SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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SAMUEL BURCHILL,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF DESIGN AND CONSTRUCTION, NEW YORK CITY TRANSIT AUTHORITY, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, METROPOLITAN TRANSIT AUTHORITY, MTA CAPITAL CONSTRUCTION, CON ED

Defendants.

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INDEX NO. 153149/2016

MOTION DATE 04/27/2021

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 122, 123, 124, 125, 126, 127, 128, 129, 130

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

In this action, plaintiff Samuel Burchill alleges that he suffered personal injuries on October 23, 2015, while working for his employer Judlau/Waterworks in a trench at Amsterdam Avenue between West 59th Street and West 62nd Street in New York County, New York. Plaintiff alleges that while in a trench and chipping away rock underneath a pipe, he was thrown backwards after observing a blue flash or flame and experiencing a feeling of electricity.

In motion sequence 003, defendants the City of New York (the City), the City of New York s/h/a New York City Department of Design and Construction (the DDC), the City of New York s/h/a New York City Department of Environmental Protection (DEP), New York City Transit Authority (NYCTA), Metropolitan Transportation Authority s/h/a Metropolitan Transit Authority (MTA), Metropolitan Transportation Authority Capital Construction Company s/h/a MTA Capital Construction (MTACC) and Consolidated Edison of New York (Con Edison),

move, pursuant to CPLR 3212, for an order granting summary judgment and dismissing plaintiff's complaint.

In plaintiff's "Memorandum of Law in Opposition," plaintiff maintains that he does not oppose the part of defendants' motion seeking dismissal of the claims asserted against the DEP, NYCTA, MTA and MTACC. (NYSCEF DOC. NO. 123).

FACTUAL ALLEGATIONS

Plaintiff Samuel Burchill's deposition

Plaintiff testified that he was involved in an accident on October 23, 2015, at 59th Street and Amsterdam Avenue at 2:00 p.m. while working for Judlau/Water Works, a joint venture. (NYCEF DOC. NO. 102, at 6, 12). Plaintiff was a laborer and a shop steward who ran jackhammers. (*id.*, at 13). Plaintiff did not have training regarding working around electrical lines or equipment, although his bosses or foreman told him to be careful working on electrical lines. (*id.* at 29). Plaintiff learned about wearing gloves to provide insulation when working with electrical equipment at a job safety meeting. (*id.*, at 31). He has previously used a jackhammer in a trench while electrical lines were present. (*id.*, at 34). At the time of his accident, he was using an air powered "Hell Dog" jackhammer to break rock and he was not wearing rubber gloves, as they were not provided. (*id.*, at 35-36, 38).

Plaintiff was directed to avoid electrical cables which were generally encased in concrete or PVC pipe. (*id.*, at 40-41). He never broke a PVC encasement with a jackhammer, however there were times, when instructed, in which he broke concrete casing to expose wires. (*id.*, at 41-42). He did not know if there was a way to ensure that electric lines were not live prior to breaking the encasement. (*id.*, at 42).

Judlau ran safety meetings at the job site on a weekly basis. (*id.*, at 45). The safety meetings did not cover electrical safety in detail or working around electrical lines. (id., at 46). There was a standing instruction not to break through encasement lines until permission was granted. (*id.*, at 46). Plaintiff was drilling and splitting with hand tools. (*id.*, at 49). Plaintiff was told that he was to work at a location at 59th and Amsterdam because a foreman named Julio needed him (*id.*, at 49-51). When he arrived, Julio instructed him "to make grade in the trench" and "wait for further instructions." (*id.*, at 51).

Julio further told plaintiff to burrow or tunnel a trench wall to break through to the other side and to be careful as there was a "feeder" cable located somewhere in the ground. (*id.*, at 52-53, 83). Plaintiff does not believe that the cable was marked and he was concerned that if the cable was not observable, that he could be electrocuted. (*id.*, at 61).

Plaintiff described his accident as follows:

> "A. Okay. So I started chopping away at the rock. Eventually, I found the white PVC pipe, thought that was the cable. I stepped back, gathered myself, cleaned my glasses, and I proceeded to go underneath the cable, roughly, three to four inches. The next thing I know, there's this blue flash and before you know it, I'm on my back thinking I was going to die."

(*id.*, at 64).

Plaintiff believes there was due an explosion (*id.*, at 70) and does not know who the cable belonged to and was not told to hand excavate if he encountered cables. (*id.* at 78). Plaintiff does not know if he punctured an electrical line with the Hell Dog or what was inside the PVC pipe. (*id.*, at 85). He maintains that no one from Con Edison, MTA, MTACC, NYCTA, DEP, the DDC, or the City told him what to do at his job. (*id.*, at 90-95).

Plaintiff was told that a cable exploded on top of a manhole earlier in the morning, but he was not sure if it was related to his accident. (*id.*, at 136-138). He maintains that he was not given any special instructions to hand-excavate around Con Edison facilities. (*id.*, at 139).

Julio Coelho's deposition

Julio Coelho (Coelho) testified that in 2015, he was a foreman for Waterworks Judllau at the manhole duct project located at 59th Street and Amsterdam. (NYSCEF DOC. NO. 104., at 4, 9, 13). As a foreman, he would tell the workers what work to perform, ensure everyone was working safely, and received instructions from his superintendent. (*id.*, at 9-10, 11). Waterworks did not have a lecture or course when he first got assigned to the project about how to work around electric utilities. (*id.*, at 8).

At the subject project, a new duct bank was being placed for Con Edison. (*id.*, at 9). At the time of plaintiff's accident, the trenches had already been excavated and the duct banks would have had pipes and cables inside. (*id.*). He did not know if there was a protocol for the electricity to be shut off in the duct banks while work was ongoing in trenches. (*id.*, at 17). He maintains that there were inspectors from Con Edison and that "most of the time we follow the rules." (*id.*).

In the morning, Coelho would meet with the workers, assign them to the various locations, and would speak with inspectors from Con Edison who were present on a daily basis (*id.*, at 20-22). He would also meet with a city inspector regarding the location. (*id.*, at 41). He does not recall if he ever spoke to the inspectors regarding whether electricity was running through Con Edison's pipes while workers were present and did not personally check that electricity was not flowing in the trenches. (*id.*, at 23, 30). He recalls observing plaintiff

working on the morning of plaintiff's accident. (*id*., at 27, 29). Judlau/Waterworks conducted safety training on this project and sometimes a Con Edison representative would be present. (*id*., at 33, 39).

Coelho recalls speaking with plaintiff and other workers about working near electrical cables. (*id*., at 72). He recalls personally receiving a direction from Con Ed that when performing work around their utility, it should be done "by hand" meaning no heavy equipment, and recalls that this was the same direction provided to workers. (*id*., at 82). He did not know if there was a procedure in place which required that electricity be shut off when Judlau/Waterworks were in the trenches. (*id.,* at 73).

Plaintiff's job was to tunnel underneath the preexisting duct that was running north and south so that the duct running east and west could go underneath. (*id.,* at 91). Coelho recalls telling plaintiff on the day of his accident to continue to perform what he was working on the day prior and that his job was to use the "Hell Dog" to chop bedrock. (*id.,* at 90, 93). Waterworks was supposed to stay clear of the preexisting duct bank which was made of clay. (*id.,* at 94). He maintains that the duct was visible and known to workers. (*id.,* at 97). Gloves would be available for plaintiff's use. (*id.*, at 97, 99).

Coelho learned from a worker that plaintiff's accident occurred as he hit a duct bank. (*id*., at 46- 47). He recalls visiting the site after the accident, but did not see anything exposed. (*id*., at 50). Judlau Waterworks provided its workers with safety protective work gloves. (*id*., at 53).

Coelho reviewed Con Edison's report from October 23, 2015, addressing another accident that occurred earlier in the day in which the crew was removed due to a secondary cable sparking. (*id*., at 72-73). The report noted that Con Edison repaired that site and that the work

continued. (*id.*, at 72-73). He does not remember if the earlier accident was in a different location than that of plaintiff's accident. (*id.*, at 74-75, 78).

Vaibhav Kadakia's deposition

Vaibhav Kadakia (Kadakia) works at Con Edison as a Senior Specialist and in October of 2015 worked as a chief construction inspector. (NYSCEF DOC. NO. 108, at 10-11). Kadakia would provide daily supervision of construction jobs and ensure safety. (*id.*, at 11). For the subject project, Con Edison was to move an electric system which included conduit and electrical structures out of the way so that it could later accommodate a city water main. (*id.*, at 19-20).

In order to perform the work, Judlau, a subcontractor, was hired to open up the ground. (*id.*, at 22). At the time of plaintiff's accident, work was taking place on 62nd Street between Amsterdam Avenue and Columbus Avenue, Amsterdam Avenue between 59th and 60th Street, and 60th Street between West End Avenue and Amsterdam Avenue. (*id.*, at 24). Kadakia would visit the sites twice a week and there were two inspectors present on a daily basis from Con Edison. (*id.*, at 25-26). When replacing the conduits, Con Edison would place the new conduits, electrify the wires, and then shut the old wires prior to removing them. (*id.*, at 30). Judlau would dig the trench with machinery. (*id.*, at 31). By October of 2015, the new conduits had not been put in place. (*id.*, at 35).

On the date of plaintiff's accident, Judlau had a crew at the site and was performing work installing new conduits for Con Edison (*id.*, at 42-44). The new conduits would be placed below the existing conduits. (*id.*, at 47). The inspector on location would know the exact location of the conduits. (*id.*, at 47-48). Judlau makes the determination where the wires are placed for the conduits and Judlau is to know the overall layout of that particular street. (*id.*, at 50). Inside the

conduit are wires that carry the voltage. (*id*., at 73). A chisel bit would be used to break the conduit. (*id*., at 80). If Judlau had a concern that its workers would be performing chipping with drilling devices near electrified wires, its foreman could speak to Con Edison about possibly shutting off the current. (*id.,* at 84).

Kadakia was alerted of plaintiff's accident by Ed Shaffer (Shaffer), a Con Edison employee that a worker was working in a trench, that he experienced a flash, and that the worker suffered burns. (*id*., at 16-17). Shaffer was told of the accident by a foreman from Judlau or Waterworks. (*id*., at 16). Kadakia maintains that at the time plaintiff was drilling, the conduits in the area would have been Con Edison's and would have been electrified. (*id*., at 88). The conduits at the site of plaintiff's accident were made of precast concrete. (*id*., at 34).

Kadakia spoke with the superintendent for Judlau, who told him that they were digging for conduits and that in doing so, something happened to plaintiff and that he got burned or hurt in the trench. (*id*., at 54). While reviewing photographs of the accident site, Kadakia maintains that he was told that there was a "pop" noise and a "bang." (*id*., at 57). Con Edison and Shaffer would have been informed that someone was drilling near where the wires were located and Shaffer was aware that there was drilling occurring in the area. (*id*., at 62).

Judlau would be in charge of workers wearing safety equipment. (*id*., at 65). Contractors working for Con Edison would be required to wear "KV-rated" gloves in the area of electrified wires and would be checked by different Con Edison representatives. (*id*., at 68).

Kadakia reviewed a field activity report dated November 13, 2018, stating that a cable had sparked in a manhole on 59th Street and Amsterdam was repaired. (*id*., at 93-94). It further states that as plaintiff was breaking rock in a trench, a primary feeder shorted out in the trench causing the side wall of the duct bank to break out with a flash hitting him. (*id*., at 95). Kadakia

maintains that Con Edison would flag the area if existing conduit is exposed, however, he was not sure if the area where the accident occurred was flagged. (*id.*, at 98-99).

Evan Arctander's deposition

In 2015, Evan Arctander (Arctander) worked for Judlau as a safety engineer. (NYSCEF DOC. NO. 106, at 7, 10). A joint venture was created for the project comprised of Judlau Contracting, Inc. and OHL North America called the "Water Works Joint Venture". (*id.*, at 12). Arctander ensured that workers were protected from any known hazards such as Con Edison feeders, and that policies and procedures were being adhered to. (*id.*, at 41-42).

Arctander and a safety engineer would be on-site daily. (*id.*, at 38). There was a part of a safety plan which discussed notifying Con Edison that Judlau workers would be working in and around a Con Edison feeder prior to the commencement of work. (*id.*, at 40). It would be either the field engineer or the superintendent for the site or project manager who would contact Con Edison about where Judlau workers would be working on a particular date and time in relation to Con Edison feeders. (*id.*, at 41). It was not Arctander's responsibility to notify Con Edison that the workers would be working in and around Con Edison feeders. (*id.*, at 41). There were occasions when Con Edison would de-energize the area. (*id.*, at 42).

Regarding plaintiff's accident on October 23, 2015, the area of the manhole located between 59th and 60th on Amsterdam Avenue was not de-energized because according to Con Edison's general industry standards, existing feeders would not be de-energized for work around the feeder. (*id.*, at 42-43). Con Edison would be the party responsible for that decision. (*id.,* at 43).

Arctander believes that there should be a record that Con Edison was placed on notice that Judlau workers were going to work in the area where plaintiff was working at the time of his

accident. (*id.*). Con Edison would be notified where Judlau workers were going to be working by a "six week look ahead" e-mail and verbal communications. (*id.*). As a safety engineer, if Arctander observed a hazardous, unsafe condition, he would stop the hazardous dangerous work from being performed. (*id.*, at 51). Arctander was not apprised of a problem with a feeder at the northeast corner of 59th Street and Amsterdam Avenue before October 23, 2015. (*id.*, at 60). He had the authority to stop work if there was a known condition. (*id.*).

Arctander reviewed a record regarding field activity stating that at 8:20 a.m. on the morning of plaintiff's accident, "crew was removed from a manhole due to secondary cable sparking on top of structure where the cables were re-racked at prior date, so contractor can demo manhole safely." (*id.* at 64). He maintains that by the manner in which this report was written, it would appear that Judlau would have notified Con Edsion of the condition. (*id.*, at 65-66). Arctander was not aware of the Con Edison crew that allegedly repaired the secondary cable prior to the accident. (*id.* at 69).

Arctander did not know if Judlau determined whether the claimed repair by Con Edison in the morning of October 23rd, 2015, was the same secondary cable with which plaintiff came in contact. (*id.* at 70). Arctander maintains that plaintiff's accident was caused when plaintiff was breaking rock in the trench, when a primary feeder shorted out in the trench causing the sidewall of the tile duct bank to break out with the flash hitting the drill runner. (*id.* at 74). Con Edison's feeders were originally encased with a terra cotta-type piping or ducts. (*id.* at 75). He maintains that there was a broken section of the terra cotta which was where he believed the flash originated. (*id.* at 75).

Arctander recalls speaking with a Con Ed inspector, about the cause of the accident. (*id.*, at 90). He believes that the cause of the accident was plaintiff chipping into the feeder. (*id.*, at

92). Arctander did not see records or reports discussing the cause of the origin of the explosion. (*id*., at 127). He maintains that feeders were known and sprayed red on the ground. (*id.,* at 127-128).

Affidavit of Evan Arctander

Arctander submits an affidavit dated April 27, 2021, stating that the Con Edison feeder allegedly involved in plaintiff's accident, ran north and south under Amsterdam Avenue and consisted of copper conductors, which were separately covered with rubber insulation. (NYSCEF DOC. NO. 112, ¶ 3). The feeder was encased inside of a pipe, a conduit or a duct, made of terra cotta or clay. (*id.*). Arctander states that the ducts, were encased in concrete in a manner referred to as a duct bank, which was at least two inches thick. (*id.*).

Affidavit of Utilda Ramsay

Utilda Ramsay (Ramsay) submits an affidavit dated April 20, 2022. (NYSCEF DOC. NO. 110). Ramsay, a senior claims specialist for MTA in the Risk Management Department, Claims & Handling, states that in 2012, Waterworks was hired by the DDC to install water mains in Manhattan, including at and/or around the accident location. (*id*., ¶ 6). Ramsay was advised that in 2012, Waterworks was also hired by Con Edison to relocate Con Edison's underground gas and electric facilities for the water main project known as the "Interference Work" and that on October 23, 2015, the plaintiff was performing work pursuant to the "Interference Work" agreement. (*id*., ¶ 6).

Ramsay states that on and before the date of plaintiff's accident, the MTA and the MTACC did not own the roadway, the water main or other underground water facilities, a conduit, duct bank, feeder, or other electrical facility, at or around the accident location. (*id*., ¶ 8-9). Ramsay maintains that MTA and MTACC were also not a party to the work agreement

between Waterworks and Con Edison for the gas and electric facilities necessary for the watermain project. (*id.*).

Ramsay maintains that MTA and MTACC did not perform services, was not present at, did not hire or choose any contractors and/or subcontractors to perform work at or near the accident location, and/or in relation to the water main project or the "Interference Work". (*id.*).

Affidavit of Sergey Abramov

Sergey Abramov (Abramov) submits an affidavit dated April 23, 2021. (NYSCEF DOC. NO. 111). Abramov, an employee of Aecom USA, Inc. (Aecom) states that on October 23, 2015, he was a water main & sewer inspector assigned to the DDC as a third-party consultant monitoring the installation of new water mains and sewers. (*id.*, ¶ 1). In 2012, the DDC and Waterworks, a joint venture, entered into a contract for a water main project in Manhattan including at and around the intersection of Amsterdam Avenue and West 59th Street. (*id.*, ¶ 3).

Abramov states that in 2012, Con Edison and Waterworks entered into an agreement to relocate Con Edison's underground gas and electric facilities necessary for the water main project, including at and around the intersection of Amsterdam Avenue and West 59th street. (*id.*, ¶ 5). Abramov states that the DDC was not a party to the agreement between Con Edison and Waterworks; did not have the authority to supervise, direct or control the work and/or any work performed for Con Edison at and around the intersection of Amsterdam Avenue and West 59th Street; and did not supervise, direct or control plaintiff's work. (*id.*, ¶ 7-8).

Abramov states that prior to plaintiff's accident, the DDC did not have knowledge or notice of any allegedly dangerous electrical or other condition at and around the intersection of Amsterdam Avenue and West 59th Street, including any alleged condition of Con Edison's feeder, duct, duct bank and secondary cable. (id., ¶ 9).

Affidavit of Edward Shaffer

Edward Shaffer (Shaffer) submits an affidavit dated April 23, 2001. (NYCEF DOC. NO. 113). Shaffer has been employed by Con Edison and worked in the Public Improvement Department as an inspector, responsible for support and protection of Con Edison's utilities including advising contractors working underground near Con Edison utilities. (*id.*, ¶ 4). He worked as an inspector until 2016, including on the date of plaintiff's accident. (*id.*). Shaffer states that in 2012, Con Edison hired Waterworks, a joint venture, to relocate and provide clearances for Con Edison's electric, gas, and steam utilities where necessary for the installation of a new water main by the City of New York including on West 59th Street and West 60th Street. (*id.*, ¶ 5).

Shaffer states that Con Edison had several primary feeders running north and south in a duct bank underneath Amsterdam Avenue, including between West 59th Street and West 60th Street which carry 13,800 volts of current. (*id.*, ¶ 6). The feeder that was allegedly involved in plaintiff's accident was in a duct in the existing north and south duct bank. (*id.*, ¶ 6).

Shaffer states that on October 23, 2015, he received a call that a neutral secondary cable was sparking where it had been previously re-racked to the I-beam at street level. (*id.*, ¶ 9). The feeder allegedly involved in plaintiff's accident did not terminate at the manhole but continued north on Amsterdam Avenue and was not part of the same circuit as any of the secondary cables including that one which sparked on October 23, 2015. (*id.*, ¶ 10). Therefore, he concludes that the sparking secondary cable at the street level which had been repaired about four hours before plaintiff's accident, could not have caused the feeder allegedly involved in plaintiff's accident to short or burn out and could not have caused the alleged flash. (*id.*, ¶ 11).

Affidavit of Kathleen Hopkins

Kathleen Hopkins (Hopkins) submits an expert affidavit dated June 7, 2021 on behalf of plaintiff. Hopkins is a Certified Site Safety Manager and specializes in construction site accident investigations, hazard analysis, and causation. Hopkins reviewed discovery in this litigation including documents, deposition transcripts, affidavits, and site photographs authenticated at the deposition of Kadakia. (NYSCEF DOC. NO. 124-125). Hopkins concludes that defendants violated Industrial Code sections 23-1.13 (b) (3), 23-1.13 (b) (4), 23-1.13 (d) (1) and (d) (2), and that Con Edison was negligent and failed to provide plaintiff with a safe place to work. (*id.* at 21-22)

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, 553-554 [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, 510-511 [1st Dept 2010] [internal citations omitted]). The evidence presented in 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 (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Labor Law § 240 (1)

Defendants contend that summary judgment should be granted in their favor on plaintiff's Labor Law 240 § (1) claim because it is not applicable since plaintiff did not fall from an elevation and since plaintiff did not suffer any other type of gravity related injury.

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) 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]). Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and 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]).

Not every worker who falls 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], Roman, J. concurring). Instead, 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 show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]).

Here, plaintiff testified that he was standing in a trench while chipping into a rock wall when an explosion caused him to fall backwards. The object plaintiff struck while chipping away at the rock wall and the resultant explosion was neither a "falling object" nor was plaintiff a "falling worker" and the "accident did not otherwise flow from the application of the force of gravity. Thus, [plaintiff is] not covered by Labor Law § 240 (1) . . ." (*Martinez v 342 Prop. LLC*, 128 AD3d 408, 409 [1st Dept 2015] [holding piece of equipment that pinned plaintiff was not a "falling object" and the plaintiff was not a "falling worker" therefore not covered by Labor Law §240 (1)]).

Accordingly, the part of defendants' motion for summary judgment, seeking to dismiss plaintiff's cause of action alleging a violation of Labor Law § 240 (1), will be granted.

Labor Law § 200

Defendants also contend that they are entitled to summary judgment on plaintiff's Labor Law § 200 claim.

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" (*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.

Claims brought under this section "fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). If the accident arises out of a dangerous premises condition, liability may be imposed if defendant created the condition or failed to remedy a condition of which it had actual or constructive notice (*see Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]). "Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury producing work" (*Cappabianca*, 99 AD3d at 144). Thus, even though a defendant may possess the authority to stop the construction work for safety reasons or exercise general supervisory control over the work site, such authority is insufficient to establish the degree of supervision and control necessary to impose liability (*see Villanueva v 114 Fifth Ave.*

Assoc. LLC, 162 AD3d 404, 407 [1st Dept 2018] [finding a defendants' stop work authority insufficient to establish that the defendant actually "exercised any control over the manner and means of plaintiff's work"]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007] [concluding that overseeing job site activities and monitoring project milestones insufficient evidence of the requisite degree of supervision and control necessary to impose liability under common-law negligence or Labor Law § 200]).

Defendants argue that regarding the manner and means in which plaintiff's work was performed, he testified that defendants did not supervise, direct, or control plaintiff's work.

Con Edison

In opposition, plaintiff contends that because he was performing work for his employer under its contract with Con Edison, plaintiff's accident arose from the manner and means of the injury producing work, even if it was communicated through an intermediary. Plaintiff argues that there is no dispute that Con Edison was aware that plaintiff's manner of work was to utilize a power drill to dig rock adjacent to its live electrical feeder, that the feeder was energized because of Con Edison's policy, and that Con Edison had exclusive authority under its contract with Waterworks to determine whether a line should be de-energized. Plaintiff further argues that Con Edison had exclusive control over protocols such as flagging requirements for marking live electrical facilities and protective gear. Plaintiff also contends that Judlau received instructions from Con Edison regarding the tunnel work and that the specific means of plaintiff's injury causing work, came from Con Edison.

Here, a question of fact remains as to the cause of the feeder to short or burn out, causing the explosion or flash. Plaintiff testified that he was unaware if he struck something to cause the short and the testimony of the other witnesses is inconclusive. (NYSCEF DOC. NO. 102, at 69).

Along with the question of what caused the short, it remains disputed whether Con Edison oversaw how plaintiff's work was performed. Specifically, Coelho, a foreman for Judlau at the project, testified that inspectors from Con Edison were present on a daily basis, that he received a direction from Con Edison that when performing work around their utility it should be performed "by hand" meaning no heavy equipment in the area, and recalls that this direction was provided to workers. (NYSCEF DOC. NO. 104, at 20-22, 82).

Furthermore, Con Edison was aware of live electricity at the location where plaintiff was working and drilling. Kadakia, a Senior Specialist at Con Edison, testified that Shaffer, Con Edison's inspector, was aware that someone was drilling near where the wires were located. (NYSCEF DOC. NO. 108, at 62-63). Kadakia also testified that when there was drilling occurring around Con Ed's conduits or wires, the electricity would not be turned off, however he was aware that the electricity could in fact be turned off. (*id.* at 62-63). This testimony evidences that Con Edison was not only aware of the manner in which plaintiff was working, but had the ability to turn the electricity off in the area (s*ee Johnson v Ebidenergy, Inc.*, 60 AD3d 1419, 1421 [4th Dept 2009] [holding that an issue of fact exists as to whether either of the defendants had control over the method and manner of plaintiff's work which involved working on energized circuits]).

Kadakia also testified that Con Edison would flag the area if existing conduit was exposed, but he was not sure if the area where the accident occurred was flagged. (NYSCEF DOC. NO. 108, at 98- 99). Kadakia further testified that Con Edison made recommendations to Judlau regarding what protective device to utilize, that workers were required to wear gloves around wires, and that there are different representatives from Con Edison to check that the contractor is wearing proper equipment while working around Con Edison facilities. (*id.,* at 65, 67- 68). Both flagging the area for workers as well as checking on safety equipment also suggests that Con Edison may have had a level of control over the manner of the work.

Along with the witness testimony, the Interference Work Agreement raises questions about Con Edison's involvement in the manner in which plaintiff's work was performed. The Interference Work Agreement discusses the work Waterworks was to complete for Con Edison and includes provisions stating that the workers breaking out or moving electrical facilities have to be familiar with the hazards of working on or near live electrical facilities, that Con Edison was to provide detailed design information layouts to Waterworks, and that Con Edison and Waterworks were to cooperate in order to identify the most efficient means of performing the work. (NYCEF DOC NO. 54).

Therefore, a question of fact exists as to whether Con Edison exercised supervision and control over the manner in which plaintiff performed his job.

Regarding whether the accident occurred due to a dangerous condition, defendants contend that Con Edison did not cause or have notice of a dangerous condition because the feeder was properly protected and because a feeder shorting out is an unforeseeable event. They argue that Kadakai testified that the outer shell of the duct

bank was concrete, that Arctander confirmed that the feeder was insulated and encased inside a clay or tile duct which was encased in concrete at least two inches thick, and that Shaffer testified that it was not foreseeable that the feeder would short.

In opposition, plaintiff contends that the feeder was not sufficiently insulated or protected and that Con Edison fails to submit proof establishing when the subject electrical feeder was last inspected. Plaintiff maintains that Con Edison's Field Activity Report suggests that plaintiff's drill did not pierce the electrical feeder line, but instead the electricity shorted out and broke through the encasement. Plaintiff argues that whether or not it was foreseeable that the feeder would short out is a question of fact.

It remains unclear what caused the feeder to short and whether it was faulty encasement of the feeder, plaintiff chipping into the feeder, or another cause. Furthermore, defendants failed to present evidence as to the maintenance and inspection of the feeder to show that the condition was not present when Con Edison was last present at the site (*see Arnold v Empire 326 Grand LLC*, 2022 NY Slip Op 00965 [1st Dept 2022]; *Spencer v Term Fulton Realty Corp*., 183 AD3d 441, 442-443 [1st Dept 2020] [a defendant will be found to have "failed to establish that they lacked constructive notice of the dangerous condition that caused plaintiff's injury, [if] they submitted no evidence of the cleaning schedule for the work site or when the site had last been inspected before the accident."]).

Accordingly, because questions of fact exist as to Con Edison's alleged negligence and whether it controlled the manner of the injury producing work or had notice of the subject feeder's condition which allegedly caused plaintiff's injury, the part

of defendants' motion for summary judgment dismissing plaintiff's Labor Law § 200 claim as against Con Edison will be denied.

The City of New York[1]

The City argues that it was not a party to the Interference Work Agreement, did not supervise or control plaintiff's work and did not have notice of the allegedly dangerous condition at the accident location. Plaintiff responds that the City had an inspector at the project site who had the authority to stop Waterworks's work and that having an inspector on the site at all times who had the authority to stop the work suggests that the City was aware of the dangerous condition presented by Con Edison's energized electrical feeder line.

The City's authority to stop the work being done at the project site is insufficient to establish the necessary degree of supervision and control over plaintiff's work to impose liability. However, affording plaintiff the benefit of every possible inference in his favor, the City inspector present at the project site with the authority to stop the work, suggests that the City was aware of the allegedly dangerous condition of the Con Edison electrical feeder line.

Accordingly, because a question of fact remains as to whether the City was aware of the allegedly dangerous condition of the Con Edison electrical feeder line, the part of defendants' motion for summary judgment dismissing plaintiff's Labor Law § 200 claim as against City will be denied.

Labor Law § 241 (6)

Finally, defendants contend that they are entitled to summary judgment dismissing plaintiff's Labor Law § 241 (6) claim.

[1] As will be explained below, the case will be dismissed as against the DDC, DEP, MTA, MTACC and NYCTA.

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

> "[a]ll 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, 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) 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 504-505). 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" (*see 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]).

In his bill of particulars dated August 27, 2016, plaintiff alleges violations of Industrial Code sections 23-1.5, 23-1.10, 23-1.12, and 23-1.13 and OSHA provisions. (NYSCEF DOC. NO. 97). In plaintiff's sixth supplemental bill of particulars dated December 24, 2020, plaintiff alleges violations of sections 23-1.13 (b) (3), (b) (4), (d) (1) (i-iii) and (d) (2); and 23-3.2 (a) (2), (a) (3) and (c). (NYSCEF DOC. NO. 98).

Although plaintiff alleges multiple violations of the Industrial Code, with the exception of Industrial Code sections 23-1.13 (b) (3), 23-1.13 (b) (4), 23-1.13 (d) (1) and (d) (2), plaintiff does not oppose dismissal of the other alleged sections, therefore, the unopposed sections 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"]).

Also, to the extent that plaintiff alleges violations of O.S.H.A, O.S.H.A. claims cannot form the basis of a Labor Law § 241 (6) claim (*Rizzuto v L.A. Wenger Contracting Co.*, 91 NY2d 343, 351 [1998]; *Schiulaz v Arnell Constr. Corp*., 261 AD2d 247, 248 [1st Dept 1999]).

Regarding plaintiff's allegation that Industrial Code section 23-1.13 was violated, this section, entitled "Electrical hazards" provides:

> "(a) Operations subject to the jurisdiction of the Public Service Commission. None of the provisions of this section shall apply to or in connection with operations conducted by employers, owners, contractors and their agents subject to the jurisdiction of the Public Service Commission."

Plaintiff concedes that section 23-1.13 of the Industrial Code would be inapplicable to Con Edison, as 23-13 (a) states that none of the provisions of this section of the Industrial Code would apply to operations subject to the jurisdiction of the Public Service Commission, which would include Con Edison's operation of the distribution of electric power. *See* NYCLS Pub Ser § 5. Defendants contend that this Public Service Commission exception also applies to the City because the work at the site was performed by Waterworks pursuant to an agreement related to future water mains usage and the City's role at the project should be considered in light of its water supply role.

Plaintiff responds that the Industrial Code claims for electrical hazards as against the City are predicated on its ownership of the property where the excavation work was being performed, and specifically the duct bank in which plaintiff was working, and not in its capacity as owner of the separate water mains or in its water distribution role. Therefore, it must be determined whether the City violated sections 23-1.13 (b) (3), (b) (4), (d) (1) and (d) (2) of the Industrial Code.

Industrial Code section 23-1.13 is sufficiently specific to support a claim under Labor Law § 241 (6) (*Hernandez v Ten Ten Co.,* 31 AD3d 333, 333 [1st Dept 2006]).

Industrial Code section 23-1.13 (b) provides:

> "(3) Investigation and warning. Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool or machine into physical or electrical contact therewith. The employer shall post and maintain proper warning signs where such a circuit exists. He shall advise his employees of the locations of such lines, the hazards involved and the protective measures to be taken."

Here, the testimony of the witnesses raises a question of fact as to whether this section of the Industrial Code was complied with or violated. Plaintiff testified that he did not think that the cable was marked out anywhere and was concerned, as he could not see the cable and he could get electrocuted. (NYSCEF DOC. NO. 102, at 61). Plaintiff also testified that he did not receive training on how to work around electrical lines or equipment, although his bosses or foreman told him to "[b]e careful" working on electrical lines. (*id.* at 29). This testimony conflicts with that of Coelho, who testified that the duct bank was visible, clear, and known. (NYSCEF DOC. NO. 104, at 96-97. Furthermore, Kadakia testified that Con Edison would flag the area if existing conduit is exposed, however he was not sure if the area where the accident occurred was flagged. (NYSCEF DOC. NO. 102, at 98-99).

Accordingly, as the testimony is inconclusive as to whether proper warning signs were placed near the electrical power source and whether employees were advised of the lines, the part of defendants' motion seeking to dismiss the alleged violation of Industrial Code section 23-1.13 (b) (3), will be denied.

Regarding Industrial Code section 23-1.13 (b) (4), this section provides:

> "(4) Protection of employees. No employer shall suffer or permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means. In work areas where the exact locations of underground electric power lines are unknown, persons using jack hammers, bars or other hand tools which may contact such power lines shall be provided with insulated protective gloves, body aprons and footwear."

Here, a question of fact exists as to whether this section of the Industrial Code was violated, because it remains unclear what caused the flash that impacted plaintiff, and whether it was caused by ineffective insulation since the power was not de-energized. Furthermore, plaintiff testified that he was not wearing rubber protective gloves, as they were not provided to him. (NYSCEF DOC. NO. 102, at 38). Accordingly, the part of defendants' motion seeking to dismiss the alleged violation of Industrial Code section 23-1.13 (b) (4), will be denied.

Regarding Industrial Code section 23-1.13 (d) (1) and (d) (2), these sections provide:

> "(d) High-voltage power circuits (over 300 volts to ground) at construction, demolition and excavation sites. (1) At any construction, demolition or excavation site where any person or equipment is required to approach nearer than 10 feet to any overhead energized high-voltage power line or power facility, such approach shall not be made unless or until the following procedure has been complied with:
> (i) The owner of such power line or power facility shall be notified in writing by the employer that such an approach is to be made.
> (ii) In not more than one normal working day following the receipt of such written notice, the owner of the high-voltage power line or power facility shall advise and make recommendations for the procedure to be followed in performing any work nearer than 10 feet to such power line or power facility.

> Exception: In an emergency situation involving imminent danger to the life, health or safety of any person the employer is not required to comply with this provision.
>
> (iii) The employer shall follow the procedure recommended by the owner of the high-voltage power line or power facility in performing any work within 10 feet of such power line or power facility.
> (2) The procedure outlined in subparagraphs (i), (ii) and (iii), above, shall be followed whenever any excavation work is to be performed in any area where underground high-voltage power circuits are known or expected to exist."

As to Industrial Code section 23-1.13 (d) (1), the evidence does not support that plaintiff was working near an overhead energized high-voltage power line or power facility, but that the power line was located underground exposed during excavation work.

Accordingly, as plaintiff fails to demonstrate otherwise, this subsection is inapplicable to plaintiff's accident and the part of plaintiff's complaint alleging a violation of Industrial Code section 23-1.13 (d) (1) will be dismissed.

As to Industrial Code section 23-1.13 (d) (2), it remains unclear from the evidence if the written notice requirement was complied with and what steps were provided following written notice. For example, plaintiff testified that he was not given any special instructions to hand-excavate around Con Edison facilities. (NYSCEF DOC. NO. 102, at 139). Furthermore, Coelho, did not know if there was a protocol for the electricity to be shut off in the duct banks when work was being done in the trenches, did not know if he ever spoke to the inspectors about whether electricity was running through Con Edison's power lines while workers were present, and did not do anything personally to ensure that electricity was not flowing where plaintiff was working. (NYSCEF DOC. NO. 104, at 17, 23, 30).

Accordingly, as it is unclear if Industrial Code section 23-1.13 (d) (2) was complied with, the part of defendants' motion seeking to dismiss the alleged violation of Industrial Code section 23-1.13 (d) (2) will be denied.

Finally, defendants contend that plaintiff's complaint as against the DDC and DEP should be dismissed because the DDC and DEP are City agencies and as against the MTA, MTACC and NYCTA as they did not own the roadway where plaintiff was working.

Section 396 of the New York City Charter provides that "[a]ll actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the city of New York and not in that of any agency, except where otherwise provided by law" (*see Ali v City of New York*, 2011 NY Slip Op 31218 [U] [Sup Ct, NY County, 2011] [holding that "the New York City Police Department is not a suable entity"]).

Plaintiff does not oppose the part of defendants' motion seeking dismissal as against the DEP, MTA, MTACC and NYCTA. As to the DDC plaintiff argues that the DDC has been a defendant in other lawsuits. Defendants reply that the cases cited by plaintiff do not address whether the DDC is immune from a lawsuit and whether the City is the proper party.

Since the DDC is an agency of the City, and because the City is a named defendant, the case will proceed against the City and the causes of action as against the DDC separately, will be dismissed (*see Rozenfeld v Department of Design & Constr. of City of N.Y.,* 875 FSupp 2d 189, 201 n 3 [EDNY 2012] [holding that "[t]he DDC is a non-suable entity under New York City Charter Section 396.").

Accordingly, the part of defendants' summary judgment motion seeking dismissal of the complaint as against the DDC, DEP, MTA, MTACC and NYCTA will be granted.

CONCLUSION

Based on the foregoing, it is

ORDERED that the part of defendants the City of New York, the City of New York s/h/a New York City Department of Design and Construction, the City of New York s/h/a New York

City Department of Environmental Protection, New York City Transit Authority, Metropolitan Transportation Authority s/h/a Metropolitan Transit Authority, Metropolitan Transportation Authority Capital Construction Company s/h/a MTA Capital Construction and Consolidated Edison of New York's motion for summary judgment dismissing the claims as against the New York City Department of Design and Construction, New York City Department of Environmental Protection, New York City Transit Authority, Metropolitan Transportation Authority s/h/a Metropolitan Transit Authority, Metropolitan Transportation Authority Capital Construction Company s/h/a MTA Capital Construction is granted; and it is further

ORDERED that the caption shall be amended in accordance with the foregoing to remove the foregoing defendants from the caption; and it is further

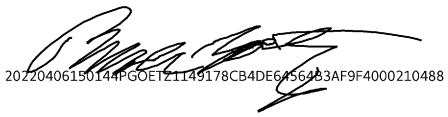
ORDERED that counsel for movants shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (ww.nycourts.gov/supctmanh)]; and it is further

ORDERED that the part of defendants' motion for summary judgment seeking dismissal of plaintiff's Labor Law § 240 (1) cause of action is granted; and it is further

ORDERED that the part of defendants' motion for summary judgment seeking dismissal of plaintiff's Labor Law § 200 cause of action is denied; and it is further

ORDERED that the part of defendants' motion for summary judgment seeking dismissal of plaintiff's Labor Law § 241 (6) cause of action is granted except to the extent that it is predicated upon Industrial Code §§ 23-1.13 (b) (3), (4) and 23-1.13 (d) (2).



4/6/2022
DATE

PAUL A. GOETZ, J.S.C.

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