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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden **PART** 11

Justice

Index Number : 106402/2009
AURORA, THOMAS
vs.
46TH STREET DEVELOPMENT
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

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 decided in accordance with the ~~for~~ attached Memorandum Decision + Order

RECEIVED
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FILED
FEB 06 2014
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: January 27, 2014

_____, **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 11

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THOMAS AURORA and JENNIFER AURORA,

Plaintiffs,

-against-

46th STREET DEVELOPMENT, LLC, PLAZA CONSTRUCTION CORP., WHITESTONE CONSTRUCTION CORP. and METRO-TECH ERECTORS CORP.,

Defendants.

Index No.:106402/09

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WHITESTONE CONSTRUCTION CORP.,

Third-Party Plaintiff,

-against-

METRO-TECH ERECTORS CORP.,

Third-Party Defendant.

Third-Party Index No.: 590991/09

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WHITESTONE CONSTRUCTION CORP. and METRO-TECH ERECTORS CORP.,

Second Third-Party Plaintiffs,

-against-

TOTAL SAFETY CONSULTING, LLC,

Second Third-Party Defendant.

Second Third-Party Index No.: 591126/10

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Madden, J.:

In this action arising from an accident at a construction site, second third-party defendant Total Safety Consulting, LLC (Total Safety) moves, pursuant to CPLR 3212, for summary judgment dismissing the second third-party claim, as well as all cross claims, against it (motion seq. no. 002). Defendants and second third-party plaintiffs Whitestone Construction Corp.

(Whitestone) and Metro-Tech Erectors Corp. (Metro-Tech) (together, the Whitestone defendants) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint, as well as all cross claims, against them (motion sequence number 003). Defendants 46th Street Development, LLC (46th Street) and Plaza Construction Corp. (Plaza) (together, the 46th Street defendants) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint, as well as all cross claims, against them (motion seq. no. 004).[1]

BACKGROUND

On the day of the accident, defendant 46th Street was the owner of the project underway at the premises. Defendant Plaza served as general contractor for the project. Plaza hired defendant/second third-party plaintiff Whitestone to perform the installation of curtain wall glass paneling and windows for the facade of the building. Whitestone, in turn, subcontracted out the curtain wall installation work to defendant/second third-party plaintiff Metro-Tech.[2] Although Plaza had its own site safety program, as well as a site safety coordinator, for the project, Plaza hired second third-party defendant Total Safety to provide site safety management services for the project. As site safety manager, Total Safety provided the project with a licensed safety consultant to monitor the job site daily to make sure that local and federal safety rules were complied with and to report any relevant safety-related issues to Plaza.

This is an action to recover damages for injuries sustained by plaintiff Thomas Aurora ("Aurora") on December 13, 2007, when he tripped while exiting a temporary bathroom during the construction of a building (the project) located at 247 West 46th Street, New York, New York (the premises). On the day of the accident, Aurora was working as an electrician for nonparty

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[1]Motion sequence numbers 002, 003 and 004 are hereby consolidated for disposition.

[2]Whitestone's third-party action against Metro-Tech has been discontinued.

Five Star Electric Corp. (Five Star), the entity hired to install electrical lighting throughout the premises. The accident occurred when, as he was exiting the temporary bathroom on the 35th floor of the building (the bathroom), Aurora's left foot tripped over an uninstalled window buck (the window buck),[3] which rested on 2x4 pieces of wood, causing him to fall forward onto debris and a gang box. The window buck had been stored with several others along the wall outside the bathroom near the 35th floor hoist run. As soon as the 35th floor hoist run was dismantled and removed, the window bucks were to be installed in its space. At the time of the accident, all the windows forming the exterior side of the building had been installed, with the exception of the windows that still needed installation following the removal of the hoist run.

Aurora testified that, on the morning of the accident, he was assigned by his foreman to perform interior electric work on the 35th floor of the building. After arriving on the 35th floor, he set up his ladder and opened his tool box in the hallway in front of an electrical closet, which was to be his work space. Then, he went to use the temporary bathroom on the floor which had been set up for the workers. Aurora described the bathroom as "a wooden enclosure" (Aurora's dep. at 64).

