

Buffalino v City of New York

2025 NY Slip Op 34364(U)

November 17, 2025

Supreme Court, New York County

Docket Number: Index No. 150058/2020

Judge: Richard Tsai

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. RICHARD TSAI PART 21

Justice

-----X

PHILIP BUFFALINO and JENNIFER BUFFALINO,

Plaintiffs,

- v -

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT
AUTHORITY, METROPOLITAN TRANSPORTATION
AUTHORITY, MTA CAPITAL CONSTRUCTION, MTA
LONG ISLAND RAILROAD, and TUTOR PERINI
CORPORATION,

Defendants.

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INDEX NO. 150058/2020

MOTION DATE 03/03/2025,
08/21/2025

MOTION SEQ. NO. 004 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 004) 50- 83
were read on this motion to/for JUDGMENT – SUMMARY.

The following e-filed documents, listed by NYSCEF document numbers (Motion 006) 103-116, 133, 136-
149
were read on this motion to/for JUDGMENT - SUMMARY.

This is an action to recover damages for personal injuries allegedly sustained by
a union construction worker on February 15, 2019, when, while working at a
construction site located within the East Side Access Project’s subway tunnels beneath
Manhattan (the Tunnels), he stepped onto the track’s rail ties, slipped and fell from the
track to the tunnel floor, 18 inches below.

In motion sequence number 004, plaintiffs Philip Buffalino (plaintiff) and Jennifer
Buffalino move for summary judgment in their favor as to liability on their Labor Law §§
240 (1) and 241 (6) claims against defendants Metropolitan Transportation Authority
(MTA), MTA Capital Construction, and Tutor Perini Corporation (Tutor Perini).

In motion sequence number 006, defendants move for summary judgment
dismissing the complaint.

This decision addresses both motions.

BACKGROUND

On the day of the accident, the Tunnels were operated by MTA. MTACC, on
behalf of MTA, entered into a contract with Tutor Perini to provide general contractor

services for the project within the Tunnels (the Project), which entailed building out new tunnels and refitting old tunnels. Tutor Perini, in turn, hired non-party Railworks Transit Inc. (Railworks) to perform carpentry work on the Project. Plaintiff was employed by Railworks.

Plaintiff's 50-h Testimony (NYSCEF Doc. No. 56, 57)

Plaintiff testified that, on the day of the accident, he was a union carpenter employed by Railworks (plaintiff's 50-h, at 14). Railworks was responsible for "[l]aying the track and pouring concrete" at the Project (*id.* at 17). Plaintiff's work entailed installing concrete forms and bracket work (*id.* at 29).

Plaintiff's foreman, "Larry" directed his work (*id.* at 26-27). In the morning, most days, he would enter the Tunnels, meet with Larry and get driven to his work area (*id.* at 22). On the day of the accident, he was directed to "install negatives on the rail" (*id.* at 27). Negatives are formwork designed to establish gaps in concrete when it is poured (*id.* at 27).

Plaintiff testified that shortly before the accident, he had finished his work and "was walking on the bench wall towards [his] toolbox" which was approximately 250 feet away (*id.* at 27). The bench wall is a "six-foot high fence wall" that workers used so they "would not have to step over all the bracing" on the tunnel floor (*id.* at 30). However, near the accident location, the bench wall became obstructed with "[p]alates of concrete bags . . . plumbing and conduit and fittings and garbage all over" (*id.* at 30).

Plaintiff climbed down to the tunnel floor next to the track and continued in the direction of his tool box (*id.* at 28). As he got closer to the area where the most recent concrete pour was located, "the floor became very hazardous with concrete muck, water, dirt, dust" and plaintiff "couldn't continue" walking on the tunnel floor (*id.* at 28). Plaintiff explained that "muck" is "just like concrete. It's thick" and contains "[b]olts, scraps of wood, anything that the hose [from a cleaning operation] washes" down the tunnels (*id.* at 36).

To avoid the muck, which was "about four inches thick" (*id.* at 36) and reached the top of his boots (*id.* at 77), plaintiff stepped up onto a concrete block, a part of the "railroad ties" that hold the rails in place (the Block) (*id.* at 28).¹ The Block was "at least 18 inches" high (*id.* at 48). It was also covered with water and muck (*id.* at 45). Plaintiff stepped up onto the Block, began to take another step. He immediately slipped and fell to the tunnel floor, striking another Block as he fell (*id.* at 41).

Plaintiff testified that at the time of the accident, a Railworks laborer, named "Innocent" was using a high-pressure water hose to clean a nearby area (*id.* at 44). That cleaning created the muck in the tunnel. Innocent was approximately 150 feet

¹ At the deposition, plaintiff was shown a photograph of an area that was representative of the accident location. In that photograph, he identified the object he stepped up onto with a series of Xs (see notice of motion, exhibit K; NYSCEF Doc. No. 62).

away (*id.* at 44), pushing the muck towards “where [plaintiff and his coworkers] were working” (*id.* at 28).

