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 360 Adams Street, Brooklyn, New York, on the 24th day of April, 2023.

P R E S E N T:
HON. DEBRA SILBER, Justice.

- X

JOSE GOMEZ,

Plaintiff,

- against -

91-93 FRANKLIN LLC,
Y.N.H. CONSTRUCTION INC.,
and ALPINE READY MIX INC,

Defendants.

- X

91-93 FRANKLIN LLC
AND Y.N.H. CONSTRUCTION INC.,

Third-Party Plaintiffs,

- against -

CAPITAL CONCRETE NY INC.,

Third-Party Defendant.

- X

DECISION/ORDER

Index No. 527680/2019

Motion Seq. Nos. 7, 9, 10

Date submitted: 3/9/23

The following papers read herein:	NYSCEF Documents
Notices of Motion, Affidavits (Affirmations) and Exhibits	148-159; 182-200
Notices of Cross-Motion, Affidavits (Affirmations) and Exhibits	170-181
Opposing Affidavits (Affirmations) and Exhibits	212-214; 207-210
Reply	211; 215; 216

Upon the foregoing papers, defendant Alpine Ready Mix Inc. (hereafter "Alpine") moves, in mot. seq. 7, for an order, pursuant to CPLR 3212, granting it summary judgment and dismissing the plaintiff's complaint as against it. This motion was filed on August 30, 2022, and as such, was timely filed, as the note of issued was filed on July 11, 2022. In motion

seq. #9, plaintiff cross-moves for an order granting him partial summary judgment on his Labor Law §241(6) claim as against defendant Alpine. This motion was filed on October 18, 2022, and as such, was untimely, although as it involves the same subject matter as Alpine's motion, the court has the discretion to entertain it. In motion seq. 10, also filed on October 18, 2022, plaintiff requests more time to move for summary judgment, and also in that motion, he seeks an order granting him partial summary judgment on his Labor Law §241(6) claim as against the other two defendants.

Background

Plaintiff commenced the instant action on December 20, 2019, by electronically filing a summons and verified complaint. Plaintiff claims therein that on September 18, 2019, he was working at 91 Franklin Avenue in Brooklyn, NY when he was injured in a work-related accident. He avers that defendant 91-93 Franklin LLC (hereafter "Franklin") was the owner of the premises at all relevant times, and that defendant Y.N.H. Construction Inc. (hereafter "YNH") was the general contractor[1] He avers that both defendant Alpine and third-party defendant Capital Concrete NY Inc. (hereafter "Capital"), were sub-contractors of YNH. On the date of the subject accident, plaintiff was employed by third-party defendant Capital. Plaintiff alleges that at all relevant times, he was engaged in work within the scope of the Labor Law. The project was a new four-story residential apartment building. Plaintiff alleges that defendants failed to provide him with a safe place to work, and failed to provide him with proper equipment and/or safety devices so as to prevent him from being injured at the worksite. Specifically, he alleges that he was "struck in the eye with hot liquid concrete due

[1] The NYC Dept. of Buildings' website confirms that the general contractor was YNH, on the building permit issued for the new building construction.

to defective conditions at the premises, including but not limited to his not having been provided with eye protection equipment or with suitable overhead protection, barricades, fencing or the equivalent" [Doc 1 ¶22]. The complaint asserts causes of action pursuant to Labor Law sections 240(1), 241(6) and 200, as well as for common law negligence.

Defendant Alpine interposed an answer [Doc 6] on March 23, 2020, generally denying plaintiff's allegations and asserting a crossclaim against the other two defendants for contribution and common law indemnification. Defendants Franklin and YNH apparently answered the complaint and asserted crossclaims against Alpine, but failed to electronically file it until March 23, 2023, after oral argument on these motions [Doc 217].[2] This answer, dated April 1, 2020, was, until it was filed as Document 217, solely viewable as an exhibit to the motions in this case, the first of which is at Document 27. On January 10, 2022, defendants Franklin and YNH commenced a third-party action against Capital [Doc 49]. The third-party complaint asserts claims for contribution, common law indemnification, contractual indemnification, and breach of the contractual obligation to procure insurance. The third-party defendant then interposed a third-party answer on July 21, 2022 [Doc 97]. Plaintiff then filed a note of issue on July 11, 2022. These motions followed.

The Accident

Plaintiff testified at his EBT, held virtually on April 20, 2021, that he lives alone, and grew up in Florida. He had been trained, before the accident, on forklift, backhoe, cherry picker and attended OSHA safety training. His OSHA certification is for 30 hours, issued in the summer of 2019. He has not worked since the date of the accident, September 18, 2019.

[2] The relevance of this will be discussed below.

He started working for Capital in May 2019. Asked what his job description was at Capital, he said [Doc 155 Page 15] "All around everything. I did everything, but my main job was construction log with the photos, Raken. It's called Raken." He explained that he used this "app" called Raken to take progress photos of the worksite for Capital. He used it as his prior job as well. Counsel looked up the app on the internet and reported [id. at 16] that it is described as follows: "Raken provides a cloud based mobile and daily reporting platform solutions to companies -- construction application for daily reporting that allows users to get real-time updates on the progress of a job, and access, manage, and download various jobs." Plaintiff said Capital is a foundation superstructure company [id. at 27].

Asked what "everything" entailed, plaintiff said "Helping out the guys when they need help." Asked for examples, he said "Building forms, prepping for concrete, check the tool list, make sure all of the tools are in at the end of the day" [id. at 18]. He testified that he had worked for a concrete company in Miami, Florida and has been working in "the concrete business" since 1993, "on and off", and in carpentry as well [id. at 19].

Plaintiff testified that he learned safety at his OSHA course, and that in the concrete industry, safety equipment includes "gloves, face shields, goggles, hard hat, boots, harness if needed" [id. at 22]. He was then asked, "And in regard to goggles, what were you advised or taught?" and he responded, "It's very important."

Plaintiff testified that the building site was a new building being constructed, and that the superstructure was finished before he first worked at this jobsite. He started there about a week before the accident [id. at 30], and on the date of his accident, there were seven or eight Capital workers present. His supervisor was Jesus Verde, the foreman. Capital did not provide

him with any job training. He owned his own safety vest and harness and safety goggles [id. at 36] and a hard hat [id. at 46] and Capital "once in a while" provided him with safety equipment, such as "safety goggles, harnesses, flags for the trafficking -- for the traffic outside, and vests [id. at 36]". Later on in the EBT, he said he had been given the goggles at the prior jobsite, where he left them, and was asked "how did these goggles become your own personal goggles as opposed to goggles . . . that you needed to return" and he responded "he gave them to me and told me I could keep them" [id. at 63]. Plaintiff as then asked if he had ever bought his own goggles, and he said "no, they were always given to me by the GC of the buildings" [id. at 63], and "a couple times" by his employer [id.]. Plaintiff was asked what went into his decision to bring "his own" equipment with him to work, and he answered that it depended on what the work they were doing was. He was asked "what general activities would you not bring your PPE (personal protective equipment) items to work?" and he replied "when I was just taking pictures that day" [id. at 39].

Plaintiff testified that on the day of his accident, he was assigned "to get the guys ready for prepping for concrete" [id. at 41], which entailed "getting it ready to pour concrete on inside the forms." He continued "My job was to watch them, take pictures, and log what we were doing, building the forms, getting ready for concrete." He received a call from Mende, the foreman's supervisor, who was not on site, that they should "get ready, that he was about to dispatch concrete" [id. at 44]. He had left his own goggles at the last jobsite in the gang box there, so he only had his hardhat [id. at 46] and his boots. He asked for goggles when he first started working at Franklin. First, he asked somebody from YNH whose name he could not remember, and was told they did not have any. He did not ask anyone from Capital for

goggles. Asked "why?" He said "Just didn't think about it at the time" [id. at 56]. A few minutes later, after a break in the deposition, plaintiff testified that he asked his foreman Jesus Verde for goggles the first day he was at the 91 Franklin jobsite, and was told that Capital did not have any, to ask the general contractor, that "they're supposed to provide to you" [id. at 59]. The GC said they did not have any, but when asked if he told Mr. Verde that, plaintiff responded "I don't remember" [id. at 60].

Plaintiff was asked "what were you instructed in regard to wearing goggles on the jobsite?" and he replied "It's important. It protects your eyes." He was then asked, "were you given any instructions as to when you should be wearing your goggles at a jobsite", and he responded "the whole time" [id. at 57]. Counsel then asked plaintiff if he had worn goggles on the jobsite on the first day he worked at 91 Franklin, and he said "no" [id. at 58]. That was the day he inquired about getting a pair of goggles. The remainder of the days he worked at this jobsite up until his accident, which he was unable to clearly remember, but he thought it was about a week, he did not wear any goggles, as "they never provided them" [id.]. Plaintiff was asked if he had observed any of the seven or eight Capital employees wearing eye goggles at this job site prior to the date of his accident, and he said "no" [id. at 76]. From the day he started at this jobsite to the date of his accident, there were no safety or toolbox meetings held. All of his instructions for his work came from Capital Concrete employees [id. at 79].

Plaintiff was next asked "in light of your training that you should be wearing goggles 'the whole time' in your words, while you were at a jobsite, why did you not endeavor to obtain goggles, either on your own, from Home Depot, or something else, or continue to bring up this topic with your employer, Capital Concrete, until you were provided with goggles?"

[id. at 65]. After a colloquy between the attorneys about the applicable law, plaintiff was asked why he didn't go back to the prior job site and get the goggles, and he said he couldn't, as Capital was done at that site, and their staff had removed the gang box he had left them in and brought it back to the shop. He didn't ask about them, and "guessed they were going to give me some on Franklin" [id. at 70]. He was then asked "Once it became clear that you were not being given another set of goggles at the Franklin Avenue jobsite, why didn't you go to the gang box and get the goggles that you believed were in there? "and plaintiff responded "That's pretty far away" [id. at 72] and "I had no way of getting there" [id. at 75]. Plaintiff then testified that he asked his foreman, Jesus Verde to have someone bring them from the office of Capital Concrete to the job site, and "they never showed up with the glasses" [id. at 75].