To gain access to the bathroom, Aurora had to enter an unfinished apartment from the hallway. As he entered the apartment, he noticed pieces of sheet rock stacked along a wall approximately 30 feet from the bathroom door. In addition, he observed two or three large window panels, or window bucks, stacked and leaning upright against the wall, approximately three or four feet from the bathroom door. The window bucks were approximately 10 feet tall and eight feet wide. There was no work being done in the apartment and the materials he observed were being stored there. Aurora also noticed random pieces of debris, such as metal

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[3]A window buck is the steel frame that surrounds a glass window.

studs, pieces of wood, spackle buckets and insulation tape, which he had to "navigate" in order to get to the bathroom (*id.* at 78). He testified that there was "three to four inches" of space to get to the bathroom and that he would not call it a "path" because debris was blocking the way and he had to step over it (*id.* at 77).

Aurora testified that as he exited the bathroom, he also observed debris in his path including "spackle buckets, the wood, metal studs and the window bucks." (*id,* at 83). He stepped over the debris and he fell when his left foot touched one of the window bucks, stored against the wall, which caused him to fall forward and land on debris and a gang box.

Plaza's project superintendent, Robert Marrone testified that he was responsible for overseeing the day-to-day operations of the project, conducting daily walkthroughs of the site to monitor the progress of the work and serving as the person to whom all onsite superintendents report. Marrone explained that Plaza had its own specific safety program for the project, and that each of Plaza's subcontractors were required to submit their own site safety program to Plaza for review. In addition, each trade on site was responsible for keeping its own areas organized and clean. Debris was center-piled for removal by Plaza laborers.

As stated above, in addition to its own safety program, Plaza hired Total Safety to provide site safety management services, as required by the New York City Building Code. Marrone and Total Safety's site safety manager, Joseph Amore, walked the site together daily, discussing potential safety issues. Marrone testified that Amore provided safety orientation classes to new employees and monitored housekeeping on the project. If Amore observed any safety issues, he would bring them to Marrone's attention. However, he noted that "anyone on-site" had the ability to stop the work in the event that they observed a safety issue (Marrone Dep. at 90). Marrone stated that he never heard any complaints about Total Safety's work on the project.

Marrone testified that he did not remember having any discussions with Amore concerning materials stored around the bathrooms. Marrone never observed debris in the accident area, nor did he ever hear of any complaints regarding the same. Marrone further maintained that the subject window bucks were not "in the way of anybody" (*id.* at 77). However, if he had observed any materials stored in a way that impeded access, he would have called the contractor and had them address the problem.

Amore testified that his duties included conducting walkthroughs of the premises, keeping a daily log of his observations, monitoring contractor compliance with Plaza's safety program, holding a weekly safety meeting for the trade foremen and conducting new employee orientation to introduce the workers to Plaza's health and safety program. If he noticed anything that needed to be corrected during his walkthroughs, he would note the safety issue in his safety log and "immediately contact that trade" (Amore dep. at 23). After making sure the issue was corrected, Amore would also note that in his log. When asked if he ever noticed the improper storage of window bucks on the 35th floor, Amore replied, "[n]ot that I recollect, no" (*id.* at 87-88).

In addition, during his walkthrough of the accident area on the afternoon preceding the day of the accident, Amore did not note any unsafe conditions. After the accident, Amore went to the accident location and observed two stacks of window bucks leaning against the wall in the area near where they were going to be installed. These panels, which were located right outside the door of the temporary bathroom, rested on 2x4 pieces of wood which extended out from the window bucks, with the purpose of protecting the window bucks from becoming damaged on the newly poured concrete floor. Amore also noticed some gang boxes in the area, which made the area "crowded" and "tight" (Amore dep. at 51). Amore then notified Plaza's labor foreman to

clean and "widen up the area so it is easier to walk" (*id.* at 55).

In his affidavit in opposition to the motion, plaintiff states:

> Now that I know [based on Amore's testimony] that the windows were situated upon 2x4's that extended out from the windows, it makes more sense to me why I fell. I believe that I avoided the windows and actually tripped on one of the 2x4's that the windows were resting upon[4]"

(*id.*).

