

**Mott v Tromel Constr. Corp.**

2009 NY Slip Op 32404(U)

September 8, 2009

Supreme Court, Suffolk County

Docket Number: 05-28322

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 24 - SUFFOLK COUNTY

**PRESENT:**

Hon. PETER FOX COHALAN  
Justice of the Supreme Court

MOTION DATE 5-26-09  
ADJ. DATE 6-23-09  
MNEMONIC: 005 - MotD

-----X		BRECHER, FISHMAN, PASTERNAK, et al.
DONALD MOTT and MABLE MOTT,	:	Attorneys for Plaintiffs
	:	233 Broadway, Suite 820
Plaintiffs,	:	New York, New York 10279
	:	
- against -	:	JEFFREY S. SHEIN & ASSOCIATES, P.C.
	:	Attorneys for Defendants Tromel,
TROMEL CONSTRUCTION CORP.,	:	Sullivan & Nickel, Half Hollow
SULLIVAN & NICKEL CONSTRUCTION CO.,	:	Hills
INC., D. MAGNAN & CO., INC., BAYBRENT	:	575 Underhill Blvd., Suite 112
TILE CORP., HALF HOLLOW HILLS	:	Syosset, New York 11791
CENTRAL SCHOOL DISTRICT a/k/a	:	
CENTRAL SCHOOL DISTRICT # 5, HALF	:	
HOLLOW HILLS CENTRAL SCHOOL	:	GORTON & GORTON, LLP
DISTRICT BOARD OF EDUCATION,	:	Attorneys for Defendants D. Magnan
	:	1539 Franklin Avenue, 3 <sup>rd</sup> Floor
Defendants.	:	Mineola, New York 11501
-----X		

Upon the following papers numbered 1 to 34 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (005) 1 - 20; Notice of Cross-Motion and supporting papers    ; Answering Affidavits and supporting papers 21-27; 28-29; Replying Affidavits and supporting papers 30-32; 33-34; Other    ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion (005) by the defendants, Tromel Construction Corp. (hereinafter Tromel), Sullivan & Nickel Construction Co., Inc. (hereinafter S & N), Half Hollow Hills Central School District a/k/a Central School District #5 (hereinafter School District), and Half Hollow Hills Central School District Board of Education (hereinafter BOE), pursuant to CPLR §2221(e) for an order granting renewal of motion (004) which motion was brought pursuant to CPLR §3212 for summary judgment on liability and granting summary judgment over and against the defendant D. Magnan & Co., Inc. (hereinafter Magnan) on the issue of contractual indemnification and which motion was denied, is granted as to renewal, and upon renewal, motion (005) is granted to the extent that the cause of action premised upon violation of Labor Law §200 as asserted against the defendants BOE, School District and S & N is dismissed as a matter of law; summary judgment is granted as to the causes of action premised upon the defendants' alleged violation of Labor Law §240 and that part of the complaint as asserted against the moving defendants, Tromel, S & N, BOE and School

District, is dismissed as a matter of law; summary judgment is granted as a matter of law on that portion of the complaint premised upon violation of Labor Law §241(6) and Industrial Code of the State of New York/ Title 12 NYCRR 23 including but not limited to 23-1.7(e)(2) (hereinafter Industrial Code) as asserted against S & N and the BOE of the school district, and that part of the complaint is dismissed with prejudice as asserted against them; and that part of the defendants' application for judgment over as against defendant Magnan on the issue of indemnification is denied as premature.

Motion (004) was previously denied without prejudice to renewal upon submission of the answer served by S & N along with a complete copy of the prior motion by order of this Court, dated April 2, 2009.

The complaint of this action arises out of a trip and fall incident which occurred on August 31, 2004, wherein the plaintiff, Donald Mott (hereinafter plaintiff), seeks damages for personal injury allegedly sustained when he tripped on a rope attached to a sludge hose in a hallway where he was working at the Half Hollow Hills West High School, Dix Hills, New York (hereinafter High School). He was employed by Rowlanti Construction, Inc. (hereinafter Rowlanti) at the time. The plaintiff sues for negligence for the defendants' alleged violation of Labor Law §200, §240, §241(6) and the Industrial Code/Title 12 NYCRR 23 including, but not limited to §23-1.7(e)(2). The plaintiff's wife Mable Mott also has a derivative claim.

The moving defendants seek an order granting summary judgment on the issue of liability and judgment over and against the defendant Magnan on the issue of contractual indemnification. The moving defendants also assert in their reply that the plaintiff has not submitted his affidavit in opposition to the motion and therefore the opposition is insufficient as a matter of law. However, in lieu of an affidavit, the plaintiff submitted a copy of the transcript of his examination before trial (hereinafter EBT) in support of his opposition which was also submitted by the moving defendants in support of their motion, thus rendering the defendants' argument without merit (see, **Santos v Intown Assocs.**, 17 AD3d 564, 739 NYS2d 477 [2<sup>nd</sup> Dept 2005]). There are also factual issues raised in the moving papers as stated below which preclude a finding that the defendants have demonstrated prima facie entitlement to summary judgment on their entire application.

The moving defendants Tromel, S & N, and the School District have submitted in support of this application, inter alia, an attorney's affirmation; copy of the prior order of this Court, dated April 2, 2009; copies of the pleadings and answers; copy of the stipulation of discontinuance as to the cross-claims as interposed between the defendants; verified bill of particulars; agreement between the School District and S & N, dated October 29, 2001; agreement between the School District and Tromel, dated May 6, 2003; subcontract agreement between Tromel and Magnan, dated February 11, 2004; copies of the transcripts of the EBTs of the plaintiff, October 12, 2006, Brian Donovan (hereinafter Donovan), dated March 7, 2007, Albert Indri (hereinafter Indiri), dated October 16, 2007, Barry Tompkins II (hereinafter Tompkins), dated May 25, 2007; and a copy of the Farm Family Insurance policy, effective December 31, 2003 to December 31, 2004.

Magnan has no objection to the motion of its co-defendants but opposes the motion in part on the issue of contractual indemnification as asserted against it and submits solely an attorney's affirmation in support of its opposition.

In support of their opposition to this motion, the plaintiffs have submitted an attorney's affirmation; a copy of the summons and complaint; copies of the verified bills of particulars served pursuant to the demands of the defendants; copies of the transcripts of the EBT of Tompkins, dated May 25, 2007 and the plaintiff, dated March 31, 2005; a copy of an unsigned, unsworn statement of Tompkins; and a copy of the expert affidavit of Kathleen Hopkins, dated December 19, 2008.

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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (**Sillman v Twentieth Century-Fox Film Corporation**, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (**Winegrad v N.Y.U. Medical Center**, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (**Winegrad v N.Y.U. Medical Center, supra**). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (**Castro v Liberty Bus Co.**, 79 AD2d 1014, 435 NYS2d 340 [2<sup>nd</sup> Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (**Friends of Animals v Associated Fur Mfrs.**, 46 NY2d 1065, 416 NYS2d 790 [1979]).

The plaintiff testified at his EBT that at the time of the accident he was employed by Rowland as a carpenter and was a member of Local 7 Union. He had been working at the High School in different buildings for about a month prior to the accident and last worked in the new extension where the accident occurred about two weeks prior to it. His foreman at the site was Tompkins, and on the date of the accident, August 31, 2004, just he and Tompkins were working installing chalk boards and tack boards in classrooms located on that floor and on the second floor. He arrived at the work site at about 7:30 a.m. and brought his tools consisting of a tool box with wheels and a four foot collapsible fiberglass ladder to room 173. Also at the job site were electricians, plumbers, terrazzo people and the general contractor and there were people walking in the hallway, which he described as about ten feet wide. In the hallway in the vicinity of room 173 the floors were wet (covered with a layer of water) and there were cardboard boxes, piles of cement, debris, dust, garbage, coffee cups and broken up concrete all over the hallway. The floor was terrazzo flooring. He stated he made complaints almost daily about the condition of the job site as there was constantly water and garbage on the floor which never got cleaned up. He would then see laborers cleaning the site. In the hallway he also saw a four inch fire hose running next to the wall down the length

of the hallway connected to a pump in the lobby area. The four inch hose was used for sucking up concrete. There was also a garden hose in the hallway which also ran the length of the hallway next to the other hose. The garden hose was leaking at the couplings and there were pinhole leaks as well from which he could see water coming out. He started complaining to Tompkins, his foreman, that the hoses were blocking the doorway, and that one hose had a blue string called a jet line (nylon type of string that electricians use to pull wires through the pipes) sticking out on it that everyone was tripping on. He had tripped on the cord as he walked in but did not fall at that time. He described the string in the hallway as being about the middle of room 173 and tied onto the four inch hose. It was about eight feet long, stuck out in a loop and both ends were tied onto the hose. He had stepped on the rope that was attached to the hose, and pushed it on top of the hose by kicking it out of the way, leaving the entire rope on top of the hose. He remained in the room for about eight minutes, then followed his foremen out of the room. At about thirty feet from the northmost wall of rooms 171 and 172, as he was going down the hallway carrying his ladder, looking straight ahead, he thought he might have stepped inside the loop and took a step but the rope wrapped about his ankle and yanked his body. He tried to maintain his balance and swung around as he did not want to fall, and started skipping and hopping for about six feet, feeling pain shooting up the back of his left leg from ankle to his knee, but he did not fall. He also felt pain in his left elbow which was bent carrying the ladder. He then sat for about five minutes in pain, and began to limp around and continued to work for the remainder of the day. Tompkins, who was walking in front of him, turned around and tripped on the same rope, then cut the rope off the hose with his knife. About a week or less later he told S & N and made out an accident report.

At his EBT Tompkins testified that he was employed as a union carpenter with local 608, Manhattan, and at the time of the plaintiff's accident he was working with the plaintiff for Rowlandti installing cabinet work, marker boards and chalkboards in classrooms at the High School. He stated that Mangan was installing terrazzo flooring in the hallways at the time, or at least Mangan's name was on the equipment, and he saw water and a bilge pump being used to pump out the sludge in the hallway. He stated the pump had a hose, like a fire hose about two inches in diameter. The hose was not sitting on the floor of the hallway, but was raised off the floor with a blue and white nylon 3/16ths diameter electrical twine or string attached and lying in a loop. At the time that the plaintiff was injured, the hose and string were on the floor as Mangan would move it as it did a different part of the floor. He thought the plaintiff was carrying a cabinet with him down the corridor when the plaintiff stumbled or tripped because the string or twine grabbed his foot and tugged his leg. Tompkins then stated he tripped on the same string after the plaintiff did, and after doing so, cut the twine and thought he threw it into the dumpster. He described the twine as the same as he had seen used by the terrazzo people working in the hallway. He did not see any electricians using the twine at the job but stated it was the same type of twine an electrician would use. He did not try to move the hose. He had previously complained to the terrazzo people about the condition of the hallways and also to S & N whom he thought was the general contractor. He stated it was a constant battle almost everyday. He stated that the work had to be completed before the start of the new school year, and they were behind in their work because Magnan, the floor company, was behind schedule. Otherwise they would not have had to walk around and over the stuff in the hallway.

In opposition to the defendants' motion the plaintiffs have submitted the expert affidavit of Kathleen Hopkins, a Certified Site Safety Manager. She stated that her areas of specialty include construction site accident investigations and hazard analysis and causation. She stated her opinions based upon her review of the verified bill of particulars and the various EBTs she reviewed. Her opinion, with a reasonable degree of professional certainty, was that the defendants failed to keep a passageway free from any obstructions or conditions which could cause tripping as there was a blue and white nylon string (jetline/pulling line) attached to a terrazzo sludge removal hose upon which the plaintiff tripped. She further opined that Tromel exercised supervisory control over the entire site and knew or should have known that the hose with the attached nylon string in the passageway used by all contractors presented a tripping hazard to the plaintiff. The blue and white string attached to the terrazzo sludge removal belonged to Magnan. She further stated that the defendants failed to ensure compliance with 29 CFR §§1926.250(a)(3) and (c) of the OSHA Regulations to keep the passageway clean and clear in accordance with good and accepted standards, customs and practices in the construction industry, and further violated Labor Laws §241(6), 200(1) and the Industrial Code and that the violations were the proximate cause of the plaintiff's injuries.

