

Flynn v 835 6th Ave. Master L.P.

2012 NY Slip Op 31739(U)

July 2, 2012

Sup Ct, NY County

Docket Number: 107370/09

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. JUDITH J. GISCHF
J.S.C.

PRESENT: _____
Justica

PART 10

Index Number 107370/2009
FLYNN, DOUGLAS
vs.
835 6TH AVENUE MASTER
SEQUENCE NUMBER 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

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

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

*Status conf pt 10
7/26/12 v 9.30
JG*

FILED

JUL 03 2012

JUL 02 2012

Dated: _____

NEW YORK J.S.C.
HON. JUDITH J. GISCHF
CLERK'S OFFICE
J.S.C.

- 1. CHECK ONE: CASE DISPOSED
- 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

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----x
Douglas Flynn,
Plaintiff (s),

-against-

835 6th Avenue Master L.P., c/o
J.D. Carlisle Development Corp., M.D.
Carlisle Construction Corp.,

Defendant (s).

-----x
835 6th Avenue Master L.P., c/o
J.D. Carlisle Development Corp., M.D.
Carlisle Construction Corp.,

3rd Party Plaintiffs,

-against-

Century-Maxim Construction Corp. and
Spieler & Ricca Electrical Co. Inc.,

3rd Party Defendants.

-----x
Century-Maxim Construction Corp. and
Spieler & Ricca Electrical Co. Inc.,

2nd-3rd Party Plaintiffs,

-against-

Rebar Lathing Corp.,

2nd - 3rd Party Defendants.
-----x

DECISION/ ORDER

Index No.: 107370/09
Seq. No.: 001, 002, 003

PRESENT:

Hon. Judith J. Gische
J.S.C.

T.P. Index No.:
591063/09

FILED

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NEW YORK
COUNTY CLERK'S OFFICE

2nd - T.P. Index No.
590869-10

(caption continued next page)

-----X
 835 6th Avenue Master L.P., c/o
 J.D. Carlisle Development Corp., M.D.
 Carlisle Construction Corp.,

3rd - T.P. Index No.:
 591007-10

3rd - 3rd Party Plaintiffs

-against-

Rebar Lathing Corp.,

3rd- 3rd Party Defendant.
 -----X

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Motion Seq No. 1	
835 and Carlisle n/m (3212) w/MPG affirm, exhs	1
Rebar opp w/AY affirm, exhs	2
Century-Maxim partial opp w/DMT affirm, exhs	3
Spieler partial opp w/PJLP affirm, exhs	4
Plff x/m (amend BOP) w/BB affirm, exhs	5
Spieler opp w/PJLP affirm, exhs	6
Rebar opp W/AY affirm, exhs	7
Century-Maxim opp w/DMT affirm, exhs	8
835 and Carlisle opp w/MPG affirm, exhs	9
Pltff reply to all opp w/BB affirm	10
Motion Seq No. 2	
Rebar n/m (3212) w/AY affirm, exhs	11
Century-Maxim partial opp w/DMT affirm, exhs	12
835 and Carlisle opp w/MPG affirm, exhs	13
Rebar reply w/AY affirm	14
Century-Maxim x/m (3212) w/MIL affirm, exhs	15
Rebar opp w/AY affirm, exh	16
Century-Maxim reply w/DMT affirm	17
Motion Seq No. 3	
Spieler n/m (3212) w/PJLP affirm, exhs	18
Century-Maxim partial opp w/DMT affirm	19
Rebar opp w/AY affirm, exh	20
Spieler reply (Century-Maxim) w/PJLP affirm	21
Spieler reply (Rebar) w/PJLP affirm	22

Other:

Stips of adj (various dates)	23
Stip so-ordered 5/3/12	24

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action by plaintiff, Douglas Flynn, alleging violations of the New York State Labor Laws. Issue has been joined in the main action, as well as in the third, second-third and third-third party actions. Plaintiff filed his note of issue on June 28, 2011 certifying that all discovery is completed. There are presently three motions and two cross motions before the court. Each motion, with the exception of plaintiff's cross motion to amend his bill of particulars, is for summary judgment. Since the movants seeking summary judgment have complied with the statutory requirements of CPLR 3212, summary judgment relief is available (Brill v. City of New York, 2 N.Y.3d 648 [2004]).

