SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO **PART** 33M
Justice

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DAVID CONNER,

Plaintiff,

- v -

BOP SE LLC,BOP SE RETAIL LLC,TISHMAN CONSTRUCTION CORPORATION OF NEW YORK

Defendant.

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INDEX NO. 153136/2022

MOTION DATE 12/31/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 97, 98, 99

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

Upon the foregoing documents, and after a final submission date of June 9, 2025, Defendants BOP SE LLC, BOP SE Retail, LLC ("BOP Retail"), and Tishman Construction Corporation of New York's ("Tishman") (collectively "Defendants") motion for summary judgment dismissing Plaintiff David Conner's ("Plaintiff") Complaint is granted in part and denied in part. Plaintiff's cross-motion for summary judgment against Defendants on his Labor Law § 241(6) claim is denied.

I. Background

On February 25, 2021, non-party Metropolitan Walters ("Metropolitan") employed Plaintiff as a raising gang foreman at 33rd Street and Ninth Avenue in New York, New York (the "Premises") (NYSCEF Doc. 50 at 32-36; *see also* NYSCEF Doc. 55). Plaintiff tried to open his gang box[1], but the lid was stuck. Plaintiff was struggling with the lid when the lid popped, and Plaintiff felt pain in his left arm (NYSCEF Doc. 50 at 49-50; 52-53). BOP SE LLC and BOP Retail

[1] A gang box is a metal box where workers keep tools and equipment.

owned the Premises and contracted Tishman to serve as a construction manager. Tishman subcontracted steel erecting work to Metropolitan.

Plaintiff sues Defendants for negligence and alleged violations of the New York Labor Law. Defendants move for summary judgment dismissing Plaintiff's Complaint, and Plaintiff cross-moves for summary judgment on the issue of liability with respect to his Labor Law § 241(6) claim. For the reasons that follow, Defendants' motion is granted in part and denied in part and Plaintiff's cross motion is denied.

II. Discussion

"Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial (*See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Plaintiff does not oppose dismissal of his Labor Law § 240(1) claim. Nor does he oppose dismissal of his Labor Law § 241(6) claim premised on violations of Industrial Code §§ 23-1.5(c)(1); 1.7(d); 2.1(a)(1)(2)(b), and 23-2.4(a)(b)(1)(i)(ii)(2)(3)(c)(1)(2). Therefore, these claims are dismissed as abandoned.

However, the motion is denied as to Plaintiff's Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-1.5(c)(3). This provision requires "[a]ll safety devices, safeguards and equipment in use shall be kept sound and operable and shall be immediately repaired or

restored or immediately removed from the job site if damaged." Contrary to Defendants' position, allegedly defective opening and locking mechanisms on gang box lids fall within Industrial Code § 23-1.5(c)(3)'s ambit (*see Ormsbee v Time Warner Realty Inc.*, 203 AD3d 630, 631 [1st Dept 2022]). In *Ormsbee*, a defective pump in a gang box lid caused the lid to suddenly fall and injure the Plaintiff's shoulders. There, the First Department found an issue of fact as to whether there was a violation of Industrial Code § 23-1.5(c)(3). That holding applies here, where Plaintiff alleges a defective hinge on his gang box injured his arm. There is no dispute that the broken hinge constituted defective equipment or a defective safeguard which should have been replaced (NYSCEF Doc. 52 at 61-62). Therefore, based on precedent and the plain meaning of § 23-1.5(c)(3), the facts of this case may give rise to an Industrial Code § 23-1.5(c)(3) violation.

Moreover, Defendants failed to eliminate issues of fact regarding notice of the allegedly defective hinge. For purposes of a Labor Law § 241(6) claim, all that is required is that somebody in the chain of construction had notice of the violation (*Leonard v City of New York*, 216 AD3d 51 [1st Dept 2023]; *Gallina v MTA Capital Constr. Co.*, 193 AD3d 414, 415 [1st Dept 2021]). Here, constructive notice may be inferred from the nature of the alleged defect, a broken rusty hinge (*Genova v City of New York*, 165 AD3d 486, 487-88 [1st Dept 2018] citing *Johnson v 675 Coster St. Hous. Dev. Fund*, 161 AD3d 635 [1st Dept 2018]). Moreover, Tishman's witness testified that the site safety manager on the project, Mr. Labbate, visited Plaintiff's worksite daily and ensured site safety protocols were followed (NYSCEF Doc. 82 at 44-45). Although there is testimony that Mr. Labbate did not inspect the gang boxes, there remains an issue of fact as to whether someone in the chain of construction, including Mr. Labbate, knew or should have known about the broken hinge (*see, e.g. Ladignon v Lower Manhattan Development Corp.*, 128 AD3d 534, 535 [1st Dept 2015]). Although Defendants argue that the gang box was not defective because Plaintiff never

reported any issues to a supervisor, and because Plaintiff used the gang box for weeks prior to his accident, this goes to Plaintiff's credibility and potential comparative negligence, which are issues that cannot be resolved on summary judgment.

Defendants' motion for summary judgment with respect to Plaintiff's Labor Law § 200 and common law negligence claim is granted in part. "Where a defect is not inherent but is created by the manner in which the work is performed, the claim under Labor Law § 200 is one for means and methods and not one for a dangerous condition existing on the premises" (*see Villanueva v 114 Fifth Avenue Associates LLC*, 162 AD3d 404, 406 [1st Dept 2018]). Here, the allegedly defective hinge was not inherent to the Premises but arose from faulty equipment provided to Plaintiff by non-party Metropolitan. Therefore, the Labor Law § 200 claim as it relates to the defective hinge is a means and methods claim, and Defendants may only be held liable if they exercised supervisory control over the injury-producing work (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143 [1st Dept 2012]).

Defendants did not exercise sufficient supervisory control over Plaintiff's work. General supervisory authority is insufficient to establish control for purposes of Labor Law § 200 (*Hughes v Tishman Const. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). Metropolitan provided the gang box to Plaintiff (NYSCEF Doc. 50 at 36-37), and it was Metropolitan's responsibility to replace any defective gang box (NYSCEF Doc. 52 at 58-59). Plaintiff admitted he is unaware of any involvement by Tishman with the gang box (NYSCEF Doc. 50 at 109). Plaintiff only received instructions from Metropolitan (NYSCEF Doc. 52 at 30-31) and he admittedly requested permission from Metropolitan to discard the allegedly defective gang box (NYSCEF Doc. 50 at 76-77]). Thus, there is no Labor Law § 200 or common law negligence claim against Defendants based on Plaintiff's injuries allegedly caused by a defective gang box.

However, to the extent Plaintiff alleges he was injured due ice on his gang box, he maintains a viable Labor Law § 200 claim against Defendants. The presence of ice or snow on a worksite constitutes a dangerous condition for which Defendants may be liable if notice is established (*Lapinsky v Extell Development Company*, 202 AD3d 478, 480 [1st Dept 2022]; *Raffa v City of New York*, 100 AD3d 558, 558 [1st Dept 2012]). There is evidence in the record that in the days leading up to Plaintiff's accident, there were snowy and icy conditions on the worksite which frequently had to be cleaned and at times even prevented work (NYSCEF Doc. 68). Moreover, the Metropolitan incident report, submitted by Defendants on their motion in chief, attributed Plaintiff's accident to ice and snow (NYSCEF Doc. 54). Defendants failed to establish they lacked notice of the icy and snowy conditions which may have accumulated and contributed to Plaintiff's injury. Therefore, the motion for summary judgment dismissing Plaintiff's Labor Law § 200 and common law negligence claim premised on an icy condition is denied.

Plaintiff's cross motion for summary judgment on his Labor Law § 241(6) claim is denied. Defendants' opposition based on untimeliness of Plaintiff's motion is without merit. Defendants' motion for summary judgment was timely, therefore any cross-motion seeking relief nearly identical to Defendants' motion will also be deemed timely (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 71 AD3d 538, 540 [1st Dept 2010]). However, for the same reason notice issues precluded summary judgment in favor of Defendants dismissing Plaintiff's Labor Law § 241(6) claim, so too do those issues preclude summary judgment in favor of Plaintiff on his Labor Law § 241(6) claim. Therefore, Plaintiff's cross-motion for summary judgment is denied.

Accordingly, it is hereby,

ORDERED that Defendants' motion for summary judgment dismissing Plaintiff's Complaint is granted to the extent that Plaintiff's Labor Law § 240(1) claim, Labor Law § 241(6)

claim predicated on violations of Industrial Code §§ 23-1.5(c)(1); 1.7(d); 2.1(a)(1)(2)(b), and 23-2.4(a)(b)(1)(i)(ii)(2)(3)(c)(1)(2); and Labor Law § 200 claim premised on the allegedly defective hinge on the gang box are dismissed; and it is further

ORDERED that Defendants' motion for summary judgment dismissing Plaintiff's Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-1.5(c)(3) and Plaintiff's Labor Law § 200 claim premised on allegedly dangerous conditions caused by ice and snow are denied; and it is further

ORDERED that Plaintiff's cross-motion for summary judgment on the issue of liability with respect to his Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-1.5(c)(3) is denied; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

9/4/2025
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, 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