To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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CHAD TURGEON,

Plaintiff,

DECISION and ORDER

-against-

Index No. 1727/2014

VASSAR COLLEGE and KIRCHHOFF-CONSIGLI CONSTRUCTION MANAGEMENT, LLC,

Defendants.

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PAGONES, J D., A.J.S.C.

Defendants move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing plaintiff's complaint.

The following papers were read:

Notice of Motion-Affirmation-Affidavit of Service-Exhibits A-E	1-8
Affirmation in Opposition-Exhibits A-G-Affidavit of Service	9-17
Reply Affirmation-Affidavit of Service	18-19

By way of background, this action involves a claim for personal injuries allegedly sustained by plaintiff on July 21, 2012. Plaintiff Chad Turgeon was employed by Debrino Caulking at the time of the accident and was working as a mason's assistant. At the time of the incident, plaintiff was performing terra cotta restoration work at Rockefeller Hall on the campus of Vassar College located at 124 Raymond Avenue, Poughkeepsie, New York.

Plaintiff was assisting mason Darrell Lavare on the date of the accident. Prior to the date of the accident, plaintiff received his daily instructions from either Darrell or Alan Ingram, another Debrino employee. Vassar College did not have employees at the construction site and plaintiff admits to never receiving instructions from any employees of defendant Kirchhoff-Consigli Construction Management. On the day of the accident, plaintiff and Darrell were to perform work on the terra cotta tiles around an exterior window on the third floor of Rockefeller Hall. The men gathered their supplies, and loaded into the basket of a lift which brought them up to the level of third floor window. Upon arriving at the third floor, some tiles unexpectedly began to pull away from the building. Plaintiff reached up to push the tiles back against the building with his left hand/arm. Upon pushing the tiles back, they then slid down and injured the plaintiff's thumb. The basket was then lowered and plaintiff was rushed to the emergency room for treatment.

The complaint interposes causes of action alleging violations of Labor Law §§200, 240(1) and 241(6). With respect to plaintiff's Labor Law §241(6) claim, the complaint alleges that the defendants violated 12 NYCRR §§23-1.33(a) and 23-3.3(c).

It is noted that plaintiff has agreed to discontinue any and all causes of action asserted pursuant to Labor Law §240(1) (*see* Affirmation of Lawrence D. Lissauer, Esq., Paragraph 11).

On a motion for summary judgment, the test to be applied is whether triable issues of fact exist or whether on the proof submitted judgment can be granted to a party as a matter of law (*see Andre v. Pomeroy*, 35 NY2d 361 [1974]). The movants must set forth a prima facie showing of entitlement to judgment as matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the movants set forth a prima facie case, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

The Defendants' Motion for Summary Judgment

Liability for causes of action based upon common-law negligence and violations of Labor Law §200 are limited to those who exercise control or supervision over the work being performed (*see Natoli v. City of New York*, 32 AD3d 507 [2nd Dept 2006]). The deposition testimony of the plaintiff is sufficient to establish that the defendants did not exercise any supervision or control over his work, nor did they control the methods or manner by which the work was performed. Specifically, plaintiff testified that Allen Ingram of Debrino would give him his daily instructions, unless he was not on the job-site; then, Darrell would take over as acting foreman (*see* Deposition of Plaintiff at

p 34 lines 15-24).

Additionally, where a plaintiff's injuries arise not from the manner in which the work was performed but from a dangerous condition on the premises, a contractor or owner may be held liable only if it had control over the work site and either created the dangerous condition or had actual or constructive notice of it (*see Marquez v. L & M Dev. Partners, Inc.*, 141 AD3d 694 [2nd Dept 2016]). Here, prior to the date of the accident, there had been no other known incidents concerning terra cotta tile falling from the building (*see* Deposition of Plaintiff at p 121 lines 3-10). Accordingly, defendants have established their prima facie entitlement to judgment as to plaintiff's negligence/Labor Law §200 claim.

To recover under Labor Law §241(6), a plaintiff must establish a violation of a New York State Industrial Code Provision which sets forth specific applicable safety standards (*see Wein v. Amato Properties, LLC*, 30 AD3d 506 [2nd Dept 2006]). Here the plaintiff alleges that the defendants violated 12 NYCRR 23-1.33(a) and 12 NYCRR 23-3.3(c), which state:

> (a) Protection required.
> (1) Reasonable and adequate protection and safety shall be provided for all persons passing by areas, buildings or other structures in which construction, demolition or excavation work is being performed. In addition, such protection and safety shall also be provided for persons passing by unattended excavations, such as sump holes, trenches, shafts, wells, pits and similar excavations. Such protection and safety shall be provided in accordance with the provisions of this Part (rule).

(2) Every area, building or other structure where construction, demolition or excavation work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as not to endanger any person passing by on any sidewalk, street, highway or other public or private thoroughfare.
(3) The means, methods, procedures, devices or structures used to provide such protection and safety shall include but not be limited to railings, fences, barricades, sheeting and shoring, sidewalk sheds, temporary walkways and temporary roadways. Such means, methods, procedures, devices or structures shall be selected to provide the required protection and safety in accordance with the particular hazard or hazards involved."

and

"(c) Inspection. During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means."

As for plaintiff's reliance upon 12 NYCRR §23-1.33, there is doubt as to whether an allegation of a violation of this section can support a claim under Labor Law §241(6), since the regulation does not mandate compliance with specifications (*see McMahon v. Durst*, 224 AD2d 324 [1st Dept 1996] *citing Ross v. Curtis-Palmer Hydro Elec. Co.*, 81 NY2d 494 [1993]). Notwithstanding the foregoing, 12 NYCRR §23-1.33 does not apply to workers on a construction site (*see Mancini v. Pedra Const.*, 293 AD2d 453 [2nd Dept 2002]; *Lawyer v. Hoffman*, 275 AD2d 541 [3rd Dept 2000]).

Demolition work is defined by the Industrial Code as "[t]he work incidental to or associated with the total or partial

dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment." (22 NYCRR 23-1.4[16]). The removal and replacement of terra cotta tiles does not constitute "demolition work" as defined by the Industrial Code (*see generally Pol v. City of New York*, 126 AD3d 526 [1st Dept 2015] *leave to appeal denied by* 25 NY3d 912; *Solis v. 32 Sixth Ave. Co., LLC*, 38 AD3d 389 [1st Dept 2007]). This fact is confirmed by the deposition testimony of Michael H. Walters, Project Manager for Kirchhoff-Consigli Construction Management, LLC, who indicates that DeBrino was hired to do all exterior masonry **restoration** [emphasis supplied] work (*see* Deposition of Walters at p 9 lines 18-21).

Accordingly, the defendants have established their *prima facie* entitlement to judgment as matter of law.

Since defendants have made a *prima facie* showing of entitlement to judgment as a matter of law (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]), plaintiff must show that genuine triable issues of material fact exist in order to defeat defendants' motion (id.).

In opposition, plaintiff alleges, in regard to the Labor Law §200 claim, that drawings/plans identified those areas of the terra cotta and wall which needed replacing; thus, giving defendants notice. This Court finds little merit to this contention. It is well established that general notice of a

potential dangerous condition is insufficient for a plaintiff to establish actual or constructive notice (*see generally Gordon v. American Museum of Natural History*, 67 NY2d 836 [1986]; *Koerner v. City of New York*, 111 AD3d 435 [1st Dept 2013]; *Zieris v. City of New York*, 93 AD3d 479 [1st Dept 2012]; *DeJesus v. New York City Hous. Auth.*, 53 AD3d 410 [1st Dept 2008]). Here, it cannot be said that defendants were put on notice of falling terra cotta tiles by merely contracting to perform pointing and restoration work.

For the first time and in opposition to the defendants' motion for summary judgment, the plaintiff alleges that the defendant violated three (3) additional Industrial Code sections, specifically 12 NYCRR §§23-1.18, 23-1.5 and 23-3.2. A plaintiff may make an allegation of an Industrial Code violation in support of a Labor Law §241(6) claim in opposition to a motion for summary judgment if the allegation involves no new factual allegations, raises no new theories of liability and causes no prejudice to the defendants (*see Kowalik v. Lipschutz*, 81 AD3d 782 [2nd Dept 2011]). Given the current appellate authority and as the alleged violations involve no new factual allegations, raise no new theories of liability and causes no prejudice to the defendants, they will be addressed by the Court.

12 NYCRR 23-1.18 states:

"(a) Sidewalk sheds. A sidewalk shed constructed in accordance with the provisions of this section shall be

required along any sidewalk or thoroughfare where the following conditions persist:

(1) Where any building or other structure exceeding 40 feet in height above and alongside of such sidewalk or thoroughfare is to be erected.

(2) Where any building or other structure exceeding 25 feet in height above such sidewalk or thoroughfare is to be demolished and the distance from such sidewalk or thoroughfare to the nearest point of such building or other structure is one-half or less of the height of such building or other structure.

(3) Where during construction or demolition operations, material or debris is to be transported over such sidewalk or thoroughfare, regardless of the height of the building or other structure being constructed or demolished.

(b) Sidewalk shed construction.

(1) The deck and supporting structure of every sidewalk shed shall be constructed to sustain a live load of at least 150 pounds per square foot without breaking, and if material is to be stored thereon such deck and supporting structure shall be constructed to sustain a live load of not less than 300 pounds per square foot without breaking. Every sidewalk shed shall be so erected as to provide a vertical clearance of not less than seven and one-half feet at any point above the walkway surface. Every sidewalk shed shall have such width as to allow the unimpeded passage of pedestrians at all times but in no case shall any sidewalk shed be less than five feet wide.

(2) The outside edge and the ends of the deck of every sidewalk shed shall be provided with a substantial enclosure at least 42 inches in height, consisting of boards not less than one inch thick laid close, or of screening formed of not less than No. 16 U.S. gage steel wire mesh with openings which will reject a one and one-half inch diameter ball, or of corrugated metal sheet of not less than No. 22 U.S. gage or of exterior grade plywood not less than one-half inch thick.

(3) The deck of every sidewalk shed shall consist of planks not less than two inches thick full size laid tight. Unless such deck is constructed solidly against the face of the building or other structure in such manner that no material, debris or other objects can fall on the sidewalk or other walkway surface, the side of the shed toward the building or other structure shall be solidly fenced with a barricade for its full height. Solid sliding or swinging gates or doors may be

provided for the movement of men and materials.
(4) Metal or other materials of equivalent strength and suitability may be used in lieu of wood in the construction of sidewalk sheds.
(5) Sidewalk sheds shall be provided with illumination having an intensity of not less than five-foot candles measured at the walkway level to insure the safe movement of persons.

(c) Barricades.
(1) Along every sidewalk or pedestrian thoroughfare where a building or other structure is to be constructed or demolished and where a sidewalk shed is not required by this Part (rule), there shall be erected a substantial barricade to prevent unauthorized persons from entering the site of such operations.
(2) Such barricade shall be a fence or equivalent barrier not less than six feet in height. Such barricade shall be of solid construction for its entire height and length except for such openings, provided with solid doors, as may be necessary for the proper performance of the work.
(3) Where the height of the building or other structure to be constructed or demolished is not more than 25 feet above the ground, grade or equivalent surface and where the distance from the sidewalk or pedestrian thoroughfare to the nearest point of such building or other structure is more than one half of the height of the building or other structure, a substantial safety railing constructed in compliance with this Part (rule) may be installed at the inside edge of such sidewalk or pedestrian thoroughfare in lieu of such solid barricade."

In opposition to the defendants' motion and in support of the alleged Industrial Code violations, plaintiff offers the report and affidavit of Peter T. Caravousanos, AIA, CCM, LEED AP. Mr. Caravousanos states, in his report, that "It was expected that persons/workers would traverse the area around or near the demolition zone, possibly below as well rendering it a 'thoroughfare' and that this condition necessitated the use of sidewalk sheds and barricades yet none were provided."

Plaintiff's speculation concerning the possibility that the lack of sidewalk shed or barricade may have caused plaintiff's injury is insufficient to raise an issue of fact and is unsupported by the facts as set forth herein.

Next plaintiff's allege a violation of 12 NYCRR §23-1.5.

The code section states:

"These general provisions shall not be construed or applied in contravention of any specific provisions of this Part (rule).

(a) Health and safety protection required. All places where employees are suffered or permitted to perform work of any kind in construction, demolition or excavation operations shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection for the lives, health and safety of such persons as well as of persons lawfully frequenting the area of such activity. To this end, all employers, owners, contractors and their agents and other persons obligated by law to provide safe working conditions, personal protective equipment and safe places to work for persons employed in construction, demolition or excavation operations and to protect persons lawfully frequenting the areas of such activity shall provide or cause to be provided the working conditions, safety devices, types of construction, methods of demolition and of excavation and the materials, means, methods and procedures required by this Part (rule). No employer shall suffer or permit an employee to work under working conditions which are not in compliance with the provisions of this Part (rule), or to perform any act prohibited by any provision of this Part (rule).
(b) General requirement of competency. For the performance of work required by this Part (rule) to be done by or under the supervision of a designated person, an employer shall designate as such person only such an employee as a reasonable and prudent man experienced in construction, demolition or excavation work would consider competent to perform such work.
(c) Condition of equipment and safeguards.
(1) No employer shall suffer or permit an employee to use any machinery or equipment which is not in good repair and in safe working condition.

(2) All load carrying equipment shall be designed, constructed and maintained throughout to safely support the loads intended to be imposed thereon.
(3) All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged."

Mr. Caravousanos alleges that defendants violated 12 NYCRR §23-1.5(a) and (b) by failing to insure a sequence of demolition that would protect plaintiff and failing to designate a supervisor to ensure proper bracing and shoring requirements. Unlike 12 NYCRR §23-1.5(c)(3), the provisions of 12 NYCRR §23-1.5(a) and (b) are mere general safety standards which do not support a cause of action under Labor Law §241(6) (*see Trombley v. DLC Elec., LLC*, 134 AD3d 1343 [3rd Dept 2015]; *Gillis v. Brown*, 133 AD3d 1374 [4th Dept 2015]; *Carrillo v. Circle Manor Apartments*, 131 AD3d 662 [2nd Dept 2015] *leave to appeal denied by* 27 NY3d 906; *compare Perez v. Scholes St. Corp.*, 134 AD3d 1085 [2nd Dept 2015]).

Plaintiff next alleges that defendants violated 12 NYCRR §23-3.2. This section of the Industrial Code provides:

"(a) Preparations for the demolition of any building or other structures.
(1) Before demolition is started, all glass in the exterior openings of the building or other structure to be demolished shall be removed.
(2) Before demolition is started, all gas, electric, water, steam and other supply lines shall be shut off and capped or otherwise sealed. In each such case, the service or utility company involved shall be notified in writing at least 24 hours in advance of the start of work on such lines.
(3) Where it is necessary to maintain any gas, electric, water, steam or other supply line during the demolition

operations, such lines shall be so protected with substantial coverings or shall be so relocated as to protect them from damage and to afford protection to any person. If such lines are to be relocated, the service or utility company involved shall be notified in writing at least 48 hours in advance of such relocation. In not more than one normal working day the service or utility company shall notify the employer of the procedure to be followed in performing such relocation and such procedure shall be followed by the employer.

(b) Protection of adjacent structures. During the demolition of any building or other structure, the employer performing such demolition shall examine the walls of all buildings or other structures adjacent to the one which is to be demolished. Such examination shall include a determination of the thickness and method of support of any wall of such adjacent buildings or other structures. Where there is any reason to believe that an adjacent building or other structure or any part thereof is unsafe or may become unsafe because of the demolition operations, such operations shall not be performed until means have been provided to insure the stability and to prevent the collapse of such adjacent buildings or other structures. Such means shall consist of sheet piling, shoring, bracing or the equivalent.

(c) Barricades. Demolition sites shall be fenced, barricaded or provided with sidewalk sheds in compliance with this Part (rule).

(d) Dust control. Provision shall be made at every demolition site to control the amount of airborne dust resulting from demolition operations by wetting the debris and other materials with appropriate spraying agents or by other means."

Peter Caravousanos states that "Although demolition was specific to the window mullion, terra cotta stone, surround, directly adjacent to the windows, the windows were not removed prior to demolition, and no mitigating measure[s] were taken should the windows happen to break and fall onto the workers during demolition or construction operations." Further, Mr. Caravousanos states that no shoring or bracing took place and no barricades were installed. Mr. Caravousanos concludes that "Had

barricades been installed, Mr. Turgeon would not have been concerned about protecting workers below and would have simply allowed the stone to fall to the ground." Mr. Caravousanos's statements concerning plaintiff's actions are wholly speculative and insufficient to withstand summary judgment (*see Solis v. 32 Sixth Ave. Co., LLC*, 38 AD3d 389 [1st Dept 2007]). Moreover, the work being performed was not demolition work as defined by the Industrial Code (*id.*).

As to the remaining alleged violations of the Industrial Code, specifically 12 NYCRR §23-1.33(a) and 12 NYCRR §23-3.3(c) the plaintiff fails to raise an issue of fact. As stated above 12 NYCRR §23-1.33 does not apply to workers on a construction site (*see Mancini v. Pedra Const.*, 293 AD2d 453 [2nd Dept 2002]; *Lawyer v. Hoffman*, 275 AD2d 541 [3rd Dept 2000]). Additionally, it is clear from the deposition testimony submitted by the defendants and the plaintiff, 12 NYCRR §23-3.3 is not applicable to the facts at hand (*see Solis v. 32 Sixth Ave. Co., LLC*, 38 AD3d 389 [1st Dept 2007]; *Sparkes v. Berger*, 11 AD3d 601 [2nd Dept 2004]; *Quinlan v. City of New York*, 293 AD2d 262 [1st Dept 2002]; *Ofri v. Waldbaum, Inc.*, 285 AD2d 536 [2nd Dept 2001]).

Based upon the foregoing, defendants' motion is granted in its entirety. Plaintiff's complaint is dismissed.

The foregoing constitutes the decision and order of the

Court.

Dated: September 16, 2016
Poughkeepsie, New York

ENTER

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