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 28th day of February, 2020.

P R E S E N T:

HON. EDGAR G. WALKER
Justice.

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JORGE SERPAS AND ANA SERPAS,

Plaintiffs,

- against -

Index No. 501460/16

PORT AUTHORITY OF NEW YORK AND NEW JERSEY, PETER SCALAMANDRE AND SONS D/B/A SCALAMANDRE CONSTRUCTION, SCALAMANDRE CONSTRUCTION AND DELTA AIRLINES, INC.,

Defendants.

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The following papers numbered 1 to 7 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-5
Opposing Affidavits (Affirmations)	6
Reply Affidavits (Affirmations)	7
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendants Port Authority of New York and New Jersey (Port Authority), Peter Scalamandre and Sons, Inc., d/b/a Scalamandre Construction, Scalamandre Construction (Scalamandre) and Delta Airlines Inc., (Delta) (collectively defendants) move for an order, pursuant to CPLR 3212, granting defendants summary judgment dismissing plaintiffs' complaint including claims of negligence and violations of §§ 200, 240 (1) and 241 (6) of the Labor Law.

Background and Procedural History

In April 2015, a construction project was underway at John F. Kennedy Airport which involved the construction of a new terminal for Delta Airlines. The project included the demolition of the existing pavement where Terminal 3 had been located, and the installation of new infrastructure including new fuel lines, drainage lines, water lines and new pavement. The project area was approximately one million square feet consisting of smaller individual concrete pours in formations known as hardstands. Each concrete hardstand was approximately 18 inches tall.[1] In order to ensure that the poured concrete would not crack, the hardstands were poured in different sections. For example, if there were six rows of concrete hardstands needed, rows one, three and five would be poured. Then, a few days later, after the those hardstands had cured, rows two, four and

[1]Defendants contend that the hardstands were 18 inches high while plaintiffs maintain they were 19 inches as the hardstands rested on a one-inch base. This minor discrepancy, however, has no relevance for purposes of this motion.

six would be poured. Each pour was approximately 20 feet by 20 feet, and horizontal steel rebar type dowels were included within the pour and extended out of the edge of each hardstand.

The Port Authority owned the land upon which the work was being performed, and Delta was leasing the portion on which the project was occurring. Scalamandre was the general contractor and had contracted with plaintiff's employer, Araz Industries, to install drainage pipes at the project. On or about April 7, 2015, plaintiff and his co-worker were working at the site. They were directed to obtain a length of pipe from a storage area located at the other end of one of the concrete hardstands, and to move it to a trench that had been dug for drainage. Plaintiff testified that his foreman directed him to get on the hardstand to access the pipe. He stated that he accomplished this by sitting on the hardstand and then twisting his body around. At that point, he stood up and he then walked over to the area where the pipes were located. Plaintiff testified that he picked up a long, heavy pipe and walked back to the area where he had gotten on the hardstand. Plaintiff testified that when he went to get off the hardstand he stepped down on the pin, or steel rebar type dowel, that was sticking out of the hardstand and his foot slipped off it, causing him to fall onto the ground and sustain various injuries. He testified that as he stepped on the rebar dowel he realized that there was grease on it.

Plaintiffs commenced the instant action by service of a summons and verified complaint on or about February 2, 2016. Issue was joined by service of defendants'

verified answer on or about April 14, 2016. Discovery was completed and note of issue was filed on September 26, 2018. Defendants moved to vacate the note of issue and the motion was denied. However, the court extended the time to file summary judgment motions to January 31, 2019. Thus, the instant motion is timely.

Defendants' Motion

Defendants move for an order, seeking summary judgment dismissing plaintiffs' complaint including claims of negligence and violations of §§ 200, 240 (1)[2] and 241 (6) of the Labor Law.

Labor Law § 240 (1)

Defendants argue that Labor Law§ 240 (1) is not applicable as plaintiff's accident was not within the ambit of an elevation related hazard. In support of this position, defendants note that the hardstand that plaintiff was on was only 18 inches off the ground, and the metal rod on which he stepped as he was coming off the hardstand was about halfway down those 18 inches. Thus, they maintain that the height from which the plaintiff slipped was no more than nine inches, which defendants argue is not a significant height differential requiring that fall protection be provided. Therefore, defendants contend there is no nexus between his injury and the lack of, or failure to provide, a safety device as contemplated by Labor Law § 240 (1). Finally, defendants argue that

[2] Defendants note that plaintiffs fail to plead a Labor Law § 240 (1) claim in their complaint but have asserted it in their bill of particulars. This court will address plaintiffs' Labor Law § 240 (1) claim.

plaintiff's work did not require him to be on the hardstand as there were multiple alternative paths that plaintiff could have utilized to retrieve the pipe and that it was his choice to traverse the hardstand.

