

**Holze v Yonkers Racing Corp.**

2009 NY Slip Op 32047(U)

September 8, 2009

Supreme Court, New York County

Docket Number: 100285/07

Judge: Carol R. Edmead

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

PRESENT: HON. GAROL EDMEAD  
Justice

PART 35

Index Number : 100285/2007  
**HOLZE, KEVIN**  
vs.  
**YONKERS RACING**  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 4/21/09  
MOTION SEQ. NO. 002  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

**FILED**  
SEP 10 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

Motion sequence 002 and 003 are decided in accordance with the accompanying Memorandum Decision. It is hereby

**ORDERED** that the part of plaintiffs Kevin Holze and Lisa Holze's motion (motion sequence number 002), pursuant to CPLR 3212, for summary judgment in their favor on their Labor Law §§ 240 (1) and 241 (6) claims against defendants Yonkers Racing Corporation, Yonkers Racing Corporation d/b/a Yonkers Raceway (together, Yonkers) and Tishman Construction Corporation (Tishman) is denied. In addition, the part of plaintiffs' motion, pursuant to CPLR 3212, to strike from defendants Yonkers and Tishman's answers the affirmative defenses alleging comparative negligence and/or culpable conduct on the part of plaintiff is denied as moot; and it is further

**ORDERED** that defendant Tishman's motion (motion sequence number 003), pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint as against it is granted, and the complaint is severed and dismissed as against this defendant, and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk; and it is further

~~Dated: \_\_\_\_\_~~  
~~J.S.C.~~

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

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


**ORDERED** that the part of defendants Yonkers, YRL Associates, L.P. and Rooney Associates's cross motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' Labor Law §§ 240 (1) and 241 (6) claims as against them is granted, and these claims are severed and dismissed against these defendants, and the motion is otherwise denied as moot; and it is further

**ORDERED** that counsel for defendant Tishman shall serve a copy of this order with notice of entry within twenty days of entry on all counsel; and it is further

**ORDERED** that the remainder of the action shall continue.

**FILED**  
SEP 10 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated 9/8/09

ENTER: , J.S.C.

**HON. CAROL EDMEAD**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

-----X  
KEVIN HOLZE and LISA HOLZE,

Index No.: 100285/07

Plaintiffs,

-against-

YONKERS RACING CORPORATION, YONKERS  
RACING CORPORATION d/b/a YONKERS RACEWAY,  
TISHMAN CONSTRUCTION CORPORATION OF  
NEW YORK, YRL ASSOCIATES, L.P. and ROONEY  
ASSOCIATES,

Defendants.  
-----X

**Edmead, J.:**

Motion sequence numbers 002 and 003 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries sustained by an electrical mechanic when he fell into an open hole located immediately inside the doorway of an office building at a construction site located at the Yonkers Raceway, 810 Central Park Avenue, Yonkers, New York on June 13, 2006.

In motion sequence number 002, plaintiffs Kevin Holze (plaintiff) and Lisa Holze move, pursuant to CPLR 3212, for summary judgment in their favor on their Labor Law §§ 240 (1) and 241 (6) claims against defendants Yonkers Racing Corporation, Yonkers Racing Corporation d/b/a Yonkers Raceway (together, Yonkers) and Tishman Construction Corporation (Tishman). In addition, plaintiffs move, pursuant to CPLR 3212, to strike from defendants' answers the affirmative defenses alleging comparative negligence and/or culpable conduct on the part of plaintiff.

**FILED**  
SEP 10 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

In motion sequence number 003, defendant Tishman moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint as against it.

Defendants Yonkers, YRL Associates, L.P. (YRL) and Rooney Associates (Rooney) cross-move, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' Labor Law §§ 240 (1) and 241 (6) claims as against them, as well as for leave to serve an amended answer asserting a cross claim against co-defendant Tishman sounding in contribution.

### **BACKGROUND**

The premises where the accident took place was owned by defendants Yonkers, YRL and Rooney. Yonkers hired defendant Tishman to serve as construction manager for a portion of a construction project at Yonkers Raceway. Tishman's contract was limited to the renovation of an existing clubhouse and the construction of a new expansion building (the building) to accommodate a lottery casino. Tishman and Yonkers hired non-party E.J. Electrical (E.J.) to serve as the electrical subcontractor on the project. Plaintiff was employed as an electrician by E.J.

Plaintiff testified that his duties on the project included performing electrical installations for the rehabilitation of the clubhouse and the building. Plaintiff was also responsible for installing the in-ground conduit piping necessary for powering and lighting the parking lot and paddock areas of the premises. Plaintiff explained that the paddock area included both the paddock building, which houses the stalls for the horses, and the Racing Office, which is connected to the paddock building, though entered through a separate door. Specifically, plaintiff explained that the "paddock area is a building that is at the end of the track where the horses would go into before races and where the New York State Racing Office is" (Plaintiff's

Notice of Motion, Exhibit J, Holze Deposition, at 14).

Plaintiff testified that, during the week of his accident, he was “[l]aying pipe; going from manhole to manhole for the generator system and general power” (*id.*). Plaintiff testified that all of his work was “outside work” (*id.* at 16). However, it should be noted that in his affidavit, plaintiff maintained that he worked inside, as well as outside, while laying the pipe that led into the paddock building.

Plaintiff also testified that he received all of his assignments from his foreman, Fred Simone (Simone). On the morning of his accident, Simone instructed plaintiff to perform piping installations in the trenches that had been dug. Plaintiff explained that, at the time of his accident, he was transporting pipe from a trailer where it was being stored and then gluing it in place. Plaintiff then decided to enter the Racing Office in order to use the bathroom and to see how much pipe was needed to reach the building. Specifically, plaintiff stated, “I wanted to know how much pipe to leave on the side so when the trench got dug we were going into that building and plus I knew there was a bathroom in there” (*id.* at 21). Plaintiff acknowledged that a trailer of toilets were designated as the bathrooms for the workers, but explained that these bathrooms were located “all the way in the front of the building by the clubhouse which was about a half mile away” (*id.* at 18).

Plaintiff testified that when he pushed the door to the Racing Office open with his left arm and then stepped in with his left foot, his foot went down into an approximately four-foot deep by four-foot wide hole. After being helped out of the hole, plaintiff was assisted to the bathroom before being taken to the hospital in an ambulance.

After the accident, plaintiff filled out an accident report for his employer. Plaintiff

maintained that, prior to the accident, he had never complained to his employer or any other entity about any problems at the work site. Plaintiff also noted that no one from Tishman ever contacted him about the accident.

In his affidavit, plaintiff stated that he had been informed that the subject hole was dug by employees of the owners of Yonkers Raceway to accommodate telephone lines that were to be installed in the paddock building. Plaintiff also maintained that he was not provided with any safety devices which would have prevented him from falling into the subject hole.

### DISCUSSION

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1<sup>st</sup> Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1<sup>st</sup> Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1<sup>st</sup> Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224, 226 [1<sup>st</sup> Dept 2002]).

### PLAINTIFF’S LABOR LAW § 240 (1) CLAIM AGAINST DEFENDANTS

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1<sup>st</sup> Dept 1983]), provides, in relevant part:

All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braccs, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

“Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold ... or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person” (*John v Baharestani*, 281 AD2d 114, 118 [1<sup>st</sup> Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494, 501 [1993]). The Scaffold Law does not apply merely because work is performed at elevated heights, but also applies where the work itself involves risks related to differences in elevation (*Binetti v MK West Street Company*, 239 AD2d 214, 214-215 [1<sup>st</sup> Dept 1997]; see *Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d at 500-501]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff’s injuries (*Blake v Neighborhood Housing Services of New York City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe College*, 12 AD3d 261, 262 [1<sup>st</sup> Dept 2004]).

Initially, it should be noted that defendants Yonkers, YRL and Rooney, as owners of the construction site, fall within the purview of Labor Law §§ 240 (1) and 241 (6). However, it must be determined whether defendant Tishman, as construction manager, falls within the purview of Labor Law §§ 240 (1) and 241 (6) as a statutory agent of the owners.

When the work giving rise to the duty to conform to the requirements of Labor Law § 240 (1) is delegated to a third party, that third party then obtains “the concomitant authority to

supervise and control that work and becomes a statutory “agent” of the owner or general contractor” (*Walls v Turner Construction Company*, 4 NY3d 861, 864 [2005], quoting *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). The parties’ actual course of practice is controlling for the purposes of determining whether a construction manager is a statutory agent of the owner for the purposes of Labor Law § 240 (1) (*Ortega v Catamount Construction Corporation*, 264 AD2d 323, 324 [1<sup>st</sup> Dept 1999] [statutory agency found where construction manager was understood to be in charge of the project and to have overall responsibility for the work, including matters of safety]).

