SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ **PART** _____
Justice

Index Number : 104828/2010
THOMAS, ERNEST
vs.
GOLDMAN SACHS HEADQUARTERS
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

Dated: 5/29/12

OK , J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

----------x

ERNEST THOMAS and YASMIN THOMAS,

Plaintiffs,

Index No. 104828/10

-against-

DECISION/ORDER

GOLDMAN SACHS HEADQUARTERS, LLC, TISHMAN CONSTRUCTION CORPORATION and STRUCTURE TONE INC.,

Defendants.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross Motion and Answering Affidavits.....	2
Affirmations in Opposition to the Cross-Motion.....	3
Replying Affidavits.....	4
Exhibits.....	5

Plaintiffs commenced this action to recover for injuries plaintiff Ernest Thomas ("plaintiff") allegedly sustained when he tripped and fell in the course of his employment. All three defendants now move for summary judgment dismissing plaintiff's claims in their entirety which consist of a Labor Law §240(1) claim, a Labor Law §241(6) claim, a Labor Law §200 claim and a negligence claim. For the reasons set forth more fully below, defendants' motion is granted in part and denied in part.

The relevant facts are as follows. At the time of the accident, which occurred on January

12, 2010, plaintiff was employed by Empire Architectural as a journeyman iron worker. He was working on the 42nd floor of what was known as the Goldman Sachs Building located at 200 West Street. The exterior of the building was largely complete and work was being done on the interior. Plaintiff was walking from the west side of the floor to the southeast corner when he tripped over a piece of masonite which had been laid over the carpet to protect it. He testified that the pieces of masonite overlapped and that where the pieces of masonite met they tended to "lift up" or "flip up." He tripped over a piece that was flipped up. After he tripped, plaintiff's feet fell into a hole that was covered by the masonite and his upper body slammed against a wall. Plaintiff testified that "I tripped and I went flying into the wall... I tripped and slide [sic] right into the hole." Plaintiff did not remember if the masonite he tripped over had been taped down.

The court turns to defendants' motion seeking to dismiss plaintiff's Labor Law §240(1) claim. That statute requires that:

> All contractors and owners and their agents . . . who contract for but do not 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) was enacted to protect workers from hazards related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of materials or load being hoisted or secured. *See Rocovich v. Consolidated Edison*, 78 N.Y.2d 509, 514 (1991). Liability under this provision is contingent upon the existence of a hazard contemplated in §240(1) and a failure to use, or the

inadequacy of, a safety device of the kind enumerated in the statute. *Narducci v. Manhasset Bay Associates*, 96 N.Y.2d 259 (2001). Owners and contractors are subject to absolute liability under Labor Law §240(1), regardless of the injured worker's contributory negligence. *See Bland v Manocherian*, 66 N.Y.2d 452 (1985). Only if the plaintiff was the sole proximate cause of his injuries would liability under this section not attach. *See Robinson v East Medical Center, LP*, 6 N.Y.3d 550 (2006). A workplace accident can have more than one proximate cause. *See Pardo v Bialystoker Center & Bikur Cholim, Inc.*, 308 A.D.2d 384, 385 (1st Dept 2003).

In the instant case, defendants are entitled to summary judgment dismissing plaintiff's Labor Law §240 claim. As an initial matter, plaintiff does not oppose this portion of defendants' motion. Moreover, defendants make out a prima facie case that plaintiff's accident did not involve a height and/or gravity-related injury. Plaintiff tripped on a piece of masonite that was only 1/8 inch thick and did not create an elevation-related risk contemplated by the statute. *See Kuhn v American Int'l Realty Corp.*, 17 Misc.3d 1120 (A) (Sup Ct, NY Cty 2007).

The court now turns to defendants' motion for summary judgment dismissing plaintiff's Labor Law §241(6) claim. Section 241(6) of the Labor Law requires owners and contractors, or their agents, to provide reasonable and adequate protection and safety for workers and to comply with specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. *See Ross v Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494 at 502 (1993). A plaintiff must plead and prove that a specific Industrial Code safety regulation was violated. Plaintiff has pled that 12 NYCRR §§23-1.5, 23-1.7, 23-1.30, 23-2.1 and 23-2.4 were violated.

Defendants are entitled to summary judgment dismissing plaintiff's claim to the extent it is based on 12 NYCRR §23-1.5. That provision is insufficiently specific to constitute a predicate

for a §241(6) claim. *See Hawkins v City of New York*, 275 A.D.2d 534 (1st Dept 2000).

Defendants meet their burden of establishing that 12 NYCRR §23-1.7(d), which applies to slipping hazards, was not violated as this provision, on its face, does not apply to the instant situation. This provision states:

> 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.

This provision is geared toward preventing falls due to inherently slippery materials. The masonite was not slippery and was not a slipping hazard but a "tripping" hazard. Plaintiff's cause of action based on this Industrial Code provision is therefore dismissed.

Defendants are also entitled to have plaintiff's claim based on 12 NYCRR §23-1.7(e)(1) dismissed as the incident did not occur in a passageway. This provision provides that:

> Tripping and other hazards.
>
> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

The First Department has held that a "common, open area", even if "regularly traversed" does not constitute a passageway. *See Dalanna v City of New York*, 308 A.D.2d 400, 401 (1st Dept 2003). Defendants have sufficiently established that the incident did not occur in a passageway based on plaintiff's own testimony. Plaintiff testified that "on my way towards the door, that's when I tripped. I slide right into the wall" and that he was "five or six feet away" from the doorway when he tripped. Plaintiff did not testify that he tripped in the doorway or even fell against the

doorway. Because he fails to raise any issues of fact as to whether he fell in a "passageway", his claim predicated upon 12 NYCRR 23-1.e(1) is dismissed.

Defendants have also established that 12 NYCRR 23-1.e(2) does not apply on the ground that the masonite covering the carpet was an integral part of the work being performed. This provision states that:

> (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.

Where an item is an "integral part of the work being performed," it cannot constitute a tripping hazard under this section. The First Department has specifically held that items used to cover the floor can be integral parts of the work and, if so, do not provide a predicate for liability under this section. *See Rajkumar v Budd Contr. Corp.*, 77 A.D.3d 595 (1st Dept 2010) (paper purposefully laid over newly installed floors to protect them constituted an integral part of the work and did not constitute a tripping hazard); *Vieira v Tishman Constr. Corp.*, 255 A.D.2d 235 (1st Dept 1998) (the wire mesh over which plaintiff tripped was an integral part of the floor and thus not debris pursuant to 23-1.7(e)). In the instant case, the masonite was being used to protect the floors and was an integral part of the work being performed, rendering this section inapplicable. It is irrelevant whether the masonite could be considered a "sharp projection" because, even if it was, it was an integral part of the work being performed and therefore cannot constitute a basis for liability under this provision. *See Tucker v Tishman Constr. Corp. of New York*, 36 A.D.3d 417 (1st Dept 2007). Therefore, this claim is dismissed.

Defendants have also established that 12 NYCRR §23-2.1(a) does not apply in the instant

case. That provision applies to the storage of materials. The material here that caused plaintiff to trip was not being stored at the time of the accident but was in use. *See Castillo v Starrett City*, 4 A.D.3d 320, 321 (2nd Dept 2004). Similarly, 12 NYCRR23-1.30, which requires that work areas be adequately illuminated, is inapplicable to this case as plaintiff never claimed that the lighting was insufficient.

Defendants have also established that 12 NYCRR §23-2.4, which imposes flooring requirements in building construction, is inapplicable as it only applies to how and when permanent and temporary flooring is installed. Paragraph (a) provides that "The permanent floors of such buildings or other structures shall be installed as soon as possible as the erection of structural steel members progresses..." The remaining paragraphs impose other requirements regarding the erection of flooring. In the instant case, this provision is inapplicable as the floor had already been constructed and plaintiff did not trip because of a defect in or a safety hazard posed by the flooring itself.

Finally, plaintiff cannot base this cause of action on violations of OSHA rules. *See Vernieri v Empire Realty Co.*, 219 A.D.2d 593 (2nd Dept 1995). Therefore, defendants' motion for summary judgment dismissing plaintiff's Labor Law §241(6) claim is granted.

This court now turns to defendants' motion seeking to dismiss plaintiff's Labor Law §200 and common-law negligence claims. Labor Law §200 codifies the common law duty of an owner and general contractor to maintain a safe workplace. Defendants are liable if they supervised or controlled the injury producing work (*see Russin v Louis N. Picciano & Son*, 54 N.Y.2d 311 at 317 (1981) or, where plaintiff's injury arises because of the condition of the workplace rather than the method of plaintiff's work, if they either created the unsafe condition

or had actual or constructive notice of it. *See Arrasti v HRH Constr. LLC,* 60 A.D.3d 582 (1st Dept 2009); *Murphy v Columbia Univ.*, 4 A.D.3d 200 (1st Dept 2004); *Ortega v Puccia*, 57 A.D.3d 54, 61 (2nd Dept 2008).

In the instant case, as an initial matter, plaintiff stipulated that defendant Goldman Sachs Headquarters, LLC ("Goldman Sachs"), the owner of the property, is not liable under Labor Law §200. Because Labor Law §200 is merely a codification of common-law negligence, both those claims are dismissed as against Goldman Sachs.

However, defendants Structure Tone and Tishman are not entitled to summary judgment dismissing plaintiff's Labor Law §200 and common-law negligence claims as they fail to meet their initial burden of establishing that they did not create the unsafe condition or that they did not have actual or constructive notice of it. As an initial matter, defendants' argument that there was no unsafe condition is without basis. Their argument that the masonite was integral to the work is beside the point. The alleged defect in the instant case was not the masonite itself but the fact that the pieces overlapped and that the edges flipped up. In addition, the fact that the hole was allegedly improperly covered was a second defect which, while not the cause of plaintiff's accident, may have contributed to his injuries. Moreover, Structure Tone and Tishman do not submit any evidence or testimony showing that they did not lay the masonite or cover the hole plaintiff's foot fell into or that they did not have actual or constructive knowledge of the alleged defects in how the masonite was set up.

Because some of plaintiff Ernest Thomas's claims remain, the court hereby denies defendants' summary judgment motion to dismiss his wife's claim for loss of services.

Accordingly, defendants' motion for summary judgment is granted in part and denied in

part. Plaintiff Ernest Thomas's Labor Law §240 claim and his Labor Law §241(6) claim are dismissed. However, defendants Structure Tone and Tishman's motion for summary judgment dismissing plaintiff's Labor Law §200 claim and common-law negligence claim is denied. Defendants' motion for summary judgment dismissing plaintiff Yasmin Thomas's claim for loss of services is also denied. This constitutes the decision and order of the court.

Dated: 5/29/12

Enter: _____
J.S.C.