judgment of the court.

E N T E R,

J. S. C.

HON. DAVID L. SCHMIDT