Plaintiff confirmed that his boots were covered in muck at the time he stepped up onto the Block (*id.* at 56).

Plaintiff also testified that he had stepped up onto blocks or rail ties on other occasions, but he had never slipped off before (*id.* at 38). He also regularly witnessed his coworkers use Blocks or rail ties to avoid walking in the muck (*id.* at 81). He testified that it was a common practice (*id.* at 100).

Plaintiff further testified that workers often wore “muck boots” which are made of rubber (*id.* at 126) and go further up the leg than normal work boots. He also testified that he was not wearing muck boots at the time of the accident, and that he was never directed to wear them (*id.* at 126).

Plaintiff's Deposition Testimony (NYSCEF Doc. No. 58, 59)

Plaintiff's deposition testimony predominantly tracks with his 50-h testimony. He further explained that his duties at the Project involved installing track and pouring concrete (plaintiff's tr at 38). Specifically, he would build and install concrete forms (*id.* at 46). Plaintiff was unaware of how the City Defendants were involved in the Project. Tutor Perini was the general contractor (*id.* at 50-51).

Plaintiff explained that, based on the work being done in an area, what constituted a safe way to traverse the worksite changed and workers had to “choos[e] the safest passage every time you move” (*id.* at 81). Walking on the Blocks was often the safest path (*id.* at 81).

Plaintiff reiterated that, right before the accident, he climbed down from the bench wall and traversed the tunnel floor until the muck reached his ankles (*id.* at 77). He then stepped up onto the Block. He described the Block as a “concrete shape . . . roughly like a cinder block, but it's a little bigger and it's solid” (*id.* at 84). He then began to take a step towards the next Block when his “foot completely slipped off the block” and he fell forward, striking another concrete block before landing on the tunnel floor (*id.* at 84).

Plaintiff explained that he had a pair of muck boots, but he was not wearing them at the time of the accident as he “was supposed to be working in the mill, building wood forms” and not in the tunnels, where there is muck and water (*id.* at 140). Typically, he would only wear muck boots when he knew he would be working in an area that would be wet (*id.* at 141).

Finally, plaintiff was shown copies of several accident reports. He testified that he had never seen them before.

***Deposition Testimony of Alan Lawrence Elmer (RailWorks Carpentry Foreman)
(NYSCEF Doc. No. 59)***

Alan Elmer testified that on the day of the accident, he was a carpentry foreman for Railworks (Elmer tr at 9-10). He worked on the Project (*id.* at 12). His duties included “hands on carpentry work . . . and to instruct the guys that may be working with me” (*id.* at 10). Plaintiff was one of the Railworks employees working with him (*id.* at 14). Elmer assigned plaintiff’s work on the day of the accident, including where he was to work (*id.* at 20).

On the day of the accident, Elmer was at the Premises. He testified that on that day, “[w]e were in the process of prepping the area for concrete which would include clean up, form work” (*id.* at 19). Part of the cleanup would include the laborers using a high-powered water hose to wash the area (*id.* at 21).

Elmer did not witness the accident. He learned of it via telephone call (*id.* at 15). Elmer met with plaintiff after the accident and plaintiff described what happened (*id.* at 17). According to Elmer, plaintiff said that “he slipped on a tie, fell forward . . . and hit his chest on a tie and then settled in between the ties on the floor of the tunnel” (*id.* at 18).

Elmer also testified that Railworks carpenters “always walk on the ties” (*id.* at 18), noting “[t]hat’s just common” (*id.* at 18). One reason to do so is because of the muck created from power washing (*id.* at 23). It was common for carpenters to work in areas that contain muck (*id.* at 27).

Elmer testified that the Block that plaintiff stepped onto was “[p]robably six to eight inches” off the floor (*id.* at 27), but he also testified that the top of a Block “could be close” to 18 inches from the tunnel floor (*id.* at 29).

Elmer also testified that bench walls were typically used by workers to traverse the tunnels, and they were often blocked by materials (*id.* at 29). This would require workers to walk on the tunnel floor. If the tunnel floor was covered in muck, workers would step on to Blocks or rail ties to avoid the muck (*id.* at 30).

Elmer further testified that “it’s very common for the cleaning process and the carpentry” to happen at the same time (*id.* at 31). “Typically, we try to keep them a little bit separate . . . but they are usually within a few hundred feet of each other” (*id.* at 34).

***Deposition Testimony of Richard Peguero (Railworks’ Labor Foreman)
(NYSCEF Doc. No. 61)***

Richard Peguero testified that on the day of the accident, he was employed by Railworks as a labor foreman on the Project (Peguero tr at 9). He testified that on the

day of the accident, Railworks laborers were using high pressure water hoses to power clean parts of the Tunnel (*id.* at 13).

On the day of the accident, Peguero was near the accident location. He did not see it, but he was close enough to come to plaintiff's aid. He testified that the accident location contained concrete blocks in the ground and a bench wall to one side (*id.* at 15). The bench wall was blocked with "a crate with plumbing materials" (*id.* at 15). He estimated that the Blocks were approximately "14 to 16 inches" from the tunnel floor (*id.* at 18).

At the time of the accident, a cleaning operation was underway "like 200 or 300 feet further up" the tunnel (*id.* at 18). He was unsure if water from that operation would reach the accident location.

***Deposition Testimony of Darryl Simpson (Tutor Perini's Safety Manager)
(NYSCEF Doc. No. 60)***

Darryl Simpson testified that on the day of the accident, he was employed by Tutor Perini as a safety manager (Simpson tr at 10). Tutor Perini was the general contractor for the Project (*id.* at 14).

Simpson was a safety manager on the Project (*id.* at 12). His duties included making sure that the workers, including subcontractor workers, "work in a safe manner, follow the protocols" of Tutor Perini, their employer and the owner (*id.* at 11). He, or other safety managers, would conduct daily and weekly safety meetings (*id.* at 15). He had the authority to stop work if he saw an unsafe activity (*id.* at 20).

Simpson did not witness the accident. He learned of it shortly after it happened and began an investigation. He met plaintiff at the hospital and spoke with him. He then prepared an accident report based on that conversation (*id.* at 25). Simpson was shown a copy of an accident report and confirmed he prepared it (*id.* at 26). Otherwise, he could not recollect anything about the accident (*id.* at 29-30). He did not know the condition of the accident location, or whether muck and debris were present (*id.* at 36). He stated that, if there was muck in an area, workers "routinely worked in or walked through muck" (*id.* at 42).

Simpson testified that if he saw workers walking on tie blocks, he would "urge them not to" (*id.* at 36, 37 ["There have been times I've told them to walk on the flat area as opposed to the tie blocks"]). He understood that workers would walk on the Blocks because it was "easier" because "if you walk on the surface, you had to step over things" such as braces and brackets (*id.* at 38). He advised against it because of an increased chance of "slipping" and "fall[ing] down" (*id.* at 50).

The Accident Reports

The MTA Incident Report (NYSCEF Doc. No. 141)

The MTA “Supervisor’s Accident Investigation Report” is dated February 15, 2019 (the date of the accident) and contains a “witness description of events.” It also contains a witness statement signed and dated February 18, 2019.

The report itself states that the accident consisted of a “trip + fall on track – chest/shoulder impact on concrete tie” (*id.* at 2). The witness description states that plaintiff “was walking track, went to step up onto the blocks and fell while taking step, landed on the block” (*id.* at 3). It is unsigned.

The MTACC Injury Report Form (NYSCEF Doc. No. 142)

The MTACC Injury Report indicates that it was prepared by Simpson. It states that plaintiff “tripped and fell while attempting to step on a concrete tie block” (*id.* at 1).

The Railworks Accident Report (NYCSEF Doc. No. 143)

The Railworks accident report was prepared on the day of the accident by Jesse Diaz, who is listed as Railworks’ “manager or general foreman” (*id.* at 2). It stated that plaintiff “fell over on track” and “[a]s per employee, couldn’t walk on bench wall, fell while walking on blocks, didn’t walk on invert due to other crew washing invert. Too much muck and debris” (*id.*, at 2).

DISCUSSION

“To prevail on a motion for summary judgment, the movant must make a prima facie showing by submitting evidence that demonstrates the absence of any material issues of fact. Once that initial showing has been made, the burden shifts to the opposing party to show there are disputed facts requiring a trial. All facts are viewed in the light most favorable to the non-moving party” (*Nellenback v Madison County*, — NY3d —, 2025 NY Slip Op 02263 [2025] [internal citations omitted]).

The Labor Law § 240 (1) Claim (Seq. Nos. 004 and 006)

Plaintiffs move for summary judgment in their favor as to liability on the second cause of action against defendants, which alleges a violation of Labor Law § 240 (1). Defendants move for summary judgment dismissing the same.

Labor Law § 240 (1), 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) “imposes a nondelegable duty on owners and contractors to provide devices which shall be so constructed, placed and operated as to give proper protection to those individuals performing the work” (*Quiroz v Memorial Hosp. for Cancer & Allied Diseases*, 202 AD3d 601, 604 [1st Dept 2022] [internal quotation marks and citations omitted]). It “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]).

Here, defendants do not dispute that the MTA and MTA Capital Construction are the owners of the premises where the accident occurred, and that Tutor Perini was the general contractor.

“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]; *O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33 [2017] [section 240 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”).

In addition, Labor Law § 240 (1) “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]).

That said, not all workers injured at a construction site fall within the scope of protections of section 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]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007] [section 240 (1) “does not cover the type of ordinary and usual peril to which a worker is commonly exposed at a construction site”). 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”

(*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015], quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

Therefore, to prevail on a Labor Law § 240 (1) claim, a plaintiff must establish that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]).

Here, plaintiff's accident occurred when the tunnel floor he was walking on became obstructed with muck, requiring him to step onto 16-to-18-inch tall Blocks to continue towards his tool box. After stepping on the Block, he attempted to step to the next Block, but he slipped and fell to the tunnel floor.

Initially, the parties dispute whether plaintiff's accident falls within the scope of section 240 (1). Specifically, defendants argue that plaintiff's work and the accident location were not elevated surfaces as contemplated by section 240 (1). In opposition and in support of his own motion, plaintiff argues that the tunnel floor was impassible, which forced him to step onto and traverse the 16-to-18-inch-high Blocks, which created an elevation related hazard.

Notably, it is undisputed that plaintiff's work, and his work area, were not elevated. What is in dispute is whether the Blocks constituted an elevated route for plaintiff to reach his work area such that they constitute a safety device contemplated by section 240 (1).

To that end, plaintiff argues that the Blocks were, essentially, the functional equivalent of scaffold/platform and that they were insufficient to provide plaintiff with a safe path over the obstructed area. To establish this, plaintiff relies on (1) his testimony that the bench wall – which was the normal device used by workers to avoid the muck in the tunnels – was blocked by stored materials (plaintiff's 50-h at 30; see *also* Peguro tr at 14) and (2) that the tunnel floor was impassible due to the four-inch-thick layer of muck and debris (plaintiff's 50-h at 28 ["I couldn't continue"]), such that he was required to traverse the Blocks to reach his destination.

It is also undisputed that the bench wall was blocked and unusable to provide safe access to plaintiff's destination. In addition, plaintiff's testimony that the muck created an impassible condition is unrebutted. The record also establishes that workers in the tunnels regularly climbed onto and traversed the Blocks to avoid muck (Elmer tr at 18 ["It's just common"]) and that walking on the Blocks was "easier" than walking on the tunnel floor because "if you walk on the surface, you had to step over things" such as muck and braces and brackets (Simpson tr at 38).

"There is no bright-line minimum height differential that determines whether an elevation hazard exists" (*Brown v 44 St. Dev., LLC*, 137 AD3d 703, 704 [1st Dept 2016], quoting *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 9 [1st Dept 2011]). That being said, for a height differential between 12 inches to two feet, cases in the Appellate Division, First Department have been split (*compare Arrasti v HRH Constr. LLC*, 60

AD3d 582, 583 [1st Dept 2009] [fall from an 18 inch high ramp that was sole access to work area]; *Brown v 44 St. Dev. LLC*, 137 AD3d 703, 703-704 [1st Dept 2016] [12 to 18 inch fall through rebar latticework while carrying planks] *with Torkel v NYU Hosps. Ctr.*, 63 AD3d 587, 590 [1st Dept 2009] [12 to 18 inch high ramp from the sidewalk curb to the street was not an elevation-related hazard]; *Fischer v VNO 225 W. 58th St. LLC*, 215 AD3d 486, 487 [1st Dept 2023] [fall from a distance of between 1½ to 2 feet off a platform did not constitute “a physically significant height elevation differential to trigger the protection of Labor Law § 240 (1)”]. The cases do not explain the rationale or articulate criteria that courts should apply to determine whether a height differential between 12 inches to 2 feet would present an elevation related risk.

Previously, in another case involving work within the tunnels of the East Side Access project, this court ruled that a worker who had slipped on railroad ties that were situated over a one foot to two foot gap was not exposed to an elevation related hazard contemplated by section 240 (1) (see *Pizzola v Tutor Perini Corp.*, 2025 NY Slip Op 30657[U], *14-15 [Sup Ct, NY County 2025]).

However, the Appellate Division, First Department has acknowledged that “the jurisprudence of this Court has since evolved” (*Palumbo v Citigroup Tech., Inc.*, 240 AD3d 455, 456 [1st Dept 2025]). In light of *Palumbo*, which was issued after this court’s decision in *Pizzola*, the court is constrained to rule that plaintiff was exposed to an elevation related hazard. In *Palumbo*, the plaintiff was injured while standing on a stack of two pallets approximately 10½ to 20 inches high to use an elevated wet saw, when his foot broke through one of the wooden slabs of the top pallet, causing him to lose his balance and fall to the ground. Like *Palumbo*, the Blocks were only 18 inches above the tunnel floor.

Here, plaintiff has established that it was necessary for him to climb onto the Blocks to traverse the tunnel during the power washing operation. Accordingly, the Blocks served “conceptually and functionally as an elevated platform” over a hazardous condition (*Becerra v City of New York*, 261 AD2d 188, 189 [1st Dept 1999]; see also *Flores v Exotic Design & Wire, LLC*, 221 AD3d 428 [1st Dept 2023] [unsecured plywood sheet over bathtub on which the plaintiff was required to stand was functional equivalent of scaffold for the purposes of section 240 (1)]).

In opposition, defendants argue that the accident was not caused by a height-related hazard, but by a slippery condition – i.e. the muck itself. In support of this argument, defendants rely on several cases, including *German v Antonio Dev., LLC*. (128 AD3d 579 [1st Dept 2015]). Unlike here, the accident in *German* did not involve an elevation hazard. Rather, the court explained, the *German* plaintiff “slipped on a wet steel grate” while standing at ground level and, therefore, “the impetus for his fall was his slipping, not the direct consequence of gravity” (*German*, 128 AD3d at 579; see also *Ghany v BC Tile Contractors, Inc.*, 95 AD3d 768, 769 [1st Dept 2012] [“the impetus for the heavy stone’s fall was plaintiff’s tripping on ground level, rather than the direct consequence of gravity”]).

Similarly, defendants' reliance on *Nicometi* (25 NY3d at 90) is unpersuasive. In *Nicometi*, a worker wearing stilts slipped on a patch of ice. The Court of Appeals determined that the accident did not arise from an elevation related risk because it arose solely from a hazardous condition on the ground and was entirely unrelated to his standing on stilts (*id.* at 98). In addition, the *Nicometi* court noted that the record established that the stilts – the elevation related safety device at issue – did not fail and were proper and sufficient to protect plaintiff from height related hazards (*id.* at 99).

Here, unlike in *German*, *Ghany*, or *Nicometi*, plaintiff was not standing on the ground at the time of the accident. Rather, he was standing on a Block approximately 18 inches above the ground. And, as discussed above, the Block itself was insufficient to afford plaintiff with a stable platform to walk above the muck.

A trio of recent decisions from the Appellate Division, First Department are instructive. In *D'Angelo v Legacy Yards Tenant LLC* (237 AD3d 607, 607 [1st Dept 2025]), the Appellate Division ruled that the motion court properly granted the plaintiffs partial summary judgment on the Labor Law § 240 (1) claim, based on plaintiff D'Angelo's testimony that, "while ascending a steel ship's ladder, he slipped on an unknown grimy substance on the second rung from the top of the ladder" and began to fall (*id.* at 607). In *Saula v Harlem Urban Dev. Corp.* (235 AD3d 478, 478 [1st Dept 2025]), the Appellate Division ruled that the plaintiff's fall from a wet ladder, "the only means of access between the first and second floors, lacked slip protection and a tie-off point," was a violation of Labor Law § 240 (1) (*id.* at 478). In *Santana v Port Authority of New York and New Jersey* (237 AD3d 628 [1st Dept 2025]), the Appellate Division ruled that the court correctly granted the plaintiff's motion for partial summary judgment on the Labor Law § 240(1) claim, based on the plaintiff's testimony that he slipped and fell off the platform of a scissor lift, which had become wet from rain (*id.* at 628; *but see Hartigan v Gilbane Bldg. Co.*, 228 AD3d 487, 488 [1st Dept 2024] [plaintiff's slip and fall from a ladder due to moisture on its metal rungs raised issues of fact as to whether the plaintiff was provided with proper protection]).

Here, the Blocks constituted a safety device for the purposes of Labor Law § 240 (1). Plaintiff testified that the Blocks were slippery and covered in muck and failed to provide a safe and stable platform, causing him to fall. Like the ship's ladder covered in unknown grime in *D'Angelo*, the wet ladder in *Saula*, and the wet platform of the scissor lift in *Santana*, the slippery muck-covered Blocks here failed to protect plaintiff from falling, thus constituting a violation of section 240 (1).

Defendants also argue that plaintiff was the sole proximate cause of the accident because of the presence of muck on plaintiff's boots when he stepped onto the Block. This argument is unpersuasive. "[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it" (*Cazho v Urban Bldrs. Group, Inc.*, 205 AD3d 411, 412 [1st Dept 2022], quoting *Kielar v Metropolitan Museum of Art*, 55 AD3d 456, 458 [1st Dept 2008] [internal quotation marks and citations omitted]; *Hoffman v SJP TS, LLC*, 111 AD3d 467, 467

[1st Dept 2013] [a plaintiff cannot be the sole proximate cause of an accident where a defendant “failed to provide an adequate safety device in the first instance”]).

Accordingly, any alleged negligence on plaintiff’s part with respect to having muck on his boots at the time of the accident goes to comparative fault. Comparative fault is not a defense to a Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Melito v ABS Partners Real Estate, LLC*, 129 AD3d 424, 425 [1st Dept 2015]). “[W]here the owner or contractor has failed to provide adequate safety devices to protect workers from elevation-related injuries and that failure is a cause of plaintiff’s injury, [n]egligence, if any, of the injured worker is of no consequence” (*Hernandez v Bethel United Methodist Church of N. Y.*, 49 AD3d 251, 253 [1st Dept 2008] [internal quotation marks and citations omitted]).

Therefore, as plaintiff has established that section 240 (1) was violated, he cannot be the sole proximate cause of the accident.

Finally, defendants have not established that plaintiff was recalcitrant, either in failing to wear his muck boots or failing to heed general instructions to avoid using the Blocks.

“A defendant has no liability under Labor Law § 240 (1) when plaintiffs: (1) had adequate safety devices available, (2) knew both that the safety devices were available and that [they were] expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had they not made that choice” (*Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167-68 [2020] [internal quotation marks and citations omitted]).

Here, there is no evidence that adequate safety devices were provided to plaintiff or that he refused to use such devices. Plaintiff testified that there was no standing order to wear muck boots (plaintiff’s tr at 124), and defendants provide no testimony of any directive to do so. In addition, while Simpson testified that he would “urge [workers] not to” walk on the Blocks (Simpson tr at 36, 37), “an instruction . . . to avoid using unsafe equipment or engaging in unsafe practices is not a safety device” (*Hill v Acies Group, LLC*, 122 AD3d 428, 429 [1st Dept 2014] [internal quotation marks and citation omitted]).

Given the foregoing, plaintiffs are entitled to summary judgment in their favor on their Labor Law § 240 (1) claims against the MTA, MTA Capital Construction, and Tutor Perini. The branch of defendants’ motion for summary judgment dismissing plaintiffs’ Labor Law § 240 (1) claims is denied.

The Labor Law § 241 (6) Claims (Motion Sequence Numbers 002 and 003)

Plaintiffs move for summary judgment in their favor as to liability on Labor Law § 241 (6), predicated upon violations of Industrial Code 12 NYCRR 23-1.7 (d) and (e) (1) and (2). Defendants move for summary judgment dismissing plaintiffs' cause of action for all violations of Labor Law § 241 (6).

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

“All 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, [and] equipped . . . 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 of reasonable care upon owners and contractors “to provide reasonable and adequate protection and safety’ to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed” (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; see also *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d at 501–502).

To sustain a Labor Law § 241 (6) claim, it must be established that the defendant violated a specific, “concrete specification” of the Industrial Code, rather than a provision that considers only general worker safety requirements (*Messina v City of New York*, 300 AD2d 121, 122 [1st Dept 2002]). Such violation must be a proximate cause of the plaintiff’s injuries (*Yaucan v Hawthorne Vil., LLC*, 155 AD3d 924, 926 [2d Dept 2017] [“a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code regulation that is applicable to the circumstances of the accident”]; see also *Sutherland v Tutor Perini Bldg. Corp.*, 207 AD3d 159, 161 [1st Dept 2022]). “Whether a regulation applies to a particular condition or circumstance is a question of law for the court” (*Harrison v State of New York*, 88 AD3d 951, 953 [2d Dept 2011]).

As an initial matter, plaintiffs list multiple violations of the Industrial Code in the complaint and bill of particulars. Except for sections 23-1.7 (d) and 23-1.7 (e) (1) and (2), plaintiffs do not seek relief in their favor as to these Industrial Code provisions; nor do they oppose their dismissal. These uncontested provisions are therefore deemed abandoned (*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”)).

Industrial Code 12 NYCRR 23-1.7 (d)

Industrial Code 12 NYCRR 23-1.7 (d) is sufficiently specific to support a Labor Law § 241 (6) claim (see *Pereira v New School*, 148 AD3d 410, 412 [1st Dept 2017]). It governs “Slipping hazards” and provides as follows:

“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”(12 NYCRR 23-1.7 [d]).

First, it must be determined whether plaintiff’s accident location was a floor, passageway, walkway, scaffold, platform or other elevated working surface.

In their motion and in opposition to plaintiffs’ motion, defendants argue that the subway tunnel’s subfloor was an open area. Citing cases where courts have held that “open areas” are not covered under section 23-1.7 (d), defendants therefore argue that section 23-1.7 (d) is not applicable.

In opposition to defendants’ motion, and supplementing his own motion, plaintiffs set forth cases for the proposition that rail beds constitute floors, passageways or walkways as contemplated by section 1.7 (d).

The Court agrees with plaintiffs. The tunnel’s floor, upon which the rail beds are installed, constitutes a floor, passageway or walkway as contemplated by Industrial Code 12 NYCRR 23-1.7 (d) (*Burnett v City of New York*; 104 AD3d 437, 438 [1st Dept 2013] [section 1.7 (d) applicable to a slipping hazard in a rail bed]).

Next, defendants argue that this section is inapplicable to the accident because defendants did not have notice of the condition in the tunnel at the time of the accident. This argument is unpersuasive. “Since an owner’s liability under Labor Law § 241 (6) is vicarious, it is irrelevant that defendant, as it contends, had no notice of the hazardous condition” (*Burnett*, 104 AD3d at 438; see also *Zyskowski v Chelsea-Warren Corp.*, 238 AD3d 498, 501 [1st Dept 2025]).

Given the foregoing, Section 23-1.7 (d) is applicable to the accident location.

As to whether this provision was violated, construction debris can be a “foreign substance” pursuant to section 1.7 (d) (see *Ruisech v Structure Tone Inc.*, 42 NY3d 1061, 1065 [2024], *rearg denied*, 43 NY3d 939 [2025] [“concrete pebbles” generated during construction deemed a foreign substance]).

To that end, plaintiff's uncontested testimony is that his path was congested with "muck" that he had no choice but to walk through [plaintiff's 50-h tr at 56 [noting that his boots were covered in muck]; plaintiff's tr at 84 [stating that he walked through the muck in the tunnel until it began to overtop his boots]]. It is also uncontested that plaintiff placed his foot, which was covered in muck (plaintiff's 50-h at 56) on a tie block. His foot then slipped from the tie block, causing plaintiff to fall forwards [plaintiff's 50-h at 41; plaintiff's tr at 84).

Notably the facts in *Burnett, supra*, are similar to the instant matter. In *Burnett*, the plaintiff was required to walk through and stand in water to do his work. To perform his work, he had to lift his foot and place it "against a track tie for leverage" (*Burnett*, 104 AD3d at 438). Burnett's foot then "slipped off the tie" causing him to fall backwards. The first department held that these facts established the existence of a slippery condition that should have been remedied, in violation of section 23-1.7 (d).

Given the foregoing, plaintiff has established, prima facie, that he slipped due the slippery muck on the tunnel floor, in violation of section 23-1.7 (d).

That said, there remains a question of fact as to whether the muck was integral to the work being done at the time of the accident. Under the integral to the work doctrine, a defendant may not be found liable if the hazardous condition was an integral part of the work. However, the doctrine "applies only when the dangerous condition is inherent to the task at hand, and not . . . when a defendant or third party's negligence created a danger that was avoidable without obstructing the work or imperiling the worker" (*Bazdaric v Almah Partners, LLC*, 41 NY3d 310, 320 [2024]). Further, the doctrine does not "absolve a defendant of liability for the use of an avoidable dangerous condition or for failure to mitigate the danger . . . if preventative measures would not make it impossible to complete the work" (*id.* at 321).

Here, the task at hand was the removal of formwork in the tunnel (plaintiff's job) and the cleaning of debris generated from the formwork (plaintiff's coworker's job), which happened simultaneously. While defendants argue that the generation of muck in the tunnel was inherent to that work – and therefore an unavoidable hazard – they have not established that preventative measures aimed at safeguarding workers in the tunnels would not make it impossible to do that work (*id.*).

In a similar vein, plaintiffs have not sufficiently established that there was a feasible preventative measure or alternate work method that would have provided a safer worksite. Plaintiffs' counsel's assertion that alternate means of cleaning would have rendered the area safer, without more, is insufficient to establish that such means were feasible.

Further, plaintiffs' reliance on Elmer's testimony that laborers clear muck by bagging it (Elmer tr at 26) does not establish that such bagging can be done in a way that would not create muck. Similarly, Elmer's testimony that, in some instances, it

could be possible for laborers to perform cleaning operations when carpenters are not present (*id.* at 33) is equivocal and insufficient to establish, as a matter of law, that such work could have been done in a safer manner at the time and location of plaintiff's accident.

Accordingly, as there remain questions of fact as to whether defendants failed to sufficiently mitigate the hazard, neither plaintiffs nor defendants are entitled to summary judgment with respect to this claim.

12 NYCRR 23-1.7 (e) (1) and (2)

Industrial Code 12 NYCRR 23-1.7 (e) (1) and (2) are sufficiently specific to support a Labor Law § 241 (6) claim (see *Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 12 [1st Dept 2011]). They provide, in pertinent part, the following:

“(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.”

Turning first to defendants' arguments in support of dismissal, they argue that section 23-1.7 (e) (1) and (2) are inapplicable because plaintiff does not allege that he tripped, only that he slipped. This argument is unavailing (see *DeMaria v RBNB 20 Owner, LLC*, 129 AD3d 623, 625 [1st Dept 2015] [“That plaintiff ‘slipped,’ rather than ‘tripped,’ . . . does not render 12 NYCRR 23-1.7 (e) (2) (‘Tripping and other hazards’) inapplicable to [plaintiff’s] case”]; see also *Serrano v Consolidated Edison Co. of N.Y. Inc.*, 146 AD3d 405, 406 [1st Dept 2017]; lv dismissed 29 NY3d 1118 [2017]).

Next, defendants argue that railroad tunnels are not passageways such that section 1.7 (e) (1) would not apply. In support of this position, defendants rely solely on *Dalanna v City of New York* (308 AD2d 400 [1st Dept 2003]), where the First Department held that an “outdoor 50-foot-long concrete slab” (*id.* at 400) was an open area and not a passageway for the purposes of section 1.7 (e) (1) (*id.* at 401).

Defendants' argument is unpersuasive. The confined space of an underground railroad tunnel is not the equivalent of a large outdoor concrete slab. Rather, it is more

akin to a “defined walkway or pathway used to traverse between discrete areas” (*Venezia v LTS 711 11th Ave.*, 201 AD3d 493, 494 [1st Dept 2022]) that is “an interior or internal way of passage” (*Quigley v Port Auth. of New York*, 168 AD3d 65, 67 [1st Dept 2018]).

Finally, defendants argue that these provisions cannot apply because plaintiff only slipped when he lifted his foot from the muck and stepped onto the Block. They offer no support for this position. In light of the discussion above of *Burnett* (104 AD3d at 438), where the plaintiff slipped when he lifted his foot out of standing water and placed his boot – made wet from that water – on a surface, causing it to slip, defendants’ argument is unpersuasive.

Accordingly, defendants have not established their prima facie entitlement to summary judgment dismissing the claim premised on a violation of Industrial Code section 23-1.7 (e) (1).

Turning to plaintiffs’ arguments, plaintiffs have established that both sections 23-1.7 (e) (1) and (2) apply to the accident – as the tunnel floor is both a passageway and a floor where workers work or pass. That said, as discussed above, questions of fact exist regarding whether the tripping/slipping condition present at the accident location was integral to the work at hand, or could have been mitigated to afford greater safety (see e.g. *Bazdaric*, 41 NY3d at 320-321).

Accordingly, defendants are not entitled to summary judgment dismissing the Labor Law § 241 (6) claims premised on violations of Industrial Code 12 NYCRR 23-1.7 (e) (1) and (2). Summary judgment in plaintiffs’ favor on these claims is denied.

The Common-Law Negligence and Labor Law § 200 Claims (Motion Sequence Number 003)

Defendants move for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against them.

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.”

There are two distinct standards applicable to section 200 cases, depending on the situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]; *see also Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

Here, the accident occurred due to the manner in which debris were cleaned in the tunnel. Specifically, the creation of the transient rising tide of water mixed with debris – i.e. “muck” – actively created by a Railworks laborer, Innocent, who was power washing an area 150 feet from the accident location with a high-powered water hose. Accordingly, the accident was caused by the means and methods of the work ongoing at the time of the accident.

Where the plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work” (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]; *DaSilva v Toll First Ave., LLC*, 199 AD3d 511, 513 [1st Dept 2021]; *Andino v Wizards Studios N. Inc.*, 223 AD3d 508, 509 [1st Dept 2024]). Specifically, “liability can only be imposed against a party who exercises *actual* supervision of the injury-producing work” (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012]).

Here, the record establishes that both plaintiff's work and the cleaning work were supervised and controlled by Railworks. Plaintiff testified that he was supervised by a Railworks foreman (plaintiff's 50-h tr at 26-27), and Elmer testified that he directed plaintiff's work on the day of the accident (Elmer tr at 20). In addition, Elmer testified that it was common for Railworks carpenters and laborers to work near each other at the same time (Elmer tr at 31 and 34 [“Typically, we try to keep them a little bit separate . . . but they are usually within a few hundred feet of each other”]). Elmer also stated that Railworks' “general foreman” was responsible for coordinating the work between its carpenters and laborers (*id.* at 25).

There is no evidence in the record that defendants actually supervised or controlled Railworks' work or coordinated the work done between Railworks' own work crews. Any alleged authority over the general direction of the project, its scope, or coordination between subcontractors would only establish a general supervisory control over the work, which is insufficient to impute liability under Labor Law § 200 (*see Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014]).

To the extent that plaintiff argues that this accident involves a hazardous condition inherent to the premises, this is incorrect. “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” (*Villanueva v 114 Fifth Ave Assoc. LLC.*, 162 AD3d 404, 406 1st Dept 2018). The muck was not inherent to the premises. Rather, it was created specifically by ongoing work at the time of the accident.

Accordingly, defendants are entitled to summary judgment dismissing plaintiffs’ common-law negligence and Labor Law § 200 claims.

The parties’ remaining arguments were considered and found unavailing.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiffs’ motion for summary judgment in their favor as to liability on their Labor Law §§ 240 (1) and 241 (6) claims against defendants (Motion Sequence No. 004) is **GRANTED IN PART TO THE EXTENT THAT** plaintiffs are granted summary judgment in their favor as to liability against defendants Metropolitan Transportation Authority, MTA Capital Construction, and Tutor Perini Corporation on the second cause of action of the complaint, for violation of Labor Law § 240 (1), and the remainder of plaintiffs’ motion is otherwise denied; and it is further

ORDERED that defendants’ motion for summary judgment dismissing the complaint (Motion Sequence No. 006) is **GRANTED IN PART TO THE EXTENT THAT** the first and fourth causes of action are dismissed, and the third cause of action for violation of Labor Law § 241 (6) is dismissed, except as to those claims predicated upon 12 NYCRR 23-1.7 (d) and 12 NYCRR 23-1.7 (e) (1) and (2), and defendants’ motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.



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<u>11/17/2025</u> DATE					<u>RICHARD TSAI, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED		<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
SEQ. NO. 004	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	<input checked="" type="checkbox"/>	GRANTED IN PART
SEQ. NO. 006	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/>	OTHER
				<input type="checkbox"/>	OTHER
				<input type="checkbox"/>	REFERENCE