Flynn has withdrawn his Labor Law §§ 240 [1], 200 and common law negligence claims, leaving only his Labor Law § 241 [6] claim to be decided by the court, as well as the claims among the various defendants¹ (So-ordered Stipulation 5/3/12).

The court's decision and order is as follows:

Background and Facts

Flynn contends that on January 14, 2009, while employed as an electrician by 3rd party defendant Spieler & Ricca Electrical Co., Inc. ("Spieler") and working on a

¹Reference to "defendants" shall mean any party other than Flynn, unless otherwise specified.

construction project, he was struck by one or more reinforcement bars (commonly referred to as "rebar") causing him to fall and fracture his right wrist and shoulder.

The premises which were under construction are owned by defendant 835 6th Master L.P. c/o J.D. Carlisle Development Corp. ("Avenue Master"). Avenue Master hired defendant M.D. Carlisle Construction Corp. ("M.D. Carlisle") to act as its representative for the project and construction manager. Pursuant to a contract, dated February 29, 2008, Avenue Master hired Century-Maxim Construction Corp. ("Century") as its "concrete superstructure" contractor for the project. Pursuant to a separate contract date July 31, 2008, Avenue Master hired Spieler as its electric subcontractor. Pursuant to an earlier contract dated May 5, 2005, Century subcontracted the fabrication and installation of rebar to third party defendant Rebar Lathing Corp. ("Rebar Lathing"). Each of these 4 contracts contain indemnification provisions.

Flynn testified at his EBT that on the day of the accident he was employed by Spieler and Steve Tucker, also a Spieler employee, was his foreman. Flynn was instructed by "Nick," the sub-foreman (another Spieler employee) to tie down plastic conduit to rebar on the 20th floor. The 20th floor was wide open (i.e. exposed to the elements) and consisted of "Q-decking," a type of corrugated steel. Plaintiff testified that typically Q-decking is the first thing laid down before rebar is installed. Once rebar is installed, the various trades will install their conduits. The final step is the pouring of concrete. Flynn approximated that half the Q-decking had rebar already installed, but the other half only had Q-decking. He was working in the area where rebar was already installed, approximately 2 ½ feet away from a stack of rebar. Flynn estimates that the stack was piled up three feet high and was of a standard length (40 feet). Before the

accident he observed that other trades had placed "stuff" atop the stacked rebar and that "it wasn't just a clean pile" (DF EBT 12/16/10 p. 17). The "stuff" included reels of BX cable, each weighing hundreds of pounds, waiting to be installed by Spieler's electricians. The reels were removed from on top of the rebar approximately 1 ½ hours before the accident.

Flynn was kneeling on the floor doing the tie downs when he realized he needed more tie down materials. He got up and walked towards the Spieler gang box to get them, crossing the path of the stacked rebar. That is when, according to Flynn, "the rebar shifted ... and a piece of it caught me on the ankle and I went over on my right side" (DF EBT 12/14/10 p. 72). When asked whether he had actually seen any rebar roll off of the pile and where had it rolled from ("the top, the bottom or something else?") he said he had not seen the rebar come off the pile. He stated, however, that he was sure the stack had shifted and that is where the rebar had come from within that pile because "it was [an] unsecured bundle of rebar..." (DF EBT 12/14/10 p. 87). When asked whether he might have tripped over the rebar and caused it to shift, he denied that possibility and stated that he had "no idea" why the pile might have moved. When asked whether it had in fact moved, he answered "Of course it moved, it moved down and tripped me...I felt it move." (DF EBT 12/16/10 p. 138).

Aside from the withdrawn Labor Law and negligence claims, plaintiff has asserted a Labor Law § 241 (6) claim, which he is still pursuing. In his complaint, Flynn states that the defendants "[were] in violation of the applicable provisions of the New York Labor Law Section 241..." In response to Avenue Master and Carlisle's demand for a Bill of Particulars ("BOP"), Flynn served the following response dated August 4,

2009:

[Defendants permitted and allowed] a reinforcement bar (rebar) to be placed in such a position as to create an unsafe condition...

and:

[Defendants violated] those laws, rules, regulations and statutes that the Court will take judicial notice of at the time of trial including but not limited to Section 240, 240 (1) (sic), 200 of the Labor Laws of the State of New York. Defendants violated the provisions and regulations of the Occupational Safety and Health Administration.

