At an IAS Term, Part 83 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 3rd day of January, 2023.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

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EDUARDO FLOR,

Plaintiff,

-against-

BROADWAY CONSTRUCTION GROUP LLC and
BOND STREET OWNER, LLC,

Defendants.

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BROADWAY CONSTRUCTION GROUP LLC and
BOND STREET OWNER, LLC,

Third-Party Plaintiffs,

-against-

MANHATTAN CONCRETE LLC,

Third-Party Defendant.

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BROADWAY CONSTRUCTION GROUP LLC and
BOND STREET OWNER, LLC,

Second Third-Party Plaintiffs,

-against-

ALLIED WORLD INSURANCE COMPANY,

Second Third-Party Defendant.

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DECISION AND ORDER

Index No. 525214/2018

Mot. Seq. Nos. 2-3

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion, Affirmations, and Exhibits Annexed	60-71; 73-91
Opposing Affirmations and Exhibits Annexed	99-104; 106-110; 112
Reply Affirmations	114-115
Sur-Reply and Exhibits Annexed	122-125

Upon the foregoing papers in this personal injury action premised on common-law negligence and alleged violations of Labor Law §§ 240 (1), 241 (6), and 200, plaintiff Eduardo Flor ("Plaintiff") moves (Mot. Seq. No. 2) for an order, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law § 241 (6), as predicated on the alleged violations of Industrial Code §§ 23-1.7 (d) and (e) (2), as against defendants/third-party plaintiffs/second third-party plaintiffs Broadway Construction Group LLC ("BCG") and Bond Street Owner, LLC ("Owner"), whereas BCG and Owner (collectively, "Defendants") jointly move (Mot. Seq. No. 3) for an order, pursuant to CPLR 3212, granting them summary judgment as against: (1) Plaintiff, dismissing his entire complaint as against them; and (2) third-party defendant Manhattan Concrete LLC ("MC") and second third-party defendant Allied World Insurance Company ("AWIC"), granting them contractual indemnification, in each instance. Plaintiff, while generally opposing the branch of Defendants' motion which is for summary judgment as against him, does not oppose the dismissal of his Labor Law § 240 (1) claim in its entirety.

On Monday, September 17, 2018, a new hotel was being erected at 61 Bond Street in Brooklyn, New York (the "project"). Owner was the project developer, while BCG acted as the project's general contractor and supervising construction manager.[1] MC was the project's concrete/rebar subcontractor. Plaintiff – a carpenter employed by MC for the preceding four months at the project – reported to (and received all of his instructions from) his foreman.[2]

Shortly before the accident, Plaintiff was constructing wooden forms on the 12th-floor deck which was then an open area with a permanent cement floor (the "deck floor"),[3] as part of the concrete superstructure work being performed by MC.[4] Plaintiff was working with a crew of other MC individuals, including his foreman and his co-worker Alessandro Macedo (the "coworker").[5] Shortly before the accident, Plaintiff's foreman had instructed him to retrieve a 4'

[1] *See* BCG Rep's EBT tr at page 13, lines 10-25; page 14, lines 2-25; page 15, lines 2-11; page 16, lines 5-25; page 17, lines 2-17.
[2] *See* Plaintiff's EBT tr at page 14, lines 6-8; page 21, lines 20-25; page 22, lines 2-7 and lines 14-20; page 31, lines 20-25; page 32, lines 2-6.
[3] *See* Plaintiff's EBT tr at page 32, lines 7-25; page 33 lines 2-7.
[4] *See* Plaintiff's EBT tr at page 22, lines 21-25; page 23, lines 2-25; page 27, lines 16-25; page 28, lines 2-25; page 29, lines 2-14; page 32, lines 7-25; page 33, lines 2-7; page 37, lines 24-25; page 38, line 2; page 47, lines 9-11.
[5] *See* Plaintiff's EBT tr at page 33, lines 21-25; page 34, lines 2-25; page 35, lines 2-25; page 36, lines 2-9; page 47, lines 20-25; page 48, lines 2-25; page 49, lines 14-25; page 50, lines 2-7; page 54, lines 6-25; page 55, lines 2-9.

x 8' sheet of plywood approximately 200 feet away on the other side of the deck floor.[6] While Plaintiff was walking back on the deck floor, carrying a sheet of plywood, he tripped over the "left[-]over pieces of steel or iron on the [deck floor]" ranging in size from four to twelve inches, causing him to fall on the floor deck,[7] with the plywood falling on top of him (the "accident").[8] He was approximately 38 years old at the time of the accident. He has not been employed since then.