A review of Amore's safety log entries, for the day before and the day of the accident, reveal that Metro-Tech had "[a]ll safety precautions in place and observed" (Whitestone defendants' notice of motion, exhibit N, Total Safety safety logs). In addition, the safety logs do not contain any notations which would indicate that the window bucks at issue in this case were not properly stored.

Plaza's site safety coordinator, Scott Palumbo, testified that his duties included conducting safety audits every one to two weeks, accompanied by Amore of Total Safety. These audits included a walkthrough of the entire project site to identify safety hazards. Afterwards, Palumbo prepared an audit report, which he directed to Marrone of Plaza. Amore did not sign the safety audit. Palumbo did not recall discussing the storage of the window units on the upper floor with Amore or Marrone. Palumbo stated that he did not have any complaints regarding Total Safety's services on the project, and that he never heard any complaints from anyone

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[4]Contrary to defendants' position, plaintiff affidavit that the windows were situated upon 2x4's that extended out from the windows amplifies his deposition testimony, but does not directly contradict it, especially as his additional statement was made in light of testimony that the window buck which caused him to fall were place on stacks of 2 X 4's. See Bosshart v. Pryce, 276 AD2d 314 (1st Dep't 2000) (denying summary judgment when plaintiff's affidavit submitted in opposition to defendant's summary judgment motion, though more detailed, did not contradict her earlier deposition testimony); Lesman v. Weinrib, 221 AD2d 601 (2d Dep't 1995) (court did not err in considering affidavit which did not contradict plaintiff's deposition testimony).

regarding the same.

President and Chief Supervisor for Metro-Tech, Paul Hogendorf, testified that his company was hired by Whitestone to perform window installation for all four façades of the building under construction. Metro-Tech had its own site safety program prepared by the Lovel Safety Management Company (Lovel). Lovel provided a safety course for Metro-Tech workers and checked for safety issues at the site two times. Hogendorf testified that Marrone of Plaza advised Metro-Tech as to where to store the subject window bucks prior to installation, and that no one from Plaza or Total Safety ever instructed him to move the stored windows. He explained that the 350-pound window bucks had to be stored in the hoist area, because they were too large to fit in the corridor of any given floor.

Metro-Tech's foreman, Stanislaw Jurek, testified that Plaza directed Metro-Tech as to where to store the subject window bucks. He explained that it was best to store the window bucks along the partition wall, because of the strength of the wall. In addition, it was necessary to store the window bucks right next to the hoist opening where they were going to be installed. Jurek never received any complaints that the stored window bucks impeded bathroom access, and no one on the project requested that they be moved.

Five Star's foreman, David Tenzer, testified that he was employed as a foreman by Five Star on the day of the accident. He testified that the Five Star shop steward was responsible for the safety of Five Star workers. Tenzer testified that he was unaware of any complaints relating to storage of the window bucks in the accident area.

Thomas D'Angelo, a sub-foreman for Five Star, testified that Five Star's shop steward, Ernie Sulzer, and Five Star's general foreman, Chris Cote, were in charge of making sure that the job was safe for Five Star workers. He also identified Amore of Total Safety as a person on site

to address safety concerns. D'Angelo never complained about the services of Total Safety, nor did he ever hear of any complaints.

DISCUSSION

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

Labor Law § 241(6) claims

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-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). 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 plaintiffs list multiple violations of the Industrial Code in their bill of particulars, with the exception of Industrial Code sections 23-1.7 (e) (1) and (2) and 23-2.1 (a) (1), plaintiffs do not address these Industrial Code violations in their opposition papers, and thus, they are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003]; *Musillo v Marist Coll.*, 306 AD2d 782, 784 n [3d Dept 2003]). As such, those parts of plaintiffs' Labor Law § 241 (6) claim predicated on those provisions are deemed abandoned.

Initially, it should be noted that as an owner, defendant 46th Street, and as the general contractor on the project, defendant Plaza, may be liable to plaintiff under Labor Law § 241 (6). However, it must be determined as to whether defendant Whitestone, as the subcontractor hired by Plaza to install the window walls, and Metro-Tech, the subcontractor hired by Whitestone to perform the actual installation of the window bucks, may be liable for plaintiff's injuries under Labor Law § 241 (6) as a statutory agent of the owner.

"'When the work giving rise to [the duty to conform to the requirements of section § 241 (6)] has been 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 Constr. Co.*, 4 NY3d 861, 864 [2005], quoting *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). The parties' actual course of practice is controlling

for the purposes of determining whether a construction manager is a statutory agent of the owner for the purposes of the Labor Law (*Ortega v Catamount Constr. Corp.*, 264 AD2d 323, 324 [1st Dept 1999]).

Here, Whitestone and Metro-Tech did not have sufficient authority to supervise and control the injury-producing work at issue, i.e., the temporary storage of the window bucks, so as to be held vicariously liable for plaintiff's injuries as statutory agents of the owner under Labor Law § 241 (6) (*see Smith v McClier Corp.*, 22 AD3d 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]). In fact, the record is clear that Plaza directed Metro-Tech workers as to store the window-bucks on the 35th floor.

Thus, as Whitestone and Metro-Tech are not proper Labor Law defendants, the Whitestone defendants are entitled to summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim against them.

As to the 46th Street defendants, the remaining issues concern whether Industrial Code sections 23-1.7 (e) (1) and (2) and 23-2.1 (a) , provide a potential basis for their liability under 241(6).

Industrial Code 12 NYCRR 23-1.7 (e) states:

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.

(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 materials and from sharp projections insofar as may be consistent with the work being performed.

Industrial Code 12 NYCRR 23-1.7 (e) (1) and (2) are sufficiently specific to support a Labor Law § 241 (6) claim (*Smith v McClier Corp.*, 22 AD3d at 370; *Lopez v City of N.Y. Tr. Auth.*, 21 AD3d 259, 259-260 [1st Dept 2005]). Moreover, as the record does not indicate that the window bucks were being installed by plaintiff, who is an electrician, or other contractors at the time of the accident, it cannot be said that these provisions are inapplicable on the grounds that plaintiff fell on materials that were an integral part of plaintiff's work or ongoing work at the site (*see Maza v. University Ave. Development Corp.*, 13 AD3d 65 [1st Dept 2004][finding that "pieces of wood, sheet rock and snow/ice that allegedly caused plaintiff to fall were ... not integral to plaintiff's work as a bricklayer"]; *Singh v. Young Manor, Inc.*, 23 AD3d 249 [1st Dept 2005][holding that in light of the accumulated debris in the area where plaintiff fell the hazard cannot be viewed as integral to plaintiff's work of removing wood paneling]; *compare Burkoski v Structure Tone, Inc.* 40 AD3d 378 [1st Dept 2007][holding that four-foot high stack of tiles which was in the process of being installed at the time of plaintiff's accident were consistent with the work being done in room where plaintiff fell and therefore were not a basis for liability under 23-1.7(e);*Bond v York Hunter Constr.*, 270 AD2d 112, 113 [1st Dept 2000], *affd* 95 NY2d 883 [2000] ["the accumulation of debris was an unavoidable and inherent result of work at an on-going demolition project, and therefore provides no basis for imposing liability"]).

Industrial Code 12 NYCRR 23-1.7 (e) (1) states that "[a]ll passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping." The 46th Street defendants argue, citing *Burkoski v Structure Tone, Inc.* (40 AD3d 378), that the area where plaintiff fell was not a "passageway." Plaintiffs contend, in opposition, that there is a question of fact as to whether there was a violation section 23-1.7 (e)

(1) as he was forced by the debris to travel in a certain direction leading to the window buck on which he fell.

"Although the regulations do not define the term 'passageway,' courts have interpreted the term to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area" (*Steiger v LPCiminelli, Inc.*, 104 AD3d 1246 [4th Dept 2013] [citation omitted]; *see also Meslin v New York Post*, 30 AD3d 309, 310 [1st Dept 2006]; *Dalanna v City of New York*, 308 AD2d 400, 401 [1st Dept 2003]). The courts have found that triable issues of fact may exist as to whether a plaintiff was injured in a "passageway" in light of the configuration of the work area. In *Canning v RFD 82nd St.* (285 AD2d 439 [2d Dept 2001]), the plaintiff claimed that he was injured while walking in a clear path between an exposed open edge of the building on his left and a pile of "stringers" on his right, when he tripped on a piece of rebar. The Second Department held that plaintiff's testimony presented issues of fact as to whether defendants violated 12 NYCRR 23-1.7 (e), and thus, as to whether defendants violated Labor Law § 241 (6) (*id.*). Similarly, in *Aragona v State of New York* (74 AD3d 1260 [2d Dept 2010]), the claimant, a dock builder, allegedly tripped on a padeye, which was welded to the deck of a work barge, while carrying materials along a corridor created by lumber and construction material. The Court held that the defendant failed to show the absence of triable issues of fact as to whether the claimant tripped in a passageway (*id.* at 1261).

In *Torres v Forest City Ratner Cos., LLC* (89 AD3d 928 [2d Dept 2011]), a sheet metal worker was injured while returning tools to his employer's gang box on the floor on which he was working. In that case, there was a row of trash containers to the left of the gang box, and there was a hoist or lift to the right of the gang box (*id.*). The hoist or lift was the only way to exit the building (*id.*). The plaintiff testified that he was injured when he stepped on a "raw"

unhinged door, which was about a foot away from the gang box (*id.*). The Court held that defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim should have been denied, explaining that "defendants failed to show the absence of a triable issue of fact as to whether the plaintiff was injured in a passageway" (*id.* at 929).

Here, the court concludes that the record reveals triable issues of fact as to whether plaintiff was injured in a "passageway" within the meaning of 12 NYCRR 23-1.7 (e)(1). Aurora testified that he was injured after exiting the bathroom where he was required by the debris on the floor to walk a certain direction as his way was blocked by debris and the window bucks were leaning against the wall. Accordingly, it cannot be concluded, as a matter of law, that the area where Aurora was injured should not have been kept free of "obstruction or conditions" such as the window buck resting on the 2x4's that extended out from the windows which he alleges caused him to trip (*see Torres*, 89 AD3d at 929; *Aragona*, 74 AD3d at 1261; *Costabile v Damon G. Douglas Co.*, 66 AD3d 436 [1st Dept 2009]; *Cowan v ADF Constr. Corp.*, 26 AD3d 802, 803 [4th Dept 2006]; *Bopp v A.M. Rizzo Elec. Contrs., Inc.*, 19 AD3d 348, 350 [2d Dept 2005]; *Kerins v Vassar Coll.*, 293 AD2d 514, 515 [2d Dept 2002]; *Canning*, 285 AD2d at 439).

Moreover, the 46th Street defendants' reliance *Burkoski*, is misplaced. In that case, the First Department held that section 23-1.7 (e) (1) did not apply where the plaintiff was injured while walking across a room that measured 18 feet by 20 feet (*Burkoski*, 40 AD3d at 383). Here, in contrast, there is evidence that plaintiff was forced to traverse this pathway of the debris on the ground and the window bucks stacked and then leaned against the partition wall. As for *Mendez v. Jackson Development Group,* 99 AD3d 677, 679 [2d Dept 2012] which is also cited by the 42 Street defendants, the plaintiff in that case did not allege that he tripped but instead claimed that debris in the area "made it difficult for him to maneuver." The holding in *Johnson v. 923 Fifth*

Ave Condominium, 102 AD3d 592 [1st Dept 2013], on which the 46th Streets defendants rely is also inapposite. There, the court found that 23-1.7 (e) (1) did not apply as the area of the s sidewalk where plaintiff was unloading materials was not a passageway and that plywood on which he fell had been purposefully laid to protect it and thus constituted an integral part of the work.

Alternatively, if the fact finder determines that the place of the accident is not a passageway but rather "an open area between the job site and the street," then Industrial Code 12 NYCRR 23-1.7 (e) (2), which requires that floors in work areas be "kept free from the accumulation of dirt and debris, and from scattered materials," is potentially applicable here based on plaintiff's deposition testimony that there was debris in the area and scattered materials in the area . This conclusion is also supported by Aurora's affidavit submitted in opposition to the motion.

