SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER PART 08
Justice

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MICHAEL MUSSO, REBECCA MUSSO,

Plaintiffs,

- v -

55-15 GRAND AVENUE PROPERTY, LLC, RXR REALTY LLC, LBA LOGISTICS LLC, SUFFOLK CONSTRUCTION COMPANY, INC.,

Defendants.

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INDEX NO. 154324/2021
MOTION DATE 11/15/2024
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71

were read on this motion to/for JUDGMENT - SUMMARY.

INTRODUCTION

In this labor law action arising from personal injuries sustained at a construction site, defendants 55-15 Grand Avenue Property, LLC, ("Grand Avenue") and Suffolk Construction Company, LLC ("Suffolk") (collectively "defendants")[1] move pursuant to CPLR 3212 for summary judgment dismissing plaintiffs' complaint, which asserts causes of action under Labor Law §§ 200, 240(1), and 241(6), as well as a common-law negligence claim. Plaintiffs Michael Musso (hereinafter "plaintiff") and Rebecca Musso oppose the motion and cross-move, pursuant to CPLR 3212, for partial summary judgment as to liability on the Labor Law §§ 240(1) and 241(6) claims, and pursuant to CPLR 3043 to amend their bill of particulars to allege a violation of Industrial Code § 23-1.22(c)(1) in support of the Labor Law § 241(6) cause of action. Defendants oppose the cross-motion. For the reasons that follow, the motion and cross-motion are each granted in part.

BACKGROUND

On April 9, 2021, at approximately 10:00am, plaintiff was injured at a jobsite located at 55-15 Grand Avenue, Queens, New York (the "Premises"), which was owned by Grand Avenue (NYSCEF Doc No. 69, Plaintiff's Statement of Material Facts ["Plaintiff's SOMF"] ¶¶ 1-2).

[1] Plaintiffs discontinued the action as against RXR Realty LLC and LBA Logistics, LLC by stipulation dated June 2, 2021, prior to the filing of defendants' answer (NYSCEF Doc No. 10).

Plaintiff was working at the Premises through his Union for non-party Cross-Country Construction ("Cross Country"), a subcontractor hired by general contractor Suffolk (*id.* ¶¶ 1, 3). Plaintiff was working as a latherer installing rebar in horizontal and vertical forms on the wood floor of the building (NYSCEF Doc No. 45, Defendants' Statement of Material Facts ["Defendants' SOMF"] ¶¶ 2, 4).

To install the rebar, plaintiff had to walk on top of Cobiax boxes, which are hollow, saucer-shaped boxes that snap together and are placed between the layers of rebar in a floor slab in order to partially fill the void and minimize the amount of steel and concrete needed to fill the slab (*id.* ¶¶ 5, 9, 18, 53). After a final layer of rebar was installed atop the Cobiax boxes, concrete would be poured to form the finished floor slab (Plaintiff's SOMF ¶ 5). As plaintiff was walking atop the Cobiax boxes carrying two pieces of rebar, his foot broke through the surface of one of the boxes and went down 6-8 inches into the box's hollow interior, causing him to trip and fall (*id.* ¶ 4; Defendants' SOMF ¶¶ 7-8).

DISCUSSION

1. Plaintiff's Cross-Motion to Amend His Bill of Particulars

"Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit" (*MBIA Ins. Corp. v Greystone & Co.*, 74 AD3d 499, 499 [1st Dept. 2010]; *see Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 365-66 [1st Dept. 2007]). "[L]eave to amend the pleadings to identify a specific, applicable Industrial Code provision may properly be granted, even after the note of issue has been filed, where the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant" (*D'Elia v City of New York*, 81 AD3d 682, 684 [2nd Dept. 2011] [internal quotation marks omitted]; *see Marte v Tishman Constr. Corp.*, 223 AD3d 527, 528 [1st Dept. 2024]; *Alarcon v UCAN White Plains Hous. Dev. Fund Corp.*, 100 AD3d 431, 432 [1st Dept. 2012]; *Cordeiro v TS Midtown Holdings, LLC*, 87 AD3d 904, 905–06 [1st Dept. 2011]; *Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231, 232–33 [1st Dept. 2000]). The proposed addition of an Industrial Code provision that is either insufficiently specific to support a Labor Law § 241(6) claim or inapplicable to the underlying facts is patently devoid of merit (*see Marte*, 223 AD3d at 529; *Rodriguez v Metropolitan Transp. Auth.*, 191 AD3d 1026, 1028 [2nd Dept. 2021]).

Plaintiff seeks to amend his bill of particulars to assert a violation of Industrial Code provision 12 NYCRR 23-1.22(c)(1), which requires that "[a]ny platform used as a working area . . . shall be provided with a floor of planking at least two inches thick full size, exterior grade plywood at least three-quarters inch thick or metal of equivalent strength." This provision, which relates to "platforms . . . used to transport vehicular and/or pedestrian traffic" (*Dzieran v 1800 Boston Rd., LLC,* 25 AD3d 336, 338 [1st Dept. 2006]), is sufficiently specific to support a Labor Law § 241(6) claim (*see Marte*, 223 AD3d at 528-29).

Further, the addition of Industrial Code § 23-1.22(c)(1) to plaintiff's bill of particulars results in no prejudicial surprise to defendants, as it "merely amplif[ies] and elaborate[s] upon facts and theories already set forth in the original bill of particulars and raise[s] no new theory of liability" (*Noetzell*, 271 AD2d at 232 [internal citations omitted]). Plaintiff's original bill of particulars clearly alleges that defendants did not provide plaintiff a secure and stable platform to perform his work (NYSCEF Doc No. 32, Plaintiff's Bill of Particulars, ¶ 9). Moreover, the potential use of planks or plywood as an alternative to walking directly on the Cobiax boxes was specifically raised at every deposition taken in this matter other than that of plaintiff's wife (*see* NYSCEF Doc No. 34, M. Musso EBT Tr., at 39:8-23; NYSCEF Doc No. 35, Salorio EBT Tr., at 45:5-13; NYSCEF Doc No. 36, Carbone EBT Tr., at 19:5-20:3; NYSCEF Doc No. 37, Wilkenson EBT Tr., at 17:22-18:15; NYSCEF Doc No. 38, Delriccio EBT Tr., at 57:11-17; NYSCEF Doc No. 39, Diaz EBT Tr., at 47:4-13). For example, Suffolk Site Safety Manager Joseph Carbone testified regarding the temporary implementation of such an alternative at some point prior to plaintiff's accident (NYSCEF Doc No. 36, Carbone EBT Tr., at 19:5-20:3).

Therefore, plaintiff's cross-motion is granted to the extent it seeks leave to amend the bill of particulars to assert a violation of Industrial Code 12 NYCRR § 23–1.22(c)(1).

2. Summary Judgment

On a motion for summary judgment, the proponent bears the initial burden of making a prima facie showing that it is entitled to summary judgment as a matter of law, providing sufficient evidence that no material issues of triable fact exist (*see Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.*, 36 NY3d 69, 74 [2020]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once met, the burden shifts to the opposing party to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact"

(*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]). However, if the proponent fails to make out its prima facie case for summary judgment, its motion must be denied regardless of the sufficiency of the opposing papers (*Alvarez*, 68 NY2d at 324; *Ayotte v Gervasio*, 81 NY2d 1062 [1993]). Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). The court's function on these motions is limited to "issue finding," not "issue determination" (*see id.* at 505).

a. Labor Law § 200 and Common-Law Negligence

Defendants move for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 causes of action, arguing that they did not cause or create a dangerous or defective condition, lacked actual or constructive notice that such a condition existed, and did not exercise supervisory control over plaintiff's work.

Labor Law § 200 codifies the common law duty of owners and general contractors to provide workers with a reasonably safe place to work (*Comes v New York State Elec. And Gas Corp.*, 82 NY2d 876, 877 [1993]). There are two categories of personal injury claims under Labor Law § 200 and the common law: those arising from dangerous or defective conditions existing on the premises and those arising from the manner or means in which the work was performed (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-44 [1st Dept. 2012]). To demonstrate a *prima facie* case under the former category, plaintiff must prove that the owner or general contractor created the alleged dangerous or defective condition or had actual or constructive notice of it (*id.*). "Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work" (*id.*).

Grand Avenue is entitled to summary judgment dismissing the Labor Law § 200 and common-law negligence claims against it, as "the evidence fails to show either that it had notice of a dangerous or defective condition on the work site or that it controlled the means and methods of plaintiff's work" (*Galvez v Columbus 95th St. LLC*, 161 AD3d 530, 531 [1st Dept. 2018]; *see Cappabianca*, 99 AD3d at 144).

With respect to Suffolk's liability under the dangerous condition theory, Suffolk demonstrates, *prima facie*, that it lacked either actual or constructive notice that Cobiax boxes

were breaking under the weight of employees walking on top of them. Specifically, both Carbone, Suffolk's Site Safety Manager, and Richard Salorio, Suffolk's Regional Safety Director, testified at their depositions that they had no knowledge of any such issues prior to plaintiff's accident (NYSCEF Doc No. 35, Salorio EBT Tr., at 45:14-24; NYSCEF Doc No. 36, Carbone EBT Tr., at 21:10-22:6). Plaintiff, in opposition, fails to raise a triable issue of fact with respect to actual or constructive notice.

As to actual notice, Plaintiff points to his own testimony regarding prior instances of the Cobiax boxes breaking (NYSCEF Doc No. 34, M. Musso EBT Tr., at 39:8-41:25). However, while plaintiff testified that he often saw broken Cobiax boxes laying around the worksite, he did not know how those boxes were broken, and he further stated that, prior to his own accident, he was unaware of anyone else whose foot broke through one of the Cobiax boxes while walking on it (*id.* at 37:24-38:22, 44:7-18). Further, plaintiff did not testify that he ever shared concerns regarding the safety of walking on the Cobiax boxes with anyone from Suffolk. Plaintiff also points to the testimony of Kayon Wilkenson, Cross Country's Deputy Foreman, who testified that Cobiax boxes frequently cracked under the weight of those walking on it, and that this was a regular topic of discussion at Cross Country's morning meetings (NYSCEF Doc No. 37, Wilkenson EBT Tr., at 18:16-20:22, 29:3-24). However, like plaintiff, Wilkenson did not testify that he ever shared concerns regarding the safety of the Cobiax boxes with anyone from Suffolk, nor could he confirm whether any Suffolk employees were present at the morning meetings at which such concerns were purportedly discussed (*id.* at 20:8-22). However, Cross Country General Lather Foreman Charles Diaz testified that Suffolk representatives *did not* attend Cross Country's morning meetings and, contrary to Wilkenson, Diaz denied knowledge of any instances of the Cobiax boxes breaking when walked upon prior to plaintiff's accident (NYSCEF Doc No. 39, Diaz EBT Tr., at 28:22-29:6, 48:19-51:17).

As to constructive notice, plaintiff's contention that Pre-Task Plans (PTPs) prepared by Diaz gave Suffolk constructive notice is unavailing. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v Am. Museum of Nat. History*, 67 NY2d 836, 837 [1986]). "A 'general awareness that a dangerous condition may be present' is 'insufficient to impute notice'" (*Marte*, 223 AD3d at 528 [internal citations omitted], quoting *Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994] and *Burchill v City of New*

York, 219 AD3d 1244, 1245 [1st Dept. 2023]). Here, only two of the PTPs submitted pertain to rebar placement—the task plaintiff was performing at the time of his injury—and both are dated April 9, 2021, mere hours before plaintiff's accident. Moreover, these PTPs do not relate in any way to the specific defect or dangerous condition alleged. Rather, they contain check boxes for "Hazards Associated with the Work to be Performed," which reflect that the standard hazards associated with this type of work are "slips, trips, falls," "struck by," "caught between," "hearing loss," "burns/cuts," and "strains/sprains" (NYSCEF Doc No 63, Pre-Task Plans, at 2, 20). This vague listing of general risks associated with the installation of rebar is insufficient to demonstrate that Suffolk had constructive notice of the specific dangerous condition plaintiff alleges (*see Piacquadio*, 84 NY2d at 969; *Marte*, 223 AD3d at 528).

Suffolk has likewise demonstrated, *prima facie*, that it did not exercise supervisory control over the means and methods of plaintiff's work, and is thus also not liable under a means and manner theory of liability. Plaintiff testified that Cross Country, not Suffolk, instructed its latherers on their daily tasks, and that he reported to Wilkenson, a Cross Country employee (NYSCEF Doc No. 34, M. Musso EBT Tr., at 20:18-24). Further, Carbone testified that it was Cross Country's responsibility to assemble the Cobiax boxes (NYSCEF Doc No. 36, Carbone EBT Tr., at 27:20-24). To the extent plaintiff argues that Suffolk had supervisory control because they instructed Cross Country to use planks as an alternative to the Cobiax boxes *after* plaintiff's accident, the court finds that such authority to review onsite safety "do[es] not rise to the level of supervision or control necessary to hold the general contractor liable for plaintiff's injuries under Labor Law § 200" (*Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept. 2014] [internal citations omitted]).

Therefore, Suffolk is also entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims asserted against it.

b. Labor Law § 240(1)

Defendants and plaintiff both seek summary judgment as to liability on plaintiff's Labor Law § 240(1) claim. Labor Law § 240(1), commonly known as the scaffold law, imposes absolute liability upon owners, contractors, and their agents engaged in "the erection, demolition, repairing, altering, painting, cleaning or pointing of a premises or structure" for injuries proximately caused by a breach of the statutory duty to "furnish or erect proper scaffolding,

ladders and similar safety devices to protect employees in the performance of the work" (NY Lab. Law § 240(1); *Gordon v Eastern Railway Supply, Inc.*, 82 NY2d 555, 559 [1993]).

Labor Law § 240(1) protects workers only from the "extraordinary elevation risks" contemplated by the statute, but not from "expos[ure] to the usual and ordinary dangers of a construction site" (*Rodriguez v Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d 841, 843-44 [1994]). Thus, "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)" (*Narducci v Manhasset Bay Associates*, 96 NY2d 259, 267 [2001]). "Rather, liability 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.*).

Section 240(1) was '"designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*'" (*Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 604 [2009], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). The hazards contemplated by the statute are thus those that arise from a difference between either "the elevation level of the required work and a lower level" or "the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]).

Defendants principally contend that the Labor Law § 240(1) claim must fail as a matter of law because the height differential—6–8-inches according to defendants, 12-18 inches according to plaintiff—of the hollow gap within the Cobiax box into which plaintiff's foot fell did not present the type of elevation related hazard contemplated by the statute. This contention is without merit, as '"[t]here is no bright-line minimum height differential that determines whether an elevation hazard exists'" (*Marte*, 223 AD3d at 529, quoting *Brown v 44 St. Dev., LLC*, 137 AD3d 703, 704 [1st Dept. 2016]). Indeed, in *Marte*, which involved a plaintiff injured when, while walking on a rebar mat carrying a metal rod, his foot slipped through the rebar causing him to fall down an 18-inch gap to the plywood below, the First Department rejected precisely the same argument now advanced by defendants, holding that Labor Law § 240(1) liability was not barred as a matter of law simply because the relevant height differential was

only 18 inches (*id.*). The First Department likewise upheld a finding of Labor Law § 240(1) liability in favor of the plaintiff in *Brown*, who was injured when, "while carrying wood planks, he fell through an opening in a latticework rebar deck to a plywood form that was 12 to 18 inches below" (137 AD3d at 703-04). Defendants thus fail to demonstrate as a matter of law that plaintiff "was not faced with the special elevation risks contemplated by the statute" (*Marte*, 223 AD3d at 529 [internal quotation marks omitted]).

To the contrary, the record establishes that plaintiff's fall was the result of exposure to an elevation related hazard. As in *Brown* and *Marte*, plaintiff was injured when his foot fell through the elevated surface on which he was required to walk to perform his duties (*see id.* at 528; *Brown*, 137 AD3d at 704, citing *Arrasti v HRH Const. LLC*, 60 AD3d 582, 583 [1st Dept. 2009] [ramp from which plaintiff fell was "sole means of access" to concrete floor 18 inches below, and "was thus a device to protect against an elevation-related risk"]; *Gomez v City of New York*, 63 AD3d 511, 512 [1st Dept. 2009] [fire escape on which it was necessary for plaintiff to stand to perform his work was "functional equivalent" of a scaffold]). Indeed, plaintiff testified he had to wait for the Cobiax boxes to be installed before he could perform his rebar placement (NYSCEF Doc No. 34, M. Musso EBT Tr., at 31:12-20). Further, the fact that plaintiff's fall resulted from a Cobiax box breaking under him rather than from his having fallen through one of the gaps between the Cobiax boxes does not dictate a different result. Because plaintiff was required to walk on top of the Cobiax boxes to perform his duties and had no other surface to walk on, the Cobiax boxes were functionally a device to protect against an elevation-related risk (*see Arrasti* 60 AD3d at 583; *Gomez*, 63 AD3d at 512). Therefore, the court finds that plaintiff was exposed to an elevation-related hazard within the meaning of Labor Law § 240(1).

However, plaintiff nonetheless does not demonstrate entitlement to summary judgment on his Labor Law § 240(1) claim. Here, as in *Marte*, plaintiff contends that planks or plywood should have been placed to create a safer surface on which to walk. And, as in *Marte*, there is testimony indicating that concrete was to be poured after the installation of the second layer of rebar (NYSCEF Doc No. 34, M. Musso EBT Tr., at 11:9-11; NYSCEF Doc No. 35, Salorio EBT Tr., at 44:5-21; NYSCEF Doc No. 37, Wilkenson EBT Tr., at 16:11-20), raising a question of fact as to whether the pouring of concrete would "render placing plywood or wooden planks on top of [the Cobiax boxes] 'impractical and contrary to the very work at hand to cover the area

where the concrete was being spread'" (*Marte*, 223 AD3d at 529-30, quoting *Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 140 [2011]).

Therefore, defendants' motion and plaintiff's cross-motion are both denied to the extent they seek summary judgment with respect to the Labor Law § 240(1) claim.

c. Labor Law §241(6)

Labor Law § 241(6) imposes a non-delegable duty on contractors and owners to ensure that "[a]ll areas in which construction, excavation or demolition work is being performed" is "so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein . . . ." The scope of the duty imposed by Labor Law § 241(6) is defined by the safety rules set forth in the Industrial Code (*see Garcia v 225 E. 57th Owners, Inc.*, 96 AD3d 88, 91 [1st Dept. 2012], citing *Ross*, 81 NY2d at 501-02). Thus, to establish liability under this provision, plaintiff must "specifically plead and prove the violation of an applicable Industrial Code regulation" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept. 2007]). Further, "[t]he Code regulation must constitute a specific, positive command, not one that merely reiterates the common-law standard of negligence" (*id.*, citing *Ross*, 81 NY2d at 503-04; *see Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]). Here, plaintiff's bill of particulars, as amended, asserts violations of Industrial Code §§ 23-1.22(c), 23-1.5, 23-1.7, 23-2.1, 23-2.2, 23-2.3, 23-3, 23-4, 23-5, 23-6, 23-7 and 23-8.

Defendants move for summary judgment dismissing plaintiff's Labor Law § 241(6) claim in its entirety, while plaintiff cross-moves for summary judgment on so much of the claim as alleges violations of Industrial Code §§ 23-1.7(e)(2), 23-1.22(c)(1), and 23-2.2(a). Plaintiff does not specifically oppose defendants' motion as to this claim except with respect to the three Industrial Code provisions on which he himself cross-moves. As such, the Labor Law § 241(6) claim is deemed abandoned except with respect to Industrial Code §§ 23-1.7(e)(2), 23-1.22(c)(1), and 23-2.2(a) (*see Kronick v L.P. Thebault Co.*, 70 AD3d 648, 649 [2nd Dept. 2010]).

Section 23-1.7(e)(2) provides 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." As defendants correctly contend, this section is inapplicable here

because the Cobiax boxes were integral to the work being performed (*see generally Bazdaric v. Almah Partners LLC*, 41 NY3d 310, 320 [2024] ["integral to the work" defense applies "when the dangerous condition is inherent to the task at hand, [but] not . . . when a defendant or third party's negligence created a danger that was avoidable without obstructing the work or imperiling the worker"]). The parties' deposition testimony demonstrates that latherers such as plaintiff were required to walk on top of the Cobiax boxes to place the second layer of rebar and that the Cobiax boxes themselves were a permanent part of the project, as they would ultimately be encased in concrete to form the final floor slab. As such, they were an "integral part of the construction" (*Krzyzanowski v City of New York*, 179 AD3d 479, 481 [1st Dept. 2020] [internal citations omitted]). Further, the Cobiax boxes were not inherently a tripping hazard as contemplated by the code, as they were not "dirt and debris," "scattered tools and materials," or "sharp projections." Therefore, defendants' motion is granted and plaintiff's cross motion is denied to the extent they seek summary judgment as to that part of the Labor Law § 241(6) claim premised on a violation of Industrial Code § 23-1.7(e)(2).

Industrial Code § 23-2.2(a) provides that "forms, shores and reshores shall be structurally safe and shall be properly braced or tied together so as to maintain position and shape." Defendants submit the affirmation of Martin R. Bruno, CHST, a construction site safety expert, in which Bruno states that Cobiax boxes cannot be considered a concrete form, as concrete is not poured into them, and that shores and reshores are used to hold concrete in place, which was not the use of the Cobiax boxes here (NYSCEF Doc No. 45, Bruno Aff., ¶ 51). Defendants thus demonstrate, *prima facie*, that Industrial Code § 23-2.2(a) is inapplicable here because plaintiff's accident did not involve forms, shores, or reshores.

Plaintiff, in opposition, submits no evidence sufficient to raise a triable issue of fact as to the applicability of this Industrial Code provision. Plaintiff argues the Cobiax boxes are a novel type of formwork to which this provision applies, relying on what is purported to be an information sheet published by the manufacturer of the Cobiax boxes that describes the boxes as "void forms" or "void formers" (NYSCEF Doc. 61, Cobiax USA Information Sheet, at 2). However, this purported information sheet is not submitted in admissible form, as plaintiff simply attaches it as an exhibit to the affirmation of counsel in support of his motion without laying any foundation to support its admissibility (*see O'Connor v Restani Const. Corp.*, 137 AD3d 672, 673 [1st Dept. 2016]).

Industrial Code § 23-1.22(c)(1) provides that "[a]ny platform used as a working area . . . shall be provided with a floor of planking at least two inches thick full size, exterior grade plywood at least three-quarters inch thick or metal of equivalent strength." "'[T]he platforms contemplated by that section are those used to transport vehicular and/or pedestrian traffic"' (*Marte*, 223 AD3d at 528, quoting *Dzieran,* 25 AD3d at 338). As already discussed, plaintiff's failure to assert a violation of this provision in his original bill of particulars is "not necessarily fatal to a section 241(6) claim and, in the absence of unfair surprise or prejudice, may [as here] be rectified by amendment, even where a note of issue has been filed" (*id.*). Further, because it is undisputed that "plaintiff was traversing the [Cobiax boxes] carrying more rebar, and workers were expected to walk over the [Cobiax boxes], there is at least an issue of fact as to whether the [Cobiax boxes] qualified as a platform used to transport pedestrian traffic" (*id.*). As such, summary judgment dismissing that part of the Labor Law § 241(6) claim premised on a violation of Industrial Code § 23-1.22(c)(1) is denied.

The portion of plaintiff's cross-motion that seeks summary judgment on that part of the Labor Law § 241(6) claim premised on this Industrial Code provision is likewise denied. The Note of Issue in this case was filed on April 26, 2024. Defendants filed their summary judgment motion on August 26, 2024, on the last day within which to timely do so (*see* CPLR 3212[a]). The parties thereafter stipulated to adjourn defendants' motion to November 15, 2024 (NYSCEF Doc No. 46). Plaintiff filed its cross-motion on November 8, 2024, well past the expiration of the statutory 120-day period. "Although a court may decide an untimely cross motion, it is limited in its search of the record to those issues or causes of action 'nearly identical' to those raised by the opposing party's timely motion" (*Guallpa v Leon D. DeMatteis Const. Corp.*, 121 AD3d 416, 419 [1st Dept. 2014], quoting *Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept. 2006]). Here, defendants' timely motion did not address Industrial Code § 23-1.22(c)(1), as plaintiff did not allege a violation of that section until his untimely cross-motion. Therefore, the portion of plaintiff's cross-motion that seeks summary judgment on that part of the Labor Law § 241(6) claim premised on a violation of Industrial Code § 23-1.22(c)(1) is denied as untimely.

The court has considered the parties' remaining contentions and finds them unavailing.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion is granted to the extent it seeks summary judgment dismissing plaintiff's causes of action for common-law negligence, violation of Labor Law § 200, and violation of Labor Law § 241(6) except insofar as premised on an alleged violation of Industrial Code 12 NYCRR 23-1.22(c)(1), and the motion is otherwise denied; and it is further

ORDERED that plaintiffs' cross-motion is granted to the extent it seeks leave to amend plaintiffs' bill of particulars, and the cross-motion is otherwise denied; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

4/21/2025
DATE

LYNN R. KOTLER, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE