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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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JOHN CAPPABIANCA,

Index No.: 103046/06

Plaintiff,

-against-

DECISION AND ORDER

SKANSKA USA BUILDING INC., SKANSKA USA INC., NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, BOARD OF TRUSTEES OF THE NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, THE CITY OF NEW YORK BOARD OF EDUCATION, THE NEW YORK CITY DEPARTMENT OF EDUCATION, THE CITY OF NEW YORK, AND SAFETY AND QUALITY PLUS, INC.,

Defendants.

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HON. SALIANN SCARPULLA, J.:

Motion sequence numbers 004 and 005 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries sustained by a bricklayer while working at a construction site for a future high school located at 94-102 104th Street, Ozone Park, New York on July 29, 2005.

In motion sequence number 004, defendant Safety and Quality Plus, Inc. ("Safety") moves for summary judgment dismissing plaintiff John Cappabianca's ("Cappabianca") complaint and all cross claims asserted against it, as well as for summary judgment in its favor on its cross claims for common-law and contractual indemnification as against defendants Skanska USA Building Inc., Skanska USA Inc.

(collectively referred to as "Skanska"), New York City School Construction Authority ("NYCSCA"), Board of Trustees of the New York City School Construction Authority, The City of New York Board of Education, The New York City Department of Education and The City of New York (collectively referred to as "defendants").

In motion sequence number 005, defendants move for summary judgment dismissing the complaint and Safety's cross claims asserted against them, as well as granting summary judgment in their favor on their cross claims asserted against Safety.

Cappabianca cross-moves for partial summary judgment in his favor on the issue of liability under common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6), or, in the event that the court finds his cross motion untimely, he requests that the court search the record and grant him partial summary judgment in his favor on the issue of liability.

Background

NYCSCA was the owner of the premises where the accident took place ("the site"). NYCSCA hired Skanska to serve as general contractor on a project to build a high school ("the project") at the site. Skanska subcontracted with non-party Job Opportunities for Women ("JOFW") to perform masonry work at the site. Skanska hired Safety to conduct various safety inspections for the project, to identify and report safety deficiencies and to conduct safety meetings. On the day of the accident, Cappabianca was employed by JOFW as a bricklayer.

Cappabianca testified that, while at the site, he reported directly to his foremen, Ken Shutte ("Shutte") and Jim McCoy ("McCoy"). Cappabianca also maintained that he received all of his job instructions from Shutte and McCoy, and that he received no instructions from defendants. Cappabianca also stated that all of the tools and equipment used by him, such as rubber gloves, earplugs and a rubber apron, were either owned by him or were provided to him by JOFW.

Cappabianca explained that his job on the project consisted of cutting bricks with an electric stationary circular wet saw ("the saw"). The saw sat on a stand which was placed on a movable pallet. Cappabianca then stood on an adjacent wooden pallet to use and operate the saw. The floor of the pallet was composed of slats positioned approximately three inches apart. Cappabianca stated that he used this same saw for two months prior to the accident. In addition, he maintained that the saw and the stand remained in the same position throughout the entire length of the project. Cappabianca stated that JOFW owned the saw, but he did not know who owned and assembled the saw stand and pallets. He also noted that, without the pallet, the wet saw would be inoperable, as he needed to stand on the pallet in order to reach the saw and operate the foot pedal.

Cappabianca further explained that, in order to cut the bricks, water, which was pumped via a hose from an adjacent 55-gallon drum, which also sat on the pallet, was sprayed onto the brick through the saw's blade from underneath the blade's hood cover.

Excess water from the wet saw was collected in a sliding tray, which was situated at the bottom of the saw. This tray had to be drained two to three times per day.

Cappabianca testified that the accident occurred when water from beneath the pallet, as well as his movement in picking up some bricks from an adjacent pallet caused the pallet that he was standing on to turn. His left foot then went between two of the pallet's slats, and got caught, thereby causing him to fall to the concrete floor and sustain injuries to his knee.

Specifically, Cappabianca testified:

> I was cutting brick on a wet saw, standing on the [pallet] in front of the saw I cut the brick, I turned to the left to put the brick on the [pallet], my left foot got caught between the slats of the [pallet], which caused me to fall backwards to my left, which tore my knee out of socket I guess. I landed on the concrete floor on my right shoulder.

Cappabianca maintained that his fall was not caused as a result of slipping on the pallet. He also noted that, on the day of his accident, there were no defects in the saw or the pallet on which he stood while utilizing the saw.

