SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **47**

Justice

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JAVIER MUNOZ,

Plaintiff,

- v -

TISHMAN CONSTRUCTION CORPORATION, PORT AUTHORITY OF NEW YORK AND NEW JERSEY

Defendants.

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INDEX NO. 160836/2016

MOTION DATE 10/27/2022, 10/27/2022

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 106, 108, 110, 112, 114, 116, 118, 120, 122, 124, 126, 128, 130, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 147, 149, 152

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 107, 109, 111, 113, 115, 117, 119, 121, 123, 125, 127, 129, 131, 146, 148, 150, 151, 153, 154, 155, 156

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

This is an action to recover damages for personal injuries allegedly sustained by a union construction worker on March 30, 2016, when, while working at a construction site located at 3 World Trade Center, New York, New York (the Premises), he fell part way into a hole.

In motion sequence number 002, plaintiff Javier Munoz moves, pursuant to CPLR § 3212, for summary judgment in his favor as to liability on his Labor Law § 240 (1) claim against defendants Tishman Construction Corporation (Tishman) and the Port Authority of New York and New Jersey (Port Authority) (collectively, defendants).

In motion sequence number 003, defendants move, pursuant to CPLR § 3212, for summary judgment dismissing the complaint as against them.

The motions are consolidated for disposition.

BACKGROUND

On the day of the accident, the Premises was owned by the Port Authority. The Port Authority hired Tishman as the general contractor for a project at the Premises that entailed the new construction of the Premises (the Project). Tishman hired plaintiff's employer non-party Roger and Sons Concrete, Inc. (R&S), to perform concrete work for the Project.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident he was employed by R&S and his supervisor was Fernando Riberio. Plaintiff would typically work with a group of R&S workers. R&S was responsible for constructing the floors – laying out the deck, setting up wood to pour concrete and then pouring the concrete.

Plaintiff's work entailed installing scaffolding and wood frames on the floor decks in advance of concrete pours. His equipment included "a hardhat, harness, and then tools [and] the yo-yo's on [his] back" (plaintiff's tr at 62). Plaintiff clarified that a yo-yo is a retractable safety line or lanyard (*id.* at 62). His equipment, including the lanyard, was provided by R&S (*id.* at 204).

On the day of the accident, plaintiff was working on the deck/subflooring of the 64th or 65th floor of the Premises (*id.* at 65). Most of the deck had been laid out, except for an area of approximately 20 8-by-4-foot pieces of plywood. Shortly before the accident, plaintiff was tasked with installing safety railings (*id.* at 87). Specifically, plaintiff was installing "toeboards" designed to prevent things from "falling towards the outside" of the Premises from the unfinished floor (*id.* at 88). The railings were wooden 2x4s, measuring approximately 16 feet in length (*id.* at 105). Because he was working on an unfinished deck, he wore a lanyard, and was tied off at the time of the accident (*id.* at 93).

Immediately before the accident, plaintiff was carrying a piece of safety railing towards the edge of the deck. He turned around to make sure that he was clear to move forward, and his shoulder struck a part of a raised platform (*id.* at 118). He lost his balance and stepped backwards (*id.* at 121). Then his "left foot entered a hole" in the decking while "the right one stayed" on the decking, causing him to fall (*id.* at 119).

Plaintiff described the hole as rectangular, with dimensions of approximately eight feet long and two feet wide (the Hole) (*id.* at 120). Plaintiff further explained that he fell part way into the Hole and did not fall to the floor below (*id.* at 120). He lost consciousness after he fell (*id.* at 125) and next remembered being taken down to the street level for the ambulance.

At his continued deposition, plaintiff testified that his entire left leg went into the hole, up to his hip (*id.* at 158). He also testified that the hole was uncovered (*id.* at 159) and the he lost consciousness but regained it as he was being removed from the hole (*id.* at 176). At that time, he saw a "person from Tishman . . . pulling on the lanyard" (*id.* at 178). He further testified that the Tishman worker noted that the lanyard "would not lock" (*id.* at 187).

Plaintiff testified that he was aware that Tishman and R&S each prepared reports. He did not recall seeing the reports, reviewing them, or signing them. He testified that, once he saw the reports, they were "all wrong" (*id.* at 182). He also testified that while one report had what "looks like [his] signature," he did not remember signing it (*id.* at 199). Plaintiff also testified that the reports were in English, and he does not speak or read English.

In addition, plaintiff was shown several photographs. He testified that they depicted a floor at the Premises but he could not say whether it depicted the floor he worked on because "[e]ach floor looked like that" (*id.* at 206). Plaintiff also identified one photograph as depicting a safety railing of the type he was installing at the time of his accident (*id.* at 218). He testified

that the accident location did not have the safety railing installed because he was injured prior to installing it (*id.* at 218).

Deposition Testimony of Thane Szilagyi (Tishman's Site Safety Manager)

Thane Szilagyi testified that on the day of the accident he was Tishman's site safety manager for the Project. His duties included "ensur[ing] that we had compliance to our guidelines" and "that companies were doing things in a safe manner" (Szilagyi tr at 15). He conducted weekly safety meetings and prepared accident reports where needed. He would walk the Premises on a daily basis (*id.* at 15). If he was informed of an accident he would "try to speak to witnesses, take pictures, talk to the injured worker . . . get witness statements and file a report from Tishman" (*id.* at 16).

Szilagyi did not learn of the accident until the day after it took place (*id.* at 45). He went to the accident location. Szilagyi received a witness statement from Fernando Batista, plaintiff's coworker. Szilagyi did not take Batista's statement (*id.* at 19). He later took plaintiff's statement (*id.* at 18), though he did not explicitly recall taking that statement (*id.* at 25).

Szilagyi was shown a copy of plaintiff's accident report and confirmed that it contained his handwriting (*id.* at 26). He also confirmed that the accident report and witness statement noted that the accident occurred on the 56th floor (*id.* at 50).

At his deposition, Szilagyi reviewed several photographs. He testified that he believed he took the photographs. Szilagyi also testified that the photographs depicted "a deck for form work, a guardrail system" and a gap in the deck for "a piece of plywood either to go in or [which had] been removed from one section of that decking" (*id.* at 32). He testified that he did not know for certain whether the photographs depicted the hole plaintiff fell through but confirmed that the photographs were annexed to the accident report.

Szilagyi further testified that the photograph that depicted the hole showed that the hole contained "the ribs that the plywood attaches to" (*id.* at 53); specifically, a series of four-by-four pieces of plywood framing (*id.* at 54).

At the deposition, Szilagyi also reviewed an R&S contractor's report for the day of the accident and confirmed that the report indicated that R&S was "framing 56th floor core slab" as well as working on floors 55 and 58-59 (*id.* at 87). He also reviewed a Tishman daily log for the day of the accident which stated that "R&S worker injured groin after falling partially through an opening in 56th floor framing deck" (*id.* at 91).

Affidavit of Thane Szilagyi

Szilagyi supplements his deposition testimony by affidavit and annexed to his affidavit are copies of the incident reports and worker statements that he discussed at his deposition and he states that he prepared them as a part of his "duties and responsibilities as [Tishman's] senior site safety manager" (Szilagyi aff, ¶ 2; NYSCEF Doc. No. 140).

Szilingyi further states that he was unaware of any other Tishman employee investigating the accident location prior to Szilyagi's own investigation. He had never heard or learned from anyone that plaintiff's lanyard was defective or inoperable (*id.* at 6).

