SHORT FORM ORDER

INDEX No. 05-4077

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 4-17-09 (#003)
MOTION DATE 5-4-09 (#004)
ADJ. DATE 1-24-12
Mot. Seq. # 003 - MotD
004 - MotD

DONNA JEAN WILSON, Plaintiff, - against - CEACREST CONSTRUCTION CORP., GIAQUINTO MASONRY, INC, GIAQUINTO MASONRY, LLC and PIKE MECHANICAL, Defendants.	BRODY, O'CONNOR & O'CONNOR Attorney for Plaintiff 7 Bayview Avenue Northport, New York 11768 WELLINGHORST & FRONZUTO Attorney for Ceacrest Construction Corp. 4 Franklin Avenue Ridgewood, New Jersey 07450 JEFFREY S. SHEIN & ASSOCIATES, P.C. Attorney for Giaquinto Masonry 575 Underhill Boulevard, Suite 112 Syosset, New York 11791
PIKE MECHANICAL, Third-Party Plaintiff, - against - WELSBACH ELECTRIC CORP., L.I., Third-Party Defendant.	ANDREA G. SAWYERS, ESQ. Attorney for Pike Mechanical P.O. Box 9028, 3 Huntington Quadrangle Melville, New York 11747 LONDON FISCHER LLP Attorney for Welsbach Electric Corp, L.I.. 59 Maiden Lane New York, New York 10038

Upon the following papers numbered 1 to 61 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; 18 - 29; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 30 - 46; 47 - 51; 52 - 53; Replying Affidavits and supporting papers 52 -53; 54 - 55; 56 - 57; 58 - 59; 60 - 61; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for the purpose of determination; and it is further

ORDERED that the motion by defendant The Pike Company, incorrectly sued herein as Pike Mechanical, for, *inter alia*, summary judgment dismissing the complaint and all cross claims asserted against

it or, in the alternative, summary judgment on its cross claims for indemnification is granted to the extent that (1) it seeks summary judgment dismissing so much of the plaintiff's complaint as alleges a cause of action pursuant to Labor Law §240(1) as against it; and (2) it seeks summary judgment dismissing so much of the plaintiff's complaint as alleges a cause of action pursuant to Labor Law §241(6) premised on a violation of 12 NYCRR §23-1.5 as against it, and is otherwise denied; and it is further

ORDERED that the motion by defendants Giaquinto Masonry, Inc. and Giaquinto Masonry, LLC, for summary judgment dismissing the complaint and all cross claims asserted against them is granted to the extent that (1) it seeks summary judgment dismissing so much of the plaintiff's complaint as alleges a cause of action pursuant to Labor Law §240(1) as against it, (2) it seeks summary judgment dismissing so much of the plaintiff's complaint as alleges a cause of action pursuant to Labor Law §241(6) as against it, and (3) it seeks summary judgment dismissing so much of the plaintiff's complaint as alleges a cause of action pursuant to Labor Law §200 as against it, and is otherwise denied.

In the instant action, the plaintiff seeks to recover damages for personal injuries which she purportedly sustained when she tripped and fell on a pile of debris that was present at a construction site located in Manorville, New York. The owner of the subject premises Eastport/South Manor Central High School District (hereinafter the district), contracted directly with various prime contractors for the construction of a new school building at the location. The district contracted with defendant Sea Crest Construction, incorrectly sued herein as Ceacrest Construction, (hereinafter Sea Crest), pursuant to a written agreement, to perform general construction work including installation of the foundation, exterior walls, structural steel, windows and interior finishings. Sea Crest subcontracted the masonry work required under its agreement to defendants Giaquinto Masonry, Inc. and Giaquinto Masonry, LLC (hereinafter Giaquinto). The district contracted directly with the plaintiff's employer, non-party Wellsbach Electric, to perform the electrical work at the construction site. The district hired The Pike Company, incorrectly sued herein as Pike Mechanical, (hereinafter Pike), pursuant to a written agreement, to act as the construction manager at the construction site.

In her complaint, the plaintiff alleges that the defendants are liable for her injuries based on their violation of Labor Law §§200 and 241, as well as, common law negligence. The bill of particulars further alleges a violation of Labor Law §240. The plaintiff alleges that the defendants' were negligent in, *inter alia*, creating a dangerous and defective condition at the job site, knowingly allowing the job site to become and remain in a defective and dangerous condition, failing to provide the plaintiff with a safe place to work, failing to provide the plaintiff with adequate safety devices, failing to properly clean the premises so as to prevent the accumulation of construction debris, failing to provide a safe and suitable passageway into the building, failing to properly inspect the work areas, and ignoring prior complaints regarding the dangerous condition of the job site. In their respective answers, each of the defendants asserts cross claims against their co-defendants for indemnification.

Pike now moves for summary judgment dismissing the complaint and all cross claims asserted against it. Specifically, Pike contends that it is entitled to summary judgment (1) dismissing the Labor Law claims because it was not an agent of the owner or general contractor and, thus, cannot be held liable under such provisions, (2) dismissing the Labor Law §240 claim on the grounds that the plaintiff's accident was not an elevation related accident as contemplated by such statute, (3) dismissing the Labor Law §241(6) claims on the grounds that the Industrial Code provisions relied on in support of such claims are either too general or inapplicable to the facts of this case, and (4) dismissing the Labor Law §200 and common law negligence

claims because Pike did not direct or control the plaintiff's work and did not have notice of the condition that allegedly caused the plaintiff's accident. In the alternative, Pike seeks summary judgment on its cross claims for contractual indemnification and breach of contract against Sea Crest, and conditional summary judgment on its cross claims for common law indemnification against Sea Crest and Giaquinto.

By separate motion, Giaquinto moves for summary judgment dismissing the plaintiff's complaint and any and all cross claims asserted against it. Specifically, Giaquinto contends that it is entitled to summary judgment (1) dismissing the Labor Law claims because it is not liable to the plaintiff under such provisions, (2) dismissing the Labor Law §241(6) claim because there was no Industrial Code violation to support such a claim and because the condition complained of was open and obvious, and (3) dismissing the Labor Law §200 and common law negligence claims because (a) the accident at issue occurred during its ongoing operations and there is no evidence that it had the opportunity to remove debris, (b) the dangerous condition complained of was open and obvious, (c) the plaintiff assumed the risk of her injury, and (d) it did not control the means or methods utilized by the plaintiff in the performance of her work.

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 demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

In support of its motion, Pike submits, *inter alia*, the plaintiff's deposition testimony, the deposition testimony of Richard Heller on behalf of Pike, the agreement for Construction Management Services between Pike and the district, the deposition testimony of Victor Czartorysky on behalf of Sea Crest, the agreement between the district and Sea Crest, the deposition testimony of David Sciarretta on behalf of Giaquinto, and Sea Crest's purported insurance policy which was in effect at the time of the plaintiff's accident. In support of its motion, Giaquinto submits, *inter alia*, the plaintiff's deposition testimony, the deposition testimony of David Sciarretta on behalf of Giaquinto, the deposition testimony of Victor Czartorysky on behalf of Sea Crest, and the deposition testimony of Richard Heller on behalf of Pike.

As is relevant to these motions, the plaintiff testified that she had been at the subject job site on a regular basis for approximately two to three months prior to the accident. The accident at issue occurred at approximately 7:30 a.m. on July 23, 2002. At the time of the accident, she was bringing materials from her employer's trailer into the interior of the building, and was carrying a bundle of electrical pipe on her shoulder. There was debris, consisting of broken concrete and cinder blocks, in front of the entrance to the building. The pile of debris was approximately 8 to 12 inches off of the ground. According to the plaintiff, you could not walk through the entrance without climbing over the pile of debris. The plaintiff testified that as she attempted to climb over the pile of debris to enter the building, her foot slipped and she fell. According to the plaintiff, she had observed the particular pile of debris prior to the date of the accident. She was unsure exactly how long the pile of debris was present in the location, but testified that she first recalled seeing the pile when the

bricklayers started their work in the area. The plaintiff admitted that she did not actually observe who put the debris in the entranceway. The plaintiff testified that she repeatedly complained to her supervisors prior to the date of the accident about the condition of the entranceway and that her complaints were ignored. The plaintiff testified that piles of concrete and broken cinder blocks were also present throughout the job site. On a date prior to the incident at issue, she had twisted her ankle on a pile of debris that was present in another location. The plaintiff testified that she did not have contact with any one from Sea Crest, and that the only direction she received at the job site was from her employer, Welsbach Electric.

Richard Heller, project manager for Pike at the subject job site, testified that Pike was the construction manager for the subject job through September of 2002. A construction manager acts on behalf of the owner to manage the project. The district contracted directly with at least five prime contractors to perform work at the subject job site. It was Pike's job to coordinate these trades. According to Heller, Sea Crest was the general construction prime hired directly by the district, and Pike did not have any involvement with any subcontractors hired or subcontracts executed by Sea Crest in the performance of this work. Heller's duties as project manager included holding weekly coordination meetings with the prime contractors. These meetings were attended by the owner, the construction manager, and a representative of each prime. According to Heller, site safety would be discussed at these coordination meetings as was required. Heller testified that each prime contractor was responsible for placing its own debris into dumpsters, which were provided by the owner. Heller testified that he was present at the job site on a daily basis, and did not recall observing debris consisting of broken blocks or bricks throughout the job site. If he had seen such a condition, he would have brought it up at the coordination meeting and had the prime contractors clean it up. Specifically, he would have brought the condition to the attention of Sea Crest, because it was Sea Crest's masonry subcontractor that worked with such materials. Heller initially testified that he did not recall any complaints about primes or their subcontractors, including Sea Crest's masonry subcontractor, not cleaning up their debris. He testified that if such a complaint had been made it would have been discussed at the coordination meeting. Heller, thereafter, admitted that minutes documenting the items discussed at the coordination meetings indicated that clean up of construction debris was repeatedly discussed. In this regard, (1) April 22, 2002 meeting minutes indicate a discussion regarding cleanup of the site and that each prime contractor was responsible for its own cleanup, (2) June 12, 2002 minutes indicate a discussion regarding cleanup not being performed as required, and (3) July 10, 2002 minutes indicate that clean up of the job site was a continuing issue.

Victor Czartorysky, project manager for Sea Crest at the subject job site, testified that Sea Crest had a contract with the district to construct the foundation, exterior walls, structural steel, windows and interior finishing of the new school building. Sea Crest considered itself the general contractor for the aforementioned portion of the work on the job site. Sea Crest had meetings with its subcontractors on a regular basis about workmanship, scheduling and quality of work. Sea Crest also held safety meetings and turned over the minutes of such meetings to Pike. Sea Crest subcontracted construction of all interior and exterior masonry walls to defendant Giaquinto, which had its own foreman on the job site. Giaquinto's work required the use of bricks and cinder blocks, and as far as Czartorysky was aware, no other contractors had occasion to use such materials in association with their work at this job site. Sea Crest had a field superintendent on the job who was responsible for overseeing construction, maintaining the schedule, and coordinating the work of its subcontractors and the other prime contractors at the job site. Cleanliness of the job site was within the responsibilities of the field superintendent. It was his understanding that, pursuant to its agreement with the district, Sea Crest was responsible for cleaning up after itself and its subcontractors, and that debris was to be placed in containers provided by the district. He recalled several occasions where it was requested that the

owner provide more waste containers. Czartorysky testified that he never directly observed Giaquinto creating debris, but did observe debris below the scaffold on which they were working. He testified that Giaquinto was responsible for cleaning up any debris that it made during the course of its work. Czartorysky testified that he did not recall hearing anyone complain, prior to the date of the accident, that the entranceway at issue was blocked by debris, and did not recall ever observing debris at such entrance.

According to Czartorysky, Pike represented the district in the day-to-day management of the project, and Heller and two assistants were present on the job site on a daily basis on behalf of Pike. Czartorysky testified that he dealt with Heller on a daily basis. He testified that Pike ran weekly meetings, which were attended by all of the prime contractors on the job site, for the purpose of coordination and review of any issues. Itineraries were prepared prior to such meeting and minutes were taken at these meetings and distributed to those who attended. Site cleanliness and safety issues were discussed at these meetings. The job site policy was that every prime contractor was responsible for the clean up of its own debris. Prime contractors could request certain issues be discussed at these meetings. Czartorysky initially testified that he did not become aware of any complaints regarding the cleanliness of the job site or the presence of dangerous conditions on the job site prior to the date of the accident. However, he thereafter admitted that at certain meetings, concerns were expressed with respect to the cleanliness of the job site and the presence of construction debris in the areas being traversed by workers. He testified that it was mentioned that some prime contractors were delinquent in cleaning up their portion of the work. He believed that, on one occasion, Giaquinto may have been named as such a contractor based on the presence of masonry debris along a wall somewhere, but he did not recall when. It was his understanding that Sea Crest's field supervisor took action to have the condition corrected, but he did not know for sure. Upon review of minutes from Pike's coordination meetings, Czartorysky admitted that April 17, 2002 minutes indicated a discussion regarding contractors' responsibility to clean up and if they did not clean up that Pike would do so and back charge their contracts accordingly. According to Czartorysky, the complaints precipitating this discussion did not involve Sea Crest. Czartorysky further admitted that (1) April 22, 2002 coordination meeting minutes stated that Sea Crest had hired laborers to clean up the debris of their subcontractors and that all other primes needed to take whatever measures necessary to maintain a clean work environment, (2) June 12, 2002 coordination meeting minutes stated that cleanup was not being performed as required, (3) July 3, 2002 coordination meeting minutes indicated that there was a "big open issue" with respect to each prime contractor's responsibility for site clean up, and (4) July 10, 2002 and July 24, 2002 coordination meeting minutes both indicate Pike's statements that the job site needed general clean up. According to Czartorysky, any complaints about job site clean up at these meetings did not involve Sea Crest, and Sea Crest was the only prime contractor at the job site that was cleaning up after itself.

David Sciarretta, a brick mason employed by Giaquinto, was the project foreman for Giaquinto on the subject job site. Sciaretta testified that Giaquinto was working at the job site, as a subcontractor of Sea Crest, from approximately the Spring of 2002 through the Spring of 2003, and was hired to erect the masonry structure of the new school building. Giaquinto worked with cinder block, concrete block, and mortar in performing its work and generated masonry debris which consisted of chipped or broken bricks and blocks as well as masonry drippings. The majority of Giaquinto's cutting, and the formation of piles of debris, would occur at centralized cutting locations which were placed based on their proximity to the particular work being performed. Sciarretta had no recollection of, or documentation indicating, where such centralized cutting locations were located. According to Sciarretta, Giaquinto would have between 75 and 125 workers at the site at a given time, scattered throughout various locations and he would monitor all of their work throughout the day. Sciarretta admitted that Giaquinto was responsible for daily cleanup, disposal of debris, and securing of all equipment and material.

