

Silva v 9 Dekalb Fee Owner, LLC
2026 NY Slip Op 31484(U)
April 9, 2026
Supreme Court, Kings County
Docket Number: Index No. 505131/22
Judge: Katherine A. Levine
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P R E S E N T: HON. KATHERINE A. LEVINE,
Justice.

-----X

DIHEGO SILVA,

Plaintiff,

-against-

Index No.: 505131/22

Mot. Seq. Nos. 4 & 5

9 DEKALB FEE OWNER, LLC and JDS
CONSTRUCTION GROUP LLC,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and

Affidavits (Affirmations) Annexed _____

63-65, 79-81, 100-101

Opposing Affidavits (Affirmations) _____

107-108, 112-113,

Affidavits/Affirmations in Reply _____

118

Memorandum of Law _____

77, 102, 110, 116, 117

Transcript of Oral Argument _____

120

Upon the foregoing papers, plaintiff Dihego Silva moves for an order, pursuant to CPLR 3212, granting him partial summary judgment with respect to liability on his Labor Law § 241 (6) cause of action (Mot. Seq. 4). Defendants 9 Dekalb Fee Owner LLC (“9 Dekalb”) and JDS Construction Group LLC (“JDS”) also move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint (Mot. Seq. 5).

Plaintiff’s motion (Mot. Seq. 4) is denied.

Defendants’ motion (Mot. Seq. 5) is granted to the extent that plaintiff’s Labor Law §§ 240 (1), (2), & (3), and 241-a causes of action are dismissed and the Labor Law § 241 (6) cause of action is dismissed to the extent that it is premised on Industrial Code (12 NYCRR) § 23-1.7 (b). The dismissal of the Labor Law §§ 240 (1), (2), & (3), and 241-a causes of action is without

prejudice to plaintiff to moving to amend the complaint to add those causes of action if he is so advised. Defendants' motion is otherwise denied.

BACKGROUND

In this action premised on common-law negligence and violations of Labor Law §§ 200 and 241 (6), plaintiff alleges that he suffered injuries on November 22, 2021, when he tripped on debris while carrying a cement form that he was going to hand to another worker. Plaintiff was performing this work on the 74th floor of a building under construction.¹ The building site was owned by 9 Dekalb, which had hired JDS to act as the construction manager for a project involving the construction of a 92-story residential tower with some retail space on the lower floors. JDS, in turn, hired Trident General Contracting LLC ("Trident") as the concrete superstructure contractor. Plaintiff was employed by Trident and his duties included installing, stripping, and moving concrete forms. Plaintiff only received instructions regarding his job duties from Trident supervisors.

According to plaintiff's deposition testimony, on the date of the accident, a Trident supervisor directed plaintiff to carry metal concrete forms from another part of the building, some of which were on the floor below as well as on the same level, and hand them up to workers who were installing the forms. These other workers were standing on another level that was 10 to 15 feet above plaintiff. Just before the accident, plaintiff hoisted one of the smaller forms that was

¹ Plaintiff testified that the accident occurred on the 64th or 65th floor of the building. Vincent Cadden, an assistant superintendent employed by Trident General Contracting LLC stated, in an affidavit (NY St Cts Elec Filing [NYSCEF] Doc No. 100, at ¶ 11) that the accident location was the 74th floor. This assertion is also supported by the Trident's daily log for the date in question (NYSCEF Doc No. 119). The exact floor on which the accident occurred, however, is not particularly relevant to determination of the motion as it is undisputed that it occurred at the location shown in the photographs submitted by the parties (NYSCEF Doc Nos. 70 and 88).

located on the same floor that weighed approximately 30 kilograms² onto his shoulder and started walking on a beam towards the installer to whom he intended to hand the form. The accident happened as he was stepping off the beam onto a lower level, approximately 30 inches below the beam, that was filled with debris which included plywood pieces, rebar, sheet metal and pipes. As plaintiff was stepping onto a piece of debris with his right foot, plaintiff rolled or twisted his right ankle and hit his back on the wall of the lower level as he fell.

When shown a photograph of the accident location taken the day before the accident,³ plaintiff marked the area where he fell,⁴ and stated that, except for a larger square metal piece that was not present, the debris shown in the photograph was the same debris that was present on the date of the accident. Although the concrete that made up the beams was freshly poured at the time of the photograph, it had dried by the date of the accident and plaintiff was able to walk on it. Plaintiff picked up the form at issue from an area on the right corner of the photo, and the area where plaintiff was handing off the form was past the far-left portion of the photograph and therefore was not visible in the photograph. Plaintiff conceded that he physically could have walked on the beam around the debris to hand off the form but asserted that he did not do so because the other side of the beam was at the edge of the building and it was dangerous there. When defense counsel asked plaintiff, “But I do see that there is secured safety measures around the building, correct?” plaintiff answered, “Right, but it’s not 100 percent. It’s not totally safe” (Plaintiff, December 23, 2022 deposition tr at 76, lines 13-17). Although plaintiff could not

² 30 kilograms is around 66 pounds.

³ This photograph is appended as Appendix A.

⁴ Plaintiff testified that he stepped off of the beam in the area marked with a square into the lower debris filled area that is marked with a circle. The star marks the area where plaintiff hit his back.

remember exactly how many times he had taken this path to deliver the construction forms to his coworker prior to the accident, he asserted that he had taken it multiple times.

DISCUSSION

Labor Law §§ 240 (1), (2), & (3), and 241-a

Defendants are entitled to dismissal of the Labor Law §§ 240 (1), (2), & (3), and 241-a causes of action as they are only alleged in plaintiff's fifth bill of particulars and are not pleaded in the complaint (*see Greenwood v Whitney Museum of Am. Art*, 161 AD3d 425, 426 [1st Dept 2018]; *Fusca v A & S Constr., LLC*, 84 AD3d 1155, 1157 [2d Dept 2011], *lv dismissed* 18 NY3d 837 [2011]; *Castleton v Broadway Mall Props., Inc.*, 41 AD3d 410, 411 [2d Dept 2007]). This dismissal is made without prejudice to a motion to amend the complaint (*see Greenwood*, 161 AD3d at 426).

Labor Law § 241 (6)

Turning to plaintiff's Labor Law § 241 (6) claim, under that section, an owner, general contractor or their agent may be held vicariously liable for injuries to a plaintiff where the plaintiff establishes that the accident was proximately caused by a violation of an Industrial Code section stating a specific positive command that is applicable to the facts of the case (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349-350 [1998]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821 [2d Dept 2017]). "In order to establish prima facie entitlement to summary judgment [dismissing such a claim], a defendant must show that the plaintiff failed to identify a section of the Industrial Code that was allegedly violated, that any such section is insufficiently specific to support liability or is inapplicable to the facts of the case, or that the defendant complied with the requirements of the identified provision" (*Lopez v Kamco Servs., LLC*, 231 AD3d 1142, 1144 [2d Dept 2024] [internal quotation marks omitted]; *see Kelly v RBSL Realty, LLC*, 244 AD3d 1086,

1088 [2d Dept 2025]). Conversely, in order for plaintiff to meet his summary judgment burden proving defendants' liability under Labor Law § 241 (6), he is required to show that: (1) the Industrial Code section relied upon applied under the circumstances; (2) that the specific commands of the section were violated; (3) that the violation alone, "or considered with other undisputed factual evidence, constitutes negligence; and (4) the violation caused plaintiffs' injuries" (*Bazdaric v Almah Partners LLC*, 41 NY3d 310, 318 [2024]).

Plaintiff, in his bill of particulars, alleged violations of Industrial Code (12 NYCRR) §§ 23-1.7 (e) (1), (2) and 23-2.1 (a) (1), (b). Section 23-1.7 (e) (1) and (2) are the provisions plaintiff relies on in moving for summary judgment on his Labor Law § 241 (6) claim, and these provisions address tripping and other hazards in passageways and working areas.⁵ Section 23-2.1 addresses the storage of materials and the disposal of debris.⁶

This court initially addresses defendants' assertion that plaintiff's actions in stepping through the debris area where he fell were the sole proximate cause of his accident. Generally, in the context of a Labor Law case, a plaintiff's negligence constitutes the sole proximate cause of his or her injuries "when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he [or she]

⁵ Section 23-1.7 (e) (1) provides that, "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." Section 23-1.7 (e) (1) provides that, "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."

