SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. PART 2
Justice

Index Number : 105750/2009
PIORKOWSKI, CHRISTOPHER
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is is decided in accordance with the accompanying decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/9/14

LBY
LOUIS B. YORK, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

----------X

CHRISTOPHER PIORKOWSKI,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, METCALF & EDDY OF NEW YORK, INC., KEY MECHANICAL INC. and AECOM USA, INC.,

Defendants.

----------X

Index Nº.: 105750/09
Motion Seq. No. 003, 004, 005
DECISION AND ORDER

LOUIS B. YORK, J.S.C.:

In a case involving a plumber who injured his face when an impact gun came apart as he used it above his head, defendants The City of New York (the City) and New York City Department of Environmental Protection (DEP) (together, the City defendants) move, pursuant to CPLR 3212, for summary judgment dismissing all claims as against them (motion seq. No. 003). Meanwhile, defendants AECOM USA, Inc. (Aecom) and Key Mechanical Inc. (Key Mechanical) also seek summary judgment dismissing all claims as against them (motions seq. Nos. 004 and 005, respectively). The three motions are consolidated for disposition.

BACKGROUND

On February 7, 2008, plaintiff, a plumber employed by nonparty WDF, was working at a water treatment facility located on Wards Island when he was struck in the face by components of an impact gun. Plaintiff was "bolting pipe together" (plaintiff's tr at 19) from an A-frame ladder, which was either "a six footer or eight footer" (*id.* at 21). The impact gun was used to tighten the bolts (*id.* at 28), and plaintiff held it with two hands while standing on the second or third rung of the ladder (*id.* at 32). Plaintiff was working on a pipe directly above him (*id.* at 33) when the impact gun unexpectedly came apart, injuring him: "I hit the trigger . . . the extension

and the knuckle, they didn't go together. I didn't know that at the time. I hit the impact gun. It spun off the socket and the knuckle hit me right in the face" (*id.* at 36).

Plaintiff's safety goggles were broken by the impact and he jumped off the ladder to the floor, where his coworkers came to his aid (*id.* at 40-41). Aside from lacerations on his face, plaintiff broke his nose and his cheekbone (*id.* at 53).

On April 23, 2009, plaintiff served a summons and complaint on defendants alleging that they are liable under Labor Law § 200 and common-law negligence, as well as Labor Law § 240 (1), and Labor Law § 241 (6).

DISCUSSION

"Summary judgment must be granted if the proponent makes '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,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

Initially, the court notes that plaintiff has not responded to Key Mechanical's motion for summary judgment. As such, plaintiff has abandoned its claims against Key Mechanical, and Key Mechanical's motion for summary judgment dismissing the complaint as against it is granted (*see Gary v Flair Beverage Corp.*, 60 AD3d 413, 413 [1st Dept 2009] [holding that "plaintiff's failure to address this issue in its responding brief indicates an intention to abandon this basis of liability"]).

I. Labor Law § 240 (1)

Labor Law § 240 (1) provides, in relevant part:

> "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."

The Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused a plaintiff's injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]). A statutory violation is present where an owner or general contractor fails to provide a worker engaged in section 240 activity with "adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Where a violation has proximately caused plaintiff's injuries, owners and general contractors are absolutely liable "even if they do not have a continuing duty to supervise the use of safety equipment" (*Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 [1st Dept 2011] [citation omitted]).

A. The City defendants

The City defendants argue that plaintiff's Labor Law § 240 (1) cause of action claim must be dismissed, as plaintiff's accident was not caused by an absent or defective elevation device. Specifically, the City defendants argue that plaintiff's accident was not related to the ladder. Moreover, the City defendants argue that no danger relating to an elevation differential caused plaintiff's accident, and plaintiff does not even suggest that an elevation-related safety device could have prevented the accident.

In opposition, plaintiff characterizes his section 240 (1) cause of action as a falling-object claim. Specifically, plaintiff argues that he was obliged to hoist the impact gun above his head, and that the possibility of the gun falling on him was a risk arising from a physically significant elevation differential.

Here, plaintiff's accident was not caused by a risk arising from a physically significant elevation differential. It was caused by the malfunction of the impact gun he was using. That is, the spinning of the gun launched the socket and knuckle as projectiles into plaintiff's face. Thus, the accident was not caused by a gravity-related risk. Accordingly, the branch of the City defendants' motion seeking dismissal of plaintiff's Labor Law § 240 (1) claim is granted.

B. Aecom

Similar to the City defendants, Aecom argues that the section 240 (1) claim must be dismissed as plaintiff's accident did not arise form a height-related occurrence. For the reasons discussed above, the branch of Aecom's motion seeking to dismiss plaintiff's Labor Law § 240 (1) claim is granted.

II. Labor Law § 200 and common-law negligence

Labor Law § 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" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed" (*id.*).

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or

contractor "is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; *see also Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]). In the dangerous-condition context, "whether [a defendant] controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common-law negligence claims . . ." (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

A. The City defendants

The City defendants argue that plaintiff's Labor Law § 200 and common-law negligence claims should be dismissed, as against it, as the City defendants argue that they did not have supervisory control over plaintiff's work.

In support, the City defendants cite to a portion of plaintiff's deposition in which he was asked who provided the orange reflective vest he wore on the day of the accident, and plaintiff, answering a broader question than the one put to him, responded that "[e]verything came from WDF" (plaintiff's tr at 32). The City defendants also submit deposition testimony from Keith Beckman (Beckman), a section chief at the treatment plant, who testified that specific contractors, such as WDF, would be responsible for directing the work of their own employees (Beckman tr at 32-33).

In opposition, plaintiff argues that his Labor Law § 200 and common-law negligence claims should not be dismissed as against the City defendants, as the City defendants did have supervisory control over his work. In support, plaintiff, citing to Beckman's testimony, argues that the City retained the authority to change the work schedule of a contractor, like WDF (Beckman tr at 15). Moreover, plaintiff notes that Beckman testified, "if I saw something that was being done in an unsafe manner, I would immediately note it and have it corrected" (*id.* at 34).

Here, the City defendants make a prima facie showing of entitlement to judgment on the issue of Labor Law § 200 and common-law negligence by submitting evidence, such as plaintiff's own testimony regarding WDF's supervision of his work, showing that they lacked the requisite control over plaintiff's work to be liable under these causes of action. The evidence that plaintiff marshals in opposition fails to raise an issue of fact as to supervisory control. The authority to change the schedule of work and to stop work for safety concerns is insufficient to show supervisory control, as such authority does not demonstrate control over how plaintiff performed his work.

B. Aecom

Aecom argues that it is not liable under Labor Law § 200 and common-law negligence because it did not have supervisory control over plaintiff's work. Contractually, Aecom contends, it was not delegated the authority to supervise, or even stop plaintiff's work. Aecom submits the construction management contract between the City defendants and Aecom's predecessor, Metcalf & Eddy of New York, Inc. (Metcalf & Eddy), which, under its Specific Requirements section, provides, among other things:

> It is the responsibility of the Construction Contractors, and not the responsibility of the CM, to determine the means and methods of construction . . . . However, if it becomes apparent that the means and methods of construction proposed by the Construction Contractors will constitute or create a hazard to the work, or to persons or property, or will not produce finished work in accordance with the terms of the Construction Contracts, such means and methods must be reported to the Commissioner [of the DEP], or to the Commissioner's duly authorized representative.

Aecom maintains that this language shows that it was not responsible for supervising the work of WDF. In addition, Aecom refers to the testimony of Beckman, the City's section chief, that specific contractors will provide supervision over their own work (Beckman tr at 32-33), as well as submitting testimony from Donald Gibbs (Gibbs), Aecom's health and safety officer. Gibbs testified that he did not specifically instruct workers on how to do their jobs, but instead

communicated through "safety reps or the company project managers" (Gibbs tr at 21). Gibbs also testified that he would, and in fact did, stop work when he saw a safety violation, and then he would instruct the workers to contact a safety representative from the City, who would instruct the worker on proper safety measures (*id.* at 25). Moreover, Gibbs stated that he did not instruct workers on "means and methods" and, when asked what he meant by the phrase, he elaborated on his role:

> "contractor would have a plan upon how they are going to attack a certain portion of work and what type of equipment that they will employ or how they will enter into [the] task would be up to them. I would just compare that to OSHA rules and City rules and make sure that it's within that range of compliance"

(*id.* at 24).

In opposition, plaintiff argues that Aecom did have supervisory control over his work. Plaintiff submits the deposition testimony of Frank Washer (Washer), a project superintendent for nonparty Silverite Construction (Silverite). Silverite was the general contractor for another project at the water filtration plant that was going on simultaneously with the project on which plaintiff was injured (Washer tr at 8-10). Washer testified that subcontractors hired by Silverite were under Silverite's supervision and control (*id.* at 21). When asked if Aecom's predecessor, Metcalf and Eddy, supervised WDF, plaintiff's employer, Washer testified that he did not know (*id.* at 41). Washer also testified that, Metcalf and Eddy/Aecom, for the Silverite project, "would oversee the project for compliance of the plans and specs, take care of daily issues, you know, related to construction safety" (*id.* at 59). Asked whether Metcalf and Eddy/Aecom performed this same for WDF's work, Washer stated: "I don't know. I would assume so" (*id.*).

Plaintiff also refers to Beckman's testimony, noting that he generally described the role of a construction manager, as an entity that "oversees the day-to-day operations of the project. [It] does inspections of the work being performed by the contractors, coordinate[s] the schedules, construction meetings, invoicing" (Beckman tr at 13). Beckman also stated that construction managers, generally, have the authority to alter the schedule if work is done "in an improper

sequence" (*id.* at 15). Plaintiff also cites to the portion of Beckman's testimony where he states that Metcalf & Eddy/Aecom had the authority to stop work at the project (*id.* at 43).

In addition, plaintiff cites to the deposition testimony of Richard Smith (Smith), the president of defendant Key Mechanical, who stated, "I don't think [Metcalf & Eddy/Aecom] were involved in direction of any work being performed" (Smith tr at 26). Smith also stated, generally, that Metcalf & Eddy was a consulting engineer that would, generally, produce a set of plans and specifications for a project (*id.* at 25). Finally, plaintiff submits the testimony of Aecom's Gibbs, cited above, in which he states that he had, and exercised, the authority to stop work in the event that he observed a dangerous condition (Gibbs tr at 25).

Here, it is clear that Aecom did not have supervisory control over plaintiff's work, as it never instructed plaintiff, or any workers from WDF, on how to perform their work. Thus, the branch of Aecom's motion seeking dismissal of plaintiff's Labor Law § 200 and common-law negligence claims is granted.

III. Labor Law § 241 (6)

Labor Law § 241 (6) provides, in relevant part:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> . . . All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting Labor

Law § 241 [6]). While this duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-349 [1998]), "comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]).

To maintain a viable claim under Labor Law § 241 (6), plaintiffs must allege a violation of a provision of the Industrial Code, 12 NYCRR Part 23, that requires compliance with concrete specifications (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis,* 16 NY3d at 416).

Plaintiff argues that the defendants violated the following provisions of the Industrial Code: 12 NYCRR 23-1.8; 12 NYCRR 23-1.10; 12 NYCRR 23-1.16; 12 NYCRR 23-1.21; 12 NYCRR 23-1.32. While plaintiff also refers to 12 NYCRR 23-1.5, 12 NYCRR 23-1.7, and 12 NYCRR 23-1.33 in his bill of particulars, he abandons these predicates by ignoring them in his opposition to defendants' motions. However, both 12 NYCRR 23-1.8 and 12 NYCRR 23-1.10 do not appear in the bill of particulars, but are defended in plaintiff's opposition.

12 NYCRR 23-1.16, entitled "Safety belts, harnesses, tail lines, and lifelines," is sufficiently specific to serve as a predicate to liability under Labor Law § 241 (6) (*see Mills v Niagara Mohawk Power Corp.*, 262 AD2d 901, 902 [3d Dept 1999]; *see also Macedo v J.D. Posillico, Inc.*, 68 AD3d 508, 510 [1st Dept 2009] [referring specifically to 12 NYCRR 23-1.16 (d)]). The City defendants argue that there is no testimony that plaintiff used, or needed, any of these devices. Aecom makes the same argument. In opposition, plaintiff argues that plaintiff was not provided with a safety belt, harness, tail line, or lifeline, despite the fact that he had to hold the impact gun above his head without the ability to brace himself with either of his hands.

Here, 12 NYCRR 23-1.16 is not applicable, as plaintiff's injuries were caused by a fall

and all of the devices discussed in the regulation are fall-prevention devices.

12 NYCRR 23-1.21, entitled "Ladders and ladderways," is sufficiently specific to sustain a claim under Labor Law § 241 (6) (*see Jicheng Liu v Sanford Tower Condominium, Inc.*, 35 AD3d 378, 379 [2d Dept 2006]). The City defendants argue that plaintiff fails to specify a subsection on this regulation. Additionally, the City defendants argue that there is no evidence in the record that the ladder plaintiff was standing on proximately caused his accident. Aecom makes the same argument regarding proximate causation and notes that plaintiff testified that the ladder was a "quality tool" and was not loose (plaintiff's tr at 74).

In opposition, plaintiff argues that there is no evidence that anyone was holding the ladder, which, plaintiff argues, shows that subsection (b) (4) (iv) of 12 NYCRR 23-1.21 was violated.[1] The subsection provides:

> When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used.

Here, the record makes clear that plaintiff's injuries were not caused by a fall from a ladder. As such, any violation of 12 NYCRR 23-1.21 cannot be the proximate cause of plaintiff's injuries. Accordingly, 12 NYCRR 23-1.21 cannot serve as a predicate to liability under Labor Law § 241 (6).

12 NYCRR 23-1.32, entitled "Imminent danger–notice, warning and avoidance," provides that:

> Where noncompliance with a provision of this Part (rule) causes or tends to cause imminent danger to a person employed in construction, demolition or excavation work and written notice thereof is given by the commissioner to the appropriate

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[1] Plaintiff refers to this subsection as "section iv."

> employer, owner, contractor or his agent, such person shall either (a) at once effect compliance sufficiently to end the danger, or (b) unless the commissioner does such posting or tagging on his behalf, forthwith post the dangerous area or tag the dangerous device or material with suitable posters or signs warning of the danger and forbidding unauthorized entry into the area or unauthorized use of the device or material, and shall maintain such posters or signs until the danger has been ended. While such noncompliance exists no employer shall suffer or permit any person employed by him to enter or be within an area or to use a device or material as to which he has received such a notice of imminent danger, or which is so posted or tagged, except to effect compliance with this Part (rule). No unauthorized person shall remove such poster or sign.

No prior case has held definitively that 12 NYCRR 23-1.32 is sufficiently specific to sustain a cause of action under Labor Law § 241 (6), although the Court in *Mancini v Pedra Constr.* (293 AD2d 453, 454 [2d Dept 2002]) held, without any discussion of specificity, that it was inapplicable because defendant "never received written notice of an Industrial Code violation." The City defendants argue that this regulation is inapplicable because there is no evidence that written notice of an imminent danger was given by the commissioner. Aecom makes the same argument. In opposition, plaintiff argues that the impact gun had previously malfunctioned and notice was given to plaintiff's foreman.

However, plaintiff does not address the argument made by defendants that this regulation was not violated because no written notice was given by the commissioner. Here, it is clear from the language of the regulation requiring written notice from the commissioner that defendants have not violated 12 NYCRR 23-1.32.

12 NYCRR 23-1.8 is entitled "Personal protective equipment." While plaintiff does not identify any particular subdivision of this regulation, he argues that he should have, at least, been provided with a welder's mask. This at least suggests subsection a, entitled "Eye protection," which provides:

> "Approved eye protection equipment suitable for the hazard involved shall be provided for and shall be used by all persons while employed in welding, burning or cutting operations or in chipping, cutting or grinding any material from which particles may fly, or while engaged in any other operation which may endanger the eyes."

12 NYCRR 23-1.8 (a) is sufficiently specific to sustain a claim under Labor Law § 241 (6) (*see Buckley v Triborough Bridge & Tunnel Auth.*, 91 AD3d 508, 509 [1st Dept 2012]).

The City defendants, in reply, argue that the regulation is inapplicable, as plaintiff was not involved in "welding, burning or cutting operations." Aecom, in its reply, argues that plaintiff has not shown the presence of any condition which would require the use of safety equipment under 12 NYCRR 23-1.8. In support, Aecom cites to *Badzmierowski v PBAK, LLC* (5 Misc 3d 1005[A], 2004 NY Slip Op 51207[U] [Sup Ct, NY County 2004]).

> However, *Badzierowski* cuts against Aecom's arguments:
> Having determined that 12 NYCRR § 23-1.8 (a) meets the threshold requirements of specificity and applicability, defendant's motion for summary judgment on this issue must be denied, as it remains a question of fact as to whether the particular activity plaintiff was engaged in at the time of the accident involved a foreseeable risk of eye injury. To hold otherwise would render the catch-all phrase of 12 NYCRR § 23-1.8 (a) superfluous. Furthermore, an issue of fact exists as to whether eye protection was provided at the subject premises. Therefore, the defendant's motion for summary judgment dismissing plaintiff's claims under Labor Law § 241 (6) as to 12 NYCRR § 23-1.8 (a) must be denied.

(*id.* at *10 [internal citation omitted]).

Here, defendants have failed to show that the catch-all phrase, "or while engaged in any other operation which may endanger the eyes" is not applicable to plaintiff's accident. Thus, there remains a question of fact as to whether 12 NYCRR 23-1.8 may serve as a predicate to liability. As to the defendants' complaints that 12 NYCRR 23-1.8, like 12 NYCRR 23-1.10, does not appear in plaintiff's bill of particulars, courts regularly allow plaintiffs to amend the bill of particulars to add regulations that are alleged to have been violated where there is no prejudice to defendants because plaintiffs' new claims involve "no new factual allegations or theories of liability" (*Flynn v 835 6th Ave. Master L.P.*, 107 AD3d 614, 614 [1st Dept 2013]). Here, plaintiff does not allege any new factual allegations or theories of liability, so he will be allowed, following a proper application, to amend his bill of particulars.

12 NYCRR 23-1.10 is entitled "Hand tools." Without, once again, providing a specific

subsection, plaintiff argues that the impact gun did not have a cut-off switch, which would have prevented plaintiff's accident. Plaintiff does cite to the record in support. This argument apparently refers to subsection (b) (1), entitled "Electrical and pneumatic hand tools, Power shut-off requirements," which provides:

> Electric and pneumatic hand tools shall be disconnected from power sources and the pressure in hose lines shall be released before any adjustments or repairs are made except for the replacement of bits in electric drills. Before disconnecting any air hose, the air shall be shut off. Every electric and pneumatic hand tool shall be equipped with a cut-off switch within easy reach of the operator.

12 NYCRR 23-1.10 (b) (1) is sufficiently specific to sustain a claim under Labor Law § 241 (6) (*see Shields v General Elec. Co.*, 3 AD3d 715 [3d Dept 2004]).

In reply, the City defendants argue that the regulation is inapplicable because plaintiff was not making repairs or adjustments at the time of his accident. In its reply, Aecom argues that a cut-off switch would not have protected plaintiff from his accident. However, Aecom provides no citation to the record or expert analysis to support this point.

Here, the sentence requiring a cut-off switch is clearly disjoined from the sentence referring to repairs or adjustments. However, a cut-off switch within easy reach of the operator would not have prevented plaintiff's accident, as plaintiff testified that the impact gun unexpectedly came apart immediately after he pulled the trigger (plaintiff's tr at 36). As a result, 12 NYCRR 23-1.10 is not applicable to plaintiff's accident.

As question a of fact remains as to the applicability of 12 NYCRR 23-1.8, the branches of the City defendants' motion and Aecom's motion seeking dismissal of plaintiff's Labor Law § 241 (6) claim are denied.

CONCLUSION

Based on the foregoing, it is

ORDERED that the motion of defendants The City of New York (the City) and New York City Department of Environmental Protection (DEP) (motion seq. No. 003) is granted only

to the extent that plaintiff's Labor Law § 240 (1), as well as plaintiff's Labor Law § 200 and common-law negligence claims are dismissed; and it is further

ORDERED that the motion of defendant AECOM USA, Inc. (Aecom) (motion seq. No. 004) is granted only to the extent that plaintiff's Labor Law § 240 (1), as well as plaintiff's Labor Law § 200 and common-law negligence claims are dismissed; and it is further

ORDERED that the motion of defendant Key Mechanical Inc. (motion seq. No. 005) is granted with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the action is severed and continued against the remaining defendants.

Dated: 1/9/14

ENTER:

FILED

JAN 14 2014

NEW YORK
COUNTY CLERK'S OFFICE

Honorable LOUIS B. YORK

LOUIS B. YORK
J.S.C.