Plaintiff testified at his pretrial deposition that, as an MC carpenter, he only worked with wooden materials and generated wooden debris only.[9] He further testified that whenever he generated debris as part of his work, he would clean it up himself and place it in the MC-provided trash bins.[10] He next testified that the pieces of steel or iron over (*i.e.*, the debris) which he tripped or fell were the prior night's left-overs from the iron subcontractor which had failed to remove them.[11] Plaintiff testified that he and other workers had previously complained about the regular presence of debris at the project site.[12]

Plaintiff's pretrial testimony is corroborated by the affidavit of his coworker who witnessed the accident (the "Coworker").[13] The Coworker averred in his affidavit that: (1) the area at issue had been "dirty from the day before the accident and no one bothered to pick [up the debris] that morning"; (2) "at this job site, cleanliness was not a priority"; (3) "although there was a cleaning crew, they were employed mostly as helpers and only cleaned when it got really bad or there was going to be a Department of Building inspection"; (4) Plaintiff "tripped on a piece of rebar that was construction garbage, which caused him to fall"; (5) "the piece of rebar on which Plaintiff tripped was a result of the work debris created by other workers"; (6)

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[6] *See* Plaintiff's EBT tr at page 36, lines 6-9; page 38, lines 3-25; page 39, lines 6-25; page 40, lines 2-9; page 45, lines 12-14.
[7] *See* Plaintiff's EBT tr at page 38, lines 3-25 ("pieces of steel or iron on the floor"; "pieces of metal on the floor"; "metal debris"); page 40, lines 2-25; page 41, lines 2-25 ("10 pieces of [steel or iron] approximately"); page 42, lines 2-10 ("More or less from four inches to one foot" in dimension; "debris, for sure"); page 43, lines 4-9 ("trash"); page 50, lines 8-25 ("the pieces of metal were there from six inches to one foot"); page 51, lines 12-25 ("I tripped on the metal"); page 65, lines 2-19 ("it wasn't a single piece, it was approximately 10 pieces"); page 68, lines 20-22 ("I tripped over the piece of metal"); page 73, lines 2-3 ("In the place I was walking through [, it] was just the iron").
[8] *See* Plaintiff's EBT tr at page 38, lines 3-25; page 52, lines 15-25; page 53, lines 2-24.
[9] *See* Plaintiff's EBT tr at page 43, lines 7-9, 16-21; page 122, lines 13-19.
[10] *See* Plaintiff's EBT tr at page 122, lines 23-25; page 123, lines 2-25; page 124, lines 2-11.
[11] *See* Plaintiff's EBT tr at page 43, lines 10-15, 22-25; page 44, lines 2-17; page 119, lines 2-13.
[12] *See* Plaintiff's EBT tr at page 71, lines 23-25; page 72, lines 2-22; page 118, lines 5-10.
[13] *See* Coworker's Aff., page 1.

"[Plaintiff] and [the Coworker] did not use rebar"; and (7) "as carpenters, [Plaintiff and the Coworker] were not responsible for picking up garbage."[14]

The topic of the clean-up of construction debris was covered at the pretrial deposition of BCG's Assistant Project Manager Joseph Napolitano ("BCG's rep"). According to BCG's rep: (1) BCG was responsible for ensuring that the construction debris was cleaned up and its laborers were responsible for general housekeeping and cleanup;[15] (2) the trade contractors at the project site were responsible for cleaning and picking up their respective garbage or debris;[16] (3) MC's carpenters generated wooden debris, and MC's "rebar guys," who worked on a different phase of the concrete work,[17] generated metal debris;[18] and (4) MC's obligation to clean and pick up its garbage and debris was ongoing throughout the workday.[19] BCG's rep further testified that: (1) if BCG observed that the debris removal was required on the deck floor, BCG would direct MC to clean it up in the morning;[20] and (2) BCG typically would not be responsible for the condition of the deck floor.[21]

A bit of history will explain how Defendants' litigation with AWIC and MC came to be presented. As part of the project, BCG initially entered into a contract, dated February 26, 2016, with non-party Park Side Construction Builders Corporation ("PSCB") for the superstructure concrete work (the "PSCB Contract"). Pursuant to the PSCB Contract, PSCB was responsible for removing all of its own debris.[22]

In connection with the PSCB Contract, on August 9, 2016, AWIC, as surety, executed a Performance Bond and a Payment Bond on behalf of PSCB, as principal, in favor of BCG and Owner, as obligees, each in the penal sum of $9.3 million. Previously, PSCB had executed and delivered an Agreement of Indemnity in favor of AWIC, pursuant to which PSCB irrevocably appointed and designated AWIC (and the latter's designees) as its attorney-in-fact.

