

<b>Garcia v 1000 Dean LLC</b>
2019 NY Slip Op 31151(U)
March 28, 2019
Supreme Court, Kings County
Docket Number: 507711/14
Judge: Edgar G. Walker
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At an IAS Term, Part 90 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 28<sup>th</sup> day of March, 2019.

P R E S E N T:

HON. EDGAR G. WALKER

Justice.

-----X

DANIEL HERNANDEZ GARCIA,

Plaintiff,

- against -

1000 DEAN LLC, STUDEBAKER BUILDERS LLC AND BFC PARTNERS,

Defendants.

-----X

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Index No. 5077114

The following papers numbered 1 to 9 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	_____	1-2, 3-6
Opposing Affidavits (Affirmations) _____	_____	7-8
Reply Affidavits (Affirmations) _____	_____	9
_____ Affidavit (Affirmation) _____	_____	_____
Other Papers _____	_____	_____

Upon the foregoing papers, defendants 1000 Dean LLC (Dean) and Studebaker Builders LLC, (Studebaker) (collectively the moving defendants), move for an order, pursuant to CPLR 3212, granting summary judgment (1) dismissing all claims as against Studebaker pursuant to §§ 11 and 29 of the Workers Compensation Law (WCL), and (2) dismissing plaintiff Daniel Hernandez Garcia's Labor Law §§ 241 (6), 200 and common law negligence claims as against the moving defendants. Plaintiff cross-moves for partial summary judgment in his favor on his Labor § 241 (6) claim as against all defendants.

### Background and Procedural History

Dean is the owner of property located at 1000 Dean Street in Brooklyn (the premises). Dean retained Studebaker to perform construction related services at this location. Plaintiff was working at the premises performing various construction related tasks for approximately four to six months in early 2013. Plaintiff testified that on May 15, 2013, he was carrying two pieces of rebar on his shoulder walking toward the corner of the building where he was going to install the rebar. However, his right foot fell into a hole that was approximately five to six inches wide and three to four inches deep. Plaintiff testified that he was caused to drop the rebar but his body did not fall to the ground. He claims to have sustained various injuries. Plaintiff testified that the area where the incident occurred was not well lit but that he never complained about the lack of lighting to his supervisors. He testified that he observed the hole on two occasions prior to the incident. Plaintiff further testified that he was supervised by Pawel Kowalski and Steve Capoccia at this site.

Mr. Kowalski testified that he was employed by Studebaker which had been retained to perform interior and exterior renovations at the premises. He stated that he was a foreman on the project and that Dagoberto Nieva was the foreman on the site for the Spanish speaking employees, including plaintiff. Kowalski stated that he would relay information to Nieva who would, in turn, inform the Spanish speaking workers regarding what work needed to be performed. Kowalski testified that he reported to project manager Tracy Nisiewicz, who visited the site two to three times a week. He further testified that although Capoccia was employed as a supervisor for subcontractors at the site, he (Capoccia) did not begin supervision at this site until Fall 2013, months after plaintiff's accident occurred. Kowalski testified that the hole plaintiff alleges he fell in was caused by the removal of plumbing and that all Studebaker employees knew that if there was an opening it needed to be covered with

plywood. He stated that although he walked past the area in which plaintiff alleges he was injured, he never observed this hole uncovered prior to plaintiff's accident but that he personally covered the hole after becoming aware of the incident. Kowalski testified that the site was lit using temporary construction lighting and that it was sufficient to provide illumination.

Joseph Ferrara testified on behalf of Dean. He testified that Dean was involved in the development of the premises and that he visited the site on two occasions prior to plaintiff's accident.

Plaintiff commenced this action on August 22, 2014, and issue was joined by service of Dean and Studebaker's answer on or about October 8, 2014, and by the service of the answer of BFC Partners (BFC) on or about January 2, 2015. Plaintiff served a verified bill of particulars on May 7, 2015 and supplemental bill of particulars on February 19, 2016. A Note of Issue was filed on August 31, 2017. A Compliance Conference Part order, dated October 3, 2017, extended the time to move for summary judgment to January 31, 2018. On that date, Dean and Studebaker moved for summary judgement. Plaintiff cross-moved for partial summary judgment on April 17, 2018.

#### Dean and Studebaker's Motion

Dean and Studebaker, the moving defendants, move for an order dismissing all claims as against Studebaker pursuant to §§ 11 and 29 of the WCL. They note that plaintiff alleges in his complaint and bill of particulars that he was employed by non-party, Riverview West Contracting. In addition, he testified during his deposition that he was employed by BFC, and that he never heard of Riverview until he received his Workers' Compensation benefits. However, the moving defendants argue that plaintiff was actually employed by Studebaker. In support of this contention, they point to plaintiff's payroll records and W-2 statement all

of which list his employer as Studebaker Builders LLC. Further, they point to the testimony of plaintiff's supervisor Kowalski, indicating that plaintiff's employer on this project was Studebaker.

In opposition, plaintiff argues that Studebaker has failed to meet its burden of establishing that it was his employer on the date of the accident and, thus, material questions of fact exist that preclude summary judgment in Studebaker's favor on this ground. Plaintiff contends that he was informed that the Workers' Compensation Board had determined that he was employed by Riverview West but that the moving defendants' witness, Mr. Ferrara testified that he was not aware of Riverview West. Thus, plaintiff argues that the moving defendants have failed to establish the relationship between the various interrelated companies. In support of this contention, plaintiff points to the Second Department's holding in *Weitz v Anzek Const. Corp.*, (65 AD3d 678, 680 [2009]) which involved an injured plaintiff that applied for, and obtained, workers' compensation benefits indicating that he was employed by an entity called "Anzek." However, his wages were paid by an entity called "Steve & Andy" which was also listed as his employer on his W-2 statement. The Second Department held that Anzek was not entitled to summary judgment dismissing plaintiff's complaint on the ground that it was plaintiff's employer as questions of fact existed as to which entity was in fact his employer and what relationship existed between Anzek & Steve & Andy.

#### *Discussion*

"The Workers' Compensation Law expressly provides that an employee's eligibility to collect workers' compensation benefits is the employee's exclusive remedy against an employer for job-related injuries" (*Dumervil v Port Auth. of N.Y. & N.J.*, 163 AD3d 628, 629 [2018]; see Workers' Compensation Law §§ 11, 29[6]; *Isabella v Hallock*, 22 NY3d 788,

792-793[2014]; *Reich v Manhattan Boiler & Equip. Corp.*, 91 NY2d 772, 779[1998]). “A cornerstone of the workers' compensation framework is a tradeoff: the employee is afforded ‘swift and sure’ compensation and the employer is assured that its workers’ compensation liability to its employee ‘shall be exclusive and in place of any other liability whatsoever’” (*Weiner v City of New York*, 84 AD3d 140, 143 [2011]; Workers' Compensation Law § 11; see Workers' Compensation Law § 29 [6]; *Gonzales v Armac Indus.*, 81 NY2d 1, 8 [1993]; *Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 159 [1980]; *O'Rourke v Long*, 41 NY2d 219, 222 [1976]; *Williams v Hartshorn*, 296 NY 49, 50 [1946]; *Hyman v Agtuca Realty Corp.*, 79 AD3d 1100 [2010]).

““For purposes of the Workers' Compensation Law, a person may be deemed to have more than one employer—a general employer and a special employer””( *James v Crystal Springs Water*, 164 AD3d 660, 661 [2018] quoting *Bostick v Penske Truck Leasing Co., L.P.*, 140 AD3d 999, 1000; see *Munion v Trustees of Columbia Univ. in City of N.Y.*, 120 AD3d 779, 779 [2014 ] ). Although “[a] person's categorization as a special employee is usually a question of fact . . . the determination of special employment status may be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact” (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553,557-558 [1991]). “Many factors are considered in determining if a special employment relationship exists, such as who controls and directs the manner, details, and ultimate result of the employee’s work, and who is responsible for the payment of wages and the furnishing of equipment, although no one factor is determinative” (*Flanagan v Kajima USA, Inc.*, 163 AD3d 775, 776 [2018]; see *Thompson v Grumman Aerospace Corp.*, 78 NY2d at 558; *Pena*, 105 AD3d at 925; *Charles v Broad Street Development, LLC*, 95 AD3d 814, [2012])[holding that the critical factors in determining if a person is a special employee are where he got his

paychecks from, who he reported to, who controlled his daily assignments and hours of work and who prepared the accident report]). Importantly, “receiving Workers' Compensation benefits from a general employer precludes an employee from commencing a negligence action against a special employer” (*Pena*, 105 AD3d at 924).

At the outset, the court finds no merit to plaintiff's contention that because the Workers' Compensation Board determined he was employed by Riverview West, the moving defendants have failed to establish the relationship between the various interrelated companies. Courts have consistently found that where as here, “the identity of the injured plaintiff's employer was not a disputed issue in the workers' compensation proceeding, and the Workers' Compensation Board did not specifically adjudicate this issue, the administrative finding that the injured plaintiff was entitled to recover compensation benefits from . . . [a particular entity] is not conclusive proof that he was employed by that corporation” (*Weitz v Anzek Constr. Corp.*, 65 AD3d 678, 680 [2009]; see *Vitello v Amboy Bus Co.*, 83 AD3d 932, 933 [2011]; *Caiola v Allcity Ins. Co.*, 257 AD2d 586, 587-588 [1999]). The court notes that a copy of the Workers' Compensation policy has been submitted which lists Riverview West Contracting as the policy holder, but lists Studebaker as one of several additional insured entities under the policy.

The court finds that Studebaker is entitled to summary judgment dismissing plaintiff's complaint as asserted against it. The record reveals that plaintiff was, at a minimum, the special employee of Studebaker. His paycheck and W-2 statement indicate that Studebaker was his employer and it is undisputed that he was supervised, and took direction from Kowalski, a Studebaker foreman. Based upon the foregoing, that branch of the moving defendants' motion seeking dismissal of all of plaintiff's claims as asserted against Studebaker is granted and said claims are hereby dismissed. The caption of this matter shall

be amended accordingly. As such, the court will hereinafter refer solely to Dean in relation to defendants' motion.

Dean also seeks dismissal of plaintiff's Labor Law §§ 241 (6), 200 and common law negligence claims as against it.

Plaintiff alleges that Dean violated Labor Law § 200 and principles of common law negligence by permitting him to work at a dangerous and defective construction and demolition site. Dean argues that it is entitled to summary judgment dismissing this claim as plaintiff cannot establish that it was negligent in failing to provide plaintiff with a safe working environment

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

Section 200 of the Labor Law statute 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 (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Haider v Davis*, 35 AD3d 363[2006]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 61 [2008]; *see Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2008]). "When a claim involves the manner in which the work is performed, meaning it arises out of alleged defects or dangers in the methods or materials of the work (*see Ortega v Puccia*, 57 AD3d at 61), recovery against the owner or general contractor for common-law negligence or a violation of Labor Law § 200 is unavailable unless it is shown that the defendant had the authority to supervise or control the performance of the work" (*Abelleira v City of New York*, 120 AD3d 1163, 1164 [2014]; *see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317

[1981]; *Klimowicz v Powell Cove Assoc., LLC*, 111 AD3d 605, 607 [2013]; *Gallelo v MARJ Distribs., Inc.*, 50 AD3d 734, 735 [2008]; *Dooley v Peerless Importers, Inc.*, 42 AD3d 199, 204-205 [2007]). Where “a claim arises out of an alleged dangerous premises condition, a property owner or general contractor may be held liable in common-law negligence and under Labor Law § 200 when the owner or general contractor has control over the work site and either created the dangerous condition causing an injury, or failed to remedy the dangerous or defective condition while having actual or constructive notice of it” (*Mitchell v Caton on the Park, LLC*, 167 AD3d 865, 867 [2018] quoting *Abelleira*, 120 AD3d at 1164; see *Shaughnessy v Huntington Hosp. Assn.*, 147 AD3d 994, 997 [2017]; *Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 698, [2016]; *Doto v Astoria Energy II, LLC*, 129 AD3d 660, 663 [2015]; *Martinez v City of New York*, 73 AD3d 993, 998 [2010]).

Here, plaintiff alleges that he was injured as a result of a dangerous or defective premises condition. Thus, liability for a violation of Labor Law § 200 will be imposed on Dean if it is determined that it had control over the work site and either created the dangerous condition or had actual or constructive notice of it. Dean maintains that it did not control the means and methods of plaintiff’s work, nor did it have actual or constructive notice of the alleged defective premises condition. In support of this position, Dean points to the testimony of its witness, Mr. Ferrara, who testified that he only visited the premises twice prior to plaintiff’s accident. They further point to Kowalski’s testimony that he was a Studebaker employee and that he, along with Studebaker employee Nieva, were responsible for supervising plaintiff in his work on the project (Kowalski tr at 20 and 32-33).

In opposition, plaintiff argues that Dean has failed to meet its burden of demonstrating that it had no supervisory role over plaintiff’s work. In this regard, plaintiff points to Kowalski’s testimony that he reported to Tracy Nisiewicz, who was the project manager for

the site. Kowalski testified that his supervisor/project manager was Nisiewicz, that she was at the site two to three times a week and that they would plan out the work to be performed and how it was to be performed (Kowalski tr at 25-26). However, the record is unclear regarding exactly which entity employed Nisiewicz. Specifically, Kowalski testified as follows:

Q. And did you report to anyone from Studebaker?

A. Did I report to anyone?

Q. Yeah. Who was your supervisor?

A. It was - - my project manager was Tracy Nisiewicz.

Mr. Ferrara, testifying on behalf of Dean, testified as follows:

Q. As you sit here now, do you know, was Ms. Nisiewicz employed by Studebaker, by 1000 Dean, by BFC Partners, or what entity she was employed by, or you just don't know?

A. I don't know.

Thus, plaintiff argues that as it is unclear which entity employed Nisiewicz and, thus, Dean has failed to eliminate all material questions of fact regarding whether Dean, through Nisiewicz, supervised the work giving rise to plaintiff's injury.

#### *Discussion*

Here, plaintiff alleges he was injured as a result of a dangerous premises condition. Accordingly, liability may only be imposed on Dean, the property owner, if it had "control over the work site and either created the dangerous condition causing an injury, or failed to remedy the dangerous or defective condition while having actual or constructive notice of it" (*Mitchell*, 167 AD3d at 867; see *Bessa v Anflo Indus., Inc.*, 148 AD3d 974, 978 [2017]; *White v Village of Port Chester*, 92 AD3d 872, 876 [2012]; *Slikas v Cyclone Realty, LLC*, 78 AD3d 144, 147 [2010]; *Aragona v State of New York*, 74 AD3d 1260, 1260-1261 [2010]). The court finds that in light of the uncertainty regarding which entity employed Nisiewicz, Dean has failed to make a prima facie demonstration that it did not have control over the

work site. In addition, plaintiff argues that material questions of fact exist with respect to actual and constructive notice. In this regard, plaintiff points to Kowalski's testimony that the hazardous opening was created approximately three weeks prior to the accident when the plumbing was removed and that Kowalski testified that he walked through this area several times a day on his way to the restroom. The court notes that, as determined above, Kowalski was employed by Studebaker and thus, any notice of this condition on his part cannot be imputed to the premises owner Dean. However, Kowalski testified that Nisiewicz was at the premises two to three times a week and as it is unclear whether she was employed by Dean, the court finds that Dean has failed to offer proof affirmatively demonstrating its lack of actual or constructive notice, including proof as to when they last inspected the floor where the accident occurred. Accordingly, that branch of the motion seeking summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims are denied.

**Labor Law § 241 (6)**

Dean also seeks dismissal of plaintiff's Labor Law § 241 (6) claim. 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.”

The statute imposes a nondelegable duty on owners, contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work, and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see Misicki v Caradonna*, 12 NY3d 511 [2009]; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]; *Seales v*

*Trident Structural Corp.*, 142 AD3d 1153 [2016]; *Norero v 99-105 Third Ave. Realty, LLC*, 96 AD3d 727 [2012]). The ultimate responsibility for safety practices at building construction sites lies with the owner and general contractor (see *Allen v Cloutier Constr. Corp.*, 44 NY2d 290 [1978]). In order to prevail on a Labor Law § 241 (6) claim, it must be predicated “upon violations of specific codes, rules, or regulations applicable to the circumstances of the accident” (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 53 [2011]). In support of his Labor Law § 241 (6) claim, plaintiff’s verified bills of particulars allege violations of 12 NYCRR §§ 23-1.7, 23-1.30, 23-2.2, 23-2.7, 23-3.2 and 23-3.3. However, in his cross motion papers, plaintiff only moves for partial summary judgment on this claim based upon a violation of Industrial Code § 23-3.3 (j) (2). In addition, plaintiff’s opposition papers only address §§ 23-1.7(e)(1), 23-1.30, and 23-3.3. Thus, this Court will consider only the applicability of those provisions of the Industrial Code (see *Videan v NRG Energy, Inc.*, 149 AD3d 1533, 1534-1535 [2017]; *Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [2012] (“[w]here a defendant so moves [for summary judgment], it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section”).

#### Industrial Code § 23-1.7

Dean notes that plaintiff fails to articulate which subsection of Industrial code § 23-1.7 he alleges was violated. Dean contends that based upon plaintiff’s allegations, subsection (b) (1) which relates to hazardous openings would be the most applicable. However, Dean correctly points out that courts have held that this code provision “does not apply to openings that are too small for a worker to completely fall through” (*Johnson v Lend Lease Constr. LMB, Inc.*, 164 AD3d 1222, 1223; see *Vitale v Astoria Energy II, LLC*, 138 AD3d 981, 983

[2016]; *Brown v New York-Presbyterian HealthCare Sys., Inc.*, 123 AD3d 612, 613 [2014]; *DeLiso v State of New York*, 69 AD3d 786, 787 [2010]; *see also Messina v City of New York*, 300 AD2d 121 [2002]; *Alvia v Teman Elec. Contr.*, 287 AD2d 421 [2003]). Accordingly, this subsection cannot support plaintiff's Labor Law § 241 (6) claim.

However, plaintiff, in his opposition, contends that it was § 23-1.7 (e) (1) that was violated. This subsection states in relevant part as follows: "(e) tripping and other hazards (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 cut or puncture any person shall be removed or covered." Plaintiff argues that this section is applicable and was violated as he encountered a tripping hazard while traversing a passageway.

In reply, Dean argues that this subsection is not applicable since plaintiff does not claim that he tripped on dirt, debris, or a sharp projection and he did not fall to the ground, but rather he claims that his foot got caught in a small hole. Moreover, Dean notes that plaintiff does not allege that any accumulations of dirt or debris proximately caused his accident. However, the regulation encompasses "conditions which could cause tripping." Here, the hole plaintiff alleges caused his injuries, may fall within this catchall (*see McCullough v One Bryant Park*, 132 AD3d 491, 492 [2015] [reversing dismissal of a section 241 (6) claim premised on a violation of 12 NYCRR 23-1.7 (e) (1) where the plaintiff tripped on an uncovered "drain hole"]; *see generally Rodriguez v BCRE 230 Riverdale, LLC*, 91 AD3d 933, 935 [2012]). Accordingly, the court finds that Dean has failed to demonstrate that this Industrial Code section is not applicable and was not violated. Thus, that branch of its motion seeking dismissal of plaintiff's Labor Law § 241 (6) claim as based upon a violation of § 23-1.7 (e) (1) is denied.

Industrial Code § 23-1.30

Plaintiff also alleges that Industrial Code § 23-1.30 was violated. This section states, as follows:

**Illumination.** Illumination sufficient for safe working conditions shall be provided wherever persons are required to work or pass in construction, demolition and excavation operations, but in no case shall such illumination be less than 10 foot candles in any area where persons are required to work nor less than five foot candles in any passageway, stairway, landing or similar area where persons are required to pass.

Initially, the court notes that Industrial Code section 23-1.30 is sufficiently specific to support a Labor Law § 241 (6) cause of action (*Murphy v Columbia Univ.*, 4 AD3d 200, 202, [2004]; *Giglio v St. Joseph Intercommunity Hosp.*, 309 AD2d 1266, 1267 [2003]; *Herman v St. John's Episcopal Hosp.*, 242 AD2d 316, 317 [1997]).

In support of this branch of its motion seeking to dismiss plaintiff's Labor Law § 241 (6) claim as based upon a violation of § 23-1.30, Dean points to Kowalski's testimony that Amber Lite was hired to install temporary construction lighting at the premises (Kowalski tr at 31). Dean contends that although plaintiff testified that the lighting in the area where the incident occurred was insufficient, he never notified his supervisors of this problem. Dean further points to plaintiff's own deposition testimony that he had walked by the subject hole on two occasions prior to the incident and had observed the hole (plaintiff tr at 104). Thus, Dean argues that plaintiff cannot establish that a lack of lighting was the proximate case of his accident.

In opposition, plaintiff argues that the area where the incident occurred was completely enclosed and received no natural light, with only one temporary light fixture located approximately six to ten feet away from where the accident occurred. Plaintiff

further contends that his supervisors were aware that the lighting was deficient, pointing to Kowalski's testimony that the lighting was "not perfect" (Kowalski tr at 75).

The court finds that Dean has failed to put forth sufficient evidence to establish that the lighting in the exact area where plaintiff was injured was sufficient to meet the standard set forth in Industrial Code § 23-1.30. In any event, plaintiff testified that the lighting in the area where he was injured was insufficient, that it was enclosed and that there was no natural light (plaintiff's tr at 105-106). Thus, plaintiff raises a triable issue of fact in opposition as to whether the standard set forth in section 23-1.30 was met (*see Capuano v Tishman Constr. Corp.*, 98 AD3d 848, 851 [2012] [section 23-1.30 applicable where the plaintiff testified that the work area "had no windows to provide natural light and the artificial light was not working"]; *Hernandez v Columbus Ctr., LLC*, 50 AD3d 597, 598 [2008] [{"(p)laintiff's testimony . . . that lighting conditions were poor, consisting only of a street light 150 to 200 feet away, created a triable issue of fact as to adequate lighting"}]; *Verel v Ferguson Elec. Constr. Co., Inc.*, 41 AD3d 1154, 1157-58 [2007][the plaintiff's deposition testimony, wherein he testified that the area where he fell had no artificial lighting and was too dark to read a newspaper, created a triable issue of fact as to whether the lighting conditions fell below the regulatory standard of 10 foot candles of illumination as required by section 23-1.30]). Accordingly, Dean is not entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim as predicated on an alleged violation of Industrial Code § 23-1.30. The court will next address that branch of Dean's motion seeking dismissal of plaintiff's Labor Law § 241 (6) claim as predicated on a violation of Industrial Code § 23-3.3 (j) (2) (i) below.

### Plaintiff's Cross Motion

Plaintiff cross-moves for partial summary judgment in his favor on his Labor § 241 (6) claim as against all defendants. Specifically, plaintiff alleges a violation of Industrial Code § 23-3.3 (j) (2) (i) in support of his Labor Law § 241 (6) claim and seeks partial summary judgment in his favor on this claim.

#### *Opposition to Plaintiff's Cross Motion*

Dean opposes plaintiff's cross motion for partial summary judgment arguing that it is untimely, having been filed more than two and a half months after the court imposed deadline to file dispositive motions in this case.

Defendant BFC also opposes plaintiff's cross motion arguing that it is untimely and improper as it seeks relief against a non-moving party and was filed more that 60 days after the deadline set in this court's Interim Order dated, October 3, 2017, and more than 120 days after the filing of the Note of Issue in this matter. BFC notes that the moving defendants' timely motion does not seek any relief as against BFC. BFC argues that plaintiff's cross motion seeks partial summary judgment against "defendants" without specifying from whom relief is sought and BFC has not moved for relief in this matter.

#### *Discussion*

It is true, as the defendants point out, that plaintiff's cross motion is untimely inasmuch as it was made after the deadline set forth in this court's October 3, 2017 order. Furthermore, courts are generally precluded from considering untimely summary judgment motions irrespective of the merits of the motions (*Brill v City of New York*, 2 NY3d 648 [2004]). However, a well-established exception to this rule exists when the untimely cross motion is "nearly identical" to a timely summary judgment motion already before the court (*Vitale v Astoria Energy II, LLC*, 138 AD3d 981 [2016]; *Wernicki v Knipper*, 119 AD3d 775

[2014]; *Homeland Ins. Co. of N.Y. v National Grange Mut. Ins. Co.*, 84 AD3d 737, 738-739 [2011]; *Whitehead v City of New York*, 79 AD3d 858, 860 [2010]). The rationale for this exception stems from the court's statutory authority under CPLR 3212 (b) to award summary judgment to a non-moving party in the course of deciding a timely summary judgment motion.

Here, plaintiff's cross motion for partial summary judgment under Labor Law § 241 (6) is nearly identical to that branch of the moving defendants' timely motion seeking summary judgment dismissing plaintiff's Labor Law § 241 (6) claim, thus the court will decide plaintiff's cross motion as it relates to the moving defendants. Importantly, though, this exception only applies to true cross motions as defined in CPLR 2215, and not to purported "cross motions" against a non-moving party, thus "[a] cross motion is an improper vehicle for seeking affirmative relief from a nonmoving party" (*Mango v Long Island Jewish-Hillside Med. Ctr.*, 123 AD2d 843, 844 [1986]; see CPLR 2215; see also *Asiedu v Lieberman*, 142 AD3d 858, 858 [2016]; *Sanchez v Metro Bldrs. Corp.*, 136 AD3d 783, 785 [2016]; *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 88 [2013]; *Terio v Spodek*, 25 AD3d 781, 785 [2006]; *Gaines v Shell-Mar Foods, Inc.*, 21 AD3d 986, 987-988 [2005]). Accordingly, that branch of plaintiff's cross motion seeking summary judgment in his favor as against defendant BFC is denied.

In support of his cross motion for partial summary judgment, plaintiff argues that Industrial Code § 23-3.3 (j) (2) (i) is specific enough to support his Labor Law § 241 (6) claim, is applicable to the facts of the case and was violated. Plaintiff points out that Kowalski admitted that holes were created as a result of the removal of plumbing equipment in the form of preexisting risers. He maintains that Kowalski's testimony establishes that the floor opening that caused plaintiff's injuries was created during the demolition and removal

of the pipes. Plaintiff maintains that the hole that caused his accident was improperly left uncovered and, thus, liability for this violation should be imposed upon Dean.

Industrial Code 23-3.3 (j) (2) (i) states that:

i) Every opening used for the removal of debris or materials on every floor not closed to access, except the top working floor, shall be provided with an enclosure from floor to ceiling equivalent to that afforded by planking not less than two inches thick full size. Such enclosure shall be solid except for portions openable for loosening blocked debris. Alternatively, the opening shall be fenced off by a substantial safety railing constructed and installed in compliance with this Part (rule) and placed not less than 20 feet from the perimeter of such opening. *Every opening not used for the removal of debris or other materials in any floor to which access is permitted shall be protected by a solid enclosure as described above, by a substantial safety railing constructed and installed at least two feet from the perimeter of the opening and otherwise in compliance with this Part (rule) or such opening shall be solidly planked over with planks not less than two inches thick full size(emphasis added).*

Dean opposes plaintiff's cross motion on the merits, and refers to the arguments asserted in support of its motion seeking summary judgment dismissing plaintiff's Labor Law § 241 (6) claim as based upon a violation of Industrial Code § 23-3.3 (j) (2) (i). Dean asserts that plaintiff cannot establish a violation of this provision. In this regard, Dean points to Kowalski's testimony that the holes, that had been caused by the removal of the plumbing, had been planked over with plywood and that all Studebaker employees knew that holes need to be covered with plywood. Dean further points to Kowalski's testimony that he walked by the area daily and never observed an uncovered hole. Finally, Dean argues that because plaintiff's accident was not witnessed and he failed to report it for several days, it is not possible to determine if the hole was uncovered at the time of the accident. In addition, Dean submits the affidavit of Bernard Lorenz, a civil engineer, with over thirty years of experience in civil engineering. Mr. Lorenz opines that there was no violation of Industrial Code § 23-

3.3 (j) (2) (i) arguing that this section is not applicable as plaintiff was not performing demolition work at the time that he sustained his injuries. He notes that plaintiff testified that he was merely carrying rebar to an area where a beam was being constructed at the time of his accident.

In reply, plaintiff argues that the court should disregard Mr. Lorenz's expert affidavit on the basis that it is not in admissible form since it lacks a Certificate of Conformity as required under CPLR 2309. Subdivision c of CPLR 2309 provides that “[a]n oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation.” Here, Dean has failed to submit a Certificate of Conformity. The court notes however that “the Appellate Division, Second Department, has typically held, since 1951, that the absence of a certificate of conformity is not, in and of itself, a fatal defect” (*Midfirst Bank v Agho*, 121 AD3d 343, 351-352 [2014]; *see Seiden v Sonstein*, 127 AD3d 1158, 1161-1162 [2015]; *Todd v Green*, 122 AD3d 831, 832 [2014]; *Mack-Cali Realty, L.P. v Everfoam Insulation Sys., Inc.*, 110 AD3d 680 [2013]; *Bey v Neuman*, 100 AD3d 581, 582 [2012]; *Fredette v Town of Southampton*, 95 AD3d 940, 941 [2012]; *Falah v Stop & Shop Cos., Inc.*, 41 AD3d 638, 639 [2007]; *Smith v Allstate Ins. Co.*, 38 AD3d 522, 523 [2007]; *Raynor v Raynor*, 279 App Div 671 [1951]). Here, Mr. Lorenz’s affidavit was signed and notarized in New Jersey, and was not accompanied by the required certificate of conformity, and Dean made no attempt to rectify this defect (*see CPLR 2309 [c]*; *PRA III, LLC v Gonzalez*, 54 AD3d 917, 918 [2008]). In any event, the court notes, as will be discussed below, that the expert affidavit, nonetheless, lacks merit.

Plaintiff argues that the expert's opinion that this section is not applicable because plaintiff was not actually engaged in demolition work at the time of the incident lacks merit. In support of this contention, plaintiff points to *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, (104 AD3d 446, 451 [2013]), which involved a plaintiff who had been walking towards a window through which insulation was being delivered, when he stepped on an eight-by-four-foot section of three-quarter-inch-thick plywood that had been covering a floor opening. The plywood flipped up causing plaintiff to fall through the hole down 10-12 feet to the story below. The First Department, when holding that Industrial Code § 23-3.3 (j) (2) (i) applied to the facts of that case, stated “[w]e disagree with defendants' theory that a construction project must be at the actual demolition phase in order for this section to apply.”

#### *Discussion*

“Demolition” is defined in the Industrial Code as “work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment” (12 NYCRR 23-1.4 [b] [16]). Courts have consistently held that in order to constitute demolition within the meaning of § 23-3.3, the work must involve “changes to the structural integrity of the building” as opposed to mere renovation of the interior (*Cardenas v One State St., LLC*, 68 AD3d 436, 439 [2009] quoting *Solis v 32 Sixth Ave. Co. LLC*, 38 AD3d 389, 390 [2007]; see *Baranello v Rudin Mgt. Co.*, 13 AD3d 245, 2468 [2004], lv denied 5 NY3d 706 [2005]). Here, although plaintiff himself was not performing demolition work at the time of the accident, demolition work had clearly taken place prior to his fall inasmuch as there was testimony that the holes were created as a result of the removal of the existing plumbing pipes (see *Vega v Renaissance 632 Broadway, LLC*, 103 AD3d 883, 885 [2013])[in which plaintiff was injured

during the removal of pipes which the court deemed to be demolition work]). Moreover, when Kowalski was asked about the scope of the work that was performed at the site he testified that “it was exterior renovation. We did concrete repairs, and we did some demolition, some partition walls and cleanup. That’s what we were doing.” (Kowalski tr at 23). Accordingly, the court finds no merit to Dean’s argument, and the opinion rendered by its expert that this provision is not applicable because plaintiff was not performing demolition at the time of his accident.

However, the court finds that the facts of the *Alonzo* case are distinguishable from the facts of the instant case. The plaintiff in *Alonzo* fell 10-12 feet down into a hole that had been covered by plywood measuring 8 feet by 4 feet. The court addressed the applicability of that portion of Industrial Code § 23-3.3 (j) (2) (i) related to large openings used for the removal of debris or materials as generated during the demolition process holding that “the removal of the covering, which created a significant falling hazard, was unquestionably negligent.” Here, plaintiff testified that the hole involved was merely 5-6 inches wide and only three to four inches deep, thus not a significant falling hazard caused by a hole used to remove debris from one floor to another. In fact, plaintiff testified that he never even fell to the ground (plaintiff tr at 110). The court has found no case in which this Industrial Code provision has been held to have been violated involving a hole of such a de minimis size. Accordingly, the court finds that plaintiff has failed to establish his prima facie entitlement to summary judgment in his favor on his Labor Law § 241 (6) claim as premised upon a violation of Industrial Code § 23-3.3 (j) (2) (i). Based upon the foregoing, plaintiff’s cross motion for partial summary judgment is denied and that branch of Dean’s motion seeking summary judgment dismissing plaintiff’s Labor Law § 241 (6) claim as based upon Industrial Code § 23-3.3 (j) (2) (i) is granted.

Conclusion

That branch of the moving defendants' motion seeking dismissal of all of plaintiff's claims as asserted against Studebaker is granted and said claims are hereby dismissed. That branch of the motion seeking summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claim as asserted against Dean is denied, as is the branch seeking dismissal of plaintiff's Labor Law § 241 (6) claim as based upon a violation of Industrial Code §§ 23-1.7 (e) (1) and 23-1.30. In addition, that branch of Dean's motion seeking summary judgment dismissing plaintiff's Labor Law § 241 (6) claim as based upon Industrial Code § 23-3.3 (j) (2) (i) is granted. Plaintiff's cross motion for partial summary judgment in his favor on his Labor Law § 241 (6) claim as based upon a violation of Industrial Code § 23-3.3 (j) (2) (i) as asserted against the moving defendants and BFC is denied.

Based upon the dismissal of plaintiff's claims as asserted against Studebaker, the caption is amended as follows:

-----X

DANIEL HERNANDEZ GARCIA,  
Plaintiff,

- against -

Index No. 507711/14

1000 DEAN LLC, AND BFC PARTNERS,

Defendants.

-----X

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. EDGAR G. WALKER

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KINGS COUNTY CLERK  
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