

Duran v 200 SJA Montague LLC

2025 NY Slip Op 31049(U)

March 31, 2025

Supreme Court, Kings County

Docket Number: Index No. 507852/2021

Judge: Richard J. Montelione

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At IAS Part 99 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, NY 11201, on the ___ day of March 2025.

MAR 31 2025

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 99

**DECISION
and
ORDER**

-----X
WALTER DURAN,

Plaintiff,
-against-

Index No.: 507852/2021
Mot. Seq. Nos.: 5&6

200 SJA MONTAGUE LLC, et al.,

Defendants.
-----X

After oral argument, the following papers were read on this motion pursuant to CPLR 2219(a):

<u>Papers</u>	<u>NYSCEF DOC. #</u>
MS#5	
Defendants 200 SJA Montague, LLC, Aurora Capital Associates, LLC, Cauldwell-Wingate Company, LLC and Cauldwell-Wingate Company, Inc.'s motion pursuant to CPLR 3212 dismissing the complaint and granting summary judgment and supporting papers.....	93-107
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Defendants 200 SJA Montague, LLC, Aurora Capital Associates, LLC, Cauldwell-Wingate Company, LLC and Cauldwell-Wingate Company, Inc.'s Reply	128-129
MS#6	
Plaintiff's motion pursuant to CPLR §3212 1) granting plaintiff partial summary judgment against 200 SJM Montague LLC, Aurora Capital Associates, LLC, ACHS Management Corp., Cauldwell Wingate Company LLC and Cauldwell-Wingate Company, Inc., pursuant to Labor Law §241(6), and; 2) pursuant to CPLR §3212 granting plaintiff partial summary judgment against 200 SJM Montague LLC, Aurora Capital Associates, LLC, ACHS Management Corp., Cauldwell Wingate Company LLC and Cauldwell-Wingate Company, Inc., pursuant to Labor Law §200, and; 3) pursuant to CPLR § 603 and §1010 to sever the third-party action.....	109-119
Defendants 200 SJA Montague, LLC, Aurora Capital Associates, LLC, Cauldwell-Wingate Company, LLC and Cauldwell-Wingate Company, Inc.'s opposition papers.....	120, 127, 134
Plaintiff's Reply.....	137

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MONTELIONE, RICHARD J., J.

Plaintiff commenced the instant action against defendants by filing the summons and complaint on April 2, 2021, for personal injuries arising out of a workplace accident occurring on February 23, 2021, when he was employed by third-party defendant Pasenti Concrete Inc., and while working on a rebar crew at 200 Montague Street, Brooklyn, New York (the Premises). (NYSCEF Doc. No. 1.) Plaintiff alleges violations of Labor Law §§ 200, 240(1), and 241(6). Regarding Labor Law § 241(6), plaintiff alleges violations of Part 23 of the Industrial Code. Plaintiff also alleges violation of OSHA Regulations. Plaintiff asserts that while he and others were carrying a forty-foot piece of rebar, plaintiff slipped on a piece of loose rebar, on the rebar grid, which rolled forward causing his right foot – up to his ankle – to fall into a lower layer of the rebar grid, then causing him to fall backwards onto the rebar grid, from which he suffered resulting injuries. (NYSCEF Doc. No. 97, Transcript Page (T.) 87:3-20).

Defendant Aurora Capital Associates, LLC was served with the Summons and Attorney-Verified Complaint on April 8, 2021. (NYSCEF Doc. No. 2.) Defendants 200 SJA Montague, LLC; ACHS Management Corp.; Cauldwell-Wingate Company, LLC; and Cauldwell-Wingate Company, Inc. were served on April 9, 2021. (NYSCEF Doc. Nos. 3, 8, 4 & 7 respectively.)

Issue was joined as to defendants 200 SJA Montague, LLC; ACHS Management Corp.; Cauldwell-Wingate Company, LLC; and Cauldwell-Wingate Company, Inc. on August 11, 2021 when they appeared by counsel and answered. (NYSCEF Doc. 11.) On January 9, 2023, Defendant Aurora Capital Associates, LLC, was found by the court to be in default (NYSCEF Doc. No. 53). A stipulation was entered into on June 6, 2024, and “So Ordered” on June 6, 2024, vacating Aurora Capital Associates, LLC’s default (NYSCEF Doc. No. 106) wherein Plaintiff agreed to accept Aurora Capital Associates, LLC’s late answer (filed on May 15, 2024 – NYSCEF Doc. No. 89).

Defendants 200 SJA Montague, LLC; Aurora Capital Associates, LLC; Cauldwell-Wingate Company, LLC; and Cauldwell-Wingate Company, Inc. move for summary judgment (MS#5) against plaintiff.

Plaintiff moves against defendants 200 SJA Montague, LLC; Aurora Capital Associates, LLC; ACHS Management Corp.; Cauldwell-Wingate Company, LLC; and Cauldwell-Wingate Company, Inc. for partial summary judgment pursuant to Labor Law § 241(6) and Labor Law § 200; and pursuant to CPLR 603 and CPLR 1010 to sever the third-party action. (NYSCEF No. 109.)

The well-known standards to be applied by the trial courts regarding motions for summary judgment are found in *Ayers v City of Mount Vernon*, 176 AD3d 766, 769 [2d Dept 2019]:

‘[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’ (*Alvarez v Prospect Hosp.*, 68 NY2d 320,

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324, 508 NYS2d 923, 501 NE2d 572; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642; see *Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718). ‘Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers’ (*Alvarez v Prospect Hosp.*, 68 NY2d at 324, 508 NYS2d 923, 501 NE2d 572; see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853, 487 NYS2d 316, 476 NE2d 642). ‘Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action’ (*Alvarez v Prospect Hosp.*, 68 NY2d at 324, 508 NYS2d 923, 501 NE2d 572; see *Zuckerman v City of New York*, 49 NY2d at 562, 427 NYS2d 595, 404 NE2d 718).

“[O]nly if (movant’s) burden is met does the burden then shift to the party opposing summary judgment to tender evidence, in a form admissible at trial, sufficient to raise a triable issue of fact.” *Reyes v. Arco Wentworth Mgmt. Corp.*, 83 A.D.3d 47, 50, [2d Dept 2011].

MS#5-Defendants 200 SJA Montague, LLC, Aurora Capital Associates, LLC, Cauldwell-Wingate Company, LLC and Cauldwell-Wingate Company, Inc.’s Motion for Summary Judgment and MS#6-Plaintiff’s Motion for partial Summary Judgment

Labor Law §240(1)

Defendants argue this is not a valid Labor Law § 240(1) case as plaintiff did not fall all the way through the rebar grid. Further, Labor Law § 241(6) does not apply because no Industrial Code violations occurred and plaintiff’s Labor Law § 200 common law claims must be dismissed because the defendants did not control the means or methods of the plaintiff’s work. (NYSCEF No. 94.)

Labor Law § 240(1) states in pertinent part as follows:

All contractors and owners and their agents, ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, *scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices* which shall be so constructed, placed and operated as to give proper protection to a person so employed....
(emphasis added)

Labor Law § 240(1) imposes absolute or strict liability for violations on all contractors, owners, and their agents. (See *Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280 [2023].) As such, in order for defendants to meet its prima facie burden,

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defendants must show that the statute does not apply and was not violated because it did not involve an elevation-related hazard to which protective devices are designed to apply (i.e. scaffolding, hoists, etc.; *see Avila v Plaza Const. Corp.*, 73 AD3d 670, [2d Dept 2010]). “[L]iability arises under Labor Law § 240 (1) only where the plaintiff’s injuries are the ‘direct consequence’ of an elevation-related risk, not a separate and ordinary tripping or slipping hazard.” (*Id.* at 860-861.) (citations omitted).

The transcript from the plaintiff’s examination before trial (EBT) was submitted by defendants in support of their motion. During the EBT, plaintiff testified that at the time of the accident on February 23, 2021, at 9:25 a.m., he was employed by the non-party Pasenti Concrete Inc. On the day of the accident, he was in a three-person line of workers (it was supposed to be four; NYSCEF #97, T. 17-21), having spaced themselves out, and tasked with carrying individual rebar pieces into place on a rebar grid. (NYSCEF Doc. No. 97, T. 17-20.) The individual rebars would be carried one by one from a bundle of 40-foot rebars to the place of installation on the rebar grid. (NYSCEF Doc. No. 97, T. 57:17-19.) While holding a rebar piece of approximately 40-feet and weighing approximately 200 lbs. (NYSCEF Doc. No. 97, T. 20:13), plaintiff stepped on an unsecured six-foot piece of rebar on the rebar grid, which rolled and caused his foot to slide off the unsecured bar and caused him to fall backwards onto the rebar grid. (NYSCEF Doc. No. 97, T. 60:7-15.) The rebar grid was at the ground level and plaintiff’s fall was not a result of an elevation-related risk stemming from a physically significant elevation differential. Therefore, defendants argue, Labor Law § 240(1) is not applicable here.

Legal Analysis-Labor Law §240(1)

Plaintiff’s alleged accident, which occurred when plaintiff tripped over a loose six-foot rebar when he was carrying rebar with two co-workers, is not a gravity related accident that falls within Labor Law § 240(1) and therefore claims under this provision must be dismissed. “These special hazards do not encompass any and all perils that may be connected in some tangential way with the effects of gravity. Rather, they are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured” *see Gonzalez v. Turner Constr. Co.*, 29 A.D.3d 630, 631, 815 N.Y.S.2d 179 [2nd Dept 2006].

Defendants met their prima facie burden as related to Labor Law § 240(1) and plaintiff has failed to raise an issue of fact.

Labor Law § 241(6)

Labor Law § 241[6] states in pertinent part as follows:

All contractors and owners and their agents, ... 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,

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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, ... shall comply therewith. (*Emphasis added.*)

Industrial Code Part 23 “governs the protection of workers in construction, demolition and excavation operations. Its ‘application’ provision expressly states that the rules in part 23 apply to ‘owners, contractors and their agents obligated by the Labor Law to provide such persons with safe working conditions and safe places to work’ (12 NYCRR 23-1.3). Hence, it is clear that part 23 was promulgated pursuant to the authority granted by Labor Law § 241 (6) and that owners and contractors may be vicariously liable based on violations of part 23 regulations.” *Nostrom v. A.W. Chesterton Co.*, 15 N.Y.3d 502, 507–508 [2010].

Labor Law § 241[6] “impose[s] a nondelegable duty upon owners ... to vicariously respond in damages for injuries sustained due to the negligence of general contractors or subcontractors in failing to conduct their construction, demolition or excavation operations so as to provide for the reasonable and adequate protection of the person employed therein.” *Monroe v. City of New York*, 67 A.D.2d 89, 107 [1979]. Further, a plaintiff asserting a viable Labor Law § 241(6) claim “need not show that defendants exercised supervision or control over his worksite in order to establish his right of recovery.” *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]. However, a violation of the Industrial Code is a requirement for recovery under Labor Law § 241(6). (*Id.*)

In the instant action, plaintiff alleges Industrial Code violations of sections 23-1.5; 23-1.7(b)(d)(e)(f); 23-1.7(e)(1-2); 23-1.8(c); 23-1.11; 23-1.15; 23-1.22(c); 23-1.30; 23-2.1(b); and 23-2.7(a)(b)(c)(d)(e). (NYSCEF Doc. No. 96, Plaintiff’s Bill of Particulars, p. 7, ¶ 10.) Industrial Code 23-1.5 deals with general health and safety protection required and does not apply. Defendants claim that no provision of the Industrial Code was violated. (NYSCEF Doc. No. 94, ¶¶ 48-63.)

Industrial Code Sections Alleged to Have Been Violated

Industrial Code Section 23-1.7(b)(d)(f): Protection for General Hazards-Falling Hazards(b), Slipping Hazards (d), Vertical Passage (f). (Inapplicable).

Industrial Code Section 23-1.7(e)(1-2):

(e) Tripping and other hazards.

(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

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(2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Industrial Code Section 23-1.8(c): Personal protective equipment (Inapplicable).

Industrial Code Section 23-1.11: Lumber and nail fastenings (Inapplicable).

Industrial Code Section 23-1.15: Safety Railing (Inapplicable).

Industrial Code Section 23-1.22(c): Structural runways, ramps and platforms (Inapplicable).

Industrial Code Section 23-1.30: Illumination (Inapplicable).

Industrial Code Section 23-2.1(b): Maintenance and housekeeping. (Although this section deals with storage, there is no allegations or evidence that the six-foot rebar that plaintiff stepped on was stored).

Industrial Code Section 23-2.7(a)(b)(c)(d)(e): Stairway requirements during the construction of buildings (Inapplicable).

Defendants provided an affidavit from Nephtaly Cornet, a superintendent employed by Paenti Concrete on the job site where the accident occurred (NYSCEF #99). Mr. Cornet described the process of layering the rebar in a grid and specifically indicated that "(i)n the foreground of the above image you can see in the bottom of the photo a triangular area which is part of an area that is further reinforced as it will be a column, this is what that approximately six foot piece of rebar present would have been for" (NYSCEF #99, photo page 3, ¶9). The process involves rebar being carried to its final installation location by one set of workers and tied into place by another. (NYSCEF #99, ¶11). Further (NYSCEF #99, ¶¶19, 29, 30):

19. There were no random pieces of rebar laying around. All the rebar was placed on the grid because it was about to be installed. If the Plaintiff stepped on a loose piece of rebar it was only loose because it had not yet been tied in place by the crew that was tying it in place.

29. While I did not observe the incident, I was present when Mr. Duran was interviewed...

30. I did not observe any pieces of rebar in the area that was not about to be installed.

Plaintiff objects to the court's consideration of the Cornet affidavit because this non-party witness was not disclosed to plaintiff. Even though Cornet did not witness the accident, he may

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still be considered a fact witness because he looked at the work area soon after the accident and he observed plaintiff use the work ladder after the accident, which may be relevant for damages. The defendants' explanation that plaintiff was aware of this witness because he is mentioned in the incident report is rejected. Plaintiff is Spanish speaking and the supervisor's name is spelled "NEWF" in the incident report. Cornet's name is, however, mentioned in the Workers Compensation records. Regardless of whether the name may have been mentioned at a deposition or found within the Workers Compensation records, this name should have been provided to the plaintiff. Nonetheless, the court will consider the affidavit because for purposes of this motion the court assumes plaintiff tripped over a loose six-foot piece of rebar and there appears to be no dispute that plaintiff used the work ladder after the accident.

Legal Analysis-Labor Law § 241(6)

None of the plaintiff's Labor Law § 241(6) claims, predicated on violations of sections of the Industrial Code cited in plaintiff's Bill of Particulars apply, except potentially Industrial Code §23-1.7(e)(2) pertaining to tripping hazards.¹ The issue is whether the rebar that plaintiff tripped over was integral to the work being performed (*O'Sullivan v IDI Const. Co., Inc.*, 822 NYS2d 745, [Ct. of Ap. 2006].

The defendants have met their burden of showing, as a matter of law, that 12 NYCRR 23-1.7(e)(2) is inapplicable. "... (B) based on plaintiff's testimony showing that the rebar that allegedly caused him to fall was in the process of being installed and, thus, integral to the ongoing work, defeating his claim of a violation of the Industrial Code. There is no dispute here that the rebar plaintiff slipped from was integral to the work. Therefore, the Labor Law § 241 (6) claim is dismissed," *Brown v 44th St. Dev., LLC*, 48 Misc 3d 234, 246 [Sup Ct, NY County, 2015], *aff'd* 137 AD3d 703 [1st Dept 2016].) "(Defendant) established its prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 241 (6) cause of action by demonstrating that the rebar on which the plaintiff caught his pants leg was an integral part of the construction (*see Venezia v State of New York*, 57 AD3d 522, 523 [2008]). In opposition, the plaintiff failed to raise a triable issue of fact regarding the alleged violation of Labor Law § 241 (6)," *see Mitchell v Caton on the Park, LLC*, 167 AD3d 865, 866 [2d Dept 2018]; *accord Johnson v Lend Lease Construction LMB, Inc.*, 164 AD3d 1222, 1223 [2d Dept 2018].) "Industrial Code § 23-1.7 (e) (2) is also inapplicable because the rebar did not constitute debris but rather was consistent with the work being performed at the construction site (*see Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 383 [1st Dept 2007])," *see Brown v Tishman Constr. Corp. of New York*, 226 AD3d 529, 530, (AD 1st Dept 2024). "The regulation relied upon by the plaintiff does not apply where, as here, 'the object on which the plaintiff tripped ... was an integral part of the work he was performing' (*Alvia v. Teman Elec. Contr.*, 287 A.D.2d 421, 423, 731 N.Y.S.2d 462 [internal quotations omitted])," *see Marinaccio v. Arlington Cent. Sch. Dist.*, 40 A.D.3d 714, 715, (2nd Dept 2007).

The six-foot rebar, not yet secured to the rebar grid but on the grid, which was in the process of continued construction, is a condition inherent in the work itself (*see Marinaccio v.*

¹ There is no question of fact that the area where plaintiff fell through up to his ankle is not a hazardous opening (NYCRR 23-1.7[b][1]) because it was not large enough to fit his entire body. *Vitale v Astoria Energy II, LLC*, 138 AD3d 981 [2d Dept 2016].

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Arlington Cent. Sch. Dist., 40 A.D.3d 714, 715, [2nd Dept 2007]) and does not constitute a dangerous or defective condition at the work site and was otherwise readily observable.

The plaintiff has failed to raise an issue of fact that the rebar was not integral to the work or inconsistent with the work being performed or that he did not see where he was stepping.

Labor Law § 200

Labor Law § 200 states in pertinent part as follows:

1. 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 protection to all such persons. The board may make rules to carry into effect the provisions of this section.

“Labor Law § 200 (1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work’ (*Ortega v Puccia*, 57 AD3d 54, 60 [2008]). ‘Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed’ (*id.* at 61). Where ‘a claim arises out of alleged defects or dangers arising from a subcontractor’s methods or materials, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation’ (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]; *see Lombardi v Stout*, 80 NY2d 290, 295 [1992]). ‘A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed’ (*Ortega v Puccia*, 57 AD3d at 62). ‘[M]ere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200’ (*id.*; *see Suconota v Knickerbocker Props., LLC*, 116 AD3d 508, 508 [2014]).” *Poulin v. Ultimate Homes, Inc.*, 166 A.D.3d 667, 670 [2d Dept 2018].

As opposed to an injury related to the means and manner of the work performed, “when a worker at a job site is injured as a result of a dangerous or defective premises condition, a property owner’s liability under Labor Law § 200 and for common-law negligence ‘rests upon whether there is evidence that the property owner created the condition, or had actual or constructive notice of it and a reasonable amount of time within which to correct the condition.’” *Reyes v. Arco Wentworth Mgmt. Corp.*, 83 A.D.3d at 49. (citations omitted).

Finally, a Labor Law § 200 claim may arise due to both a dangerous workplace condition, and a danger created due to the manner and means of the work, rendering concurrent causes of plaintiff’s injuries. (*Id.* at p. 50.) “[W]hen an accident is alleged to involve defects in both the premises and the equipment used at the work site, the property owner moving for summary judgment with respect to causes of action alleging a violation of Labor Law § 200 is

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obligated to address the proof applicable to both liability standards. Defendants moving for summary judgment with respect to causes of action alleging a violation of Labor Law § 200 and common-law negligence must examine the plaintiff's complaint and bill of particulars to identify the theory or theories of liability, in order to properly direct proof to premises issues, or means and methods issues, or both, as may be indicated on a case-by-case basis. The property owner is entitled to summary judgment only when the evidence exonerates it as a matter of law for all potential concurrent causes of the plaintiff's accident and injury, and when no triable issue of fact is raised in opposition as to either relevant liability standard." (*Id.* at 52.)

Defendants submit plaintiff's Verified Bill of Particulars that alleges plaintiff suffered injuries as a result of both a dangerous condition and a danger created by the manner and means of the work. (NYSCEF #96, ¶3).

Defendants submit an Affidavit in support of their motion from Nephtaly Cornet (Cornet) (NYSCEF Doc. No. 99), wherein Cornet states that on February 23, 2021, he was employed as a superintendent "on the job site located at 200 Montague Street, Brooklyn, NY" by Pasenti Concrete (*id.* ¶ 1). He supervised Pasenti Construction work, and "[t]he workers were directly supervised by the foremen on the job." (*Id.* ¶ 2.) Cornet "*did not observe the incident*" (*id.* ¶ 29). (emphasis added) "I understand that the Plaintiff says he stepped on a loose piece of rebar and fell. There were no random pieces of rebar laying around. ... If the Plaintiff stepped on a loose piece of rebar it was only loose because it had not yet been tied in place by the crew that was tying it in place." (*Id.* ¶¶ 18-19.)

Defendants submit the EBT transcript of Steven Catuogno (Catuogno), a senior-superintendent employee of defendant Cauldwell Wingate, the general contractor for the project (NYSCEF Doc. No. 98, pp. 7, 9-10) in support of their motion. A third-party site safety company, Total Safety, had been hired by defendant Aurora Capital, that was on site several times per week. (*Id.* at pp. 10-11.) Robert Tillis, from Total Safety was Catuogno's "safety manager." (*Id.* at 11.) When questioned about Robert Tillis's duties, Catuogno testified as follows:

Q Now, back to Robert Tillis. What were his responsibilities based on what you observed?

A Daily safety.

Q What did that involve? Did he keep Safety Logs? Did he walk the site? Did he do orientations for new employees? Just give me an idea, please, of what he did.

A All three of those items that you just mentioned. He walked the site. We'd have brief encounters. During the day, if there was any issues, we'd have to have it addressed immediately.

Q So, he had authority to stop work if he saw a condition that he believed to be unsafe; correct?

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A We gave him that authority, yes.

Q Okay, and you had that authority as well?

A Yes. He was there to advise. And, if he saw any issues immediately he would stop the work and he'd get us involved.

(*Id.* at 12-13.)

Defendants submit the EBT of plaintiff in support of their motion. (NYSCEF Doc. No. 97.) In pertinent part, plaintiff's EBT (NYSCEF #97, T. 16:8-17) states as follows:

Q. On the date of the claimed incident, sir, what were you doing when the incident occurred?

A. Lifting rebar.

Q. What were you doing with the rebar once you lifted it, sir?

A. Walking.

Q. Where were you walking with the rebar?

A. Walking forward.

Plaintiff's EBT (NYSCEF #97, T. 17:8-14) states as follows:

Q. The rebar you were carrying at this point in time, how long was it?

A. Approximately 40 feet long.

Q. Were you carrying this by yourself or with other people?

A. There were other persons next to me, helping me.

Plaintiff's EBT (NYSCEF #97, T. 18:3-4) states as follows:

Q. So were you walking on rebar?

A. Yes, sir. (*Id.* at 18.)

EBT (NYSCEF #97, T. 31:24-25, T. 32:2-14) states as follows:

Q. Can you describe the piece of rebar that you said was loose?

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A. I just happened to step on a piece of rebar that was loose.

Q. Can you describe the piece of rebar, sir, that was loose?

A. It was about a piece of rebar that was cut about six feet long laying on the ground or the floor.

Q. Again, sir, by ground or floor you mean the rebar grid?

A. Yes, sir. Right where you see those persons standing on that, that's where we would walk by.

Plaintiff's EBT (NYSCEF #97, T. 33:15) states as follows:

Q. To your understanding, was there any need for six-foot leads of rebar?

A. I have no idea why they were cut that way. (*Id.* at 33.)

Plaintiff's EBT (NYSCEF #97, T. 37:3-11) states as follows:

Q. Do you know if there were other six-foot lengths of rebar in the area where you claim you fell?

A. I don't remember. I don't remember having seen anything.

Q. Was this the first piece of rebar you tried to move that day?

A. That was the first piece of rebar that I was carrying.

Plaintiff's EBT (NYSCEF #97, T. 55:19-25, 56:3) states as follows:

Q. Sir, was it the practice to move all the rebar that was going to be installed in the area or did you move one piece and install it at a time?

A. We were more or less in the area where the across beams that you see to the left there are, and we would grab them from the pile one by one and bring them to the area where they needed to be installed.

Q. So would you move the rebar into the area first and then come back and install it, or did you move one piece and install that piece?

A. Yes, we would bring them over one by one, lay them down and

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install them but not completely. We would at least tie them down or secure them one by one.

Q. Is this always the way it was done?

A. I can't tell you specifically. We would mostly do it that way.

Plaintiff's EBT (NYSCEF #97, T. 57:12-19):

Q. Is it your understanding all the rebar that would be moved into the work area would be installed?

MR. BARBOUR: Note my objection. He can answer.

A. Yes, we would put them down where they needed to go and they would be installed one by one.

Plaintiff's EBT (NYSCEF #97, T. 84:5-8):

Q. Okay. That piece of rebar, do you know if it was used on the job site, if it was installed?

A. No, it was just laying there.

Further, defendants did not control the means and methods of the work performed by the plaintiff and mere general supervisory authority at a work site is insufficient to impose liability under Labor Law § 200. See *Pilato v 866 U.N. Plaza Assoc., LLC*, 77 AD3d 644, 909 NYS2d 80, 2010 NY Slip Op 07157, 2010 WL 3910180 [2d Dept 2010].

Defendants have met their burden, as a matter of law, in showing they did not "control" the work and although plaintiff cites *Walls v Turner Const. Co.*, 4 NY3d 861 [Ct of App 2005] in arguing that Caldwell cannot escape liability as an agent of the owner, using the AIA contract, nothing in the AIA contract implicates "control." The contract speaks of coordination and inspection of the project, to ensure that the quality of labor and material are in accordance with the contract documents and authorizes the general contractor to promptly take remedial action, if necessary. (NYSCEF #113, AIA Agreement, §2.3.1.4). "[M]ere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200" (*id.*; see *Suconota v Knickerbocker Props., LLC*, 116 AD3d 508, 508 [2014]). *Poulin v. Ultimate Homes, Inc.*, 166 A.D.3d 667, 670 [2d Dept 2018].

CPLR 603 and CPLR 1010

Plaintiff also moved for relief pursuant to CPLR 603 and CPLR 1010 to sever the third-party action, but this request is rendered moot.

Duran, W. v. 200 SJA Montague LLC et al., Index No. 507852/2021

For the forgoing reasons, it is

ORDERED, that defendants 200 SJA Montague, LLC, Aurora Capital Associates, LLC, Cauldwell-Wingate Company, LLC, and Cauldwell-Wingate Company, Inc.’s motion for summary judgment to dismiss plaintiff Walter Duran’s Labor Law § 240(1) cause of action is **GRANTED** and plaintiff’s Labor Law § 240(1) claims are **DISMISSED**; and it is further

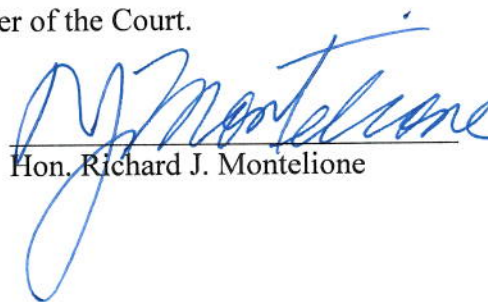
ORDERED, defendants 200 SJA Montague, LLC, Aurora Capital Associates, LLC, Cauldwell-Wingate Company, LLC, and Cauldwell-Wingate Company, Inc.’s motion for summary judgment to dismiss plaintiff Walter Duran’s Labor Law § 241(6) cause of action as predicated on violations of sections 23-1.5; 23-1.7(b)& (f); 23-1.8(c); 23-1.11; 23-1.15; 23-1.22(c); 23-1.30; and 23-2.7(a)(b)(c)(d)(e), 23-1.5; 23-1.7(b)& (f); 23-1.8(c); 23-1.11; 23-1.15; 23-1.22(c); 23-1.30; and 23-2.7(a)(b)(c)(d)(e), 12 NYCRR 23-1.7(d)&(e), and 12 NYCRR 23-2.1(b), of the Industrial Code is **GRANTED** and these causes of action are **DISMISSED**; and it is further

ORDERED, that plaintiff Walter Duran’s motion for partial summary judgment pursuant to Labor Law § 241(6) and Labor Law § 200 is **DENIED**; and it is further

ORDERED, that plaintiff Walter Duran’s cross-motion pursuant to CPLR 603 and CPLR 1010 is **DENIED** as moot; and it is further

ORDERED, that the complaint is **DISMISSED**.

This constitutes the decision and order of the Court.


Hon. Richard J. Montelione

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FILED