At his EBT Brian Donovan of Tromel testified that he was the superintendent at the site as a site safety officer for Tromel and coordinated the trades, the subcontractors and basically oversaw the job at the High School on a daily basis. Construction began in June or July of 2003 and was substantially completed in September 2004. The job involved a two-story addition consisting of classrooms and a gym which was eventually attached to the main building. Tromel was the general contractor on the job pursuant to a contract with the School District. He reported to Thomas Healy, Tromel's president. He stated that Tromel subcontracted with S & N. S & N's Richard Gleckler, as project manager, and Paul Sheridan as assistant project manager, were at the job site overseeing all primes, contractors, and subcontractors. S & N was the construction manager and liaison between the School District and the School District's architect and subcontractors. If he had any questions he had to go through S & N to contact the architect. He stated he only gave instructions to his own subcontractors hired by Tromel. There were subcontractors at the job that were not hired by Tromel. In August 2004, the work was substantially completed with bill work, floors, painting and the final stages being all done. Magnan was installing terrazzo floors and was a subcontractor for Tromel. Baybrent Tile Corp. (hereinafter Baybrent) was doing bathroom tile and was a subcontractor for Tromel. Tromel had two or three workers working at the site in August, 2004. Meetings were bi-weekly in August 2004 with S & N, the architect and Vincent Gelb from the School District to discuss progress and safety issues as S & N was the liaison between the architect, the School District and the subcontractors, and was in charge of all the primes on the job site. Tool box meetings were held separately every couple of weeks, attended by Tromel and its subcontractors. The primes were all responsible for their subcontractors. He did not recall any particular safety issues brought to his attention by subcontractors at those meetings and no one ever complained about the work being done by Magnan or cleanliness at the job site. He testified that he would stay in the building most of the day and walked all over throughout the building more than five times a day. If there was an accident on site, Tromel would fill out an accident report for Tromel subcontractors and he would note it in his daily report if someone else was hurt. He was informed by Richard

Gleckler of S & N that the plaintiff got hurt by tripping on a cord in the hallway, but thought he learned of it weeks after it happened. He stated that if the plaintiff got hurt, he did not miss a day of work as he was still on the job performing his duties. He observed work being done by the terrazzo subcontractors and stated that hoses (bigger than typical garden hoses) were being used for incoming water, and a pump was used to pump out excess water. The waste went through a garden hose into a 55 gallon drum which was carted out. Magnan also used squeegees and shovels to load the waste into the vats, but then he was not sure if there was a pump. He testified that the terrazzo contractors hung their electrical cords used to operate the terrazzo contractors' equipment with cords from the ceiling because of the water. The cords were hung from the ceiling trestles as the drop ceilings had not yet been installed when the terrazzo was being done. The incoming and outgoing water hoses were tied up if the terrazzo contractors were grinding or if they were in the way. He did not recall what kind of wire or string was used to hang the cords. He also testified that Baybrent used garden hoses to bring water in to mix grout, but he never observed a hose used by Baybrent tied with a string or a rope or cord, and Baybrent was doing tile work in the bathrooms when the terrazzo floors were being installed, but he did not know on which floor. He also testified that when the terrazzo work was being done that they tried to keep the foot traffic in the hallways to a minimum. Tromel had laborers on the site in August 2004 to clean up the site from the debris from all the trades, and to accept deliveries. In August 2004 the hallways were lit with temporary lighting on stringers attached to the ceiling trestles. Donovan testified that if he saw a safety problem, such as a tripping hazard, that he would point it out to the subcontractor or to whomever was responsible for it, and that the situation would have to have immediate attention. If the problem were not corrected immediately, he would threaten to throw that entity off the job and had the authority to stop anyone's work if necessary.

At his EBT Indri testified on behalf of Magnan that he had been employed for the last forty six years by Magnan and on August 31, 2004 was a field supervisor for the installation and grinding of terrazzo floors at the High School. His duty was to make sure the job was running correctly and to see if any materials were needed. He stated that Magnan employees, Kenny (Norbert) Phillips (hereinafter Phillips), the foreman, and Victor Guircocha, who was in charge of grinding, were working at the site pursuant to a contract, but he did not know if they were there on August 31, 2004. He stated that Phillips took his instructions from him, and the other Magnan employees took their instructions from Phillips. He stated he thought Tromel was the general contractor. He did not think Tromel instructed Magnan's employees on how to do their jobs. He testified that the grinding of the terrazzo floor was done wet with water and stones on a large terrazzo grinding machine. A garden hose was used to obtain the water for the grinding to put into the buckets. To remove the slurry from the area, a two-inch fire hose was used. The hose went out the building into a container. The slurry was pushed with squeegees onto a tray which was also the pump, and the slurry was pumped out. The floor was then grouted and after the grouting was completed, it dried in about a day. The floors were polished and were sealed using a terrazzo machine, powered by electric and using water from a pail. A mop was used to apply the sealer. He stated the hoses were not held above the flooring by any means while the evacuation of the slurring was taking place, and there were no strings or rope or any other device used to hold the hose above the flooring while the grinding process was taking place. He testified that to his

knowledge, no type of string or rope was used on August 31, 2004 in the course of the terrazzo installation and grinding, and at no time when he visited the site did he see any type of strings or ropes being used to hold hoses or cables or wires above the terrazzo flooring while it was being installed. He was not aware of any other trade utilizing blue nylon string or rope to hang hoses or pipes or anything from the ceiling. There was no particular person from Magnan responsible for debris removal for the terrazzo site related to the work Magnan was performing and it was each employee's job to police the area or clean up whatever was utilized. He was not aware of any reports or complaints made about the condition of the floor in terms of its cleanliness at the job.

On October 29, 2001, the School District as the "owner" and S & N as "construction manager" contracted that S & N was to provide the services as enumerated in Articles 1, 2 and 3 of their agreement and any other services included in Article 12. The construction manager's basic services were to be provided in conjunction with, and in reliance upon the services of an architect. Projects 1 through 5 were set forth with any other projects proposed by the owner outside Projects 1 through 5 to follow the same principles outlined by the agreement. S & N was to manage all construction work (Schedule A, Projects 1-5); provide, set up and remove trailers. The agreement provided for pre-construction; construction phase-administration of the construction contract; and an addendum. The construction manager was to, inter alia, review the safety programs developed by each of the contractors to confirm the contractors were coordinating their respective safety programs with those of the other contractors. The agreement provided in part at paragraph 2.4.12 that "The Construction Manager's responsibilities for coordination of safety programs shall not extend to direct control over or charge of the acts or omissions of the contractors or subcontractors, agents or employees of the contractors or subcontractors, or any other persons performing portions of the work and not directly employed by the Construction Manager." Paragraph 2.4.13 provided in pertinent part that "The Construction Manager, in consultation with the Architect, may reject Work which does not conform to the requirements of the Contract Documents." At paragraph 2.15, the agreement provided in part that "With respect to each Contractor's own Work, the Construction Manager shall not have control over or charge of and shall not be responsible for construction means, methods, technique, sequences or procedures, or for safety precautions and programs in connection with the Work of each of the contractors, since these are solely the Contractor's responsibility under the Contract for Construction..... The Construction Manager shall not have control over or charge of acts or omissions of the Contractors, Subcontractors, or their agents or employees, or any other persons performing portions of the Work not directly employed by the Construction Manager."

An agreement, dated May 6, 2003, between the School District and Tromel, the contractor provided for the additions and alterations at the High School and for general construction work, with the work schedule of S & N annexed. However, much of the agreement provided by the moving defendants is illegible.

A subcontract agreement, dated February 11, 2004, entered into between Tromel as contractor, and Magnan as subcontractor provided for installation by Magnan of the terrazzo on the stair tread, intermediate platforms and specified stairwells. The agreement provided

that the subcontractor was to provide the contractor with original certificates of insurance covering workmen's compensation and public liability per the attached rider. The subcontractor also agreed to indemnify, reimburse and save harmless the architect, engineer, contractor and owner of and from loss and damage to person or property and all claims, suits or demands arising from damages or injuries to the subcontractor and his employees, contractor and his employees, owner and his employees, other subcontractor and their employees, and the general public due to, arising from or connected with the subcontractor's work on the project. It was further agreed that the subcontractor is bound with the contractor in all conditions of the contract with the owner of which this subcontract was a part. The insurance hold harmless agreement annexed to the agreement, dated February 11, 2004, required the subcontractor to purchase and maintain the insurance in the type and amount deemed necessary by the contractor to protect and defend against all claims, loss and liability arising from injury, death and damage to persons or property arising out of the performance or nonperformance of the subcontract work, including worker's compensation insurance, comprehensive general liability insurance (including premises/operations, independent contractors, completed operations and contractual liability covering indemnification agreements) and comprehensive insurance.

### LABOR LAW §200

Labor Law §200 provides in pertinent part that "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...." (*Trbaci v AJS Construction Project Management, Inc, et al*, 2009 NY Slip Op 50153U; 22 Misc3d 1116A [Supreme Court of New York, Kings County 2009]). "... Labor Law §200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work" (*Kim v Herbert Constr. Co.*, 275 AD2d 709, 713 NYS2d 190 [2000]).

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 plaintiff's work, or who have actual or constructive notice of an unsafe condition that causes an accident (*Aranda v Park East Constr.*, 4 AD3d 315, 772 NYS2d 70 [2004]; *Akins v Baker*, 247 AD2d 562, 669 NYS2d 63 [1998])" (*Marin v The City of New York, et al*, 15 Misc3d 1003A, 798 NYS2d 710 [Supreme Court of New York, Kings County 2004]). An implicit precondition to the common-law duty imposed upon an owner or general contractor to provide construction workers with a safe place to work is that the party charged with that responsibility has the authority to control the activity bringing about the injury and have actual or constructive notice of the alleged unsafe condition (*Ramos v HSBC Bank et al*, 29 AD3d 435, 815 NYS2d 504 [1<sup>st</sup> Dept 2006]). In order to prevail on a claim under Labor Law §200, a plaintiff is required to establish that a defendant exercised some supervisory control over the operation (*Mendoza v Cornwall Hill Estates, Inc.*, 199 AD2d 368, 605 NYS2d 308 [2<sup>nd</sup> Dept 1993]).

The moving papers demonstrate the School District and S & N bear no liability under Labor Law §200. S & N was the construction manager for the job site and did not have the authority to control the activity bringing about the injury and had no actual or constructive notice of the alleged unsafe condition. The School District, based upon the evidentiary submissions, did not exercise supervisory control over the construction operations, manner or methods. However, Tromel did exercise supervision and control over the work site and had actual and constructive notice of the condition.

Accordingly, the cause of action premised upon violation of Labor Law §200 as asserted against the defendants BOE, School District and S & N is dismissed.

#### LABOR LAW §240

Labor Law §240. Scaffolding and other devices for use of employees (1) provides “[a]ll 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, 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, braces, 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) is applicable to work performed at heights or where work itself involves risks related to differentials in elevation” (see, **Plotnick et al v Wok’s Kitchen Incorporated, et al**, 21 AD3d 358, 800 NYS2d 37 [2<sup>nd</sup> Dept 2005]; **Handlovic v Bedford Park Development, Inc.**, 25 AD3d 653, 811 NYS2d 677 [2<sup>nd</sup> Dept 2006]). Labor Law §240 (1) was enacted to “prevent those types of accidents in which the scaffold, hoist, stay, ladder 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” (**Cruz v The Seven Park Avenue Corporation et al**, 5 Misc3d 1018A, 799 NYS2d 159 [Supreme Court of New York, Kings County 2004]).

In **Ortega et al v Puccia et al**, 2008 NY Slip Op 8350, 2008 NY App Div Lexis 8140 [2<sup>nd</sup> Dept October 28, 2008], the Court stated that Labor Law §240 is intended to protect workers from gravity-related occurrences stemming from the inadequacy or absence of enumerated safety devices. The duties articulated in Labor Law §240 are nondelegable, and liability is absolute as to the general contractor or owner when its breach of the statute proximately causes injury.

“Labor Law §240(1) provides exceptional protection for workers against the special hazards that arise when the work site itself is either elevated or is positioned below the level where materials or load are being hoisted or secured (*citations omitted*). These special hazards do not encompass any and all perils that may be connected in some tangential way with the effects of gravity.... Rather, they are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured .... To establish liability under Labor Law §240(1), a plaintiff must show

more than simply that an object fell, thereby causing injury to a worker. The plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (**Natale v City of New York et al**, 33 AD3d 772, 822 NYS2d 771 [2<sup>nd</sup> Dept 2006]).

Labor Law §240(1) applies to "both falling worker and falling object cases. In falling object cases, the object had to have been related to a risk inherent in the elevation at which material or loads had to have been positioned or secured. A plaintiff has to show that an object fell while being hoisted or secured, because of the lack of a proper safety device listed in the statute. The fact that the workers were working at an elevation when objects fell is irrelevant in falling object cases. Absolute liability for falling objects arises only when there was a failure to use proper hoisting or securing devices" (**Narducci et al v Manhasset Bay Associates, et al**, 96 NY2d 259, 727 NYS2d 37 [2001]).

Not every hazard or danger encountered in a construction zone falls within the scope of Labor Law §240(1) as to render the owner or contractor liable for an injured worker's damages. Rather, Labor Law §240(1) is aimed at only elevation-related hazards, and accordingly, injuries resulting from other types of hazards are not compensable under that statute even if proximately caused by the absence of a required safety device.

The plaintiff allegedly tripped on a blue and white cord or twine attached to a hose lying on the floor in the hallway of the construction site. This was "a general hazard of the workplace, not one contemplated to be subject to Labor Law §240(1)" (**O'Keefe v Tishman Westside Construction of New York**, 2007 NY Misc Lexis 4783; 237 NYLJ 125 [Supreme Court of New York, New York County 2007]). Here the testimony clearly demonstrates that the plaintiff did not fall from an elevation and there was no gravity-related falling object which caused injury to the plaintiff (**Pastor et al v RAC Mechanical et al**, 2007 NY Slip Op 50836U, 15 Misc3d 1125A, 841 NYS2d 220 [Supreme Court of New York, Nassau County 2007]; **Smith v County of Nassau**, 242 AD2d 380, 662 NYS2d 70 [2<sup>nd</sup> Dept 1997]).

Accordingly, summary judgment is granted as to the causes of action premised upon the defendants' alleged violation of Labor Law §240 and that part of the complaint as asserted against the moving defendants, Tromel, S & N, BOE and the School District, is dismissed as a matter of law

#### **LABOR LAW §241(6)**

Labor Law §241(6) provides in pertinent part that "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 persons employed therein or lawfully frequenting such places." The statutory duties imposed by Labor Law §241(6) place ultimate responsibility for safety practices on owners of the worksite and general contractors (**Bopp v A.M. Rizzo Electrical Contractors, Inc. et al**, 19 AD3d 348, 796 NYS2d 153 [2<sup>nd</sup> Dept 2005]).

Thus Labor Law §241(6) places a nondelegable duty upon owners and general contractors and their agents to comply with the specific safety rules protecting workers stated in the Industrial Code. It restates the common-law duty to provide a safe working environment.

Labor Law §200 is a general safety standard and thus is insufficient to support a Labor §241(6) claim. Accordingly, in order to support a cause of action under Labor Law §241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code that is applicable given the circumstances of the accident, and set forth a concrete standard of conduct rather than a mere reiteration of common-law principals (*Ross* at 502; *Ares v State*, 80 NY2d 959, 590 NYS2d 874 [1992]; see also, *Adams v Glass Fab.*, 212 AD2d 972, 624 NYS2d 705 [1995])” (*Marin v The City of New York, et al*, 15 Misc3d 1003A, 798 NYS2d 710 [Supreme Court of New York, Kings County 2004]; see, *Mahoney v Madeira Associates et al*, 32 AD3d 1303, 822 NYS2d 190 [Supreme Court of New York 4<sup>th</sup> Dept 2006]). Unlike Labor Law §200, Labor Law §241(6) does not require the plaintiff to show that the defendant exercised supervision or control over the worksite (*Mendoza v Cornwall Hill Estates, supra*). If a violation of one of these specific regulations is found, Labor Law §241(6) imposes absolute liability upon a general contractor for the negligence of a subcontractor irrespective of its control or supervision of the construction site (*Bopp v A.M. Rizzo Electrical Contractors, Inc. et al, supra*).

As the Court of Appeals explained in *Rizzuto v L.A. Wegner Contracting Co., Inc.*, 91 NY2d 343, 670 NYS2d 816 [1998], “Thus once it has been alleged that a concrete specification of the Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused plaintiff’s injury. If proven, the general contractor (or owner, as the case may be) is vicariously liable without regard to his or her fault” (*McDevitt et al v Cappelli Enterprises, Inc. et al*, 16 Misc3d 1133A, 847 NYS2d 903 [Supreme Court, New York County 2007]).

Here, the plaintiff alleges that the Industrial Code *i.e.* 12 NYCRR 23-7.1(e)(2) was violated. Such statute provides for protection from general hazards, tripping hazards (*Pastore et al v RAC Mechanical et al*, 2007 NY Slip Op 50836U, 15 Misc3d 1125A, 841 NYS2d 220 [Supreme Court of New York, Nassau County 2007]). Industrial Code, *i.e.* 12 NYCRR 23-1.7(e)(1) provides in pertinent part that “Tripping and other hazards. Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping.... (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.”

Here the plaintiff contends that he tripped on a piece of nylon cord or twine attached to the hose on the floor in the hallway which was allegedly place by Magnan, the subcontractor installing the terrazzo floor. This testimony is further supported by Tompkins, the plaintiff’s foreman, who claims he also tripped on the same cord immediately after the plaintiff tripped. The hallway where the incident occurred lead to the classrooms where the plaintiff was installing various cabinetry items and marking boards and it was traversed from the storage area to the

classroom to move those items to be installed. This nylon cord or twine was not being used by the plaintiff to perform his job and the plaintiff did not injure himself by tripping over materials being used in the furtherance of his craft. (see, **Alvia v Teman Elec. Contr. Inc.**, 287 AD2d 421, 731 NYS2d 462, 750 NYS2d 117 [2<sup>nd</sup> Dept 2000]; **Pastor et al v RAC Mechanical et al**, 2007 NY Slip Op 50836U; 15 Misc3d 1125A, 841 NYS2d 220 [Supreme Court of New York, Nassau County 2007]).

In this case the facts alleged support the plaintiff's claim for a violation of the Industrial Code *i.e.*, 12 NYCRR 23-1.7(e) because the plaintiff tripped in the hallway as stated above. However, there are factual issues concerning if there was a cord attached to the hose, who placed the blue and white nylon cord on the hose in the hallway and who the hose belonged to as there were multiple workers from different companies performing work involving the use of water and hoses for grouting, tile work and terrazzo floor installation. The testimony of Donovan, on behalf of Tromel, established that he saw nylon cord on the hose in the hallway and he explained it was used to lift the electrical cords of the equipment which the floor installers were using when the floor was wet. However, Indri testified on behalf of Magnan that he did not see any blue or blue and white cord or twine and that Magnan did not lift the hose off the floor in the hallway during the installation of the terrazzo floors. The plaintiff and Tompkins his foreman, testified that they observed the name of the defendant Magnan on the equipment in the hallway.

Tromel, pursuant to its agreement with the School District, was the general contractor for the job site. Donovan of Tromel testified he was aware of the cord or nylon cord used to tie up the electrical lines from the terrazzo installer's equipment to the ceiling trestles and thus had actual notice of the condition. Pursuant to the agreement entered into between Tromel and Magnan, Tromel hired Magnan as a subcontractor for the terrazzo floor installation and supervised the work site and inspected it for safety issues. Donovan testified that he had the authority to remove any worker or subcontractor from the work site if he determined there were safety issues which were not timely corrected after being notified of the same. Therefore, Tromel exercised supervision and control over the work site where the within accident occurred. Labor Law §241(6) places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code (see, **Ross v Curtis Palmer Hydro-Elec. Co.**, 81 NY2d 494, 601 NYS2d 49). Therefore, summary judgment is denied as a matter of law as to the School District, owner of the work site, and Tromel, the general contractor but granted as to defendants S & N and BOE.

S & N, pursuant to its agreement with the School District, was to supervise all construction work. However, it was not to be responsible for construction means, methods, technique, sequences or procedures, or for safety precautions and programs in connection with the work of each of the contractors since these were deemed solely the contractor's responsibility.

The Board of Education is not listed as an owner in the agreements and is not a party to the contracts and agreements submitted by the moving parties.

The moving defendants also seek an order granting judgment over and against the defendant Magnan on the issue of contractual indemnification. An indemnification provision in an agreement between parties is void as against public policy and unenforceable wherein it seeks to be indemnified fully for its own negligence (see, General Obligations Law §5-322.1; *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 658 NYS2d 903 [1997]). Here the apportionment of liability has not been established in this action and there are factual issues which remain to be determined.

Accordingly, that part of the defendants' application for judgment over as against defendant Magnan on the issue of indemnification is denied as premature.

Dated: September 8, 2009



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J.S.C.

\_\_\_\_\_ FINAL DISPOSITION  X  NON-FINAL DISPOSITION