⁶ Section 23-2.1 (a) (1) provides that, "All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare." Section 23-2.1 (b) provides that, "Disposal of debris. Debris shall be handled and disposed of by methods that will not endanger any person employed in the area of such disposal or any person lawfully frequenting such area."

was expected to use them but for no good reason chose not to do so, causing an accident” (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]; see *Biacca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167-1168 [2020]; *Przyborowski v A&M Cook, LLC*, 120 AD3d 651, 653 [2d Dept 2014]).

This standard, however, is not the exclusive means of demonstrating sole proximate cause, which also can be demonstrated by proving that a plaintiff’s workplace actions were unnecessary and unforeseeable (see *Lin v City of New York*, 117 AD3d 913, 914 [2d Dept 2014]). For example, courts have found a plaintiff’s sole proximate cause precluded a liability finding where a plaintiff jumped from a stalled elevator rather than waiting for assistance (see *Egan v A.J. Constr. Corp.*, 94 NY2d 839, 841 [1999]), chose to ride in the back of a truck with unsecured materials (*Eddy v John Hummel Custom Builders, Inc.*, 147 AD3d 16, 23-24 [2d Dept 2016], *lv denied* 29 NY3d 913 [2017]), climbed over a catwalk railing and walked on a narrow beam to search for a piece of wood (see *Lin*, 117 AD3d at 914), stood on a folding chair while attempting to climb into an unoccupied freight elevator (see *Weingarten v Windsor Owners Corp.*, 5 AD3d 674, 677 [2d Dept 2004]), or committed a similar unforeseeable act (see *Capellan v King Wire Co.*, 19 AD3d 530, 532 [2d Dept 2005]; *Misirlakis v East Coast Entertainment Props.*, 297 AD2d 312, 312-313 [2d Dept 2002], *lv denied and dismissed* 100 NY3d 637 [2003]; *George v State of New York*, 251 AD2d 541, 542 [2d Dept 1998], *lv denied* 92 NY2d 815 [1998]; *Mack v Altmans Stage Light. Co.*, 98 AD2d 468, 472-473 [2d Dept 1984]).

Here, the photograph of this area shown to plaintiff during his deposition demonstrates that the beam does not have the same debris/obstructions as the depressed area and that there is apparently substantial edge protection along the outer side of the beam. Defendants have also submitted the affirmation of Vincent Cadden, a Trident supervisor, who asserts that the “Cocoon

System” edge protection system provided by Trident complied with all relevant “heavy duty fall arrest/debris/diaper and netting” requirements contained in the New York City Building Code and in the OSHA rules and that this system provided plaintiff with adequate fall protection at the location of the accident. Defendants have thus submitted proof suggesting that the beam served as the only reasonable pathway for plaintiff to use to transport the forms to his coworkers and that it was unnecessary for plaintiff to step down into the debris (*see Eddy*, 147 AD3d at 23-24; *Lin*, 117 AD3d at 914). In view of this proof, this case is akin to snow and ice cases in which courts have found a plaintiff’s choice to walk over uncleared snow and ice or climb over mounds of snow rather than use nearby paths that had been cleared of snow to constitute the sole proximate cause of their accidents (*see Polanco v Durgaj*, 202 AD3d 638, 638 [1st Dept 2022]; *Tzamorot v JP Morgan Chase & Co.*, 167 AD3d 550, 550 [1st Dept 2018], *lv denied* 33 NY3d 904 [2019]; *Polomski v Deluca*, 161 AD3d 1116, 1117 [2d Dept 2018]).

On the other hand, the top of the beam appears somewhat narrow, and the photograph appears to show a gap between the edge of the beam and the netting. These considerations suggest that plaintiff’s concern about walking along the edge of the building may not have been wholly unreasonable. Further, as noted above, plaintiff testified that the path he followed through the depression was the path he had taken numerous times before the accident. Although plaintiff did not testify that he took this path in the presence of supervisors, defendants have presented no evidence suggesting that supervisors were unaware he was taking this path or that he was specifically instructed to take a particular route (*see Gallagher*, 14 NY3d at 88-89; *Estrella v ZRHLE Holdings, LLC*, 218 AD3d 640, 644 [2d Dept 2023]; *Zholanji v 52 Wooster Holdings, LLC*, 188 AD3d 1300, 1302 [2d Dept 2020]; *Doto v Astoria Energy II, LLC*, 129 AD3d 660, 662 [2d Dept 2015]; *Murray v Arts Ctr. & Theater of Schenectady, Inc.*, 77 AD3d 1155, 1156-1157

[3d Dept 2010]; *see also Biaca-Neto*, 34 NY3d at 1167-1168). In sum, this court finds that the factual issues regarding sole proximate cause require denial of the motions by plaintiff and defendants.

Defendants also assert that they are entitled to dismissal of Industrial Code (12 NYCRR) §§ 23-1.7 (e) (1), (2) and 23-2.1 (a) (1) on the ground that the debris and material that he fell on were integral to the ongoing work. Notwithstanding the conclusory assertions of defendants' expert that the material could have been used in Trident's concrete work, plaintiff's testimony and the photograph of the accident site demonstrate as a matter of law that this material cannot be deemed integral to the work because it was not inherent to plaintiff's task at hand or any ongoing work at the time of the accident (*see Ruisech v Structure Tone Inc.*, 42 NY3d 1061, 1064-1065 [2024]; *Bazdaric*, 41 NY3d at 320; *Tower v Structure Tone, LLC*, --- AD3d ----, 2026 NY Slip Op 01747, *2 [1st Dept 2026]; *Owen v Schulmann Constr. Corp.*, 26 AD3d 362, 363 [2d Dept 2006]).

With respect to Industrial Code § 23-1.7 (e) (1), defendants argue that the area in which plaintiff stepped may not be considered a passageway within the meaning of that section. "Although the regulations do not define the term 'passageway' . . . , courts have interpreted the term to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area" (*Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 1250 [4th Dept 2013]; *see Quigley v Port Auth. of N.Y. & N.J.*, 168 AD3d 65, 67-68 [1st Dept 2018]; *Cody v State of New York*, 82 AD3d 925, 928 [2d Dept 2011]). Here, defendants essentially assert that the unobstructed beam area around the depressed area in which plaintiff stepped served as a passageway, and that by entering into the debris strewn area plaintiff departed from the passageway and was not entitled to the protection of section 23-1.7 (e) (1). For essentially the same reasons discussed above with respect to sole proximate cause, the court finds triable issues of fact as to whether plaintiff's

accident occurred outside the designated pathway or, given his safety concerns about walking on the beam, whether it occurred in what was effectively the only reasonable path available. These issues preclude dismissal of plaintiff's Labor Law § 241(6) claim as based upon section 23-1.7 (e) (1) or summary judgment in plaintiffs favor on that claim (*Tower*, 2026 NY Slip Op 01747, *2; *Venezia v LTS 711 11th Ave.*, 201 AD3d 493, 495-496 [1st Dept 2022] [issue of fact as to whether accident occurred in passageway in the context of an Industrial Code (12 NYCRR) § 23-1.7 (d) claim]; *Rossi v Mount Vernon Hosp.*, 265 AD2d 542, 543 [2d Dept 1999] [issue of fact as to whether it was necessary for plaintiff to traverse area where grease pits were located to perform his façade restoration work]; *see also Steiger*, 104 AD3d at 1251 [path chosen by plaintiff that departed from sidewalk was not a passageway]; *cf. Lakenbauer v 162 Fifth Ave. Assoc. LLC*, --- AD3d ---, 2026 NY Slip Op 01463, *1 [1st Dept 2026] [issue of fact as to whether accident occurred in a passageway for purposes of an Industrial Code (12 NYCRR) § 23-2.1 [a] [1] claim]).⁷

Although Industrial Code §§ 23-1.7 (e) (2), which applies to working areas, does not require that the accident occur in a passageway, it still only applies if a plaintiff is required to “work [in] or pass” through the area in question. The competing concerns presented by the evidence discussed with respect to sole proximate cause and Industrial Code § 23-1.7 (e) (1) demonstrate that there are likewise factual issues as to whether plaintiff was required to traverse the area in question or whether he could have avoided the debris by walking on the beam. These issues preclude dismissal of plaintiff's claim to the extent predicated on Section 23-1.7 (e) (2) or summary judgment in plaintiffs favor on that claim (*see Quigley*, 168 AD3d at 68; *Muscarella v*

⁷ To the extent that defendants argue that plaintiff never testified that he “tripped” and is thus not covered by Industrial Code (12 NYCRR) §§ 23-1.7 (e) (1) and (2), this court finds that this argument is an exercise in semantics as plaintiff's testimony that he rolled or twisted his ankle conveys that he in fact tripped.

Herbert Constr. Co., 265 AD2d 264, 264 [1st Dept 1999]; *cf. Harkin v City of New York*, 69 AD3d 901, 902 [2d Dept 2010]; *Smith v Hines GS Props., Inc.*, 29 AD3d 433, 433-434 [1st Dept 2006]).

In view of the factual issues with respect to whether the accident location constituted a passageway, this court likewise finds that there are factual issues with respect to whether the materials obstructed a passageway, walkway or other thoroughfare within the meaning of Industrial Code § 23-2.1 (a) (1) that require the denial of the portion of defendants' motion addressed to that Industrial Code section (*see Lakenbauer*, 2026 NY Slip Op 01463, *1).

Defendants, however, are entitled to dismissal of the Labor Law § 241 (6) cause of action to the extent that it is premised on Industrial Code § 23-2.1 (b) because that section is not sufficiently specific to support a section 241 (6) cause of action (*see Dyszkiewicz v City of New York*, 218 AD3d 546, 548-549 [2d Dept 2023]; *Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 844 [2d Dept 2014]).

Common-Law Negligence and Labor Law § 200

With respect to plaintiff's common-law negligence and Labor Law § 200 causes of action, when such claims arise out of alleged defects or dangers in the methods or materials of the work, "there is no liability under the common law or Labor Law § 200 unless the owner or general contractor exercised supervision or control over the work performed" (*Carranza v JCL Homes, Inc.*, 210 AD3d 858, 860 [2d Dept 2022], quoting *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 801 [2d Dept 2005]; *see Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 435 [2015]; *Valencia v Glinski*, 219 AD3d 541, 545 [2d Dept 2023]). Where a premises condition is at issue, property owners and general contractors may be held liable under common-law negligence and for a violation of Labor Law § 200 if they either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident

(see *Abelleira v City of New York*, 120 AD3d 1163, 1164 [2d Dept 2014]; *Bauman v Town of Islip*, 120 AD3d 603, 605 [2d Dept 2014]; *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

Through the deposition testimony of plaintiff, plaintiff's coworker Jhonathan Alves Coelho, and Michael Jones, a JDS management employee, defendants have demonstrated that plaintiff's work was solely supervised by Trident, and thus, that they may not be held liable under a methods and materials theory of liability (see *Gonzalez v City of New York*, 227 AD3d 958, 959 [2d Dept 2024]; *Wilson v Bergon Constr. Corp.*, 219 AD3d 1380, 1383 [2d Dept 2023]; *Kefaloukis v Mayer*, 197 AD3d 470, 471 [2d Dept 2021]; *Lopez v Edge 11211, LLC*, 150 AD3d 1214, 1215-1216 [2d Dept 2017]).

However, in his bill of particulars (NYSCEF Doc Nos. 84-86, 90, 94), plaintiff also alleged that the accident occurred as the result of a dangerous premises condition. As such, defendants, in order to demonstrate their prima facie entitlement to summary judgment, were required to address this premises condition theory of liability as well (see *Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 52-53 [2d Dept 2011]). In moving, defendants did not address this allegation other than by asserting that the accident was solely caused by plaintiff's decision to walk through the area where the construction materials were stored. Defendants' position is essentially an argument that plaintiff's actions were the sole proximate cause of his injury, and, as discussed above, this court has found factual issues as to whether it was reasonable or necessary for plaintiff to take the route he did. Since defendants did not present evidentiary proof demonstrating that they did not have control of the worksite or that they did not have actual or constructive notice regarding how the material was stored, this court finds that they have failed to demonstrate their prima facie entitlement to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 causes of action (see *Padilla v Touro Coll. Univ. Sys.*, 204 AD3d 415, 416 [1st Dept 2022]);

Cantalupo v Arco Plumbing & Heating, Inc., 194 AD3d 686, 690 [2d Dept 2021]; *Slikas v Cyclone Realty, LLC*, 78 AD3d 144, 148-149 [2d Dept 2010]; *Aguilera v Pistilli Constr. & Dev. Corp.*, 63 AD3d 763, 764-765 [2d Dept 2009]; *cf. Cody*, 82 AD3d at 926-927).

CONCLUSION

For the foregoing reasons, it is hereby:

ORDERED that plaintiff's motion (Mot. Seq. 4) is denied; and it is further

ORDERED that defendants' motion (Mot. Seq. 5) is granted to the extent that plaintiff's Labor Law §§ 240 (1), (2), & (3), and 241-a causes of action are dismissed without prejudice and the Labor Law § 241 (6) cause of action is dismissed without prejudice to the extent that it is premised on Industrial Code (12 NYCRR) § 23-1.7 (b); and it is further

ORDERED that defendants' motion is otherwise denied, and the remaining claims shall proceed to trial.

This constitutes the decision, order and judgment of the court.

Dated: 04/09/2026

KAL HON. KATHERINE A. LEVINE
Hon. Katherine A. Levine, J.S.C.

Appendix A

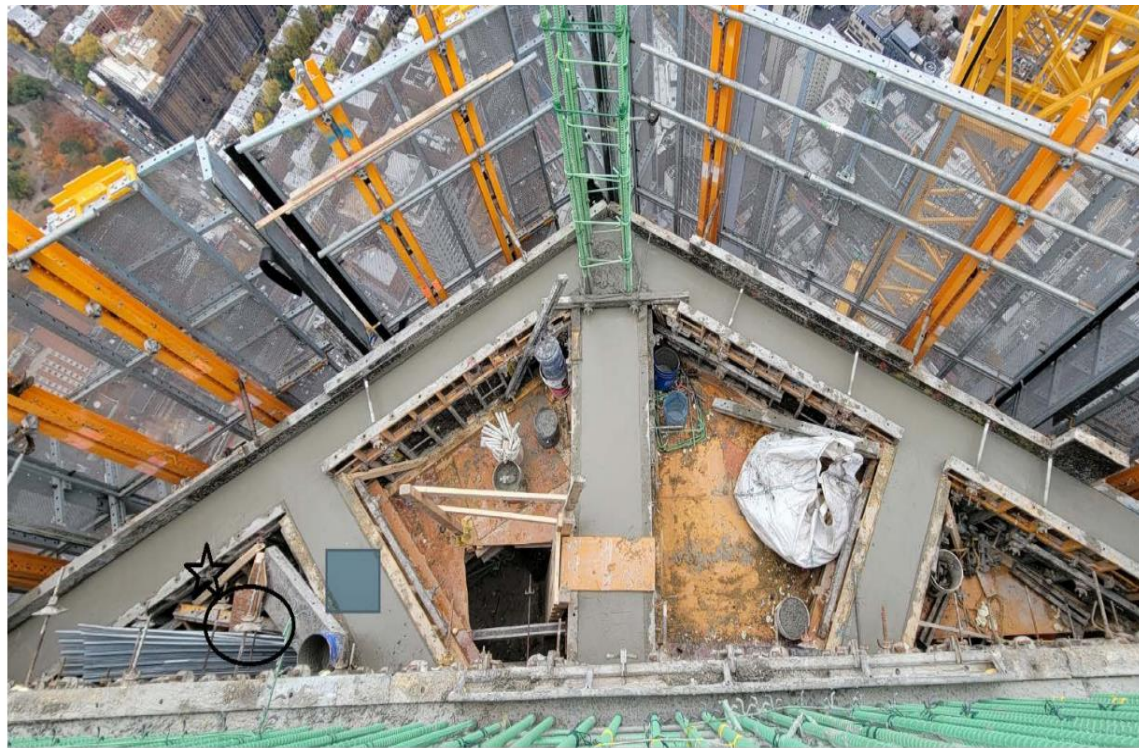


EXHIBIT
Exhibit 2