Plaintiff testified that his accident took place after lunch, in the afternoon. His description of the accident is as follows: "The two carpenters, Brazil and Verde, started removing the safety gate to bring the chute inside the jobsite to pour the last two yards inside the jobsite. So they were finishing the two yards, pouring it in the jobsite, the concrete hit the puddle, and splattered into my face on the left side. And that's when I grabbed my face and started running, and grabbed water" [id. at 82]. He was about five feet away from the chute, and was about to take photos with his phone for his Raken log. The "puddle" was the concrete, which splashed as it was pouring. His left eye was injured [id. at 91]. Plaintiff testified that Verde and Brazil were next to the chute, which was pouring cement into the jobsite [id. at 152]. He called his boss on the phone to tell him there were two yards left, and was told to pour it and throw it out, not to send it back on the truck. So Verde told the Alpine

driver where to pour the cement, after they opened the gate so the chute could come inside the jobsite. The driver remained at the truck.

Defendant Alpine provides two additional deposition transcripts with its motion, that of Domingo Medina of Alpine, at Document 156, and of Abraham Brody of YNH at Document 157. Mr. Brody was not at the jobsite at the time of plaintiff's accident. Mr. Medina was the Alpine driver of the cement mixer. He did not learn of the accident until months later [Doc 156 Page 83]. He said the cement truck was parked on Franklin Avenue, and he did not enter the job site at any time while the cement was being delivered from the truck. He testified that he has a commercial driver's license, and had no other training for the job. He had been going to the site regularly to bring cement. He brings a receipt, and someone signs it to acknowledge the delivery, he gives them a copy and returns to Alpine with the receipt [id. at 40]. He was shown the receipt for the date of plaintiff's accident, which he said had his handwriting on it. Just the time he arrived and his truck number. He left the office with it. He brought the truck filled with cement and the receipt to 91 Franklin, arriving at 10:23 a.m., and he stayed until the truck was emptied, usually about an hour, but sometimes two or three hours. He had no recollection of this specific delivery [id. at 45].

Mr. Medina was asked to describe what delivering the cement entailed. He said first, he has to determine what kind of cement mix was ordered, and how much water should be used. Then, he has to add the water. He does this when he arrives at the site, by opening a valve [id. at 49]. His truck was parked next to the pump for the cement, and there is another worker who pumps it. He did not know if on the day of plaintiff's accident whether the person at the pump was a Capital employee or an employee of another company. He testified that all

he does is open the valve for water until the correct number is shown, then turn it off and "pour the cement on the pump and the guy just pumps the cement to wherever they need it" and he waits until the customer is finished, then gets the receipt signed and goes back to the office [id. at 53]. Mr. Medina was then asked to explain "what you did physically to pour the cement on the pump" and he replied "the truck has something that we call the chute, and you, you know, move the chute towards the pump and then the cement slides down the chute and place it in the pump" [id.]. Mr. Medina clarified that he needed to release the cement into the chute [id. at 55]. He said the chute is about eight feet long and is attached to the truck. It can be mechanically (hydraulically) raised and lowered to the height of the pump [id. at 54]. He did not remember the size or type of pump that was on site that day [id. at 59]. Pumps are vehicles, with wheels, parked at the curb. It is noted that plaintiff testified that the cement came directly from the chute onto the ground, not from a pump. Mr. Medina was asked about this, and Mr. Medina said "I can't recall, but I'm almost certain that I didn't do it because you're not supposed to pour cement onto the ground [id. at 67].

Mr. Brody testified that he was the site manager for the job for YNH, and there was supposed to be a site safety meeting every morning [Doc 157 48]. He said he visited the job site daily. He was asked if the Capital workers wore goggles when he visited, and he said he did not remember. He was asked "Do you have a specific recollection of you personally telling the Capital foreman that his workers should be wearing safety glasses or safety goggles at 91 Franklin Avenue prior to September 18, 2019? Do you remember a specific conversation in which you said that?" and he responded, "no" [id. at 96]. Mr. Brody was asked about goggles available at the job site, and he said there was a pair for his use in the office at the

site, and no others [id. at 100]. Mr. Brody was asked who provided the safety glasses or safety goggles that were worn by Capital employees at the job site, and he responded, "I think Capital." He was asked "did Capital have safety goggles at the site for its workers?" and he answered "I don't remember" [id. at 156].

Procedural History

After Alpine filed its motion for summary judgment (Seq. #7), plaintiff filed motion sequence #8 on September 9, 2022, which solely sought an extension of time to move for summary judgment, stating in the notice of motion that plaintiff needed "an order to extend plaintiff's time to move for summary judgment until 60 days after defendants 91-93 Franklin LLC and Y.N.H. Construction Inc. serve an order with notice of entry resolving their pending motion to purge their preclusion from offering an affidavit in support or opposition to a dispositive motion, or until 60 days after defendants 91-93 Franklin LLC and Y.N.H. Construction Inc. are permitted to serve their final discovery response, whichever is later" [Doc 161].

Before these motions were submitted, various motions were decided in the Central Compliance Part, including plaintiff's motion seq. #8 and defendants' motions to purge their preclusion. A summary is appropriate, as background for plaintiff's request for permission to make his untimely motions.

The Order dated June 3, 2021 is a Final Pre-Note Order [Doc 22], and has an EBT schedule for all parties, meaning that nobody was yet deposed or precluded. Motion #1, plaintiff's motion for discovery sanctions against all three defendants followed that order, and resulted in an order [Doc 44] with a discovery schedule. The order concludes with this

language: "Failure to comply with this order will result in the non-complying party being precluded from offering evidence, or submitting an affidavit in response to any dispositive motion, upon further motion for same, pursuant to CPLR 3126 (2)."

Motion #2 was then filed by plaintiff, for preclusion due to all three defendants' failing to comply with the prior order. The order on this motion is at Document 82, and is dated June 24, 2022, before any of these motions were filed, and states that "Defendants are precluded from testifying at trial or offering an affidavit in support or opposition to a dispositive motion. Defendants 91-93 FRANKLIN LLC and Y.N.H. CONSTRUCTION INC may purge their preclusion, upon further motion, if they provide affidavits of diligent search for all items not provided w/in 30 days of entry of this order." This is a conditional preclusion order, which only pertains to plaintiff's document demands. It is ambiguous as to whether Alpine was precluded, as it says "defendants" and the motion was made with regard to all three defendants, but only provides for two of the defendants to purge their preclusion". A few days later, defendants Franklin and YNH filed a response to the document demands [Docs 85-87] and defendant Alpine filed a response a day later [Doc 88]. Franklin and YNH then moved, in motion seq. #3, for any order granting them leave to reargue the June 24, 2022 order, the conditional preclusion order. The affirmation in support argues that they should be permitted to purge their preclusion as they have "now provided all outstanding discovery as outlined in the June 24, 2022 order." Alpine then made an identical motion, motion sequence #5, [Doc 111] also seeking to "renew and reargue." Concrete made a motion to sever the third-party action in the interim,[3] which was assigned motion Seq. 4. Before motion #3 was

[3] Severance was granted by order dated August 19, 2022 on motion #4.

decided, due to the short time period for such motions, Franklin and YNH moved to strike plaintiff's note of issue on July 28, 2022 (seq. #6).

Motions 3, 5 and 6 were all addressed in one CCP order dated 8/18/22, which granted Alpine's motion to vacate their preclusion, adjourned the other defendants' motion to vacate their preclusion to September 19, 2022, and denied the motion to strike the note of issue. By order dated June 24, 2022, which was actually signed after the adjourn date of September 19, 2022, and filed [Doc 169] on October 7, 2022, the court (CCP) granted Franklin and YNH's motion to vacate the preclusion order as to them. The requests in the defendants' motions to extend their time to make dispositive motions were denied with leave to renew before the IAS judge in conjunction with the dispositive motions, pursuant to *Brill v City of NY*, 2 NY3d 648 [2004]. Only defendant Alpine has made a dispositive motion, and it was timely filed.

The Request for Leave to Make Late Motions

To reiterate, Alpine's motion was timely. Plaintiff's cross-motion was not, but the court has discretion to entertain a cross motion which addresses the same subject matter. The law in the Second Department is that "[a]n untimely motion or cross motion for summary judgment may be considered by the court where a timely motion for summary judgment was made on nearly identical grounds" (*Munoz v Salcedo*, 170 AD3d 735 [2d Dept 2019]). The court shall determine motions #7 and #9, Alpine's motion and plaintiff's cross motion.

Turning to the plaintiff's request for permission to make a late motion for summary judgment in motion sequence #10 against the other two defendants, the court finds this request must be denied. To be clear, the order issued by the CCP judge on June 24, 2022 provides that "NOI extended to July 14, 2023 and plaintiff may file his NOI forthwith." The matter

was calendared for June 1, 2023, to see if the note of issue had been filed, but once plaintiff filed his note of issue, it was noted in the court's computer that plaintiff had already filed his note of issue and the adjourn date was cancelled. Why plaintiff voluntarily filed his note of issue on July 11, 2022, a year before he was required to do so, and then, on October 18, 2022, filed motion #10 seeking more time to move for summary judgment, the court has difficulty understanding.

Plaintiff's affidavit in support of motion seq. #10 states "I make this affirmation in support of plaintiff's motion for an order to extend plaintiff's time to move for summary judgment as against the defendants 91-93 Franklin, LLC and Y.N.H. Construction Inc., and upon granting such extension, granting plaintiff partial summary judgment as to liability on his Labor Law §241[6] claim against 91-93 Franklin, LLC, Y.N.H. Construction [Doc 183 ¶2], and then says "The Court is respectfully referred to our Statement of Material Facts for a full and complete discussion of the undisputed facts, and to the accompanying Memorandum of Law for a full and complete discussion of the legal arguments as to why this motion should be granted in its entirety [id. ¶4]. The court scoured these two documents [Docs 199 and 200] to find a reason that plaintiff filed his note of issue a year before he was required to, but then filed a motion for leave to make a late summary judgment motion. The discussion is the argument made at Point I of the memo of law [Doc 200]. Plaintiff's counsel notes and explains that he moved for leave to make a late summary judgment motion before he filed his note of issue, which was denied by the CCP court "with leave to renew 'before the IAS Judge in accordance with Brill v City of New York (2 NY3d 648 (2004))'" [Doc 200 ¶16].

The reason provided by plaintiff for the late motions is that "We submit that good cause has been shown under *Brill* because it would have been unreasonable to expect plaintiff to move for summary judgment while the motion to renew and reargue the preclusion order was pending. Now that the preclusion order has been vacated, and the defendants' discovery defaults have been purged, the plaintiff can now proceed with his motion for partial summary judgment as to liability" [id. ¶17]. Nothing else is said on this issue.

In Kings County, pursuant to Local Rule 6[4], a motion for summary judgment must be made no later than sixty days after the filing of the note of issue, except with leave of court on good cause shown. "In the absence of such a good cause showing, the court has no discretion to entertain even a meritorious, nonprejudicial motion for summary judgment" (*Bricenio v Perez*, 178 AD3d 1002, 1003 [2d Dept 2019], citing *John P. Krupski & Bros., Inc. v Town Bd. of Town of Southold*, 54 AD3d 899, 901, 864 NYS2d 149 [2008]; *see Brill v City of New York*, 2 NY3d 648, 652-653, 814 NE2d 431, 781 NYS2d 261 [2004]).

Plaintiff's sole argument then, is that he didn't make the motion until CCP had vacated the preclusion order, but does not explain why he filed the note of issue a year before it was required to be filed. Nor does he explain how his motion papers would have been different had the preclusion order been in effect. He still would have had the burden of proof to establish a prima facie case for summary judgment.

In 2004, the Court of Appeals held "[w]e conclude that 'good cause' in CPLR 3212(a) requires a showing of good cause for the delay in making the motion--a satisfactory explanation for the untimeliness--rather than simply permitting meritorious, nonprejudicial

[4] NY Kings County Supreme Court Uniform Civil Term Rules, Part C, Rule 6.

filings, however tardy" (*Brill v City of NY*, 2 NY3d 648, 652 [2004]). This court finds that plaintiff has failed to set forth a satisfactory explanation for filing his note of issue a year before he was required to do so, and then moving for leave to make an untimely motion. To conclude otherwise would reward plaintiffs who choose to put themselves on the trial calendar when the case is not ready for trial, and plaintiff does not know if the defendant is precluded, and then allow plaintiff to argue that he could not make a timely summary judgment motion because he did not know if the defendant would be precluded. This makes no sense. This case is on the calendar for trial on July 21, 2023, a year earlier than it would have been had plaintiff filed his note of issue at the end of the time period he was provided.

Defendant Alpine's Motion for Summary Judgment

The gravamen of Alpine's motion is that it is not a proper Labor Law defendant as it is not an owner or a general contractor, did not owe a duty to plaintiff, and was not negligent in any event. Counsel argues that Alpine "was merely a sub-contractor that supplied concrete to the construction site wherein plaintiff alleges to have been injured" [Doc 149 ¶2]. Counsel for defendant proceeds to explain his understanding of the happening of the plaintiff's accident and why he believes this motion should be granted. It is noted that Alpine does not, in his notice of motion, or in his affirmation in support, seek to dismiss the crossclaims asserted by defendants Franklin and YNH, and at oral argument, averred that he was never served with their answer with crossclaims. The court notes that the unfiled answer with cross claims from Franklin and YNH is dated April 1, 2020, and that the court was closed to e-filing due to the Covid-19 Pandemic at that point in time. Counsel for Franklin and YNH emailed it to plaintiff's counsel and to Alpine's counsel on April 3, 2020, according to the transmittal

e-mail at Page 11 of Doc 217. Whether or not this constituted service on Alpine, the court finds that there is no prejudice to dismissing the crossclaims. If Franklin and YNH wish to assert them as third-party claims, they may do so.

The defendant claims in his affirmation that Alpine provided a cement mixer truck to the job site, as was requested by Capital, the plaintiff's employer. The cement mixer truck was parked in the street, with either a chute or a pump to move the cement to the requested location. The witnesses dispute whether it was a chute or a pump, but this has no bearing on the motion. The driver of the truck, Domingo Medina, was in the cab, and plaintiff "never spoke with the driver after the incident occurred and never told the driver about the incident" [id. ¶24]. Further, "The driver of the truck was outside of the construction area and the plaintiff could not see him" [id. ¶37]. After the concrete was delivered, Mr. Medina left.

