

<b>Hiseni v Consolidated Edison Co. of N.Y., Inc.</b>
2021 NY Slip Op 30929(U)
March 25, 2021
Supreme Court, New York County
Docket Number: 150577/2017
Judge: Dakota D. Ramseur
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR PART IAS MOTION 5

Justice

-----X

ADEM HISENI,

Plaintiff,

- v -

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., CONSOLIDATED EDISON, INC.,

Defendants.

-----X

INDEX NO. 150577/2017

MOTION DATE 01/31/2020

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 156, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 188, 189, 190, 191

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

Plaintiff Adam Hiseni commenced two Labor Law/negligence actions, later consolidated (NYSCEF 121), against defendant Consolidated Edison Company of New York (Con Ed) and the City of New York (the City) to recover for personal injuries sustained on October 22, 2016, at the intersection of 57th Street and Madison Avenue in Manhattan when he lost his footing on a bent lower access step of a CAT Model 450E backhoe, identified as BDB-013 (BDB-013) owned by non-party Danella Construction of New York (Danella). Con Ed now moves, pursuant to CPLR 3212, for summary judgment dismissing the Complaint. Plaintiff opposes and cross-moves, pursuant to CPLR 3212, for summary judgment against Con Ed and the City. Con Ed and the City oppose plaintiff's cross-motion. For the reasons below, and after oral argument on December 8, 2020, Con-Ed's motion is granted in part, and plaintiff's cross-motion is denied.

BACKGROUND

The City owns the public roadway at the intersection of 57th Street and Madison Avenue where plaintiff was injured (NYSCEF 131, City answer at ¶ 4). According to Con Ed supervisor John Flanagan, Con Ed hired Danella<sup>1</sup> to dig a trench to work on a steel gas main as part of a large project with multiple work sites, including the 57th and 10th site where plaintiff was traveling to when he was injured (NYSCEF 139, Flanagan tr at 17:20-19:13; NYSCEF 137, pl tr at 13:3-24).<sup>2</sup> Con Ed was "responsible for making sure...the contractors were doing work safely at the 57th Street and Madison Avenue work site in October 2016" (Flanagan tr at 17:20-4). Con Ed had the "authority to shut down the work...if it observed any unsafe work practices" (id. at

<sup>1</sup> Plaintiff explains that only 2 pages of a 58-page contract were initially produced; the remaining pages were produced in reply (NYSCEF 159 ¶ 6).

<sup>2</sup> Flanagan was not working on the date of plaintiff's injury.

18:5-9). Flanagan could not recall whether Con Ed also supervised a site at 57th and Madison, where plaintiff was injured, despite at least numerous Foreman Daily Time Reports (FDTR) indicating both Danella's work at that site and Plaintiff's presence there (*id.* at 90:9-20, 92:4-93:16).

Plaintiff, a licensed operating engineer affiliated with operators' union Local 15, has experience in the construction field operating backhoes and excavating since 2001 (NYSCEF 136, *pla tr* at 34:10-15, 42:8-20, 114:17-21). Plaintiff also has experience as a foreman, and has completed OSHA training throughout his career, including 10 times while working for Danella in 2016 (*id.* at 44:3-45:7, 84:13-19). The training included how to safely and properly use ladders, power tools, protective equipment, and excavation equipment (*id.* at 45:8-46:11). Danella hired plaintiff as a union-affiliated operator on August 29, 2016 (NYSCEF 138, *pla tr* at 273:24-284:7). Plaintiff's duties included using a backhoe to dig trenches for utility installation (NYSCEF 136 at 126:23-127:19). During his tenure with Danella, plaintiff would report to the Danella yard located at 400 Tiffany Street, Bronx, New York, each morning to learn his work assignment and pick up his backhoe (*id.* at 141:2-10, 143:11-17).

Prior to October 22, 2016, plaintiff had been using a rental CAT Model 450F backhoe designated #462 (CAT 462) (NYSCEF 137, *pla tr* at 74:11-25). According to Danella Supervisor Charles Agro, in the days preceding the subject incident, "at no point...was [plaintiff] ever assigned to use nor ... provided with a Danella-owned backhoe, including but not limited to BDB-013" (NYSCEF 145, C. Agro *aff* at ¶¶ 18-19). Another Danella employee and Supervisor, Sam Agro, also avers that on October 22, 2016, he assigned plaintiff to use a rental backhoe without "any defective bent or damaged steps," not BDB-013 "or any other Danella-owned backhoe" (NYSCEF 144, S. Agro *Aff* at ¶¶ 10-11). According to Sam Agro, BDB-013 was not in use on October 22, 2016 (*id.* at ¶ 12).

According to plaintiff, on October 22, 2016, he was assigned to 57th between 9th and 10th, but his usual backhoe, CAT 462, was unavailable (NYSCEF 136 at 145:11-146:17). Instead, he was assigned "backhoe 13," a CAT 450E (*id.* 147:2-21). The backhoe was parked next to large, 3-4 foot by 3-4 foot "boulders" stacked to make a wall (NYSCEF 137 at 20:25-24:4). The boulders were so tall that they obstructed the backhoe's access step, and plaintiff essentially had to use the boulders as steps to the cab of the backhoe (*id.* at 24:5-26:7).

Plaintiff stopped at 57th and Madison to pick up a helmet and vest, and to "check the transmission fluid" because the backhoe had "a problem with the transmission" (*id.* at 27:22-29:12). As he was exiting the backhoe, plaintiff "slipped and fell because the [fixed] ladder on the bottom was bent" (*id.* at 28:25-29:4). The step was indented such that the outer edges of the step were approximately eight inches deep, while the center was only one inch deep (NYSCEF 138 at 383:9-20; NYSCEF 164). Plaintiff further indicates that the "[s]tep of the ladder [] mounted on the fuel tank reservoir[] was wet and smelled of diesel that had spilled onto the steps due to the tank's being overfilled by other workers back at the yard" (NYSCEF # 160, *pla aff in opp*, at ¶ 14).

In support of its motion for summary judgment, Con Ed argues: (1) that plaintiff's claims are incredible as a matter of law because admissible evidence establishes that BDB-013, the

allegedly defective backhoe alleged by plaintiff to have caused his injuries, was not in use at the time of plaintiff's incident; (2) that plaintiff is not a proper plaintiff under the Labor Law because he was not performing construction work or employed or permitted to work at the location where he was injured; (3) that Con Ed is not a proper Labor Law defendant because it is not an owner, contractor, or agent; (4) that plaintiff's misconduct was the sole proximate cause of his injury; (5) that Con Ed is entitled to summary judgment on plaintiff's Labor Law § 240(1) claim because alighting from a backhoe is not an extraordinary elevation-related hazard; (6) that Con Ed is entitled to summary judgment on plaintiff's Labor Law § 241(6) claims because plaintiff failed to allege an applicable and specific Industrial Code violation; and (7) that Con Ed is entitled to summary judgment on plaintiff's Labor Law § 200 claim because Con Ed had neither control over the means, materials, or methods of plaintiff's work nor notice of the allegedly defective condition.

In opposition, plaintiff argues: (1) that Danella's business records are incomplete, inconsistent, unreliable, and lacking probative value, and therefore that the affidavits relying upon them are equally meritless; (2) that plaintiff has established that falling from a broken or defective access step when exiting a backhoe is an elevation-related risk protected by Labor Law § 240(1); (3) that the "general context of the work," plaintiff's membership in an excavation team performing under a construction contract, not the "moment of injury," brings plaintiff within the ambit of the Labor Law; (4) that Con Ed was a "de facto general contractor under the Labor Law" because it exercised control and supervision over the construction sites involved; (5) that plaintiff was not the sole proximate cause of his own accident because the BDB-013 access step was defective; (6) that plaintiff has established entitlement to summary judgment under Labor Law § 241 (6) based on various violations of the Industrial Code; and (7) that Con Ed is liable under Labor Law § 200 because Con Ed did control the means and methods of his work, and because Con Ed failed to produce the construction representative assigned to the incident site.

