

**Quigley v Port Auth. of N.Y. & N.J.**

2017 NY Slip Op 30884(U)

March 8, 2017

Supreme Court, Bronx County

Docket Number: 22509/14

Judge: Ben R. Barbato

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

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THOMAS QUIGLEY AND ROBBIN QUIGLEY, **DECISION AND ORDER**

Plaintiff(s), Index No: 22509/14

- against -

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,  
DELTA AIRLINES, INC., AND COMMODORE  
CONSTRUCTION CORP.,

Defendant(s).

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In this action for personal injuries resulting from, *inter alia*, violations of Labor Law §§ 200, 240(1), and 241(6), defendants move for an order granting them summary judgment and dismissal of the complaint. Defendants contend that (1) with respect to plaintiffs' claim pursuant to Labor Law § 240(1), summary judgment is warranted because plaintiff THOMAS QUIGLEY's (Quigley) accident was not the result of the hazards contemplated by Labor Law § 240(1) in that he merely slipped and fell at ground level; (2) with respect to Labor Law § 200, summary judgment is warranted because defendants - owner, lessee, and subcontractor at the premises, neither directed nor controlled the work from which Colon's accident arose and had no notice of the defect alleged to have caused his accident; and (3) with respect to plaintiffs' claim pursuant to Labor Law § 241(6), summary judgment is warranted

insofar as, *inter alia*, Quigley's accident did not arise from violations of the Industrial Code sections pleaded by plaintiffs. Plaintiffs oppose the instant motion to the extent summary judgment is sought with respect to plaintiffs' Labor Law § 200 and § 241(6) claims. Plaintiffs aver that insofar as the pipes on which plaintiff slipped constituted a dangerous condition about which defendants had notice, questions of fact with respect to liability under Labor Law § 200 preclude summary judgment. With respect to Labor Law § 241(6), plaintiffs aver that summary judgment in defendants' favor must be denied because on this record Quigley's accident was the result of defendants' violation of multiple sections of the Industrial Code. Based on the foregoing, plaintiffs cross-move for partial summary judgment on the issue of liability with respect to their claim pursuant to Labor Law § 241(6). Defendants' oppose plaintiffs' cross-motion for the same reasons they seek summary judgment.

For the reasons that follow hereinafter, defendants' motion is granted, in part, and plaintiffs' cross-motion is denied.

The instant action is for alleged personal injuries resulting from alleged violations of the Labor Law and as a result of common law negligence. Plaintiffs' complaint establishes, in relevant part, the following: On January 29, 2014, Quigley was involved in an accident while working at John F. Kennedy International Airport, located in Queens, NY. More specifically, as Quigley worked at

Delta Airlines' Terminal 4 , he slipped and fell on ice and or snow. Plaintiffs allege that the instant premises was owned by defendant PORT AUTHORITY OF NEW YORK AND NEW JERSEY (PANYNJ), leased by defendant DELTA AIRLINES, INC. (Delta) and was undergoing construction at the time of Quigley's accident. It is alleged that in connection with the aforementioned construction, Delta retained defendant COMMODORE CONSTRUCTION CORP. (Commodore) to act as its general contractor. Commodore retained non-party J&E to perform work and Quigley was employed by J&E. It is further alleged that Quigley's accident and resulting injuries were the result of defendants' negligence in failing to keep the premises reasonably safe and in violating Labor Law § 200, § 240(1), and § 241(6). Plaintiff ROBBIN QUIGLEY, Quigley's wife, asserts a derivative loss of consortium claim.

#### Standard of Review

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello*

*v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009]). Notably, the court can consider otherwise inadmissible evidence, when the opponent fails to object to its admissibility and instead relies on the same (*Niagara Frontier Tr. Metro Sys. v County of Erie*, 212 AD2d 1027, 1028 [4th Dept 1995]).

Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562). It is worth noting, however, that while the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. As noted by the Court of Appeals,

[t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing summary judgment' in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact.' Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary

proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case

(*Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067-1068 [1979] [internal citations omitted]). Accordingly, generally, if the opponent of a motion for summary judgment seeks to have the court consider inadmissible evidence, he must proffer an excuse for failing to submit evidence in inadmissible form (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

Moreover, when deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman* (278 AD2d 811, 811 [4th Dept 2000]),

[s]upreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint. Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present issues for trial

(see also *Yaziciyan v Blancato*, 267 AD2d 152, 152 [1st Dept 1999]; *Perez v Bronx Park Associates*, 285 AD2d 402, 404 [1st Dept 2001]). Accordingly, the Court's function when determining a motion for

summary judgment is issue finding not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

Defendants' Motion

**Labor Law §240(1)**

Defendants' motion for summary judgment with respect to plaintiffs' claim pursuant to Labor Law § 240(1) is granted insofar as the uncontroverted evidence establishes that the accident herein - a slip and fall on snow covered pipes does not give rise to a claim under Labor Law § 240(1). Notably, plaintiffs fail to proffer any arguments in opposition to this portion of defendants' motion. Moreover and significantly, Quigley's accident was not the result of the hazards contemplated by Labor Law § 240(1) because it did not arise from an elevation-related risk - namely, a task where Quigley was required to work at an elevation nor was it the result of a falling object, which caused Quigley to be injured.

Labor Law §240(1) requires that

[a]ll contractors and owners and their agents who contract for but do not direct or control the work, in 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), applies where the work being performed subjects those involved to risks related to elevation differentials (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 561 [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Specifically, the hazards contemplated by the statute "are those related to the effects of gravity where protective devices are called for . . . because of a difference between the elevation level of the required work and a lower level" (*Gordon* at 561 [internal quotation marks omitted]). Since Labor Law § 240(1) is intended to prevent accidents where ladders, scaffolds, or other safety devices provided to a worker prove inadequate so as to prevent an injury related to the forces of gravity (*id.*), it applies equally to injuries caused by falling objects and falling workers (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]).

For purposes of liability, a violation of the statute which proximately causes an employee to sustain injury gives rise to absolute liability (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Gordon* at 559). Notably, Under Labor Law § 240(1), a complete failure to provide the safety devices

promulgated by the statute constitutes a violation thereof, and is, in and of itself, conclusive proof of proximate causation (*Zimmer v Chemmung County Performing Arts, Inc.*, 65 NY2d 513, 519 [1985]). Hence, if the evidence demonstrates that the defendants failed to provide any safety devices at all, the statute has been violated as a matter of law (*id.*). By contrast, when a defendant does provide safety equipment and an accident nevertheless occurs, the adequacy, functionality, and placement of said device must be assessed in order to determine whether there has been a violation of the Labor Law (*Narducci* at 267 ["liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein."]). When a defendant provides some, but not all the safety devices required by the statute, Labor Law § 240(1) is nonetheless violated if a defendant fails to provide plaintiff with the safety devices intended to protect the plaintiff from each and every height related risk associated with the particular work being performed (*Felker v Corning Incorporated*, 90 NY2d 219, 224 [1997] (Court held that plaintiff was exposed to two different elevation related risks, the first for which defendant provided an adequate safety device; the second, for which defendant did not. Defendant, thus violated Labor Law § 240(1).]; *Barnaby v A & C Properties*, 188 AD2d 958, 959-960 [3d Dept 1992 ["Although plaintiff was provided with a safety device intended to protect him from the risk inherent

in having to work at a height of up to 8 1/2 feet above the floor level, he was provided with no device to protect him from the risk inherent in working in a window opening some 15 to 20 feet above the ground. Because no device was provided to protect plaintiff from this elevation-related risk, the order granting plaintiff's motion for summary judgment on the liability issue should be affirmed."). Thus, the relevant inquiry is whether given the particular risk involved a safety device intended to protect against each and every risk was provided (*Felker* at 224; *Barnaby* at 959-960).

To be sure, in *Barnaby*, plaintiff was tasked with framing windows inside a building (*id.* at 959). At the time of the accident, the work was being performed indoors and plaintiff was provided with a ladder to access the windows which extended some ten feet above the floor (*id.*). As plaintiff worked atop the ladder, he stumbled and fell through the window and to the ground outside the building, some 15-20 feet below (*id.*) In granting plaintiff partial summary judgment on the issue of liability, the court found that while defendant satisfied the statute in providing a ladder to plaintiff for the work on the windows inside the building, by failing to provide a safety device designed to protect against plaintiff's fall through and out the window, the defendant violated the Labor Law § 240(1) (*id.* at 959-960).

It is well settled that under Labor Law § 240(1), owners of

the location where an accident occurs and the general contractor employed by the owner are absolutely liable irrespective of whether they exercised supervision and/or control over the particular work from which the accident arose (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]; *Haimes v New York Tel. Co.*, 46 NY2d 132, 135 [1978]). This means, that because the duty imposed by Labor Law §240(1) is non-delegable, owners and general contractors remain for a breach of the statute even if the work is farmed out to an independent contractor (*Gordon* at 559; *Ross* at 500; *Rocovich* at 513). Additionally, the absolute liability imposed by Labor Law § 240(1) means that a plaintiff's contributory or comparative negligence is wholly irrelevant in determining liability and does not bar recovery or serve to offset liability (*Stolt v General Foods Corporation*, 81 NY2d 918, 919 [1993]; *Bland v Manocherian*, 66 NY2d 452, 460-461 [1985]).

Since construction work, however, can be delegated to another, the party to whom such work is delegated is only liable under Labor Law § 240(1) if such party - such as a subcontractor - controls and exercises supervision over the work from which the accident arises (*Russin v Picciano*, 54 NY2d 311, 318 [1981]; *Serpe v Eyriss Production, Inc.*, 243 AD2d 375, 379-380 [1st Dept 1997]). The determinative factor on the issue of control is not whether the agent or subcontractor merely furnishes equipment, but rather, whether such subcontractor has actual control over the work and the

authority to insist that proper safety practices be followed (*Serpe* at 380; *Iveson v Sweet Assocs.*, 203 AD2d 741, 742 [3d Dept 1994]).

Not every accident at a work site means that the Labor Law has been violated (*Blake* at 288-289; *Narducci* at 267). As the court in *Narducci* noted

[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein

(*id.* at 267). Significantly, Labor Law § 240(1) was not intended to penalize those people who, by providing the requisite safety equipment, have complied with the statute (*Blake* at 286). Indeed, neither owners, contractors, or agents are the insurers of a plaintiff's safety and are merely required to abide by the statute (*id.*). A distinction must be made between those accidents caused by the failure to provide a safety device required by Labor Law §240(1) and those caused by general hazards specific to a workplace (*Narducci* at 268-269) The former, a violation of Labor Law §240(1) giving rise to liability, the latter negating it (*Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 843-844 [1994]; *Thompson v St. Charles Condominiums*, 303 AD2d 152, 154 [1st Dept 2003]).

Accordingly, generally, an accident which does not result from a gravity-related hazard, does not give rise to a Labor Law § 240(1) violation (*Lopez v City of New York Tr. Auth.*, 21 AD3d 259, 259 [1st Dept 2005] ["Plaintiff David Lopez, a journeyman electrician, was injured at a job site when, with both feet on the ground and while in the process of closing an extension ladder, he slipped on debris around the bottom of the ladder, and his right hand fell between the closing half and the stationary part of the ladder, crushing his wrist. The motion court correctly dismissed the Labor Law § 240(1) claims. Since the injury did not result from an elevation-related risk, the statute does not apply."]; *Sahota v Celaj*, 11 AD3d 308, 309 [1st Dept 2004] [Court granted summary judgment dismissing plaintiff's claim pursuant to Labor Law § 240(1) where "[t]he uncontroverted record evidence shows that plaintiff was injured when, at the direction of his employer, he halted his masonry pointing and sealing work which he was performing from a scaffold, dismounted the scaffold onto an adjacent fire escape platform and tried to descend from there down to street level. As he stood on the fire escape platform attempting to lower the fire escape ladder, its securing mechanism broke, suddenly releasing a metal bolt (and the ladder), which crashed down and struck his left arm, fracturing his radius and ulna. No work was being done from the fire escape nor, during the course of this project, was the fire escape ever used as a scaffold. No work

was being done to the fire escape and the fire escape ladder mechanism was not being hoisted or secured at the time of the accident. The safety equipment that plaintiff used in his work, the scaffold and a harness, functioned perfectly and did not contribute to the accident."]; *Cabrera v Sea Cliff Water Co.*, 6 AD3d 315, 316 [1st Dept 2004] [Labor Law § 240(1) inapplicable when "plaintiff picked up a broom and swept up the accumulated sheetrock dust and sawdust. During the course of sweeping, he stumbled and fell, injuring a knee."]; *Bomova v. KMK Realty Corp.*, 255 AD2d 351, 352 [2d Dept 1998], *lv. denied* 93 NY2d 818 [1999]).

In support of this motion, defendants submit Sean Timoney's (Timoney) deposition transcript wherein he testified, in pertinent part, as follows: On January 29, 2014, he was employed by Commodore as its Project Superintendent. Commodore had been retained in connection with the expansion of Delta's Terminal 4 and had been retained to provide concrete related services. The project had no general contractor, but STV was the construction manager. Commodore hired J&E, for whom Quigley was employed and whose work Commodore had the ability to stop if it was being performed unsafely. On January 29, 2014, Timoney was notified by Quigley's foreman about an accident involving Quigley. Timoney was told that the accident occurred in the northeast corner of the construction site in an area where neither Commodore nor J&E were working. Upon reporting to that location, Timoney noted that the area housed

J&E's shanty and several pipes. The pipes did not belong to Commodore. Timoney testified that he had never been to this section of the construction site prior to Quigley's accident.

Defendants submit Quigley's deposition transcript wherein he testified, in pertinent part, as follows: On January 29, 2014, while employed by J&E as a lather at Delta's terminal within JFK, he was involved in an accident. J&E was retained to build an airport hanger and more specifically, to install mesh and rebar which would then receive concrete. On the date of his accident, as he drove to work, he noticed snow on the ground. Once at the JFK, he took a bus to Delta's terminal. After getting off the bus, he made his way to J&E's shanty about 300 feet away. In order to get into his shanty, he had to walk on snow covered plumbing pipes. There were 20 pipes in total, which had been there for weeks, and which were directly in front of the shanty. After he procured his equipment from within the shanty, Quigley exited, stepped on to the pipes, and as he walked on the pipes, slipped and fell.

Based on the foregoing, defendants' motion seeking summary judgment with respect to plaintiffs' Labor Law § 240(1) claim is granted. Generally, an accident which does not result from a gravity-related hazard, does not give rise to a Labor Law § 240(1) violation (*Lopez* at 259; *Sahota* at 309; *Cabrera* at 316; *Bomova* at 352). Here, based on Quigley's own testimony, the accident for which he sues occurred when he slipped and fell on pipes as he

exited a shanty. Not only had Quigley not yet started his work, which by itself mandates summary judgment (*Sahota* at 309), but the accident itself is a trip and fall at ground level rather than one resulting from work exposing plaintiff to a gravity-related risk (*Lopez* at 259).

Insofar as plaintiffs do not oppose this portion of defendants' motion, nothing precludes summary judgment on the claim pursuant to Labor Law § 240(1).

**Labor Law § 241(6)**

Defendants' motion for summary judgment with respect to plaintiffs' claim pursuant to Labor Law § 241(6) is denied. While the record establishes that many of the sections of the Industrial Code pleaded as predicates for a violation of Labor Law § 241(6) are factually inapplicable to the accident herein or specific enough to constitute cognizable predicates, the very evidence submitted by defendants, when viewed against the backdrop of prevailing law, raises a question of fact as to whether defendants violated 12 NYCRR § 23-1.7(e)(2) by failing to keep Quigley's work area free of materials, namely the pipes on which alleges to have fallen.

Labor Law § 241 states that "[a]ll contractors and owners and their agents . . . when constructing or demolishing buildings" shall comply with, *inter alia*, the requirements under Labor Law § 241(6), which require that

[a]ll 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 frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and 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.

Thus, Labor Law § 241(6) imposes a duty of reasonable care upon owners, contractors and their agents, requiring that owners, contractors and their agents provide reasonable and adequate protection to those employed in all areas where construction, excavation, or demolition is being conducted (*Rizzutto v Wagner Contracting Co.*, 91 NY2d 343, 348 [1998]; *Ross* at 501-502). The duty imposed by the this section of the Labor Law is nondelegable, meaning that an owner, contractor or agent can be held liable for the breach of the statute absent supervision or control of the particular work site at issue (*Rizzutto* at 348-349; *Ross* at 502).

A violation of Labor Law §241(6) necessarily requires a failure to comply or adhere to external rules and statutes (*Ross* at 503). In order to establish a violation of Labor Law § 241(6), it must be shown that a defendant also violated an applicable section of a rule or regulation promulgated by the Commissioner of Labor, which mandates compliance with concrete specifications (*Ross* at

501-502; *Basile v ICF Kaiser Engineers Corp*, 227 AD2d 959, 959 [4th Dept 1996]). Accordingly, a violation of Labor Law § 241(6) requires a violation of an underlying statute or rule and such statute or rule must be one that prescribes a concrete and specific standard of conduct (*Rizzutto* at 350; *Ross* at 503). Moreover, the facts alleged must be tantamount to a violation of the Industrial Code section asserted (*Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 271 [1st Dept 2007]). Unlike a violation of Labor Law § 240(1) which establishes conclusive negligence, a violation of Labor Law § 241(6) does not conclusively establish negligence and is instead "merely some evidence of negligence which the jury may consider on the question of defendant's negligence" (*Rizzutto* at 349 [internal quotation marks omitted]); see also *Long v Forest-Fehlhaber*, 55 NY2d 154, 159 [1982]; *Teller v Prospect Hgts. Hosp.*, 280 NY 456, 460 [1939]). Moreover, unlike Labor Law § 240(1), contributory and comparative negligence are valid defenses to any allegation pursuant to Labor Law §241(6) (*Rizzutto* at 350). Thus, a violation of Labor Law § 241(6) does not conclusively establish negligence and is instead "merely some evidence of negligence which the jury may consider on the question of defendant's negligence" (*Rizzutto* at 349 [internal quotation marks omitted]); see also *Long* at 159; *Teller v Prospect Hgts. Hosp.*, 280 NY 456, 460 [1939]).

While an owner and general contractor are statutorily liable

for a violation of Labor Law §241(6), an agent, e.g., a subcontractor, is only liable for a violation of Labor Law § 241(6), if he was delegated supervision or control of the accident causing activity (*Russin* at 318; *Everitt v Nozkowski*, 285 AD2d 442, 444 [2d Dept 2001] *Serpe* at 379-380). Moreover, subcontractor's liability is limited to a breach of Labor Law § 241(6) with respect to those areas, activities and control actually delegated to it (*Everitt* at 444). Prima facie entitlement to summary judgment, is established when plaintiff demonstrates a violation of a rule or regulation promulgated by the Commissioner of Labor, which mandates compliance with concrete specifications (*Ross* at 501-502; *Basile* at 959).

Here, while many of the predicates pleaded are inapplicable, at least one - if the Court credits Quigley's version of the facts is. For example, plaintiffs contend that defendants violated 12 NYCRR 23-1.7(d), which states that "[e]mployers 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." Here, this section is inapplicable because it is clear that the dirt walkway on which Quigley walked, while covered in snow, did not cause his accident. To be sure, Quigley testified as follows:

Q: Did you have to alter the way you walked at all in order to go over the snow and ice?

A: No.

Q: You just walked normally?

A: Yes.

Q: As you were walking, were you stepping on snow or stepping on ice or something else?

A: Just dirt and a dusting of sleet and snow.

Q: was any of it slippery?

A: No. Not that I recall.

Thus, it is clear that the walkway and the snow located thereat was not the cause of Quigley's fall and that he fell because he stepped on snow covered pipes. Thus, on this record, defendants did not violate 12 NYCRR 23-1.7(d) (Ross at 501-502; Basile at 959). [4th Dept 1996]).

Similarly, contrary to plaintiffs' assertion, defendants' evidence establishes that defendants did not violate 12 NYCRR 23-1.7(e)(1). 12 NYCRR 23-1.7(e)(1) states "Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping." Here, plaintiff testified that he slipped and fell on ice and not, as proscribed by the foregoing rule, tripped and fell on debris.