In response to Century's demand for a BOP, plaintiff served the following response dated February 2, 2010:

[Defendants permitted and allowed] a reinforcement bar (rebar) to be placed in such a position as to create an unsafe condition; failing to make timely, adequate and proper inspections of said premises in violating Section 200, 240 § 240 (1) (sic) of the Labor Law of the State of New York; in placing plaintiff in a place a danger; in failing to provide proper safety equipment; in failing to warn plaintiff of dangerous, unsafe and hazardous conditions; in failing to protect plaintiff from falling objects at the time of this accident; and in failing to take all necessary and proper means and precautions to avoid the said accident.

Flynn served a supplemental BOP dated December 8, 2011, identifying four (4) Industrial Code provisions that he claims were violated. In response to Avenue Master and Carlisle's motion for summary judgment dismissing his complaint, Flynn has now cross moved for permission to serve an amended BOP. In his proposed BOP (dated February 28, 2012), he states that the direct defendants violated the following sections of Rule 23 of the Industrial Code: 12 NYCRR 23-1.7 (e) (2) (Protection from General Hazards: tripping-work areas) and 12 NYCRR 23-2.1 (a) (1) (Construction operations;

Maintenance and Housekeeping; Storage of Materials or equipment).

Each of the defendants oppose Flynn's cross motion, presenting similar and supporting arguments why the cross motion to amend the BOP should be denied. They argue that Flynn's cross motion is brought too late and should be rejected for that reason alone. They also claim that were the court to grant plaintiff's cross motion it would "de-value" this court's preliminary conference and other orders addressing discovery issues because plaintiff did not previously identify the Industrial Code sections he was relying on but waited until after he had filed his Note of Issue.

Anticipating that the court might accept plaintiff's cross motion to amend as timely and possibly grant the relief he seeks, defendants argue that the Industrial Code sections Flynn proposes are inapplicable to the facts of this case, as Flynn alleges them to be. Defendants emphasize that Flynn has never stated that he tripped over rebar or that there was any rebar scattered on the ground. Defendants also deny that the area where Flynn was working was a walkway, passageway or thoroughfare, characterizing it instead as an unfinished roof.

The defendants also deny that the rebar was improperly stored, providing deposition testimony that rebar is always stacked this way and that it is heavy enough to anchor itself down. Michael Smith, Rebar Lathing's president, testified that rebar had never fallen off a bundle before. James Coyle, Rebar Lathing's project manager, testified that he had worked with rebar since 1978 and never seen a bundle fall apart. Brian Alvarez, Century's project manager, also testified that in his 21 years in construction, he had never seen rebar move or shift while stacked. These witnesses each also testified that it is customary and ordinary for rebar to be hoisted to a work

site, placed on metal horses or propped up by wood 2x4's and kept in bundles until needed. The defendants note that Flynn's own testimony is that rebar is very and heavy and "it takes two men to lift and carry an individual piece of rebar..." (DF EBT 12/16/10 p19). Century separately argues that if, in fact, the rebar was improperly stacked, such negligence is due solely to how Rebar Lathing chose to store/maintain the rebar. Rebar denies negligence and argues that if the rebar did in fact shift, it was because Spieler placed the heavy BX cables on the pile. Spieler denies it was negligent and claims it was Rebar Lathing that was in charge of the rebar and negligently stacked it.

In addition to seeking summary judgment on plaintiff's complaint, Avenue Master and Carlisle seek summary judgment on the defense and contractual indemnification claims in their 3rd party complaint against Century and Spieler, as well as in their 3rd -3rd party complaint against Rebar Lathing. Avenue Master and Carlisle have also asserted breach of contract claims, based upon Century, Spieler and Rebar Lathing's alleged failure to procure and maintain insurance coverage for the owner and construction manager's benefit. Avenue and Carlisle have also asserted a claim for common law indemnification and seek summary judgment on that claim as well.