Affidavit of Acacio Fernando Ribeiro (Plaintiff's Foreman)

Acacio Fernando Ribiero states that on the day of the accident, he was employed by R&S as a foreman for the Project and that on that day, he assigned plaintiff and Batista to install decking the 56th floor (Ribiero aff, ¶ 4; NYSCEF Doc. No. 136). Specifically, plaintiff and Batista were to lay down plywood over a series of four-by-four plywood beams (*id.* at 11 [noting that plaintiff "then nails the plywood to the 4x4 which keeps them secured"]).

Ribiero did not witness the accident. He was one floor below. He arrived two minutes after learning of the accident. He states that the hole plaintiff fell into was "the only space/hole in the area" (*id.* at 14) and that the hole was a part of the unfinished deck that had yet to be covered by "the last piece of plywood that had to be put down for the day" (*id.* at 15).

Finally, Ribiero states that plaintiff "was not installing a handrail/guardrail, but was installing the last piece of decking" when his accident occurred (*id.* at 16).

Affidavit of Fernando Batista (Plaintiff's Coworker)

Fernando Batista states that on the day of the accident, he was employed by R&S as a carpenter at the Project and that on that day he was assigned to work with plaintiff on "an upper floor" of the Premises (Batista aff, ¶ 4; NYSCEF Doc. No. 137). When they began work, there was no plywood installed. Ribeiro assigned plaintiff and Batista "to put the plywood down over the previously installed 4"x4" plywood studs on the floor" (*id.* at 5).

Batista states that they performed this work "that whole day" without issue (*id.* at 6). He also states that the deck was "99% complete at the time of the accident" (*id.* at 9). Batista further states that he was approximately six feet from plaintiff when the accident occurred, but he did not witness it happen (*id.* at 7).

Batista annexes a photograph that he says depicts the accident location. He states that the photograph "shows the deck with the only gap space on the deck as it appeared immediately following the accident" (*id.* at 10).

Expert Affidavit of Kathleen Hopkins (Plaintiff's Safety Expert)

Plaintiff submits the expert affidavit of Kathleen Hopkins who avers that she is a site safety manager. Hopkins states that she reviewed the bills of particulars and deposition transcripts to formulate her opinion. Based on her review of those documents, she opines that

plaintiff's lanyard was defective, as it did not prevent him from falling partway into the hole. She also opines that the hole should have been covered or ringed with safety railings.

Finally, while Hopkins states that her curriculum vitae is attached to her affidavit, it is not.

Expert Affidavit of Martin Bruno, CHST (Defendants' Safety Expert)

Martin Bruno states that he is a former project manager and site safety specialist and OSHA trainer. He indicates that he reviewed the pleadings and depositions as well as all accident reports. He opines that no safety device was needed to cover the hole due, in part, to ongoing work in the area.

Bruno further opines that a safety harness/line was not needed with respect to the hole, as it was too small to fall through (Bruno Aff, ¶ 47; NYSCEF Doc. No. 133). He also opines that the safety line is not designed to prevent such a short fall as the safety line's brake "would not have engaged . . . as the acceleration and distance needed for it to have engaged was not present" (*id.*, ¶ 49).

The Accident Reports

The Tishman Report

Defendants provide a copy of a "GC Incident Reporting Form" (the Tishman Report) which was prepared by Szilyagi on March 31, 2016 (one day after the accident) (NYSCEF Doc. No. 100). It provides as relevant, the following:

> "[Plaintiff] was decking off framing of the 56th core with plywood when he describes turning around with a 2x4x16 for guard rail for a nearby opening . . . it struck a doka trailing platform above him and he lost his balance. His left foot went into a nearby opening and his right foot stayed on the decking. His groin struck the 4"x4" framing when his leg went through the opening"

(*id.* at 3). Annexed to the Tishman Report are several photographs depicting a narrow rectangular hole. Within the hole are several crossbeams and braces. The report indicates that this was the hole that plaintiff fell into.

R&S Investigation Report

Defendants provide a copy of the R&S "Accident Investigation Report" dated April 1, 2016 (the R&S Report) (NYSCEF Doc. No. 155). It states that the accident occurred on the "56th floor core slab" and describes the accident as "while walking on the wood deck, [plaintiff's] foot went into a small opening causing him to do a split" (*id.* at 2).

Annexed to the R&S Report is an employee statement, also dated April 1, 2016. It states that plaintiff "lost his balance and one of his foot went down the small opening" (*id.* at 4).

DISCUSSION

"It is well settled 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'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-54 [1st Dept 2010]).

"The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility" (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-11 [1st Dept 2010]

[internal citations omitted]). The evidence presented on a summary judgment motion must be examined "in the light most favorable to the non-moving party" (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

The Labor Law § 240 (1) Claim

Plaintiff moves for summary judgment in his favor on his Labor Law § 240 (1) claim. Defendants move for summary judgment dismissing the same claim. Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

> "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."

Labor Law § 240 (1) "imposes a nondelegable duty on owners and contractors to provide devices which shall be so constructed, placed and operated as to give proper protection to those individuals performing the work" (*Quiroz v Memorial Hosp. for Cancer & Allied Diseases*, 202 AD3d 601, 604 [1st Dept 2022] [internal quotation marks and citations omitted]). It "was designed to prevent those types of accidents in which the scaffold . . . 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'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

The absolute liability found within section 240 "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" (*O'Brien v. Port Auth. of N.Y. & N.J.,* 29 NY3d 27, 33 [2017] [internal quotation marks and citation omitted]). In addition, Labor Law § 240 (1) "must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC,* 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

But not every worker who is injured at a construction site is afforded the protections of Labor Law § 240 (1), and "a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace" (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007] [section 240 (1) "does not cover the type of ordinary and usual peril to which a worker is commonly exposed at a construction site"). 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" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

Therefore, to prevail on a section 240 (1) claim, a plaintiff must establish that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]).

As an initial matter, defendants do not challenge that they are the owner and general contractor. Therefore, they are proper defendants under the Labor Law.

Here, plaintiff alleges that, while working on unfinished deck, he stepped into and fell partway through the uncovered and unguarded hole in the deck. It is also uncontested that the hole was uncovered and unbarricaded. Therefore, plaintiff has set forth his prima facie

entitlement to summary judgment in his favor on his Labor Law § 240 (1) claim (*see.e.g. Carpio v Tishman Constr. Corp. of N.Y.,* 240 AD2d 234, 235 [1st Dept 1997] [a fall through a hole in the floor implicates the protections of section 240 (1)]).

In opposition and in support of their own motion for summary judgment, defendants initially argue that Labor Law § 240 (1) cannot apply to plaintiff's accident because he did not fall completely through the hole. This argument is unpersuasive (*see Favaloro v. Port Auth of N.Y. & N.J.,* 191 AD3d 524, 524 [1st Dept 2021] ["that plaintiff did not fall all the way through the hole do[es] not take his fall out of the ambit of Labor Law § 240 (1)."]; *see also Coleman v Crumb Rubber Mfrs*., 92 AD3d 1128, 1130 [3d Dept 2012], citing *Pilato v Nigel Enters., Inc.,* 48 AD3d 1133, 1134-1135 [4th Dept 2008] ["It is not necessary . . . that an injured worker actually fall through such an opening to sustain a claim premised on this regulation"]).

Next, defendants argue that section 240 (1) is inapplicable to plaintiff's accident because R&S's ongoing work at that time included installing the floor where the accident took place by specifically installing plywood to create the decking. More specifically, they argue that the hole itself was the last remaining spot of the deck that had yet to be installed (*see Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 140 [2011] [dismissing the section 240 (1) claim because "it would be illogical to require an owner or general contractor to place a protective cover over, or otherwise barricade [a hole] when the very goal of the work is to fill that hole"]; *Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 101 [2015]).

Initially, there is a dispute over what specific task plaintiff was assigned at the time of his accident. However, there is no dispute that plywood decking installation work was ongoing at that time. To that end, testimony supports that R&S workers were installing plywood decking around the accident location throughout the day (plaintiff's tr at 219 [noting that "[his] co-

workers were putting down the plywood" on the day of the accident]; Riberio aff at 11 [noting that plaintiff and his coworkers were tasked with installing plywood]), and that the accident location was one of the last, if not the last, part of the floor that had yet to be covered (Riberio aff at 15 [noting that the hole was "the last piece of plywood that had to be put down for the day"]; Batista tr at 9 [noting that the deck was "99% complete at the time of the accident"]). Further, Batista explained that he was performing deck installation work on the floor at the time of plaintiff's accident and was "about 6 feet" away from plaintiff at the time of the accident (Batista tr at 7).

While plaintiff argues that the hole should have been covered and/or barricaded, "the installation of a protective device of the kind [plaintiff] posits . . . would have been contrary to the objectives of the work plan" (*Salazar,* 18 NY3d at 139-140) – installing the plywood decking. Therefore, the lack of a cover or barricade around the hole was not a violation of Labor Law § 240 (1). In the absence of a violation, there is no liability under Labor Law § 240 (1) (*see O'Brien,* 29 NY3d at 33 [noting that liability under section 240 (1) "is contingent upon . . . the failure to use, or the inadequacy of, a safety device" contemplated by the statute]).

Plaintiff also argues that his safety harness – which he was wearing at the time of the accident – should have prevented his fall; and its failure to do so is also a violation of section 240 (1). Plaintiff, however, fails to support this argument sufficiently to raise a question of fact. Specifically, Defendants' expert, Martin Bruno, opined that plaintiff's safety harness system was not designed to prevent a short fall because the brake on the safety line "would not have engaged . . . as the acceleration and distance needed for it to have engaged was not present" (*id.*, ¶ 49). In other words, the safety harness system was intended to be utilized as a safety device to protect

against falls from a more significant height than the short distance fall involved in plaintiff's accident.

In response, plaintiff fails to present admissible evidence to overcome defendants' expert testimony. "For a witness to be qualified as an expert, the witness must possess the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable" (*Schechter v 3320 Holding LLC,* 64 AD3d 446, 449 [1st Dept 2009], citing *Matott v Ward,* 48 NY2d 455, 459 [1979]). While plaintiff provides the expert affidavit of Kathleen Hopkins, Hopkins' CV was not provided to the court. Importantly, Hopkins' affidavit explicitly references her CV as the basis for her knowledge and expertise. As plaintiff failed to provide Hopkins' CV, her expert affidavit lacks foundation regarding her expertise and the reliability of her opinion. Notably, plaintiff had an opportunity to cure this defect on two occasions (in reply on his own motion and in opposition to defendants' motion), but failed to do so. Therefore, plaintiff's expert's affidavit cannot be considered.

Given the foregoing, while plaintiff's accident falls within the scope of protection contemplated by Labor Law § 240 (1), defendants have established that the nature of the work at the accident location precluded the use of a cover over, or barricades around the hole (*Salazar*, 18 NY3d at 140). In opposition, plaintiff has not sufficiently raised a question of fact regarding the failure or inadequacy of any other safety device that would give rise to a violation of Labor Law § 240 (1).

Therefore, in light of the specific facts discussed above, plaintiff's accident was caused by an ordinary peril of the worksite (*Buckley,* 44 AD3d at 267 [section 240 (1) "does not cover the type of ordinary and usual peril to which a worker is commonly exposed at a construction site").

Accordingly, defendants are entitled to summary judgment dismissing plaintiff's Labor Law § 240 (1) claim as against them and plaintiff is not entitled to summary judgment in his favor as to the same claim.

The Labor Law § 241 (6) Claims (Motion Sequence Numbers 003)

Defendants move for summary judgment dismissing all of plaintiff's Labor Law § 241 (6) claims against them.

Labor Law § 241 (6) provides, 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, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection for workers and to comply with specific safety rules which have been set forth by the Commissioner of the Department of Labor (*St. Louis v Town of N. Elba*, 16 NY3d 411, 413 [2011]). "The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). In addition, "[t]he [Industrial Code] provision relied upon by [a] plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*id.*, citing *Ross*, 81 NY2d at 504-05). Therefore, in order to prevail on a Labor Law § 241 (6) claim, "a plaintiff must establish a violation of an implementing regulation which sets forth a specific standard of conduct" (*Ortega v Everest Realty LLC*, 84 AD3d 542, 544 [1st Dept 2011]), and that the violation was a

proximate cause of the injury (*see Egan v Monadnock Constr., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

Here, plaintiff lists multiple violations of the Industrial Code in his complaint and/or bill of particulars. Defendants move for summary judgment dismissing all the claims. Except for 12 NYCRR 23-1.7 (b) (1) (i), plaintiff does not contest their dismissal. These uncontested provisions are deemed abandoned (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ["Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section"]).

Accordingly, defendants are entitled to summary judgment dismissing those parts of plaintiff's Labor Law § 241 (6) claim predicated on the abandoned provisions.

Industrial Code 12 NYCRR 23-1.7 (b) (1)

Initially, section 23-1.7 (b) (1) is sufficiently specific to support a Labor Law § 241 (6) claim (*see Cordeiro v TS Midtown Holdings, LLC*, 87 AD3d 904, 906 [1st Dept 2011]).

Section 23-1.7 (b) (1) (i) provides the following:

> "Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule)."

"[A]lthough the term 'hazardous opening' is not defined in 12 NYCRR 23-1.7 (b), based upon a review of the regulation as a whole – particularly the safety measures delineated therein – it is apparent that the regulation is 'inapplicable where the hole is too small for a worker to fall through'" (*Rice v Board of Educ. of City of N.Y.*, 302 AD2d 578, 579 [2d Dept 2003] [internal citation omitted] [a 1-foot by 1-foot hole was too small for a worker to fall through and section 23-1.7 (b) did not apply]; (*Urban v No. 5 Times Sq. Dev., LLC,* 62 AD3d 553, 556 [1st Dept

2009] ["a 10-to-12-inch gap is not a 'hazardous opening'" for the purposes of section 23-1.7 (b)]).

While there is a question of fact as to whether the subject hole was large enough for plaintiff to physically fall through, it is of no moment. Even if the hole was sufficiently large enough to constitute a hazardous opening, "12 NYCRR 23-1.7 (b) (1) (i) cannot be reasonably interpreted to apply . . . where covering the opening in question would have been inconsistent with [the work], an integral part of the job" (*Salazar*, 18 NY3d at 140).

Accordingly, defendants are entitled to summary judgment dismissing all of plaintiff's Labor Law § 241 (6) claims as against them.

The Common-Law Negligence and Labor Law § 200 Claims (Motion Sequence Number 003)

Defendants move for summary judgment dismissing the common-law negligence and Labor Law § 200 claim as against them.

Section 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Labor Law § 200 (1) states, in pertinent part, as follows:

> "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."

There are two distinct categories of section 200 cases. The first applies where the accident is the result of the means and methods used by a contractor to do its work. The second applies where the accident is the result of a dangerous condition that is inherent in the premises

(*see Ruisech v Structure Tone, Inc.*, 208 AD3d 412, 414 [1st Dept 2022]; *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]).

Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless "it actually exercised supervisory control over the injury-producing work" (*Jackson v Hunter Roberts Constr, L.L.C.*, 205 AD3d 542, 543 [1st Dept 2022] [internal quotation marks and citation omitted]; *Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012] ["liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work"]). "General supervisory authority is insufficient to constitute supervisory control" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]).

Where "a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a general contractor may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition" (*Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708 [2d Dept 2007]; *Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]).

Here, the accident was caused when plaintiff stepped into the hole, an unfinished portion of the under-construction decking. The hole was uncovered because the floor – including the Hole – was in the process of being installed by plaintiff's coworkers. Therefore, plaintiff's accident was caused by the means and methods of the work.

A review of the record establishes that defendants did not have the supervisory authority over the installation of decking at the Project. Plaintiff testified that he received his direction and supervision from his foreman, an R&S employee. It is also undisputed that R&S was

responsible for installing decking at the Premises. While Tishman had a general authority to stop work if its employees saw an unsafe practice at the site, such general supervisory control is insufficient to impute liability under section 200 (*Bisram v Long Is. Jewish Hosp.,* 116 AD3d 475, 476 [1st Dept 2014] [where an entity "had the authority to review onsite safety, . . . [such] responsibilities do not rise to the level of supervision or control necessary to hold the [entity] liable for plaintiff's injuries under Labor Law § 200"]).

To the extent that plaintiff argues that his accident was caused by defective equipment – i.e. his allegedly defective safety harness – this argument is unavailing. Under section 200, an owner or the general contractor may not be liable "where the accident arises out of a defect in the subcontractor's tools, equipment, or methods of operation" (*Vilardi v Berley*, 201 AD2d 641, 644 [2d Dept 1994]; *see also Williams v River Place II, LLC*, 145 AD3d 589, 590 [1st Dept 2016] [Owner and general contractor were not "liable for any defects in the saw, which was supplied to plaintiff by his employer"]).

"When a defendant lends allegedly dangerous or defective equipment to a worker that causes injury during its use, in moving for summary judgment that defendant must establish that it neither created the alleged danger or defect in the instrumentality nor had actual or constructive notice of the dangerous or defective condition" (*Lam v Sky Realty, Inc.*, 142 AD3d 1137, 1138–39 [2d Dept 2016]). However, where "a worker's injury results from his or her employer's own tools or methods, . . . a defendant . . . [would] be liable only if possessed of authority to supervise or control the work" (*Chowdhury v Rodriguez*, 57 AD3d 121, 130 [2d Dept 2008]).

Here, testimony establishes that R&S provided the safety harnesses and lanyards to plaintiff. In addition, as discussed above, testimony further establishes that defendants did not

have the authority to supervise or control the work that gave rise to the accident. Therefore, Defendants – the owner and general contractor – cannot be liable in negligence for any injuries that arose from alleged defects to R&S's equipment.

Finally, to the extent that plaintiff argues the accident should be considered under a dangerous condition analysis, it should not because "[w]here a defect is not inherent but is created by the manner in which the work is performed, the claim under Labor Law § 200 is one for means and methods and not one for a dangerous condition existing on the premises" (*Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 406 [1st Dept 2018]). Here, the condition was caused by the means and methods of installing the decking at the Premises.

Accordingly, defendants have established their entitlement to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims as against them.

The parties remaining arguments have been considered and are unavailing.

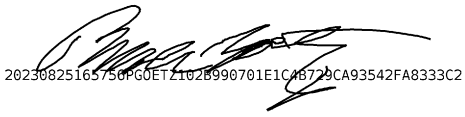
CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion of plaintiff, Javier Munoz (motion sequence number 002), pursuant to CPLR § 3212, for summary judgment in his favor as to liability on his Labor Law § 240 (1) claim against defendants Tishman Construction Corporation and Port Authority of New York and New Jersey (defendants), is denied; and it is further

ORDERED that defendants' motion (motion sequence number 003), pursuant to CPLR § 3212, for summary judgment dismissing the complaint is granted and the complaint is dismissed with costs and disbursements as taxed by the clerk of the court upon submission of an appropriate bill of costs; and it is further

ORDERED that the clerk of the court is directed to enter judgment accordingly.



8/25/2023
DATE

PAUL A. GOETZ, J.S.C.

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