At an IAS 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 12th day of January, 2023.

PRESENT:

HON. DEBRA SILBER,

Justice.

- X

BLAINES SANTOS VELASQUEZ,

Plaintiff,

-against-

RS JZ DRIGGS LLC and FOREMOST CONTRACTING AND BUILDING LLC,

Defendants.

- X

DECISION / ORDER

Index No. 514312/2019
Mot. Seq. # 4 & 5

The following e-filed papers read herein:	NYSCEF Doc Nos.	
Notice of Motion/Cross Motion and Affidavits (Affirmations)	99-150, 160;	129-143
Opposing Affidavits (Affirmations)	163;	164-176
Reply	177-178;	180

In this personal injury action, plaintiff Blaines Santos Velasquez (plaintiff) moves, in mot. seq. four, for an order granting him leave to amend his bill of particulars, pre-note of issue, pursuant to CPLR 3025 (b), to allege a violation of 12 NYCRR (Industrial Code) 23-1.7 (e) (2), and, upon receiving such leave, granting him partial summary judgment on his Labor Law § 241 (6) claim, pursuant to CPLR 3212, based upon on a violation of 12 NYCRR 23-1.7 (e) (2).

Defendants RS JZ Driggs LLC (Driggs) and Foremost Contracting and Building LLC (Foremost) (collectively, defendants) cross-move, in mot. seq. five, for an order,

pursuant to CPLR 3212, granting them summary judgment and dismissing plaintiff's complaint.[1]

Background

Plaintiff commenced this action on June 28, 2019, after sustaining injuries while performing construction work at the premises located at 658 Driggs Avenue in Brooklyn, New York (premises or worksite) on May 31, 2019. Driggs was the owner of the property where, at the time, a new five-story mixed-use building was being constructed. Foremost was the general contractor for the project, and Concrete was the subcontractor hired by Foremost to perform the foundation, rebar and concrete superstructure work. At the time of the accident, plaintiff was employed by Concrete as an ironworker. In his complaint, plaintiff asserts claims against the defendants for common law negligence and alleged violations of Labor Law §§ 200, 240 (1), 240 (2), 240 (3) and 241 (6). Issue was joined on September 16, 2019, by the filing of defendants' answer, which was later amended on December 22, 2021.

Plaintiff's Motion

On April 25, 2022, plaintiff filed the instant motion seeking leave to amend his bill of particulars to allege a violation of 12 NYCRR 23-1.7 (e) (2), and, upon receiving such leave, for an order granting him partial summary judgment on his Labor Law § 241 (6) claim. In support of his motion, plaintiff has submitted his attorney's affirmation, his

[1] Initially, defendants also moved for summary judgment on their third-party complaint against (plaintiff's employer) the third-party defendant Concrete Courses Concepts Corp. (Concrete). However, that branch of defendants' motion was withdrawn by stipulation dated July 13, 2022, after the court granted Concrete's motion to sever the third-party action from the main action, by order dated June 2, 2022.

deposition transcript, two photographs marked as defendants' exhibits A1 and A2 during plaintiff's deposition, the deposition transcript of Foremost's witness, and plaintiff's proposed amended bill of particulars.

During his deposition, plaintiff testified that he began working for Concrete at the premises two months before his accident. His work included making rebar columns, known as "throwing iron," a process during which pieces of rebar are placed in specific areas on a plywood floor prior to the pouring of concrete. Mario and Antonio were the foremen for defendant Concrete. Antonio directly oversaw the ironworkers and gave them daily work instructions. No one, other than Antonio and Mario, gave plaintiff instructions at the site. The other ironworkers on this job included Edwin Cruz, Dennis Cruz, someone named Meno, and someone named Elder. Defendant Concrete also had carpenters on site.

On the day of the accident, plaintiff arrived at the site at 6:40 a.m., as his shift began at 7:00 a.m. Upon his arrival, Antonio directed the ironworkers to work on the building's first floor, which was at street level. Plaintiff worked on the first floor until 9:15 a.m., when he and other ironworkers took a fifteen-minute coffee break. After plaintiff returned to work following his coffee break, Antonio told him that he and Elder should go to the floor above, (the second floor) to help the ironworkers who were already working there. Plaintiff and Elder then climbed a ladder to access the building's second floor, which was open to the sky, as the third floor had not yet been constructed.

The accident occurred five minutes after plaintiff arrived on the second floor. He had not previously been on the second floor that day. Upon his arrival, he saw other ironworkers and carpenters working. Everyone on the second floor at that time was

employed by Concrete. The carpenters had placed plywood on the floor so the ironworkers could perform their work. During the minutes before the accident, plaintiff was placing rebar "chairs,"[2] which were to be used to install the rebar, onto the plywood floor surface. The floor was level and dry. In describing his accident, plaintiff stated that he and Elder were placing the chairs, four feet apart, onto the surface when, as he took two steps backwards, a portion of the plywood floor "lifted up." As a result of the plywood lifting up, he fell backwards and was impaled by a piece of rebar, which he alleges was uncapped. At the time of the accident, plaintiff was holding three rebar chairs with his hands in front of him. Dennis and Edwin were on each side of him and Elder was behind him. Antonio was also on the second floor at the time of the accident.

The piece of rebar which plaintiff fell onto was one of several pieces of rebar which were previously attached to the floor which constituted a "rebar column," and they extended approximately ten inches above the plywood surface. The rebar columns were to serve as reinforcement for subsequently poured concrete. Although plaintiff believes that the rebar column was uncapped, he did not observe it prior to his fall on the day of the accident. Plaintiff was shown two photographs at his deposition, which were marked as defendants' exhibits A1 and A2. According to plaintiff, the photograph marked as defendants' exhibit A1 depicts the accident location shortly after his accident and shows three other ironworkers. However, he could not discern their identities since their faces are not visible in the photograph. The photograph also depicts the ambulance personnel who assisted him at the accident scene and the rebar column at issue. Although the rebar

[2] These are plastic items for positioning rebar.

column is depicted with safety caps, plaintiff asserts that the caps were placed on the rebar after his accident. He believes that Mario instructed the carpenters, whose job it was to place the caps on the rebar, to cap the rebar after his accident, because he later saw that the rebar was capped. Plaintiff admits, however, that he did not hear Mario give the carpenters this instruction and that no one told him that they heard Mario give this instruction. He did not know who took the photographs or when they were taken. All of the rebar in the subject column are capped in both photographs.

Anthony Piscione (Piscione), the President of Foremost, testified that Driggs, as owner of the property, retained Foremost as the general contractor for the construction project at the premises. Foremost then hired the subcontractors for the project, including Concrete. The project was completed in July or August of 2021. Foremost's field superintendent during the concrete superstructure phase was Timothy Wallette (Wallette). Frank Purino (Purino) was another Foremost superintendent, who primarily worked at another construction project, but would sometimes come to the subject construction site. Piscione did not recall whether Wallette or Purino had witnessed plaintiff's accident. Wallette was at the site daily during the time of the plaintiff's accident. With regard to safety, Foremost only had a limited safety role at the site. Concrete hired a concrete safety manager, who was on site during the concrete superstructure phase. Wallette generally oversaw the subcontractors' work and held regular safety meetings for the subcontractors, which would be attended by the subcontractors' foremen and employees. If there was a safety issue, Wallette had the authority to stop the work.

Piscione does not know the plaintiff and was not at the premises when the accident occurred. He had visited the site in the morning on the date of the plaintiff's accident, but had left to visit another construction project. He first learned of the accident when someone, whose name he does not recall, called him to advise him of it. After learning of the accident, he returned to the subject construction site. At that time, plaintiff had already been taken to the hospital. Upon his arrival, Piscione spoke to Wallette, who took him to the accident location, which was on a plywood deck on the second floor. The weather was clear and dry, and the deck was level and non-slippery. Wallette told him that plaintiff was unloading rebar on the deck with another ironworker when he slipped and fell backwards onto a piece of rebar, which was part of a column of rebar that protruded vertically from the plywood deck. Piscione did not see any slipping hazards when he inspected the deck after the accident. Concrete had installed the deck on May 29, 2019. The rebar column had been installed by Concrete before the deck was installed. Based upon his visit to the accident location and his conversation with Wallette following the accident, Piscione prepared an accident report that day or the next day. During his deposition, Piscione was not asked whether the rebar column was uncapped when he saw it after the accident or if he ever learned that it was uncapped at the time of the accident.

Plaintiff's counsel argues that plaintiff should be granted leave to amend his Bill of Particulars to include a violation of 12 NYCRR 23-1.7 (e) (2), as this amendment will not cause defendants any prejudice or surprise, particularly since he previously plead a violation of 12 NYCRR 23-1.7 and 1.7 (d) in his original Bill of Particulars. Upon receiving such leave, plaintiff argues that he is entitled to summary judgment on his Labor Law

§ 241 (6) claim based upon defendants' violation of 12 NYCRR 23-1.7 (e) (2).

Defendants' Opposition and Summary Judgment Motion

Defendants oppose the branch of plaintiff's motion which seeks leave to amend his Bill of Particulars, but do not set forth any substantial arguments against the amendment. However, defendants dispute plaintiff's contention that he is entitled to summary judgment on his Labor Law § 241 (6) claim and separately move for summary judgment in their favor and dismissal of plaintiff's complaint in its entirety. In support of their motion, defendants submit an attorney's affirmation, the deposition transcripts of plaintiff and Piscione, affidavits from Piscione, Wallette and Mario Peres (Peres), Foremost's accident report, and Peres' written "statement" regarding the accident dated June 5, 2019.

Piscione Affidavit and Foremost's Accident Report

In his affidavit [Doc 121], Piscione attests that the accident report from Foremost is a fair and accurate copy of the report of plaintiff's accident that he prepared. In addition, he avers that:

> "[t]he information contained within this accident report was provided to me by my site superintendent Tim Wallet [sic]. I spoke with Mr. Wallet [sic] while at the scene of the accident and, in turn, I inserted his description of what happened into the accident report. As the President, I was not made aware of any issues or defects regarding plywood flooring or rebar prior to Mr. Velasquez's accident."

In describing the accident in the report, Piscione states that "[a]fter rebar delivery employee of Concrete Course slipped on plywood deck on the second floor level. From a standing position he fell backwards and dislodged rebar cap and squated [sic] on the

exposed rebar. . .” (NYSCEF Doc No. 116). The accident report notes that Frank Purino took photographs, but does not provide any additional details such as the subject of the photographs or when they were taken. The accident report also does not list any eyewitnesses to plaintiff’s accident.

Wallette Affidavit

In his affidavit [Doc 122], Wallette states that he was Foremost’s site superintendent at the time of plaintiff’s accident, and that he was at the premises on the date of plaintiff’s accident, but that he did not witness the accident. He states that plaintiff was an employee of Concrete, the concrete subcontractor at the site, who, as a “necessary part” of their superstructure work, had installed temporary plywood flooring to enable their employees to work on each level of the building. He additionally states that Concrete had installed pieces of rebar, which protruded vertically from the plywood flooring on the second-floor level, in order to pour the support columns for the building. He attests that Concrete had installed OSHA-approved caps on the rebar in the column before they began their work on the day of the accident. He further attests that he was on the second-floor level approximately one hour before plaintiff’s accident, and that, at that time, he observed that the rebar column had OSHA-approved caps in place and that the plywood floor had been properly installed. He states that during the one hour that elapsed between his visit and plaintiff’s accident, Concrete’s employees were on the second-floor level performing their work.

Wallette first learned of plaintiff’s accident immediately after it occurred from other Concrete employees, who told him that plaintiff was walking backwards on the plywood

floor when fell backwards and landed on one of the rebar pieces in the rebar column. He states that the Concrete employees also told him that plaintiff knocked off the rebar cap when he fell onto the rebar. Wallette avers that he later relayed this information to Piscione, who included it in the Foremost accident report.

Wallette concludes that Foremost did not supervise or control "the means and methods" of Concrete's installation of the plywood floor or the rebar column, or of the work that plaintiff was performing at the time of the accident. He states that if he saw an unsafe condition at the site, he would notify Concrete's foreman, who would then address the condition. He further states that:

> "[both the plywood and rebar were a necessary part of Concrete Courses' specific job at the site. I had no knowledge of any dangerous condition associated with that work concerning the plywood or the rebar and no one complained to me, during the hour I was off the roof, that a plywood board loosened or that someone removed one of the rebar caps"

Peres' Affidavit and Statement

In his affidavit submitted in opposition to plaintiff's motion, as well as in his "statement," which is not notarized and looks like a letter, Peres, one of the Concrete foremen, states that he was on the second-floor level from 7:00 a.m. to 11:30 a.m. on the day of the accident. He states that, from 7:00 a.m. to 9:00 a.m., Concrete received a rebar delivery for the second-floor level. Thereafter, Concrete "continued with light housekeeping and safety" on the second floor. In describing the accident, Peres states that, at approximately 10:15 a.m., plaintiff was "marking rebar spacing on the deck and while backing up he slipped and fell . . . and got impaled" by a vertical piece of rebar after plaintiff dislodged the rebar cap during his fall.

In his affidavit, Peres attests that the rebar column was properly capped approximately two days before the accident and that "[j]ust minutes before the accident," he "personally observed" that all pieces of the rebar column had "appropriate OSHA-approved caps." He additionally states that he did not observe any issues with the plywood floor before or after the accident. Peres admits that he did not witness the accident but states that, after the accident, he "immediately ran over to plaintiff and spoke with a co-worker" who told him that plaintiff "slipped and fell backwards onto a piece of rebar and knocked off the cap."

The defendants argue that, based upon their submissions, plaintiff's request for summary judgment should be denied and his Labor Law § 241 (6) claim dismissed, since the rebar at issue was properly capped at the time of the accident. To the extent that plaintiff argues that the statements made by the unidentified ironworkers to Peres at the accident scene are hearsay, the defendants contend that such statements are admissible under the excited utterance exception to the hearsay rule.[3] Defendants argue that both the plywood floor and the rebar column were integral to Concrete's work at the site and, thus, 12 NYCRR 23-1.7 (e) (2) is inapplicable in this action. As a result, defendants assert that they are entitled to summary judgment in their favor with regard to plaintiff's Labor Law § 241 (6) claim.

[3] In their reply, defendants also assert, for the first time, that the unidentified ironworkers' statements may also be admitted under the present sense impression exception to the hearsay rule. However, as this argument was only first raised in their reply papers and plaintiff was not afforded the opportunity to submit a sur-reply, this newly raised argument is improper and will not be considered (*see Citibank, N.A. v Brooks*, 180 AD3d 865 [2d Dept 2020]).

Defendants also move for dismissal of plaintiff's common law negligence and Labor Law §§ 200 and 240 claims.[4] In seeking dismissal of plaintiff's common law negligence and Labor Law § 200 claims, defendants argue that they neither created nor caused the alleged dangerous conditions, did not have authority to supervise or control Concrete's work at the site, and had neither actual nor constructive notice of the allegedly loose plywood floor or uncapped rebar prior to plaintiff's accident.

Plaintiff's Opposition and Reply

In opposition to the branches of defendants' motion which seek dismissal of his Labor Law § 200 and common law negligence claims, and his Labor Law § 241 (6) claims which are predicated upon 12 NYCRR 23-1.5 (c) (3) and 23-1.7 (e) (2), plaintiff argues that defendants' contention that the rebar column was capped is solely based upon hearsay, as neither Piscione nor Wallette have first-hand knowledge of whether the rebar was capped at the time of his accident. Plaintiff argues that even if the cap was knocked off during his fall, he would still be entitled to summary judgment on his Labor Law § 241 (6) claim based upon violations of 12 NYCRR 23-1.7 (e) (2) and 23-1.5 (c) (3) since, if the cap became dislodged upon contact with plaintiff, then it was inadequate or improperly placed on the rebar. Likewise, plaintiff argues that the plywood which lifted up and caused him to trip and fall also violated these provisions.

[4] As plaintiff concedes in his opposition to defendants' summary judgment motion, Labor Law § 240 is inapplicable herein, so the court will not address defendants' arguments pertaining to plaintiff's Labor Law § 240 claims.

Moreover, plaintiff argues that defendants' contention that the rebar was an integral part of "the work being performed" and, therefore, they are exempt from liability under Labor Law § 241 (6), is also unavailing. Citing *Lopez v New York City Dept. of Environmental Protection* (123 AD3d 982 [2d Dept 2014]), plaintiff argues that liability under Labor Law § 241 (6) attaches to defendants because plaintiff was not working on or with the rebar column at the time of his accident, so the rebar column was not an integral part of "the work being performed."

Plaintiff further argues that defendants' request for dismissal of his Labor Law § 200 and common law negligence claims must also be denied because this action involves both the means and methods employed by Concrete as well as a dangerous or defective condition on the premises. Plaintiff asserts that the Wallette affidavit establishes that Foremost had "authority to control the job site" and that "he had inspected the area of plaintiff's accident no less than one hour before the accident" but "failed to detect the loose planks or the uncapped rebar." As such, plaintiff argues that defendants have not established that they lacked actual and/or constructive notice.

Regarding the Peres affidavit[5], plaintiff argues that, although Peres claims that he saw the rebar capped minutes before the accident, he did not account for the time between

[5] The Peres Affidavit was initially and properly submitted with defendants' affirmation in opposition to plaintiff's motion (mot. seq. four), and was also submitted with defendants' reply affirmation (mot. seq. five). In his reply affirmation, plaintiff asks that the court not consider the Peres Affidavit in further support of defendants' motion, since it is improper to submit new evidence with a reply affirmation to correct shortcomings in the original motion papers. However, as plaintiff's Labor Law § 241 (6) claim is the subject of both motions, the motions are so intertwined that the Peres Affidavit is properly before the court for consideration on both motions.

this observation and plaintiff's accident. Plaintiff further contends that Peres' statement that plaintiff knocked the rebar cap off during his fall is mere speculation, which is insufficient to defeat his motion. Plaintiff also argues that defendants' contention that the unidentified ironworkers' statements to Peres were excited utterances is unavailing, since Peres does not identify who these co-workers were, despite having knowledge of their identities, as he was a foreman for defendant Concrete. Plaintiff further contends that Peres failed to state whether the co-workers statements were based upon what they saw or what they were told by someone else, and he does not specify how long after the accident these conversations took place. As such, plaintiff argues that the excited utterance exception is inapplicable in this instance.

Defendants' Reply

In reply, defendants maintain that 12 NYCRR 23-1.7 (e) (2) and 23-1.5 (c) (3) are both inapplicable here, since the rebar column was capped at the time of plaintiff's accident. Defendants argue that 12 NYCRR 23-1.5 (c) (3) is also inapplicable because this provision does not apply to temporary plywood flooring. The defendants additionally argue that *Lopez* is distinguishable from this action, because, unlike this action, it was undisputed in *Lopez* that the rebar was uncapped at the time of the accident. The defendants further argue that both the First and Second Departments have recently held that the "integral part of the work being performed" defense applies to the overall work at the construction site, not solely to the specific work being performed by the plaintiff at the time of the accident, citing *Martinez v 281 Broadway Holdings, LLC*. (183 AD3d 712 [2d Dept 2020]), *Fonck v City of NY* (198 AD3d 874 [2d Dept 2021]), *Vita v New York Law Sch*. (163 AD3d 605

[2d Dept 2018]) and *Bazdaric v Almah Partners, LLC*. (203 AD3d 643 [1st Dept 2022]). The defendants contend that the rebar column and plywood floor were integral parts of Concrete's construction work at the site, and argue that the rebar column and the temporary plywood floors were necessary for the construction of the building's upper levels.

The defendants also argue that contrary to the plaintiff's contention, the excited utterance exception is applicable herein, since defendants are entitled to rely on the excited utterances of plaintiff's co-workers at the accident scene as to the cause of the accident, and that these statements are supported by the personal observations of Peres, as stated in his affidavit. Finally, the defendants reiterate their argument that they are entitled to dismissal of plaintiff's common law negligence and Labor Law § 200 claims, since plaintiff has failed to raise a triable issue of fact as to whether defendants caused or create the alleged premises condition, had authority to supervise or control Concrete's work, or had actual or constructive notice of the alleged premises conditions.

DISCUSSION

Leave to Amend the Bill of Particulars

CPLR 3025 (b) provides that leave to amend a pleading, including a bill of particulars, "shall be freely given." "The decision to allow or disallow the amendment is committed to the court's discretion" (*Edenwald Contr. Co., Inc. v City of New York*, 60 NY2d 957 [1983]). "[L]eave should be given where the amendment is neither palpably insufficient nor patently devoid of merit, and the delay in seeking amendment does not prejudice or surprise the opposing party" (*US Bank, N.A. v Primiano*, 140 AD3d 857 [2d Dept. 2016]).

Here, as defendants do not substantially oppose plaintiff's amendment request and since the proposed amendment is neither palpably insufficient, patently devoid of merit nor prejudicial, the branch of plaintiff's motion seeking leave to amend his Bill of Particulars to assert a violation of 12 NYCRR 23-1.7 (e) (2) is granted. Plaintiff's proposed amended Bill of Particulars is, hereby, deemed served.

Labor Law § 241 (6)

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 [2d Dept 2007]). In order to prevail under this section of the Labor Law, a plaintiff must establish that the alleged injuries were proximately caused by a violation of a specific safety rule or regulation in the Industrial Code promulgated by the Commissioner of the Department of Labor (*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 [2d Dept 2008]; *Jicheng Liu v Sanford Tower Condominium, Inc.*, 35 AD3d 378, 379 [2d Dept 2006]).

Here, plaintiff's amended verified Bill of Particulars alleges that defendants violated the following provisions of Rule 23 of the Industrial Code of the State of New York: 12 NYCRR 23-1.5, 23-1.5 (a), 23-1.5 (c) (3), 23-1.5 (b), 23-1.7, 23-1.7 (b) (1), 23-1.7 (d), 23-1.7 (e) (2), 23- 1.15, 23-1.16, 23- 1.16 (a) through (f), 23-1.17, 23-1.17 (a) through (e), 23-1-21, 23-1.24, 23-3.2, 23-3.3, 23-3.3 (c), 23-3.3 (g), 23-3.3 (j) (2) (i) and/or (ii), 23-5.1,

23-5.3, and 23-5.9. However, plaintiff's request for summary judgment on his Labor Law § 241 (6) claim is solely predicated on an alleged violation of 12 NYCRR 23-1.7 (e) (2). In addition, in his opposition to the defendants' motion, plaintiff only asserts violations of 12 NYCRR 23-1.5 (c) (3) and 23-1.7 (e) (2), and makes no reference to the other sections which were allegedly violated which are listed in his amended Bill of Particulars. Based upon the foregoing, the Court finds that plaintiff has abandoned these Industrial Code sections as predicates for liability under Labor Law § 241 (6) (*see Debennedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021] [holding that plaintiff abandoned his reliance on any other provisions of the Industrial Code by failing to address them in his brief]).

12 NYCRR 23-1.7 (e) (2)

In support of his motion, plaintiff argues that the evidence establishes that defendants violated 12 NYCRR 23-1.7 (e) (2), and that this violation was a proximate cause of his accident and injuries.

12 NYCRR 23-1.7 (e), entitled "Tripping and other hazards," states, in pertinent part, the following:

> "(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."

As an initial matter, the court notes that 12 NYCRR 23-1.7 (e) (2) is sufficiently specific to support a claim under Labor Law § 241 (6) and is arguably applicable since plaintiff's accident undisputedly occurred in a "work area" within the meaning of 12 NYCRR 23-1.7 (e) (2). Further, the rebar column, if uncapped as alleged by plaintiff,

would be a "sharp projection" under the provision[6] (*see Lopez v New York City Dept. of Environmental Protection*, 123 AD3d 982 at 982). However, the defendants correctly note that the First and Second Department cases that were decided subsequent to *Lopez* have held that a party is not entitled to summary judgment under Labor Law § 241 (6) based on a violation of 12 NYCRR 23-1.7 (e) (2) where the object or condition that allegedly caused the accident was a permanent and integral part of the overall construction work at the site, and was not solely the work being performed by plaintiff at the time of the accident (*see Vita v New York Law Sch*., 163 AD3d 605; *Martinez v 281 Broadway Holdings, LLC*, 183 AD3d 712]; *Fonck v City of New York*, 198 AD3d 874; *Bazdaric v Almah Partners, LLC*., 203 AD3d 643).

Here, however, the applicability of 12 NYCRR 23-1.7 (e) (2) is a material issue of fact that must be determined at trial. The parties dispute whether the rebar was capped at the time of the accident. Although the rebar column itself was a permanent and integral part of the overall construction at the worksite, as it was necessary to construct the building's upper levels, it cannot be said that the rebar which plaintiff claims was uncapped, was a permanent and integral part of the construction, particularly in light of the requirement that OSHA-approved caps be placed on the rebar, pursuant to 29 CFR

[6] However, the court notes that 12 NYCRR 23-1.7 (e) (2) is inapplicable to plywood flooring without a significant defect (*see Parker v Ariel Assocs. Corp.*, 19 AD3d 670 [2d Dept 2005]; *Santo v Scro*, 43 AD3d 897 [2d Dept 2007]; *cf. Giza v New York City School Constr. Auth*., 2004 NY Misc LEXIS 3331, * 8 [Sup Ct, Kings County 2004] affd 22 AD3d 800 [2d Dept 2005]). Thus, as plaintiff has failed to establish a significant defect in the plywood floor at issue, his Labor Law § 241 (6) claim relative to the plywood floor insofar as it is predicated on 12 NYCRR 23-1.7 (e) (2) lacks merit.

1926.701 (b)[7] (*see Giza v New York City School Constr. Auth.*, 22 AD3d 800 [2d Dept 2005]).

There is also the issue of the allegedly warped or lifted plywood. In *Giza*, the Second Department affirmed the lower court's determination which found that there was a triable issue of fact whether 12 NYCRR 23-1.7 (e) (2) was violated when the plaintiff tripped over a piece of "warped" plywood that had been intentionally laid down in a parking lot to protect the asphalt during construction work (*Giza v New York City School Constr. Auth*., 22 AD3d at 801). In reaching its determination, the lower court reasoned as follows:

> "[the] [p]laintiff did not merely trip over a piece of plywood. He tripped over a piece of plywood that was warped to the point that its edge was elevated three inches above the surface of the parking lot. It was the warped nature of the plywood that presented the tripping hazard, and while the work might have required the use of plywood, it did not require the use of warped plywood" **(***Giza v New York City School Constr. Auth*., 2004 NY Misc LEXIS 3331, * 8 [Sup Ct, Kings County 2004] affd 22 AD3d 800 [2d Dept 2005]).

Another case, *Egan v West Square Corp.* (2018 NY Slip Op 33376 [U] [Sup Ct, Kings County 2018]), is also instructive here. In *Egan*, the court held that "the Masonite itself was integral to the work inasmuch as it was needed to protect the wood floors. However, the hazardous condition present in the Masonite that caused the accident (i.e., the raised edge) was not integral to the work."

Even if the court found that the rebar column was not an integral part of the overall construction, there would still remain a triable issue of fact as to whether the rebar

[7] 29 CFR 1926.701 (b) mandates that "all protruding reinforcing steel, onto and into which employees could fall, shall be guarded to eliminate the hazard of impalement."

constituted a sharp projection in violation of 12 NYCRR 23-1.7 (e) (2), given the parties' dispute regarding whether the rebar was capped or uncapped at the time of the accident, or, if it was capped, if the cap was adequate for its intended purpose, as it is alleged that it was easily knocked off.

12 NYCRR 23-1.5 (c) (3)

In opposition to defendants' motion, plaintiff argues that the evidence establishes that defendants violated 12 NYCRR 23-1.5 (c) (3), and that this violation was a proximate cause of his injuries. 12 NYCRR 23-1.5 (c) (3), entitled "Condition of equipment and safeguards," states, in pertinent part that:

> "All safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged."

This provision is sufficiently specific to support a Labor Law § 241 (6) claim (*see Perez v 286 Scholes St. Corp.*, 134 AD3d 1085 [2d Dept. 2015]). However, as there remain triable issues of fact as to whether the rebar column was capped at the time of the accident, as well as whether the cap was defective or inadequate, the branch of defendants' motion seeking dismissal of plaintiff's Labor Law § 241 (6) claim, which is predicated upon a violation of Industrial Code 23-1.5 (c) (3), must also be denied. The court agrees with the defendants that the plywood flooring at issue is not a safety device, a safeguard, or a form of equipment within the meaning of this provision.

Hearsay evidence with regard to plaintiff's Labor Law § 241(6) claim

Plaintiff is correct that the statements allegedly made to Wallette and Peres by unidentified ironworkers are hearsay. However, hearsay evidence submitted in opposition

to a summary judgment motion for the purpose of demonstrating the existence of a triable issue of fact is admissible, as long as it is not the only evidence submitted (*see Rodriguez v Sixth President, Inc.*, 4 AD3d 406 [2d Dept 2004]; *Johnson v Pollack*, 261 AD2d 585 [2d Dept 1999]; *Guzman v L.M.P. Realty Corp*., 262 AD2d 99 [1st Dept 1999]; *Koren v Weihs*, 201 AD2d 268 [1st Dept 1994).

In this case, hearsay statements were not the only evidence submitted by defendants. The statements were corroborated by the affidavits of Piscione, Wallette and Peres, which are in admissible form and include their personal observations. In addition, defendants submitted plaintiff's and Piscione's deposition transcripts, as well as the accident report prepared by Foremost, which is admissible as a business record as it was prepared in the ordinary course of Foremost's business (*see* CPLR 4518).

The photographs marked during the plaintiff's deposition as defendants' exhibits A1 and A2 were also submitted by defendants. However, these photographs were not properly authenticated, as no evidence or testimony was proffered to demonstrate that they are unaltered and are fair and accurate depictions of how the accident scene appeared on the date of accident (*see People v Price*, 29 NY3d 472, 477-489 [2017]). Although they constitute hearsay (*see Rivera v GT Acquisition 1 Corp*., 72 AD3d 525 [1st Dept. 2010]), the photographs may properly be considered, given the other evidence that has been offered. The Court also notes that plaintiff has not objected to their admissibility and has also offered the photograph marked as defendants' exhibit A1 in support of his own motion (*see Brooklyn Union Gas Co. v Arrao*, 100 AD2d 949 [2d Dept 1984]; *In Re Estate of MacDonald*, 40 NY2d 995 [1976] *lv dismissed* 42 NY2d 1102 [1977]. *See also*, *Bank of*

New York Mellon v Gordon, 171 AD3d 197 [2d Dept 2019], quoting Jerome Prince, Richardson on Evidence § 8-108 [Farrell 11th ed 2008] which states that "[i]n civil cases, inadmissible hearsay admitted without objection may be considered and given such probative value as, under the circumstances, it may possess". Therefore, the statements of the ironworkers to Wallette and Peres and the photographs are properly before the court for consideration in opposition to plaintiff's motion.

Excited Utterance Exception

Defendants argue that the ironworkers' statements may also be admissible under the excited utterance exception. An excited utterance is a "spontaneous declaration . . . made contemporaneously or immediately after a startling event . . . which asserts the circumstances of that occasion as observed by the declarant' . . . [and] may be admitted in evidence 'as expressing the true belief of the declarant as to the facts observed'" (*People v Cummings*, 31 NY3d 204 at 209 [2018] quoting *People v Edwards*, 47 NY2d 493, 496-497 [1979]). "The decision to admit hearsay as an excited utterance is an evidentiary decision" that is better left to the sound discretion of the trial judge and, in fact, may be reconsidered at a retrial (*People v Cummings*, 31 NY3d 204 at 208).

Contrary to plaintiff's contentions, "the lack of identification of the declarant does not make an excited utterance inadmissible per se," as a statement of an unidentified declarant may nevertheless be admissible as an excited utterance if facts "exist from which a reasonable trier of fact could infer that the declarant personally observed the incident" (*People v Cummings*, 31 NY3d 204, 211 [2018]).

Here, plaintiff testified that at the time of the accident, Dennis and Edwin were right beside him, Elder was behind him, and Antonio was also on the second floor. Thus, under the circumstances of this case, plaintiff's co-workers' proximity to the accident location provided them with sufficient opportunity to observe the accident, and to express their shock immediately following the accident, after seeing plaintiff impaled by the rebar. Furthermore, Peres' statements in his affidavit; that he was on the second floor at the time of the accident while plaintiff and five other ironworkers were laying rebar; that he immediately ran over to plaintiff; and that he spoke with another ironworker, within seconds of the incident, who told him that plaintiff knocked off the rebar cap when he fell, provides a further basis from which the court can reasonably infer that the declarant witnessed the accident and made the statement immediately afterwards.

Accordingly, the branch of defendants' motion for summary judgment on plaintiff's Labor Law § 241(6) claim, and the branch of plaintiff's motion for summary judgment on his Labor Law § 241(6) claim, are both denied.

Labor Law § 200 and Common-Law Negligence

Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). "To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have 'authority to exercise supervision and control over the work'" (*Rojas v Schwartz*, 74 AD3d 1046, 1046 [2d Dept 2010] quoting *Gallello v MARJ Distribs., Inc.*, 50 AD3d 734,

735 [2008]; *see also Roblero v Bais Ruchel High Sch., Inc.*, 175 AD3d 1446, 1448 [2d Dept 2019]). General supervisory authority to oversee the progress of the work is insufficient to impose liability (*see Wein v E. Side 11th & 28th, LLC*, 186 AD3d 1579, 1582 [2d Dept 2020]; *Sullivan v New York Athletic Club*, 162 AD3d 955, 958 [2d Dept 2018]).

"A defendant has the authority to control the work for the purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" (*Sullivan v New York Athletic Club*, 162 AD3d 955 at 958 quoting *Erickson v Cross Ready Mix, Inc.*, 75 AD3d 519, 522 [2d Dept 2010]). If the challenged means and methods of the work are those of a subcontractor, and the owner or contractor exercises no supervisory control over the work, no liability attaches under Labor Law § 200 or the common-law (*see LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]; *see also Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494 at 505).

Where a plaintiff's injuries arise not from the means and methods in which the work was being performed, but from a hazardous premises condition, 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 at 1047, quoting *Ortega v Puccia*, 57 AD3d 54 at 61 [2d Dept. 2008]).

In this action, plaintiff makes claims under both of these theories of liability. First, he alleges that there was negligence in the means and methods of Concrete's work, contending that the rebar caps were not in place, or were improperly or incorrectly placed.

Second, plaintiff alleges that Concrete had failed to properly secure the plywood to the floor, thereby creating, or permitting to exist, a dangerous and defective premises condition in his work area.

To demonstrate entitlement to summary judgment in their favor on plaintiff's common law negligence and Labor Law § 200 claims, defendants must show, for the "means and methods" claim, that they didn't have authority to supervise or control Concrete's work, and for the hazardous premises condition claim, that they neither caused nor created the alleged premises condition, and they had neither actual nor constructive notice of the alleged premises condition. The court finds that defendants have met their burden of proof with regard to both claims, with plaintiff's and Piscione's deposition testimony and the affidavits from Piscione and Wallette.

During his deposition, plaintiff testified that Concrete ironworkers installed the rebar columns at the site and that Concrete carpenters installed the plywood floors. Plaintiff further stated that it was the responsibility of the Concrete carpenters to cap the rebar. Plaintiff additionally testified that, during the two months that he worked at the premises, including the date of the accident, he only received work instructions from the foremen from Concrete. Plaintiff also stated that, prior to the accident, he did not see the condition of the rebar column and, thus, could not definitively state that the rebar was uncapped at the time of his accident.

In his affidavit, Wallette confirms that Concrete installed the rebar column and the plywood floor. He also corroborates Piscione's deposition testimony that Foremost only had a general safety role at the site and did not have authority to supervise or control the

means or methods in which Concrete performed its work. In addition, Wallette states that he did not see any dangerous or defective premises conditions at the site on the day of the accident, and further, that he did not receive any complaints about any dangerous or defective conditions prior to the plaintiff's accident. In his affidavit, Piscione similarly attests that he was not made aware of any dangerous or defective conditions relative to the plywood floor or the rebar column prior to plaintiff's accident. Wallette's and Peres' affidavits also establish the defendants' lack of constructive notice. Specifically, Wallette attests that he was on the second floor one hour before the accident and that, at that time, the rebar was capped and the plywood was properly installed (*see Ford v Citibank, N.A.*, 11 AD3d 508 [2d Dept 2004]. Peres also attests that the rebar column was properly capped when he was there approximately two days before the accident, and that "just minutes before the accident, he personally observed that the rebar column was capped." He further states that he did not observe any issues with the plywood floor before the accident. As such, defendants have sufficiently demonstrated that they did not have authority to supervise or control Concrete's work, and that they neither caused nor created the allegedly hazardous condition, and did not have actual or constructive notice of the allegedly hazardous condition.

In opposition, plaintiff fails to raise a triable issue of fact sufficient to overcome defendants' prima facie showing of entitlement to dismissal of plaintiff's common law negligence and Labor Law § 200 claims. Contrary to plaintiff's assertions, the fact that Wallette was at the site daily, that he held safety meetings, or that he kept a daily log of the work performed at the site, are insufficient for the court to find that he had the authority to

supervise or control plaintiff's work so as to impose liability against defendants based upon common-law negligence or Labor Law § 200 (*see Ortega v Puccia*, 57 AD3d 54 at 62 [2d Dept 2008]; *Geonie v OD & P NY* Ltd., 50 AD3d 444, 445 [1st Dept 2008] [evidence that general contractor's project superintendent coordinated work of trades, conducted weekly safety meetings with subcontractors and conducted regular walk-throughs and had general authority to stop the work if he observed an unsafe condition was insufficient to raise triable fact issue as to whether contractor exercised the requisite degree of supervision and control over the work]; *see also Sullivan v New York Athletic Club*, 162 AD3d 955 at 958).

Accordingly, the branch of defendants' motion seeking summary judgment dismissing plaintiff's common law negligence and Labor Law § 200 claims is granted.

Conclusions of Law

Based upon the foregoing, it is hereby

ORDERED that the branch of plaintiff's motion (mot. seq. four) which seeks an order granting him leave to amend his Bill of Particulars, pursuant to CPLR 3025(b), is granted. Plaintiff's Bill of Particulars is hereby deemed amended and served in the form annexed to his motion as exhibit 4 (NYSCEF Doc No. 134). The remainder of plaintiff's motion is denied; and it is further

ORDERED that the branches of defendants' motion (mot. seq. five) which seek summary judgment and dismissal of plaintiff's claims of common law negligence, Labor Law §§ 200 and 240(1) are granted, and said claims are hereby dismissed; and it is further

ORDERED that the branch of defendants' motion which seeks summary judgment dismissing plaintiff's Labor Law § 241(6) claim is granted ***except*** to the extent that said claim is predicated upon 12 NYCRR 23-1.7 (e) (2) and 12 NYCRR 23-1.5 (c) (3).

This constitutes the decision and order of the court.

E N T E R:

Hon. Debra Silber, J.S.C.