Therefore, defendant avers that "a subcontractor who is neither an owner nor a general contractor is not liable for injuries under the Labor Law" [id. ¶33]. This argument is addressed to Labor Law §§ 240(1) and 241(6). He continues "In limited circumstances, a subcontractor can be liable if it is determined that they are statutory agent of the owner or of the general contractor. However, in order for a subcontractor to be a statutory agent there must be a showing that the subcontractor has authority and control over the work which caused the injuries to the plaintiff. The determining factor is whether the owner has control and authority over the work that is being performed and to insist that certain safety practices be followed", citing *Grochowski v Ben Rubins, LLC,* 81 AD3d 589 [2d Dept 2011].

Defendant's counsel moves on to discuss plaintiff's Labor Law § 200 and common law negligence causes of action. He states that as the accident arose from the means and

methods of plaintiff's work, which was being performed solely by plaintiff and his co-workers, and as Alpine had no authority to control the means and methods of plaintiff's work, it cannot be responsible for plaintiff's accident. In the alternative, counsel argues that, if, for some reason, the accident is considered to have arisen from a dangerous premises condition, Alpine had neither actual nor constructive notice of it.

Plaintiff's Cross-Motion

Plaintiff opposes Alpine's motion and cross-moves for partial summary judgment solely on his Labor Law § 241(6) claim. Counsel's affirmation in support states that "to avoid needless duplication" the court should refer to their opposition to Alpine's motion and the exhibits supplied by Alpine and by plaintiff in his opposition to Alpine's motion, as well as plaintiff's memorandum of law "for a full and complete discussion of the legal arguments as to why Alpine's motion for summary judgment and dismissal of the complaint should be denied and why plaintiff is entitled to partial summary judgment as to liability on the Labor Law §241[6] claim" [Doc 171 ¶4].

This court does not require Statements of Material Facts, and will not read them, as the court long ago determined that they do not contain undisputed facts but instead the attorneys' opinions, which are not probative. In plaintiff's memorandum of law, plaintiff "concede[s] that the facts in this case do not support a cognizable claim against Alpine under Labor Law § 240(1)" [Document 179, page 1].

At Point I of the memorandum, plaintiff's counsel argues that plaintiff is entitled to summary judgment on his Labor Law §241(6) claim, as Alpine was a "statutory agent." He claims that "Alpine was retained as a subcontractor to supply wet concrete mix and was

responsible for pouring the wet cement at the jobsite. Therefore, even if Alpine had no authority to supervise and control the plaintiff's work or the work area, it had the authority to supervise and control the activity which brought about the injury. . . the issue here is not whether Alpine had the authority to supervise or control plaintiff's work as a concrete laborer (a position never argued by plaintiff), but whether Alpine was delegated the authority to supervise and control the safe delivery of wet concrete mix at the jobsite. Clearly, Alpine was retained by Capital Concrete to provide, deliver, and pour wet concrete mix at the jobsite and to do so in a safe and proper manner" [id. ¶12].

With regard to Labor Law 200 and common law negligence, counsel argues, at Point III of the memorandum, that "dismissal of plaintiff's Labor Law §200 and common law negligence claims is not warranted as there are issues of fact as to whether Alpine was negligent in its supervision and control of the injury producing work" [id. 24].

Next, plaintiff asserts that he is entitled to partial summary judgment against defendant Alpine with respect to his Labor Law §241(6) claim as predicated upon a violation of Industrial Code §23-1.8 (a) and that such violation was a proximate cause of his injuries. He avers that he has demonstrated his prima facie entitlement to judgment as a matter of law.

Plaintiff claims that defendants' failure to ensure compliance with this provision violated the Industrial Code, proximately caused his injuries, and establishes a prima facie Labor Law §241(6) claim.

The section which plaintiff's counsel relies on, which he asserts that defendant violated, is Industrial Code §23-1.18 (a), Personal Protective Equipment, which provides:

> "(a) Eye protection. Approved eye protection equipment suitable for the hazard involved shall be provided for and shall be used by all persons while

> employed in welding, burning or cutting operations or in chipping, cutting or grinding any material from which particles may fly, or while engaged in any other operation which may endanger the eyes."
> N.Y. Comp. Codes R. & Regs. tit. 12 § 23-1.8

Defendant Alpine's Arguments in Opposition

In opposition to plaintiff's cross-motion for partial summary judgment on his Labor Law §241(6) claim, defendant Alpine opposes the motion, arguing that "the evidence demonstrates that ALPINE is not a statutory defendant and is not subject to liability under the Labor Law. Additionally, on the merits, the evidence demonstrates that at the time of the accident, the plaintiff was not engaged in an activity which required protective eyewear. Therefore, the plaintiff's motion should be denied" [Doc 212 ¶2].

Summary Judgment Standards

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "[T]he 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" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY3d941 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]). Moreover, a party seeking summary

judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]). If a movant fails to do so, summary judgment should be denied without reviewing the sufficiency of the opposition papers (*Derise v Jaak 773, Inc.*, 127 AD3d 1011, 1012 [2d Dept 2015], citing *Winegrad*, 64 NY2d 851).

If a movant meets the initial burden, parties opposing the summary judgment motion must demonstrate evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324, citing *Zuckerman*, 49 NY2d at 562). Parties opposing a summary judgment motion are entitled to "every favorable inference from the parties' submissions" (*Sayed v Aviles*, 72 AD3d 1061, 1062 [2d Dept 2010]; *see also Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]). Indeed, in deciding a summary judgment motion, the court must accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas*, 305 AD2d at 385; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; *see also Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]). Furthermore, "[i]n all but the most extraordinary

instances, whether a defendant has conformed to the standard of conduct required by law is a question of fact necessitating a trial" (*St. Andrew v O'Brien*, 45 AD3d 1024, 1028 [3d Dept 2007] [internal quotations omitted]; *see also Ferrer v Harris*, 55 NY2d 285, 291-292 [1982]; *Andre*, 35 NY2d at 364; *Nandy v Albany Med. Ctr. Hosp.*, 155 AD2d 833, 833 [3d Dept 1989]; *Kiernan v Hendrick*, 116 AD2d 779, 781 [3d Dept 1986]). Lastly, "[a] motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112, 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; *see also Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

Discussion

Labor Law §240(1)

As plaintiff has conceded that his accident does not fall under this statute, the branch of defendant Alpine's motion to dismiss this claim as against it is granted.

Labor Law §241(6)

Labor Law §241 states, in applicable part, as follows:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements: . . .
>
> "6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Labor Law §241(6) imposes a nondelegable duty on owners and contractors to comply with the specific safety rules and regulations set forth in the Industrial Code in connection with construction, demolition or excavation work (*Ascencio v Briarcrest at Macy Manor, LLC*, 60 AD3d 606, 607 [2d Dept 2009], citing *Rizzuto*, 91 NY2d at 348; *Ross*, 81 NY2d at 501-502; *Nagel v D & R Realty Corp.*, 99 NY2d 98, 102 [2002]; *Valdivia v Consolidated Resistance Co. of Am., Inc.*, 54 AD3d 753, 754 [2d Dept 2008]).

A sustainable Labor Law §241(6) claim requires the plaintiff to demonstrate that defendants violated a provision of the Industrial Code that contains "concrete specifications" (*Ramcharan v Beach 20th Realty, LLC*, 94 AD3d 964, 966 [2d Dept 2012], citing *Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *see also Ross*, 81 NY2d 494 [1993]) and "mandates a distinct standard of conduct, rather than a general reiteration of common-law principles" (*Rizzuto*, 91 NY2d at 351). "To support a cause of action under Labor Law §241(6), a plaintiff

must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the accident" (*Rivera v Santos*, 35 AD3d 700, 702 [2d Dept 2006], citing *Ross*, 81 NY2d at 502; *Ares v State of New York*, 80 NY2d 959, 960 [1992]; *Adams v Glass Fab*, 212 AD2d 972 [4th Dept 1995]).

Moreover, even if a violation of the Industrial Code has been established, such a violation is merely some evidence of negligence, and it is for the trier of fact to determine the cause of plaintiff's injury (*Rizzuto*, 91 NY2d at 351). Indeed, "such a violation . . . does not conclusively establish a defendant's liability as a matter of law, but constitutes some evidence of negligence and thereby reserve[s], for resolution by a jury, the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances" (*Seaman v Bellmore Fire Dist.*, 59 AD3d 515, 516 [2d Dept 2009] [internal quotes omitted], quoting *Rizzuto*, 91 NY2d at 351; *see also Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982]; *Daniels v Potsdam Cent. School Dist.*, 256 AD2d 897, 898 [3d Dept 1998]). Additionally, the question of whether a violation of the Industrial Code proximately caused injury to a worker lies with the trier of fact (*Rizzuto*, 91 NY2d at 351; *see also Johnson v Flatbush Presbyt. Church*, 29 AD3d 862 [2d Dept 2006]; *Reinoso v Ornstein Layton Mgt., Inc.*, 19 AD3d 678, 679 [2d Dept 2005]; *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684 [2d Dept 2005]).

Plaintiff seeks summary judgment on his claim under Labor Law 241(6). In particular, plaintiff claims defendant Alpine violated Industrial Code section 23-1.18(a). Plaintiff relies solely on this section. Defendant Alpine claims it is not a proper Labor Law defendant under

this section. In the alternative, it argues that if it is found to be a statutory agent, that plaintiff did not need goggles for the photography work he was performing at the time of his accident.

The court finds that Industrial Code section 23-1.18(a) is sufficiently specific to support a Labor Law §241(6) cause of action, and it applies to the plaintiff's description of how this accident occurred in this case (*see Harsch v City of New York*, 78 AD3d 78, 783 [2010]). However, the court finds that defendant was not a statutory defendant, and as such, is not a proper Labor Law defendant for this cause of action. Therefore, the branch of defendant's motion for summary judgment dismissing plaintiff's cause of action under Labor Law 241(6) is granted, and plaintiff's cross-motion for summary judgment on this claim, as against defendant Alpine, is denied.

Labor Law §200 and Common-Law Negligence

Labor Law §200 states, in applicable part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment and devices in such places shall be so placed, operated, guarded and lighted as to provide reasonable and adequate protections to such persons."

Labor Law §200 codifies the common-law duty of an owner or general contractor to provide workers with a safe place to work (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 850 [2d Dept 2006]; *Brown v Brause Plaza, LLC*, 19 AD3d 626, 628 [2d Dept 2005]; *Everitt v Nozkowski*, 285 AD2d 442, 443 [2d Dept 2001]; *Giambalvo v Chemical Bank*, 260 AD2d

432, 433 [2d Dept 1999]). "It applies to owners, contractors, or their agents who exercise control or supervision over the work, or either created the allegedly dangerous condition or had actual or constructive notice of it" (*Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2d Dept 2000], citing *Russin v Picciano & Son*, 54 NY2d 311 [1981]; *Lombardi*, 80 NY2d 290 at 294-295; *Jehle v Adams Hotel Assocs.*, 264 AD2d 354 [1st Dept 1999]; *Raposo v WAM Great Neck Assn. II*, 251 AD2d 392 [2d Dept 1998]; *Haghighi v Bailer*, 240 AD2d 368 [2d Dept 1997]).

Labor Law §200 and common-law negligence liability "will attach when the injury sustained was a result of an actual dangerous condition, and then only if the defendant exercised supervisory control over the work performed on the premises or had notice of the dangerous condition which produced the injury" (*Sprague v Peckham Materials Corp.*, 240 AD2d 392, 394 [2d Dept 1997], citing *Seaman v Chance Co.*, 197 AD2d 612 [2d Dept 1993]).

Here, plaintiff's allegation in opposition to the branch of defendant Alpine's motion for summary judgment on these claims is that "there are issues of fact as to whether Alpine was negligent in its supervision and control of the injury producing work." The court disagrees.

Plaintiff has not established prima facie entitlement to summary judgment with respect to liability as against this defendant pursuant to Labor Law §200 and common law negligence. Alpine did not have the authority to control the injury-producing work which proximately led to plaintiff's accident, and, in fact, its sole employee at the jobsite never left the truck.

The record establishes that Alpine did not direct plaintiff's work; in fact, plaintiff testified that his supervisors at Capital alone determined the manner in which he worked.

Accordingly, plaintiff has no viable Labor Law §200 or common-law negligence claims against this defendant (*see e.g. Bright v Orange Rockland Utils., Inc.*, 284 AD2d 359, 360 [2d Dept 2001]; *see also Lamar v Hill Intl., Inc.*, 153 AD3d 685, 686 [2d Dept 2017] ["The parties' deposition testimony also demonstrated that the defendants did not have control or a supervisory role over the plaintiff's day-to-day work and that they did not assume responsibility for the manner in which that work was conducted"]).

Moreover, the court notes that "[t]he retention of general supervisory control, presence at a work site, or authority to enforce safety standards is insufficient to establish the control necessary to impose liability" in common-law negligence claims or under Labor Law §200 (*Biance v Columbia Washington Ventures*, LLC, 12 AD3d 926, 927 [3d Dept 2004], citing *Shields v General Elec. Co.*, 3 AD3d 715, 716-717 [3d Dept 2004]; *Sainato v City of Albany*, 285 AD2d 708, 709 [3d Dept 2001]; *see also Putnam v Karaco Indus. Corp.*, 253 AD2d 457, 459 [2d Dept 1998] ["A defendant's mere presence at the worksite is insufficient to give rise to a question of fact as to the defendant's direction and control"]). Since no defendant was involved in supervising or controlling plaintiff's work, plaintiff's Labor Law §200 claims are unsustainable (*Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 620 [2008] [no Labor Law §200 liability if accident arose from methods of plaintiff's employer and defendants exercise no supervisory control over the work],citing *Peay v New York City School Constr. Auth.*, 35 AD3d 566, 567 [2006]). Accordingly, the court grants the branch of defendant's motion for summary judgment with regard to plaintiff's claims of common law negligence and Labor Law §200 which he has asserted against defendant Alpine.

Conclusions

Accordingly, it is

ORDERED that defendant Alpine's motion, motion sequence #7, for an order granting it summary judgment dismissing the plaintiff's complaint, as against it, is granted; and it is further

ORDERED that the crossclaims asserted against defendant Alpine by co-defendants Franklin and YNH are also dismissed, without prejudice to being asserted in a third-party action by Franklin and YNH; and it is further

ORDERED that the plaintiff's cross-motion, motion sequence #9, for an order awarding him partial summary judgment on the issue of liability pursuant to Labor Law §241(6), as against defendant Alpine, is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

Hon. Debra Silber, J.S.C.