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 A.D.3d 184, 185-186 (1st Dept. 2006), *quoting Winegrad v New York University Medical Center*, 64 N.Y.2d 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." *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980); *Mazurek v Metropolitan Museum of Art*, 27 A.D.3d 227, 228 (1st Dept. 2006); *DeRosa v City of New York*, 30 A.D.3d 323, 325 (1st Dept. 2006). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 N.Y.2d 223, 231 (1978); *Grossman v Amalgamated Housing Corporation*, 298 A.D.2d 224, 226 (1st Dept. 2002).

Cappabianca's Labor Law § 240 (1) Claim Against Defendants and Safety

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 A.D.2d 615, 615 [1st 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, 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) 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 A.D.2d 114, 118 (1st Dept. 2001), *quoting Ross v Curtis-Palmer Hydro-Electric Company*, 81 N.Y.2d 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 A.D.2d 214, 214-215 (1st Dept 1997); *see Ross v Curtis-Palmer Hydro-Electric Company*, 81 N.Y.2d 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 N.Y.3d 280, 287 (2003); *Felker v Corning Inc.*, 90 N.Y.2d 219, 224-225 (1997); *Torres v Monroe College*, 12 A.D.3d 261, 262 (1st Dept. 2004). "The statute is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed [internal citations omitted])." *Valensisi v Greens at Half Hollow, LLC*, 33 A.D.3d 693, 695 (2d Dept. 2006).

Initially, it should be noted that defendants, as owner and general contractors of the construction site, may be liable to Cappabianca under Labor Law §§ 240 (1) and 241 (6). However, it must be determined whether defendant Safety, as safety consultant, may be vicariously liable for Cappabianca's injuries under Labor Law §§ 240 (1) and 241 (6) as statutory agents of the owner.

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 N.Y.3d 861, 864 (2005), *quoting Russin v Louis N. Picciano & Son*, 54 N.Y.2d 311, 318 (1981).

A review of the record establishes that Safety did not have sufficient authority to supervise and control the injury-producing work at issue, so as to be held vicariously liable for Cappabianca's injuries as a statutory agent of the owner under Labor Law §§ 240 (1) and 241 (6). *See Smith v McClier Corporation*, 22 A.D.3d 369, 371 (1st 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 A.D.3d 398, 399 (1st 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).

Thus, Safety is entitled to summary judgment dismissing Cappabianca's Labor Law §§ 240 (1) and 241 (6) claims asserted against it.

The court notes that the pallet that Cappabianca was working on at the time of his accident is not an enumerated device for the purposes of Labor Law § 240. In addition, although defendants argue that the height of Cappabianca's fall does not bring the accident within the purview of the statute, the extent of the elevation differential may not necessarily determine the existence of an elevation-related risk. *Rocovich v Consolidated Edison Company*, 78 N.Y.2d 509, 515 (1991). The Scaffold Law does not apply merely

because work is performed at elevated heights, but rather, applies where the work itself involves risks related to differences in elevation. *Brennan v RCP Associates*, 257 A.D.2d 389, 390-391 (1st Dept. 1999).

However, "[a]lthough the statute was intended to protect a worker against gravity-related risks arising from the work being performed, not every gravity-related hazard falls within the scope of the statute [citation omitted]" *Melo v Consolidated Edison Co. of N.Y.*, 246 A.D.2d 459, 460 (1st Dept. 1998), *affd* 92 N.Y.2d 909 [1998]; *Narducci v Manhasset Bay Assoc.*, 96 N.Y.2d 259, 267 (2001); *Hill v Stahl*, 49 A.D.3d 438, 442 (1st Dept. 2008); *Buckley v Columbia Grammar & Preparatory*, 44 A.D.3d 263, 267 (1st Dept. 2007). "Rather, the statute addresses only exceptionally dangerous conditions posed by elevation differentials, when the work site itself is elevated or is positioned below the area where materials or load are hoisted or secured [internal quotation marks and citations omitted]." *Id.*; *Buckley v Columbia Grammar & Preparatory*, 44 A.D.3d at 263.

Here, Cappabianca was involved in work that did not impose a gravity-related risk, so as to come within the purview of Labor Law § 240 (1), when, while utilizing a wet saw, his foot fell through a slat on the pallet, causing him to twist his knee. *See Meslin v New York Post*, 30 A.D.3d 309, 310 (1st Dept. 2006)(plaintiff's injuries were not compensable under Labor Law § 240 (1) where plaintiff was allegedly injured when he stepped off a scaffold, which was at ground level, onto a pipe, which then rolled and

caused him to fall into a three-foot hole); *Caradori v Med Inn Centers of America*, 5 A.D.3d 1063, 1064 (4th 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).

The court further notes that, although Cappabianca testified at his 50-h hearing that the pallet was approximately eight to 12 inches from the floor, a review of photographs and other testimonial evidence in the record indicate that the pallet was approximately four to five inches from the floor. As a result, it can hardly be stated that there was a significant risk posed by the elevation differential at issue in this case. *See Marvin v Korean Air Inc.*, 2 A.D.3d 223, 224 (1st Dept. 2003); *Dilluvio v City of New York*, 264 A.D.2d 115, 118 (1st Dept. 2000), *affd* 95 N.Y.2d 928 (2000) (three-foot elevation differential between the tailgate of a pickup truck upon which the worker sat, prior to his fall, and the ground did not pose a significant risk as is required for the protections of Labor Law § 240 (1)); *Skudlarek v Bethlehem Steel Corporation*, 251 A.D.2d 974, 975 (4th Dept. 1998) (where plaintiff was injured when he fell backwards off a wooden pallet situated over standing water and which was 10-12 inches off the ground, Court held that plaintiff's injuries did not result from any elevation-related hazard and did not come within the purview of Labor Law § 240 (1)).

Labor Law § 240 (1) also requires that persons working at an elevation be provided with appropriate safety equipment to secure them from falling. *Wasilewski v*

Museum of Modern Art, 260 A.D.2d 271, 271 (1st Dept. 1999) (defendant liable under Labor Law § 240 (1) for failure to provide other safety devices, such as a safety belt, to a worker who fell from an unsecured ladder). However, under the facts of this case, there were no such safety devices that could have been utilized that would have prevented Cappabianca's accident.

Thus, as Cappabianca's injuries did not result from a special elevation-related hazard under Labor Law § 240 (1), but "rather from the usual and ordinary dangers which exist on a construction site," defendants are entitled to summary judgment dismissing the Labor Law § 240 (1) claim asserted against them. *Wells v British American Development Corporation*, 2 A.D.3d 1141, 1143 (3d Dept. 2003); *Misseritti v Mark IV Construction Company*, 86 N.Y.2d 487, 491 (1995); *Buckley v Columbia Grammar & Preparatory*, 44 A.D.3d at 267 ("The statute does not cover the type of ordinary and usual peril to which a worker is commonly exposed at a construction site").

Cappabianca's Labor Law § 241 (6) Claim Against Defendants

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 N.Y.2d 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 Cappabianca lists multiple violations of the Industrial Code in his bill of particulars, with the exception of Industrial Code sections 23-1.7 (b) (1) (i), (d) and (e) (2), 23-1.8 (c) (2), 23-1.22 (c) (1), and 23-5.1 (b), (c) (2), (e) (1), (f) and (h), he does not address these Industrial Code violations in his opposition papers, and thus, they are deemed abandoned. *See Genovese v Gambino*, 309 A.D.2d 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 A.D.2d 782, 784 n (3d Dept. 2003). As such, defendants are entitled to summary judgment dismissing the Labor Law § 241 (6) claim predicated on those provisions.

Cappabianca is unable to maintain a cause of action based upon Labor Law § 241 (6), as none of the remaining allegedly violated Industrial Code provisions applies to the facts of this case. For example, 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 A.D.2d 578, 579 (2d Dept. 2003), *quoting Alvia v Teman Electrical Contracting, Inc.*, 287 A.D.2d 421, 422-423 (2d Dept. 2001) ("hazardous openings" regulation did not apply where the 16-inch hole that worker fell into was too small for him to fall through); *Piccuillo v Bank of New York Company*, 277 A.D.2d 93, 94 (1st 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); *Messina v City of New York*, 300 A.D.2d 121, 123 (1st Dept. 2002) (the drainpipe hole into which plaintiff stepped was not considered a "hazardous opening"); *Serrano v St. James Episcopal Church*, 12 Misc.3d

1190[A] (Sup Ct, Kings Co. 2006)(court noted that the approximately one and half by two-foot hole that plaintiff fell into was "arguably big enough for someone to fall through").

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 Cappabianca's Labor Law § 241 (6) claim. *See Scarso v M.G. General Construction Corporation*, 16 A.D.3d 660, 661 (2d Dept. 2005); *Olsen v James Miller Marine Service, Inc.*, 16 A.D.3d 169, 171 (1st Dept. 2005).

Here, defendants are entitled to summary judgment dismissing that part of Cappabianca's Labor Law § 241 (6) claim predicated on a violation of Industrial Code section 23-1.7 (b) (1) (i), because the space which his foot fell through was not large enough for him to fall through. Thus, this provision, which deals with hazardous openings, does not apply to the facts of this case.

Industrial Code 12 NYCRR 23-1.7 (d) provides:

> "(d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

Industrial Code 12 NYCRR 23-1.7 (d) contains specific directives that are sufficient to sustain a cause of action under Labor Law § 241 (6). *Lopez v City of New York Transit Authority*, 21 A.D.3d 259, 259-260 (1st Dept. 2005).

Here, there is no evidence in the record to demonstrate that Cappabianca's accident was caused by him slipping and falling. In fact, his accident was caused when his foot got caught in the pallet's slats, causing him to twist his knee. Thus, defendants are entitled to summary judgment dismissing Cappabianca's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-1.7 (d).

For the same reasons, Industrial Code 12 NYCRR 23-1.7 (e) (1) and (2), which deal with hazards which may cause "[t]ripping," also do not apply to the instant case. Thus, defendants are entitled to summary judgment dismissing Cappabianca's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-1.7 (e) (1) and (2).

Industrial Code 12 NYCRR 23-1.8 (c) (2) does not apply to the facts of this case because there is no evidence to suggest that Cappabianca was not provided with the proper protective gear. In any event, Cappabianca maintains that his accident was caused when his foot got caught in the pallet's slats, not because he was not provided with proper gear. Thus, defendants are entitled to summary judgment dismissing that part of Cappabianca's Labor Law § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-1.8 (c) (2).

Industrial Code 12 NYCRR 23-1.22 (c) (1), which requires that platforms used as working areas be provided with floor planking, does not apply to the facts of this case, as this section is intended to apply to platforms used to transport vehicular or pedestrian traffic. *Dzieran v 1800 Boston Road, LLC*, 25 A.D.3d 336, 337-338 (1st Dept. 2006) (Industrial Code 12 NYCRR 23-1.22 (c) inapplicable to the facts of the case because plaintiff was not working on a platform "used to transport vehicular and/or pedestrian traffic"). In any event, it should be noted that planking would have hindered the subject pallet's primary purpose of preventing water to gather at Cappabianca's feet while he was working with the wet saw, thereby creating a slipping hazard.

Finally, as Industrial Code sections 23-5.1 (b), (c) (2), (e) (1), (f) and (h) and 23-5.2 only apply to scaffolds, and not pallets, and as it has not been sufficiently demonstrated that the subject pallet in this case served as the functional equivalent of a scaffold, defendants are entitled to summary judgment dismissing these alleged Industrial Code violations.

Cappabianca's Common-law Negligence and Labor Law § 200 Claims Against Defendants and Safety

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 A.D.2d 122, 122 (1st Dept. 2000); *see also Russin v Louis N. Picciano & Son*, 54 N.Y.2d 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."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, as in the instant case, and when the accident is the result of a dangerous condition. See *McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints*, 41 A.D.3d 796, 797-798 (2d Dept. 2007).

It is well-settled that in order to find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work. *Rizzuto v L.A. Wenger Contracting Company*, 91 N.Y.2d 343, 352 (1998); *Comes v New York State Electric & Gas Corporation*, 82 N.Y.2d 876, 877 (1993) (no Labor Law § 200 liability where plaintiff's injury was caused by lifting a beam and there was no evidence that defendant exercised supervisory control or had any input into how the beam was to be moved); *Ortega v Puccia*, 57 A.D.3d 54, 61 (2d Dept. 2008).

"'A defendant has the authority to supervise or control the work for the purposes of Labor Law § 200 when the defendant bears responsibility for the manner in which the work is performed'" *Orellana v Dutcher Avenue Builders, Inc.*, 58 A.D.3d 612, 614 (2d Dept. 2009), *quoting Ortega v Puccia*, 57 A.D.3d at 62.

Here, a review of the record indicates that neither defendants nor Safety directed or supervised the means and methods by which Cappabianca performed his brick-cutting work. Cappabianca testified that he received his work instructions solely from his two supervisors on the job and that no one else at the job site instructed him as to how he was supposed to perform his work.

In addition, Richard Salorio ("Salorio"), NYCSCA's safety specialist, testified that his responsibilities included ensuring contractor compliance at the site by conducting inspections. Salorio explained that "[i]f the workers are doing things that aren't according to regulations, I write violations. Recommendations." Salorio noted that, if during his inspections he saw an unsafe situation, he would bring it to the attention of the Skanska employees and include the information in his typed report. Salorio also testified that the regulations that he would typically enforce with regard to scaffolds do not apply to pallets. Notably, Salorio maintained that the pallet set-up was part of JOFW's means and methods for cutting bricks and blocks.

Paul Deremer ("Deremer"), Skanska's safety director, testified that his duties included going to ongoing Skanska job sites and performing field inspections. Deremer explained that, if during his walk-through inspections of the project site, he observed something that he deemed a dangerous condition, he would not direct or instruct the workers to stop doing what they were doing, but instead, he would ask where the foreman was and inform the foreman of the unsafe condition. For example, Deremer explained

that, if he saw an electrical hazard or a piece of equipment that was dangling, he would "ask the foreman to take it out of service."

In addition, Deremer, who observed the pallet after the accident, stated that its set up was "construction standard," and that it was not the kind of potential hazard that might cause someone to get their foot caught. Deremer also described the pallet as a "means and method" of the bricklayer's job.

Fabian Garzon ("Garzon"), Safety's safety specialist, testified that, in the event that he identified an unsafe condition during his walk-throughs, he did not have the authority to stop work. In addition, Garzon maintained that he did not have the authority to direct or control any of the bricklayers.

Further, the contract between defendant Skanska and Safety ("the contract") states that Safety "does not guarantee, warranty, insure, accept, condone or agree with operations, construction means or work performed by others and is not responsible for any defects, damages, discrepancies or errors of the work it inspects." In addition, the contract also states, in pertinent part:

> SERVICES - The work and services to be performed by [Safety] as stated in the proposal are limited to furnishing, installing and inspecting equipment and devices for site safety ... [Safety] is not responsible for the construction, creation, operation, correction ... equipment, tools, devices ... [Safety] has no liability or responsibility for any damages whatsoever including personal injuries ... caused by or arising out of the construction activities at the project site.

Moreover, although a review of the record reveals that defendants and Safety may have had some general supervisory control over Cappabianca's work at the site, this evidence is insufficient to establish that they had any supervisory control or input regarding Cappabianca's operation of the wet saw, so as to impose liability pursuant to the statute. "[G]eneral supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" *Hughes v Tishman Construction Corporation*, 40 A.D.3d 305, 311 (1st Dept. 2007); *Burkoski v Structure Tone, Inc.*, 40 A.D.3d 378, 381 (1st Dept. 2007) (no Labor Law § 200 liability where defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work); *Smith v 499 Fashion Tower, LLC*, 38 A.D.3d 523, 524-525 (2d Dept. 2007); *Natale v City of New York*, 33 A.D.3d 772, 773 (2d Dept. 2006).

As there is no evidence in the record to support a finding that defendants and Safety had any actual supervisory control or input as to the work Cappabianca was performing at the time of the accident, these defendants are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against them.

In light of the fact that Cappabianca's complaint has been dismissed as to both defendants and to Safety, these defendants are also entitled to summary judgment dismissing all cross claims asserted against them, as they are moot. In addition,

defendants and Safety are not entitled to summary judgment in their favor on their cross claims as against each other.

Cappabianca's Cross Motion for Partial Summary Judgment

Cappabianca urges the court to consider his cross motion despite the fact that it was made after the post-note of issue 120-day statutory period had expired, no good cause for the delay was presented, and no motion for leave of court to file the late cross motion was brought. In the alternative, Cappabianca requests that this court search the record and find in its favor on the issue of liability as against defendants and Safety. Absent a showing of good cause, "a court has no discretion to entertain even a meritorious, nonprejudicial summary judgment motion" *Hesse v Rockland County Legislature*, 18 A.D.3d 614, 614 (2nd Dept. 2005). In any event, in light of the court's determination that defendants and Safety are entitled to summary judgment dismissing Cappabianca's complaint as asserted against them, Cappabianca's cross motion is denied as moot.

In accordance with the foregoing, it is

ORDERED that defendant Safety and Quality Plus, Inc.'s motion for summary judgment dismissing plaintiff John Cappabianca's complaint and all cross claims as asserted against it and for summary judgment on its cross claims asserted against the remaining defendants is granted to the extent that the complaint and all cross claims asserted against it are dismissed and the motion is otherwise denied as moot; and it is further

ORDERED that defendants Skanska USA Building Inc., Skanska USA Inc., New York City School Construction Authority, Board of Trustees of the New York City School Construction Authority, The City of New York Board of Education, The New York City Department of Education, and The City of New York's motion for summary judgment dismissing the complaint and Safety's cross claims as asserted against them and for summary judgment in their favor on their cross claims asserted against Safety is granted to the extent that the complaint and Safety's cross claims as asserted against them are dismissed, and the motion is otherwise denied as moot; and it is further

ORDERED that plaintiff John Cappabianca's cross motion for partial summary judgment is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York
May 3, 2010

ENTER:

J.S.C.

SALIANN SCARPULLA
J.S.C.