SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

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

MARCO YANZA,
Plaintiff,

- against -

TOCCI BUILDING CORP. OF NEW JERSEY, INC., et al.,

Defendants.

INDEX NO. 11373/2006

MOTION DATE October 14, 2008

MOTION CAL. NO. 32

MOT. SEQ. NUMBER 3

TOCCI BUILDING CORP. OF NEW JERSEY, INC., et al.,

Third-Party Plaintiffs,

- against -

JKN, INC. d/b/a APRO CONSTRUCTION GROUP,

Third-Party Defendants.

TOCCI BUILDING CORP. OF NEW JERSEY, INC., et al.,

Second Third-Party Plaintiffs,

- against -

DA VINCI CONSTRUCTION OF NASSAU, INC. d/b/a DA VINCI CONSTRUCTION,

Second Third-Party Defendants.

The following papers numbered 1 to 10 read on this motion by the defendants Tocci Building Corp. of New Jersey, Inc., ASN Roosevelt Center, LLC, Archstone-Smith Operating Trust and Archstone-Smith Communities, LLC for summary judgment dismissing the plaintiff's complaint and for an extension of time to move for summary judgment on its third-party claims. The plaintiff cross-moves for summary judgment on its causes of action brought pursuant to Labor Law §241[6] and §200.

PAPERS NUMBERED

Notice of Motion/Affid(s)-Exhibits..... 1 - 4
Notice of Cross Motion/Affid(s) in Opp.-Exhibits... 5 - 8
Replying Affidavits..... 9
Replying Affidavits..... 10

Upon the foregoing papers the motion and cross-motion are determined as follows:

This action originates in a accident that occurred on April 6, 2008 at a premises located at 1299 Corporate Drive, Westbury, New York. On that date, the plaintiff was employed by the third-party defendant JKN, Inc. d/b/a Apro Construction Group ("Apro") and was installing materials to the exterior of the building identified as number nine. At the time of the accident, the plaintiff was on the balcony of apartment 905 in building nine when he slipped on sawdust and fell to the floor of the balcony. According to the sub-contract between defendant Tocci Building Corp. of New Jersey, Inc., ("Tocci") and Apro, Tocci was the construction manager on the project and the defendants Archstone-Smith Operating Trust and Archstone-Smith Communities, LLC ("Archstone") were the owners of the premises.

The branch of the motion to dismiss the plaintiff's cause of action brought pursuant to Labor Law §240[1] is granted without opposition. Labor Law § 240[1] does not protect a worker from "any and all perils that may be connected in some tangential way with the effects of gravity," rather only from "specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured . . ." (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501). The harm must flow "directly . . . from the application of the force of gravity to an object or person" (Ross v Curtis-Palmer Hydro-Elec. Co., supra at 501). Here, the plaintiff's accident, a classic slip and fall, clearly does not fall within the protections of Labor Law §240[1].

The defendants also seek summary dismissal of the plaintiff's cause of action alleging violations of section 241[6] of the Labor Law. That statute provides, inter alia, that areas in which construction is being performed shall be "guarded, arranged, operated, and conducted" in a manner which provides "reasonable and adequate protection and safety to the persons employed therein," that the Commissioner of Labor may make rules to implement the statute, and that owners, contractors, and their agents shall comply with them (See, Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343). The duty imposed by Labor Law § 241[6] upon owners and contractors is also nondelegable and exists regardless of their control and supervision of the job site (See, Rizzuto v L.A. Wenger Contracting Co., Inc., supra; Whalen v City of New York, 270 AD2d 340).

In order to prove a cause of action pursuant to Labor Law § 241[6], a plaintiff must show that a defendant "violated a rule or regulation of the Commissioner of Labor that sets forth a specific standard of conduct as opposed to a general reiteration of common-law principles" (Adams v

Glass Fab, Inc., 212 AD2d 972, 973). The regulation upon which a plaintiff relies must "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" (Mendoza v Marche Libre Associates, 256 AD2d 133, quoting Adams v Glass Fab, 212 AD2d 972, 973; Quinlan v City of New York, 293 AD2d 262).

In the verified bill of particulars, the plaintiff claims the defendants violated fifteen provisions of the Industrial Code. However, the plaintiff only offers arguments in his opposition in support of five Industrial Code sections, to wit 12 NYCRR §23-1.7[b], 23-1.7[d], 23-1.7[e], 23-1.15 and 23-2.1. Any claims as to the remainder of the Industrial Code violations alleged by the plaintiff in his bill of particulars are dismissed since the plaintiff has abandoned his reliance on these sections by failing to address their viability in his opposition papers (See, Musillo v Marist College, 306 AD2d 782, 783).

Although the plaintiff also asserts in his bill of particulars that the defendant violated certain Occupational Safety and Health Act ("OSHA") regulations, a cause of action based on Labor Law § 241[6] "must refer to a violation of the specific standards set forth in the implementing regulations (12 NYCRR Part 123)" (Simon v Schenectady North Congregation of Jehovah's Witnesses, 132 AD2d 313, 317 [emphasis added]; Vernieri v Empire Realty Co., 219 AD2d 593). Therefore, a violation of OSHA regulations can not form the basis of a cause of action under Labor Law §241[6]. Moreover, responsibility to ensure compliance with Occupational Safety and Health Act regulations rested with Apro, the plaintiff's employer, not the defendants (See, 29 CFR §1910.12[a]; Kocurek v Home Depot, USAP, Inc, 286 AD2d 577, 580; Pellescki v City of Rochester, 198 AD2d 762, 763; Herman v Lancaster Homes, Inc, 145 AD2d 926).

Turning to each of the Industrial Code sections individually, section 23-1.7[b][1] is plainly inapplicable as the plaintiff's accident was not caused by a "hazardous opening", but rather sawdust on the floor. In addition, 23-1.7[b][2] does not apply since the plaintiff's accident occurred on a building balcony, not a "[b]ridge or highway overpass".

Section 23-1.7[d] is applicable to the facts of this case. The defendants' argument that the area where the plaintiff fell is not included within this section is misplaced. Section 23-1.7[d] does not require that the work surface be elevated to be actionable (See, Cottone v. Dormitory Auth., 225 AD2d 1032, 1033 ["*Contrary to defendant's contention, neither that section nor our decision in Durfee v Eastman Kodak Co. (212 AD2d 971, lv dismissed 85 NY2d 968) requires that the work surface be elevated before an employer's duty is triggered*"]). Indeed, the location of the plaintiff's fall was a "floor" within the meaning of that section (See, Colucci v Equitable Life Assur. Soc'y of the US, 218 AD2d 513; Durfee v Eastman Kodak Co., 212 AD2d 971).

Additionally, the defendants failed to establish that the sawdust was not a "foreign substance which may cause slippery footing".

Insofar as section 23-1.7[e] of the Industrial Code is concerned, that subdivision, according to the titles of its subheadings, governs "[p]assageways" and "[w]orking areas". Clearly, the location where the plaintiff fell, a balcony was not a passageway as defined by the Industrial Code (See, 23 NYCRR §23-1.7[e][1]). The section covering "[w]orking areas", 23 NYCRR §23-1.7[e][2], on the other hand, is actionable as it applies to "floors, platforms and similar areas where persons work or pass". The sawdust which the plaintiff claims caused him to fall was not, as the defendant argues, an integral part of the work performed by the plaintiff. There is no proof that sawdust was applied to the floor intentionally or was required as part of the construction project (See e.g., Maza v Univ. Ave. Dev. Corp., 13 AD3d 65; McDonagh v Victoria's Secret, Inc., 9 AD3d 395) nor is there any proof that the sawdust was created by the plaintiff as part of the work he performed (See, Solis v 32 Sixth Ave. Co. LLC, 38 AD3d 389). Indeed, the plaintiff testified that he did not cut any wood or materials he was installing on the balcony. Instead, the plaintiff averred that all the cuts to materials he was using were performed outside the building on the street. Moreover, the plaintiff averred that the sawdust and other debris was already on the balcony when he arrived that day and that it was made by "another company", not Apro.

As to section 23-1.15, it "does not specify when safety railings are required but, rather, sets forth only how they must be constructed when they are required" (Partridge v Waterloo Cent. Sch. Dist., 12 AD3d 1054). Since the plaintiff failed to establish that neither safety railings were required nor even provided, this section is not applicable in this case (See, Kwang Ho Kim v. D & W Shin Realty Corp., 47 AD3d 616).

Section 23-2.1[a] of the Industrial Code is also inapplicable to this case. That section requires that all building materials and equipment be stored in "a safe and orderly manner" and in particular locations. Here, the plaintiff only testified that he slipped on sawdust which does not qualify as building materials or equipment connected with the project at hand. Section 23-2.1[b] of the Industrial Code can not sustain the plaintiff's Labor Law §241[6] claims because it lacks the requisite specificity to be actionable (See, Madir v 21-23 Maiden Lane Realty, LLC, 9 AD3d 450, 452; Fowler v CCS Queens Corp., 279 AD2d 505).

Accordingly, the branch of the defendants' motion to dismiss the plaintiff's claims brought under Labor Law §241[6] is granted the extent that all the plaintiff's claims are dismissed except those founded on Industrial Code sections 23-1.7[d] and 23-1.7[e][2].

The defendants also move to dismiss the plaintiff's Labor Law §200 cause of action. Labor Law §200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction

site workers with a safe place to work" (Comes v New York State Elec & Gas Corp, 82 NY2d 876, 877). Where the accident is the result of a dangerous or defective condition in the workplace, liability is predicated upon the party at issue either creating the condition or having actual or constructive notice of the condition (See, Gambino v Mass. Mut. Life Ins. Co., 8 AD3d 337; DeBlase v Herbert Constr. Co., 5 AD3d 624; Paladino v Soc'y of the N.Y. Hosp., 307 AD2d 343, 345). When the theory of liability is based upon the manner in which the plaintiff's work was being performed, liability will attach only if the party to be charged exercised supervision and control over the work performed at the site or had actual or constructive notice of the unsafe practice causing the accident (See, Comes v New York State Electric and Gas Corporation, supra).

While it is ultimately the plaintiff's burden at trial to establish a prima facie case of negligence against the defendants, on a motion for summary judgment it is incumbent upon the moving party to present evidence in admissible form showing their entitlement to judgment in its favor as a matter of law (See, e.g., Zuckerman v City of New York, 49 NY2d 557). As the accident here arose out of an allegedly dangerous slippery condition at the premises, specifically sawdust in the plaintiff's work area, the defendants were required to establish in the first instance that they lacked actual or constructive notice of the condition as well as that they did not create same. However, since neither defendant annexed to the moving papers either an affidavit or deposition testimony of a representative with appropriate knowledge, there is no proof that demonstrates the defendants' lack of notice of the allegedly dangerous condition.

Accordingly, as the defendants failed to establish their entitlement to judgment as a matter of law, the branch of the defendants' motion to dismiss the plaintiffs' Labor Law §200 cause of action is denied irrespective of the sufficiency of the plaintiff's opposing papers (See, Alvarez v Prospect Hospital, 68 NY2d 320, 325).

The branch of the defendants' motion pursuant to CPLR §3212[a] for an extension of time to make dispositive motions against the second third-party defendant is denied. Other than stating that the deposition transcript of the second third-party defendant and other unidentified materials had not been received as of the time the motion was made, the defendants failed to demonstrate how these materials were essential for a motion for summary judgment on its claims for contractual and common law indemnification to be made. In particular, the defendants did not specify what information in the second third-party defendant's possession was crucial to establish their prima facie case for indemnification. Additionally, the defendants neglected to explain why this issue was not sufficiently addressed at the compliance conference, which was conducted approximately fifteen months after the defendants commenced the second third-party action.

The plaintiff's cross-motion is denied as untimely (See, CPLR

§3212[a]). Pursuant to CPLR §3212[a], "the court may set a date after which no [summary judgment] motion may be made". Here, in a stipulation so-ordered by Justice Martin E. Ritholtz, the parties expressly agreed that motions for summary judgment would be "made returnable before the assigned justice not later than 6/24/08" (emphasis added). It is undisputed that the cross-motion was originally returnable on August 19, 2008. As the plaintiff did not proffer any explanation for the delay in making his cross-motion, it must be denied (See, Brill v City of New York, 2 NY3d 648; Thompson v Leben Home for Adults, et al, 17 AD3d 347).

Dated: November 17, 2008

Peter J. Kelly, J.S.C.