In relevant part, Avenue Master and Carlisle's contract with Century states that:

The Contractor [Century] is an Independent Contractor and at its own expense...(e) shall and hereby does indemnify and agree to save and hold harmless and defend [Avenue Master/Carlisle]...from and against all claims, suits, judgments and loss, expense or damage brought against, recovered against or suffered by [Avenue Master/Carlisle] for, or on account of, any claim growing out of any injury or the death of any person or persons by reason or act, omission or negligence of

[Century], its agents, employees, subcontractors ... (except to the extent it is caused by the sole negligence of [Avenue Master/Carlisle]) and [Century] shall and hereby does indemnify and agree to save and hold harmless and defend [Avenue Master/Carlisle]...by reason of any injury or damage to the property, including loss of use thereof of [Avenue Master/Carlisle], of that of any person arising out of the performance of this work, or by or on account of any act, omission, or negligence of [Century], its agents, employees, subcontractors, vendors and material men (except to the extent it is caused by the sole negligence of [Avenue Master/Carlisle]...

Spieler's contract with the owner contains identical language to the above.

Rebar Lathing's contract with Century states that:

[Rebar Lathing] shall indemnify and hold harmless [Century] and/or their agents and employees including but not limited to the names listed above as additional insured from and against all claims, damages, losses and expenses including attorneys fees arising out of or resulting from the performance of the work, provided any such claim, damage, loss or expense is (A) attributable to bodily injury, sickness, disease or death or destruction of tangible property, other than the work itself, including the loss of use resulting therefore and is (B) caused in whole or in part by any neglect (*sic*) act or omission by the subcontractor, any sub-tier contractor or any one directly or indirectly employed by him or anyone for whose acts he may be liable, regardless of whether it is caused in part by party indemnified hereunder. Such obligation shall not be considered to negate or abridge or otherwise reduce any right to obligation of indemnity which would otherwise exist as to any party or person described in this paragraph.

Avenue Master and Carlisle's motion for summary judgment on their indemnification, etc., claims is opposed by Rebar Lathing, Century and Spieler. Each of those defendants has separately moved for summary judgment on the indemnification, etc., claims either asserted by them or against them. They also

oppose each other's motions.

Although Rebar acknowledges the validity of the indemnity provisions in its contract with Century, Rebar Lathing argues that the indemnity provision is only triggered where the claim is "caused in whole or in part by any neglect (*sic*) act or omission" by Rebar Lathing. Despite the awkward wording of this provision, Rebar Lathing argues that only if it is established that Rebar Lathing was neglectful or negligent, will Rebar Lathing be obligated to indemnify Century and Rebar Lathing denies it was negligent.

Century contends that the indemnification provision in its contract with Avenue Master and Carlisle is only triggered if Flynn's accident was caused by Century's own negligence or the negligence of its subcontractor (i.e. Rebar). Thus, Century argues that unless and until Avenue Master and Carlisle establish their freedom from negligence, they are not entitled to contractual indemnification. For the same reason, Century contends that Avenue Master and Carlisle's claim for defense costs is premature.

Alternatively, Century argues that Avenue Master and Carlisle are not entitled to common law indemnification because Century was only responsible for the concrete superstructure on the project, but Rebar Lathing's employees actually installed the rebar. Thus, according to Century, it cannot be held vicariously liable for Rebar Lathing's negligence, if any. Century relies on deposition testimony by various Rebar Lathing employees, which Century contends shows that Rebar Lathing employees had exclusive responsibility and control of the rebar and they alone decided how it would be used, maintained or stored during the project. In particular, Century cites to the EBT

testimony of Bryan Jimenez. He testified that rebar is hoisted onto the floor where it is needed and once it lands, the master bundle is cut open to create smaller bundles.

Spieler argues that the only contract under which it was charged to perform work on this project is with Avenue Master/Carlisle and, therefore, any cross claim against it by Century or Rebar Lathing for contractual indemnification must be dismissed. Spieler opposes Century and Rebar's motion against it for summary judgment on their common law indemnification claims, arguing that they have not shown themselves free from negligence. Spieler, on the other hand, seeks summary judgment on its own common law indemnification claims against Century and Rebar Lathing on the basis that Rebar Lathing was responsible for the installation of the rebar and, therefore, Rebar Lathing was the negligent party. Spieler also claims that Century and Rebar Lathings common law indemnification and contribution claims are barred by the Workers' Compensation Laws (section 11) as Flynn did not sustain a "grave injury." Although its contract with Avenue Master/Carlisle requires Spieler to indemnify the owner and construction manager, Spieler denies any negligence on its part.