## DISCUSSION

### *I. Whether plaintiff's claims are incredible as a matter of law*

Con Ed first argues that it is entitled to summary judgment because plaintiff's contentions are impossible, to the extent that the BDB-013 was located several miles away from the site of the accident on the date and time of plaintiff's accident. Con Ed submits the affidavit of Paul Kubat (Kubat), a business analyst for Danella, wherein he states that Danella's construction vehicles and equipment are equipped with global positioning (GPS) trackers (NYSCEF 146 at ¶ 6). Kubat further states that he performed three separate searches to determine the location of the BDB-013 in October 2016, including: a "trip report" for the subject vehicle in the month of October 2016, which reveals the points of travel, travel time, and idle time while the vehicle is in use; a "summary report" for all Danella vehicles located within a one-tenth of a mile radius of the construction site; and a "detail report" for all Danella vehicles located within one-tenth of a mile radius of the construction site, which includes all of the events concerning a Danella owned vehicle for a specific location, including , when the vehicle is turned on or off and whether a vehicle is moving or stopped (*id.*). A review of the three GPS reports submitted by Con Ed reveals that the BDB-013 was neither present at the construction site, nor within a one-tenth of a mile radius of construction project, on the date of plaintiff's accident.

Con Ed also attaches photos of the BDB-013 backhoe taken in April of 2018 with no access step defect and aver that no repair records exist to support plaintiff's claim that the access step was ever defective (NYSCEF 148). Con Ed challenges plaintiff's photos as well, arguing that the photos' metadata proves that they were not taken until months after the alleged incident, and that "none of the photographs depict the defect together with anything that can be used to identify the depicted backhoe as BDB-013" (NYSCEF 149 at pp 3-4).

In opposition, plaintiff argues that the affidavits and records are "incomplete, internally inconsistent, unreliable and without probative value" (NYSCEF 159 at 19). Plaintiff's first contention, that the GPS raw data forming the GPS reports were not exchanged in discovery, is belied by the fact that plaintiff never requested GPS records for the subject vehicle from Con Ed or subpoenaed the records from Danella. Plaintiff's next argument, that the GPS records for two unrelated construction vehicles, BDB-019 and BDB-020, do not match the site locations listed for those vehicles on the FDTR for October 22, 2016, is irrelevant as to whereabouts of the BDB-013 on the date of plaintiff's accident.

Next, plaintiff contends that the trip report data is incomplete, to the extent that "GPS tracking data should be available for [BDB-013]," even while it was at Danella's yard, and that the data for October 22, 2016 is missing from the report (*id* at 45). As described in Danella's business analyst's initial affidavit (*id.* at ¶ 9), and supplemental affidavit in reply, the trip report only reveals location data where the vehicle is in use, that is, when the vehicle's ignition is turned on (NYSCEF # 175 at ¶¶ 5-7). Thus, that the GPS data for the subject vehicle on October 22, 2016, does not appear on the trip report is consistent with Con Ed's contention that the vehicle was not in operation that day.

Despite the uncertainty that BDB-013 was the vehicle involved in plaintiff's fall, as plaintiff argues, Con Ed may be liable even if plaintiff fell from another construction vehicle. Accordingly, the Court next turns to whether Con Ed may be liable pursuant to the Labor Law.

## ***II. Whether plaintiff may assert the protections of Labor Law §§ 240 and 241***

### ***A. Whether plaintiff was protected by the Labor Law***

Con Ed next argues that plaintiff is not eligible for Labor Law § 240's protection because he was neither at the subject worksite nor authorized to be present at the Madison Avenue location. Con Ed argues that plaintiff had no "work-related reason for going to the Madison Avenue Project," and that plaintiff's reason for being there, to retrieve safety equipment, was insufficient because plaintiff acknowledged that the equipment was not required to operate a backhoe (NYSCEF 149, Con Ed mem of law at 8, citing NYSCEF 138 at 308:25-309:9). In opposition, plaintiff urges the Court to consider the overall context of plaintiff's presence at 57th and Madison: "as part of one overall project with multiple work sites." Plaintiff argues that he is protected by the Labor Law because he was in transit to a designated work site when he had to stop to check the malfunctioning transmission (NYSCEF 159, pla opp at ¶¶ 67-75).

Labor Law § 240(1) provides, as relevant here, for protection related to elevation risks in specific contexts:

“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 absolute liability on building owners and contractors whose failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker” (*Garbett v Wappingers Cent. Sch. Dist.*, 160 AD3d 812, 814 [2d Dept 2018]). Labor Law § 240(1) is designed “to minimize injuries to employees by placing ultimate responsibility for safety practices on owners and contractors, rather than on the workers, who as a practical matter lack the means of protecting themselves from accidents,” and is thus “is to be construed as liberally as may be for the accomplishment of the purpose for which it was framed (*Martinez v City of NY*, 93 NY2d 322, 325-326 [1999]).

However, “[w]hile the reach of section 240 (1) is not limited to work performed on actual construction sites, the task in which an injured employee was engaged must have been performed during the ‘erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure’” (*Gonzalez v Woodbourne Arboretum, Inc.*, 100 AD3d 694, 696-697 [2d Dept 2012]). “To come within the special class for whose benefit absolute liability is imposed upon contractors, owners and their agents to furnish safe equipment for employees. . . , a plaintiff must demonstrate that he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it owner, contractor or their agent” (*Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970, 971 [1979]).

However, limiting analysis solely to the moment that plaintiff was checking the backhoe’s transmission fluid ignores the overall context of plaintiff’s actions: specifically, that, whatever the location of his injury, he was driving the backhoe, itself a piece of equipment necessary for construction, to a designated worksite where the backhoe was to be employed. The Court agrees, guided substantially by *Cox v LaBarge Bros. Co.*, (154 AD2d 947 [1st Dept 1989]). In *Cox*, the plaintiff, an employee of a trucking company, was injured when he fell from the top tier of pipes stacked on a flatbed truck as the plaintiff was rolling the pipes off the flatbed truck and “stringing” them along the path of the pipeline right-of-way (*id.*). The First Department held that “Plaintiff was not merely delivering materials to be stockpiled for future use, but was unloading and placing the pipe along the construction site, which brought his activity within the protection of the Labor Law” (*id.*; see also *Simms v Elm Ridge Assoc.*, 259 AD2d 538, 538-539 [2d Dept 1999] [plaintiff, who was injured delivering a washer-dryer to be installed in a condominium unit under construction, “was an integral part of the construction process,” and therefore protected by Labor Law § 241(6)]; accord *Williams v G.H. Dev. & Constr. Co.*, 250 AD2d 959, 961 [3d Dept 1998]).

To the extent that Con Ed relies upon *Fabrizio v City of NY*, (306 AD2d 87 [1st Dept 2003]) and similar cases to support an argument that Plaintiff should be excluded from the Labor Law's protections because plaintiff was injured away from his primary designated worksite, those cases can be distinguished. *Fabrizio* involved an electrician who the First Department identified "not [as] a worker at the site, but a 'contract-vendee' who was inspecting the vault in order to estimate the cost of the electrical work to be done therein by his company" (*id.*)—in other words, with no direct connection to construction or repair activity occurring at the time of injury. Accordingly, the Court finds in favor of plaintiff, and grants summary judgment on the issue of whether plaintiff was engaged in a protected activity under the Labor Law.

Further,

***B. Whether Con Ed was an owner, contractor, or agent for Labor Law purposes***

Con Ed next argues that it did not own, or contract for work to be performed at, the precise location where plaintiff fell: "in the 'middle' of the street across from the Madison Avenue Project" (*NYSCEF 149*, citing *NYSCEF 138/Pl EBT 379:12-380:3*). In opposition, Plaintiff argues that Con Ed had the right to, and actually did, exercise control over Plaintiff's work, including safety protocols.

"The label of construction manager versus general contractor is not necessarily determinative" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]). "Rather, the critical question is whether the construction manager was delegated supervisory control and authority over the work being done when the plaintiff was injured" (*Barrios v City of NY*, 75 AD3d 517, 519 [2d Dept 2010] [holding that title of "construction manager" does not relieve it from duties imposed under Labor Law § 240(1) where manager was delegated supervisory authority to oversee and control the work of various on-site contractors]). Here, as plaintiff argues, the record reflects that Con Ed hired Danella, made daily visits to the various sites, and had the authority to enforce safety protocols (*NYSCEF 139* at 8, 11, 17, 18, 34, 40, 45-46, 100-102, 115-16, 129-130). As plaintiff has demonstrated, as a matter of law, that Con Ed is a proper defendant under the Labor Law, the Court must next determine whether plaintiff's substantive claims survive dismissal.

***III. Labor Law § 240(1)***

Con Ed argues that it is entitled to summary judgment because plaintiff was not exposed to the type of hazard contemplated by Labor Law § 240(1). Labor Law § 240(1) provides, as relevant here, for protection related to elevation risks in specific contexts:

"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), also known as the “Scaffold Law,” imposes absolute liability on an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (*Ernish v City of New York*, 2 AD3d 256 [1st Dept 2003], citing *Bland v Manocherian*, 66 NY2d 452 [1985]; *Cherry v Time Warner, Inc.*, 66 AD3d 233, 235, 885 NYS2d 28 [1st Dept 2009] [“The failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers “ ‘are scarcely in a position to protect themselves from accident.’ ”]).

However, “[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). 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” (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

To establish a cause of action under Labor Law § 240, a plaintiff must show that the statute was violated, and the violation was a proximate cause of the worker’s injury (*Toukara v Fernicola*, 80 AD3d 470, 914 NYS2d 161 [1st Dept 2011] [“Plaintiff made a prima facie showing of defendants’ liability under § 240(1) by asserting that defendants failed to provide him with an adequate safety device, and that such failure was a proximate cause of the accident”]). “The statute is violated when the plaintiff is exposed to an elevation-related risk while engaged in an activity covered by the statute and the defendant fails to provide a safety device adequate to protect the plaintiff against the elevation-related risk entailed in the activity or provides an inadequate one” (*Jones v 414 Equities LLC*, 57 AD3d 65, 69 [1st Dept 2008] [citations omitted]).

As Con Ed argues, “the risk of alighting from the construction vehicle [is] not an elevation-related risk which calls for any of the protective devices of the types listed in Labor Law § 240 (1) (*Bond v York Hunter Constr., Inc.*, 95 NY2d 883, 884-885 [2000] [summary judgment granted dismissing the complaint where the plaintiff, stepping from the cab of the vehicle onto the vehicle’s track, slipped on grease and fell three feet]; see also *Dilluvio v City of New York*, 95 NY2d 928 [2000] [granting summary judgment to defendant where plaintiff fell three feet from the back of a pickup truck in which he was riding]; *Molloy v Long Island R.R.*, 150 AD3d 421, 422 [1st Dept 2017] [affirming dismissal of Labor Law 240 claim where plaintiff lost his footing while exiting the cab of a locomotive]; cf *Bond v York Hunter Constr., Inc.*, 95 NY2d 883, 884-885 [2000] [holding § 240(1) inapplicable where plaintiff injured when his foot slipped on a vehicle’s track, using it like a step]). Accordingly, Con Ed’s motion for summary judgment on this issue is granted, and plaintiff’s claim pursuant to Labor Law § 240(1) is dismissed.

#### **IV. Labor Law § 241(6)**

Con Ed argues that it is entitled to summary judgment on plaintiff’s Labor Law § 241(6) claims because Plaintiff has failed to allege an applicable and sufficiently specific Industrial Code violation to sustain his claim. Labor Law § 241 (6) provides that “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.”

Labor Law § 241(6) “requires owners and contractors 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” (*Misicki v Caradonna*, 12 NY3d 511, 515, 909 NE2d 1213 [2009]). This section imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation, or demolition (*see Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501-502 [1993]). To recover, a claimant need not prove that the owner or contractor exercised supervision or control over the work being performed (*see Ross*, 81 NY2d at 501-502;). However, the worker must allege and prove that the owner or contractor violated a rule or regulation of the Commissioner of the Department of Labor which sets forth a specific standard of conduct, as opposed to a general reiteration of the common law (*see Ross*, 81 NY2d at 502-504; *Coyago v Mapa Properties, Inc.*, 73 AD3d 664, 901 NYS2d 616 [1st Dept 2010] [“A Labor Law § 241(6) claim requires that there be a violation of some specific safety standard”]). The violation of a specific standard of conduct, once proven, does not establish negligence as a matter of law, but rather is some evidence of negligence to be considered with other relevant proof (*see Long*, 55 NY2d at 160). A plaintiff “must articulate a New York State Department of Labor safety regulation affirmatively mandating specific, concrete conduct or conditions that apply to the work at plaintiff’s work site and that defendant violated (*Martinez v Hitachi Constr. Mach. Co., Ltd.*, 15 Misc 3d 244, 255 [Sup Ct, Bronx County 2006], citing *Comes v NY State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]).

Here, Plaintiff alleges violations of Industrial Code §§ 23-1.7, 23-9.2, 23-9.4 and 23-1.21. Industrial Code § 23-1.7(d), states:

“Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.”

Industrial Code § 23-1.7(e) states:

“(e) Tripping and other hazards.

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

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

Here, the City correctly argues that that the access step plaintiff slipped on was not a “floor, passageway, walkway, scaffold, platform or other elevated working surface” within the meaning of 12 NYCRR 23–1.7(d)” (*Bond v York Hunter Const., Inc.*, 270 AD2d 112, *affd.*, 95 NY2d 883 [2000] [internal quotations and citations omitted] [“The complaint was properly dismissed based on plaintiff’s uncontradicted account of his injury—in descending from the vehicle . . . , he placed his foot on the vehicle’s track, intending to use it as a step down, slipped on a spot of grease on the track, fell off the track, landed on debris, and twisted his ankle”]; *see also Quigley v Port Auth. of New York*, 168 AD3d 65, 67 [1st Dept 2018] [“A ‘passageway’ is commonly defined and understood to be a typically long narrow way connecting parts of a building” and synonyms include the words corridor or hallway”] [internal quotation marks and citations omitted). Further, Con Ed submits the unrebutted expert affidavit of Bernard Lorenz, P.E., an engineering consultant, wherein he affirms that the “[s]ole purpose of these steps is to allow an operator to enter and exit the machine. Indeed, neither the upper nor lower access step is designed to allow a user to perform work while standing on either step” (NYSCEF 147 at ¶ 26).

Plaintiff’s remaining claims asserted under Labor Law § 241(6) are also dismissed. Plaintiff fails to present any evidence supporting his conclusory statement that oil spilled on the step due to refueling and otherwise fails to demonstrate that defendant had knowledge of the alleged defective condition (Industrial Code § 23-9.2[a]). As for Industrial Code § 23-9.4, plaintiff fails to cite to any caselaw supporting his argument that section 23-9.4 is sufficiently specific to support a Labor Law 241 § (6) claim. Plaintiff also fails to demonstrate the applicability of Industrial Code § 23-1.21(b)(2), since the color of the step is not at issue and unrelated to plaintiff’s injured. Further, plaintiff fails to cite to any caselaw supporting his position that the subject step was a ladder as contemplated by Industrial Code § 23-1.21(b)(3)(1).

#### **V. Labor Law § 200 and Common Law Negligence**

Con Ed also moves for dismissal of plaintiff’s claim under both the common law and Labor Law § 200.

Labor Law § 200 “codifies landowners’ and general contractors’ common-law duty to maintain a safe workplace” (*Dunham v Hilco Constr. Co.*, 89 NY 2d 425 [1996], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d [1993]). Labor Law § 200 is a general duty that does not require plaintiff to be engaged in an enumerated activity, and unlike Labor Law § 241(6), Labor Law § 200 “does not require that the plaintiff be engaged in construction, excavation or demolition” (*Mejia v Levenbaum*, 30 AD3d 262 [1st Dept 2006]).

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]).

As plaintiff argues his accident was caused by the improper instruction he was given to complete his task, this is a “manner or methods” case, and liability cannot be imposed on defendants under Labor Law § 200 and the common law as they did not direct or exercise any supervisory control over plaintiff’s work.

Here, both Con Ed and Danella’s supervisors testified that Con Ed’s authority was limited to stop work if it observed an unsafe work practice, and that Con Ed did not control the means or methods of the work performed by Danella’s employees. However, plaintiff testified that Con Ed had authority to stop plaintiff’s work and to instruct plaintiff on how to perform his work (NYSCEF 138, 340:24-341:3). Accordingly, an issue of fact exists as to whether Con Ed maintained sufficient supervisory authority over the means and methods of plaintiff’s work.

#### **VI. Plaintiff’s cross-motion against the City**

As for plaintiff’s cross-motion for summary judgment on its claims against the City, “[t]he rule is that a cross motion is an improper vehicle for seeking relief from a nonmoving party” (*Kershaw v Hosp. for Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013], citing *Mango v Long Island Jewish-Hillside Med. Ctr.*, 123 AD2d 843 [2d Dept 1986]). As the City is not a moving party plaintiff’s cross-motion against the City is denied.

Accordingly, it is hereby

ORDERED that Con Ed’s motion for summary dismissal of the complaint is granted as to plaintiff’s Labor Law §§ 240(1) and 241(6) claims; and it is further

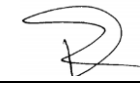
ORDERED that plaintiff’s cross-motion for summary judgment on its complaint against Con Ed and the City is denied; and it is further

ORDERED that Con Ed shall serve a copy of this decision and order upon all parties with notice of entry, within fourteen (14) days of entry.

This constitutes the decision and order of the Court.

3/25/2021

DATE



DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE