At an IAS Term, Part 9 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 2nd day of April, 2020.

P R E S E N T:

HON. DEBRA SILBER

Justice.

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JOSEPH DEGREGORIO,

Plaintiff,

- against -

CPS FEE COMPANY, LLC, LEND LEASE (US) CONSTRUCTION INC., EMPIRE TRANSIT MIX, INC., AND JOHN DOE (FIRST AND LAST NAME BEING FICTITIOUS AND UNKNOWN),

Defendants.

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DECISION/ORDER

Index No. 502741/17

Mot. Seq. # 6 & 7

The following papers numbered 1 to 10 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1- 3, 4-5
Opposing Affidavits (Affirmations)	6
Reply Affidavits (Affirmations)	7-8
Other Papers Defendants' Memoranda of Law	9-10

Upon the foregoing papers, defendants CPS Fee Company, LLC (CPS) and Lend Lease (US) Construction, Inc. (Lend Lease) move, pursuant to CPLR 3212, for an order

granting them summary judgment dismissing plaintiff Joseph DeGregorio's complaint and all cross claims asserted against them. Defendant Empire Transit Mix, Inc. (Empire) moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing plaintiff's complaint and all cross claims asserted against it.

Factual Background

This is an action to recover monetary damages for personal injuries allegedly sustained by the plaintiff Joseph DeGregorio (plaintiff) on November 23, 2016, while at a construction site located at 250 South Street, New York City (hereinafter, the premises or the South Street worksite/location). Defendant CPS was the owner and developer of the site, on which a 72-story mixed use commercial and residential condominium tower was being constructed. Construction work was also taking place on the same tax lot, referred to as an "adjacent worksite," located at 227 Cherry Street (hereinafter, Cherry Street worksite), which was also owned by CPS. Both projects were being developed simultaneously.[1] Pursuant to a Construction Management Agreement, CPS retained Lend Lease to serve as the construction management company to oversee the South Street project. Pursuant to the terms of the agreement, Lend Lease hired various subcontractors to work on the site, including Pinnacle Construction Industries (Pinnacle), not a party herein, which was retained to perform certain concrete work related to the superstructure of the tower building as well as the adjacent Cherry Street building. Pinnacle subsequently contracted with defendant Empire, a concrete

[1] The tower was being developed as "market rate" condos, while the Cherry Street building was being developed as a thirteen-story building with 205 "affordable units." The two tax lots on Block 248 were merged into Lot 7501 in 2005, according to the NYC Department of Buildings' website.

supplier, to deliver concrete at both worksites. At the time of the accident, plaintiff was employed by Pinnacle as a union laborer.

During his deposition, plaintiff testified that he was supervised by a Pinnacle foreman at the worksite, Paul Tyndale (also known as Pablo). Plaintiff also received directions from Pinnacle's general foreman, Ricky, but from no one else at the site. Plaintiff's work for Pinnacle initially involved carrying wood and pouring concrete, but later involved working as a flagman directing traffic at the entrance to the South Street worksite. On the day of the accident, the plaintiff arrived at the South Street worksite at 7:00 a.m. Pablo directed him to work as a flagman directing traffic at that location's gated entrance located at the corner of South Street and Pike Street. Plaintiff testified that he had worked at this entrance on at least ten prior occasions, and that a second flagman was typically assigned to work with him. On the day in question, however, the plaintiff was working alone. In order to perform his flagman duties, the plaintiff positioned himself in the street, and stood next to the gate rather than in front of the entrance to the site. According to plaintiff, cement trucks usually dropped off their deliveries at either the South Street or the Cherry Street locations, and would thereafter wash the trucks out after a cement pour. He testified that the trucks could only be washed out at the South Street location.

Plaintiff testified that the accident occurred as he was signaling/guiding one of the Empire cement trucks as it was backing up into the construction site. He was standing on the left side (driver's side) of the truck, about a foot away from the truck. As plaintiff guided the

truck, the back of the truck hit him. As a result, plaintiff claims he was thrown into the air, landed on his feet, and then stumbled, tripped and fell backwards onto a pile of debris which was in the street. Plaintiff landed on his elbow and sustained various injuries. He described the debris as consisting of "a pile of sand and little rocks", located about six or seven feet into the street, outside the South Street entrance to the worksite. Plaintiff did not know where the debris came from; nor had he seen it before the accident occurred. Plaintiff testified that he knew the truck that hit him was an Empire vehicle because he observed the lettering on the back of it. According to plaintiff, after the truck hit him, the driver stopped and got out of the truck, and inquired whether he was okay. Plaintiff did not know the name of the man who was driving the truck that hit him. He also claimed that two people got out of their respective vehicles (a white van and a taxi), to see if he was okay, but that he never learned their names or the license plate numbers of their vehicles.

On or about February 8, 2017, the plaintiff commenced the within action against CPS, Lend Lease and Empire, seeking to recover damages for the personal injuries he allegedly sustained as a result of the incident. His complaint alleges violations of Labor Law §§ 240 (1), 241 (6), 200 and common-law negligence. He also alleges that the defendants violated New York State Vehicle and Traffic Law §§ 388, 1101, 1121, 1122, 1124, 1125, 1146, 1163, 1180, 1212 and 1226, and sections 4-03, 4-06, 4-07, and 4-12 of the Traffic Regulations of the City of New York. CPS and Lend Lease interposed a Verified Answer on or about March 23, 2017, and Empire interposed its Verified Answer on or about April 14, 2017. The parties

subsequently engaged in discovery, and the plaintiff filed a note of issue on or about July 31, 2018. On or about January 15, 2019, the parties entered into a stipulation, which was "So Ordered" by this Court, pursuant to which the time for filing motions for summary judgment was extended to March 18, 2019. These motions ensued and are timely.

Discussion

CPS and Lend Lease (collectively, defendants) seek summary judgment dismissing plaintiff's entire complaint and any cross claims asserted against them. Empire also seeks summary judgment dismissing plaintiff's entire complaint, as well as all cross claims, as asserted against it.

It is well settled that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez v Prospect Hospital*, 68 NY2d at 324; *see also, Smalls v AJI Industries. Inc.,* 10 NY3d 733, 735 [2008]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

The Parties' Contentions

In support of their motion to dismiss the plaintiff's complaint, CPS and Lend Lease initially argue that Lend Lease, as the construction manager, had no authority to supervise or control the plaintiff's work, and therefore cannot be held liable for the plaintiff's injuries under the Labor Law. CPS and Lend Lease also contend that a review of the record reveals conflicting versions of how the plaintiff's accident occurred. Defendants note that the plaintiff testified during his deposition that he was hit by an Empire cement truck, and then stumbled backwards and tripped due to a pile of debris which was in the street. However, defendants contend there is conflicting evidence as to whether a truck was involved in plaintiff's accident at all. In this regard, defendants have submitted a copy of the Medcor "Patient Care Report" dated December 9, 2016, which states that while working as a flagman, the plaintiff tripped on a rock and fell backwards. It is noted that Medcor was located at the jobsite. The report makes no mention of plaintiff having first been hit by a truck. Defendants have also submitted the affidavit of Hubert Charles, the Occupational Health Technician for Medcor, who examined the plaintiff and prepared the Medcor report. In his affidavit, Mr. Charles avers that he conducted a physical examination of the plaintiff on December 9, 2016, at which point he claims the plaintiff told him his injuries resulted from tripping and falling on a rock. He further states that the plaintiff never mentioned a cement truck or any other vehicle being involved in his accident (Broccolo Affirmation, Exhibit L, ¶ 2-3).

In addition, defendants refer to plaintiff's C-2 Workers Compensation application which states that the plaintiff "tripped on a rock and fell backwards" and makes no reference to a cement truck hitting him (Faley Affirmation, Exhibit M). Lauren Renna, Administrative Assistant at Pinnacle, plaintiff's employer, avers in her affidavit that she filled out the C-2 Report on behalf of Pinnacle and based it on the information she received from the Medcor report (*id.,* Exhibit N). Defendants also refer to a copy of Lend Lease's accident report, which only states that the plaintiff tripped on a rock and fell backwards. Additionally, a City MD report states that the plaintiff "slipped on a rock at work", and makes no reference to a truck. Defendants additionally note that the statements by plaintiff's treating physician indicate that his injuries resulted from being hit by a truck, and make no reference to plaintiff tripping over a rock. Defendants argue that the foregoing differing accounts of how plaintiff's accident occurred raise serious issues as to plaintiff's credibility, thereby warranting the dismissal of his entire complaint.

CPS and Lend Lease further contend that the evidence in the record establishes that Empire made no cement deliveries to either project location on the date of the plaintiff's accident, and argue that, regardless of which version of plaintiff's accident occurred, his Labor Law and common-law negligence claims should be dismissed. In this regard, assuming his injuries were in fact the result of plaintiff being struck by a truck that was backing up into the site, defendants argue that there is no evidence that they were in any way negligent in the happening of the accident. In the event there is a

finding that the plaintiff was injured by tripping over a rock in the public street, defendants argue that the area of the accident was neither owned nor controlled by them, and therefore they had no duty with respect to such area, warranting a dismissal of plaintiff's claims. CPS and Lend Lease also seek to dismiss all of plaintiff's claims based upon alleged violations of the New York State Vehicle and Traffic Laws and the New York City Traffic Rules and Regulations, on the ground that they neither owned nor operated the Empire vehicle that allegedly struck the plaintiff.

In support of its summary judgment motion, Empire argues that all Labor Law claims should be dismissed as against it, as it was neither an owner, contractor nor an agent within the meaning of the Labor Law. Empire also argues that there is no evidence that any of its cement trucks were involved in the plaintiff's accident. In addition to the discrepancies set forth in the medical and accident reports (Medcor, C-2 and Lend Lease reports) which only reference the plaintiff tripping over a rock, Empire contends that evidence in the record establishes that none of its trucks was even present on the site on the date in question. In this regard, Empire has submitted the affidavit of its Controller, Dana Tamara, wherein she avers that a search of Empire's invoice records reveal that Empire made no deliveries to Pinnacle and/or to the South Street location on November 23, 2016, the date of the plaintiff's accident. Based upon the foregoing, Empire maintains that there is no evidence that it had any cement trucks on the premises and therefore, it cannot be liable to the plaintiff for negligence. Empire additionally argues

that since there is no evidence its vehicle was involved in the accident, all claims under the New York State Vehicle and Traffic Laws and the New York City Traffic Rules and Regulations should be dismissed as against it.

In opposition, the plaintiff concedes that issues of fact exist as to how his accident occurred, but argues that such issues preclude summary judgment in defendants' favor. Plaintiff contends that the above-referenced reports (Medcor, C-2 and Lend Lease accident reports) which all fail to mention that he was hit by a truck, are all based on an incomplete version of the events which were provided by him and recorded by the Medcor technician, Mr. Charles, and are inadmissible hearsay. Plaintiff relies on his own deposition testimony that an Empire cement truck backed into him while he was performing his flagman duties, which caused him to stumble backwards and trip on and fall onto a pile of debris. Plaintiff testified that he specifically noticed the truck that hit him was an Empire truck because he noticed the lettering on the back of it at the time of the accident. Plaintiff also contends that while Empire may not have come to the South Street location to make a cement delivery on the date of the accident, it made a delivery for the Cherry Street project and then proceeded to the adjacent South Street site to wash out its truck's "box". Plaintiff submits the affidavit of his Pinnacle foreman, Paul Tyndale, who was working at the Cherry Street location on the date of the plaintiff's accident. Mr. Tyndale avers that he would typically have cement delivered to the Cherry Street location, and then direct the truck driver to bring the truck to the South Street

location to wash out the box (Zuckerman Affirmation, Exhibit H, ¶¶ 3, 5-6). He further avers that the plaintiff told him he was struck by a cement truck as he was directing its driver (*id.*, ¶ at 20). Thus, plaintiff argues that there is sufficient evidence in the record establishing that his injuries were the result of being hit by an Empire truck and then tripping over debris. In addition, the plaintiff has submitted an expert affidavit from Kathleen V. Hopkins, a Certified Site Safety Manager with over thirty-nine years of experience in the construction industry. Ms. Hopkins opines, to a reasonable degree of professional site safety certainty, that defendants' failure to assign a second flagman to assist the plaintiff, and their failure to keep the area where he was working free from debris, substantially contributed to his accident and his injuries.

In reply, Empire argues that the plaintiff's expert affidavit is purely speculative, lacks any probative value, and should therefore be rejected by the court. Empire additionally argues that the affidavit of Pinnacle's foreman, Paul Tyndale, should not be considered, as his identity was improperly disclosed for the first time in plaintiff's opposition papers. Empire has also submitted the affidavit of Diane Sedacca, a Pinnacle administrative assistant. In her affidavit, Ms. Sedacca avers that her search of Pinnacle's records (not Empire's) related to Empire's deliveries reveals that Empire made no deliveries at either the South Street or the Cherry Street locations on November 23, 2016, the date of the plaintiff's accident (Prager Affirmation, Exhibit D, ¶ 3-4). In addition, Empire also submits the expert affidavit of Martin Bruno, a construction site safety

expert, who opines that the Labor Law is inapplicable to this accident, and, as Empire's trucks were not on the worksite on the day in question, and since Empire had no control or supervisory authority over plaintiff, Empire therefore owed no duty to the plaintiff (*id*., Exhibit A).

Conclusions of Law

I. Lend Lease as a Labor Law Defendant

As an initial matter, the court finds that the defendants have failed to establish, as a matter of law, that Lend Lease is not a proper Labor Law defendant. Defendants contend that Lend Lease was merely hired by the owner/developer (CPS) to hire subcontractors and manage/coordinate their work at the construction site, and note that Lend Lease only performed its construction manager duties at the South Street location, not the Cherry Street location. Defendants contend that there is no evidence in the record establishing that Lend Lease interacted with the plaintiff in any way with respect to the work he or his employer (Pinnacle) were performing. As such, defendants argue that all Labor Law claims against Lend Lease should be dismissed.

Although a construction manager is generally not considered a "contractor" or "owner" within the meaning of Labor Law §§ 240 (1) or 241, it may nonetheless become responsible for the safety of the workers at a construction site if it has been delegated the authority and duties of a general contractor, or if it functions as an agent of the owner of the premises (*see Walls v Turner Constr. Co.,* 4 NY3d 861, 863–864 [2005]; *Russin v*

Louis N. Picciano & Son, 54 NY2d 311, 318 [1981]; *Lodato v Greyhawk N. Am.,* LLC, 39 AD3d 491, 493 [2007]; *Kenny v Fuller Co.*, 87 AD2d 183, 190 [1982). Moreover, "[t]he label of construction manager versus general contractor is not necessarily determinative" (*Walls v Turner Constr. Co.*, 4 NY3d at 864; *see Tomyuk v Junefield Assoc.*, 57 AD3d 518, 520 [2008]; *Lodato v Greyhawk N. Am., LLC,* 39 AD3d at 493). Rather, the critical question is whether the construction manager was delegated supervisory control and authority over the work being done when the plaintiff was injured (*see Walls v Turner Constr. Co.*, 4 NY3d at 863–864). Thus, Lend Lease's status as a contractor or agent under the Labor Law is dependent upon whether it had the right to exercise control over the work, not whether it actually exercised that right (*see Myles v Claxton*, 115 AD3d 654, 655 [2014]; *Russin v Picciano & Son*, 54 NY2d at 317–318; *see also Walls v Turner Constr. Co.*, 4 NY3d at 863–864; *Medina v R.M. Resources*, 107 AD3d 859, 860 [2013]; *Samaroo v Patmos Fifth Real Estate, Inc.*, 102 AD3d 944, 946 [2013] ["a defendant's potential liability is based on whether it had the right to exercise control over the work, not whether it actually exercised that right"]).

A review of the record reveals that Lend Lease was responsible for hiring numerous subcontractors to perform work on the project, including Pinnacle, and for overseeing the project's field operations and handling the day-to-day construction site issues. Lend Lease's site superintendent, Tess Williams, testified that Lend Lease had superintendents on the project daily and kept a daily log/report which consisted of a brief

description of the work performed that day, as well as personnel counts for each contractor on the job site. Additionally, Ms. Williams testified that if Lend Lease became aware that Pinnacle had only one flagman positioned at the front entrance, it would have directed Pinnacle to provide another flagman at that location. Since Lend Lease had the authority to choose/hire the subcontractors who did the work, including plaintiff's employer (Pinnacle), and directly entered into contracts with them, it arguably had the authority to exercise control over the work, even if it did not actually do so (*see Cabrera v Arrow Steel Window Corp.,* 163 AD3d 758, 759 [2018]; *Williams v Dover Home Improvement, Inc.,* 276 AD2d 626, 626 [2000]). Under these circumstances, defendants have failed to make a *prima facie* showing that Lend Lease was not a contractor and/or a statutory agent within the meaning of the Labor Law. Accordingly, that branch of defendants' motion seeking to dismiss plaintiff's Labor Law claims as against Lend Lease on the ground it is not a proper Labor Law defendant is denied. It is noted that Land Lease is the general contractor listed on the Building Permits issued in 2009, and which are still in effect, according to the NYC Building Department website.

As to Empire, however, the court finds that it was neither an owner, contractor, nor an agent thereof, and thus not a proper Labor Law defendant. It is well settled that "[a] subcontractor will be held strictly liable under Labor Law § 240 (1) . . . where it has become a statutory agent of . . . the general contractor by virtue of having been delegated the authority to supervise and control the plaintiff's work or work area" (*Stevenson v*

Alfredo, 277 AD2d 218, 220 [2000] [internal quotation marks and citation omitted]). Here, it is undisputed that Empire, a concrete supplier, lacked any authority to direct, supervise, or control plaintiff's work at the site. In fact, deposition testimony indicates that Empire's workers were only responsible for delivery of concrete, and were trained to follow the directions of Pinnacle's workers (flagmen) who guided them onto the worksite. Plaintiff has failed to raise an issue of fact establishing otherwise. Accordingly, plaintiff's Labor Law §§ 240 (1) and 241(6) claims are hereby dismissed as against Empire (*see Kelarakos v Massapequa Water Dist.*, 38 AD3d 717, 718 [2007] subcontractor was not liable under the Labor Law where it neither controlled nor supervised plaintiff's work]).

II. Plaintiff's Labor Law § 240 (1) Claim

As to plaintiff's Labor Law § 240 (1) claim, that branch of defendants' motion seeking summary judgment dismissing said claim is granted. As defendants correctly point out, Labor Law § 240 (1) is not applicable herein. While there are conflicting versions of how the accident occurred, whether he tripped on debris, was hit by a truck, or both, plaintiff's injuries were clearly not "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *Carrera v Westchester Triangle Hous. Dev. Fund Corp.*, 116 AD3d 585 [2014]). The court notes

that the plaintiff does not oppose the dismissal of this claim. Accordingly, plaintiff's Labor Law § 240 (1) claim is hereby dismissed as against all defendants.

III. Plaintiff's Labor Law § 241 (6) Claim

CPS and Lend Lease seek summary judgment dismissing plaintiff's Labor Law § 241 (6) claim as against them. Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers without regard to direction and control (*see Romero v J & S Simcha, Inc.*, 39 AD3d 838 [2007]). In order to prevail under this section of the Labor Law, a plaintiff must establish that specific safety rules and regulations of the Industrial Code promulgated by the Commissioner of the Department of Labor were violated (*see Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494 [1993]; *Ares v State of New York,* 80 NY2d 959 [1992]). The rule or regulation alleged to have been breached must be a specific, positive command and be applicable to the facts of the case (*see Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 619 [2008]; *Jicheng Liu v Sanford Tower Condominium, Inc.,* 35 AD3d 378, 379 [2006]).

Here, in his supplemental bill of and second supplemental bill of, the plaintiff alleges that defendants violated Industrial Code 12 NYCRR §§ 23-1.7, 23-1.29, 23-1.32, 23-1.33, 23-9.5 and 23-9.7. CPS and Lend Lease argue that these provisions are either not applicable to the facts herein and/or that the subsections thereof were not sufficiently plead. In opposition to defendants' motion, however, the plaintiff only relies upon the

alleged violation of section 23-1.7 (e) (2) and fails to address the other cited provisions. Thus, except for section 23-1.7 (e) (2), all other cited Industrial Code provisions are hereby deemed abandoned by the plaintiff (*see Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2017]; *Palomeque v Capital Improvement Servs., LLC*, 145 AD3d 912, 914 [2016]; *Harsch v City of New York*, 78 AD3d 781, 783 [2010]; *Cardenas v One State St., LLC,* 68 AD3d 436, 438 [2009]).

As to section 23-1.7 (e) (2), entitled "Tripping and other hazards," this provision provides as follows:

> (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.

CPS and Lend Lease initially argue that the court should not consider this regulation because the plaintiff raises it for the first time in his opposition papers. Defendants further argue that section 23-1.7 (e) (2) is inapplicable as the area where the accident occurred was not a "working area" within the meaning of the regulation. In this regard, defendants argue that the plaintiff's accident occurred in a public New York City street, which was not associated with the construction project, and thus cannot be considered a working area as defined by section 23-1.7 (e) (2). In addition, defendants contend that the debris over which the plaintiff allegedly tripped was not related to the ongoing construction work. In support of this contention, defendants note that the debris

was located outside the construction site's gated entrance. Defendants also refer to plaintiff's deposition testimony that he did not know where the debris (pile of sand and little rocks) came from, and did not notice it before his accident occurred.

In opposition, the plaintiff argues that this regulation is applicable since at the time of the accident, he was working as a flagman at the South Street entrance and it was his job to assist Empire trucks in backing up to use the "wash out box". In addition, plaintiff notes that he was specifically directed by his Pinnacle foreman to perform this task. Thus, plaintiff contends that the work area included any surface on which he needed to stand or walk in order to adequately perform his duties as a flagman. In support, the plaintiff has submitted the expert affidavit of Ms. Hopkins, a Certified Site Safety Manager, who opines, to a reasonable degree of professional site safety certainty, that section 23-1.7 (e) (2) is applicable, and that defendants' failure to keep plaintiff's work area free from debris substantially contributed to his injuries. Thus, plaintiff argues that defendants are not entitled to a dismissal of his Labor Law § 241 (6) claim to the extent it is predicated on an alleged violation of this provision.

The court first rejects defendants' argument that plaintiff's claim of a violation of section 23-1.7 (e) (2), which was raised for the first time in his opposition papers, (to be contrasted with section 23-1.7, which was listed in his bill of particulars) and thus should not be considered. Although a plaintiff asserting a Labor Law § 241 (6) cause of action must allege a violation of a specific and concrete provision of the Industrial Code (*see*

Ross v Curtis–Palmer Hydro–Elec. Co., 81 NY2d 494 [1993]; *Samuel v A.T.P. Dev. Corp.,* 276 AD2d 685, 686 [2000]), a failure to identify the Code provision or specify the subsection thereof in the complaint or bill of particulars is not fatal to such a claim (*see Kelleir v Supreme Indus. Park, LLC,* 293 AD2d 513, 513–14 [2002]; *Noetzell v Park Ave. Hall Hous. Dev. Fund Corp*., 271 AD2d 231 [2000]). Here, plaintiff's belated identification of the subsection (e) (2) of section 23-1.7 (which section was listed in his bill of) entails no new factual allegations, raises no new theories of liability, and has caused no prejudice to defendants (*see Noetzell*, 271 AD2d at 233). The court will therefore consider this regulation as a predicate for plaintiff's Labor Law § 241 (6) claim.

Further, the court finds that section 23-1.7 (e) (2), which is sufficiently specific and concrete to support a Labor Law § 241 (6) cause of action, applies to the circumstances of this case (*see Harsch v City of New York,* 78 AD3d 78, 783 [2010]). Contrary to defendants' contention, since plaintiff was required to work in the street in order to perform his assigned flagman duties, it was in fact part of the "working area" within the meaning of the provision (*see Gonzalez v G. Fazio Constr. Co.*, 176 AD3d 610, 611[2019]; *Quigley v Port Auth. of New York,* 168 AD3d 65, 68 [2018]; *Dalanna v City of New York,* 308 AD2d 400, 401 [2003] [place of injury was regularly traversed to bring supplies to the worksite and could be described as a working area]; *Canning v Barney's New York*, 289 AD2d 32, 34 [2001] [the place of injury was a working area rather than a passageway, because it was constantly used for loading and unloading

materials and debris]; *Cafarella v Harrison Radiator Div. of Gen. Motors*, 237 AD2d 936, 938 [1997]; *see also Lucas v KD Dev. Const. Corp.,* 300 AD2d 634, 634–35 [2002] [plaintiff flagman struck by a car as he was walking on the street adjacent to the worksite towards awaiting concrete trucks was within the worksite]).

In addition, plaintiff's deposition testimony that he tripped/stumbled backwards over debris, in addition to being hit by an Empire truck, is sufficient to raise an issue of fact as to whether 12 NYCRR 23–1.7(e) (2) was violated, and whether said violation was a substantial cause of plaintiff's injuries (*see Lelek v Verizon N.Y., Inc.*, 54 AD3d 583, 585 [2008]). Accordingly, that branch of defendants' motion seeking to dismiss plaintiff's Labor Law § 241 (6) claim insofar as it is based upon an alleged violation of section 23-1.7 (e) (2) is denied.

IV. Plaintiff's Labor Law § 200/Common-law Negligence Claims against CPS and Lend Lease

CPS and Lend Lease also seek summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims as against them. Labor Law § 200 codifies the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*see Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709 [2000]). Where a plaintiff's injuries stem from a dangerous condition on the premises, a [defendant] may be liable under Labor Law § 200 if it "'either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition'" (*Rojas v Schwartz*, 74 AD3d 1046, 1047 [2010], quoting *Ortega v Puccia*, 57

AD3d 54, 61 [2008]; *see Banscher v Actus Lend Lease, LLC,* 132 AD3d 707, 709 [2015]). However, "[w]here . . . a claim arises out of the means and methods of the work, a [defendant] may be held liable for common-law negligence or a violation of Labor Law § 200 only if he or she had 'the authority to supervise or control the performance of the work'" (*Forssell v Lerner*, 101 AD3d 807, 808 [2012], quoting *Ortega v Puccia*, 57 AD3d at 61). "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d at 62). "[T]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence" (*Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684 [2010] [internal quotation marks omitted]; *see Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955, 959 [2013]; *Allan v DHL Express [USA], Inc.*, 99 AD3d 828, 832 [2012]; *Harrison v State of New York,* 88 AD3d 951, 954 [2011]; *Cambizaca v New York City Tr. Auth.*, 57 AD3d 701, 702 [2008]; *Peay v New York City School Constr. Auth.*, 35 AD3d 566, 567 [2006]).

Here, plaintiff alleges that his injuries were the result of a dangerous condition, that is, a physical defect at the construction site (pile of debris), as well as the manner in which he needed to perform his work as a flagman. In this regard, plaintiff alleges that another worker should have been provided to assist him with his flagman duties at the

site. Thus, to establish their prima facie entitlement to judgment as a matter of law, the defendants were obligated to address the proof applicable to both the "premises" and "means and methods" liability standards (*see Banscher v Actus Lend Lease, LLC*, 132 AD3d at 710; *Pineda v Elias*, 125 AD3d 738 [2015]; *Garcia v Market Assoc.*, 123 AD3d 661, 664 [2014]).

The court finds that plaintiff's Labor Law § 200 and common-law negligence claims should be dismissed as against both CPS and Lend Lease, since the undisputed evidence establishes that neither directed nor controlled plaintiff's work as a flagman at the site, or the work of his employer, Pinnacle. Moreover, the record evidence clearly establishes that only Pinnacle employees exercised direct supervisory control over the methods and manner of plaintiff's work. In fact, it was a Pinnacle foreman who made the decision to have the plaintiff perform his flagman duties without a second flagman because they were short staffed on the day in question. Contrary to plaintiff's assertion, Lend Lease's general supervision over the South Street construction project, which involved keeping a daily log, and coordinating various trades' schedules on the worksite, is insufficient to trigger liability pursuant to Labor Law § 200 and common-law negligence (*see Vasiliades v Lehrer McGovern & Bovis,* 3 AD3d 400, 401–402 [2004]; *Reilly v Newireen Associates*, 303 AD2d 214, 218–221 [2003] lv denied 100 NY2d 508 [2003]; *Loiacono v Lehrer McGovern Bovis, Inc.*, 270 AD2d 464 [2000]).

Further, there is no evidence that either CPS or Lend Lease created the alleged dangerous condition (pile of debris), or that they had any notice of it. Plaintiff himself testified that the debris was located outside the entrance gate to the project and in the street, and that he did not notice it until after his accident occurred. The plaintiff has failed to raise a triable issue of fact in opposition. Accordingly, that branch of CPS and Lend Lease's motion seeking to dismiss plaintiff's Labor Law § 200 and common-law negligence claims is granted and said claims are dismissed as against them.

Empire

As noted above, Empire was neither the owner nor a general contractor, and has demonstrated that it lacked the requisite authority and control over plaintiff's work (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Russin v Picciano & Son*, 54 NY2d at 316–317). Therefore, that branch of Empire's motion seeking to dismiss plaintiff's Labor Law § 200 claim is granted.

Under common-law negligence principles, however, Empire, as a subcontractor, "may be held liable for negligence where there is an issue of fact whether the work [it] performed . . . created the condition that caused [the] plaintiff's injury" (*Stevenson v Alfredo,* 277 AD2d 218, 221 [2000]; *see Kelarakosv Massapequa Water Dist.*, 38 AD3d 717, 719 [2007]; *Ryder v Mount Loretto Nursing Home Inc.,* 290 AD2d 892, 893 [2002]). As noted above, defendants' submissions, as well as plaintiff's opposition, highlight conflicting accounts regarding how the plaintiff's accident occurred. Viewing the

evidence in the light most favorable to plaintiff, as the nonmoving party, the court concludes that there are triable issues of fact as to whether an Empire vehicle was involved in his accident, and if so, whether negligence on the part of its driver was a proximate cause of plaintiff's injuries (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004] ["Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . on a motion for summary judgment"] [internal citations omitted]; *see also Scott v Long Is. Power Auth.,* 294 AD2d 348 [2002]; *Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997] ["It is not the court's function on a motion for summary judgment to assess credibility"]). Considering the foregoing issues of fact, the branch of Empire's motion seeking to dismiss plaintiff's common-law negligence claim as against it is denied. That branch of Empire's motion seeking to dismiss co-defendants' cross claims against it for common-law indemnity and/or contribution is also denied (*see Bryde v CVS Pharmacy*, 61 AD3d 907, 909 [2009]).

V. New York State Vehicle and Traffic Law

Empire maintains that its truck was not involved in the plaintiff's accident, but in the event there is a finding that it was, it seeks summary judgment dismissing plaintiff's claims under the New York State Vehicle and Traffic Law (VTL) §§ 388, 1101, 1121, 1122, 1124, 1125, 1146, 1163, 1180,1212 and 1226, and sections 4-03, 4-06, 4-07 and 4-12 of the Traffic Regulations of the City of New York.

As to VTL 1121, 1122, 1124, 1125, 1163, 1180 and 1226, the court finds that these regulations are not applicable to the facts herein as plaintiff alleges that the accident occurred while he was directing an Empire truck as it was backing into the South Street entrance. There are no allegations that the accident was caused by the Empire truck passing or overtaking another vehicle ([passing vehicles in opposite direction [see VTL 1121]; overtaking vehicle on left [VTL 1122]; limitations on overtaking a vehicle on the left [VTL 1124]; improperly driving on the left side of the street [VTL 1125], or by failing to signal prior to turning the truck [*see* VTL 1163 - pertaining to a vehicle turning and related required signaling]). There is no evidence that the truck was speeding [VTL 1180]. Additionally, there is no allegation that the Empire truck driver failed to keep at least one hand on the steering wheel (*see* VTL 1226). Accordingly, plaintiff's claims based upon these provisions are dismissed as against Empire.

Empire, however, has failed to make a prima facie showing warranting the dismissal of plaintiff's claims as based upon violations of VTL 388, VTL 1101, VTL 1146 and VTL 1212.

VTL 1101 generally states that "it is a traffic infraction for any person to . . . fail to perform any act required by this title." As to VTL 388, that regulation states that "every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any

person using or operating the same with the permission, express or implied, of such owner" (VTL § 388; *see Elrac v Ward*, 96 NY2d 58 [2003]). Empire notes that plaintiff's account of the accident was that he was standing at the rear left side of the vehicle (cement truck) as he directed the driver to back the truck up. Under these circumstances, Empire contends that negligence on the part of the plaintiff, not Empire's driver, is the only plausible way that he could have ended up directly behind the vehicle and be struck by it. Empire's unsupported speculation fails to eliminate all triable issues of fact as to its vicarious liability under this provision of the VTL. Indeed, Empire has failed to meet its prima facie burden of establishing the cement truck operator's freedom from fault in the happening of this accident as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Palmeri v Erricola*, 122 AD3d 697, 698 [2014; *Cattan v Sutton*, 120 AD3d 537, 538 [2014]).

Additionally, Empire has failed to eliminate all triable issues of fact as to whether its driver acted recklessly and/or failed to exercise due care while backing up into the South Street entrance (*see Nunez v Olympic Fence & Railing Co.*, 138 AD3d 807, 809 [2016]; *see* VTL 1146 [requiring drivers to exercise due care in operation of vehicle]; VTL 1212 [prohibiting reckless driving]. Accordingly, that branch of Empire's motion seeking to dismiss plaintiff's claims against it as based upon violations of VTL 388, 1101, 1212, and 1146 is denied.

VI. New York City Traffic Rules

The court holds that New York City (NYC) Traffic Rule § 4-03 (34 RCNY § 4–03) (pertaining to traffic signals and yielding the right of way) is not applicable herein, as there are no allegations that the plaintiff's accident was caused by Empire's driver failing to yield the right of way to other vehicles. NYC Traffic Rule § 4-06 (34 RCNY § 4–06) (pertaining to speed restrictions) is also not applicable herein, as plaintiff has made no allegations that the driver exceeded the 25 mph speed limit. NYC Traffic Rule § 4-12 (34 RCNY § 4–12), which encompasses a variety of miscellaneous rules, including subsection (e) which mandates that an operator of a vehicle place at least one hand on the steering wheel, is also not applicable herein.

However, as to NYC Traffic Rule § 4-07 (34 RCNY § 4–07), entitled "Other Restrictions on Movement," subsection (d), the only subsection that is arguably applicable herein, sets forth restrictions on backing a motor vehicle. It states that "no person shall . . . back a vehicle unless such movement can be made in safety." Empire's submissions fail to eliminate all triable issues of fact as to whether one of its drivers backed its vehicle in an unsafe manner thereby contributing to plaintiff's injuries. Since plaintiff's testimony concerning the circumstances of the accident, which differs from the evidence set forth by defendants, presents questions of fact as to how the accident occurred and whether the Empire driver used reasonable care to avoid hitting him, that branch of Empire's summary judgment motion seeking to

dismiss plaintiff's claims as based upon NYC Traffic Rule § 4-07(d) is denied (*see Romeo v DeGennaro*, 255 AD2d 208 [1998])

As to CPS and Lend Lease, that branch of their motion seeking to dismiss all of plaintiff's claims as based upon alleged violations of the VTL and the NYC Traffic Rules and Regulations is granted as neither defendant had any ownership interest or involvement with the vehicle that allegedly struck the plaintiff.

VII. CPS and Lend Lease's Cross Claims Against Empire for Contractual Indemnity and Breach of Contract for Failure to Procure Insurance

The branch of Empire's motion seeking summary judgment dismissing co-defendants' cross claims against it for contractual indemnification and for breach of contract for failure to procure insurance is granted. Empire has established that there was no contract between it and either Lend Lease or CPS, and therefore no contractual indemnification or insurance procurement provisions existed between these parties. In opposition, CPS and Lend Lease have failed to raise a triable issue of fact establishing otherwise (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324). Accordingly, co-defendants' cross claims for contractual indemnification and breach of contract to procure insurance are dismissed as against Empire (*see Pantaleo v Bellerose Senior Hous. Dev. Fund Co.*, 147 AD3d 777, 778–79 [2017]; *Holub v Pathmark Stores, Inc.*, 66 AD3d 741, 742 [2009]).

Conclusions

Based upon the foregoing, it is hereby

ORDERED that the branch of CPS and Lend Lease's motion seeking summary judgment dismissing plaintiff's complaint as asserted against them is granted to the extent that plaintiff's Labor Law §§ 240 (1), 200 and common-law negligence claims are hereby dismissed as against them; and it is further

ORDERED that the branch of CPS and Lend Lease's motion seeking summary judgment dismissing plaintiff's Labor Law § 241 (6) claim is granted to the extent that all of plaintiff's claims of alleged Industrial Code violations are dismissed except 12 NYCRR § 23–1. 7 (e) (2); and it is further

ORDERED that the branch of CPS and Lend Lease's motion seeking summary judgment dismissing all of plaintiff's claims based upon alleged violations of New York State Vehicle and Traffic Law §§ 388, 1101, 1121, 1122, 1124, 1125, 1146, 1163, 1180, 1212 and 1226, and sections 4-03, 4-06, 4-07 and 4-12 of the Traffic Regulations of the City of New York is granted; and it is further

ORDERED that the branch of Empire's motion seeking summary judgment dismissing plaintiff's Labor Law §§ 240 (1), 241 (6) and 200 claims as against it is granted and said claims are hereby dismissed as against Empire; and it is further

ORDERED that the branch of Empire's motion seeking summary judgment dismissing plaintiff's common-law negligence claim as against it is denied; and it is further

ORDERED that the branch of Empire's motion seeking summary judgment dismissing CPS and Lend Lease's cross claims against it for contractual indemnification and for breach of contract for failure to procure insurance is granted; and it is further

ORDERED that the branch of Empire's motion seeking summary judgment dismissing CPS and Lend Lease's cross claims against it for common-law indemnification and contribution is denied; and it is further

ORDERED that the branch of Empire's motion seeking summary judgment dismissing plaintiff's claims based upon alleged violations of the Vehicle and Traffic Law and the NYC Traffic Rules is granted to the extent that plaintiff's claims with regard to alleged violations of VTL §§ 1121,1122, 1124, 1125, 1163, 1180 and 1226, and sections 4-03, 4-06 and 4-12 of the NYC Traffic Rules, are hereby dismissed.

The foregoing constitutes the decision and order of the court.

E N T E R :

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Debra Silber, J.S.C.