Century and Spieler each contend that they obtained liability coverage pursuant to their respective contracts with Avenue Master and Carlisle. They state that copies of these policies were provided to Avenue Master and Carlisle. Rebar Lathing contends that Avenue Master and Carlisle are not entitled to insurance coverage under their contract because the owner and construction manager are not entitled to indemnity (contractual or common law).

Discussion

Labor Law § 241(6) requires 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 the persons employed therein or lawfully frequently such places. The commissioner may make rules to carry into effect the provisions of this subdivision, the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

To recover damages under statute requiring owners and contractors to provide reasonable and adequate protection and safety for workers and comply with specific safety rules and regulations, a plaintiff does not have prove that owner or contractor exercised supervisory control over the work site (Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 N.Y.2d 343 [1998]). The plaintiff must, however, allege that the property owners violated a regulation that sets forth a specific standard of conduct and not simply a recitation of common-law safety principles (St. Louis v. Town of North Elba, 16 N.Y.3d 411, 414 [2011]). Furthermore, alleged violations of regulations promulgated by the Occupational Safety and Health Administration (OSHA) do not provide a basis for liability under statutory provision requiring protection and safety of workers engaged in construction, demolition, or excavation work (McKinney's Labor Law § 241(6); Shaw v. RPA Associates, LLC, 75 A.D.3d 634 [2nd Dept 2010]).

Leave to amend a pleading (even a BOP) "should be freely granted, so long as there is no surprise or prejudice to the opposing party" (see CPLR 3025[b]; Kocourek v. Booz Allen Hamilton Inc., 85 A.D.3d 502, 504 [1st Dept 2011]). Mere delay is insufficient to defeat a motion for leave to amend and prejudice requires "some indication that the defendant has been hindered in the preparation of his case or has

been prevented from taking some measure in support of his position ..." (Loomis v Civetta Corinno Constr. Corp., 54 NY2d 18, 23 [1981]).

Although Flynn did not identify a specific Industrial Code provision in his complaint or bill of particulars, this is not fatal to his claim (Noetzell v. Park Avenue Hall HDFC, 271 A.D.2d 231 [1st Dept 2000]). Therefore, in deciding whether to allow the BOP be amended, the court's attention is on whether plaintiff's evidence demonstrates possible violations of the newly added Industrial Code sections alleged, whether the belated identification of these sections is based upon new factual allegations or raise new theories of liability and whether there is any prejudice to defendant (Latchuk v. Port Authority of New York and New Jersey, 71 A.D.3d 560 [1st Dept 2010]). The new Industrial Code section can even be raised by a plaintiff after the note of issue has been filed (Ortega v. Everest Realty LLC, 84 A.D.3d 542 [1st Dept 2011]) or in opposition to a motion for summary judgment (Burton v. CW Equities, LLC, 92 A.D.3d 509 [1st Dept 2012]).

Applying these legal principles to the case at bar, plaintiff's cross motion to amend his BOP is accepted and defendants' arguments, that the motion is late is rejected. Although plaintiff did not identify in his complaint the exact Industrial Code section he claims was violated by the Avenue Master and Carlisle, his BOP and EBT testimony contain a very detailed account of how he claims his accident occurred. None of the defendants address how they were hindered in the preparation of their case or what different measures they would have taken had they known sooner the exact sections of the Industrial Code Flynn was relying on (Loomis v. Civetta Corinno Constr. Corp., supra). In fact, a good portion of each of the defendants' motions

discusses the issue of whether the rebar was stacked, strewn or somehow knocked over. There are, therefore, no new facts being alleged, there is no new claim alleged because plaintiff pleaded a Labor Law § 241 [6] cause of action in the complaint and defendants have shown no prejudice (Harris v. City of New York, 83 A.D.3d 104 [1st Dept 2011]; Latchuk v. Port Authority of New York and New Jersey, supra).

A third consideration in whether plaintiff's evidence demonstrates possible violations of the newly added Industrial Code sections alleged (Id.) This consideration is closely tied with the issue of whether the condition alleged to have existed at the time of the accident is within the scope of the Industrial Code regulation. A determination of whether an Industrial Code is applicable presents a legal issue for the court to decide (Messina v. City of New York, 30 A.D.2d 121 [1st Dept 2002]).

The two newly asserted Industrial Code sections are as follows:

12 NYCRR 23-1.7 Protection from General Hazards

- (e) Tripping and other hazards.

