Prela v Morgan Contr. Corp.
2015 NY Slip Op 31618(U)
August 26, 2015
Supreme Court, Queens County
Docket Number: 26023/2011
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Hon. David Elliot
Justice

IAS PART 14

PJETER PRELA, et ano.,
Plaintiff(s),

-against-

THE MORGAN CONTRACTING CORP., et al.,
Defendant(s).

Index
No. 26023 2011

Motion
Date June 18, 2015

Motion
Cal. No. 112

Motion
Seq. No. 2

The following papers numbered 1 to 15 read on this motion by defendants for an order granting summary judgment dismissing the complaint.

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Notice of Motion-Affidavits-Exhibits.....	1- 9
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Memorandum of Law.....	

Upon the foregoing papers it is ordered that the motion is determined as follows:

In June 2008, the New York City School Construction Authority (SCA) commenced a construction project at PS 13 located at 55-01 94th Street, Elmhurst, New York. The first phase of the project consisted of the completion of a new addition to the school building, and the second phase of the project consisted of the demolition of the existing, and construction of a new, kitchen and cafeteria. Defendant The Morgan Contracting Corporation (Morgan) was the general contractor for this project; defendant Cardoza Plumbing Corp. (Cardoza) was the plumbing contractor; and ACS System Associates, Inc. (ACS), was hired to perform sheet metal and HVAC work.

Plaintiff Pjeter Prela, a supervisor employed by ACS, alleges that he sustained personal injuries during the course of his employment on November 30, 2010, when he tripped on three pipes (commonly referred to as stub-ups) approximately an inch wide and extending up 8 to 10 inches through the concrete floor of the kitchen floor of PS 13.

Plaintiffs served a notice of claim on defendant New York City Board of Education and defendant New York City Department of Education on February 16, 2011. Plaintiffs commenced the within action on June 21, 2011 against Morgan Construction Enterprises Inc., SCA, New York City Board of Education, New York City Department of Education and the City of New York, and the defendants served an answer. On August 29, 2012, plaintiffs served a supplemental summons and amended complaint, adding Cardoza as a defendant and correcting the name of defendant of Morgan. Issue was joined on October 3, 2013 as to all defendants.

The amended complaint alleges three causes of action on behalf of Pjeter Prela for negligence and for violations of Labor Law §§ 200, 240 and 241. The fourth cause of action on behalf of Ornela Prela, the wife of Pjeter Prela, alleges a claim for loss of services and society of her husband.

Plaintiffs served their first bill of particulars on June 19, 2012, and served a fourth supplemental bill of particulars on February 27, 2013 and a sixth supplemental and amended bill of particulars on December 4, 2014. Pjeter Prela was deposed at a 50-h hearing on May10, 2011, and was also deposed by the parties. Ornela Prela was deposed at a 50-h hearing and was also deposed by the parties. Defendants SCA, Morgan, and Cardoza were also deposed. Plaintiffs did not request a deposition of defendants City of New York, New York City Board of Education, and New York City Department of Education.

Pjeter Prela's Depositions

Mr. Prela testified that he was assigned to work at PS 13 by ACS' project manager, Ray, and began working at PS 13 between May and June 2009. He stated that ACS provided the blueprints to which he referred in order to determine the type and location of the work to be performed. He did not receive instructions from Ray on where to work, and none of the defendants instructed him as to the manner or method of performing his work. On occasion, the school custodian was called to unlock a room the workers needed to access, but the custodian never told Mr. Prela how to perform his work. His communications with Cardoza's employees were limited to coordinating their work. All of the equipment and tools used by Mr. Prela were either owned and supplied by ACS or were his personal equipment.

Mr. Prela stated that the accident occurred on November 30, 2010, between 7:00 and 7:15 p.m. The kitchen area was under construction and there were no appliances in the room. Mr. Prela used a ladder and drill to extend a piece of duct around a pipe located in the kitchen's ceiling. When he finished this work, he came down the ladder, unplugged the drill's extension cord approximately 25 feet away, closed the ladder and placed it over his left shoulder. He placed the drill and extension cords in a bucket which he carried in his left hand. Mr. Prela stated that the area where he had been working was almost in the center of the kitchen, and that he intended to walk in the direction of his coworker Brian, who was working on the other side of the room, when the accident occurred. He stated that he wanted to turn to his left towards Brian and took two steps backwards and stepped onto three stub-ups, causing him to lose his balance and fall. All of the equipment he was carrying fell on top of him. He stated that he never saw said stub-ups prior to his accident and did not know who placed them there. He stated that he had worked in the kitchen the day before the accident and did not see said stub-ups at that time, and that they looked new. He also stated that there was no caution tape around the stub-ups at the time of his accident.

Mr. Prela stated that Glen, Morgan's supervisor, was talking to others in the area, and was the first one to help him get up after he fell. He stated that he experienced severe pain in his right knee, and that he and Brian left the job site and he sought to file an accident report and was told to do it the following day. Mr. Prela went home and his wife drove him to the hospital later that evening. He stated that x-rays were taken and a doctor informed that he had a fractured knee. His right leg was in a full length leg cast for eight weeks and thereafter, he had knee and back surgery. In his bills of particular, he alleges injuries to his right knee, back, and left hip. Mr. Prela has not returned to work since the accident and receives Workers' Compensation benefits.

Mr. Prela also testified that he is the superintendent at the apartment building where he lives, and that he does not pay rent for the apartment he resides in with his wife, two children, mother, and brother. He stated that he has been the superintendent for eight years; that prior to his accident his wife helped him with his duties as superintendent; and that after the accident, his wife and brother assisted him.

Ornela Prela's Depositions

At the 50-h hearing and at her deposition in this action, Ornela Prela testified about her alleged loss of services and society of her husband following his accident. She also stated at her deposition that, after her husband's accident, she and her brother-in-law Alex had taken over his duties as superintendent in the building in which they live. She stated that Alex moved to the United States from Albania in March 2011 and that, prior to her husband's accident, she did not help him with his superintendent duties. She stated that she was born

with a dislocated left hip, which was repaired when she was approximately two years old. She stated that she began having pain in her left hip in 2011; that, after her husband was injured, she began lifting more and doing more heavy work around the house and shoveling snow; and that she had surgery on her left hip in September 2011 and January 2012.

SCA's Deposition

Imtiaz Hasan, a level 2 project officer assigned to the construction project at PS 13, was deposed on behalf of the SCA. Mr. Hasan stated that his duties included ensuring that the general contractor Morgan followed the plans and specifications for the work. The PS 13 project began in June 2008; the first phase was to complete the new addition and turn over the classroom space for the school's use; the second phase was to demolish the old kitchen and cafeteria, and construct a new kitchen and cafeteria. He stated that he was on the job site nearly every day and performed walkthroughs to check the progress of the work and safety issues. Mr. Hasan stated that, if he saw a dangerous condition, he would alert the general contractor immediately so that it could be remedied. He took photographs while conducting the walkthroughs which were uploaded to the SCA database. Mr. Hasan stated that the entire old kitchen and cafeteria were gutted, and that the floor was excavated so that the old plumbing could be removed and new piping installed. The new plumbing work was performed by Cardoza, a subcontractor hired by Morgan with the SCA's approval.

Mr. Hasan was not a witness to the accident. At his deposition, he was shown a photograph taken after the accident depicting the subject stub-ups and drain sticking up above the concrete floor surface, with caution tape around the stub-ups and drain and orange paint on the floor. Mr. Hasan stated that this did not meet SCA requirements for protection from a tripping hazard, and that the depicted stub-ups and drain should have been protected with a barrier or an encasement, caution tape, and paint around the area. He stated that it was the subcontractor and general contractor's responsibility to construct or place a proper barrier around the protruding stub-ups and drain.

Mr. Hasan stated that the SCA did not have general supervisory authority over the worksite; that the SCA had the power to correct safety or health violations itself and to require others to correct such violations; that the SCA conducted inspections of the worksite at least once a day; and that if he or other members of the SCA's safety unit saw a hazard that needed correction, they would ensure that it was corrected.

Ron McComiskey, a SCA employee, was a site safety manager/inspector at the time of the November 30, 2010 accident. He testified that either he or another inspector would visit the PS 13 job site one to four times a month, and that the SCA did not have a permanent safety inspector at the job site. He stated that, if he were on a project site and saw a safety

hazard, he had the authority to issue a stop work order or a partial stop work order and that he would first issue a verbal order and that it would then be documented. He was shown a photograph taken after the accident which depicted the stub-ups and drain and opined that there was a clear potential trip hazard at that location, as there was not a high contrast marking around the pipes and drain. Mr. McComiskey was not a witness to the accident.

Cardoza's Deposition

Anthony Cammarano, an employee of Cardoza, was a foreman in November 2010, and worked on the PS 13 project. He stated that he worked on phase one and phase two of the project and was there nearly every day. With respect to the new kitchen, he stated that Cardoza installed and connected the underground pipe for the new kitchen equipment after the old floor had been excavated and before the new cement floor was put in. He stated that they installed water piping, waste piping, and grease traps in the excavated area, and right before the cement floor was put down they set drains, and put in stub-ups for hot and cold water lines going to the sinks. Mr. Cammarano stated that the stub-ups protruded seven or eight inches from the floor, and that he placed caution tape around the stub-ups and that, if there was no tape around the stub-ups, it would be a tripping hazard. He stated that he was never issued a safety warning or complaint from either Morgan or the SCA regarding any type of safety violation, and did not recall the SCA ever telling him that there was a hazard he needed to correct. He stated that he did not learn about the accident until shortly before his deposition in October 2013.

Morgan's Deposition

Ronald Hansen, an employee of Morgan, was the senior project manager for the PS 13 project in November 2010. Mr. Hansen testified he was responsible for overseeing all of the construction activity on the job site and to handle the contract administration. He stated that he was on the job site on a daily basis and did a walkthrough at least once a day. He did not witness Mr. Prela's accident. He stated that there were stub-ups in the kitchen; that tripping hazards should be marked; and that, for stub-ups, the common practice is to put caution tape around them, to paint it with fluorescent orange or lime green paint and to have adequate lighting. He stated that this was done here, but that, if the caution tape was not in place, it would be more of a hazard.

Defendants' Affidavits

In support of the within motion, defendants submit affidavits from Ron McComiskey, Imtiaz Hasan, Ronald Hansen, Anthony Cammarano, and Marvin Rodriguez – a custodial

engineer employed by the City of New York/New York City Department of Education and assigned to PS 13 – with accompanying photographs and reports.

Mr. Hasan, in his affidavit, states in pertinent part, that he was unaware of any complaints at any time prior to and including November 30, 2010, regarding the stub-ups depicted in the photograph identified as Plaintiff's Exhibit 7; that he was not aware of any prior incidents involving workers tripping on stub-ups; that he did not recall seeing the stub-ups depicted in the photograph without any caution tape at any time prior to and including November 30, 2010; and that he never received any complaints about the lack of caution tape around the stub-ups depicted in the photograph at any time prior to and including November 30, 2010. He stated that he never observed said stub-ups to be defective, unsafe, loose, or in need of repair at any time prior to and including November 30, 2010. He further stated that each contractor was responsible for providing or procuring its own tools, material and equipment; that each contractor was responsible for providing instructions to its employees on their work; that the SCA did not provide any instructions to the contractors' employees regarding their work; that the SCA did not provide any tools, materials, or equipment to the contractors; and that the SCA did not exercise any supervision, direction or control over the work performed by Mr. Prela at the time of his accident.

Mr. McComiskey states in his affidavit, in pertinent part, that he reviewed safety inspection reports from October 18, 2010 through November 29, 2010 in connection with the PS 13 project; that said reports do not reference any safety deficiencies related to the stub-ups in the kitchen area and do not reference any lighting deficiencies in the kitchen area; that he reviewed stub-ups shown in the photograph and, had they been in a dangerous or defective condition, he would have taken a photograph of the pipes and made reference to them in his report.

Mr. Hansen states in his affidavit, in pertinent part, that there was adequate lighting in the condition and that he was not aware of any complaints about the lighting; that he reviewed the photograph depicting the stub-ups and that he never observed them to be loose, defective, unsafe, or in need of repair at any time; that he was not aware of any complaints regarding the stub-ups; that he was not aware of any prior incidents involving workers tripping over the subject stub-ups; that he did not recall seeing the subject stub-ups without caution tape at any time prior to and including November 30, 2010, and never received complaints about the lack of caution tape around the stub-ups at any time prior to and including November 30, 2010. He stated that each contractor was responsible for providing or procuring its own tools, materials, and equipment; that Morgan did not provide any tools, materials, or equipment to the contractors; that each contractor was responsible for providing instructions to its employees on their work; that Morgan did not provide any instructions to the contractors' employees regarding their work.

Mr. Cammarano states in his affidavit, in pertinent part, that he reviewed a photograph depicting the subject stub-ups and confirmed that they were installed by Cardoza; that he painted the area around the stub-ups after they were installed and that he placed caution tape around the stub-ups; and that he never saw the subject drain and stub-ups without the caution tape. He states that Cardoza never received a warning or complaint from Morgan or the SCA about any type of safety violations, including the lack of caution tape, or that the stub-ups were loose or in need of repair. Mr. Cammarano states that he was not aware of any accidents involving stub-ups at the job site. He states that each contractor was responsible for providing or procuring its own tools, materials, and equipment; that Cardoza did not provide any tools, materials, or equipment to the other contractors; that each contractor was responsible for providing instructions to its employees on their work; that Cardoza did not provide any instructions to the other contractors' employees regarding their work. Finally, he states that Cardoza was not the owner of subject premises and that it was not the general contractor at the PS 13 project at any time prior to and including November 30, 2010.

Mr. Rodriguez states in his affidavit that the custodial staff had no involvement with the renovation work performed in the kitchen at any time prior to and including November 30, 2010; that it did not hire contractors to perform the renovation work; did not provide any tools, equipment, or materials to any of the contractors; did not exercise supervision, direction, or control over the renovation work, and did not perform any physical work involved in the kitchen; was not responsible for maintaining or repairing any piping installed in the kitchen; did not receive any complaints about the condition of the kitchen during the renovation work, or about the means, methods or manner in which the contractors performed their work; and that the custodial staff was not permitted to enter the kitchen area while the renovation work was being performed.

Plaintiffs' Expert's Affidavit

In opposition to the within motion, plaintiffs submit an affidavit from Daniel M. Paine, C.S.E., their construction safety expert. Mr. Paine opines, with a reasonable degree of certainty as a construction site safety and fall protection expert, that stub-ups create a tripping hazard and that the one and only way to rectify this is to build a barrier around the stub-ups that extends at least 36 inches into the area, so that a worker would notice the barrier when he walked into it. He states that this is the industry standard. He also states that the stub-ups were located in or near a passageway. Mr. Paine further opines that the placement of yellow tape around the stub-ups does not comport with industry standards as it would only, at best, merely increase the chance that the worker would see the stub-ups but would not prevent a worker from entering the area and falling over the stub-ups. He further opined that the owner, general contractor, and plumbing contractor should have considered that stub-ups would be created, and should have planned in their initial safety design or safety plans for

the construction of barricades immediately after the concrete floor was poured. He opines that this is the "basic operating procedure in the construction context. The failure to do this violates the general standards of care."

Discussion

On a motion for summary judgment, the movant bears the initial burden of establishing, prima facie, entitlement to judgment as a matter of law, offering sufficient evidence, in admissible form, to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus. Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d at 557; CPLR 3212 [b]).

When deciding a summary judgment motion, the court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

The Notice of Claim: **The City of New York**

The documentary evidence submitted herein establishes that the City of New York was served with a notice of claim. Therefore, that branch of the motion which seeks to dismiss the complaint against the City of New York on the grounds of failure to serve a timely notice of claim is denied.

Ornela Prela's Claim

In the notice of claim against the City of New York and New York City Department of Education and the notice of claim against the New York City Board of Education and the SCA, Mrs. Prela claims as her damages and injuries that she was "deprived of the services and society of her husband."

Plaintiffs' fourth supplemental bill of particulars asserts that Mrs. Prela sustained personal injuries, stating "[n]ecessity for hip surgeries due to strenuous labor and over exertion which was required by reason of the injuries sustained by her husband Pjeter Prela and his resulting inability to perform his usual and customary activities." Plaintiffs' sixth supplemental and amended bill of particulars also alleges that Mrs. Prela sustained personal injuries.

"To enable authorities to investigate, collect evidence and evaluate the merit of a claim, persons seeking to recover in tort against a municipality are required, as a precondition to suit, to serve a Notice of Claim" (*Brown v City of New York*, 95 NY2d 389, 392 [2000]; *see* General Municipal Law § 50-e). The General Municipal Law requires that the notice set forth, among other things, "the nature of the claim," and "the time when, the place where and the manner in which the claim arose" (General Municipal Law § 50-e [2]; *see Brown v City of New York*, 95 NY2d at 393; *Vargas v City of New York*, 105 AD3d 834, 836 [2d Dept 2013]; *Palmer v Society for Seamen's Children*, 88 AD3d 970, 971 [2d Dept 2011]). "The requirements of the statute are met when the notice describes the accident with sufficient particularity so as to enable the defendant to conduct a proper investigation thereof and to assess the merits of the claim" (*Palmer v Society for Seamen's Children*, 88 AD3d at 971; *see O'Brien v City of Syracuse,* 54 NY2d 353, 358 [1981]; *Ingle v New York City Tr. Auth.*, 7 AD3d 574, 575 [2d Dept 2004]). Causes of action for which a notice of claim is required which are not listed in the plaintiffs' original notice of claim may not be interposed (*see generally Mazzilli v City of New York,* 154 AD2d 355 [2 Dept 1989]; *DeMorcy v City of New York*, 137 AD2d 650, 651 [2d Dept 1988]).

Contrary to plaintiffs' assertions, they may not maintain a claim against the defendants for Mrs. Prela's alleged personal injuries. A spouse's cause of action to recover for loss of services or consortium does not exist independent of the injured spouse's right to maintain an action for injuries sustained (*see Liff v Schildkrout*, 49 NY2d 622, 632 [1980]; *Klein v Metropolitan Child Servs., Inc.*, 100 AD3d 708 [2d Dept 2012]). Here, Mrs. Prela's claims for loss of services and loss of consortium are derivative in nature, and as such do not encompass any independent claim by her for personal injury. As the notice of claim does not assert any claim against the defendants for negligence by Mrs. Prela, other than her derivative claims, her claims are limited to loss of services and loss of consortium.

Plaintiffs' complaint only asserts a derivative claim on behalf of Mrs. Prela. It is well-settled that the duty to provide a safe place to work does not extend to members of the worker's family or household or other third parties who were not physically present on the premises (*see Matter of New York City Asbestos Litig.*, 5 NY3d 486 [2005]). Plaintiffs' reliance on *Broadnax v Gonzales* (2 NY3d 148 [2004]) is clearly misplaced, as the principles enunciated therein have no bearing on this action. Here, the duty to provide a safe place to

work does not extend to Mr. Prela's wife, as she was not physically present at the job site. As plaintiffs have not sought to serve an amended notice of claim or an amended complaint, the court need not determine whether Mrs' Prela's personal injury claim is barred by the statute of limitations. To the extent that the bills of particular seek to assert a direct claim by Mrs. Prela for personal injury, that branch of the defendants' motion which seeks summary judgment dismissing her personal injury claim is granted.

Plaintiffs' Labor Law Claims

Plaintiffs have discontinued the claim for a violation of Labor Law § 240 pursuant to a stipulation.

Plaintiff's Labor Law § 241 (6) Claim:

Labor Law § 241 provides, in pertinent part, as follows:

> "All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements: . . .
>
> 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Here, plaintiffs have alleged in their bill of particulars violations of the following sections of the Industrial Code: 12 NYCRR 23-1.7 (e) (1) (Tripping Hazards in Passageways) and 23-1.7 (e) (2) (Tripping Hazards). 12 NYCRR 23-1.7 (e) (1), which requires owners and general contractors to keep all passageways free of debris which could cause tripping, is inapplicable under the circumstances of this case, as the accident occurred in an open room rather than a passageway (*see O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225 [1st Dept 2006], *affirmed* 7 NY3d 805 [2006]; *Parker v Ariel Assocs. Corp.*, 19 AD3d 670 [2d Dept

2005]; *Castillo v Starrett City*, 4 AD 3d 320, 322 [2d Dept 2004]; *Appelbaum v 100 Church*, 6 AD3d 310 [1st Dept 2004]; *Vieira v Tishman Constr. Corp*., 255 AD2d 235 [1st Dept 1998]). Contrary to plaintiffs' counsel's assertions, the fact that Mr. Prela was about to cross a portion of the kitchen in order to reach the area in the room where his coworker was working does not transform this open room into a passageway within the meaning of the statute.

12 NYCRR 23-1.7 (e) (2), which requires that areas where persons work or pass be kept "free from accumulations of . . . debris and from . . . materials . . . insofar as may be consistent with the work being performed," likewise is inapplicable, as the stub-ups on which plaintiff tripped were an integral part of the ongoing construction; contrary to plaintiffs' contention, the stub-ups need not have been an integral part of the work *he* was specifically performing (*see O'Sullivan v IDI Constr. Co., Inc*., 7 NY3d at 806; *Gonzalez v Magestic Fine Custom Home*, 115 AD3d 798 [2d Dept 2014]; *Thomas v Goldman Sachs Headquarters, LLC*, 109 AD3d 421 [1st Dept 2013]; *White v Village of Port Chester*, 92 AD3d 872 [2d Dept 2012]; *Cody v State of New York*, 82 AD3d 925 [2d Dept 2011]; *Smith v New York City Hous. Auth.,* 71 AD3d 985, 987 [2d Dept 2010]; *Aragona v State of New York*, 74 AD3d 1260 [2d Dept 2010]).

In opposition, plaintiffs' conclusory assertions are insufficient to raise triable issues of fact warranting denial of this branch of the motion (*see Zuckerman v New York, supra)*. Therefore, that branch of the defendants' motion which seeks summary judgment dismissing plaintiffs' cause of action for a violation of Labor Law § 241 (6) is granted.

Plaintiffs' Common-Law Negligence and Labor Law § 200 Claims:

It is well-settled that the owner, operator, and possessor of property has the duty to maintain the premises in a reasonably safe condition in light of all the circumstances, including the likelihood of injury to those on the property, the seriousness of the injury, and the burden of avoiding the risk (*see Peralta v Henriquez*, 100 NY2d 139, 144 [2003], *citing Basso v Miller*, 40 NY2d 233, 241 [1976]*; Ruggiero v City School Dist. of New Rochelle*, 109 AD3d 894 [2d Dept 2013]). In addition, Labor Law § 200 codifies the common-law duty of owners, employers, and contractors to provide employees with a safe place to work (*see Paladino v Soc'y of the NY Hosp*., 307 AD2d 343 [2d Dept 2003]; *Brasch v Yonkers Constr. Co.*, 306 AD2d 508 [2d Dept 2003]). Liability under Labor Law § 200 falls into two categories. The first involves the case where the injury results from an alleged defective or dangerous condition of the premises where the work is performed (*see Chowdhury v Rodriguez*, 57 AD3d 121 [2d Dept 2008]), and the second is where the injuries arises from the means and methods of the work (*see Ortega v Puccia*, 57 AD3d 54 [2d Dept 2008]).

Where, as here, plaintiffs' claim is based upon an alleged unsafe or dangerous condition of the premises, supervisory authority is not an element of a Labor Law § 200 cause of action (*see Comes v New York State Elec. & Gas Corp*., 82 NY2d 876, 877 [1998] *Roppolo v Mitsubishi Motor Sales of Am.*, 278 AD2d 149, 150 [1st Dept 2000]). Under these circumstances, liability based upon common law negligence and Labor Law § 200 can be imposed on the defendants if they created or had actual or constructive notice of the alleged condition and a reasonable opportunity to correct it (*see Reyes v Arco Wentworth Management Corp.*, 83 AD3d 47, 49 [2d Dept 2011]; *Scott v Redl*, 43 AD3d 1031 [2d Dept 2007]).

The accident at issue here was allegedly due to an unsafe condition at the premises constituting a tripping hazard, *i.e.*, the presence of the stub-ups, which protruded up from the surface of the floor, and which allegedly were not marked in such a way as to warn of their presence. Therefore, in order for defendants to be liable under common-law negligence and Labor Law § 200 theories, it must be shown that defendants either created the alleged unsafe condition by installing the stub-ups and then failing to mark it in such a way as to warn of its presence, or that they had actual or constructive notice of the unsafe condition and failed to adequately correct it.

It is undisputed that Cardoza installed the stub-ups that plaintiff allegedly tripped over and that defendants SCA and Morgan had actual notice of the installation of said stub-ups. As the stub-ups had been installed and the cement kitchen floor had been poured weeks prior to the plaintiff's accident, a question of fact exists as to whether defendants City of New York, Board of Education, and Department of Education had constructive notice of the subject alleged unsafe condition. This court further finds that based upon the parties' conflicting deposition testimony, questions of fact exist as to whether there was caution tape in place at the time of the accident, and whether the use of caution tape and paint on the cement floor provided sufficient protection from the alleged tripping hazard. Therefore, that branch of the defendants' motion which seeks summary judgment dismissing the causes of action for negligence and a violation of Labor Law § 200 is denied.

Finally, defendants argue that, due to the open and obvious nature of the unsafe condition at issue in this case, the duty to provide a safe place to work does not apply. However, liability under Labor Law § 200 is not negated by plaintiff's awareness that the stub-ups may have been present at the location of his accident, or by the open and obvious nature of this allegedly unsafe condition, as these factors merely go to plaintiff's comparative negligence[1] (*Devlin v Ikram*, 103 AD3d 682 [2d Dept 2013]; *Zastenchik v Knollwood*

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1. It is noted that various witnesses agreed that the existence of the stub-ups in general presented a potential tripping hazard.

Country Club, 101 AD3d 861, 863 [2d Dept 2012]; *Van Salisbury v Elliott-Lewis,* 55 AD3d 725 [2d Dept 2008]).

Conclusion

For the foregoing reasons, it is hereby

ORDERED that the branch of defendants' motion which seeks summary judgment dismissing the claim asserted by plaintiff Ornela Prela in the bill of particulars to recover damages for personal injuries is granted; and it is further

ORDERED that the branch of defendants' motion which seeks summary judgment dismissing plaintiffs' claims against defendant City of New York on the grounds of failure to serve a timely notice of claim is denied; and it is further

ORDERED that the branch of defendants' motion which seeks summary judgment dismissing plaintiffs' cause of action for a violation of Labor Law § 241 (6) is granted; and it is further

ORDERED that the branch of defendants' motion which seeks summary judgment dismissing plaintiffs' causes of action for common law negligence and a violation of Labor Law § 200 is denied.

Dated: August 26, 2015

J.S.C.