

**Locascio v 4101 Austin Blvd. Corp.**

2013 NY Slip Op 30531(U)

March 20, 2013

Supreme Court, New York County

Docket Number: 100562/11

Judge: Joan M. Kenney

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** JOAN M. KENNEY  
*Justice*

**PART** 8

Index Number : 100562/2011  
LOCASCIO, FRANK  
vs.  
4101 AUSTIN BOULEVARD  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. 100562/11  
MOTION DATE 12/4/13  
MOTION SEQ. NO. 002

The following papers, numbered 1 to 33, were read on this motion to/for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). 1-18  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 19-32  
Replying Affidavits \_\_\_\_\_ | No(s). 33

Upon the foregoing papers, it is ordered that this motion is

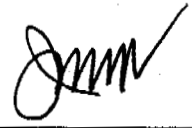
**MOTION IS DECIDED IN ACCORDANCE  
WITH THE ATTACHED MEMORANDUM DECISION**

**MOTION IS DECIDED IN ACCORDANCE  
WITH THE ATTACHED MEMORANDUM DECISION**

**FILED**

MAR 20 2013

NEW YORK  
COUNTY CLERK'S OFFICE



\_\_\_\_\_  
JOAN M. KENNEY, J.S.C.

Dated: MARCH 12, 2013

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 8

-----X

FRANK LOCASCIO,  
  
Plaintiff,  
  
-against-

DECISION & ORDER

Index No. 100562/11

4101 AUSTIN BOULEVARD CORP., HUNTER  
ROBERTS CONSTRUCTION GROUP, SKANSKA  
USA BUILDING, INC. (UNDERPINNING AND  
FOUNDATIONS SKANSKA), LAQUILA GROUP,  
INC. and TOTAL SAFETY CONSULTING,

Defendants.

-----X

HUNTER ROBERTS CONSTRUCTION GROUP,  
SKANSKA USA BUILDING, INC. (UNDERPINNING  
AND FOUNDATIONS SKANSKA), LAQUILA  
GROUP, INC.,

Defendants/Third-Party Plaintiffs,  
  
-against-

**FILED**

MAR 20 2013

NEW YORK  
COUNTY CLERK'S OFFICE

Third-Party  
Index No. 530766/12

FERRARA BROS. BUILDING MATERIALS  
CORP.,

Third-Party Defendant.

-----X

**JOAN M. KENNEY, J.S.C.:**

This action arises out of a work-related accident which occurred on March 30, 2010 on a worksite known as the Fiterman Hall Project. Defendants, Hunter Roberts Construction Group (Hunter Roberts), Skanska USA Building, Inc. (Underpinning and Foundations Skanska) (Skanska), Laquila Group, Inc. (Laquila), and Total Safety Consulting (Total Safety) seek an Order, pursuant to CPLR 3212, dismissing the complaint as against them.

**BACKGROUND**

Briefly, Hunter Roberts was the general contractor on the Fiterman Hall Project. Hunter Roberts retained Laquila as a subcontractor to perform various portions of concrete work. Laquila, in turn, hired Skanska to construct and fill concrete caissons on the job site. Skanska retained

plaintiff's employer, third-party defendant Ferrara Brothers Building Materials Corp. (Ferrara), to supply the concrete for the caissons. Total Safety was the site safety coordinator on the project.

Plaintiff testified that he was employed as a concrete truck driver by Ferrara on the date of the accident (Plaintiff EBT, at 12). Plaintiff had been to the site on at least six prior occasions (*id.* at 102). His accident occurred on an earthen ramp while he was delivering concrete to Skanska (*id.* at 10, 15). Plaintiff described his job duties that day as preparing the load for dumping, dumping the load, and washing down the chutes (*id.* at 22). Plaintiff arrived at the site before 3:00 P.M., and was coming from a plant in Maspeth where the truck was loaded with concrete (*id.* at 21, 22). According to plaintiff, there was another Ferrara truck already in the pit pouring its concrete in a caisson which plaintiff was expected to "top off" with the concrete in his truck (*id.* at 23-24). Plaintiff testified that he was directed to park next to the jersey barrier (a movable concrete divider), but was unsure who directed him to park there (*id.* at 29, 100). The truck was about two feet from the jersey barrier, and the back of the truck was at the top of the ramp (*id.* at 29, 30, 99).

Plaintiff further testified that he had to exit the truck because he had to prepare the load for testing, which involved adding chemicals to adjust the concrete mix (*id.* at 30, 31). In order to have the concrete tested, plaintiff got out of his truck onto the jersey barrier, walked along the jersey barrier, stepped down, and went to the back of the truck (*id.* at 110). Plaintiff then re-entered his truck and thought he was ready to unload the mix but was advised by someone from Skanska to change the mix; Skanska "directed [him] in the mixing of the load. It's [Skanska's] call" (*id.* at 30, 31).

Plaintiff exited the truck again, and stepped on the first step leading to the driver's side of the truck (*id.* at 31, 32). Plaintiff climbed directly on top of the jersey barrier because the wheels of

the truck were right up against the barrier (*id.* at 32). When asked why he did not exit from the passenger side of the cab, plaintiff testified that “[i]t was safer” to exit from the driver’s side “because that’s the side [he] was on” and “[he] always exit[s] the vehicle from the side [he] enter[s] from” (*id.* at 32, 33). He intended to hold on to the truck and walk along the jersey barrier to reach the back of the truck to add chemicals to the load of concrete to the proper “slump” (*id.* at 108). Plaintiff fell from the jersey barrier when his right foot got caught in one of the interlocking portions connecting two barriers (*id.* at 35, 36, 37). He fell about 30 inches onto his left hand (*id.* at 36, 40).

Gavin Schiraldo testified that he was a project manager employed by Hunter Roberts on the Fiterman Hall Project (Schiraldo EBT, at 6, 7). Schiraldo managed the financials, scheduling, and quality assurance, and described his role as “bridg[ing] the gap between [the] client, subcontractors and consultants” (*id.* at 7).

Brendan Dwyer testified that he was Skanska’s project superintendent on the job (Dwyer EBT, at 9). Dwyer stated that Laquila hired Skanska to install drilled-in caissons and to pour concrete into the caissons (*id.* at 11-12). Ferrara supplied the concrete (*id.* at 13). Dwyer testified that the normal protocol for delivery of concrete was for the driver to have the concrete tested at the top of the ramp; a Skanska laborer would have the “truck pull in, mix and give a sample” (*id.* at 30).

Chris Nolan testified that he was the general superintendent for Laquila (Nolan EBT, at 6). According to Nolan, Hunter Roberts hired Laquila to do work on the existing foundation walls and to remove concrete in the existing slab (*id.* at 9). Laquila subcontracted the installation of caissons to Skanska (*id.* at 15). Nolan testified that Laquila’s supervisory role in March 2010 was to “make sure the concrete was not delayed too long, make sure there was a proper slump in the concrete. Other than that, that’s all we were involved with” (*id.* at 19). Laquila installed the jersey barriers on

both sides of the earthen ramp to prevent trucks from falling off the edge of the ramp (*id.* at 28-29). The jersey barriers were about two feet wide at the base, three feet high, and eight inches wide at the top (*id.* at 28). Nolan testified that he did not have any interaction with Ferrara drivers, and did not direct concrete delivery workers where to park (*id.* at 51, 52).

Augustine Clery, the site safety manager employed by Total Safety on the Fiterman Hall Project, testified that he was present on the job site on the date of the accident (Clery EBT, at 12, 22). Clery testified that the earthen ramp was constructed shortly after December 2009 to allow access to the site for heavy equipment (*id.* at 37). According to Clery, the ramp was wide enough to accommodate vehicular traffic and for someone to walk on the side of the vehicle (*id.* at 55). Laquila installed jersey barriers for protection while the crew was drilling caissons next to the ramp (*id.* at 42-44). Clery stated that the jersey barriers were not intended for people to walk on; the top of the jersey barriers is approximately five inches thick (*id.* at 53, 54). Clery testified that after plaintiff's fall, "[he] observed the truck parked on the ramp and in relation to the jersey barrier, [he] saw that [plaintiff] could have come off from the truck and walk [sic] on the ramp, whether it was on the left side or right side of the ramp" (*id.* at 66). Clery prepared an accident report on the date of the accident, which states that "[plaintiff] hurt his left wrist as he attempted to step on a jersey barrier from his dump truck" (Jemal Affirm. in Support, Exh. N). Clery believed that plaintiff should not have been walking on the top of the jersey barrier (Clery EBT, at 92, 93).