- (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.

and:

12 NYCRR 23-2.1 Maintenance and Housekeeping

- (a) Storage of material or equipment.
 - (1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.

Flynn describes his accident as having occurred while he was doing his job of tying down plastic conduit to rebar. Needing more tie downs, Flynn got up to get it from the gang box. According to Flynn, one or more pieces of rebar came loose from a stacked pile of rebar. The rebar was awaiting installation in the Q-decking. The loosened rebar struck him ankle, just above his boot, causing him to fall down. He did not step on the rebar nor was it under foot. When the accident occurred, Flynn was working on, what was at that time, the topmost level of the building under construction. The area, level or deck he was working on was wide open and concrete had not yet been poured. In fact, plaintiff described his surprise at the how simple the perimeter fence was that he observed surrounding the edge of the deck.

To prevail on their motions for summary judgment dismissing plaintiff's Labor Law § 241 [6] claim, defendants 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" (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). To properly state a claim under Labor Law § 241[6], the plaintiff must identify a specific and applicable Industrial Code provision that has been violated (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 [1993]). Labor Law § 241 [6] is not self-executing, but requires reference to outside sources to determine whether the safety measures actually employed on a job site were reasonable and adequate (Zimmer v. Chemung County Performing Arts, Inc., 65 N.Y.2d 513, 523 [1985]). For the reasons that follow, the court decides that neither Industrial Code provision plaintiff relies on provides a predicate basis for his Labor Law § 241 [6] claim.

Defendants have established that 12 NYCRR 23-1.7 (e)(2) is inapplicable to

plaintiff's accident, even when viewing the evidence and facts in the light most favorable to Flynn who has not moved for summary judgment. Plaintiff does not claim he "tripped" on any tripping hazard. He has repeatedly stated that the rebar struck him on his ankle, just above the boot. Although plaintiff struggles to bring himself within this Industrial Code section by stating that the rebar was out of place and therefore, "scattered," the rebar was not underfoot, he did not step or trip on it and the situation described by him simply does not meet the criteria of "dirt" "debris" "scattered tools or materials" or a "sharp projection," as required by this particular section of the code (Dalanna v. City of New York, 308 A.D.2d 400 [1st Dept 2003]). Consequently, plaintiff has failed to raise a genuine triable issue of fact.

Defendants have also established that plaintiff was not working in a passageway, walkway, stairway or other thoroughfare (Zieris v. City of New York, 93 A.D.3d 479 [1st Dept 2012]). The area where plaintiff was working was an open, outdoor space, exposed to the elements. No concrete had been poured yet and half of the floor was just Q-decking (see: Ghany v. B.C. Tile Contractors, Inc., 95 A.D.3d 768 [1st Dept 2012]; compare: Canning v. Barney's New York, 289 A.D.2d 32 [1st Dept 2001]). Regardless of whether the 20th floor was a roof or not, it does not meet the criteria of defined space found in Industrial Code 12 NYCRR 23-2.1(a)(1)

Although 12 NYCRR 23-2.1(a)(1) has been applied by some courts in certain situations where the accident did not take place in a passageway, walkway, stairway or other thoroughfare, that application is limited to cases where the plaintiff actually tripped over the material (Militello v. 45 W. 36th St. Realty Corp., 15 AD3d 158 [1st Dept 2005]) or there was some proof of instability or improper storage, such as an expert's report

(compare: Castillo v. 3440 LLC, 46 A.D.3d 382 [1st Dept 2007]). Plaintiff did not trip on a piece of rebar, nor has he provided an expert's affidavit. Although Flynn claims that the rebar must have been improperly stored or stacked because it shifted, this generalized and speculative claim is insufficient to raise a genuine issue of fact. The witnesses deposed (and even Flynn) testified that rebar is usually stacked/maintained/stored in the manner it was on the day of the accident. The rebar was in use; it was not debris. There were no prior complaints about a rebar stack shifting or collapsing or prior incidents involving rebar shifting or toppling over. Flynn's own testimony is that rebar is very long and heavy, requiring two workers to lift and carry it. The testimony of the other witnesses is that rebar is usually placed on 2x4's and then stacked pyramid like to prevent it from falling. There are no material facts raised by Flynn that the manner in which this rebar was stacked made it less secure or stable.

Having granted the defendants' motions for summary judgment on plaintiff's sole remaining claim, Flynn's complaint is hereby dismissed.

Indemnification, Contribution, Breach of Contracts Claims

Century and Spieler have established they complied with the insurance procurement provisions in their contracts and argue that Avenue Master and Carlisle's motion for summary judgment on their breach of contract claim is moot. This point is not addressed in Avenue Master/Carlisle's reply and a copy of the insurance policy obtained by Century is included as an exhibit. Avenue Master and Carlisle's motion for summary judgment on their breach of contract claim is, therefore, denied as moot as to Century. The motion is denied, however, without prejudice as to Spieler because it did

not provide a copy of the insurance policy with its papers.

With respect to Rebar Lathing, Article 9 of its contract with Century is controlling.

In relevant part, Article 9 provides that:

The Subcontractor [Rebar Lathing] and its Subcontractors if any shall obtain, maintain for life of this Subcontract and pay for all insurance coverage which shall not [be] less than the limits required by the contract documents or required by law.

Article 1 of Rebar Lathing's contract provides that "The Contract Documents for this Subcontract consist of this Agreement and any Exhibits attached hereto, the Agreement between the Owner and Contractor, the Conditions of the Contract between the Owner and Contractor..." Article 1 also states that "All of the above documents which form the Contract between the Owner and the Contractor, are a part of this Subcontract."

Although the foregoing provisions obligate Rebar Lathing to obtain insurance for Century's benefit, it does not obligate Rebar Lathing to provide insurance for the owner/construction manager's benefit. Assuming that Avenue Master/Carlisle's argument is that Rebar Lathing is bound by the terms of the prime contract, they have failed to identify any provision in the prime contract expressly requiring subcontractors (like Rebar Lathing) to purchase insurance (Bussanich v. 310 East 55th Street Tenants, 282 A.D.2d 243 [1st Dept 2001]). Therefore, Avenue Master and Carlisle's motion for summary judgment on their breach of contract against Rebar Lathing is denied. Since Rebar Lathing has moved to dismiss the owner and construction manager's 3rd - 3rd party complaint against it, Rebar Lathing is entitled to summary judgment on Avenue Master and Carlisle's breach of contract (insurance) claim against it.

None of the movants have addressed what remains of their claims or cross claims if Flynn's complaint is dismissed. It would appear that dismissal of plaintiff's complaint resolves the issue of whether any defendant was negligent, thereby rendering any remaining indemnification and contribution claims moot. So these issues can be clarified and the court can determine how this case should proceed, a status conference is hereby scheduled for **JULY 26, 2012 at 9:30 a.m. in Part 10**. Defendants Avenue Master and Carlisle shall serve a copy of this decision and order on the Mediator before whom there is scheduled mediation on August 1, 2012.

Conclusion

The court has granted Flynn's motion to amend his bill of particulars for the reasons stated. Although Flynn set forth plausible argument about possible violations of the newly identified Industrial Code sections, ultimately they do not apply. Therefore, there is no predicate basis for Flynn's Labor Law § 241 [6] claim. Defendants' motions for summary judgment dismissing Flynn's Labor Law § 241 [6] claim is, therefore, granted. The complaint is dismissed.

The remaining branches of the defendants' motions addressing issues of insurance, indemnification and contribution are decided in the manner provided. So these issues can be clarified and the court can determine how this case should proceed, a status conference is hereby scheduled for **JULY 26, 2012 at 9:30 a.m. in Part 10**. Defendants Avenue Master and Carlisle shall serve a copy of this decision and order on the Mediator before whom there is scheduled mediation on August 1, 2012.

In accordance with the foregoing.

It is hereby.

ORDERED that the clerk shall enter judgment against Douglas Flynn dismissing the complaint; and it is further

ORDERED a status conference is hereby scheduled for **JULY 26, 2012 at 9:30 a.m. in Part 10**; and it is further


ORDERED defendants Avenue Master and Carlisle shall serve a copy of this decision and order on the Mediator before whom there is scheduled mediation on August 1, 2012; and it is further

ORDERED that any relief not addressed are denied; and it is further

ORDERED this constitutes the decision and order of court.

Dated: New York, New York
July 2, 2012

So Ordered:



Hon. Judith J. Gische, JSC