At an IAS Term, Part 13 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8th day of February, 2008.

P R E S E N T:

HON. HERBERT KRAMER,
Justice.

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LUIS ENRIQUE BERREZUETA,
Plaintiff,

- against - Index No. 16908/02

ANDY O. ALEGE, JACQUELINE ERLACHER, EXTECH INDUSTRIES, INC. AND MARTIN & PAUL STEEL FABRICATORS, INC.
Defendants.

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The following papers numbered 1 to 13 read on this motion:

| | Papers Numbered |
|---|---|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed | 1-6 |
| Opposing Affidavits (Affirmations) | 7-10 |
| Reply Affidavits (Affirmations) | 11-13 |
| Affidavit (Affirmation) | |
| Other Papers | |

Upon the foregoing papers, plaintiff Luis Enrique Berrezueta (plaintiff) moves for summary judgment on his claims under Labor Law §§ 240 (1), 241 (6), 200 and common-law negligence against defendants Andy O. Alege, Jacqueline Erlacher, Extech Industries, Inc. (Extech), and Martin & Paul Steel Fabricators, Inc. (Martin). Extech moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint and all cross claims and

counterclaims insofar as asserted against it. Martin cross-moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint and all cross claims insofar as asserted against it.

***Facts and Procedural History***

Plaintiff testified at his deposition that on March 12, 2002, he was employed by non-party Intex, working as a cement bricklayer at 195 St. James Place in Brooklyn, where Intex was hired to construct a commercial building. Plaintiff's foreman was a man named Lucas. On the day of the accident, the second floor of the structure had not yet been completed.

Just prior to the accident, plaintiff was on the second floor of the building erecting a wall with cement blocks. The second floor had already been partially erected with metal beams and decking, but the facade of the second floor was still open. A truck arrived with a crane-like "machine" on it, and the truck driver used the crane to place two pallets of blocks, one pallet of bricks, and one pallet of cement bags in the middle of the second floor toward the front of the building, approximately one to two meters away from each other, and four to six meters from where plaintiff was working. There were approximately 180 blocks on each pallet, each brick weighed approximately 8 pounds, and each cement bag weighed eighty pounds. The materials were not moved prior to the accident.

Plaintiff was in the front of the building and went to retrieve some cement. Almost immediately after the pallets were placed, the floor could not stand the weight of the

materials and collapsed, which caused plaintiff, as well as the material, to fall some fifteen feet to the first floor.[1] Plaintiff was not supplied with any safety equipment.

Juan A. Mercado testified at his deposition that he was employed as a truck driver for Extech, which sold blocks, cement, sand and bricks. On March 12, 2002, he was told to deliver two skids of bricks, two skids of sand, and four skids of 6 x 18 inch blocks to Intex at 195 St. James Place. The blocks weighed approximately 40 pounds each and there were 140 blocks on each skid. The bricks were eight by seven inches, weighed two to two and one-half pounds each, and there were 500 bricks on each skid. Each bag of sand weighed approximately 50 pounds and there were approximately 50 bags of sand on each skid. The truck had a boom on it which could reach two or three stories high. Mercado was trained for a week for his job, namely to operate the boom safely.

When Mercado arrived at the construction site, a supervisor from Intex told him where to put the material on the second floor. Mercado told the supervisor that the material weighed too much, but the supervisor insisted. Mercado said he could not put it up there and that he "[m]ight as well take it back to Extech." The Intex supervisor called his own supervisor, and then told Mercado to put the material on the second floor, saying "they'll move it around and the weight won't be all in one spot." Mercado told the supervisor that he

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[1]Plaintiff also testified that the men he had been working with were in the corners of the second floor, placing material that had been delivered the previous day against the wall, and that there was some material left on the truck that had not been unloaded when the accident occurred.

would try placing one pallet and that if it was not safe, as indicated by the building shaking, he would not load any more.

Mercado placed a skid of sand in the back corner of the second floor, and the building did not shake. The skid was moved and the workers on the second floor distributed the weight. He then placed a second skid seven feet away from the first skid and placed a third skid in the front center of the second floor. The building did not shake, but Mercado told the Intex supervisor that he did not want to load anymore. The supervisor told Mercado that "nothing moved, everything is safe" and Intex moved the blocks where Mercado could not see them. Mercado told the supervisor that no more materials should be loaded because there was too much weight there already, but the supervisor told him to continue loading. Mercado placed the fifth skid, consisting of blocks, on the sidewalk, but the supervisor wanted him to put it on the second floor. Mercado refused, said there was too much weight on the second floor, and that he was going to put the sixth skid, consisting of blocks, on the ground. The supervisor said "no, no, don't you see, we moved it. There's nothing there." Mercado again objected but the supervisor said he had distributed the material, so Mercado placed the sixth skid, consisting of blocks, on the second floor, and the building did not shake. There were two skids of bricks left on the truck. The supervisor insisted that Mercado place the seventh skid, consisting of bricks, on the second floor. Mercado again objected, but the supervisor insisted, and Mercado agreed since Intex was the customer, and

"the customer is always right." Four minutes after Mercado put the seventh skid on the second floor, the floor collapsed.

Lucasz Zawojek testified at his deposition that he was employed by Intex in March 2002 as Project Manager, and that Intex was the general contractor for the job. On the day of the accident, Extech, as well as the truck driver, Juan, notified Zawojek that there would be a delivery that day. Zawojek telephoned the Intex foremen, Mr. Ortis, that the delivery was arriving, and told him to "only put up two to three [pallets] on top of the second floor, and no more." Ortis said he would comply. Zawojek said it was either his or Ortis' responsibility to tell the driver where to place the materials and to keep the Intex workers safe.

Zawojek said that when he learned about the accident that day, Ortis told him he had put up more than three pallets because "he wanted to make his job easier, so he would not have to go down to the ground floor," and that Ortis apologized to Zawojek. Zawojek also testified that he had told Ortis to spread out the loads to the side walls after they were placed on the second floor, but later learned that the laborers were unable to "keep up."

Leslaw Kowal, president of Martin in March 2002, testified that Martin contracted with Intex to install steel staircases, floors, beams and c-joists at 195 St. James Place in Brooklyn.[2] There was an architect's blueprint for the job, and he did not voice any objections to it. To build the floors, corrugated plates or deck plates were placed on top of c-joists, and

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[2]A piece of steel plate bent like a "c."

plywood was placed on the corrugated or deck plates. Kowal said the floors were subfloors because they were not finished. Martin built the second floor of the subject building, but Kowal did not know if it had been completed by the day of the accident. Martin had never built a subfloor of a building.

Kowal signed an April 10, 2003 statement[3] saying Martin was in charge of the reinforcement of the floor, that Martin did it properly, and that at the time of the accident, the job was still in progress, namely that the steps from the second floor to roof, as well as the roof, still had to be completed. The statement also said that one to three hours after the accident, Kowal looked at the floor and "found out [it] had been overloaded with building supplies." He determined this because "part of the [second] floor [toward the front of the building] ... collapsed" and he saw "a lot of construction materials [on the first floor]," namely bent and broken joists and corrugated metal.

Prior to the accident, Martin constructed the first floor, the stairs, and laid the c-joists and corrugated plates on the second floor according to the architect's blueprints. He also testified that all the c-joists were installed on the day of the accident but only part of the corrugated plates had been installed. He did not know how much of the corrugated plates had been installed because he said he was not there.

Mr. Kosciukiewicz, another Martin employee, and Mr. Karlicki, the Vice President of Martin, built the second floor. Kowal also testified that he visited the site two times

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[3]Mr. Kowal's insurance company requested that he make the statement.

during the construction of the second floor, and installed c-joists and corrugated plates, but also said he was at the site every few days when the second floor was built.

Kowal told the Martin employees what to do in the morning in the "workshop," and Mr. Karlicki, the main supervisor for the work being done on the second floor, instructed the Martin employees what to do on the job site. Mr. Karlicki was responsible for making sure the blueprints of the architect were followed correctly. Mr. Karlicki told Mr. Kowal that he had previously built floors in a building, and had experience reading architect plans.

At the time of the accident, Kowal did not know if plywood had been placed, but it was Intex's responsibility to place plywood, not Martin's, which was only responsible for the metal work. Mr. Kowal testified that the second floor would be at full weight-bearing capacity when "everything is done except the covers of the floor, and that the plywood increased the floor's full weight bearing capacity.

Martin supplied a few steel beams and the rest of the steel was supplied by Intex. The steel beams were used to hold the staircase in place. The c-joists were supplied by Intex.

After the accident, Martin repaired the second floor with the same materials initially used to build the floor. The architect made some changes but Kowal did not know what they involved. When Martin was not at the site while the second floor was being erected, Kowal did not see any signs cautioning that the floor was not complete. Kowal believed that "Mr. Lukasz" was coordinating all the deliveries to the job site. In the course of erecting the

second floor, there were small quantities of material there. Mr. Kowal testified that Mr. Lukasz was responsible for the safety of Intex employees at the job site.

Plaintiff commenced the instant action against Alege, Erlacher, Extech and Martin, alleging violations of Labor Law §§ 240 (1), 241 (6), and common-law negligence. Extech and Martin subsequently joined issue, asserting affirmative defenses and cross claims against each other. Upon the completion of discovery, the parties brought the instant motions for summary judgment.

***Labor Law 240 (1)***

In support of that branch of his motion for summary judgment under Labor Law § 240(1), plaintiff argues that the deposition testimony indicates that during the course of the construction work, the second floor of the building where he working collapsed, causing him to fall some 15 feet to the first floor and sustain injuries. Given these circumstances, and the fact that plaintiff was not supplied with any safety devices to prevent his fall, plaintiff argues that defendants are liable for his injuries under Labor Law § 240 (1) as a matter of law. In support of their motion and cross motion and in opposition to this branch of plaintiff's motion, Extech and Martin argue that they may not be held liable under Labor Law § 240 (1) since they were neither owners, general contractors, nor agents of the owner or general contractor. In this regard, Martin argues that it was solely responsible for installation of the flooring within the building, that it did not control the work being performed at the

site, and that its principals were not present the day of the accident. Extech argues that it merely delivered the building supplies to Intex.

As to the timeliness of its cross motion, Martin notes that it is being submitted "at this time" because "the deposition of an essential witness, [Mr. Zawojek] . . . was not taken until June 21, 2007, and the transcript of the deposition was only recently received."

In opposition to Martin's cross motion, Extech argues, as relevant here, that the cross motion is late since it was submitted beyond July 22, 2007, the deadline by which the court directed all parties to submit their motions for summary judgment. Extech asserts that Martin's excuse regarding Mr. Zawojek's deposition does not constitute good cause for the delay in making the motion since Martin could have subpoenaed Zawojek before June 21st, and since Extech and plaintiff were able to submit timely motions for summary judgment using Zawojek's deposition transcript. Martin's cross-motion was served on September 25, 2007.

In opposition to the motion and cross motion of Extech and Martin, respectively, plaintiff argues that defendants controlled the work which directly contributed to plaintiff's accident. Specifically, plaintiff argues that Mr. Mercado, Extech's truck driver/boom operator, admitted that it was his job to place the material where it was safe, that he was trained not to place the skids close to each other, but placed all the skids in the same spot, and that he made the decision to load the fifth skid, but not the seventh, which showed he was controlling the work.

Similarly, plaintiff argues that Martin controlled the work in that Mr. Kowal admitted that Martin was in charge of reinforcement of the floor, that plywood was needed to reinforce the floor and increase its weight load, that there were no signs cautioning that the floor was not complete, and that he did not object to the materials suggested by the architect, knowing that the c-joists which failed were not as strong as a steel beam. Based upon the foregoing, plaintiff also contends that defendants were agents of the general contractor (Intex) or the owners.

***Timeliness of Martin's Cross Motion***

As an initial matter, the note of issue was filed on February 22, 2007, and in an order dated April 4th, 2007, the court directed all parties to serve their summary judgment motions by July 22, 2007. Here, Martin did not cross-move for summary judgment dismissing the complaint until September 25, 2007. Thus, the cross motion is untimely (see CPLR 3212[a]). Nevertheless, the court will consider the cross motion. In this regard, "CPLR 3212 (a) states that a party may not make a summary judgment motion more than 120 days after filing a note of issue unless it obtains 'leave of court on good cause shown'" (*Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 128-129 [2000]). "A trial court thus has discretion in determining whether to consider a motion for summary judgment made more than 120 days after the filing of a note of issue. (*id.*). Good cause may exist where a movant delays making a motion in order to complete outstanding depositions (*id.*). Here, Martin's cross motion was made returnable two months beyond the deadline fixed by the Supreme Court in its preliminary

conference order. However, Martin demonstrated that this delay occurred because the deposition of non-party Mr. Zawojek was not scheduled until June 21, 2007. Further, it is undisputed that Martin did not receive the transcript until closer to the date Martin served its cross motion, and that Mr. Zawojek's testimony was essential to Martin in making its cross motion. Thus, Martin established good cause for its delay and its cross motion will be entertained (*id.; Smith v Nameth,* 25 AD3d 599, 600 [2006]).

***Labor Law § 240(1)***

Labor Law § 240 (1) provides in pertinent part that:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, [or] altering . . . 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 enacted to "prevent those types of accidents in which the scaffold, hoist, stay, ladder 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*" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). In order to accomplish this goal, the statute places the responsibility for safety practices and safety devices on owners, general contractors, and their agents who "are best situated to bear that responsibility" (*id.* at 500; *see also Zimmer v Chemung County Perf. Arts*, 65 NY2d 513,

520 [1985]). "The duty imposed by Labor Law § 240 (1) is nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (*Ross* at 500). Furthermore, the statute is to be construed as liberally as possible in order to accomplish its protective goals (*Martinez v City of New York*, 93 NY2d 322, 326 [1999]). However, "[n]ot every worker who falls at a construction site . . . gives rise to the extraordinary protections of Labor Law § 240 (1)" (*Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 267 [2001]). Rather, only those accidents proximately caused by a Labor Law § 240 (1) violation will result in the imposition of liability under the statute (*Blake v Neighborhood Hous. Services of New York City*, 1 NY3d 280, 287 [2003]).

In addition, Labor Law §§ 240 (1), 241 (6), and 200 liability cannot be maintained against a subcontractor where the subcontractor did not supervise or control the injured plaintiff's work (*Kelarakos v Massapequa Water Dist.*, 38 AD3d 717, 718 [2007] [subcontractor not liable under Labor Law where it was undisputed that it neither controlled nor supervised the injured plaintiff's work]; *Mancini v Pedra Constr.*, 293 AD2d 453, 454 [2002] [since the subcontractor did not control or supervise the injured plaintiff and did not have the authority to do so, the Labor Law claims were properly dismissed insofar as asserted against]; *Stevenson v Alfredo*, 277 AD2d 218, 220 [2000] ["A subcontractor will be held strictly liable under Labor Law § 240 (1) . . . where it has become a statutory agent of . . . the

general contractor [or owner] by virtue of having been delegated the authority to supervise and control the plaintiff's work or work area"][internal quotations and citations omitted]).

Here, plaintiff has submitted admissible evidence that he was injured when standing on the second floor of the building, which collapsed. Evidence that a worker fell as a result of a floor collapse constitutes prima facie proof of a Labor Law § 240 (1) violation (*Robertti v Chang*, 227 AD2d 542, 543 [1996]; *Richardson v Matarese*, 206 AD2d 353 [1994]). Accordingly, plaintiff has demonstrated that he is entitled to summary judgment against Alege and Erlacher, the owners of the building under Labor Law § 240 (1), and the burden shifts to defendants to produce evidence in admissible form sufficient to establish a material issue of fact which would require a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). However, defendants Alege and Erlacher have not opposed plaintiff's motion. In view of the foregoing, this branch of plaintiff's motion as to these two defendants is granted.

As to Extech and Martin, it is undisputed that they were neither owners nor general contractors of the subject project. Further, the record reveals that they were not agents of the owners or general contractor since they did not supervise or control plaintiff's work. In this regard, Extech was the masonry supplier and Martin was responsible for constructing the first and second floors of the building. In addition, plaintiff testified that he was supervised by Lucas, the foreman for non-party Intex, the general contractor for the project. As such, plaintiff's motion seeking summary judgment against Extech and Martin under Labor Law § 240(1) is denied, and those branches of the motion and cross motion of Extech and Martin,

respectively, seeking dismissal of plaintiff's Labor Law § 240(1) claims insofar as asserted against them is granted.

***Labor Law § 241 (6)***

Labor Law §241 (6) provides in pertinent part that:

> "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 persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code (*Ross*, 81 NY2d 494, 501-502 [1993]). "To support a cause of action under Labor Law § 241 (6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the accident" (*Rivera v Santos*, 35 AD3d 700, 702 [2006], citing *Ross*, 81 NY2d at 502).

Plaintiff argues that defendants violated 12 NYCRR 23-2.1 (a) (2), which provides that "[m]aterial and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor scaffold, or platform." Plaintiff also asserts that 12 NYCRR 23.4 (b) (1) (I) is sufficiently specific to support a Labor Law § 241 (6) claim. That section provides "Temporary flooring--skeleton

steel construction in tiered buildings. ( I ) Erection by tower crane or derrick. (I) The erection floor shall be covered over the entire surface except for access openings. Such flooring shall be of the proper strength to support the working load intended to be imposed thereon. Such temporary flooring shall be laid tight and secured against movement." Plaintiff also argues that since the materials were being lowered onto the floor on which he stood, 12 NYCRR 23-6, "is implicated as well, as are the other sections alleged in the complaint and bill of particulars." As noted, defendants Alege and Erlacher have not opposed plaintiff's motion. Martin and Extech argue that Labor Law § 241 (6) does not apply to them as they did not supervise or control plaintiff's work, and since they were neither owners nor general contractors.

As noted above, this claim is inapplicable to Extech and Martin as they were neither the owners, general contractors or agents of the owners, and because they did not supervise or control plaintiff's work (*Bopp v A.M. Rizzo Electrical Contractors, Inc.*, 19 AD3d 348 [2005] [Labor Law § 241 (6) dismissed against subcontractor which was neither an owner or general contractor or agent since it did not exercise the requisite supervisory control over the plaintiff's work]).

As to defendant owners, 12 NYCRR 23-2.1 (a) (2) is sufficiently specific to support a Labor Law § 241 (6) claim (*Herman v St. John's Episcopal Hosp.*, 242 AD2d 316 [1997]). In light of the testimony that the floor collapsed after six pallets of building material were placed upon the second floor, plaintiffs have made a prima facie showing entitling them to

summary judgment on this cause of action (*Mendoza v Cornwall Hill Estates*, 199 AD2d 368, 369 [1993]), which as noted, is unopposed. 12 NYCRR 23.4 is inapplicable as the second floor was not temporary. Finally, plaintiff has failed to make a prima facie showing that 12 NYCRR 23-6 was violated since, as noted above, plaintiff did not articulate any argument relating to this regulation.

In sum, that branch of plaintiff's motion for summary judgment on its Labor Law § 241(6) cause of action is denied except as to defendants Alege and Erlacher with respect to 12 NYCRR 23-2.1 (a) (2). Accordingly, those branches of Extech and Martin's cross motion and motion, respectively, to dismiss plaintiff's Labor Law § 241 (6) claims insofar as asserted against them is granted.

***Labor Law § 200/Common-Law Negligence Claims***

Labor Law § 200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2000]). Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the methods that plaintiff employs in his work, or who have actual or constructive notice of, or are otherwise responsible for an unsafe condition that causes an accident (*Aranda v Park East Constr.*, 4 AD3d 315 [2004]; *Akins v Baker*, 247 AD2d 562, 563 [1998]). Further, under common-law negligence, "a subcontractor may be held liable for negligence where there is an issue of fact whether the work [he or she]

performed . . . created the condition that caused [the] plaintiff's injury" (*Stevenson v Alfredo*, 277 AD2d at 221; *Ryder v Mount Loretto Nursing Home* Inc., 290 AD2d 892, 893 [2002]; *Kelarakos*, 38 AD3d at 719).

In support of this branch of his motion, plaintiff argues that defendants Alege and Erlacher acted negligently because they inspected the building once or twice a week. Plaintiff contends that Extech was negligent because it overloaded the second floor with material when it was the boom operator's responsibility to ensure that the load was adequately disbursed. As to Martin, as well as Alege and Erlacher, plaintiff asserts that they failed to warn that the second floor, being unfinished, and was not at full load bearing capacity. Plaintiff also contends that Martin should have objected to the use of c-joists in the erection of the second floor since Mr. Kowal testified that beams were stronger. Finally, plaintiff argues that the theory of res ipsa loquitor "applies and can form a basis for summary judgment."

In support of its own cross motion and in opposition to plaintiff's motion, Martin argues that since it did not supervise or control plaintiff's work, it may not be held liable under Labor Law § 200; that the testimony of Mr. Kowal, Mr. Mercado, and Mr. Zawojek, in effect, that too much weight had been placed on the second floor, reveals that the accident occurred as a result of the improper placement of building material; that there is no testimony disputing Mr. Kowal's testimony that it correctly installed the floor in accordance with the architect's instructions; and that the theory of res ipsa loquitor is inapplicable since Martin

was not on the job site at the time of the accident and did not have exclusive control of the floor. Martin also argues that since the materials were improperly placed on the second floor by Mr. Mercado, an Extech employee, Extech is not entitled to summary judgment on its cross claims.

In support of its own motion and in opposition to plaintiff's motion, Extech argues that as a materials delivery subcontractor, it may not be held liable under Labor Law § 200 since it was neither an owner, general contractor, or agent of either in that it did not direct or control plaintiff's work. Further, Extech asserts that its employee, Mr. Mercado, had no control over the work site and was merely taking direction from plaintiff's employer, Intex, in unloading the materials. In this regard, Extech notes that Mr. Zawojek directed Mr. Mercado to place the materials on the second floor despite Mr. Mercado's objections; that the Intex supervisor told Mr. Mercado that the Intex employees were distributing the materials; and that Mr. Zawojek testified that Intex was responsible for telling the Extech driver where to place the materials, for spreading out the loads and for plaintiff's safety, and admitted that Intex's foreman told Mr. Mercado to place the materials on the second floor to make his job easier. Extech also contends that plaintiff is not entitled to summary judgment on the common-law negligence claims since plaintiff only pleaded violations of the Labor Law. Finally, Extech asserts, in effect, that plaintiff has failed to articulate how the theory of res ipsa loquitor applies to this case.

In opposition to Martin's cross motion, Extech asserts that based upon the deposition testimony of Mr. Kowal (of Martin), Martin's contract with Intex, and Extech's expert, multiple questions of fact exist as to whether Martin was negligent, namely whether Martin failed to warn others at the site not to place any loads on the second floor when it had not been completed, due to the floor's potential danger and lack of weight-bearing capacity; whether Martin supplied appropriate materials, based upon Mr. Kowal's testimony that he only supplied some of the beams when the contract required Martin to supply all material; whether Martin was negligent in failing to have anyone present when the floor was only partially completed, since the contract stated that Martin was responsible for "all field conditions;" and whether Martin lacked the qualifications to erect the floor, based upon Mr. Kowal's testimony that his firm had never erected a floor and that he did not know the qualifications of one of his workers.

Further, Extech's engineering expert, Martin J. Fradua, opines that if the floor had been completed when the accident occurred, the collapse occurred because Martin failed to adequately connect the floor joists which were therefore not properly braced to prevent web buckling of the joists, nor connected properly to the metal deck to brace against lateral joist movement. Alternatively, he opines that if the floor was not completed at the time of the accident, Martin had a duty to ensure that no construction loads were placed on the second floor, and that Martin was negligent in leaving the second floor unfinished, unattended and in failing to warn plaintiff or the general contractor that the floor was not complete. The

expert also opines that Martin was negligent in performing work they were unqualified to perform.

As an initial matter, contrary to Extech's claim, both the complaint and the verified bill of particulars allege a common-law negligence claim. To the extent a claim under Labor Law § 200 is not explicitly pleaded, it is a codification of a common-law claim of negligence. On the merits, plaintiff has failed to make a prima facie showing that defendants Alege and Erlacher supervised and controlled plaintiff's work, as plaintiff merely testified that they looked at the progress of the work once or twice a week, and spoke with plaintiff's foreman, which is insufficient to raise an issue of fact (*Buccini v 1568 Broadway Assocs.*, 250 AD2d 466 [1998]). Plaintiff has also failed make a prima facie showing that Alege and Erlacher were negligent in any other respect. Similarly, plaintiff has failed to demonstrate that Extech and Martin supervised or controlled plaintiff's work (*Ryder,* 290 AD2d at 894 [Labor Law § 200 "will impose liability against a subcontractor only in the rare case where that party is in effect standing in the shoes of an owner or contractor through the conferral of authority upon it to supervise and control the activity that produced the plaintiff's injury;" the fact that the subcontractor had authority and control over the instrumentality which allegedly gave rise to plaintiff's injury is insufficient to impose liability]). As such, that branch of plaintiff's motion for summary judgment under Labor Law § 200 and common-law negligence against Alege and Erlacher is denied, that branch of plaintiff's motion for summary judgment under Labor Law § 200 against Extech and Martin is denied, and those branches of Extech and

Martin's motion and cross motion, respectively, to dismiss plaintiff's Labor Law § 200 claim insofar as asserted against them is granted.

With respect to plaintiff's common-law negligence claims against Extech, it is true that Mr. Zawojek, a former Intex employee, testified that Intex was responsible for telling Mr. Mercado, the Extech driver, where to place the pallets, for spreading out the pallets, and for plaintiff's safety. However, Mr. Mercado's admissions that it was his job to place the material where it was safe and that he was trained not to place the pallets too close to each other, as well as his testimony that he was concerned about placing successive pallets on the second floor because he thought the floor was unable to withstand the weight, and that he decided to place six of the seven pallets on the second floor, while leaving one pallet on the ground, raise a question of fact as to whether Extech, aware of the potential collapse of the floor, was negligent in overloading the pallets on the second floor. Accordingly, that branch of Extech's motion to dismiss plaintiff's common-law negligence claim insofar as asserted against it is denied.

With respect to Martin, neither plaintiff nor Martin has made a prima facie showing entitling them to summary judgment on plaintiff's common-law negligence claim. Plaintiff argues that Martin failed to warn Extech that the unfinished second floor was not at full load-bearing capacity, and that Martin should have objected to the c-joists as being insufficient because Mr. Kowal testified that a beam is stronger than a c-joist. However, plaintiff failed to submit any competent evidence to support his claim that the second floor was not at full

load-bearing capacity. Moreover, merely because Mr. Kowal testified that beams had a different shape and were stronger than c-joists does not mean, nor was there any testimony, that c-joists were inappropriate for use in erecting the floor. In addition, given the involvement of Intex and Extech, plaintiff cannot avail himself of the doctrine of res ipsa loquitor since he did not establish that his injuries were caused by an agency or instrumentality within the exclusive control of Martin (*Kruck v St. John's Episcopal Hosp.*, 228 AD2d 565, 566 [1996]).

Similarly, in support of its own cross motion, Martin points out that Mr. Kowal installed the floor correctly, that the c-joists and corrugated plates were installed according to blueprints, that the floor collapsed because it was overloaded with pallets, and that the doctrine of res ispa loquitor is inapplicable. Like plaintiff's proof, however, Mr. Kowal's self-serving conclusory testimony is not supported by any competent evidence that the floor was properly constructed.[4]

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[4]The court does not find that the affidavit of Extech's expert raises an issue of fact as to whether the floor, if completed when the materials were delivered, was improperly installed. In this regard, the expert engineer, Mr. Fradua, opines that based upon his review of the architectural drawings by OKG Professional Engineers, enumerated in the contract between Intex and Martin, that the second floor would not have been over-stressed if it had been properly braced by bridging, namely attaching the metal deck to the joists, and if the joists had been properly connected. It appears, although it is not completely clear, that he makes conclusion on the ground that the A-6 architectural drawing shows a metal deck and a concrete slab being supported by double joists, and that "double joists are shown as box members, but the connection details to create a box are not identified." Mr. Fradua does not define a "box" in this context. In any event, Mr. Fradua did not view the second floor after the floor fell, and therefore his opinion based upon the architectural drawings is speculative. Notably, Mr. Kowal submitted an affidavit stating that the metal deck was connected to the joists. Moreover, Mr. Fradua also opines that Martin had a duty to ensure that no other persons walked or worked on the second floor and that no loads were placed on the second floor if the second floor was not complete, and that Martin was therefore negligent in leaving the floor unfinished, unattended, and in failing to warn plaintiff and/or the general contractor that the floor was not complete. However, Martin properly

In sum, that branch of plaintiff's motion for summary judgment on his Labor Law §§ 240 (1) and 241 (6) causes of action against defendants Alege and Erlacher is granted, and that branch of his motion for summary judgment against Alege and Erlacher on his Labor Law § 200 and common-law negligence claims is denied. Those branches of plaintiff's motion for summary judgment on his Labor Law claims against Extech and Martin are denied, and those branches of Extech and Martin's motion and cross motion, respectively, dismissing plaintiff's Labor Law claims insofar as asserted against them are granted. Those branches of plaintiff's motion for summary judgment on his common-law negligence claims against Extech and Martin are denied, and those of Extech and Martin's motion and cross motion, respectively, to dismiss plaintiff's common-law negligence claims insofar as asserted against them are denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. JUSTICE HERBERT KRAMER

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replies that given the testimony by Mr. Mercado (Extech) and Mr. Zawojek (Intex) that, in effect, they were aware that the floor could not withstand the weight to which it was subjected, Martin's failure to warn that the floor was unfinished and the fact that it left the floor unattended cannot be the proximate cause of the accident.