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[14] *See* Coworker's Aff., pages 1-2.
[15] *See* BCG Rep's EBT tr at page 24, lines 22-25; page 25, lines 2-25; page 26, lines 2-5; page 28, lines 7-25; page 29, lines 2-16.
[16] *See* BCG Rep's EBT tr at page 25, lines 17-25; page 26, lines 2-5.
[17] In that regard, BCG's rep explained (at page 34, lines 3-25; and at page 35, lines 2-3 of his pretrial deposition) that the carpenters performed their form work first, after which the lathers, who worked on the rebar, performed their work.
[18] *See* BCG Rep's EBT tr at page 30, lines 14-25; page 31, lines 2-13; page 108, lines 23-25; page 109, lines 2-8.
[19] *See* BCG Rep's EBT tr at page 77, lines 14-20; page 92, lines 6-16; see also page 26, lines 2-5; page 89, lines 24-25; page 90, lines 2-12.
[20] *See* BCG Rep's EBT tr at page 42, line 25; page 43, lines 2-22; page 55, lines 11-25; page 56, lines 2-9.
[21] *See* BCG's EBT tr at page 54, lines 6-10.
[22] *See* PSCB Contract, General Scope of Work, ¶ 21 at page 11; ¶ 36 at page 28.

By letter, dated June 1, 2018, PSCB voluntarily defaulted in the performance of its obligations under the PSCB Contract. Shortly thereafter, BCG and Owner jointly entered with AWIC (as PSCB's surety) into a Surety Takeover Agreement, dated June 21, 2018, for the latter's undertaking of completion of PSCB's work under the PSCB Contract (the "Takeover Agreement"). In the Takeover Agreement, AWIC designated MC as the entity responsible for completing PSCB's superstructure work under the PSCB Contract.

As relevant at this stage of the case, the Takeover Agreement (in ¶¶ 1-2 on page 2 thereof) provides that:

> "WHEREAS, pursuant to its rights and obligations as set forth in the Performance Bond, [AWIC] has elected to complete the [PSCB] Contract through, and [BCG and Owner have] agreed to accept, [MC] . . . , as completion contractor, who is ready, willing, and able to perform and complete all of the work required to be performed under the [PSCB] Contract in accordance with the terms and conditions thereof, subject to, and in accordance with, the terms and conditions further set forth below.
> 1. All terms, covenants, and conditions of the [PSCB] Contract are incorporated herein by reference and shall be binding on [AWIC] to the same extent as [PSCB] would be so bound, to the fullest extent reasonably possible, except as to the extent expressly modified by this [Takeover] Agreement. In arranging for completion of the Project as described herein, [AWIC] is acting in its capacity as performance bond surety for [PSCB] and not as a completion contractor.
> 2. [AWIC] hereby agrees to complete the [PSCB] Contract in accordance with the terms and conditions thereof, except to the extent expressly modified herein, and the Performance Bond, through [MC]" (emphasis omitted).

On June 30, 2018, AWIC entered into a contract with MC to complete PSCB's scope of work for the project as required by the PSCB Contract (the "MC Contract"). The MC Contract contains two relevant provisions. First, the MC Contract (in ¶ 3 on pages 3-4 thereof) provides that:

> "This Agreement consists of the terms and provisions herein, the proposal by [MC,] dated May 30, 2018, attached hereto . . . , all documents or specific portions of documents which may be referred to herein or in any Exhibits attached hereto and incorporated by reference herein, the [PSCB] Contract (including all General, Supplementary, and Special Conditions, drawings, specifications, forms, addenda and documents forming a part of the [PSCB] Contract), and any modifications to the [PSCB] Contract, as well as all written notices issued by [BCG] to [PSCB], including but not limited to notices alleging delay and improper work, the granting or denial of additional time, and nonconforming materials, and including all inspection reports pursuant to inspections of [PSCB's]

> work and materials, all of which are incorporated herein by reference and which are hereinafter referred to collectively as the '[PSCB] Contract Documents.'"

Second, the MC Contract provides (in ¶ 6 on page 5 thereof) that:

> "[MC] shall be bound to [AWIC] by all of the terms and provisions of the [PSCB] Contract Documents, including administrative as well as technical provisions, and shall strictly comply therewith in all respects. Furthermore, [MC] shall be bound to [AWIC] in the same manner and to the same extent that [AWIC] and [PSCB] or either of them would be bound to [BCG] under the [PSCB] Contract, including . . . the conditions or determinations by [BCG] with respect to work done thereunder."

On December 14, 2018, Plaintiff commenced the instant action against BCG and the Owner (*i.e.*, Defendants herein). After joinder of issue, Defendants (acting jointly) separately impleaded MC and AWIC under (among other legal theories) contractual indemnification. On May 6, 2022, Plaintiff filed a note of issue and certificate of readiness.

The recitation of the third-party litigation would not be complete without reference to a separate action that was concurrently commenced on January 17, 2020 (and that was likewise concurrently concluded on May 20, 2022) by BCG and Owner against AWIC in Supreme Court, New York County, under Index No. 650430/2020 (the "NY County action"). Therein, BCG and Owner sought damages from AWIC as a result of the alleged delays caused by the failure of PSCB and MC to adhere to the project schedule and as a result of the substandard work of those contractors, for which AWIC was contractually responsible.[23] Approximately two years later on January 24, 2022, AWIC impleaded MC in the NY County action for its alleged breach of the MC Contract with AWIC. Shortly after Plaintiff had filed a note of issue/certificate of readiness in this action on May 6, 2022, BCG, Owner, and AWIC entered into a Settlement Agreement on May 11, 2022 in the NY County Action (the "NY County Settlement Agreement"). The NY County Settlement Agreement recited, in its prefatory part, that BCG, Owner, and AWIC wished to compromise and resolve, *to the fullest extent possible, all claims asserted by BCG and/or Owner against AWIC and all claims asserted by AWIC against BCG and/or Owner.*"[24] Substantively, the NY County Settlement Agreement provides, in relevant part, that:

> (¶ 1) "In full and final settlement of all claims asserted by BCG and Owner against [AWIC] and all claims asserted by [AWIC] against BCG [and] Owner . . . , [AWIC] shall pay the sum of $4,100,000.00 to BCG and Owner ('the Settlement Payment'). . . ."

[23] *See* Complaint in the NY County action, ¶ 1.
[24] See NY County Settlement Agreement, the last "Whereas" clause on page 2 (emphasis added).

> (¶ 2) "*Except* with respect to the obligations created by or arising under this [NY County] Settlement Agreement and *as otherwise set forth below*, and subject to receipt of the Settlement Sum in good funds, and without the need for further or additional documentation, *BCG and Owner, jointly and severally, hereby release [AWIC]* and all of its past, present, and future employees, agents, representatives, attorneys, accountants, auditors, insurers, officers, directors, managers, parents, subsidiaries, affiliates, divisions, predecessors, reinsurers, successors, and assigns from *any and all claims, damages, actions, suits, causes of action, rights, liens, demands, obligations, claims for attorneys' fees, and/or liabilities, in law or equity, arising from or relating in any manner whatsoever to* the Bonds, *the [PSCB] Contract, the Takeover Agreement, and/or the Project, whether known or unknown, existing as of the Effective Date* or arising in the future, pursuant to contract, statute, or common law" (emphasis added).
> (¶ 5) "Upon the Settlement Payment clearing the account of BCG and Owner, the Parties shall cooperate to execute and file all papers necessary to discontinue all litigation among them relating in any manner to the Bonds, the [PSCB] Contract, the Takeover Agreement and/or the Project with prejudice . . . , except that [AWIC's] third-party action against [MC] [in the NY County action] may be dismissed without prejudice."
> (¶ 14) "*In the event that any term of this [NY County] Settlement Agreement shall be interpreted in such a manner as to be overbroad*, vague, invalid, or unenforceable by any court of competent jurisdiction, *such provision shall be enforced to the fullest extent permissible to effectuate the intent of the Parties*, and all other provisions and terms of this [NY County] Settlement Agreement shall remain unaffected" (emphasis added).

On May 20, 2022, the parties to the NY County Settlement Agreement filed a Stipulation of Discontinuance, dated May 15, 2022, in the NY County Action. Notwithstanding the aforementioned settlement of the NY County Action, no corresponding stipulation of discontinuance of the third-party actions was filed in this action.

On July 5, 2022, Plaintiff and Defendants timely served their respective motions for summary judgment. On September 15, 2023, the Court heard oral argument, reserving decision on both motions. Additional facts are stated when relevant to the discussion below.

It is well established that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Ayotte v. Gervasio,* 81 NY2d 1062, 1063 [1993], citing *Alvarez v. Prospect Hospital,* 68 NY2d 320, 324 [1986]; *Zapata v. Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form,

sufficient to establish the existence of material issues of fact which require a trial of the action. (*Zuckerman v. City of New York,* 49 NY2d 557 [1980]).

Summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable (*Elzer v. Nassau County*, 111 A.D.2d 212, [2nd Dept. 1985]; *Steven v. Parker*, 99 AD2d 649, [2nd Dept. 1984]; *Galeta v. New York News, Inc.*, 95 AD2d 325, [1st Dept. 1983]). When deciding a summary judgment motion, the Court must construe facts in the light most favorable to the non-moving party (*Marine Midland Bank N.A. v. Dino & Artie's Automatic Transmission Co.,* 168 AD2d 610 [2d Dept. 1990]; *Rebecchi v. Whitemore,* 172 AD2d 600 [2d Dept. 1991]).

"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 [2d Dept 2023] [internal quotation marks omitted]). The plaintiff must establish a prima facie entitlement to judgment as a matter of law on this cause of action based upon a specific violation of a section of the Industrial Code and that this violation was a proximate cause of his injuries (*see Grant v City of NY*, 109 AD3d 961, 963 [2d Dept 2013]). The plaintiff will prevail if the opposing party fails to raise a triable issue of fact (*id.*). For a defendant to prevail, it must demonstrate, prima facie, that those provisions of the Industrial Code asserted by the plaintiff are inapplicable to the facts of this case (see *Cruz v 1142 Bedford Ave., LLC*, 192 AD3d 859, 863 [2d Dept 2021]).

Here, Plaintiff relies on two Industrial Code provisions – Industrial Code §§ 23-1.7 (d) and 23-1.7 (e) (2) – to establish his entitlement to partial summary judgment on the issue of liability on his Labor Law § 241 (6) claim. The first relied-on provision – Industrial Code § 23-1.7 (d) ("Slipping hazards") – states that "[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a *slippery* condition. Ice, snow, water, grease and any other foreign substance which may cause *slippery* footing shall be removed, sanded or covered to provide safe footing" (emphasis added). In this case, however, Plaintiff alleges that he *tripped and fell* on a piece of debris or discarded rebar that should have been removed from (but had been left on) the deck floor. The debris or discarded rebar on which Plaintiff allegedly tripped and fell did not constitute the type of foreign substance that would pose a *slipping* hazard as contemplated by

Industrial Code § 23-1.7 (d) (*see e.g. Nankervis v Long Is. Univ.*, 78 AD3d 799, 801 [2d Dept 2010]; *Salinas v Barney Skanska Const. Co.*, 2 AD3d 619, 622 [2d Dept 2003]). Accordingly, Industrial Code § 23-1.7 (d) is inapplicable to the facts of this case.

In contrast, Plaintiff's reliance on the other Industrial Code provision – Industrial Code § 23-1.7 (e) (2) ("Tripping and other hazards") – is well founded. This provision reads 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" (emphasis added). Here, Plaintiff's pretrial testimony (as corroborated by the Coworker's affidavit) that he tripped and fell on the debris and/or discarded rebar, while traversing the deck floor, has established his prima facie entitlement to summary judgment that Defendants violated Industrial Code 12 NYCRR § 23-1.7 (e) (2), because the deck floor constituted a passageway and the debris/discarded rebar created a tripping hazard within the meaning of the regulation. In opposition, Defendants have submitted no evidence controverting plaintiff's account of the accident (*see Piedra v 111 W. 57th Prop. Owner LLC*, 219 AD3d 1235 [1st Dept 2023]). Defendants' reliance on the "integral to the work defense" is misplaced. It is true that the "[t]he 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" (*Ruisech v Structure Tone Inc.*, 208 AD3d 412, 414 [1st Dept 2022]). Here, Plaintiff has demonstrated, prima facie and without serious opposition from Defendants, that the debris/rebar over which he tripped and fell were the discarded left-overs of unnecessary materials (*see Rossi v 140 W. JV Mgr. LLC*, 171 AD3d 668 [1st Dept 2019]; *Tighe v Hennegan Const. Co., Inc.*, 48 AD3d 201, 202 [1st Dept 2008]; *accord Kavouras v Steel-More Contr. Corp.*, 192 AD3d 782, 784 [2d Dept 2021]; *Ramsey v Leon D. DeMatteis Const. Corp.*, 79 AD3d 720, 723 [2d Dept 2010]).[25] Lastly, any possible comparative negligence on plaintiff's part does not preclude liability founded on a violation of Labor Law § 241 (6) (*see Rodriguez v City of NY*, 31 NY3d 312, 324-325 [2018]).

While Plaintiff also alleges violations of Industrial Code §§ 23-2.1, 23-2.2, 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-2.3, 23-2.4, and 23-6.1 as additional predicates for his Labor Law §

[25] *Cf. Martinez v 281 Broadway Holdings, LLC*, 183 AD3d 712, 714 (2d Dept 2020); *Mitchell v Caton on Park, LLC*, 167 AD3d 865, 866 (2d Dept 2018), *lv denied* 33 NY3d 903 (2019).

241 (6) claim, he has since abandoned reliance on those provisions by failing to address them in his opposition to Defendants' motion (*see Debennedetto v Chetrit*, 190 AD3d 933, 935 [2d Dept 2021]; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]; *Harsch v City of NY*, 78 AD3d 781, 783 [2d Dept 2010]).

Labor Law § 200 is a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*see Chowdhury v Rodriguez*, 57 AD3d 121, 127-128 [2008]). Where, as here, "a claim arises out of an alleged dangerous premises condition, a property owner or general contractor may be held liable in common-law negligence and under Labor Law § 200 when the owner or general contractor has control over the work site and either created the dangerous condition causing an injury, or failed to remedy the dangerous or defective condition while having actual or constructive notice of it" (*Abelleira v City of NY*, 120 AD3d 1163, 1164 [2d Dept 2014]).

Here, Plaintiff has failed to establish, prima facie, that Defendants either created or had actual or constructive notice of the allegedly dangerous condition of the deck floor – the debris and the discarded rebar – constituting a proximate cause of the accident (*see Abelleira*, 120 AD3d at 1164). In contrast, Defendants have established, prima facie, their entitlement to judgment as a matter of law dismissing Plaintiff's Labor Law § 200/common-law negligence claim as against them, by demonstrating that they (or either of them) did not create or have actual or constructive notice of the condition that Plaintiff alleged caused his injuries and that they (or either of them) had no authority to supervise or control the means and methods of his work at the time of his accident (*see Panfilow v 66 E. 83rd St. Owners Corp.*, 217 AD3d 875, 879 [2d Dept 2023]; *Saitta v Marsah Props., LLC*, 211 AD3d 1062, 1064 [2d Dept 2022]). In opposition, Plaintiff has failed to raise an issue of fact.

The threshold issue is whether the NY County Settlement Agreement, which contains no explicit exclusion for the third-party claims in this action, bars and precludes Defendants' third-party claims against AWIC and MC in this action.[26] "Generally, a valid release completely bars

[26] Contrary to Defendants' contention, it is appropriate for the Court to consider the terms and conditions of the NY County Settlement Agreement. It is correct, as Defendants point out, that CPLR 3018 (b) requires that "[a] party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading such as . . . release. . ." Nonetheless, "an unpleaded defense may serve as the basis for granting summary judgment in the absence of surprise or prejudice to the opposing party" (*Sullivan v Am. Airlines, Inc.*, 80 AD3d 600, 602 [2d Dept 2011]), and, what's more, a "court may grant summary judgment based upon an unpleaded defense where[, as here,] reliance upon that defense neither surprises nor prejudices the [third-party] plaintiff[s]") (*Penn Hydro, Inc. v B.V.R. Constr. Co., Inc.*, 218 AD3d 1253,

an action on a claim that is the subject of the release" (*Burnside 711 LLC v Amerada Hess Corp.*, 109 AD3d 860, 861 [2d Dept 2013]). "A release is governed by principles of contract law, and a release that is complete, clear, and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Inter-Reco, Inc. v Lake Park 175 Froehlich Farm, LLC*, 106 AD3d 955, 955 [2d Dept 2013]).

Here, the terms of the NY County Settlement Agreement are ambiguous as to whether Defendants' third-party claims against AWIC and MC in this action were released. On the other hand, Section 2 of the NY County Settlement Agreement provides that "*[e]xcept . . . as otherwise set forth below, . . . BCG and Owner*, jointly and severally, hereby *release [AWIC] . . . from any and all claims, damages, actions, suits, causes of action, rights, liens, demands, obligations, claims for attorneys' fees, and/or liabilities, in law or equity, arising from or relating in any manner whatsoever to . . . the [PSCB] Contract . . . and/or the Project, whether known or unknown, existing as of the Effective Date*" (emphasis added). On the other hand, Section 14 thereof (*i.e.*, one of the sections that follows the aforecited Section 2) cautions that "*[i]n the event that any term of this [NY County] Settlement Agreement shall be interpreted in such a manner as to be overbroad [or] vague . . . , such provision shall be enforced to the fullest extent permissible to effectuate the intent of the Parties . . .*" (emphasis added).

"Whether an agreement is ambiguous is a question of law for the courts" (*Kass v Kass*, 91 NY2d 554, 566 [1998]). "Ambiguity is determined by looking within the four corners of the document, not to outside sources" (*id.*). In deciding whether an agreement is ambiguous, "[t]he court should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance, and a sensible meaning of words should be sought" (*Atwater & Co. v. Panama R.R. Co.*, 246 NY 519, 524 [1927]). Here, the relevant provisions of the NY County Settlement Agreement (in particular, Section 2 thereof when read in conjunction with Section 14 thereof) are ambiguous as to whether it included (and, if so included, released) the third-party claims in this action. Thus, a framed-issue

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1256 [4th Dept 2023] [internal quotation marks omitted; alterations added]). What's more, it cannot be seriously disputed here that the parties *did* enter into the NY County Settlement Agreement, with the sole issue being whether the parties intended, by the terms thereof, to include the third-party claims in this action.

Louie v Plissner, 174 AD3d 607, 609 [2d Dept 2019]; *Matter of TBA Glob., LLC v Fidus Partners, LLC*, 132 AD3d 195, 208 n 13 [1st Dept 2015]; *239 E. 115th St. HDFC v Olunkunle*, 29 Misc 3d 64, 67 [App Term, First Dept 2010]).[27]

Accordingly, it is hereby,

ORDERED that Plaintiff's motion (Mot. Seq. No. 2) is *granted to the extent* that Plaintiff is granted partial summary judgment on the issue of liability on his Labor Law § 241 (6) claim, as predicated solely on the alleged violation of Industrial Code § 23-1.7 (e) (2) ("Tripping and other hazards"), as against both Defendants, and his motion is otherwise denied; and it is further,

ORDERED that Defendants' motion (Mot. Seq. No. 3) is *granted to the extent* that: (1) Plaintiff's Labor Law § 240 (1) claim; his Labor Law § 241 (6) claim, with the sole exception of Industrial Code § 23-1.7 (e) (2) ("Tripping and other hazards"); and his Labor Law § 200/common-law negligence claim; are all dismissed with prejudice as against Defendants; and (2) the issue of whether the NY County Settlement Agreement included (and, if so included, released) Defendants' third-party claims as against each of AWIC and MC is referred to a special referee for a framed-issue hearing to hear and report (or to hear and determine if the parties so agree) in accordance with this decision and order; and the remainder of Defendants' motion is denied; and it is further,

ORDERED that Plaintiff's counsel is directed to electronically serve a copy of this decision and order with notice of entry on the other parties' respective counsel and to electronically file an affidavit of service thereof with the Kings County Clerk; and it is further,

ORDERED that the parties are reminded on their next scheduled, in-person appearance for a settlement conference in JCP-1 on April 1, 2024, at 10 a.m.

All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the Court.

HON. INGRID JOSEPH, J.S.C.
Hon. Ingrid Joseph
Supreme Court Justice

[27] According to the affidavit of the Owner's parent company's managing director and general counsel (who signed the NY County Settlement Agreement on the Owner's behalf), "the [NY County] [S]ettlement [A]greement should not be deemed to include a release of any indemnification issues arising out of personal injury actions, as this was never the intent of [the Owner] or BCG" (*see* Affidavit of Ilya Braz, dated September 13, 2023, ¶ 20 [emphasis omitted]).