A review of the record establishes that defendant Tishman did not have sufficient authority to supervise and control the injury-producing work at issue, so as to be held vicariously liable for plaintiff’s injuries as a statutory agent of the owners for the purposes of Labor Law §§ 240 (1) and 241 (6) (*see Smith v McClier Corporation*, 22 AD3d 369, 371 [1<sup>st</sup> Dept 2005] [Labor Law § 241 (6) claim dismissed as against defendant subcontractor because defendant was not owner or general contractor, and did not have authority to supervise and control injury-producing work]; *Lazarou v Turner Construction Company*, 18 AD3d 398, 399 [1<sup>st</sup> Dept 2005] [Labor Law § 240 (1) claim dismissed as against defendant where record established that defendant did not have sufficient supervision or control over the injury-producing work]; *Saaverda v East Fordham Road Real Estate Corporation*, 233 AD2d 125, 126 [1<sup>st</sup> Dept 1996] [no Labor Law § 240 (1) liability where defendant’s contract with owner was limited to demolition and construction of two walls, and where it had no right to control the work site]).

To this effect, Tishman maintains that it bears no liability in this action, because the work underway in the Racing Office where plaintiff’s accident occurred was outside the scope of

Tishman's construction management agreement with Yonkers (*see Kwokage Wong v New York Times Company*, 297 AD2d 544, 548-549 [1<sup>st</sup> Dept 2002] [although defendant was a general contractor, it was so only with respect to building construction, and thus, it had no role in the totally separate work for which plaintiff was hired, installing printing presses]; *Balthazar v Full Circle Construction Corporation*, 268 AD2d 96, 99 [1<sup>st</sup> Dept 2000] [no Labor Law § 240 (1) where plaintiff's work at the time of the accident was outside the scope of the general contractor's contract]; *Mocarska v 200 Madison Associates, L.P.*, 262 AD2d 163, 163 [1<sup>st</sup> Dept 1999] [no Labor Law liability where, while defendant performed renovation work upon the premises where plaintiff was injured, defendant's work was wholly separate from that of plaintiff's employer]).

For example, plaintiff testified that, on the day of his accident, his work included laying and gluing electrical conduit in trenches from manhole to manhole up to the Racing Office. In addition, plaintiff testified that all of his work was to be performed outside.

Thomas Barba (Barba), project superintendent for Tishman, testified that Tishman was only contracted to do the renovation of the existing clubhouse and the construction of a new expansion building alongside the clubhouse, and that Yonkers Raceway performed the renovation of the track, the Racing Association buildings and the stables. Barba asserted that Yonkers had its own construction crews and hired its own subcontractors. In addition, Yonkers did not interface with Tishman on its own portions of the project.

Barba also testified that Tishman's work on the construction project did not include the paddock building, and that he assumed it was part of "the raceway's work" (Defendant Tishman's Notice of Motion, Exhibit D, Barba Deposition, at 12). In fact, Tishman was not even

advised as to what work was going on inside the Racing Office. Further, although Tishman workers may have dug trenches running parallel to the front of the paddock building, owners Yonkers, YRL and Rooney were responsible for digging the trench that led directly into the Racing Office. Moreover, although Tishman may have had control over E.J., E.J. was not responsible for the electrical work being done inside the Racing Office building, as that electrical work was being performed by Yonker's electrician, Delta Electric.

Michael Cleary, director of property operations for Yonkers Raceway, also testified that the project consisted of an inside phase that was to be performed by Yonkers Raceway personnel, as well as an outside phase that was to be managed by Tishman.

Salvatore Petti (Petti), Yonker's carpentry foreman, testified that his superior directed him to arrange for the subject hole to be dug so that telephone lines could be installed inside the Racing Office. Petti also maintained that Marty McGrath (McGrath), the Yonkers Raceway plant manager, was in charge of the subject hole, and that he never noticed anyone from Tishman in the area of the hole as it was being dug.

McGrath confirmed that the renovation of the interior offices of the Racing Office, as well as the installation of a new power supply and the excavation of the hole inside the doorway, was directed and performed by Yonkers, and not by Tishman. McGrath opined that plaintiff knew that there was a bathroom inside the Racing Office because he had been a former security guard at Yonkers Raceway.

Robert Galterio (Galterio), vice president and general manager of Yonkers, also testified that the work being performed on the interior of the Racing Office was under the exclusive control of Yonkers, and that Tishman was only involved in the construction work going on

outside of the Racing Office. In addition, Galterio asserted that Tishman had no authority to make any decisions regarding the interior of the building.

In support of its argument that it was not responsible for the entire project going on at the premises, Tishman puts forth that the E.J. contract states that E.J. was to perform only “a portion of the construction work” (Defendant Tishman’s Notice of Motion, Exhibit J, E.J. Subcontract, at 1), and that E.J. was required to keep all of its materials and equipment isolated from all adjoining construction.

In support of his argument that Tishman had control over the area of the construction site where plaintiff’s accident occurred, plaintiff puts forth that, pursuant to the construction management agreement between Tishman and Yonkers, Tishman was “responsible for coordination and monitoring of day-to-day performance of construction work in accordance with the contract documents and specifications” (see Defendant Tishman’s Notice of Motion, Exhibit I, Schedule A.2 [1] [14]). In addition, plaintiff puts forth that E.J.’s “As Built” plan for “Partial Site Duct Bank Plan (East)” states, in pertinent part, that E.J. was to “PROVIDE (2) 4” UNDERGROUND CONDUITS WITH PULL ROPE, COORDINATE LOCATIONS OF THH11 AND PENETRATIONS INTO BUILDINGS WITH DELTA ELECTRIC” (Notice of Cross Motion, Exhibit A, E.J. As Built Plan).

However, the vague contractual evidence put forth by plaintiff does not overcome the strong testimonial evidence advanced by defendant Tishman that it had no authority to control and supervise the work going on inside the Racing Office, which is where plaintiff’s accident took place.

Thus, as the testimonial and contractual evidence in this case demonstrates that Tishman

had no actual or constructive authority to control the area of the work site where plaintiff's accident took place, it cannot be held vicariously liable for plaintiff's injuries under the Labor Law.

In any event, the facts of this case do not trigger the provisions of Labor Law § 240 (1), as the work site in question was on ground level (*see Caradori v Med Inn Centers of America, LLC*, 5 AD3d 1063, 1064 [4<sup>th</sup> Dept 2004] [no Labor Law § 240 (1) liability where plaintiff, who was working at ground level, was injured when she fell into a three-foot-deep trench]; *Panepinto v L.T.V. Steel Company*, 207 AD2d 1006, 1006 [4<sup>th</sup> Dept 1994] [Court held that plaintiff's task did not expose plaintiff to "the type of hazard that the use or placement of the safety devices enumerated in Labor Law § 240 (1) was designed to protect against" where plaintiff, while working at ground level, was injured when he fell into a hole at a work site (citation omitted)]; *Kimball v Fort Ticonderoga Association, Inc.*, 167 AD2d 581, 582 [3d Dept 1990] [where the work site in question was on the ground, plaintiff's fall into an adjacent excavation was considered not within the contemplation of Labor Law § 240 (1)].

Rather, the hole presented in this case is "the type of "ordinary and usual" peril a worker is commonly exposed to at a construction site" (*Alvia v Teman Electrical Contracting, Inc.*, 287 AD2d 421, 422 [2d Dept 2001], quoting *Misseritti v Mark IV Construction Company*, 86 NY2d 487, 489 [1995]).

Thus, plaintiff is not entitled to summary judgment in his favor on his Labor Law § 240 (1) claim against defendants Tishman, Yonkers, YRL and Rooney, and these defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 240 (1) claim against them.

## LABOR LAW § 241 (6) CLAIM

Labor Law § 241 (6) provides, in pertinent part, as follows:

“All contractors and owners and their agents ... 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 ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. ...”

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (*see Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d at 501-502). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant’s motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Although plaintiff alleges multiple violations of the Industrial Code in his bill of particulars, with the exception of Industrial Code 12 NYCRR 23-1.7 (b) (1), plaintiff fails to address those Industrial Code violations in his moving papers. Thus, this court deems those parts of plaintiff’s Labor Law § 241 (6) claim predicated on violations of the Industrial Code not mentioned by plaintiff as abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant’s summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated

was deemed abandoned]; *Musillo v Marist College*, 306 AD2d 782, 784 n [3d Dept 2003]).

Thus, plaintiff is not entitled to summary judgment in his favor on his Labor Law § 241 (6) claim predicated on the alleged violations of the Industrial Code not addressed by plaintiff, and defendants are entitled to summary judgment dismissing the same.

Initially, it should be noted that Industrial Code 12 NYCRR 23-1.7 (b) (1) (i), requiring that hazardous openings into which a person may step or fall be guarded by a substantial cover fastened in place or by a safety railing, is sufficiently concrete in its specifications to support plaintiff's Labor Law § 241 (6) claim (*see Scarso v M.G. General Construction Corporation*, 16 AD3d 660, 661 [2d Dept 2005]; *Olsen v James Miller Marine Service, Inc.*, 16 AD3d 169, 171 [1<sup>st</sup> Dept 2005]).

Industrial Code 12 NYCRR 23-1.7 (b) (1) (i) states:

- (b) Falling hazards
- (1) Hazardous openings.
  - (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).

“[A]lthough the term ‘hazardous opening’ is not defined in 12 NYCRR 23-1.7 (b), based upon a review of the regulation as a whole--particularly the safety measures delineated therein--it is apparent that the regulation is ‘inapplicable where the hole is too small for a worker to fall through’” (*Rice v Board of Education of City of New York*, 302 AD2d 578, 579 [2d Dept 2003]; quoting *Alvia v Teman Electrical Contracting, Inc.*, 287 AD2d at 422-423 [“hazardous openings” regulation did not apply where the 16-inch hole that worker fell into was too small for him to fall through]; *Dzieran v 1800 Boston Road, LLC*, 25 AD3d 336, 338 [1<sup>st</sup> Dept 2006] [Court found no

violation of Industrial Code 12 NYCRR 23-1.7 [b] [1] since plaintiff's fall was less than 15 feet]; *Messina v City of New York*, 300 AD2d 121, 123 [1<sup>st</sup> Dept 2002] [the drainpipe hole into which plaintiff stepped was not considered a "hazardous opening"]; *Piccuillo v Bank of New York Company*, 277 AD2d 93, 94 [1<sup>st</sup> Dept 2000] [where plaintiff was injured when he stepped into a hand hole, Court held that plaintiff's accident was not caused by the type of hazardous opening for which defendants would have been required to provide a cover or safety railing]).

In the case of *Alvia v Teman Electrical Contracting, Inc.* (287 AD2d at 423), wherein the Court held that Industrial Code 12 NYCRR 23-1.7 (b) (1) did not apply to the 12-inch by 16-inch hole at issue, the Court explained:

Although the regulation does not define a hazardous opening, we agree with the Supreme Court that based on the regulation as a whole, it is not meant to apply to the type of hole at issue here. The regulation provides that employees must be protected by planking installed not more than one floor or 15 feet beneath the opening, a life net five feet underneath the hole, or a safety belt with a lifeline. It is apparent that these measures are intended to protect workers from falling through an opening to the floor below and are inapplicable where the hole is too small for a worker to fall through.

Here, plaintiff is not entitled to partial summary judgment in his favor on that part of his Labor Law § 241 (6) claim predicated on a violation of Industrial Code 23-1.7 (b) (1) (i) as against defendants Tishman, Yonkers, YRL and Rooney, because the subject hole was not of the type intended to be covered by Industrial Code 12 NYCRR 23-1.7 (b) (1) (i). Accordingly, these defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on a violation of Industrial Code § 23-1.7 (b) (1) (i) as against them.

As a result of this court's determination to grant defendants' motions seeking to dismiss plaintiff's Labor Law §§ 240 (1) and 241 (6) claims against them, that part of plaintiff's motion,

pursuant to CPLR 3212, to strike from defendants' answers the affirmative defenses alleging comparative negligence and/or culpable conduct on the part of plaintiff, is denied as moot.

#### COMMON-LAW NEGLIGENCE AND LABOR LAW § 200 CLAIMS AGAINST TISHMAN

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’ [citation omitted]” (*Cruz v Toscano*, 269 AD2d 122, 122 [1<sup>st</sup> Dept 2000]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d at 317). Labor Law § 200 (1) states, in pertinent part, as follows:

“1. 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 protection to all such persons.”

Defendant Tishman moves for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims as against it. Although defendants in this case argue the issue of supervision, or lack thereof, on the part of defendants, that standard applies in Labor Law § 200 cases which involve injuries resulting from the means and methods of the work. Here, a review of the record reveals that plaintiff's accident was caused by an unsafe condition which was created by an open and unguarded hole inside the door of the Racing Office.

In such a case, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident (*see Keating v Nanuet Board of Education*, 40 AD3d 706, 708-709 [2d Dept 2007] [where plaintiff's injuries stemmed not from the manner in which the work was performed, but, rather from a dangerous condition on the premises, general contractor was liable

in common-law negligence and Labor Law § 200 when it had control over the work site and actual or constructive notice of the same]; *Thomas v Claffee*, 24 AD3d 749, 751 [2d Dept 2005]; *Murphy v Columbia University*, 4 AD3d 200, 202 [1<sup>st</sup> Dept 2004] [to support finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff because the injury arose from the condition of the work place created by or known to contractor, rather than the method of plaintiff's work]).

Here, as discussed previously, defendant Tishman had no control over the area of the work site where plaintiff's accident occurred, so as to be able to prevent or correct any unsafe conditions (*see Linkowski v City of New York*, 33 AD3d 971, 975 [2d Dept 2006]; *Miller v Weeden*, 7 AD3d 684, 685 [2d Dept 2004]). In addition, no evidence was submitted to demonstrate that Tishman created or had actual or constructive notice of the same (*see Keating v Nanuet Board of Education*, 40 AD3d at 708-709).

Thus, defendant Tishman is entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims as against it.

#### DEFENDANTS YONKERS, YRL AND ROONEY'S MOTION FOR LEAVE TO SERVE AN AMENDED ANSWER

Defendants Yonkers, YRL and Rooney move for leave to serve an amended answer asserting a cross claim against co-defendant Tishman sounding in contribution. “[L]eave to amend a pleading under CPLR 3025 (b) is freely given in the exercise of the trial court's discretion, provided there is no prejudice to the nonmoving party and the amendment is not plainly lacking in merit” (*Matter of Miller v Goord*, 1 AD3d 647, 648 [3d Dept 2003], quoting *New York State Health Facilities Association, Inc. v Axelrod*, 229 AD2d 864, 866 [3d Dept

1996]; see also *Brooks v Robinson*, 56 AD3d 406, 406 [2d Dept 2008]; *Aronov v Regency Gardens Apartment Corporation*, 15 AD3d 513, 514 [2d Dept 2005]). Absent prejudice or surprise, it is an abuse of discretion, as a matter of law, for the trial court to deny leave to amend (*Watts v Wing*, 308 AD2d 391, 392 [1<sup>st</sup> Dept 2003])[leave to amend granted inasmuch as proposed amendment did not add new factual allegations]; *Smith v Pizza Hut of America, Inc.*, 289 AD2d 48, 50 [1<sup>st</sup> Dept 2001]).

Here, as it has been established that defendant Tishman had no authority to supervise and control the work within the Racing Office building, so as to be liable for plaintiff's injuries, the proposed cross claims have no merit. Thus, Yonkers, YRL and Rooney are not entitled to leave to amend their answer. "Where ... the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit, leave to amend should be denied" (*Brooks v Robinson*, 56 AD3d at 406, quoting *Morton v Brookhaven Memorial Hospital*, 32 AD3d 381, 381 [2d Dept 2006]).

### CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

**ORDERED** that the part of plaintiffs Kevin Holze and Lisa Holze's motion (motion sequence number 002), pursuant to CPLR 3212, for summary judgment in their favor on their Labor Law §§ 240 (1) and 241 (6) claims against defendants Yonkers Racing Corporation, Yonkers Racing Corporation d/b/a Yonkers Raceway (together, Yonkers) and Tishman Construction Corporation (Tishman) is denied. In addition, the part of plaintiffs' motion, pursuant to CPLR 3212, to strike from defendants Yonkers and Tishman's answers the affirmative defenses alleging comparative negligence and/or culpable conduct on the part of

plaintiff is denied as moot; and it is further

**ORDERED** that defendant Tishman's motion (motion sequence number 003), pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint as against it is granted, and the complaint is severed and dismissed as against this defendant, and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk; and it is further


**ORDERED** that the part of defendants Yonkers, YRL Associates, L.P. and Rooney Associates's cross motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' Labor Law §§ 240 (1) and 241 (6) claims as against them is granted, and these claims are severed and dismissed against these defendants, and the motion is otherwise denied as moot; and it is further

**ORDERED** that counsel for defendant Tishman shall serve a copy of this order with notice of entry within twenty days of entry on all counsel; and it is further

**ORDERED** that the remainder of the action shall continue.

DATED:September 8, 2009

ENTER:



J.S.C.

**HON. CAROL EDMEAD**

**FILED**

SEP 10 2009

COUNTY CLERK'S OFFICE  
NEW YORK