

Digerolamo v Liro Constrs., Inc.

2023 NY Slip Op 33447(U)

September 29, 2023

Supreme Court, Kings County

Docket Number: Index No. 518684/2018

Judge: Debra Silber

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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 29th day of September, 2023.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

-----X

RICHARD DIGEROLAMO,

Plaintiff,

-against-

LIRO CONSTRUCTORS, INC. and LIRO
PROGRAM AND CONSTRUCTION
MANAGEMENT, PE, P.C.,

Defendants.

-----X

DECISION AND ORDER

Index No.: 518684/2018

Mot. Seq. Nos.: 6, 7

The following e-filed papers read herein:

NYSCEF

Notice of Motion, Affirmations (Affidavits), and Exhibits _____

115-125

Notice of Cross-Motion, Affirmations (Affidavits) in Opposition,
Memoranda of Law, and Exhibits _____

127-143¹

Affirmations (Affidavits) in Opposition to Cross-Motion, and Exhibits_

156-159

Affirmations (Affidavits) in Reply _____

162-163

Upon the foregoing cited papers, the decision and order on these motions is as follows:

In this action, plaintiff Richard Digerolamo moves, in motion sequence six, for an order granting him summary judgment, pursuant to CPLR 3212, on the issue of liability

¹ The court notes that NYSCEF Doc. No. 141 is mistakenly labeled as “Memorandum of Law in Opposition to Cross-Motion and in Further Support of Motion,” but it is actually a Memorandum of Law in Opposition to Plaintiff’s Motion and in Further Support of the Cross-Motion.

with respect to his claim pursuant to New York State Labor Law § 241 (6) based upon alleged violations of New York State Industrial Code §§ 23-1.7 (e) (1) and (2), solely as against defendant LIRO Program and Construction Management, PE, P.C. (hereafter “LIRO”).²

In motion sequence seven, LIRO cross-moves for an order granting it summary judgment, pursuant to CPLR 3212, dismissing the entire complaint, which includes claims under Labor Law §§ 200 and 241 (6), as well as common-law negligence.

Background³

In 2017, the City of New York hired LIRO to work on the Build It Back Program, pursuant to a design build contract, to either rehab a home, lift and renovate a home, or re-construct a home (Plaintiff’s statement of facts, hereafter “SOF,” ¶ 10) The Build It Back Program (the Program) included, if needed, removal of the existing foundation under the homes, elevating the homes eight or nine feet, constructing a new foundation, and then lowering the homes down onto the new foundation (*id.*, ¶ 14). In order to remove the existing foundation, workers would place temporary supports under the homes, then demolish the foundation walls and footings (*id.*, ¶ 15). After a home was raised, additional work could be performed, if needed, such as installing new beams, new floor joists, or electrical or plumbing work (*id.*, ¶ 16). Under this Program, LIRO was retained as the general contractor to lift/elevate and then rehab a house located at 9 Aster Court in

² The action was discontinued as against LIRO Constructors, Inc. by stipulation dated December 26, 2018 and filed on February 1, 2019 (NYSCEF Doc No. 11).

³ The background is excerpted from the Statements (or Counterstatements, as the case may be) of Material Facts (SOF) filed by plaintiff and LIRO (NYSCEF Doc Nos. 116, 129, and 159).

Brooklyn, New York. LIRO hired Navesink Prestige (Navesink), plaintiff's employer, as a subcontractor to carry out the work (*id.*).

LIRO employed an inspector, Luca LaSella (LaSella), who was at the subject site on a daily basis with the purpose of ensuring that the work was performed safely (*id.*, ¶ 12). LaSella prepared daily inspection logs that documented where the work was being performed, a description of the work being performed and inspected, the time he was at the subject site, the date, weather conditions, project description, contractor, and any additional comments he had (LIRO's SOF, ¶¶ 6, 10; plaintiff's counter statement of facts, hereafter "CSOF," ¶¶ 5-6; *see* NYSCEF Doc No. 137). According to LIRO, LaSella also documented the relevant conditions at the subject site in each of his daily logs. and when housekeeping (cleaning up) was observed being performed. LIRO contends that if work was performed underneath a house, LaSella would go under the house to see what work was being performed. (SOF, ¶ 10; Plaintiff's CSOF, ¶¶ 10, 13). If no work was being performed, that would also be documented (LIRO's SOF, ¶ 10). If LaSella observed any dangerous activity or condition, he had the authority to stop the work at the subject site and the unsafe condition should have been documented in his daily inspection log (Plaintiff's SOF, ¶ 12; LIRO's SOF, ¶ 10). LaSella was allegedly also responsible for reporting any unsafe conditions to the project manager and to LIRO's safety person, Shawn Juman (Juman) (Plaintiff's SOF, ¶¶ 13, 18-19; LIRO's SOF, ¶ 10). However, plaintiff argues that since LaSella was not deposed, it is unclear what the scope of his inspections entailed, the length of the inspections, and what photographs were taken (LIRO's SOF, ¶ 7; plaintiff's CSOF, ¶¶ 5-6, 10; *see* NYSCEF Doc No. 137). Juman, a LIRO employee, was responsible

for job site safety at the subject site and, as part of LIRO's normal course of business, he would prepare an incident report if an accident occurred (Plaintiff's SOF, ¶¶ 13, 20). However, LIRO did not provide any safety equipment to any of Navesink's employees or to any other workers at the job site (LIRO's SOF, ¶ 9). LIRO contends that Navesink was responsible for creating a safety plan for the subject site and for coordinating the trades at the site (*id.*). LIRO also alleges that Navesink was responsible for cleaning and maintaining the site (*id.*).

On April 6, 2017, plaintiff was employed by Navesink to perform carpentry work as part of the Program (Plaintiff's SOF, ¶¶ 1-2). As such, plaintiff would "bounce back and forth" between different work sites as needed (*id.*, ¶ 2). As part of the Program, plaintiff received instructions and assignments from two Navesink foremen, John and Brandon, who were responsible for multiple home renovation projects (*id.*, ¶ 3). On the date of the subject accident, April 6, 2017, plaintiff received a telephone call from John, who directed plaintiff to report to the construction project at 9 Aster Court (*id.*, ¶ 4). Plaintiff arrived at the subject site, his first time at this location, between 7:30 and 8:00 a.m. (*id.*). After arriving at the site, plaintiff signed in and waited for John (*id.*, ¶ 5). After John arrived, plaintiff was then directed to install Durock, a brand of cement board, across the entire underside of the raised home at the subject site (*id.*). According to plaintiff, the space underneath the raised home was four and a half feet high at the tallest point; therefore, in order for plaintiff, who is six feet and four inches tall, to access the work site and perform his work, he had to crouch under the home (*id.*, ¶ 6).

Plaintiff testified that, on the date of the accident, it was the Navesink laborers' responsibility to keep the site clean and clear of defects (LIRO's SOF, ¶ 4). However, plaintiff noted that there were no laborers/cleaners present at the time of his accident, as they had left before noon (Plaintiff's CSOF, ¶ 4). LaSella's daily inspection log for that date indicates that "[t]he laborers were housekeeping around the site and helping the carpenters" (NYSCEF Doc No. 137, at 97; LIRO's SOF, ¶¶ 11-12). Plaintiff disputes the accuracy of this log, pointing to the fact that the log indicates that two laborers were present during the time that the inspection occurred, sometime between 10:50 a.m. and 2:00 p.m., but that the Navesink sign-in sheet for April 6th indicates that one of the two laborers, Said Bovali, signed in at 7:30 a.m. and then signed out at 8:00 a.m. As such, plaintiff argues that two laborers were not, in fact, present at the time of the inspection (Plaintiff's CSOF, ¶¶ 7, 12; NYSCEF Doc No. 137, at 97-100).

LIRO argues that LaSella did not note any defects or hazardous conditions in his log (LIRO's SOF, ¶ 12). Plaintiff contends that this is because the daily logs do not have a category or section for "complaints" (Plaintiff's CSOF, ¶ 7). LIRO further argues that there is no evidence that plaintiff, or any other individual, reported debris or any other hazardous condition in the work area to a representative of either Navesink or LIRO (LIRO's SOF, ¶ 4; *see* NYSCEF Doc Nos. 134-35, 137, 142).

As part of his daily logs, LaSella included photographs of the work performed on that date (LIRO's SOF, ¶ 13; NYSCEF Doc No. 137, at 101-106). However, despite the fact that LaSella went under the subject house to take photos of the work performed for his log, plaintiff argues that the photographs do not depict the ground or surface conditions

underneath the house on the date of plaintiff's accident and that the photographs do not include the area where plaintiff's accident occurred (LIRO's SOF, ¶ 13; Plaintiff's CSOF, ¶ 13; NYSCEF Doc No. 137, at 101-106).

Plaintiff claims that at about 3:00 p.m. on April 6, 2017, he was injured as he attempted to access his work area under the subject house (plaintiff's SOF, ¶ 7). Immediately prior to plaintiff's accident, while he was crouching under the house to reach his work area, he observed that the ground was made up of gravel, and had cement chunks, rocks, and depressions ("holes") (*id.*). Specifically, as plaintiff was carrying a piece of cement board to his work area under the home, he testified that his "foot must have twisted on a piece of rock or a hole or whatever it twisted into," which caused him to fall to the ground (NYSCEF Doc No. 121, tr at 37, lines 15-25; *see* Plaintiff's SOF, ¶ 8). When plaintiff fell, he was holding a cement board and was underneath the middle of the subject house (Plaintiff's SOF, ¶ 9). There was no artificial lighting under the home or at the site at the time of the plaintiff's accident (*id.*).

According to plaintiff's testimony, there were no witnesses to his accident (LIRO's SOF, ¶ 1; NYSCEF Doc No. 134, 38:6-8, 38:24-39:2). LIRO points to the plaintiff's signed statement, which was prepared as part of Navesink's accident investigation report, dated April 7, 2017, noting that it does not indicate that plaintiff tripped or slipped over debris, cement, a rock, or a hole (LIRO's SOF, ¶ 2; NYSCEF Doc No. 142), but indicates instead that plaintiff was "[c]arrying a piece of cement board when [he] twisted [his] knee and fell" (NYSCEF Doc No. 142, at 3; *see id.* at 1, 5). LIRO further argues that plaintiff described the accident as follows: he "[w]as working under [the] house at 9 Aster Ct

installing cement board, was carrying a piece and *bending down* at the same time and [his] *knee twisted* and gave out and [he] fell. [He] was then carried out [from under the house] by two guys and went to the hospital” (*id.* at 5 [emphasis added]). According to plaintiff’s testimony, this report was prepared just after his accident (Plaintiff’s CSOF, ¶ 2; LIRO’s SOF, ¶ 2; NYSCEF Doc No. 134, 42:9–43:16). LIRO also points out that, upon arriving at the emergency room, plaintiff made no reference to debris, cement, a rock, or a hole and notes that the E.R. record states that he presented “with right knee pain [due to] ‘it giving out’ at work” (NYSCEF Doc No. 138, at 3; *see* LIRO’s SOF, ¶ 3).⁴ At the hospital, plaintiff also indicated that he worked as “a construction person [and] was walking on uneven ground with sheet rock and then fell to the floor. [He] [w]asn’t able to get up and [it] felt broken” (NYSCEF Doc No. 138, at 3). [Plaintiff complained that he felt sensation in his knee and presented with “[n]o other injuries or complaints” (*id.*)].