Accordingly, there are triable issues of fact as to whether Industrial Code § 23-1.7(e)(2) applies which precludes summary judgment with respect to this provision.

Plaintiffs also based their 241(6) claim on 12 NYCRR 2.1 (a) (1), which states:

> 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.

Defendants argue that Industrial Code 12 NYCRR § 2.1 (a) (1) does not apply to this case since, at the time of the accident, the accident did not occur in a passageway, walkway or other thoroughfare. Rather, upon exiting the bathroom, plaintiff entered an open room (*see Burkoski v Structure Tone, Inc.*, 40 AD3d at 382 [section 23-2.1 (a) (2) inapplicable because the room where the accident occurred, which measured 18 feet by 20 feet, was not a passageway]; *Barrios v Boston Props. LLC*, 55 AD3d 339, 340 [1st Dept 2008] [section 23-2.1 (a) (1) inapplicable where

the accident occurred on a loading dock or work area and not in a passageway]). However, as indicated above, there are triable issues of fact as to whether plaintiff was forced to traverse a narrow path upon exiting the bathroom, created by the debris and the window bucks stacked and then leaned against the partition wall.

Moreover, contrary to the 46th Street defendants' argument, it cannot be said as a matter of law the window buck that plaintiff tripped was stored in a safe and orderly manner such that a violation of section 23-2.1 (a) did not proximately cause Aurora's accident. In this connection, the 46th Street defendants rely on evidence, including Amore's testimony that the daily safety logs showed that Metro-Tech had "[a]ll safety precautions in place and observed," and that the work bucks were required to be stored in the location as they required a sturdy concrete partition wall to support them, were too large to fit in the corridor of any given floor and as they needed to be near the hoist opening where they were to be installed.

However, even assuming *arguendo* that the evidence cited by the defendants is sufficient for make out a prima facie entitling them to summary judgment, plaintiffs controvert this showing by pointing to evidence that there was a large amount of stored materials that made the area crowded and tight and that the windows were stored too close to the bathroom door and on a 2x4 that extended out from the windows.

Accordingly, there are triable issues of fact as to whether Industrial Code § 2.1 (a) (1) provides a basis for recovery against the 46th Street defendants under Labor Law § 241 (6).

Plaintiffs' Labor Law § 200 and Common Law Negligence Claims

Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work' [citation omitted]" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]; *see also Russin v Louis N.*

Picciano & Son, 54 NY2d at 317). Labor Law § 200 (1) states, in pertinent part, as follows:

> "1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

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, 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 Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]).

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work, because the injury arose from the condition of the work place created by or known to contractor, rather than the method of the work]).

In contrast, 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 (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 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]).

Here, Aurora's injuries arising from the storage of the window bucks in the vicinity of the bathroom on the 35th floor were the result of a dangerous condition on the work site and not from the means and methods used in connection with work performed. In *Slikas v Cyclone Realty, LLC* (78 AD3d 144 [2d Dept 2010]), the plaintiff tripped on a crowbar that painters had left in an office doorway. In determining that the mislaid crowbar was a premises condition, the Second Department held that:

> "[t]he mislaid crowbar was not, at the time of the accident, being used by the painters. Instead, by leaving the crowbar in an office doorway, the painters created a tripping hazard. The plaintiff's accident occurred at a time of day when the painters had already ceased their work and were no longer using their tools, including the crowbar at issue. Therefore, the crowbar was not part of the painters' work at the time of the accident, but was a mere consequence of it after the day's work had been completed. The end of the painters' work day transformed the mislaid crowbar into a premises condition"

(*id.* at 148).

However, in *Cody v State of New York* (82 AD3d 925, 927 [2d Dept 2011]), the Second Department clarified its holding in *Slikas*, noting that "the *Slikas* case would have fallen into the 'means and methods of the work' category if the object on which plaintiff stumbled had been a product of ongoing construction work, which is precisely the situation presented in the instant case."

Here, the record shows that the window buck was not being used in construction at the time of the accident but was merely being stored on the 35th floor. In fact, Aurora testified that at the time of the accident, no work was being performed in the apartment where the bathroom at issue was located.

The remaining issues, then, concern whether the record raises issues of fact as to whether

defendants caused or created the condition or had actual or constructive knowledge of the condition. Notably, "if a reasonable inspection would have disclosed the dangerous condition, the failure to make such an inspection constitutes negligence and may make the owner liable for injuries proximately caused by the condition" (*Colon v. Bet Torah, Inc.*, 66 AD3d 731, 732 [2d Dept 2008]).

In opposition to the motion, plaintiffs submit the affidavit of Steven Williams, a co-worker of Aurora, who was also assigned to work at the premises. According to Williams, he recalls that around the time of the accident it was difficult to access the bathrooms on the 35th floor and that "you would literally have to climb over stacks of material to get to the bathroom" (Williams Aff., at 2). He also states "[Five Star] would have weekly safety meetings and his foreman, Chris Cote, would say he would speak to Plaza about it" (*id.*) He also states that "this condition lasted a long time and I only noticed an improvement after Tom Aurora tripped and hurt his back" (*id.*). Williams' affidavit is sufficient to raise a triable issue of fact as to whether Plaza had actual or constructive notice of the defect particularly, in light of testimony from Plaza's representative, Scott Palumbo, that Plaza conducted safety audits every one to two weeks, which included walkthrough of the entire project site to identify safety hazards. Next, Plaza is not entitled to summary judgment on the ground that Aurora fell on an open and obvious condition. The issue of "whether a condition is open and obvious is generally a jury question and the court should only determine that a risk was open and obvious as a matter of law when the facts compel such conclusion." Westbrook v. WR Activities-Cabrera Mkts., 5 AD3d 69, 72 (1st Dept 2004). As the First Department noted "the mere fact that a defect or hazard is capable of being discerned by a careful observer is not the end of the analysis. The nature or location of some hazards, while they are technically visible, make them likely to be overlooked" Id.; see also

Thornhill v. Toys "R" Us NYTEX, Inc., 183 AD2d 1071 (3d Dept 1992)(finding that based on the surrounding circumstances it could not be determined as a matter of law that the raised platform over which plaintiff fell was an open and obvious condition even though plaintiff initially so the platform and avoided it).

In any event, a finding that a condition is open and obvious does not eliminate a defendant's duty to maintain the property in a reasonably safe condition. Westbrook v. WR Activities-Cabrera Mkts., 5 AD3d at 73. See generally, O'Connor-Miele v. Barhite & Holzinger, Inc., 234 AD2d 106 (1st Dept 1996). In this case, the record raises issues of fact exist as to whether Plaza breached its duty to maintain the property in a reasonably safe condition with respect to the storing of the window bucks.

However, as there is no evidence that 46th Street or either of the Whitestone defendants had notice of the dangerous condition or caused or created it, summary judgment is properly granted dismissing the common law negligence and Labor § 200 claims against these defendants.

Finally, as the claims against the Whitestone defendants are being dismissed, Total Safety's motion to dismiss these defendants' claims against it for indemnification is granted.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that second third-party defendant Total Safety Consulting, LLC's motion (motion sequence number 002), pursuant to CPLR 3212, for summary judgment dismissing all third-party and cross claims asserted against it is granted, and these claims are severed and dismissed as to this defendant, and the Clerk is directed to enter judgment in favor of this second third-party defendant with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that defendants and second-third-party plaintiffs Whitestone Construction

Corp. and Metro-Tech Erectors Corp.'s motion (motion sequence number 004), pursuant to CPLR 3212, for summary judgment dismissing plaintiffs Thomas Aurora and Jennifer Aurora's complaint in its entirety, as well as all cross claims asserted against them, is granted, and the Clerk is directed to enter judgment in favor of these defendants with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that defendants 46th Street Development, LLC and Plaza Construction Corp.'s motion (motion sequence number 004), pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' claims under Labor Law § 241(6) is denied; and it is further

ORDERED that defendants 46th Street Development, LLC and Plaza Construction Corp.'s motion (motion sequence number 004), pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' claims under Labor Law § 200 is granted as to 46th Street Development, LLC and denied as to Plaza Construction Corp; and it is further

ORDERED that the parties shall proceed forthwith to mediation.

DATED: January 27, 2014

J.S.C.