At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 14th day of December, 2023.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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JOAO P. SILVA,
Plaintiff,
-against-

THE CITY OF NEW YORK,
Defendant.

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DECISION / ORDER
Index No.: 500436/2019
Mot. Seq. # 5 & 6

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion / Cross Motion and Affidavits (Affirmations) Annexed	141-152; 153-163
Opposing Affidavits (Affirmations)	165; 166-168
Affidavits / Affirmations in Reply	169; 170

Upon the foregoing papers, plaintiff Joao P. Silva (Silva) moves for an order, pursuant to CPLR 3212, granting him partial summary judgment with respect to liability on his Labor Law § 240 (1) cause of action as against defendant (motion sequence number 5). Defendant City of New York (City) moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing plaintiff' complaint in its entirety.

BACKGROUND

In this action premised on common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6), plaintiff Silva alleges that on May 21, 2018, he sustained injuries

while working for Perfetto Enterprises Co., Inc. at a construction site on Atlantic Avenue between Schenck Avenue and Barbey Street, in Brooklyn, NY. He commenced this action on January 8, 2019. Defendant City answered the complaint but does not seem to have electronically filed the answer. A copy is located as part of Document 150. The City asserted cross-claims against Tully Construction Co. Inc. On July 31, 2019, a stipulation of discontinuance was filed, discontinuing the action as against Tully Construction Co. Inc. [Doc 33]. It was signed by the City as well as the plaintiff. The Note of Issue was filed on March 24, 2023. These motions timely followed.

According to plaintiff's 50-h hearing and deposition testimony, the project was an emergency sewer repair project, and his employer was under contract with the NY City Department of Environmental Protection (DEP) for work of this sort. Plaintiff testified that he was a union member since 2008, and has worked for many companies. The project was a large project, and was about half a block long [Doc 145 Pages 12, 16]. He was employed as a laborer, and was digging with a shovel, which he referred to as hand excavation. However, his accident did not occur while he was digging. He was wearing a hardhat, safety glasses, a vest, and gloves. The day before, he was assigned to a different job by his company. It was his first day at this location.

Plaintiff testified that he was in the process of removing a chain from a steel plate that had been lowered into a truck, a truck which was not owned by his employer or by the City, but by a different subcontractor, when the steel plate slipped and pinned his hand against the side of the truck [*id.* Page 19]. He described the plate as being one inch thick and "probably eight by twenty feet" [*id.* Page 20]. He explained that the plates came in

different sizes and were used to cover holes that were dug in the street. Plaintiff said that his boss at Perfetto had called his foreman Luis and asked him to bring some plates to a different job site, so he was in the process of doing so [*id.* Page 24]. In order to move the plate, which was on the ground, it needed to be attached to a chain from the truck. His foreman Luis passed the chain to him and plaintiff hooked the chain to the plate. There is a hole in the plate to hook it to. Then, Luis was seated in the excavator and turned on the lift. The plate was lifted into the truck. Luis then asked plaintiff to unhook the chain. He proceeded to do so. He stood on one of the six truck tires and started to unhook the chain. The plate slid while he was unhooking it, and caught his right ring finger between the plate and the inside of the truck. Some part of this finger, plaintiff claims, had to be amputated.

Plaintiff was deposed on June 28, 2021. He testified that he was employed by Trac Construction, a different company than the one he was working for on the date of his accident. He is a foreman. The company puts in streets and roads in all five boroughs. He is still a member of Local 1010. His testimony was consistent with his testimony at his 50h hearing.

The defendant produced a witness for a deposition on December 2, 2022 named Iftakher Ahmed. He was an engineer for DEP on the date of the accident. He testified that both Con Ed and National Grid had inspectors at the site, to mark their lines and check the site to make sure the digging did not damage their lines. He said he was the DEP inspector for this project [Doc 147 Page 25]. He had nothing to do with site safety, which was the responsibility of the contractor [*id.*]. For Perfetto, it was Khalid Rashid. Mr. Ahmed did not remember much about this job by the time of his EBT. He was asked if there were metal

plates on the roadway, and he responded "I don't remember all this, five years ago" [*id.* Page 29]. He was asked which subcontractor had provided the truck, but he could not remember. He said he could look it up because "subcontractor should be approved from DEP, so we have the record who was the subcontractor at the time" [*id.* Page 32].

Mr. Ahmed was asked if he had seen steel plates moved at this site, and he responded that he was never on the job site when the plates were moved because they are moved in the morning so the contractor can continue their work, but he stays in his office in the morning and goes to the jobsites in the afternoon. He was then asked how the plates would be moved, and he responded "they hook the chain and with the plate and they have to use the bucket, then they remove it – you know" [*id.* Page 34]. Mr. Ahmed said he only learned about the plaintiff's accident two months before his deposition [Page 36], more than four years after the accident, and that he was the only DEP employee who would have gone to this job site while the work was in progress [*id.*]. Mr. Ahmed was asked if Perfetto provided daily reports to DEP, and he said they did not, because they were paid "only if they put some item" [Page 40].

Mr. Ahmed confirmed that Perfetto obtained the street opening permit, and said that DEP had asked Perfetto to repair the sewer. He was shown his own reports for the days leading up to the accident and for the accident date. Mr. Ahmed said the information comes from the worker's sign-in sheets. But when asked if he was actually at the site, he admitted that it was his general practice, if he was not able to get to the site on a particular day, "the next day I call the contractor, I go over there and then I get the information from the previous

day" [Page 61]. The witness was then shown the sign-in sheet for Perfetto for the day of the plaintiff's accident. Plaintiff was listed as having signed in.

DISCUSSION

Labor Law § 240 (1)

Turning first to the parties' contentions relating to plaintiff's Labor Law § 240 (1) cause of action, this section imposes absolute liability on owners and contractors or their agents when it is demonstrated that their failure to protect workers employed on a construction site from the risks associated with elevation differentials proximately caused injury to a worker (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]).

Here, there is a dispute between the parties whether the City may be held liable under Labor Law § 240 (1), as the City claims that plaintiff was not working at an elevation, that the injury was not caused by the absence of an enumerated safety device, and further, that plaintiff was not performing "covered work" and was actually not working on this job at the time of his accident. The court will address these claims separately.

First, the City claims that plaintiff has failed to demonstrate, prima facie, that his work at the time of the accident was covered work within the meaning of Labor Law § 240 (1). In this regard, the City asserts asserts that plaintiff was engaged in "a side job" collecting steel plates for his boss to move them to another work site, which was work unrelated to this job and not work for the City of New York. Plaintiff responds that Perfetto requested that the plates be moved to another of Perfetto's work sites for the City, so it was still covered work.

Basically, defendant's counsel argues that Perfetto was hired to repair this one sewer, and that work at another site would not be work for the City of New York. Plaintiff's counsel argues that Perfetto was under contract with the City to repair sewers all over the City, and that this site was not their only work site for the City. Neither side provides a copy of the contract. Mr. Ahmed said he was unfamiliar with the contract document, and continuously reminded the lawyers that he had only just learned about the accident and could not remember details from five years ago. He did say that it was a one-year contract, as all contracts are for one year, but he did not know when it started [Doc 147 Pages 20-21]. Counsel for plaintiff put on the record at Mr. Ahmed's EBT that the permit to open the street was issued to Perfetto by the New York City Department of Transportation, "valid from 5/11/18 to 6/8/18 . . The sponsoring agency is New York City Department of Design and Construction" [*id.* Page 42]. A web search of City contracts for the fiscal year 7/1/2017 – 6/30/2018 indicates that Perfetto Enterprises Company Inc. had several contracts with the City of New York for repairing sewers, storm sewers and the like.[1] This location was clearly not Perfetto's only work site for the City.

This court finds that defendant has not established that moving the steel plates was not work under Perfetto's contract with the City. However, the work he was doing was not work that is protected by Labor Law section 240 (1). While plaintiff characterizes the accident as one where plaintiff was hit by a falling object, that is not accurate. The steel plate was on the bottom of the truck bed and did not fall. It seems plaintiff put his hand in between the plate and the side of the truck, and the plate moved towards his hand, pinching

[1] https://comptroller.nyc.gov/wp-content/uploads/documents/FY17_Annual_Contracts_Report.pdf Appendix 1.

his ring finger. This does not constitute a "falling object" under Labor Law section 240 (1) as interpreted by the courts. For example, a recent decision points out that "Labor Law § 240 (1) does not apply if plaintiff is struck by a horizontally moving object and sustains an injury that "is not attributable to the sort of elevation-related risk that Labor Law § 240 (1) was meant to address" (*Santiago v Genting NY LLC*, 2023 NY Slip Op 33353[U], *6-7 [Sup Ct, NY County 2023], citing *Toefer v Long Is. R.R.*, 4 NY3d 399, 408, 828 N.E.2d 614, 795 N.Y.S.2d 511 [2005]). To be entitled to recovery, the injury sustained must be "the type of elevation-related hazard to which the statute applies" (*Nicholson v Sabey Data Ctr. Props.*, LLC, 2021 NY Slip Op 31343[U], *10 [Sup Ct, NY County 2021], citing *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1 [2011]).

Accordingly, as Labor Law § 240 (1) is inapplicable to this accident, plaintiff has not demonstrated his prima facie entitlement to partial summary judgment in his favor with respect to his Labor Law § 240 (1) cause of action. For these same reasons, the portion of the City's motion seeking dismissal of plaintiff's Labor Law section 240 (1) cause of action is granted.

Labor Law § 241 (6)

In plaintiff's bill of particulars [Doc 157], he claims that his Labor Law § 241 (6) claim is predicated upon alleged violations of Industrial Code (12 NYCRR) §§ 23-1.7, 23-1.7(a), 23-1.7(d), 23-1.72 (III), and 23-6.1 [Doc 157 ¶30]. In defendant's memo of law, the City argues that all of these sections are too general, are inapplicable or do not in fact exist. Counsel states "Industrial Code 23-1.72(III) does not appear to exist" [Doc 162 Footnote 6].

Section 23-1.7 is entitled "Protection from general hazards". These include subsections (a) Overhead hazards; (b) Falling hazards; (c) Drowning hazards; (d) Slipping hazards; (e) Tripping and other hazards; (f) Vertical passage; (g) Air contaminated or oxygen deficient work areas; and (h) Corrosive substances. None of these sections are applicable to the plaintiff's accident. Section 23-1.7 (a), falling hazards, addresses situations where a worker might fall, not where an object falls. Industrial Code § 23-1.7 (d), specifically enumerated in plaintiff's bill of particulars, provides that: "[e]mployers 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. . . [i]ce, snow, water, grease, and any other foreign substance which may cause slippery footing shall be removed, sanded, or covered to provide safe footing." Clearly, there is no allegation in this case that the accident occurred because the plaintiff slipped on an elevated working surface which was in a slippery condition. Section 23-6.1, titled "General requirements" is stated in section (a) "Application of Subpart" to "apply to all material hoisting equipment except cranes, derricks, aerial baskets, excavating machines used for material hoisting and forklift trucks." This section is clearly not applicable to plaintiff's accident.

In fact, plaintiff does not oppose this branch of the defendant's motion, as pointed out in defendant's reply affirmation [Doc 170 Page 15].

In conclusion, with respect to plaintiff' Labor Law § 241 (6) cause of action, the City has demonstrated, prima facie, that the Industrial Code sections cited in plaintiff's bill of particulars either fail to state specific standards, are not sections which exist as cited, or are inapplicable to the facts of this case (*see generally Rizzuto v L.A. Wenger Contr. Co.*, 91

NY2d 343, 349-350 [1998]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821 [2d Dept 2017]). As plaintiff has abandoned reliance on all of these regulations by failing to address them in his opposition papers, defendant is entitled to dismissal of the plaintiff's Labor Law section 241 (6) cause of action (*see Debennedetto v Chetrit*, 190 AD3d 933, 936 [2d Dept 2021]; *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]).

Labor Law § 200 and Common Law Negligence

Defendant is also entitled to dismissal of plaintiff' common-law negligence and Labor Law § 200 causes of action. As is relevant to plaintiff's Labor Law section 200 and common-law negligence causes of action, plaintiff, in his complaint and his bill of particulars, alleges that the City was the property owner and the general contractor, but does not allege that the accident occurred as the result of a dangerous premises condition. Rather, the complaint alleges, in relevant part, that the accident was the result of defendant's failure to "to keep a certain truck upon which plaintiff was directed to release chains from a metal street plate free of debris, dirt and other substances which caused said plate to become unstable and to strike plaintiff; in failing to keep said truck in proper repair; in failing to provide plaintiff with proper safety devices in connection to his work at the premises aforesaid; in failing to keep said truck free from debris . . . ; in failing to provide plaintiff with an adequate means of access to said plate; in failing to properly secure said plate; in failing to properly and adequately supervise and inspect work then and there being performed . . . ; and in failing to provide a proper and adequate means of debris removal from said truck" [Doc 1].

These allegations all focus on Perfetto's means and methods of performing its work. Defendant City, in moving for summary judgment, has provided the proper analysis for evaluating such claims in its memo of law (*see Przyborowski*, 120 AD3d at 652-653; *Ortega v Puccia*, 57 AD3d 54, 61-62 [2d Dept 2008]; *cf. Seem v Premier Camp Co., LLC,*, 200 AD3d 921, 924-925 [2d Dept 2021]; *Chowdhury v Rodriguez*, 57 AD3d 121, 129-130 [2d Dept 2008]).

Where the plaintiff's injuries arise from the manner in which the work is performed, "there is no liability under the common law or Labor Law § 200 unless the owner or general contractor exercised supervision or control over the work performed" (*Carranza v JCL Homes, Inc.*, 210 AD3d 858, 860 [2d Dept 2022], quoting *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 801 [2d Dept 2005]; *see Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 435 [2015]; *Valencia v Glinski*, 219 AD3d 541, 545 [2d Dept 2023]). Moreover, under a means and methods of work theory of liability, "no liability will attach to the owner solely because it may have had notice of the allegedly unsafe manner in which work was performed" (*Dennis v City of New York*, 304 AD2d 611, 612 [2d Dept 2003]; *see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]; *Cody v State of New York*, 82 AD3d 925, 927 [2d Dept 2011]).

Here, there is no dispute that defendant, the City of New York, did not provide Perfetto with any instructions relating to the work being done to repair the sewer at this location, which work included covering the openings in the street at the end of the day with steel plates, and removing these plates in the morning, demonstrates, prima facie, that the City did not supervise or control the work at issue (*see Wilson v Bergon Constr. Corp.*, 219

AD3d 1380, 1383 [2d Dept 2023]; *Kefaloukis v Mayer*, 197 AD3d 470, 471 [2d Dept 2021]; *Lopez v Edge 11211, LLC*, 150 AD3d 1214, 1215-1216 [2d Dept 2017]; *Przyborowski*, 120 AD3d at 652-653; *Ortega*, 57 AD3d at 61-62; *cf. Chowdhury*, 57 AD3d at 129-130). The fact that defendant had a representative from DEP, Mr. Ahmed, who was sometimes present to watch Perfetto's work, to ensure compliance with contract specifications [Doc 160 Page 8], and the fact that he may have had the authority to stop Perfetto's work, a question he was not asked, is insufficient to demonstrate that defendant had more than general authority over the worksite for purposes of liability under either common-law negligence or Labor Law § 200 liability (*see Murphy v 80 Pine, LLC*, 208 AD3d 492, 496 [2d Dept 2022]; *Abelleira v City of New York*, 201 AD3d 679, 680 [2d Dept 2022]; *Goldfien v County of Suffolk*, 157 AD3d 937, 938 [2d Dept 2018]; *Messina v City of New York*, 147 AD3d 748, 749-750 [2d Dept 2017]). As plaintiff has failed to raise an issue of fact with respect to defendant's supervision and control of the work, defendant is entitled to dismissal of plaintiff' common-law negligence and Labor Law § 200 causes of action.

Accordingly, it is **ORDERED** that plaintiff's motion (MS #5) for partial summary judgment on his cause of action under Labor Law §240 (1) is denied; and it is further

ORDERED that defendant's motion (MS #6) to dismiss plaintiff's complaint in its entirety is granted.

This constitutes the decision and order of the court.

E N T E R :

Hon. Debra Silber, J.S.C.