Plaintiff commenced this action on January 14, 2011 against defendants 4101 Austin Boulevard Corp., Hunter Roberts, Skanska, Laquila, and Total Safety, seeking recovery for violations of Labor Law §§ 200, 240, and 241 and for common-law negligence. On March 25, 2011, plaintiff amended the complaint to add additional factual allegations.

By stipulation dated April 10, 2012, plaintiff discontinued this action with prejudice against 4101 Austin Boulevard Corp. (Jemal Affirm. in Support, Exh. D).

A note of issue and certificate of readiness were filed on May 15, 2012.

Thereafter, Hunter Roberts, Skanska, and Laquila commenced a third-party action for indemnification and contribution against Ferrara.

### DISCUSSION

“[T]he proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]; see also *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action” (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

In addition, “issue-finding, rather than issue-determination, is key” on a motion for summary judgment (*Shapiro v Boulevard Hous. Corp.*, 70 AD3d 474, 475 [1st Dept 2010]).

#### A. Labor Law § 240 (1)

Defendants move for summary judgment dismissing plaintiff’s Labor Law § 240 (1) claim. Citing *Bond v York Hunter Constr.* (95 NY2d 883 [2000]), defendants argue that plaintiff’s accident did not involve an elevation-related hazard within the meaning of Labor Law § 240 (1). Plaintiff fell, defendants contend, while walking along the top of a 30-inch-high concrete barrier after stepping down onto it from the cab of his vehicle. In addition, defendants contend that plaintiff’s

decision to walk on the jersey barrier was the sole proximate cause of his accident, because he could have simply exited from the passenger side of his truck, without having to walk along the top of the jersey barrier.

Plaintiff contends, in opposition, that it is undisputed that his accident was elevation-related and that it directly resulted from the lack of an adequate safety device that would have prevented his fall (Plaintiff Mem. of Law in Opposition, at 16). Plaintiff also argues that his decision to exit the cab from the driver's side and walk on the jersey barrier was not the sole proximate cause of his accident, since he parked his truck as directed by defendants and had no choice but to exit the truck as he did. To support his argument, plaintiff submits his affidavit, an affidavit from his co-worker, Thomas Laffey, and photographs of the interior of the cab which show chemicals and supplies stored on the passenger side of the cab (Plaintiff Aff., ¶ 3, Exhs. 1-8; Laffey Aff., ¶ 8). Plaintiff states that the photographs are a fair and accurate representation of the truck at the time of the accident (Plaintiff Aff., ¶ 3).

Labor Law § 240 (1), known as the Scaffold Law, 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.”

It is well established that Labor Law § 240 (1) applies to “extraordinary elevation risks,” and not the “usual and ordinary dangers of a construction site” (*Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 843 [1994]). To establish liability under Labor Law § 240 (1), the plaintiff must establish the following two elements: (1) a violation of the statute, i.e., that the owner

or general contractor failed to provide adequate safety devices; and (2) that the statutory violation was a proximate cause of the injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 [2003]). Where a plaintiff is the sole proximate cause of an injury, liability does not attach under the statute (*id.* at 290).

In *Rocovich v Consolidated Edison Co.* (78 NY2d 509, 514 [1991]), the Court of Appeals explained that:

“[t]he contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured”

(*see also Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009] [“the single decisive question is whether plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential”]).

In *Bond* (95 NY2d 883), the plaintiff was injured while climbing down from a demolition vehicle. The Court of Appeals held that, “[a]s a matter of law, the risk of alighting from the construction vehicle was not an elevation-related risk which calls for any of the protective devices of the types listed in Labor Law § 240 (1)” (*id.* at 884-885).

In *Dilluvio v City of New York* (264 AD2d 115, 117 [1st Dept 2000], *affd* 95 NY2d 928 [2000]), the plaintiff, a highway construction worker, fell three feet from the back of a pickup truck to the pavement. As in *Bond*, the Court of Appeals held that “as a matter of law, the accident did not result from an elevation-related risk” (95 NY2d at 929).

In *Toefer v Long Is. R.R.* and its companion case, *Marvin v Korean Air* (4 NY3d 399, 405 [2005]), the Court of Appeals considered whether plaintiffs who were working on, or getting down

from, the surface of a flatbed truck were entitled to recover under Labor Law § 240 (1). In *Toefer*, the injured worker was unloading beams from the surface of a flatbed truck (*id.*). A wooden lever flew back towards him, striking him in the head and propelling him backwards to the ground (*id.*). The Court held that plaintiff's accident did not present an elevation-related risk, explaining that:

“[the injured worker] was working on a large and stable surface only four feet from the ground. That is not a situation that calls for the use of a device like those listed in section 240 (1) to prevent a worker from falling . . . His injury, horrendous as it is, is not attributable to the sort of elevation-related risk that Labor Law § 240 (1) was meant to address”

(*id.* at 408). Similarly, in *Marvin*, the plaintiff was injured when stepping off a flatbed truck when his foot became tangled in a safety harness he was wearing, causing him to break his ankle (*id.* at 406). The Court held that:

“[a] four-to five-foot descent from a flatbed trailer or similar surface does not present the sort of elevation-related risk that triggers Labor Law § 240 (1)'s coverage. Safety devices of the kind listed in the statute are normally associated with more dangerous activity than a worker's getting down from the back of a truck”

(*id.* at 408-409).

Recently, in *Ortiz v Varsity Holdings, LLC* (18 NY3d 335, 339 [2011]), a case in which a worker was injured when he fell from a six-foot-high dumpster, the Court distinguished *Toefer*, reasoning that “[a] worker may reasonably be expected to protect himself by exercising due care in stepping down from a flatbed truck.”

Here, contrary to plaintiff's contention, there is a dispute as to whether his accident was elevation-related. Defendants have moved for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim on the ground that he was not subjected to an elevation-related risk. The court agrees that the statute does not apply under the circumstances of this case. The risk of alighting from the

truck did not present an elevation-related risk which called for any protective devices of the kind listed in Labor Law § 240 (1) (*see Bond*, 95 NY2d at 884-885; *Lavore v Kir Munsey Park 020, LLC*, 40 AD3d 711, 712 [2d Dept 2007], *lv denied* 10 NY3d 701 [2008] [where plaintiff fell while descending from the side of his utility truck, the approximately five-foot elevation between the top of truck's utility bin and the ground did not present an "elevation-related risk"]; *Amantia v Barden & Robeson Corp.*, 38 AD3d 1167, 1168 [4th Dept 2007] [plaintiff's work in unloading cargo truck, including entering and exiting the truck, did not present an exceptionally dangerous condition posed by an elevation differential between the cargo floor of the truck and the ground]). Given this determination, the court need not consider whether plaintiff was the sole proximate cause of his injuries under Labor Law § 240 (1). Therefore, plaintiff's Labor Law § 240 (1) claim is dismissed.

**B. Labor Law § 241 (6)**

Labor Law § 241 (6) requires that all contractors, owners, and their agents comply with the following requirement:

"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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Labor Law § 241 (6) imposes a "*nondelegable* duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety'" to construction workers (*Rizzuto v L.A. Wenger Constr. Co.*, 91 NY2d 343, 348 [1998]). To establish liability under Labor Law § 241(6), the plaintiff must "specifically plead and prove the violation of an applicable Industrial Code regulation," which proximately caused the accident (*Garcia v 225 E. 57<sup>th</sup> St. Owners*,

*Inc.*, 96 AD3d 88, 91 [1st Dept 2012] [internal quotation marks and citation omitted]). A “plaintiff’s failure to identify a violation of any specific provision of the State Industrial Code precludes liability under Labor Law § 241 (6)” (*Owen v Commercial Sites*, 284 AD2d 315 [2d Dept 2001]).

Plaintiff’s verified bill of particulars alleges the following violations of the Industrial Code: 12 NYCRR 23-1.5 (a); 12 NYCRR 23-1.6; 12 NYCRR 23-1.7 (b) (1), (d), (e), and (f); 12 NYCRR 23-1.15; 12 NYCRR 23-1.22 (b) (2), and (4); and 12 NYCRR 23-1.23 (Verified Bill of Particulars, ¶ 7). In opposition to defendants’ motion, plaintiff only relies upon 12 NYCRR 23-1.6, 12 NYCRR 23-1.7 (b), 12 NYCRR 23-1.7 (e) (1) and (2), and 12 NYCRR 23-1.7 (f). Therefore, the court shall only consider the four disputed Industrial Code violations, and plaintiff’s claim is dismissed to the extent that it is based on the other cited regulations.

#### 12 NYCRR 23-1.6

Section 23-1.6, entitled “Responsibility of employees,” states that “[e]very employee shall observe all the provisions of this Part (rule) which directly concern or affect his conduct. He shall use the safety devices provided for his personal protection and he shall not tamper with or render ineffective any safety device, safeguard or personal protective equipment” (12 NYCRR 23-1.6).

Here, section 23-1.6 is inapplicable because it requires that *employees* observe the Industrial Code regulations and use safety equipment provided (*see Balladares v Southgate Owners Corp.*, 40 AD3d 667, 670 [2d Dept 2007]; *Sdregas v City of New York*, 309 AD2d 612 [1st Dept 2003]; *Lawyer v Rotterdam Ventures*, 204 AD2d 878, 880 [3d Dept 1994], *lv dismissed* 84 NY2d 864 [1994]).

#### 12 NYCRR 23-1.7 (b) (1)

Section 23-1.7 (b) (1), “Hazardous openings,” provides that “[e]very hazardous opening into

which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule)” (12 NYCRR 23-1.7 [b] [1] [i]).

This regulation is sufficiently specific to support a Labor Law § 241 (6) claim (*Olsen v James Miller Mar. Serv., Inc.*, 16 AD3d 169, 171 [1st Dept 2005]). The First Department has held that “[t]he safety measures required – planking installed below the opening, safety nets, harnesses and guard rails – all bespeak of protections against falls from an elevated area to a lower area through openings large enough for a person to fit” into (*Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002]). Section 23-1.7 (b) (1) only “applies to hazardous openings of significant depth and size” (*Pietrowski v ARE-East Riv. Science Park, LLC*, 86 AD3d 467, 469 [1st Dept 2011]; *D’Egidio v Frontier Ins. Co.*, 270 AD2d 763, 765 [3d Dept 2000], *lv denied* 95 NY2d 765 [2000] [same]).

In this case, plaintiff did not fall from an elevated area to a lower area through an opening, and the interlocking portion between the jersey barriers where plaintiff’s foot got caught does not constitute a “hazardous opening” (*see e.g. Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 147 [1st Dept 2012] [three- to six-inch openings in slats of pallet were not “hazardous openings”]; *Pope v Safety & Quality Plus, Inc.*, 74 AD3d 1040, 1041 [2d Dept 2010], *lv dismissed* 15 NY3d 862 [2010] [concrete landing from which worker stepped off did not constitute a “hazardous opening,” even though there was a height differential between the raised concrete floor and the floor below]; *Messina*, 300 AD2d at 124 [unguarded drainpipe hole approximately 12 inches in diameter and eight inches deep was not a “hazardous opening”]). Therefore, section 23-1.7 (b) (1) does not apply here.

12 NYCRR 23-1.7 (e)

Section 23-1.7 (e) (Tripping and other hazards) provides as follows:

“(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

(2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed”

(12 NYCRR 23-1.7 [e]).

Sections 23-1.7 (e) (1) and 23-1.7 (e) (2) have been held to be sufficiently specific to serve as a predicate for a Labor Law § 241 (6) claim (*Jara v New York Racing Assn., Inc.*, 85 AD3d 1121, 1123 [2d Dept 2011]; *Boss v Integral Constr. Corp.*, 249 AD2d 214, 215 [1st Dept 1998]).

In *Canning v Barneys N.Y.* (289 AD2d 32, 33 [1st Dept 2001]), the plaintiff was injured while carrying a bundle of electrical conduit when his foot became ensnared in the remnants of a coil of tie wire. The First Department held that the plaintiff was injured in a “working area,” rather than in a “passageway,” because at the time of the accident, the concrete had already been poured, and the site of his fall was in constant use as a work site for loading and unloading construction materials and debris (*id.* at 34).

In *Dalanna v City of New York* (308 AD2d 400 [1st Dept 2003]), a plumber tripped over a protruding bolt while carrying a pipe across an outdoor 50-foot-long concrete slab. In that case, the First Department held that neither section 23-1.7 (e) (1) nor 23-1.7 (e) (2) applied –

“[t]he slab, although regularly traversed to bring pipes to the tanks, remained a common, open area between the job site and the street, and thus was not [a] ‘passageway’ covered by 12 NYCRR 23-1.7 (e) (1), and at best was a ‘working area’ covered by 12 NYCRR 23-1.7 (e) (2). However, the bolt, which was embedded in the ground, was not ‘dirt,’ ‘debris,’ ‘scattered tools and materials’ or a ‘sharp projection[,]’ as required by the latter provision”

(*id.* at 401 [citations omitted]).

Although this regulation is sufficiently specific, section 23-1.7 (e) (1) does not apply to these facts because plaintiff did not fall in a “passageway.” Plaintiff testified that he fell from a jersey barrier located on a large earthen ramp only feet from where testing, wheelbarrow-filling and other activities were taking place (Plaintiff EBT, at 10, 27, 42-45). In addition, section 23-1.7 (e) (2) is inapplicable since plaintiff’s accident did not occur as a result of “accumulations of dirt and debris,” “scattered tools and materials,” or “sharp projections” (*see Dalanna*, 308 AD2d at 401; *cf. Dowd v City of New York*, 40 AD3d 908, 911 [2d Dept 2007] [issue of fact as to whether piece of wood embedded in trench or bent nail protruding from wood constituted “sharp projections”]).

12 NYCRR 23-1.7 (f)

The Industrial Code regulation governing “vertical passage,” section 23-1.7 (f), states that “[s]tairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided.”

Section 23-1.7 (f) has been held to be sufficiently specific to support a section 241 (6) claims (*Miano v Skyline New Homes Corp.*, 37 AD3d 563, 565 [2d Dept 2007]). Courts have held that section 23-1.7 (f) only applies to a “working level [above or] below ground requiring a stairway, ramp or runway” (*see Harrison v State of New York*, 88 AD3d 951, 953 [2d Dept 2011]; *Lavore*, 40 AD3d at 713; *Amantia*, 38 AD3d at 1169; *see also Torkel v NYU Hosps. Ctr.*, 63 AD3d 587, 590 [1st Dept 2009]). Here, plaintiff was injured when he fell from a jersey barrier, and was not injured while attempting to access a working level above ground (Plaintiff EBT, at 35, 36, 37). As a result, section 23-1.7 (f) does not apply on this record (*see Lavore*, 40 AD3d at 713 [section 23-1.7 (f) was

inapplicable where plaintiff fell when descending from side of truck bed]; *Amantia*, 38 AD3d at 1169 [section 23-1.7 (f) did not apply where plaintiff fell while descending from cargo floor of truck, which was not a working level above ground]).

Since plaintiff has failed to identify a specific and applicable Industrial Code regulation, plaintiff's Labor Law § 241 (6) claim is dismissed (*see Owen*, 284 AD2d at 315).

**C. Labor Law § 200 and Common-Law Negligence**

Defendants also move for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims. Defendants argue, first, that they did not supervise or direct the means or methods of plaintiff's work. Second, defendants contend that plaintiff's decision to walk on the jersey barrier was the sole proximate cause of his accident. Third, defendants contend that the jersey barriers were not a hazardous condition, since they were placed on the site to protect drivers from falling off the earthen ramp.

In opposition, plaintiff argues that there are issues of fact as to whether plaintiff's injuries resulted from unsafe premises conditions and/or the contractors' methods. Plaintiff contends that defendants did not distinguish between the two standards of liability or offer any proof in admissible form. Finally, plaintiff argues that Hunter Roberts, as the general contractor, and Laquila, Skanska, and Total Safety may be liable under Labor Law § 200 as agents of Hunter Roberts.

Initially, the court rejects plaintiff's contention that defendants have not offered any evidentiary proof in admissible form. Defendants have offered the deposition transcripts of Hunter Roberts's project manager, Skanska's project superintendent, Laquila's general superintendent, and Total Safety's site safety manager on the Fiterman Hall Project.

It is well settled that Labor Law § 200<sup>1</sup> is a codification of an owner's and general contractor's duty to maintain a safe work site (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]).

Generally, Labor Law § 200 claims fall into two categories: (1) those involving injuries arising from dangerous or defective premises conditions; and (2) those involving injuries arising from the means or methods in which the work is performed (*see generally Ventura v Ozone Park Holding Corp.*, 84 AD3d 516, 517 [1st Dept 2011]). Where the plaintiff's injury is caused by a dangcrous or defective premises condition, the owner or general contractor may be held liable only if it created or had actual or constructive notice of the dangerous condition (*Raffa v City of New York*, 100 AD3d 558 [1st Dept 2012]; *Augustyn v City of New York*, 95 AD3d 683, 685 [1st Dept 2012]). Where the plaintiff's injury arises out of the means and methods of the construction work, the plaintiff must establish that the owner or contractor supervised or controlled the activity giving rise to the injury (*Cappabianca*, 99 AD3d at 144; *Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]; *Dalanna*, 308 AD2d at 400).

To impose liability upon a defendant for violations of Labor Law § 200 or common-law negligence, the violations or negligence must constitute a proximate cause of the accident (*see Blake*, 1 NY3d at 290; *Weininger v Hagedorn & Co.*, 91 NY2d 958, 960 [1998], *rearg denied* 92 NY2d 875

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<sup>1</sup>Labor Law § 200 (1) provides that:

“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. The board may make rules to carry into effect the provisions of this section.”

[1998]; *Weingarten v Windsor Owners Corp.*, 5 AD3d 674, 676 [2d Dept 2004]). Proximate cause requires that a defendant's act or failure to act "was a substantial cause of the events which produced the injury" (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562 [1993], quoting *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980], *rearg denied* 52 NY2d 784 [1980]). Causation may be decided as a matter of law "where only one conclusion may be drawn from the established facts" (*Derdiarian*, 51 NY2d at 315).

Contrary to defendants' position, plaintiff's actions in exiting the truck from the driver's side and walking on the jersey barrier, after being told to park next to the jersey barrier and exit the truck, were not so unnecessary, irrational, extraordinary or unreasonable so as to render him solely responsible for his accident as a matter of law (*compare Navarro v City of New York*, 75 AD3d 590, 592 [2d Dept 2010] [defendants failed to establish that they were free from fault in happening of accident, and that worker's conduct in going to retrieve tool where he was not assigned to work was the sole proximate cause of his accident], with *Serrano v Popovic*, 91 AD3d 626, 627 [2d Dept 2012] [worker's decision to climb onto roof of main house, where there was no safety equipment, was the sole proximate cause of his injuries where worker had been instructed only to work on garage roof], *Capellan v King Wire Co.*, 19 AD3d 530, 532 [2d Dept 2005] [worker's unforeseeable act of forcing open a secured door was the sole proximate cause of his injuries], and *Misirlakis v East Coast Entertainment Props., Inc.*, 297 AD2d 312, 313 [2d Dept 2002], *lv denied* 100 NY2d 637 [2003] [employee's unnecessary and unforeseeable act of climbing onto dumpster and ascending fire escape was the sole and superseding proximate cause of his accident]).

Here, plaintiff's accident arose from the means and methods of his work, not a dangerous or defective condition on the premises. Defendants have failed to make a prima facie showing that

Skanska, the entity that hired Ferrara, did not exercise supervision, direction and control over his work. Plaintiff testified that, on the date of his accident, he had to prepare the load for dumping, dump the load, and wash down the chutes (Plaintiff EBT, at 22). According to plaintiff, a concrete foreman named Guy Tano from Skanska gave him instructions on the site (*id.* at 24, 25 [emphasis added]). Skanska had directed him to dump a sample for testing (*id.* at 23). Plaintiff stated that when he arrived at the site, he was directed to park next to the jersey barrier, but was unsure who directed him to do so (*id.* at 29). Plaintiff testified that he exited the truck to prepare the load for testing after being told to exit the truck by Skanska (*id.* at 31, 33). Skanska “directed [plaintiff] in the mixing of the load. It’s their call” (*id.* at 31 [emphasis added]). In addition, Skanska’s project superintendent, Brendan Dwyer, testified that the scope of its job was to install and complete drilled-in caissons (Dwyer EBT, at 11). Skanska supplied the concrete from Ferrara (*id.* at 13). Dwyer testified that:

“[n]ormal protocol was for the [Skanska] laborer to meet the truck at the top of the ramp and pull him in to protect the traveling public, make sure there weren’t any pedestrians. At that time they were testing the concrete before it came down and into the excavation, so the laborer would have the truck pull in, mix and give a sample”

(*id.* at 30). According to Dwyer, Skanska normally directed the Ferrara driver where to park for the slump test (*id.* at 40). In light of plaintiff’s testimony that he was directed to park next to the jersey barrier, that he received instructions from a Skanska foreman on the job site, and that a Skanska worker told him to exit the truck to perform the slump test, there are issues of fact as to whether Skanska had supervisory control over his work (*see Mejia v Levenbaum*, 30 AD3d 262, 263 [1st Dept 2006] [issue of fact as to whether lessee had directed contractor’s employee in removing unwieldy metal box from premises precluded summary judgment on plaintiff’s Labor Law § 200 and

common-law negligence claims]; *Wray v Morse Diesel Intl. Inc.*, 23 AD3d 260, 261 [1st Dept 2005] [issue of fact as to construction manager's supervisory control where it issued instructions concerning plaintiff's demolition work]). Accordingly, defendants' motion seeking dismissal of the Labor Law § 200 and common-law negligence claims must be denied as to Skanska, regardless of the sufficiency of plaintiff's opposing papers (*see Winegrad*, 64 NY2d at 853).

However, there is no evidence that Hunter Roberts, Laquila, or Total Safety exercised supervision or control over plaintiff's work. Gavin Schiraldo, the project manager for Hunter Roberts, testified that he managed the financials, scheduling, and quality assurance on the job (Schiraldo EBT, at 7). He described his role as "bridg[ing] the gap between [the] client, subcontractors and consultants" (*id.*). Hunter Roberts's superintendents were on site during the pouring of the caissons (*id.* at 20). Laquila was required to advise Hunter Roberts when concrete was going to be poured during a specific period (*id.* at 28). Hunter Roberts's superintendents were present during "slump tests" (*id.* at 29). Chris Nolan, Laquila's general superintendent, testified that the extent of Laquila's supervision of the pouring of the caissons was to "make sure the concrete was not delayed too long, make sure there was a proper slump in the concrete. Other than that, that's all we were involved with" (*id.* at 19). Nolan had authority to stop work if he observed work being done in an unsafe manner (*id.* at 25). One of the reasons why Laquila had to ensure that the concrete was not delayed too long was so as to avoid a "cold joint" in the concrete (*id.* at 47). Augustine Clery, Total Safety's site safety manager, testified that he advised contractors about safety protection (Clery EBT, at 24, 25).

Although Hunter Roberts, Laquila, and Total Safety were present on the job site, mere presence is insufficient to infer supervisory control (*Foley*, 84 AD3d at 477). Moreover, Hunter

Roberts and Laquila's general instructions as to what needed to be done, and monitoring and oversight of the timing and quality of the work, are not enough to impose liability on them under Labor Law § 200 or the common law (*see Paz v City of New York*, 85 AD3d 519 [1st Dept 2011]; *Kagan v BFP One Liberty Plaza*, 62 AD3d 531, 532 [1st Dept 2009], *lv denied* 13 NY3d 713 [2009]; *Dalanna*, 308 AD2d at 400). Finally, Laquila's superintendent's authority to stop the work for safety reasons fails to raise an issue of fact as to supervisory control (*see Foley*, 84 AD3d at 478; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 309 [1st Dept 2007]). Therefore, Hunter Roberts, Laquila, and Total Safety cannot be liable under Labor Law § 200 or in common-law negligence.

For the above reasons, plaintiffs' Labor Law § 200 and common-law negligence claims are dismissed except as to Skanska. Accordingly, it is

ORDERED that defendants Hunter Roberts Construction Corp., Skanska USA Building, Inc. (Underpinning and Foundations Skanska), Laquila Group, Inc., and Total Safety Consulting's motion is granted, to the extent that plaintiff's claims under Labor Law § 240 (1), §241 (6), § 200/common-law negligence, are as to defendants Hunter Roberts Construction Group, Laquila Group, Inc., and Total Safety Consulting, only and the application to dismiss this matter, in its entirety against all moving defendants, is denied; and it is further

ORDERED that the parties proceed to mediation and/or trial, forthwith.

March 12, 2013

**FILED** ENTER:  
 MAR 20 2013  
 NEW YORK COUNTY CLERK'S OFFICE  
 JOANNE J. CONWAY J.S.C.