Notwithstanding the foregoing, defendants' own evidence raises an issue of fact with respect to whether they violated 12 NYCRR 23-1.7(e)(2), which reads "Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed." Here, while Quigley testified that the shanty outside of which he fell was not his

worksite and that the worksite was "[m]aybe -- maybe a few hundred feet and then up a ladder and then, you know a few hundred feet depending on where we were at that particular time, you know, in either direction," he also testified that he had to "walk through the job site to get to the shanty," where he would "grab [his] hard hat, [and his] tool belt." Thus, contrary to defendants' assertion 12 NYCRR 23-1.7(e)(2) applies and was - if Quigley's testimony is credited - violated because he had to traverse the area where he had his accident to access the his worksite, such that the situs of the accident falls within the ambit of "working area" under the foregoing rule (*Canning v Barney's New York* (289 AD2d 32 [1st Dept 2001] ["the location where plaintiff fell was in constant use as a work site for the loading and unloading of construction material and debris. Although the accident did not occur in plaintiff's own work area, there can be no question that plaintiff was required to 'pass' through the area in which he fell in order to reach his work area."]; *Smith v Hines GS Properties, Inc.*, (29 AD3d 433 [1st Dept 2006] ["Nevertheless, the tradesmen at the site routinely traversed this physically defined area as their only access to equipment and materials, making it arguably an integral part of the work site. A question of fact is thus presented as to whether the spot where plaintiff's fall occurred was a 'working area' within the meaning of 12 NYCRR 23-1.7 (e) (2)."]; *Maza v Univ. Ave. Dev. Corp.* (13 AD3d 65 [1st Dept 2004])).

Accordingly, defendants fail to establish prima facie entitlement to summary judgment with respect to plaintiffs' Labor Law § 241(6) claim.

***Common Law Negligence and Labor Law § 200***


Defendants' motion seeking summary judgment with respect to plaintiffs' claim pursuant to Labor Law § 200 is denied. Here, the record fails to concretely establish the origin of the pipes on which Quigley alleges to have slipped and fallen and thus, the Court is unable to determine whether the pipes were a dangerous condition existing at the worksite created by defendants or if their placement was the result of the means and methods of a subcontractor over which defendants had no control. Thus, defendants fail to establish prima facie entitlement to summary judgment.

Labor Law § 200 reads

[a]ll 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. The board may make rules to carry into effect the provisions of this section.

Labor Law § 200 codifies the common law, requiring that an owner and general contractor provide workers with a safe place to work (*Rizzutto* at 353; *Comes v New York State Electric and Gas*

*Corporation*, 82 NY2d 876, 877 [1993]; *Russin v Picciano*, 54 NY2d 311, 317 [1981]; *Allen v Cloutier Construction Corp.*, 44 NY2d 290, 299 [1978]). For purposes of liability pursuant to Labor Law § 200, the lynchpin is supervision and control. In other words, the party against whom liability is sought must "have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Rizzutto* at 352).

It is well settled that an owner or general contractor's general control over the work giving rise to the injury ~~must~~ is  insufficient for purposes of Labor Law § 200. Specifically,

the retention of the right to generally supervise the work, to stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations, does not amount to the supervision and control of the work site necessary to impose liability on an owner or general contractor pursuant to Labor Law §200

(*Dennis v City of New York*, 394 AD2d 611, 612 [2d Dept 2003]; *Brown v New York City Economic Development Corporation*, 234 AD2d 33,33 [1st Dept 1996] [Court held that oversight responsibility as opposed to specific work of any subcontractor was insufficient to impose liability for a Labor Law §200 upon the owner.]; *Carty v Port Authority of New York and New Jersey*, 32 AD3d 732, 732-733 [1st Dept 2006]).

Accordingly, under Labor Law § 200, in addition to liability for a dangerous condition arising from the methods employed by a

subcontractor, over which the owner or general contractor exercised supervision and/or control (*Comes* at 877; *Allen* at 299; *Dalanna v City of New York*, 308 AD2d 400, 400 [1st Dept 2003]), liability can also arise when the accident is caused by a dangerous condition at the worksite that was either created by the owner or general contractor or about which they had prior notice (see *Mitchell v New York Univ.*, 12 AD3d 200, 201 [2004]; *Ortega v Puccia*, 57 AD3d 54, 61-62 [2008]); *Paladino v Society of N.Y. Hosp.*, 307 AD2d 343, 345 [2003]).

Under the common law, no liability for a condition within a premises lies absent proof that a defendant created the dangerous condition alleged to have caused a plaintiff's accident or unless the defendant has prior actual or constructive notice of the same (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Bogart v Woolworth Co.*, 24 NY2d 936, 937 [1969]; *Armstrong v Ogden Allied Facility Mgt. Corp.*, 281 AD2d 317, 318 [2001]; *Wasserstrom v New York City Tr. Auth.*, 267 AD2d 36, 37 [1999], *lv denied* 94 NY2d 761 [2000]).

Here, beyond asserting that the pipes near the shanty were used in connection with plumbing work, Timoney was unable to state to whom they belonged, how long they had been there, and how they got there. Moreover, defendants' evidence is silent on the level of supervision and control, if any, that defendants exercised over any of the contractors at the site herein. This is particularly

true with respect to PANYNJ and Delta, whose roles, beyond assertions in the complaint, is unknown. Thus, since under Labor Law § 200 an owner and/or general contractor is liable for a dangerous condition arising from the methods employed by a subcontractor, over which the owner or general contractor exercised supervision and/or control (*Comes* at 877; *Allen* at 299; *Dalanna* at 400) or when the accident is caused by a dangerous condition at the worksite that was either created by the owner or general contractor or about which they had prior notice (*Mitchell* at 201; *Ortega* at 61-62; *Paladino* at 345), here defendants fail to establish prima facie entitlement to summary judgment. To be sure, if the pipes arose from the means and methods of a contractor, defendants nevertheless fail to establish the absence of supervision and control over them and their work. If the pipes were a dangerous condition existing at the premises, defendants nonetheless fail to establish that they neither created the condition or had prior notice of it.

#### Plaintiffs' Cross-Motion

Plaintiffs' cross-motion for partial summary judgment on the issue of liability pursuant to Labor Law § 241(6) is denied. As discussed above, Quigley's testimony does indeed establish a violation of 22 NYCRR 23-1.7(e)(2). However, defendants' submissions - namely affidavits from two witnesses - raise an issue of fact as to whether the pipes alleged were in fact obstructing

access to the shanty thereby causing the accident alleged.

As noted above, a violation of Labor Law § 241(6) requires a violation of an underlying statute or rule and such statute or rule must be one that prescribes a concrete and specific standard of conduct (*Rizzutto* at 350; *Ross* at 503). Plaintiff's testimony establishes a violation of 12 NYCRR 23-1.7(e)(2) insamuch as he testified that he could not avoid the pipes and was required to pass by the area of his accident to access his worksite, the situs of the accident falls within the ambit of work area under the foregoing rule (*Canning* at 34; *Smith* at 433; *Maza* at 66-67). Accordingly, plaintiffs establish prima facie entitlement to summary judgment on their claim pursuant to Labor Law § 241(6).

Defendants' opposition, however, raises a material question of fact with respect to whether 12 NYCRR 23-1.7(e)(2) was in fact violated so as to preclude summary judgment. Here, defendants submit affidavits from Larry Hunter (Hunter) and Ernesto Estrella (Estrella), both of whom state that on the date of the instant accident they were both employed by J&E and walked with Quigley to the shanty immediately prior his fall. Both Hunter and Estrella state that while there were pipes outside the shanty, said pipes did not impede their ability to walk safely around them. Based on the foregoing, there exists a sharp question of fact with respect to whether the pipes herein were placed in the manner described by Quigley, which totally impeded entry into the shanty without having

to step on the pipes. If the pipes did not impede entry into the shanty and could, as described by Hunter and Estrella, be safely avoided, then 12 NYCRR 23-1.7(e)(2) was not violated. It is hereby

**ORDERED** plaintiff's Labor Law § 240(1) claim be dismissed with prejudice. It is further

**ORDERED** that defendants serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : March 8, 2017  
Bronx, New York



BEN BARBATO, JSC