SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

----------X

SUBI ILJAZI and ANASTASIA BYSTROVA,

Plaintiffs,

- against -

PRO-METAL CONSTRUCTION, INC., NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, NEW YORK CITY DEPARTMENT OF EDUCATION, CITY OF NEW YORK and NEW YORK CITY BOARD OF EDUCATION,

Defendants.

----------X

Index No. 157155/13

Seq. 002

Decision and Order

HON. ROBERT D. KALISH, J.:

Motion by defendants Pro-Metal Construction, Inc. (Pro-Metal), New York City School Construction Authority (SCA), New York City Department of Education (DOE), City of New York (the City) and New York City Board of Education (BOE) (collectively, Defendants), pursuant to CPLR 3212, for summary judgment dismissing the complaint against them is granted to the extent that the common-law negligence and Labor Law § 200 claims, as well as those parts of the Labor Law § 241 (6) claim that were abandoned or conceded, are granted, and these claims are dismissed as against Defendants, and the motion is otherwise denied.

Cross-motion by plaintiffs Subi Iljazi (Plaintiff) and Anastasia Bystrova, pursuant to CPLR 3212, for summary judgment in their favor on the Labor Law §§

240 (1) and 241 (6) claims against Defendants is granted to the extent that the Labor Law §§ 240 (1) claim, as well as that part of the § 241 (6) claim predicated on a violation of Industrial Code 12 NYCRR 23-1.8 (c) (4), against Defendants are granted, and the cross-motion is otherwise denied.

BACKGROUND

This is an action to recover damages for personal injuries allegedly sustained by a roofer on March 28, 2013, when, while applying hot tar with a mop to the sloped roof of a school located at 2230 Fifth Avenue, New York, New York (the Premises), he slipped and submerged his arm in a cart/bucket of tar.

Plaintiff's 50-H Hearing and Deposition Testimony

During his 50-H hearing, held on July 26, 2013, and examination before trial, taken on April 13, 2016, Plaintiff testified that, on the day of the accident, he was installing a new roof at the Premises (the Project), as an employee of nonparty Triangle Roofing (Triangle). (Snyder Affirm., Ex. I [50-H] at 7:22–8:01, 36:16–23, Ex. J [Iljazi EBT] at 25:23–26:01, 27:22–28:06.) Plaintiff received his work instructions solely from his Triangle foreman. (Iljazi EBT at 29:07–30:03.) As it was March, it was cold on the day of the accident. (*Id.* at 75:22–76:02; 50-H at 20:18–21.) Plaintiff was wearing two shirts, a jacket, which he described as a "hoody," lace-up boots, pants, long underwear, gloves, a hardhat, and goggles. (50-

H at 20:06–17, 21:12–22:01; Iljazi EBT at 74:24–76:09, 148:24–149:25.) Plaintiff testified that his company provided him with "special gloves" which he described as extending two inches upwards from his wrist. (Iljazi EBT at 71:11–72:03.) Plaintiff did not know of what kind of material the gloves were made. (*Id.* at 72:25–73:01.) When asked whether there "was . . . a particular type of gloves they told [him] to wear," Plaintiff replied "I don't remember." (50-H at 18:02–04.)

Approximately two hours before the accident, Plaintiff and his coworkers primed the roof in preparation for the application of tar. (Iljazi EBT at 49:03–22.) At the time of the accident, Plaintiff was in the process of mopping hot tar onto the roof with a tar mop. (50-H at 76:18–77:06.) When Plaintiff was asked if, "[b]efore [he] applied the tar to the roof, there was cement underneath that, correct?" Plaintiff replied "[y]es." (*Id* at 81:17–19.) When further questioned, "So, were you standing on cement when you slipped?" Plaintiff replied "[y]es." (*Id.* at 81:20–22.)

Plaintiff further explained that the area of the roof where he was working at the time of the accident was sloped or "declined." (*Id.* at 51:19–22.) Just prior to the accident, Plaintiff walked approximately two feet to the bucket/cart of tar and placed the mop in the bucket. (*Id.* at 79:03–19.) While standing at this spot, Plaintiff "slipped" and fell. (*Id.* at 79:20–22.) At this point, Plaintiff's body slid about two feet down the slope towards the middle V-section of the roof, where his

hand/arm fell into the bucket/cart of hot tar. (*Id.* at 79:23–96:12.) Plaintiff testified that his hand/arm was submerged "three to five inches above the wrist." (*Id.* at 92:05–24.) As a result, Plaintiff suffered severe burns across his hands, arms, face and neck. (*Id.* at 115:11–15.) When Plaintiff got to the hospital, he took off his glove, and his hand looked "very bad." (*Id.* at 102:10–12.) Plaintiff testified that he did not know what caused him to slip, though he opined, "[m]aybe there was some tar" that dripped from the mop onto the roof. (*Id.* at 80:09–20.)

Plaintiff's Affidavit

In his affidavit, dated May 25, 2017, Plaintiff stated that, at the time of the accident, he "was standing on an incline near the upper left corner of the roof on the right." (Iljazi Aff. ¶ 6.) He explained that "[j]ust before [his] accident [he] was applying hot tar with a mop that [he] obtained from a mop cart located roughly two feet below [him] on this sloping roof." (*Id.*) Plaintiff further stated that "[p]rior to applying the hot tar to the roof [they] had applied primer to the concrete base." (*Id.* at ¶ 8.) After applying the primer, the men had to wait two hours before applying the tar, because they had to wait for the primer to dry. (*Id.*)

Plaintiff explained that the accident occurred "as [he] was walking on the roof and mopping." (*Id.* at ¶ 9.) At that time, he "slipped on the hot roofing material and slid and fell down the sloping roof towards the lower portion of the

roof." (*Id.*) Plaintiff stated that he was injured when "[he] fell into the mop cart, severely burning [his] right arm, and neck and part of [his] face." (*Id.*) Plaintiff noted that the hot tar entered his gloves and went up his sleeves. (*Id.*) Plaintiff described the gloves as "loose and not snug." (*Id.*)

Plaintiff also asserted that he was not provided with any safety devices, other than the gloves, for the performance of this work, "like a safety line or toe boards to prevent slipping," and that he was not supplied with protective clothing, such as "a shirt buttoned at the sleeve, face shield or snug fitting work gloves [or] goggles." (*Id.* at ¶ 10.) To that effect, at the time of the accident, he was only wearing "a shirt, dungarees, work boots and ordinary cotton gloves." (*Id.* at ¶ 7.)

Deposition Testimony of Chris Panayiotou (Pro-Metal Site Supervisor)

Chris Panayiotou testified that he was employed by Pro-Metal as a site supervisor on the day of the accident. (Snyder Affirm., Ex. L [Panayiotou EBT] at 6:20–7:06.) As site supervisor, Panayiotou's duties were to "[c]heck, make sure the public and the workers are safe, and also the conditions of the scaffold, pipe scaffold, and the sidewalk bridge." (*Id.* at 8:03–10.) He further testified that, at the time of the accident, "[t]hey were laying down a new roof using hot tar." (*Id.* at 8:14–17.) He explained that the hot tar was pumped upward from a truck "with a huge pipe . . . and . . . put . . . in a big tank, and then from there they pour[ed] it in .

. . special buckets [with wheels]." (*Id.* at 9:05–18.) He described the roof where the accident occurred as sloping up six feet on two sides, with a "valley" separating the two sides. (*Id.* at 14:04–15:02.)

Panayiotou testified that Pro-Metal hired a subcontractor, Triangle, to serve as the roof contractor on the Project. (*Id.* at 15:18–25.) Triangle provided the materials, hot tar, mops, gloves, and face masks/goggles for the Project. (*Id.* at 27:23–28:15.) In addition, Triangle's foreman was responsible for overseeing the safety of its workers. (*Id.* at 16:15–22.) Panayiotou maintained that the Triangle roofers wore "[l]ong sleeve clothes" [sic] (*Id.* at 20:11–16.) He also maintained that "[t]he guy who pours the tar has to have the face mask." (*Id.*) When asked if the other workers also had to have a face mask, Panayiotou replied "[m]ostly him." (*Id.* at 20:17–23.) In addition, Panayiotou testified that the roofers were supposed to wear a "special glove" that would cover the arm higher than the wrist. (*Id.* at 20:24–21:21.) When asked if everyone was wearing those gloves on the day of the accident, he replied "I don't remember if they have them." (*Id.* at 21:22–25.)

Deposition Testimony of Gregory Wade Koelbel (SCA Project Officer)

Gregory Wade Koelbel testified that he was SCA's project officer on the day of the accident. (Snyder Affirm., Ex. M [Koelbel EBT] at 6:09–7:14.) He explained that SCA is "a City agency that manages the renovations of [public] school

buildings." (*Id.* at 7:21–25.) He explained that SCA hired Pro-Metal to repair and replace the roof of the Premises. (*Id.* at 8:04–11.) Pro-Metal then subcontracted out the actual roof work to Triangle. (*Id.* at 8:12–9:23.) Koelbel did not know what protective apparel is prescribed to perform the installation of hot roofs. (*Id.* at 20:11–14.) He noted that Triangle should provide all the workers' equipment. (*Id.* at 25:22–26:02.)

Affidavit of Plaintiff's Expert Stanley Fein

In his affidavit, Stanley Fein stated that "common sense and basic physics" dictate that "a slope extenuates gravity [sic] pull on an object on a slope." (Fein Aff. ¶ 6.) As such, a fall-preventing safety device, like a tie-line or a toeboard, would have prevented Plaintiff from falling down the sloped roof and into the bucket of tar. (*Id.*) Fein described the tar at issue in this case as "very slippery" and "corrosive" (*Id.* at ¶ 7, ¶8.) As a result, Plaintiff "should have been provided a long sleeve shirt, snug fitting gloves and a face shield." (*Id.* at ¶ 8.)

Affidavits of Defendants' Expert C.J. Abraham

In his July 20, 2017 affidavit, which he put forth in response to Plaintiff's opposition to Defendants' motion, C.J. Abraham reiterated the arguments that he made in his March 24, 2017 affidavit. Abraham asserted that "Labor Law § 240 (1) is not applicable since there is no evidence that the plaintiff fell as a result of the

application of the force of gravity." (Abraham's July 20, 2017 Aff. at ¶ 16.) Abraham explained, "[r]ather, the plaintiff testified that he was standing still when he inexplicably slipped and fell in some manner." (*Id.*) Abraham further asserted that "Labor Law § 240 (1) is not applicable because this 'low-sloped' roof did not . . . necessitate the type of safety devices set forth in the statute" because it did not present "an elevation-related hazard of the type contemplated by the Scaffold Law." (*Id.* at ¶ 20.)

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.'" (*Santiago v Filstein*, 35 A.D.3d 184, 185–86 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985].) The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." (*Mazurek v Metropolitan Museum of Art*, 27 A.D.3d 227, 228 [1st Dept 2006] [citing *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 A.D.3d 323, 325 [1st Dept 2006]].) If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 N.Y.2d 223, 231 [1978]; *Grossman*

v Amalgamated Hous. Corp., 298 A.D.2d 224, 226 [1st Dept 2002].)

The Labor Law § 240 (1) Claim

Defendants move for summary judgment dismissing the Labor Law § 240 (1) claim against them. Plaintiffs cross-move for summary judgment in their favor as to liability on said claim. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 A.D.2d 615, 615 [1st Dept 1983]), provides, in relevant 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."

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person.'" (*John v Baharestani*, 281 A.D.2d 114, 118 [1st Dept 2001] [quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501 [1993]].)

> 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). Rather, liability is contingent upon the existence of a hazard contemplated in § 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein.

(*Narducci v Manhasset Bay Assoc.*, 96 N.Y.2d 259, 267 [2001]; *Hill v Stahl*, 49 A.D.3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 A.D.3d 263, 267 [1st Dept 2007].)

To prevail on a § 240 (1) claim, Plaintiff must show that the statute was violated, and that this violation was a proximate cause of Plaintiff's injuries. (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 N.Y.2d 219, 224–25 [1997]; *Torres v Monroe Coll.*, 12 A.D.3d 261, 262 [1st Dept 2004].)

Here, Plaintiff's accident, wherein he slipped down a sloped roof, rather than slipping on a flat roof, "resulted from the type of extraordinary elevation-related risk which Labor Law § 240 (1) was enacted to guard against, plaintiff's fall having been caused, at least partially, by the lack of safety devices." (*See D'Acunti v New York City School Constr. Auth.*, 300 A.D.2d 107, 107 [1st Dept 2002] [Labor Law § 240 (1) applied where the plaintiff was injured "when he slid four feet down a barrel roof"], *Streigel v Hillcrest Hgts. Dev. Corp.*, 266 A.D.2d 809, 810 [4th Dept 1999], *aff'd* 100 N.Y.2d 974 [2003]; *cf. Favreau v Barnett & Barnett, LLC*, 47 A.D.3d 996, 997 [3d Dept 2008] [holding that plaintiff's injuries resulting from his slip-and-fall on roof ice "did not flow from the application of the force of gravity . . . [where] [h]e was not injured as the result of falling off or sliding down the slope of the roof"],

Grant v Reconstruction Home, 267 A.D.2d 555, 556 [3d Dept 1999] [finding no Labor Law § 240 (1) liability "[s]ince plaintiff's fall on the dormer roof occurred at the same level as his worksite, and in the absence of proof that any of plaintiff's injuries were attributable to the elevation differential between his work site and the lower level of the flat roof"].)

In *Streigel,* a case with similar facts to the case at bar, the Court of Appeals affirmed the lower court's determination that Labor Law § 240 (1) applied to the facts of that case. There, an employee of a roofing company sought to recover under Labor Law § 240 (1) for injuries he sustained when, as he was attempting to unload some materials while at the peak of a frost covered roof, he slid down the frost to the roof's eaves (*Streigel*, 100 N.Y.2d at 976). As noted by the Court of Appeals, the lower court in *Streigel* appropriately reasoned:

> 'in the instant case, involving as it does a sloped roof, this court believes that the risk of slipping and falling while working upon that slope is more certainly related to the direct application of gravity, pulling the worker from the elevation differential between the ridge of the roof to its eave, than if he were merely standing on a flat roof.'

(*Id.* at 976, quoting *Streigel v Hillcrest Hgts. Dev. Corp.*, 175 Misc.2d 698, 700 [Sup Ct, Erie County 1998].)

This case can be distinguished from the case of *Nicometi v Vineyards of Ferdonia, LLC* (25 N.Y.3d 90, 93 [2015]), put forth by Defendants, wherein the

plaintiff brought an action against an owner and general contractor for injuries that he sustained when, while utilizing stilts to access a ceiling, he slipped and fell on ice. In that case, the Court determined that Labor Law § 240 (1) did not apply because the "plaintiff's accident was plainly caused by a separate hazard—ice—unrelated to any elevation risk." (*Id.* at 99). The Court in *Nicometi* distinguished its facts from those in the *Streigel* case, wherein the Court determined that Labor Law § 240 (1) applied, as follows:

> "Unlike here, the plaintiff's fall in *Streigel* was caused by an elevation-related risk because his foot slid down an elevation differential, and the pitch of the roof presented a special elevation-related hazard that resulting in the plaintiff ultimately impacting the ridge of the roof and sliding 15 to 20 feet down to the eaves. This could have been avoided by the use of 'toe boards' to provide a flat path for the plaintiff to traverse. The facts of *Streigel* would [have been] more analogous to those presented here if the plaintiff in that case had been walking on a flat roof, and had slipped and fallen to the surface of that roof."

(*Id.* at 100 [internal citations omitted].)

It should also be noted that, because the roof in the case at bar was slippery and sloped, due to the nature of the tar application work, additional safety devices to prevent plaintiff from falling, like toe boards and tie-lines, were warranted. (*See Ortega v City of New York*, 95 A.D.3d 125, 130–31 [1st Dept 2012]; *Nimirovski v Vornado Realty Trust Co.*, 29 A.D.3d 762, 762 [2d Dept 2006].) "'[T]he availability of a particular safety device will not shield an owner or general contractor from

absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures.'" (*Nimirovski*, 29 A.D.3d at 762 [quoting *Conway v New York State Teachers' Retirement Sys.*, 141 A.D.2d 957, 958–59 [3d Dept 1988].)

Finally, the minor inconsistencies between Plaintiff's deposition testimony and his affidavit regarding the events leading up to the accident, such as whether he was walking or standing still at the time that he slipped, "[do] not relate to a material issue" and, thus, do not preclude an award of partial summary judgment as to liability in Plaintiff's favor (*Leconte v 80 E. End Owners Corp.*, 80 A.D.3d 669, 671 [2d Dept 2011]; *Anderson v International House*, 222 A.D.2d 237, 237 [1st Dept 1995].) In any event, Defendants' argument that gravity could not have been involved in the accident, because Plaintiff testified that he was standing still at the time of the accident, fails. Common sense dictates that, even when standing still, when positioned on a slippery slope, gravity will take hold of a person and pull them downward.

Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed." (*Valensisi v Greens at Half Hollow, LLC*, 33 A.D.3d 693, 695 [2d Dept 2006] [internal citations omitted].)

Thus, the plaintiffs are entitled to partial summary judgment in their favor as to liability on the Labor Law § 240 (1) claim against Defendants, and Defendants are not entitled to dismissal of said claim against them.

The Labor Law § 241 (6) Claim

Plaintiffs cross-move for summary judgment in their favor as to liability on the Labor Law § 241 (6) claim against Defendants. Defendants move for summary judgment dismissing said claim against them. Labor Law § 241 (6) provides, in pertinent part, as follows:

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

Labor Law § 241 (6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers." (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501 [1993].) However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the

defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety. (*Id.* at 503–05.)

Although plaintiffs list multiple violations of the Industrial Code in the bill of particulars, with the exception of Industrial Code section 23-1.8 (c) (4), plaintiffs do not move for summary judgment in their favor as to liability on those alleged Industrial Code violations, they do not oppose that part of defendants' motion seeking to dismiss them, or they conceded that they do not apply to the facts of this case during an oral argument held before this court on August 21, 2017. Thus, these alleged Industrial Code violations are deemed abandoned and/or conceded. (*See Genovese v Gambino*, 309 A.D.2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned].) As such, Defendants are entitled to summary judgment dismissing those parts of plaintiffs' Labor Law § 241 (6) claim predicated on those abandoned and conceded provisions.

Industrial Code 12 NYCRR 23-1.8 (c) (4)

Initially, Industrial Code 12 NYCRR 23-1.8 (c) (4), which requires appropriate protective equipment be provided when an employee is required to use

or handle corrosive substances, is sufficiently specific to sustain a claim under Labor Law § 241 (6). (*See Creamer v Amsterdam High School*, 241 A.D.2d 589, 591 [3d Dept 1997].)

Here, Industrial Code section 23-1.8 (c) (4) applies to the facts of this case, because the protective clothing that was provided to Plaintiff was insufficient to protect him from the corrosive effect of the hot tar that he was mopping onto the roof at the time of the accident. To that effect, at his 50-H hearing and at his deposition, Plaintiff testified that he was wearing regular long sleeve shirts and a "hoody" jacket at the time of the accident. In addition, in his affidavit, Plaintiff maintained that he was not supplied with a shirt that buttoned at the sleeve, a face shield or snug-fitting gloves.

Importantly, Plaintiff testified that the gloves that he was provided only extended approximately two inches above his wrist. That said, plaintiff, whose exposure to the hot tar caused him to suffer severe injuries to his hand, arms, face and neck, testified that, when he fell, his arm went approximately three-to-five inches into the bucket of hot tar. (*See Welsh v Cranesville Block Co.*, 258 A.D.2d 759, 760 [3d Dept 1999] [section 23-1.8 (c) (4) applied where the rubber boots that the plaintiff was provided "were inadequate to protect him from the corrosive effects of the concrete in that he was required to kneel in the substance while performing his

work"], *Creamer*, 241 A.D.2d at 591 [heated asphalt was considered a "corrosive substance" for the purposes of section 23-1.8 (c) (4)].)

In opposition to plaintiffs' cross-motion, and in support of their own motion, Defendants offer nothing to refute Plaintiff's description of the gloves that were provided to him, nor do they put forth any evidence that Plaintiff was provided with a face shield or the kind of clothing that would have properly protected him from the hot tar.

Thus, the plaintiffs are entitled to summary judgment in their favor on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of section 23-1.8 (c) (4), and defendants are not entitled to dismissal of the same.

The Common-Law Negligence and Labor Law § 200 Claims

Defendants move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them. Labor Law § 200 is a "codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work." (*Cruz v Toscano*, 269 A.D.2d 122, 122 [1st Dept 2000] [internal quotation marks and citation omitted]; *see also Russin v Louis N. Picciano & Son*, 54 N.Y.2d 311, 316–17 [1981]). Labor Law § 200 (1) states, in pertinent part, as follows:

> All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable

> and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.

There are two distinct standards applicable to § 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition. (*See McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 A.D.3d 796, 797–98 [2d Dept 2007].)

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it." (*Cappabianca v Skanska USA Bldg. Inc.*, 99 A.D.3d 139, 144 [1st Dept 2012], *Murphy v Columbia Univ.*, 4 A.D.3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work "because the injury arose from the condition of the work place created by or known to the contractor, rather than the method of [the] work"].)

It is well settled that, in order to find an owner or its agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory

control over the injury-producing work. (*Comes v New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877 [1993] [no Labor Law § 200 liability where the plaintiff's injury was caused by lifting a beam, and there was no evidence that the defendant exercised supervisory control or had any input into how the beam was to be moved].)

Moreover, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed. (*Hughes v Tishman Constr. Corp.*, 40 A.D.3d 305, 311 [1st Dept 2007]; *see also Bednarczyk v Vornado Realty Trust*, 63 A.D.3d 427, 428 [1st Dept 2009] [Court dismissed common-law negligence and Labor Law § 200 claims where the deposition testimony established that, while the defendant's "employees inspected the work and had the authority to stop it in the event they observed dangerous conditions or procedures," they "did not otherwise exercise supervisory control over the work"], *Burkoski v Structure Tone, Inc.*, 40 A.D.3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where the defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work], *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524–25 [2d Dept 2007].)

As discussed previously, the accident occurred when, while applying tar to the

sloped roof with a mop, Plaintiff slipped, submerging his arm in the bucket of hot tar. This is "not a dangerous work site condition but part of the means and methods of the work, over which [Defendants] exercised no supervision or control." (*Grant v Solomon R. Guggenheim Museum*, 139 A.D.3d 583, 584 [1st Dept 2016].)

Thus, Defendants are entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that those parts of defendants Pro-Metal Construction, Inc., New York City School Construction Authority, New York City Department of Education, City of New York and New York City Board of Education's (collectively, Defendants) motion, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law § 200 claims, as well as those parts of the Labor Law § 241 (6) claim that were abandoned or conceded, are granted, and these claims are dismissed as against Defendants, and the motion is otherwise denied; and it is further

ORDERED that those parts of plaintiffs Subi Iljazi and Anastasia Bystrova's cross-motion, pursuant to CPLR 3212, for summary judgment in their favor as to liability on the Labor Law §§ 240 (1) claim, as well as that part of the § 241 (6)

claim predicated on a violation of Industrial Code 12 NYCRR 23-1.8 (c) (4), against Defendants are granted, and the cross-motion is otherwise denied.

Dated: September 29, 2017
New York, New York

ENTER:

HON. ROBERT D. KALISH J.S.C.