Sciarretta testified that Giaquinto's contract with Sea Crest required it to remove the masonry debris it generated and that Sea Crest's field superintendent, Bill Clarke, told them how masonry debris should be disposed of, to wit, placed in the containers provided. According to Sciaretta, Giaquinto employed two to seven laborers on the job site per day for the purpose of cleaning up masonry debris, and always checked corridors, entrances and exits to ensure they were clear. At times Sciarretta made complaints to Clarke, and possibly to Heller, that the dumpsters provided were not sufficient to handle the debris generated by Giaquinto. He also made complaints that additional dumpsters were not brought in a timely fashion. On occasions where there were not enough dumpsters present at the job site, Giaquinto would gather its debris in steel clean up boxes until it could be transferred to a dumpster.

Sciarretta testified that he did not deal with anyone from Pike while at the job site but dealt with Sea Crest. He attended weekly coordination meetings, which were run by Clarke, and which all Sea Crest subcontractors were required to attend. These meetings were also attended by a representative of Pike. In addition, Sciarretta attended weekly toolbox meetings, which were held by Giaquinta's field foreman, and attended by only Giaquinta employees. Sciarretta never attended any meetings held by Pike. Sciaretta recalled occasions where the topic of debris disposal was brought up at the weekly coordination meetings, and complaints about general clean up being required on a daily basis. He also recalled Clarke contacting him with respect to the need for masonry debris clean up and Clarke informing him of complaints regarding the presence of masonry debris. He recalled Clarke mentioning that electricians at the site had questions about the presence of debris, but did not recall when those concerns arose. Sciarretta testified that he had conversations with respect to the clean up of masonry debris with Sea Crest personnel other than Clarke as well. He also recalled random occasions when he was walking around the site with the construction manager's representative, Heller, where Heller would reiterate the need for general clean up of masonry debris. Sciarretta testified that in the Summer of 2002, he became aware that the plaintiff, an electrician at the job site, was claiming to have been injured after tripping on masonry debris at an entrance of the building, and that Clarke told him an accident report was made stating that Giaquinto was not cleaning up its debris in a timely fashion, and that several complaints had been lodged with Pike. When he was notified of the incident by Clarke a few days after the incident, he went to the area and observed that it was clear. Initially, Sciarretta testified that Giaquinto's work in the area of the accident was completed a couple of weeks prior to the incident, but he, thereafter, testified that he was unsure if the work was completely done. Sciarretta admitted the existence of a work order ticket dated July 22, 2002 and July 23, 2002 indicating Giaquinto was cleaning debris at the site. According to Sciarretta, he had a conversation with the plaintiff, prior to finding out about the accident report, wherein she stated that she injured her arm at home and did not mention having tripped or fallen at the job site.

The evidence submitted establishes, as a matter of law, that Giaquinto is not liable pursuant to Labor Law §§200, 240(1) and 241(6), but fails to establish, as a matter of law, that Pike cannot be held liable under such provisions. Labor Law §§200, 240, and 241 apply to owners, general contractors, or their "agents" (*see* ***Guclu v 900 Eighth Ave. Condominium, LLC***, 81 AD3d 592, 916 NYS2d 147 [2d Dept 2011]; *see also* Labor Law §200[1], §240[1]; §241). The evidence submitted establishes that Giaquinto cannot be held liable pursuant to the Labor Law. In this regard, the evidence submitted establishes that Giaquinto was not an owner, general contractor, or agent thereof at the subject job site. Rather, Giaquinto was a subcontractor hired by an entirely separate prime contractor, Sea Crest, and had no direct agreement or contact with either the district or Pike. Giaquinto was not delegated authority and control over the job site and did not have authority or control over the plaintiff, an employee of an entirely different trade (*see* ***Urban v No. 5 Times Sq. Dev., LLC***, 62 AD3d 553, 879 NYS2d 122 [1st Dept 2009]). A prime contractor hired for a specific project is subject to liability under

the Labor Law as a statutory agent of the owner or general contractor only if it has been delegated the work in which plaintiff was engaged at the time of his injury, and is therefore responsible for the work giving rise to the duties referred to in and imposed by these statutes (***Nasuro v PI Assoc.***, 49 AD3d 829, 858 NYS2d 175 [2d Dept 2008]; ***Coque v Wildflower Estates Dev.***, 31 AD3d 484, 488, 818 NYS2d 546 [2d Dept 2006]; *see* ***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 318, 445 NYS2d 127 [1981]; *cf.* ***Pino v Irvington Union Free School Dist.***, 43 AD3d 1130, 843 NYS2d 133 [2d Dept 2007]). Although sufficient to support a claim in common-law negligence, Giaquinto's creation of the purportedly dangerous condition is insufficient to support a claim under the Labor Law (*see* ***Urban v No. 5 Times Sq. Dev., LLC***, *supra*).

In opposition to Giaquinto's *prima facie* showing of entitlement to summary judgment dismissing the causes of action alleging violation of the Labor Law as against it, the plaintiff fails to raise a triable issue of fact as to Giaquinto's liability pursuant to the Labor Law. Accordingly, the branch of Giaquinto's motion which seeks summary judgment dismissing the plaintiff's causes of action pursuant to Labor Law §§240(1), 241(6) and 200, as asserted against it, is granted (*see* ***Frisbee v 156 R.R. Ave. Corp.***, 85 AD3d 1258, 924 NYS2d 640 [3d Dept 2011]; ***Urban v No. 5 Times Sq. Dev., LLC***, *supra*).

The evidence submitted fails to establish that Pike cannot be held liable under the Labor Law because it was only a "construction manager" and not an owner or general contractor. Although a "construction manager" is generally not considered a "contractor" or "owner" within the meaning of the subject Labor Law provisions, it may nonetheless become responsible for the safety of the workers at a construction site if it has been delegated the authority and duties of a general contractor, or if it functions as an agent of the owner of the premises (***Domino v Professional Consulting, Inc.***, 57 AD3d 713, 869 NYS2d 224 [2d Dept 2008]; ***Pino v Irvington Union Free School Dist.***, *supra*; *see* ***Walls v Turner Constr. Co.***, 4 NY3d 861, 863-64, 798 NYS2d 351 [2005]; ***Russin v Louis N. Picciano & Son***, *supra*). "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done" at the location a plaintiff is injured, and has "the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition" (*see* ***Perez v 347 Lorimer, LLC***, 84 AD3d 911, 923 NYS2d 138 [2d Dept 2011]; ***Rodriguez v JMB Architecture, LLC***, 82 AD3d 949, 919 NYS2d 40 [2d Dept 2011]). In this regard, it is well settled that "[i]t is not a [party's] title that is determinative, but the amount of control or supervision exercised" (***Perez v 347 Lorimer, LLC***, *supra*; ***Rodriguez v JMB Architecture, LLC***, *supra*; ***Barrios v City of New York***, 75 AD3d 517, 905 NYS2d 255 [2d Dept 2010]). Here, Pike failed to establish the absence of triable issues of fact regarding whether it had sufficient authority to supervise and control the work being done at the location the plaintiff was injured and the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition (*see* ***Walls v Turner Constr. Co.***, *supra*; ***Gonzalez v TJM Constr. Corp.***, 87 AD3d 610, 928 NYS2d 344 [2d Dept 2011]; ***Barrios v City of New York***, *supra*; *compare* ***Rodriguez v JMB Architecture, LLC***, *compare* ***Florez v Conlon***, 82 AD3d 831, 918 NYS2d 369 [2d Dept 2011]). Indeed, the agreement between Pike and the district expressly required that Pike "shall at all times require the Trade Contractors to keep the premises reasonably free from accumulation of waste material or rubbish caused by the work" and that "prior to substantial completion of each Trade contract and of the project, [Pike] shall cause all waste material and rubbish not timely removed...to be removed from and about the site" (2.6.18). The agreement further required Pike to "demand compliance by the Trade Contractors with all applicable Federal, state and local statutes, rules, regulations and codes regarding safety," that "whenever the Construction Manager becomes aware of any unsafe practice or condition at the work site which would constitute a hazard to school children or other users of facilities or properties in proximity to the work site, the Construction Manager shall immediately direct the Trade Contractors to cease work which constitutes such

unsafe practice or hazardous condition," and that the Construction Manager shall perform such remedial safety work as a Trade Contractor may fail or refuse to perform." Furthermore, the deposition testimony submitted indicates that Pike actually exercised authority over site safety, especially the clean up of debris. In this regard, the testimony submitted indicates, *inter alia*, that Pike had representatives present on the job site daily, held weekly safety meetings with the prime contractors at which safety was discussed, and repeatedly addressed the issue of the existence of debris at the job site at such meetings (*see* ***Barrios v City of New York***, *supra*; ***Pino v Irvington Union Free Sch. Dist.***, *supra*).

Notwithstanding the foregoing, Pike demonstrated a *prima facie* entitlement to summary judgment dismissing the plaintiff's action to the extent that the plaintiff purports to assert a cause of action pursuant to Labor Law §240(1). Labor Law §240(1) provides in pertinent part: "All contractors and owners and their agents, . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed." In ***Rocovich v Consolidated Edison Co*** (78 NY2d 509, 577 NYS2d 219 [1991]), the Court of Appeals noted that the hazards contemplated and leading to the enactment of Labor Law §240(1) are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured. In ***Narducci v Manhasset Bay Assocs***, (96 NY2d 259, 267, 727 NYS2d 37 [2001]), describing cases involving these risks as "falling worker" and "falling object" cases respectively, the Court of Appeals noted that "[not] 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)." In ***Toefer v Long Island R.R.*** (4 NY3d 399, 795 NYS2d 511 [2005]), the Court of Appeals reiterated this finding and further noted that, in some cases involving falls of workers and objects, the Court had held that where a plaintiff was exposed to the usual and ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law §240(1), the plaintiff cannot recover under the statute (*see also* ***Rodriguez v Margaret Tietz Ctr. for Nursing Care, Inc.***, 84 NY2d 841, 843, 616 NYS2d 900 [1994]). In the instant matter, it is undisputed that the plaintiff's trip and fall accident was not related to an elevation-related hazard contemplated by Labor Law §240(1) (*see* ***Toefer v Long Island R.R.***, *supra*; ***Kutza v Bovis Lend Lease LMB, Inc.***, __AD3d__, 2012 NYAppDiv LEXIS 3674 [1st Dept May 10, 2012]; ***Pope v Safety & Quality Plus, Inc.***, 74 AD3d 1040, 903 NYS2d 124 [2d Dept 2010]; ***Snellman v Village of Port Chester***, 54 AD3d 371, 863 NYS2d 234 [2d Dept 2008]). The plaintiff does not oppose this branch of Pike's motion. Accordingly, the complaint is dismissed insofar as it purports to assert a cause of action based on violation of Labor Law §240(1).

With respect to the branch of Pike's motion which seeks summary judgment dismissing so much of the plaintiff's complaint as seeks recovery pursuant to Labor Law §241(6), such provision imposes a nondelegable duty of reasonable care upon an owner, general contractor, or agent to provide reasonable and adequate protection to workers. Pursuant to this provision, a violation of an explicit and concrete provision of the Industrial Code by a participant in the construction project constitutes some evidence of negligence for which the owner or general contractor agent may be held vicariously liable (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 348, 670 NYS2d 816 [1998]; ***Melchor v Singh***, 90 AD3d 866, 935 NYS2d 106 [2d Dept 2011]; ***Fusca v A & S Constr., LLC***, 84 AD3d 1155, 924 NYS2d 463 [2d Dept 2011]; ***Forschner v Jucca Co.***, 63 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; ***Cun-En Lin v Holy Family Monuments***, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]; *see also* ***Mosher v State***, 80 NY2d 286, 590 NYS2d 53 [1992]). In order to

recover damages on a cause of action alleging a violation of Labor Law §241(6), a plaintiff must establish the defendant's violation of an Industrial Code provision which sets forth specific safety standards and that such violation was a proximate cause of the accident (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, *supra*; ***Ramos v Patchogue-Medford School Dist.***, 73 AD3d 1010, 906 NYS2d 45 [2d Dept 2010]; ***Hricus v Aurora Contrs.***, 63 AD3d 1004, 883 NYS2d 61 [2d Dept 2009]; ***Seaman v Bellmore Fire Dist.***, 59 AD3d 515, 873 NYS2d 181 [2d Dept 2009]; ***Fitzgerald v New York City School Constr. Auth.***, 18 AD3d 807, 796 NYS2d 694 [2d Dept 2005]). The rule or regulation alleged to have been breached must be a specific, positive command and must be applicable to the facts of the case (*see* ***Forschner v Jucca Co.***, *supra*; ***Cun-En Lin v Holy Family Monuments***, *supra*).

In his complaint, the plaintiff alleges that the defendants are liable pursuant to Labor Law §241(6) based on their purported violations of the regulations found at 12 NYCRR §§ 23-1.5 and 23-1.7. The plaintiff's cause of action pursuant to Labor Law §241(6) must be dismissed to the extent that it is premised on the defendants' violation of 12 NYCRR §23-1.5. This provision does not set forth a specific standard of conduct, but sets forth a general standard of care for employers, and thus cannot serve as a predicate for liability for a Labor Law §241(6) claim (*see* ***Gasques v State of New York***, 15 NY3d 869, 910 NYS2d 415 [2010]; ***Ulrich v Motor Parkway Props., LLC***, 84 AD3d 1221, 924 NYS2d 493 [2d Dept 2011]; ***Spence v Island Estates at Mt. Sinai II, LLC***, 79 AD3d 936, 914 NYS2d 203 [2d Dept 2010]; ***Sparkes v Berger***, 11 AD3d 601, 783 NYS2d 390 [2d Dept 2004]). However, the evidence submitted fails to establish, as a matter of law, that Pike is entitled to summary judgment dismissing the plaintiff's cause of action pursuant to Labor Law §241(6) to the extent that it is premised on a violation of 12 NYCRR §23-1.7. Rather, there exists a triable issue of fact as to whether Pike can be held liable pursuant to Labor Law §241(6) based on a violation of 12 NYCRR §23-1.7 (e)(1), which provides that "all passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping." Similarly, there exists a triable issue of fact as to Pike's liability based on a violation of 12 NYCRR §23-1.7 (e)(2), which provides, in pertinent part, that "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" (*see* ***Laboda v VJV Dev. Corp.***, 296 AD2d 441, 745 NYS2d 67 [2d Dept 2002]; ***Samiani v New York State Elec. & Gas Corp.***, 199 AD2d 796, 605 NYS2d 516 [3d Dept 1993]). The evidence submitted, including the deposition testimony of the plaintiff and other parties, raises a triable issue of fact as to whether the plaintiff's trip and fall accident was caused by an accumulation of masonry debris which was present in a "passageway," "walkway," or thoroughfare (*see* ***Torres v Forest City Ratner Cos., LLC***, 89 AD3d 928, 933 NYS2d 71 [2d Dept 2011]; *compare* ***Burkoski v Structure Tone, Inc.***, 40 AD3d 378, 836 NYS2d 130 [1st Dept 2007]).

To the extent that the defendants argue that 12 NYCRR §23-1.7 (e)(1) and (2) are not applicable because the masonry debris over which the plaintiff purportedly tripped was either an integral part of the work being performed at the time of the accident or was material that was "in use at the time of the accident" and "consistent with the work being done in the area at such time," such argument is unavailing as it is not supported by the evidence submitted (***Kutza v Bovis Lend Lease LMB, Inc.***, *supra*; ***Torres v Forest City Ratner Cos., LLC***, *supra*; ***Tighe v Hennegan Constr. Co., Inc.***, 48 AD3d 201, 850 NYS2d 417 [1st Dept 2008]; *compare* ***Smith v New York City Hous. Auth.***, 71 AD3d 985, 897 NYS2d 232 [2d Dept 2010]; ***Galazka v WFP One Liberty Plaza Co., LLC***, 55 AD3d 789, 865 NYS2d 689 [2d Dept 2008]; ***Burkoski v Structure Tone, Inc.***, *supra*; ***Harvey v Morse Diesel Int'l***, 299 AD2d 451, 750 NYS2d 117 [2d Dept 2002]). Accordingly, the branch of Pike's motion seeking dismissal of the plaintiff's cause of action pursuant to Labor

Law §241(6) is granted to the extent that it seeks dismissal of so much of such claim as is premised on the defendants' purported violation of §12 NYCRR 23-1.5 and is otherwise denied.

The branch of Pike's motion seeking summary judgment dismissing the causes of action pursuant to Labor Law §200 and common law negligence, as asserted against it, is denied. Labor Law §200 merely codifies the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, *supra* at 352; ***Gasques v State of New York***, *supra*; ***Dooley v Peerless Importers***, 42 AD3d 199, 837 NYS2d 720 [2d Dept 2007]). When, as here, a worker's injuries result from an unsafe or dangerous condition existing at a work site, the liability of a party will depend upon whether the party had control of the place where the injury occurred, and whether it either created, or had actual or constructive notice of, the dangerous condition (*see* ***Vella v One Bryant Park, LLC***, 90 AD3d 645, 935 NYS2d 31 [2d Dept 2011]; ***Cook v Orchard Park Estates, Inc.***, 73 AD3d 1263, 902 NYS2d 674 [3d Dept 2010]; ***Harsch v City of New York***, 78 AD3d 781, 910 NYS2d 540 [2d Dept 2010]; ***Martinez v City of New York***, 73 AD3d 993, 901 NYS2d 339 [2d Dept 2010]). To provide constructive notice, the defect must be visible and apparent and exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646; ***Vella v One Bryant Park, LLC***, *supra*).

As discussed *supra* the evidence submitted by Pike indicates that Pike exercised control over construction debris clean up at the subject job site (*see* ***Samiani v New York State Elec. & Gas Corp.***, *supra*). The evidence submitted in support of the motion fails to demonstrate that Pike was free from negligence in the fulfillment of its obligations to ensure that the job site was free from the hazards of accumulated debris (*see* ***Kutza v Bovis Lend Lease LMB, Inc.***, *supra*; ***Hernandez v Columbus Ctr., LLC***, 50 AD3d 597, 857 NYS2d 84 [1st Dept 2008]; *compare* ***Burkoski v Structure Tone, Inc.***, *supra*; ***John v Tishman Constr. Corp. of N.Y.***, 32 AD3d 458, 819 NYS2d 475 [2d Dept 2006]). Moreover, the evidence submitted raises triable issues of fact as to whether Pike had actual notice of the presence of the subject masonry debris at the job site (*see* ***Kutza v Bovis Lend Lease LMB, Inc.***, *supra*; ***Vella v One Bryant Park, LLC***, *supra*; *compare* ***Harvey v Morse Diesel Int'l***, *supra*) as well as to whether such condition existed for a sufficient length of time prior to the accident for Pike to have discovered and remedied it (*see* ***Vella v One Bryant Park, LLC***, *supra*; ***Urban v No. 5 Times Sq. Dev., LLC***, *supra*). In light of Pike's failure to establish its *prima facie* entitlement to summary judgment dismissing the causes of action for violation of Labor Law §200 and common law negligence as asserted against, this branch of its motion is denied without consideration of the sufficiency of the plaintiff's opposition papers.

In a similar vein, the branch of Giaquinto's motion seeking summary judgment dismissing the plaintiff's cause of action for common law negligence as asserted against it must be denied. Giaquinto fails to submit sufficient evidence to demonstrate its entitlement to judgment, as a matter of law, dismissing the claim for common law negligence as asserted against it. Where a subcontractor creates a condition on the premises that results in an unreasonable risk of harm and that condition is a proximate cause of a worker's injuries, then such subcontractor may be held liable in common-law negligence (*see* ***Frisbee v 156 R.R. Ave. Corp.***, *supra*). The evidence submitted fails to eliminate the existence of a triable issue of fact as to whether Giaquinto created the alleged dangerous condition complained of, the accumulation of masonry debris, during the performance of its work (*see* ***Urban v No. 5 Times Sq. Dev., LLC***, *supra*; ***Vasquez v Minadis***, 86 AD3d 604, 927 NYS2d 670 [2d Dept 2011]; ***Lavaud v City of New York***, 45 AD3d 536, 844 NYS2d 719 [2d Dept 2007]; *compare* ***Posa v Copiague Pub. School Dist.***, 84 AD3d 770, 922 NYS2d 499 [2d Dept 2011]).