In support of the motion, defendants submit the affidavit of Michael Cronin, a licensed and registered professional engineer. Mr. Cronin affirms that he reviewed all of the deposition testimony, bills of particulars, color photographs marked as deposition exhibits, the hardstand technical specifications, as well as affidavits submitted by employees of Scalamandre and Araz. He opines that the 18-inch hardstand was not an elevated working surface, and that no materials were stored on the hardstand except those that were utilized as part of the concrete pouring curing process. Mr. Cronin notes that the hardstand was in the process of curing at the time of plaintiff's accident. He further opines that both the hardstand and the rebar dowels were integral parts of the concrete pouring work at the time of the accident. Mr. Cronin opines that the dowels were used to connect the individual hardstands to create a larger concrete surface, and that any grease on the dowels was integral to the process to ensure that they properly set in the curing concrete. Mr. Cronin further notes that these dowels were used to strengthen the bond between adjacent concrete slabs and to reduce cracking, and were not intended to be utilized as a stepping or climbing mechanism. Mr. Cronin opines that "since the hardstands and dowels were an integral part of the ongoing work, none of the safety devices enumerated in Labor Law § 240 (1) were applicable" (Cronin aff at ¶ 12). He

further opines that plaintiff's fall from the dowel, located approximately nine inches off the ground, was not a sufficient height requiring fall protection, and that no safety device could have prevented this incident.

In further support of the motion, defendants submit the affidavit of Lionel Tonolete, an estimator employed by Scalamandre. He states that the hardstands had a sub-ground base and that the maximum height of the hardstand would be 18 inches and the minimal height would be 16.5 inches (Tonolete at ¶ 9). In addition, defendants submit an affidavit from Robert Morice, the Araz foreman assigned to the project at issue. He affirms that he reviewed the photographs marked as exhibits during plaintiff's testimony. Mr. Morice states that he "did not give specific instructions to Mr. Serpas on the morning of the incident as he was continuing to move pipe to the trench as he was previously assigned to do. This required him to walk to Araz's staging area where we maintained pipes and to bring them over to the trench . . . The job site was completely open. Araz had secured a site to maintain its pipes on flat ground. The pipe was not stored on a concrete hard stand. That was a secured area" (Morice at ¶¶ 10 & 12). Mr. Morice further states that "[o]n the day of the incident, in the area where I am told [plaintiff] . . . fell . . . there were multiple alternative paths to walk other than walking on the hard stand. There was level flat ground immediately adjacent to the hard stand that [plaintiff] . . . could have used to carry his pipe without climbing on or off any hard stands" (Morice at ¶¶ 15).

In opposition, plaintiffs argue that defendants failed to provide plaintiff with proper safety devices to protect him from gravity-related risks. In support of their opposition, plaintiffs submit the affidavit of Kathleen Hopkins, a certified site safety manager. Ms. Hopkins affirms that she reviewed the bill of particulars and all of the relevant deposition transcripts. She contends that the hardstand was actually 19 inches in height as it had a base that was one inch in height and as such, a stairway or ladder should have been provided pursuant to OSHA regulation 29 CFR 1926 §1051 (a). Ms. Hopkins opines that "had scaffolding or ladder step(s) or other devices such as a ramp been provided for safe egress from the top of the concrete pad, the plaintiff's accident, fall and injuries would not have occurred" (Hopkins aff at ¶ 10). Additionally plaintiffs point to plaintiff's testimony that his foreman directed him to get on the hardstand to access the pipes and that it was the fastest way to get to the pipes (Serpas tr at 36).

"'"The extraordinary protections of Labor Law § 240 (1) extend only to a narrow class of special hazards, and do not encompass any and all perils that may be connected in some tangential way with the effects of gravity"'" (*Simmons v City of New York*, 165 AD3d 725, 726 [2018], quoting *Nieves v Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914, 915-916 [1999], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). "Rather, the statute was designed to prevent accidents in which a protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*Sullivan v New York Athletic Club of City of N.Y.*, 162 AD3d

950, 953 [2018] [internal citations and quotation marks omitted]). Thus, "[l]iability under the statute . . . depends on whether the injured worker's 'task creates an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against'" (*Niewojt v Nikko Constr. Corp.*, 139 AD3d 1024, 1027 [2016], quoting *Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]). "The dispositive inquiry . . . does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker. Rather, the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.,* 13 NY3d 599, 603 [2009]; *see O'Brien v Port Auth. of N.Y. & N.J.,* 29 NY3d 27, 33 [2017]*; Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.,* 18 NY3d 1, 10 [2011]; *Kandatyan v 400 Fifth Realty, LLC*, 155 AD3d 848, 850 [2017]). A "work site is "elevated" within the meaning of the statute where the required work itself must be performed at an elevation, i.e., at the upper elevation differential, such that one of the devices enumerated in the statute will safely allow the worker to perform the task" (*D'Egidio v Frontier Ins. Co.*, 270 AD2d 763, 765-766 [2000]; *see Ross*, 81 NY2d at 500-501; *Amo v Little Rapids Corp.*, 268 AD2d 712, 714-715 [2000]).

The statute places the responsibility for safety practices and safety devices on owners, general contractors, and their agents who are "best situated to bear that responsibility" (*Ross,*

81 NY2d at 500; *see also Zimmer v Chemung County Perf. Arts*, 65 NY2d 513, 520 [1985], *rearg denied* 65NY2d 1054 [1985]). "[T]he duty imposed by Labor Law §240 (1) is nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (*Ross,* 81 NY2d at 500).

At the outset, the court notes that all of the cases cited by plaintiffs in support of their opposition are distinguishable from the facts of the instant case inasmuch as they all involve incidents in which an object or materials fell on a worker rather than, as in the instant case, a plaintiff who fell a short distance.

Here, the record shows that the plaintiff's injuries did not result from the type of elevation related hazard to which the statute applies (*see Lombardo v Park Tower Mgt. Ltd.*, 76 AD3d 497, 498 [2010][holding that plaintiff's fall from the middle step of a three step stairway, which was approximately 18 inches high, "was not of sufficient height to trigger the protection of section 240 (1), nor was plaintiff exposed to the type of extraordinary risk for which the statute was designed"]; *Toefer v Long Is. R.R.*, 4 NY3d 399, [2005] [holding that a four- to five-foot descent or fall from a flatbed truck was not an elevation-related risk that triggers section 240 [1] coverage because safety devices of the kind listed in the statute are normally associated with more dangerous activity]; *Torkel v NYU Hosps. Ctr.*, 63 AD3d 587 [2009] [court found that plaintiff was not exposed to an elevation-related hazard as contemplated by section 240 (1) when he fell 12 to 18 inches

from a makeshift ramp]; *DeMayo v 1000 N. of N.Y. Co.*, 246 AD2d 506, 507 [1988] [court held that plaintiff's fall from a "13-inch high step is not an elevation-related hazard contemplated by the statute]; *see also Parker v 205-209 E. 57th St. Assoc., LLC*, 100 AD3d 607, 609 [2012] [holding that plaintiff's injuries sustained when he fell after stepping through a doorway which was several feet above the level of the lower roof of the building on which he was working did not result from the type of elevation related hazard to which Labor Law§ 240 (1) applies]). Defendants have demonstrated that the risk to plaintiff was not the type of extraordinary peril § 240 (1) was designed to prevent. Rather, his injuries were the result of the usual and ordinary dangers at a construction site. Plaintiffs have failed to raise a question of fact in opposition, Therefore, plaintiff is not entitled to Labor Law § 240 (1) protection because no true elevation-related risk was involved here (*see Nieves v Five Boro Air Conditioning & Refrigeration Corp.*, 93 NY2d 914, 916 [1999]; *Melber v 6333 Main St.*, 91 NY2d 759, 763 [1998] [the Court stated that "[t]he protective equipment envisioned by [Labor Law § 240 (1) is simply not designed to avert the hazard plaintiff encountered here, namely electrical conduit protruding from the unfinished floor']).

Based upon the foregoing, that branch of defendants' motion seeking summary judgment dismissing plaintiffs' Labor Law § 240 (1) claim is granted and said claim is hereby dismissed.

Labor Law § 241 (6)

Defendants seek summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim arguing that all of the Industrial Code provisions alleged to have been violated are either too general to support said claim or are inapplicable herein.

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 their Labor Law § 241 (6) claim, plaintiffs allege violations of 12 NYCRR §§ 23-1.7 (d), (e) (1) (2), (f), 23-1.21 (a), 23-2.1 (b), 23-2.7 (a), (b) and (e).

Industrial Code § 23-1.7 (d)

Industrial Code § 23-1.7 (d) states that "employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing." Defendants argue that § 23-1-7 (d) was not violated as the testimony demonstrates that the hardstand was not a passageway, walkway or elevated working surface and it, along with the rebar dowel, were integral parts of the ongoing construction project. In addition, defendants' expert, Mr. Cronin, opines that this section is not applicable as neither the hardstand nor the rebar dowel were a walkway, passageway or elevated work surface. Moreover, he opines that the hardstand, rebar dowel were integral parts of the concrete pouring process and "any grease on the rebar dowels was integral to that process so that they properly set in the curing concrete" (Cronin aff at ¶ 10).

In opposition, plaintiffs' expert, Ms. Hopkins, opines that this Industrial Code provision was violated as plaintiff's foot fell off the rebar dowel due to a slippery substance on it. She contends there was a direct violation of this Code provision which was a proximate cause of plaintiff's accident.

Under case law, if a substance is "an integral part" of the construction project, then it is does not constitute a "foreign substance" under 12 NYCRR 23-1.7 (d) (*see Lopez v Edge 11211, LLC*, 150 AD3d 1214, 1215 [2017][holding that the protective rosin paper upon which the plaintiff slipped was an integral part of the tile work and did not constitute a "foreign substance" within the meaning of Industrial Code § 23-1.7 (d)]; *Johnson v 923 Fifth Ave. Condominium*, 102 AD3d 592[2013]; *Rajkumar v Budd Contr. Corp.*, 77 AD3d 595 [2010]; *Galazka v WFP One Liberty Plaza Co., LLC*, 55 AD3d 789, 790 [2008][wet asbestos fibers were not a "foreign substance" under 12 NYCRR 23-1.7 (d) where plaintiff was engaged in asbestos removal, and safety regulations required fibers to be constantly wet so as to prevent them from filling the air]; *Stafford v Viacom, Inc.*, 32 AD3d 388 [2006] [12 NYCRR 23-1.7 (d) did not apply to electrician who slipped and fell on glue on the floor, which was an integral part of the installation of the carpeting or floor tiles]). Accordingly, plaintiffs' cannot support the Labor Law § 241 (6) cause of action based upon a violation of Industrial Code § 23-1.7 (d) as the rebar on which plaintiff alleges he slipped was an integral part of the project.

Industrial Code § 23-1.7 (e) (1) and (2)

Plaintiffs also allege a violation of Industrial Code 12 NYCRR § 23-1.7 (e) (1) and (2) which relates to tripping hazards and requires owners and general contractors, *inter alia*, to keep all passageways and work areas free of debris and scattered tools which could cause tripping, as well as sharp projections which could cut or puncture. Defendants argue that these sections are not applicable to the facts of the instant case. In support of this position, they offer Mr. Cronin's affidavit in which he opines that there is no violation of § 23-1.7 (e) and (2) as plaintiff has never alleged that he tripped, rather he testified that he slipped off the rebar dowel (Cronin aff at ¶19).

Plaintiffs do not oppose that branch of defendants' motion seeking dismissal of their section 241 (6) claim as based upon a violation of subdivision (e) (1). However, plaintiffs' expert, Ms. Hopkins opines that defendants violated subdivision (e) (2) which requires that working areas be kept free from dirt and debris. Specifically, she contends that there were pebbles or gravel debris on the ground where plaintiff landed after he fell from the dowel, and that such debris contributed to plaintiff's injuries (Hopkins aff at ¶ 13).

Here, defendants have established that this regulation was not applicable to plaintiff's accident, as he did not allege that he tripped on any tripping hazard. Plaintiff specifically testified that he slipped on the grease that was on the rebar dowel (*see Keener v Cinalta Constr. Corp.*, 146 AD3d 867, 867 [2017][court held this provision was inapplicable as plaintiff testified that he did not trip]; *Costa v State of New York*, 123

AD3d 648, 648 [2014]; *Cooper v State of New York*, 72 AD3d 633, 635 [2010]). Moreover, this section of the Industrial Code, "has no application where the object that caused the plaintiff's injury was an integral part of the work being performed" (*Mitchell v Caton on the Park, LLC*, 167 AD3d 865, 866 [2018]; *see O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805, 855 [2006]; *O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805, 806 [2006] [holding that electrical pipe or conduit that plaintiff tripped over was an integral part of the construction, thus no violation of Industrial Code § 23-1.7 (e) (1) and (2)]; *Aragona v State of New York*, 147 AD3d 808,809 [2017]; *Lopez v New York City Dept. of Envtl. Protection*, 123 AD3d 982, 984 [2014]; *Sanders v St. Vincent Hosp.*, 95 AD3d 1195, 1196 [2012]; *Venezia v State of New York*, 57 AD3d 522, 523[2008]; *Castillo v Starrett City*, 4 AD3d 320, 322 [2004]). Accordingly, plaintiffs cannot support their Labor Law § 241(6) cause of action based upon a violation of Industrial Code § 23-1.7 (e) (1) or (2).

Industrial Code § 23-1.7 (f)

Plaintiffs also assert a violation of 12 NYCRR § 23-1.7 (f), which relates to vertical passages and 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." Defendants argue that this code provision is similarly not applicable as plaintiff's work area was a trench and the hardstand was not used to store

materials and it was not plaintiff's work area. Mr. Cronin opines that this section is not applicable as the hard stand and dowel from which he fell was not a work area. He further opines that the hardstand and the side rebar dowels at eighteen and nine inches respectively, were not of a height to be considered elevated such that a stairway, ramp or runway would be required (Cronin aff at ¶ 20 & 21)..

In opposition, Ms. Hopkins opines that this section is applicable to the facts of the instant case as there was no stairway, step or ramp to provide a safe means of access to the top of the hardstand, which she asserts was over 19 inches above the ground, and this violation was a direct, substantial and proximate cause of plaintiff's accident (Hopkins aff at ¶14).

Here, the court finds that this Industrial Code provision is not applicable to the facts of the instant case. The hardstand and dowel were not work areas as contemplated under the Industrial Code provision (*see Lavore v Kir Munsey Park 020, LLC*, 40 AD3d 711, 713 [2007] [court found that utility bin on the side of the plaintiff's truck from which he fell, located approximately five feet above the ground, cannot be said to be a working level above ground requiring a stairway, ramp, or runway under that section; *Farrell v Blue Circle Cement, Inc.*, 13 AD3d 1178, 1179-1180 [2004] [court held that § 23-1.7 (f) was inapplicable, because the truck scale from which plaintiff fell, which was located two and a half feet (30 inches) above the ground cannot be said to be a "working level[ ] above ... ground" requiring a stairway, ramp or runway under that section]). Further, even

if the court were to find that the hardstand was plaintiff's work area, this provision is not applicable to the facts of this case involving a fall from between nine and eighteen inches (*see Sawczyszyn v New York Univ.*, 158 AD3d 510, 511-12 [2018] [regulation inapplicable where accident involved "a vertical distance of about one foot or less" on a "ramp from the truck bed to the dock"]; *Francescon v Gucci Am., Inc.*, 105 AD3d 503, 504 [2013] [where "the subfloor was only approximately 12 to 15 inches below the first floor from which [plaintiff] fell").

Accordingly that branch of defendants' motion seeking dismissal of plaintiffs' Labor Law § 241 (6) claim as predicated upon a violation of Industrial Code § 23-1.7 (f) is granted.

Industrial Code § 23-2.7 (a)

Finally, defendants argue that Industrial Code § 23-2.7 (a) is not applicable as it is intended to apply to multi-story structures and sets forth the specific requirements for stairways therein. This section states that:

> During the construction of any reinforced concrete building or other structure, at least one stairway shall be installed which shall extend to a level not more than four floors or 60 feet, whichever is less, below the uppermost working floor or level. During the construction of other types of buildings or other structures, at least one stairway shall be installed which extends to a level not more than two floors or 30 feet, whichever is less, below the uppermost working floor or level. Such stairways shall be extended upward as the construction progresses to comply with this Part (rule).

Defendants expert, Mr. Cronin, notes that the hardstand was 18 inches high and this code provision references stairway requirements for 30 feet or two stories or 60 feet or four stories and, thus, he opines this provision does not apply to the facts of the instant case. He further opines that the hardstand was "not a structure that requires a stairway, and this was a temporary exposed edge due to the nature of the construction and the time needed for the concrete to cure" (Cronin aff at ¶ 24).

Conversely, plaintiffs' expert, Ms. Hopkins, opines that this section is applicable as it relates to concrete structures such as the hardstand and if a stairway or steps had been provided for safe access to the top of the hardstand, plaintiff's accident would not have occurred (Hopkins aff at ¶ 15).

The court finds that a careful reading of the plain words of this Industrial Code provision reveal that it is not applicable to the facts of the instant case. Accordingly, that branch of defendants' motion seeking dismissal of plaintiffs' Labor Law § 241 (6) claim as based upon a violation of Industrial Code § 23-2.7 (a) is granted.

Plaintiffs fail to raise any opposition to that branch of defendants' motion seeking dismissal of plaintiff's Labor Law § 241 (6) claim as predicated upon violations of Industrial Code §§ 23-1.21 (a) and 23-2.1 (b) and 23-2.7 (b) and (e). As such, the court finds that plaintiffs have abandoned these causes of action by failing to address them in opposition to defendants' motion (*see Elam v Ryder Sys., Inc.*, 176 AD3d 675, 676 [2019]; *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]).

Based upon the foregoing, that branch of defendants' motion seeking dismissal of plaintiffs' Labor Law § 241 (6) claim is granted and said claim is hereby dismissed.

Labor Law §200 and 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*, 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];

Gallello v MARJ Distribs., Inc., 50 AD3d 734, 735 [2008]; *Dooley v Peerless Importers, Inc.*, 42 AD3d 199, 204-205 [2007]). "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" (*Torres v Perry St. Dev. Corp.*, 104 AD3d 672, 676 [2013]). "[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" (*Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 698 [2016] quoting *Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684 [2010], quoting *Gasques v State of New York*, 59 AD3d 666, 668 [2009], affd on other grounds 15 NY3d 869 [2010]; *see Torres*, 104 AD3d at 676; *Harrison v State of New York*, 88 AD3d 951, 954 [2011]).

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*, 167 AD3d at 867 quoting *Abelleira*, 120 AD3d at 1164; *see Shaughnessy v Huntington Hosp. Assn.*, 147 AD3d 994, 997 [2017]; *Marquez*, 141 AD3d at 698; *Doto v*

Astoria Energy II, LLC, 129 AD3d 660, 663 [2015]; *Martinez v City of New York*, 73 AD3d 993, 998 [2010]).

Defendants argue that it is not necessary to address either category as "[t]he duty to provide a safe place to work does not extend to hazards which are part of or inherent in the very work being performed or those hazards that may be readily observed by reasonable use of the senses . . ." (quoting *Gasper v Ford*, 13 NY2d 104 [1963]). Defendants contend that the hardstands and the metal rebar were integral to the work being performed. They further point out that plaintiff testified that he observed the rebar before he stepped on it and was thus aware of its existence. With regard to the grease on the rebar, which plaintiff maintains caused him to slip, defendants argue that it was an integral part of the construction process. Thus, whether or not plaintiff knew it was there is irrelevant inasmuch as his stepping on it was an intentional act which negates his negligence claim. In addition, defendants note it is undisputed that the plaintiff was supervised solely by his foreman at Araz, Mr. Morice, as evidenced by plaintiff's own testimony as well as the affirmation in support of defendants' motion submitted by Morice. Finally, defendants argue that there was no dangerous condition of which to take notice as the hardstand and rebar were integral parts of the ongoing construction project.

In opposition, plaintiffs argue that defendants failed to provide workers with safe ingress and egress onto and off of the concrete hardstands, and that the fact that the pipes

were placed on the hardstands made it foreseeable that workers would need to access that area. They assert that while it is true that plaintiff testified that he observed the rebar before stepping on it, he further stated that he did not observe the grease on it until after he slipped off and fell. Plaintiffs further argue that defendants were responsible for ensuring that the worksite was free from hazardous conditions caused by debris and that Delta Airlines' witness, Mr. Mancuso, testified that defendants employed a licensed site safety professional to ensure that there was a safe means of ingress and egress to all areas of the work site.

It is well settled that "[t]here is no duty to protect or warn against an open and obvious condition which is not inherently dangerous" (*Ochoa-Hoenes v Finkelstein*, 172 AD3 1080, 1081 [2019]; *see Grosskopf v Beechwood Org.*, 166 AD3d 860 [2018]; *Cupo v Karfunkel*, 1 AD3d 48, 52 [2003]). A complained-of condition is open and obvious when it is readily observable by those employing the reasonable use of the senses (*see Scalice v Braisted*, 116 AD3d 755 [2014]; *Zegarelli v Dundon*, 102 AD3d 958 [2013]; *Misir v Beach Haven Apt. No. 1, Inc.*, 32 AD3d 1002 [2006]). "'When a worker confronts the ordinary and obvious hazards of his [or her] employment, and has . . . the time and other resources (e.g., a co-worker) to proceed safely, [a defendant] may not [be held] responsible if [the worker] perform[s the] job so incautiously [so] as to [be] injure[d]'" (*Spence v Island Estates at Mt. Sinai II, LLC*, 79 AD3d 936, 938-939 [2010] quoting *Marin v San Martin Rest.*, 287 AD2d 441, 442[2001] quoting *Abbadessa v Ulrik Holding*,

244 AD2d 517, 517[1997]; *see Ercole v Academy Fence Co.*, 256 AD2d 305 [1998]). However, "[a] condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" (*Karpel v National Grid Generation, LLC*, 174 AD3d 695, 696 [2019] quoting *Doughim v M & US Prop., Inc.*, 120 AD3d 466, 468 [2014]; *see Katz v Westchester County Healthcare Corp.*, 82 AD3d 712, 713 [2011]; *Stoppeli v Yacenda*, 78 AD3d 815, 816 [2010]). Additionally, "proof that a dangerous condition is open and obvious does not preclude a finding of liability . . . but is relevant to the issue of the plaintiff's comparative negligence" (*Karpel*, 174 AD3d at 696 quoting *Cupo v Karfunkel*, 1 AD3d 48, 52 [2003]; *see Tulovic v Chase Manhattan Bank, N.A.*, 309 AD2d 923, 924 [2003] [holding that it was error for the lower court to grant summary judgement on plaintiff's Labor Law § 200 claim despite the fact that the exposed rebars were open and obvious as this does not negate the defendants's duty to maintain its premises in a reasonably safe condition; rather, it goes to the issue of the plaintiff's comparative negligence];*Van Salisbury v Elliott-Lewis*, 55 AD3d 725, 727 [2008]; *see also Pelow v Tri-Main Dev.*, 303 AD2d 940, 941[2003]; *Bax v Allstate Health Care, Inc.*, 26 AD3d 861, 863[2006]).

Here, plaintiff has testified that he was directed by his foreman to get on and off of the hardstand in order to access the pipes he needed to perform his work, and that such pipes were stored on the hardstands. Conversely, defendants have submitted an affidavit

from Mr. Morice, plaintiff's supervisor, in which he affirms that he never directed plaintiff to access the hardstand and that the pipes were never stored on the hardstands as that was a secured area. Based upon the foregoing, the court finds that questions of fact exist regarding defendants' Labor Law § 200 and common law negligence liability that preclude granting that branch of defendants' motion seeking summary judgment dismissing plaintiffs' Labor Law§ 200 and common law negligence claims.

Conclusion

Those branches of defendants' motion seeking summary judgment dismissing plaintiffs' Labor Law §§ 240 (1) and 241 (6) claims is granted and said claims are dismissed. However, that branch of defendants' motion seeking summary judgment dismissing plaintiffs' claims as based upon a violation of Labor Law § 200 and common law negligence is denied.

This constitutes the decision, order and judgment of the court.

E N T E R,

J. S. C.