LIRO also contends that plaintiff’s Labor Law § 240 (1) claim should be dismissed because there is no evidence that plaintiff fell from a height, or that his alleged injuries were the result of an object falling from a height (LIRO’s SOF, ¶ 14). It argues that as the alleged incident did not involve a gravity-related risk, plaintiff fails to meet his *prima facie* burden (*id.*).

On September 14, 2018, plaintiff commenced this action asserting claims under Labor Law §§ 200 and 241 (6), as well as a claim sounding in common-law negligence. In his verified bills of particulars, plaintiff repeats his allegations of violations of Labor Law

⁴ LIRO’s SOF cites to Exhibit M (NYSCEF Doc No. 140), a discovery order from this court (Freier, J.), but Exhibit K (NYSCEF Doc No. 138) are the relevant Coney Island Hospital records that the SOF refers to (*see* LIRO’s SOF, ¶ 3).

§§ 200, 240 (1), and 241 (6). He alleges violations of Industrial Code §§ 23-1, 23-1.7 (d), 23-1.7 (e) (1) and (2), 23-1.3, 23-1.30, 23-1.31, 23-1.32, and 2.1 (a) and (b) in conjunction with his claim that Labor Law 241 (6) was violated (*see* NYSCEF Doc No. 104).⁵

Plaintiff filed the instant motion on January 31, 2023 (mot. seq. six) and LIRO filed the instant cross-motion on March 7, 2023 (mot. seq. seven). The note of issue is due to be filed on or before March 1, 2024.

Plaintiff's Motion for Summary Judgment (Mot. Seq. No. 6)

In motion sequence # 6, plaintiff moves for an order, pursuant to CPLR 3212, granting him summary judgment on the issue of liability based on his claim of violations of Labor Law § 241 (6) predicated on Industrial Code §§ 23-1.7 (e) (1) and (2),⁶ contending that LIRO, as the general contractor, had a nondelegable duty “to provide reasonable and adequate protection and safety” to plaintiff. Plaintiff further argues that LIRO’s violation of Industrial Code §§ 23-1.7 (e) (1) and (2) was a proximate cause of his accident and injuries, as he was a construction worker who tripped and fell “due to an

⁵ Plaintiff served his initial verified bill of particulars on or about February 1, 2019; a supplemental verified bill of particulars on or about February 27, 2020; a second supplemental verified bill of particulars on or about September 13, 2021; an amended verified bill of particulars on or about December 1, 2022; and a fourth supplemental verified bill of particulars on or about December 2, 2022 (*see id.*). A violation of Industrial Code §§ 2.1 (a) and (b) is repeatedly alleged in the bills of particulars, but the court believes this to be a typographical error and plaintiff intended to instead refer to Industrial Code §§ 23-2.1 (a) and (b) (*see id.* at 12, 39, 43).

⁶ In paragraph 32 of plaintiff’s affirmation in support and paragraph 6 of plaintiff’s affirmation in reply, plaintiff also alleges violations of Industrial Code § 23-1.7 (d), but this section is not cited in the “wherefore” clause of the affirmation or the notice of motion and is not discussed at all in the motion papers, and, thus, cannot be considered by the court (*see, e.g., NYCTL 1998-1 Trust v Prol Props. Corp.*, 18 AD3d 525, 526-527 [2005] [“A court lacks jurisdiction to grant relief . . . where that relief is not requested in the moving papers”], citing CPLR 2214 [a]; *Arriaga v Michael Laub Co.*, 233 AD3d 244 [1st Dept 1996] [“as plaintiffs failed to formally and specifically demand [relief] in either the notice of motion or the ‘WHEREFORE’ clause (CPLR 2214[a]), it cannot be said that the IAS court erred in denying such relief”]).

obstruction or condition (rock/broken concrete) . . . in a passageway” and his injuries occurred “in a work area due to an accumulation of debris (broken up rock and concrete),” which “establishes a *prima facie* entitlement to summary judgment pursuant to Labor Law § 241(6).”

Additionally, plaintiff notes that to the extent LIRO argues that plaintiff’s injury “occurred in an open area as opposed to a passageway or work area, this argument is without merit” because “[t]he area underneath the house cannot be considered . . . an ‘open area’ since there was clearly a confined space for plaintiff to walk/access his work area.” Moreover, plaintiff claims that to the extent LIRO argues “that the rock that caused plaintiff’s accident was integral to [his] work, this argument is [also] without merit” because “there is no basis to find that the rock/broken concrete (that was previously demolished) that caused plaintiff to trip and fall was integral to the overall construction or the specific task plaintiff was performing (installing insulation to the undercarriage of the house) at the time his accident occurred.” Plaintiff avers that “the only debris that would be created by my drilling work would be limited to dust” and that “I did not drill into cement to perform any of my work at this job site” (NYSCEF Doc No. 157, ¶ 17). Instead, plaintiff argues that “the rock/broken concrete that caused my fall should have been removed before I was permitted to work in the area, or covered by plywood (or other material) that would have prevented me from tripping over an obstruction in a passageway/work area.” Plaintiff further argues that none of the photographs submitted with respect to the motions at issue herein show the condition of his work area on the day that his accident occurred (NYSCEF Doc No. 157, ¶¶ 12-17).

In opposition, LIRO argues that plaintiff's motion must be denied because plaintiff has failed to make out a prima facie case that LIRO violated Labor Law § 241 (6) and either Industrial Code §§ 23-1.7 (e) (1) or (2). LIRO argues that because plaintiff cannot identify the defect that allegedly caused him to trip, his testimony, which is that he either fell in a hole or tripped over debris, a piece of cement, or rock, is speculative. LIRO also argues that there is no evidence that plaintiff tripped due to a defective or hazardous condition, and that there is no testimony from plaintiff that it was debris that caused him to trip. Further, LIRO argues that plaintiff has failed to establish that the gravel floor which plaintiff claims caused him to trip was not integral to his work.

In reply, plaintiff points to his deposition, wherein he testified "that he [was] injured when his foot twisted on a piece of rock, causing him to fall to the ground," he was attempting to get to his work area, while carrying a cement board under the subject home and tripped and fell "on a piece of rock/broken-up concrete." Plaintiff reiterates that "the rock/chunks of concrete that caused his accident were created as a result of prior demolition work that was performed at the site, and that laborers who were tasked with cleaning the debris failed to do so." As such, plaintiff argues that he did in fact "identify the tripping hazard that allegedly caused his injury." Plaintiff further submits that defendant has failed to identify the location of plaintiff's accident, "other than arguing in a conclusory fashion that the location was not a work area or passageway" and it does not identify another route that plaintiff could have taken. Plaintiff argues that Industrial Code § 23-1.7 (e) (2) applies to floors, platforms, and similar areas where persons work or pass, such as the location where his accident occurred and, as he was on his way to his work area at the time, the

section is applicable. Plaintiff further notes that Industrial Code § 23-1.7 (e) (2) does not require that the passageway which was used by plaintiff be the only passageway that existed in order for plaintiff to access his work area, and that plaintiff's work area was not an open area, but was a confined space under the house at issue. With respect to Industrial Code § 23-1.7 (e) (1), plaintiff argues that courts have interpreted the term "passageway" to also mean a defined walkway or pathway used to traverse between discrete areas, as opposed to an open area.⁷

LIRO's Cross-Motion for Summary Judgment (Mot. Seq. No. 7)

LIRO cross-moves for an order, pursuant to CPLR 3212, granting it summary judgment and dismissing plaintiff's complaint on the grounds that plaintiff's Labor Law § 200 claim fails, because there was no dangerous condition, and because LIRO did not control the means and methods of plaintiff's work; that plaintiff's common-law negligence claim also fails because LIRO did not cause or create the allegedly dangerous condition, nor did it have actual or constructive notice of it; that plaintiff's accident does not involve a fall from a height or a falling object and, as such, plaintiff's Labor Law § 240 (1) claim is inapplicable; and that because the sections of the Industrial Code that LIRO allegedly violated are either inapplicable or were not violated, plaintiff's Labor Law § 241 (6) claim must also be dismissed.

⁷ Plaintiff also makes an argument in opposition to LIRO's cross-motion to dismiss (mot. seq. seven) that LIRO's construction safety expert David Collins has no personal knowledge of plaintiff's accident or the location of same and, allegedly, did not consider all of the photographs in rendering his expert opinion. Thus, plaintiff argues, the court should disregard Mr. Collins' affidavit [Doc 130] pertaining to the accident.

In support of LIRO's argument with respect to plaintiff's Labor Law § 241 (6) claim, LIRO provides an affidavit⁸ from a construction safety expert, David Collins, who asserts (*inter alia*) that "each of the Industrial Code regulations cited in plaintiff's pleadings are either too general or inapplicable to the present case as a matter of law." Specifically, Mr. Collins opines that Industrial Code § 23-1.7 (e) (1),⁹ which requires that passageways be kept clear of debris or other obstructions that may cause a tripping hazard, does not apply because "it is clear from plaintiff's testimony that his alleged accident did not occur in a passageway but in his work area" and is therefore inapplicable to the instant facts. Mr. Collins similarly opines that Industrial Code § 23-1.7 (e) (2),¹⁰ which requires that work areas be kept clear of debris or other obstructions that may cause a tripping hazard, does not apply because "the alleged 'debris' that plaintiff described was not a hazardous condition but integral to the work he was performing" and is, therefore, also inapplicable. Mr. Collins further opines that Industrial Code § 23-1.3,¹¹ which generally requires that workers be provided with a safe place to work, was not violated because plaintiff was provided with a safe place to work. In addition, Mr. Collins opines that Industrial Code §

⁸ The jurat omits "sworn to before me," and there is no Certificate of Conformity. It was notarized in N.J. The Court elects to generally overlook such defects, as just one more problem created by NY's enactment of the national bar exam, which has resulted in attorneys failing to learn New York practice.

⁹ LIRO's affirmation in opposition to plaintiff's motion and in support of its cross-motion refers to Industrial Code § 23-1 (e) (1), but the court believes this to be a typographical error (*see* NYSCEF Doc No. 128, ¶ 31). Plaintiff's motion is addressed to § 23-1.7 (e) (1) and (e) (2).

¹⁰ LIRO's affirmation in opposition to plaintiff's motion and in support of its cross-motion refers to Industrial Code § 23-1 (e) (2), but the court also believes this to be a typographical error (*id.*, ¶ 32).

¹¹ The court notes that plaintiff does not claim a violation of this section of the Industrial Code in the complaint or any of his bills of particulars.

23-1.31, which provides that applications may be made to the board for the approval of any device, apparatus, material, equipment, or method which may be used in compliance with the intent of the rule and approval by the board shall be deemed to authorize such use, is inapplicable in this instance. Mr. Collins opines that Industrial Code §23-1.32 which provides that “[w]hen noncompliance with a provision of this Part (rule) causes or tends to cause imminent danger to a person employed in construction, demotion or excavation work and written notice thereof is given by the commissioner to the appropriate employer, owner, contractor or his agent” also does not apply to the facts of this case. Mr. Collins notes that “[h]ere, there is no evidence that LiRo was provided written notice of a code violation and therefore in my opinion to a reasonable degree of construction safety certainty, this allegedly violated code provision is inapplicable to the facts of this case.” Mr. Collins also opines that Industrial Code § 23-2.1, which pertains to maintenance and housekeeping, was not violated because the evidence demonstrates that housekeeping was being performed on April 6, 2017; plaintiff could have directed the removal of debris; and there is no evidence that any materials or equipment obstructed any passageway, walkway, stairway, or thoroughfare. Based upon the foregoing, LIRO argues there was no violation of either Labor Law § 241 (6) or the Industrial Code sections mentioned by the plaintiff and, therefore, that cause of action should be dismissed.

In opposition, plaintiff argues that his Labor Law § 241 (6) claim should not be dismissed because LIRO has failed to demonstrate that Industrial Code §§ 23-1.7 (e) (1) and (2) are either too general or are not applicable to the facts of this case. Further, plaintiff submits that questions of fact exist as to the applicability of these Industrial Code sections

to plaintiff's incident. Plaintiff also argues that the Appellate Division, Second Department has held that these Industrial Code sections are sufficient to sustain a cause of action, and that "evidence of a plaintiff construction worker becoming injured due to a tripping hazard on a passageway establishes a *prima facie* entitlement to summary judgment pursuant to Labor Law § 241 (6) based on a violation of Industrial Code Section 23-1.7 (e) (1)."

Specifically, plaintiff argues that LIRO violated Industrial Code § 23-1.7 (e) (2) because his work area was not kept clear of debris, such as broken up concrete left over from demolition work, or other obstructions that may cause a tripping hazard. Further, despite LIRO's conclusory arguments that the subject accident location was not a work area, plaintiff argues that Industrial Code § 23-1.7 (e) (2) applies to "floors, platforms and similar areas where persons work or pass" and that this section of the Industrial Code does not contain any requirement that there be only one way to access a work area. Plaintiff also argues that LIRO has failed to eliminate all questions of fact regarding whether his accident occurred in a passageway and, therefore, Industrial Code § 23-1.7 (e) (1) also applies, particularly as LIRO has not suggested another way that plaintiff could have accessed his work area. Plaintiff further argues that LIRO has not established that Industrial Code § 23-1.3 was not violated because Mr. Collins' opinion is based on logs and irrelevant photographs taken two days prior to plaintiff's injury. Accordingly, plaintiff argues that Mr. Collins' findings are wholly speculative and conclusory. Plaintiff also submits that LIRO has not established that Industrial Code § 23-2.1 was not violated because the debris was not properly handled and disposed of, which was the proximate

cause of plaintiff's injuries, and, at the very least, a question of fact exists as to whether it was violated, thereby precluding this court from granting LIRO summary judgment.

Moreover, plaintiff argues that if he failed to identify the alleged tripping hazard at his EBT it was because, during his deposition, LIRO failed to pose any specific questions regarding the mechanism that caused him to trip and fall, such as asking him to "describe the rock, its color, its dimensions or where it came from, and thus plaintiff did not have an opportunity to elaborate or further describe the condition at his deposition." Plaintiff submits that in his affidavit annexed in opposition to the instant motion [Doc 157], he affirms that he was caused to trip and fall on a piece of rock/broken-up concrete and further affirms that the surface underneath the home where he was working consisted of rocks, gravel, and broken up chunks of concrete. Additionally, plaintiff argues that the condition that caused his injuries was not integral to his work, as the cement/debris was not created by him but was there when he arrived at the worksite.

Plaintiff further argues that there is no basis to dismiss his common-law negligence and Labor Law § 200 causes of action, because LIRO had the authority to control the activity that caused his injury and could have either avoided or corrected the unsafe condition. Contrary to LIRO's arguments, plaintiff asserts that LIRO had more than general oversight of the safety at the jobsite and did not simply enforce general safety policies. Plaintiff argues that LIRO did control the means and methods of his work, which he avers is supported by the contracts and the testimony of the parties. Moreover, plaintiff argues that the chunks of concrete in his work area from the recently demolished foundation presented an inherently dangerous or defective condition.

In reply, LIRO argues that plaintiff's May 2023 affidavit, submitted in opposition to the instant cross-motion, is self-serving and contradicts his prior deposition testimony (11/19) regarding the mechanism of his injury, and is insufficient to defeat a motion for summary judgment. Further, LIRO argues that plaintiff's self-serving affidavit fails to overcome its prima facie case and raise an issue of fact regarding the alleged violations of the Industrial Code, warranting dismissal of plaintiff's Labor Law § 241 (6) claim. Additionally, LIRO argues that plaintiff has failed to demonstrate that the allegedly dangerous condition was not in fact integral to his work, because the "integral to the work" defense applies to things and conditions that are an integral part of the construction, not just to the specific task a plaintiff may be performing at the time of the accident.

LIRO also argues that plaintiff has failed to raise an issue of fact to dispute its claim that it did not control the means and methods of plaintiff's work, thereby warranting dismissal of his Labor Law § 200 claim. Defendant LIRO argues that "the facts in evidence cannot support a finding that LIRO controlled the means and methods of plaintiff's work." LIRO further argues that plaintiff has failed to raise an issue of fact to overcome its claim that no dangerous condition existed in his work area, and avers that plaintiff's recent affidavit, which is contradictory and self-serving, is insufficient in that regard. Lastly, LIRO argues that plaintiff has failed to raise an issue of fact that it had actual or constructive notice of the allegedly defective condition, and avers that the affidavit their site safety manager, Shaun Juman [Doc 139], which was completely ignored by plaintiff, indicates that "neither plaintiff nor anyone else reported the existence of any rocks or cement chunks mixed with gravel [or holes] at the work site;" that "plaintiff failed to report

any allegedly defective condition even though he [Juman] spoke to plaintiff following the alleged accident;" and that he never personally observed any of the allegedly defective conditions that plaintiff claims existed.

Discussion

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 [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 [2010] [alteration in original], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the “moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 494 [1989]).

Plaintiff's Labor Law § 241 (6) Claim

As noted, plaintiff moves for summary judgment on the issue of liability on his Labor Law § 241 (6) claim against LIRO with respect to the alleged violations of Industrial Code §§ 23-1.7 (e) (1) and (2), whereas LIRO cross-moves for summary judgment

dismissing plaintiff's Labor Law 241 (6) claim and alleged violations of Industrial Code §§ 23-1.7 (e) (1) and (2), 23-1.3, 23-1.31, 23-1.32, and 23-2.1 (a) and (b). The court notes that in his bill of particulars, plaintiff also alleges that defendant violated Industrial Code § 23-1.30, and 23-1.7 (d), but defendant LIRO's motion is silent regarding these allegations.

“Labor Law § 241 (6) requires owners and contractors to provide reasonable and adequate protection and safety for workers and ‘to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor’” (*Ramones v 425 County Rd., LLC*, 217 AD3d 977, 980 [2023], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). For the plaintiff to establish his prima facie entitlement to judgment as a matter of law on this cause of action, his claim must be based upon a specific violation of a section of the Industrial Code and he must establish that this violation was a proximate cause of his accident and injuries (*Grant v City of New York*, 109 AD3d 961, 963 2013. The plaintiff will prevail if the opposing party fails to raise a triable issue of fact (*id.*). For a defendant to prevail on a motion to dismiss a Labor Law 241 (6) claim, it must demonstrate, prima facie, that those provisions of the Industrial Code asserted by the plaintiff are inapplicable to the facts of this case or, as a matter of law, were not violated (*Cruz v 1142 Bedford Ave., LLC*, 192 AD3d 859, 863 [2021]). “It is a defendant's burden, when it is the party moving for summary judgment, to demonstrate affirmatively the merits of a defense, which cannot be sustained by pointing out gaps in the plaintiff's proof” (*id.*).

Industrial Code §§ 23-1.7 (e) (1) and (2) are sufficiently specific to support a claim brought under Labor Law § 241 (6) (*see e.g., Jara v N.Y. Racing Ass'n, Inc.*, 85 AD3d 1121, 1123 [2011]). Industrial Code § 23-1.7 (e) (1) sets forth, in pertinent part, that “[a]ll passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which would cause tripping. Industrial Code § 23-1.7 (e) (2) states that “[t]he 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.”

Similarly, Industrial Code §§ 23-2.1 (a) and (b) can also “serve as valid predicates for liability under Labor Law § 241 (6)” (*Herman v St. John’s Episcopal Hosp.*, 242 AD2d 316, 317 [1997]). Industrial Code § 23-2.1 (a), entitled “Storage of material or equipment” states that:

“(1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.

(2) Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge.”

Industrial Code § 23-2.1 (b), entitled “Disposal of debris,” states that “Debris shall be handled and disposed of by methods that will not endanger any person employed in the

area of such disposal or any person lawfully frequenting such area” (12 NYCRR § 23-2.1 [b]).

The plaintiff testified that the area underneath the house where he was working when the accident occurred consisted of gravel, broken pieces of concrete and “a lot of holes in the floor” (*see* NYSCEF Doc No. 121, Digerolamo tr at p. 37). The witness for defendant LIRO, Mr. Siegel, testified that once they raise the subject house off of the ground, they demolish the existing foundation, by making “holes in the foundation to elevate it and then the foundation is coming out,” (*see* NYSCEF Doc No. 122, Siegel tr at pp. 32-33). LIRO’s witness further testified that after the existing foundation was demolished, “[w]e put gravel generally under those homes” (*id* at pp. 34-35). When asked who was responsible for putting the gravel down, the witness responded that it was the subcontractor that LIRO retained, plaintiff’s employer, Navesink.

There appears to be a dispute whether the pieces of the demolished foundation were removed, or should have been removed, before the gravel was poured by Navesink, and before the plaintiff was instructed to install the cement boards on the underside of the house.

In *Krzyzanowski v City of New York*, 179 AD3d 479 [1st Dept 2020], the court held that the “integral-to-the-work defense” applies to both Industrial Code §23-1.7(e)(1) and (2). The court goes on to find that the defendants in that case had not established their entitlement to summary judgment, and that while the boards placed on the floor could have been integral to the work, and that “the defense applies to things and conditions that are an integral part of the construction, not just to the specific task a plaintiff may be performing

at the time of the accident”, there was no evidence “why [the boards] were placed or what condition they were in. This testimony is insufficient to establish as a matter of law that the boards were a protective floor covering integral to the work being done.”

This is analogous to the circumstances in the instant matter. Plaintiff here claims the debris from the foundation should have been removed (cleaned up) before he had to do his work, as it was debris which created a hazardous condition. Defendant, on the other hand, testified (Mr. Jeremy Siegel) that in general, they would raise the house, demolish the foundation, then “lower it back down onto that new foundation” [Doc 122 Page 32]. He then said there would be work “conducted on the underside of the house in preparation of setting it down on the new foundation” [Page 33]. However, he said they did not put a slab of concrete down under the houses, but just gravel, “and that would be towards the end of the project” [Page 35]. This testimony seems to say that there was a concrete slab under this house, which they demolished, then the work would be done under the house, and just before they lowered the house down they poured the gravel. If that is what was supposed to happen, the ground would not have been covered with gravel when plaintiff started working, but the ground should have been just the soil which was under the concrete which had been demolished and removed. However, he also said there was another contractor who was “the foundation guy” [Page 43], and that a new foundation would be poured before the house was set down [Page 34]. Perhaps there were different procedures for different houses and Mr. Siegel was confused. Nonetheless, it is impossible from his testimony to determine the condition of the ground under the subject house on the date of the plaintiff’s accident.

Defendant also provides an affidavit from Shaun Juman, the program safety manager for defendant. He states that he was on site the day of plaintiff's accident, and did not observe any of the conditions plaintiff describes, but only observed "gravel placed in the work area to provide the carpenters a safe work surface to perform their work on . . . and that LaSella's daily logs even report that grading was performed by laying down additional gravel so that the workers would have a surface area on which they could perform their work" [Doc 139]. Mr. Juman thus states that, in contradiction to Mr. Siegel, the gravel was poured before the work under the house was done. He also claims the foundation had been demolished and the debris removed before the gravel had been poured, and that he did not see anything on the ground other than gravel.

The court further notes that the court in *Krzyzanowski v City of New York*, states that "[p]laintiff failed to establish that the boards were accumulated debris or scattered materials and not protective covering purposely placed on the floor while there was ongoing construction [emphasis added]." Here, if the surface was solely covered with gravel, which was intentionally poured to provide drainage and a level surface to work on, as Mr. Juman alleges, the gravel would be integral to the plaintiff's work. If the broken-up foundation had not been removed before plaintiff started his work, it would be "accumulated debris or scattered materials." This issue of fact cannot be resolved on this record. Credibility issues cannot be determined in a summary judgment motion.

Plaintiff's Motion for Summary Judgment (Mot. Seq. No. 6)

Plaintiff's motion seeking summary judgment against defendant LIRO on the issue

of liability with respect to his Labor Law § 241 (6) claim, based upon violations of Industrial Code §§ 23-1.7 (e) (1) and (2), is denied. Plaintiff has failed to establish that the gravel, rock, or debris (pieces of concrete) that was the purported cause of his accident constituted a violation of Industrial Code § 23-1.7 (e) (1) or (2) as a matter of law. At his deposition, plaintiff testified that he was unsure as to the exact cause of his accident. “It’s gravel with broken up cement and stuff, so I was carrying a piece of cement board from the pile to where it had to go under the ceiling, and my foot must have twisted on a piece of rock or a hole or whatever it twisted into, and that’s when I fell” (*see* NYSCEF Doc No. 121, Digerolamo tr at 37, lines 15-25). The other evidence that plaintiff submitted in support of his motion, Inspection Reports by defendant LIRO’s inspector, Luca LaSella, from April 4, 2017 and April 6, 2017, which include photographs of work performed on those dates, do not depict plaintiff’s work area (Digerolamo Aff., NYSCEF Doc No. 157, ¶¶ 12-16). Notably, this information comes from plaintiff’s recent affidavit submitted in opposition to LIRO’s motion for summary judgment. Based upon this evidence, plaintiff fails to eliminate all issues of material fact and fails to make a prima facie showing of entitlement to judgment as a matter of law with respect to liability under Labor Law § 241 (6). Accordingly, plaintiff’s motion seeking summary judgment on the issue of liability under Labor Law § 241 (6) predicated on violations of Industrial Code §§ 23-1.7 (e) (1) or (2) as against LIRO is denied.

LIRO’s Motion for Summary Judgment (Mot. Seq. No. 7)

LIRO also fails to make a prima facie showing of entitlement to summary judgment and dismissal of plaintiff’s Labor Law § 241 (6) claim based on violations of Industrial

Code §§ 23-1.7 (e) (1) or (2), or 23-2.1 (a) or (b). LIRO's expert's affidavit merely attempts to poke holes in the plaintiff's proof, which is insufficient to meet a defendant's prima facie burden for summary judgment on this cause of action (*Cruz*, 192 AD3d at 863). The expert affidavit submitted by LIRO is conclusory, and fails to establish, prima facie, that the above sections of the Industrial Code are either inapplicable or were not violated, and thus does not eliminate all triable issues of material fact (*see e.g., Podobedov v E. Coast Constr. Group, Inc.*, 133 AD3d 733, 735-736 [2015]; *Jara*, 85 AD3d at 1123-1124). Accordingly, the branch of LIRO's motion seeking summary judgment dismissing plaintiff's Labor Law § 241 (6) claim predicated on alleged violations of Industrial Code §§ 23-1.7 (e) (1) or (2), or 23-2.1 (a) or (b), is denied.

With respect to plaintiff's claims of violations of Industrial Code §§ 23-1.31, and 23-1.32, as plaintiff has failed to address them in his opposition to LIRO's cross-motion (*see e.g., Debenedetto v Chetrit*, 190 AD3d 933, 936 [2021]; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2017]), that portion of LIRO's cross motion is granted. Accordingly, plaintiff's Labor Law § 241 (6) claims relying on alleged violations of Industrial Code §§ 23-1.31 and 23-1.32 are dismissed. While plaintiff cites § 23-1 in his bill of particulars, there is no section with this number, so it, too, is dismissed.

Defendant, LIRO stated that it was moving to dismiss all of the claims plaintiff has made in his complaint. However, defendant's papers completely omit any mention of plaintiff's claims of violations of Labor Law 241(6) predicated on to Industrial Code Sections §§23-1.7(d) and 23-1.30. As such, plaintiff's claims under these sections remain, and their applicability will have to be determined at trial.

Plaintiff also lists section 23-1.3 of the Industrial Code in his bill of particulars. This section (“Application”) is not sufficiently specific to support a Labor Law § 241(6) claim. (*see e.g., Williams v White Haven Memorial Park*, 227 AD2d 923, 643 NYS2d 787 [4th Dept 1996]; *McGrath v Lake Tree Village Assocs.*, 216 AD2d 877, 629 NYS2d 358 [4th Dept 1995]); *Walker v New York City Transit Authority*, 2008 N.Y. Misc. LEXIS 8052, *19 [Sup Ct NY Co]. Accordingly, even though defendant has made no mention of this section in its motion, it must be dismissed as it is not an actionable claim.

Plaintiff’s Labor Law § 240 (1) Claim

LIRO moves for summary judgment and dismissal of plaintiff’s Labor Law § 240 (1) claim on the grounds that there was no elevation-related risk that caused plaintiff’s injuries.

“Labor Law § 240 (1) imposes upon owners, contractors, and their agents a nondelegable duty to provide workers proper protection from elevation-related hazards” (*Zoto v 259 W. 10th, LLC*, 189 AD3d 1523, 1524 [2020]). The purpose of the statute is to protect workers from the ‘pronounced risks arising from construction work site elevation differentials’” (*id.*, quoting *Runner v N.Y. Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

“The protections of the statute are implicated where a worker’s ‘task creates an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against’” (*id.*, quoting *Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]). “[L]iability is contingent upon ‘the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein’”

(*id.*, quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). Thus, “[i]n order to recover under section 240 (1), the plaintiff must establish that the statute was violated and that such violation was a proximate cause of his or her injury” (*id.*). A “defendant is not liable under Labor Law § 240(1) where there is no evidence of violation,” (*Blake v Neighborhood Housing Servs. of N.Y. City, Inc.*, 1 NY3d 280, 290 [2003]).

As there was no elevation-related risk in this case and plaintiff has offered no opposition to the dismissal of this claim, LIRO’s motion for summary judgment with respect to plaintiff’s Labor Law § 240 (1) claim is granted and the claim is dismissed.

Plaintiff’s Labor Law § 200 and Common-Law Negligence Claims

Defendant LIRO also moves for summary judgment and dismissal of plaintiff’s Labor Law § 200 and common-law negligence claims on the grounds that if there was a hazardous premises condition, it neither created the condition which caused plaintiff’s accident, nor did it have actual or constructive notice of the dangerous condition. Defendant LIRO also argues that if the accident arose out of the means and methods of plaintiff’s work, it did not have supervisory authority over that work.

“Landowners and general contractors have a common-law duty to provide workers with a reasonably safe place to work” (*Wejs v Heinbockel*, 142 AD3d 990, 991 [2016]). Labor Law § 200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Chowdhury v Rodriguez*, 57 AD3d 121, 127-128 [2008]). Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the plaintiff’s work, or who have actual or constructive notice of the

unsafe condition that caused the underlying accident (*Lombardi v Stout*, 80 NY2d 290, 294-295 [1992]; *Aranda v Park E. Constr.*, 4 AD3d 315, 316-317 [2004]; *Ortega v Puccia*, 57 AD3d 54, 60-64 [2008]). Specifically, if a cause of action is based upon an allegedly dangerous premises condition, a general contractor may be liable under theories of “common-law negligence and under Labor Law § 200 when the . . . general contractor has control over the work site and either created the dangerous condition causing an injury, or failed to remedy the dangerous or defective condition while having actual or constructive notice of it” (*Rodriguez v HY 38 Owner, LLC*, 192 AD3d 839, 841 [2021], quoting *Abelleira v City of New York*, 120 AD3d 1163, 1164 [2014]).

On the other hand, “[w]here a plaintiff’s claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work” (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2011]). Additionally, “[g]eneral supervisory authority to oversee the progress of the work is insufficient to impose liability” (*id.*). Moreover, “[i]f 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” (*id.*).

The court finds that LIRO has failed to establish prima facie that it did not control the means and methods of the work at the worksite (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352-353 [1998]; *Seem v Premier Camp Co., LLC*, 200 AD3d 921, 926 [2021]; *Hammer v ACC Constr. Corp.*, 193 AD3d 455, 456 [1st Dept 2021]). Accordingly,

the remaining branch of LIRO's motion for summary judgment, seeking dismissal of plaintiff's Labor Law § 200 and common-law negligence claims as against it, is denied.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment on the issue of liability under Labor Law § 241 (6), predicated on alleged violations of Industrial Code §§ 23-1.7 (e) (1) and/or (2), as against defendant LIRO, is denied; and it is further

ORDERED that the branch of defendant LIRO's motion for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim as against it, is granted without opposition, and that cause of action is dismissed;¹² and it is further

ORDERED that the branch of defendant LIRO's motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim as against it, is granted to the extent that plaintiff's claims of violations of Industrial Code §§ 23-1, 23-1.3, 23-1.31, and 23-1.32 are dismissed, and the remainder of this branch of LIRO's motion is denied; and it is further

ORDERED that the branch of defendant LIRO's motion for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims as against it is denied.

This constitutes the decision and order of the court.

ENTER,



Hon. Debra Silber, J.S.C.

¹² While there is no cause of action asserted in plaintiff's complaint under Labor Law § 240 (1) it is included in his bill of particulars. Presumably this is why defendant included it in the motion.