Contrary to the plaintiff's contention, the record, including the testimony of Giaquinto's own representative, does not support a finding that the masonry debris complained of was the product of ongoing operations and that, as such, Giaquinto did not have an adequate opportunity to remove such debris. In addition, neither the plaintiff's purported awareness of the existence of the defective condition nor the open and obvious nature of the condition absolves it from liability (*see* ***Tighe v Hennegan Constr. Co., Inc.***, *supra*). It is now well settled that the open and obvious nature of a defect only raises a question as to the injured plaintiff's comparative negligence and does not, as a matter of law, negate liability on the part of those who created the defect and/or are responsible for the project (*see* ***Figueroa v City of New York***, 89 AD3d 980, 933 NYS2d 377 [2d Dept 2011]; ***Cucuzza v City of New York***, 2 AD3d 389, 767 NYS2d 853 [2d Dept 2003]; ***Cupo v Karfunkel***, 1 AD3d 48, 767 NYS2d 40 [2d Dept 2003]; *see e.g.* ***Cortez v Northeast Realty Holdings, LLC***, 78 AD3d 754, 911 NYS2d 151 [2d Dept 2010]).

In light of the Court's determination, *supra*, that their exist triable issues of fact as to whether Pike and/or Giaquinto were negligent in the happening of the plaintiff's accident and the extent of such negligence, Pike and Giaquinto have failed to demonstrate a *prima facie* entitlement to summary judgment dismissing the cross claims against them for common law indemnification. Similarly, it would be premature at this juncture to determine the branch of Pike's motion which seeks conditional summary judgment on its cross claims for common law indemnification against Sea Crest and Giaquinto (*see* ***Urban v No. 5 Times Sq. Dev., LLC***, 62 AD3d 553, 879 NYS2d 122 [1st Dept 2009]; ***Samiani v New York State Elec. & Gas Corp.***, 199 AD2d 796, 605 NYS2d 516 [3d Dept 1993]; *cf.* ***Perez v 347 Lorimer, LLC***, 84 AD3d 911, 923 NYS2d 138 [2d Dept 2011]; *compare* ***Tighe v Hennegan Constr. Co., Inc.***, 48 AD3d 201, 850 NYS2d 417 [1st Dept 2008]).

Likewise, the branch of Pike's motion which seeks summary judgment on its cross claim for contractual indemnification against Sea Crest must be denied. The right to contractual indemnification depends upon the specific language of the contract between the parties (*see* ***Kielty v AJS Constr. of L.I., Inc.***, 83 AD3d 1004, 922 NYS2d 467 [2d Dept 2011]). With respect to indemnification, the contract between Sea Crest and the district provides, *inter alia*, that Sea Crest "shall indemnify and hold harmless the Owner, Architect, Architect's consultants, Construction Manager and agents and employees of them from and against claims, damages, losses and expenses ... arising out of or related to the performance of the Work, including but not limited to claims for bodily injury ... provided that the Contractor shall not be required to indemnify the Owner, Architect, Architect's consultants, Construction Manger or the agents and employees of them for damages arising out of bodily injury to persons ... initiated or proximately caused by or resulting from negligence of the owner, its dependent contractors, agents, employees or indemnities." Here, Pike has failed to establish an entitlement to indemnification pursuant to the terms of this agreement, as a matter of law, because the evidence submitted fails to establish that the plaintiff's injuries were not "initiated or proximately caused by or resulting from the negligence of the owner, its dependent contractors, agents, employees or indemnities." In addition, the Court notes that pursuant to General Obligations Law §5-322.1, Pike cannot recover for contractual indemnification if it is, in fact, found to be negligent (*see* ***Picchione v Sweet Constr. Corp.***, 60 AD3d 510, 875 NYS2d 42 [1st Dept 2009]; ***Castilla v K.A.B. Realty, Inc.***, *supra*; ***Linarello v City Univ. of N.Y.***, 6 AD3d 192, 774 NYS2d 517 [1st Dept 2004]; *see also* ***Brown v Two Exchange Plaza Partners***, 76 NY2d 172, 556 NYS2d 991 [1990]; ***Quevedo v New York***, 56 NY2d 150, 451 NYS2d 651 [1982]; *cf.* ***Armentano v Broadway Mall Props., Inc.***, 70 AD3d 614, 897 NYS2d 113 [2d Dept 2010]).

Lastly, to the extent that Pike seeks summary judgment in its favor and against Sea Crest on its

purported cause of action for breach of contract for failure to procure insurance, the Court notes that the pleadings before this Court do not indicate that Pike has properly asserted such a cross claim as against Sea Crest. Accordingly, the branch of Pike's motion which purports to seek summary judgment on such cross claim must be denied.

Dated: June 13, 2012
Central Islip, NY

HON. HECTOR D. LASALLE, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION