Alikakos v Metropolitan Transp. Auth.
2026 NY Slip Op 31686(U)
April 18, 2026
Supreme Court, New York County
Docket Number: Index No. 154417/2020
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

GEORGE ALIKAKOS,

Plaintiff,

- v -

METROPOLITAN TRANSPORTATION AUTHORITY, MTA CONSTRUCTION AND DEVELOPMENT COMPANY, RAILWORKS CORPORATION, TUTOR PERINI CORPORATION, and RAILWORKS TRANSIT, INC,

Defendants.

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INDEX NO. 154417/2020

MOTION DATE 06/09/2025, 06/09/2025

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 48-67, 88-99, 102-104, 106-109

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

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 68-87, 100, 105, 110, 111

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

In this action alleging violations of Labor Law §§ 200, 240 (1) and 241 (6) and common-law negligence, plaintiff George Alikakos, an electrician, was allegedly injured on November 6, 2019, while engaged in construction work on the East Side Access project, within an eastbound tunnel at East 55th Street, between Park Avenue and Madison Avenue (the "Project"). Plaintiff allegedly stepped onto a plywood cover over a drain opening, causing him to sink and fall into opening. The opening was three feet deep, but plaintiff fell off to the side after sinking 12 inches.

Plaintiff now moves for summary judgment in his favor as to liability on his Labor Law §§ 240, 241 (6), and 200 claims against defendants (Seq. No. 002).

Defendants oppose the motion and separately move for summary judgment dismissing the complaint (Seq. No. 003). Defendants argue that Labor Law § 240 (1) does not apply because plaintiff was not exposed to a gravity/elevation risk, and that plaintiff's Labor Law § 241 (6) must be dismissed because the opening was not sufficiently deep enough for plaintiff to fall completely through the opening. Lastly, defendants argue that plaintiff's Labor Law § 200 claim should be dismissed because they lacked actual or constructive notice, and that they did not cause or create the defect. Plaintiff opposes the motion.

This decision addresses both motions.

BACKGROUND

The Project

At his deposition, plaintiff testified that, on November 6, 2019, he was employed as a journeyman electrician by Five Star Electric (Five Star), which was performing electrical installation work for the East Side Access Project (*see* plaintiff's Exhibit H in support of mot, plaintiff's EBT, at 22, lines 15-21; at 23, lines 15-17; at 36, lines 7-9 [NYSCEF Doc. No. 58]).[1]

According to Eric W. Schwing, a project manager employed by defendant Tutor Perini Corporation (Tutor Perini), the purpose of the project was to join Grand Central to the Long Island Railroad (*see* plaintiff's exhibit N in support of mot, Schwing EBT, at 9, lines 9-14; at 14, line 23 through 15 line 2 [NYSCEF Doc. No. 64]).[2] Schwing testified that there was a written construction contract between Tutor Perini and the MTA for the work (*id.* at 9, 16-17). He testified that Five Star was performing the "electrical scope" on the project, which "entailed installing conduit, pulling wires, installing equipment, electrical panels, et cetera" (*id.* at 9, line 21 through 10, line 6). Tutor Perini had a written subcontract with Five Star (*see* plaintiff's Exhibit P in support of mot [NYSCEF Doc. No. 107]).

Plaintiff stated that, on the date of the incident, he was working on "man drilling conduit": "[b]asically we're running – it's called a man drill through conduit, high voltage, through the pipes to clean them" (plaintiff's EBT at 24, lines 14-20). Plaintiff further explained, "Basically we snake high voltage conduits with rope and we pull it through the pipes, clear any debris blocking the high voltage conduits" (*id.* at 58, lines 20-23).

Plaintiff explained, "The man drill is like a plastic hard plastic device used to clear debris in the conduit. It's pulled through to clear concrete box, bottles, anything preventing the wire from getting through conduit" (*id.* at 63, line 2-7). According to plaintiff, "You pull the man drill through the conduit with a rope to clean the conduit out before we put the high voltage cable inside the pipe" (*id.* at 63, lines 13-16). Plaintiff stated that this work had been going on for "[a] couple of weeks" (*id.* at 58, line 24 through 59, line 3).

The Incident

Plaintiff testified that his incident occurred between approximately 1:30 p.m. and 2:00 p.m., in the tunnels on track EB2 at East 55th Street in Manhattan (plaintiff's EBT, at 31, lines 16-20; at 61, lines 19-25). Plaintiff stated, "I was rolling up an extension cord, and I stepped onto a piece of plywood, sunk into the hole, and I fell down, and I hit

[1] Plaintiff's deposition transcript was also submitted as defendants' exhibit C in support of their motion (NYSCEF Doc. No. 74).
[2] Schwing's deposition transcript was also submitted as defendants' exhibit G in support of their motion (NYSCEF Doc. No. 78).

my right side" (*id.* at 62, lines 5-8). The plywood covered a drain, which plaintiff testified was three feet wide by three feet long, and "roughly about three feet" deep (*id.* at 47, lines 8-15; at 101, lines 15-18; *see also* plaintiff's Exhibit K in support of mot, injury report form [NYSCEF Doc. No. 61]).

According to plaintiff, he sank "[a]bout 12 inches" (*id.* at 47, lines 4-7). When asked, "what stopped you from falling in the hole three feet?", plaintiff replied, "I lost balance and shifted to my right and fell down" (*id.* at 86, lines 6-9). Plaintiff stated that his right shoulder and arm hit the train track rail (*id.* at 91, lines 8-13). Plaintiff then testified as follows:

"Q. Where were your legs positioned once you were on the rail?
A. Right side on the floor.
Q. Were they in the hole?
A. I have no idea" (*id.* at 91, lines 14-18).

When asked if he fell into a drain, plaintiff answered, "Yes" (*id.* at 92, line 25 through 93, line 2). When asked, "When you stepped on the plywood and sunk, did it snap or did it bend?", he replied, "I have no idea" (*id.* at 90, lines 17-19).

Plaintiff testified that, prior to the accident, the plywood completely covered the opening (*id.* at 110, lines 11-15). He further testified that he saw the plywood immediately before the incident, and that it was not marked in any way (*id.* at 87, lines 2-13). Plaintiff testified that, besides the plywood, there were no railings or caution tape around the drain hole (*id.* at 93, lines 3-6).

When asked if he knew who had placed the plywood, plaintiff testified as follows:

"A. Railworks or Tudor [sic] Perini.
Q. How do you know it's Railworks?
A. They were doing the tunnel.
Q. Excuse me?
A. They are doing the tunnel, tracks" (*id.* at 48, lines 7-12).

According to Schwing, Tutor Perini would do the initial covers of the drains on the track beds, "and then anybody who worked in the area or worked on the drains would have to re-install them when they were done. (Schwing EBT, at 16, lines 5-12). Schwing testified that, other than Tutor Perini employees, Railworks would have been working on the drains, because Tutor Perini had contracted with Railworks to install cast iron grating over the drains (*see id.* at 16, line 13 through 17, line 18).

Supervision of Plaintiff's work

Plaintiff testified that Billy Carr at Five Star, his foreman, was his supervisor on the East Side Access project and the only person who gave him instructions for the Project (plaintiff's EBT, at 32, line 20 through 33, line 4; at 87, lines 14-17). According

to plaintiff, on the date of the incident, his foreman had given him instructions at the beginning of plaintiff's shift (*id.* at 34, lines 15 through 20; at 42, lines 8-11).

Plaintiff denied receiving instructions from anybody at the MTA, MTA Capital Construction, MTA Construction Development, Tutor Perini, and Railworks[3] (*id.* at 87, line 20 through 88, line 12). And yet, when asked if he was ever supervised by anyone from the MTA, plaintiff replied, "Yes" (*id.* at 88, lines 18-20). When asked, "In what capacity did he supervise you?", plaintiff answered, "he was present during the drilling of a high voltage conduit" (*id.* at 89, lines 5-6). However, plaintiff stated that this inspector was not present when the incident occurred (*id.* at 89, lines 7-9).

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*, 44 NY3d 329, 334 [2025] [internal citations omitted]).

I. Plaintiff's Labor Law § 240 (1) claims

Labor Law § 240 (1) states:

> "Scaffolding and other devices for use of employees
>
> 1. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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 upon owners, contractors and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work" (*Barreto v Metropolitan Transp. Auth.,* 25 NY3d 426, 433 [2015]). 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*

[3] Plaintiff was asked if he received instruction "from anybody from Railworks" and he answered "no". Defendants' attorney did not indicate whether "Railworks" referred to defendant Railworks Corporation and/or defendant Railworks Transit Inc.

Baharestani, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co*., 81 NY2d 494, 501 [1993]).

> "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]; *see also 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"]).

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]).

Plaintiff argues that Labor Law § 240 (1) was violated because he fell into a drain opening that "was neither protected with a secure, fastened covering nor guarded by any sort of barrier or safety railing to prevent a worker such as Alikakos from falling into the unprotected opening" (plaintiff's memo of law in support of mot, at 8 [NYSCEF Doc. No. 50]). Plaintiff argues that the facts of this case are nearly identical to the Appellate Division, First Department's recent decision in *Haskins v Metropolitan Transportation Authority* (227 AD3d 409 [1st Dept 2024]).

Defendants argue that Labor Law § 240 (1) does not apply because plaintiff was not exposed to a gravity/elevation risk, and that plaintiff was provided with proper support and safety equipment to perform his work (defendants' memo of law in support of mot, at 9 [NYSCEF Doc. No. 71]). Lastly, they contend that plaintiff was the sole proximate cause of the accident (*id.* at 10).

As defendants point out, in some instances, courts have held that a height differential of one foot or less has not constituted an elevation related hazard (*Fischer v VNO 225 W. 58th St. LLC,* 215 AD3d 486, 487 [1st Dept 2023] [ten inch height

differential did not "trigger the protection of Labor Law § 240(1)"]; *Sawczyszyn v New York University*, 158 AD3d 510, 511[1st Dept 2018] [eight to twelve inch height differential "does not constitute a physically significant elevation differential"]; *Jackson v Hunter Roberts Constr. Group, LLC*, 161 AD3d 666, 667 [1st Dept 2018] ["The height differential of 6 to 10 inches . . . did not constitute a physically significant elevation differential"]; *DeStefano v Amtad New York, Inc.*, 269 AD2d 229, 229 [1st Dept 2000] [fall from twelve inch high ramp is not an elevation hazard]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514-15 [NY 1991] ["it is difficult to imagine how plaintiff's proximity to the 12-inch trough could have entailed an elevation-related risk which called for any of the protective devices of the types listed in section 240 (1)"]; *Cappabianca*, 99 AD3d at 146 [fall from pallet between four to twelve inches high did not fall within the scope of section 240 (1)]).

However, the Appellate Division, First Department recently recognized that "[w]hile this Court has previously held that a height differential of at most 12 inches above the floor was insufficient to find an elevation-related risk, the jurisprudence of this Court has since evolved, recently reiterating that '[t]here is no bright-line minimum height differential that determines whether an elevation hazard exists'" (*Palumbo v Citigroup Tech., Inc.*, 240 AD3d 455 [1st Dept 2025], quoting *Haskins*, 227 AD3d 409). Thus, in *Palumbo*, the Appellate Division ruled that Labor Law § 240 (1) applied to the plaintiff's fall from a height of approximately 10 ½ to 20 inches.

Here, there is an elevation-related risk. Although plaintiff testified that he sank 12 inches, he also testified that the drain opening was three feet deep. A height differential between two feet to four feet has been found to constitute an elevation related hazard (*Haskins*, 227 AD3d 409 [hole measured two to two-and-a-half feet deep]; *Megna v Tishman Constr. Corp. of Manhattan*, 306 AD2d 163, 164 [1st Dept 2003] [two foot fall from collapsed temporary stair leading to work area]; *Vurchio v Kalikow Lincoln Dev. Co.*, 187 AD2d 280, 280 [1st Dept 1992] [fall from the top of a 30 inch high sawhorse that collapsed]; *Hoyos v NY-1095 Avenue of the Americas, LLC*, 156 AD3d 491, 503, [1st Dept 2017] [four foot fall from unguarded loading dock]). The cause of plaintiff sinking when he stepped onto the plywood is the direct consequence of gravity acting on the plaintiff.

Thus, plaintiff's case easily falls under the line of cases where Labor Law § 240 (1) applies because the plaintiff is injured while struggling to avoid the elevation-related risk of falling (*see e.g. Ciaurella v Trustees of Columbia Univ. in City of New York*, 228 AD3d 555, 556 [1st Dept 2024]; *York v Tappan Zee Constructors, LLC*, 224 AD3d 527, 528 [1st Dept 2024]). "Labor Law § 240 (1) may apply where a plaintiff is injured as a result of his or her attempt to prevent a fall . . . and the fact that a plaintiff does not actually fall is irrelevant" (*Wilson v Bergon Constr. Corp.*, 219 AD3d 1380, 1381 [2d Dept 2023]). Alternatively, plaintiff's case falls under another line of cases where Labor Law § 240 (1) applies to the plaintiff who was injured from partially falling into an opening (*see Favaloro v Port Auth. of New York & New Jersey*, 191 AD3d 524 [1st Dept 2021]; *Carpio v Tishman Constr. Corp. of N.Y.,* 240 AD2d 234 [1st Dept 1997]).

In *Haskins*, a worker fell into a hole covered by a thin black plastic waterproofing material, and the hole "measured 2 to 2½ feet deep, 18 inches wide, and 3 feet long" (227 AD3d at 409). The Appellate Division, First Department rejected the argument that the height differential was de minimis (*id*).

Given all the above, plaintiff has established a violation of Labor Law § 240 (1); the court rejects defendants' argument that Labor Law § 240 (1) does not apply. Because plaintiff has demonstrated a violation of the statute, plaintiff cannot be solely responsible for his injury under the statute (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003] ["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]).

The violation of Labor Law § 240 (1) was a substantial factor in causing the incident. However, the issue of whether a violation of Labor Law § 240 (1) was a substantial factor in causing plaintiff any injuries is an issue to be determined at trial.

Turning to the issue of who may be held liable for the violation of Labor Law § 240 (1), by an interim order dated April 28, 205, this court specifically directed plaintiff to submit supplemental papers on the issue of whether defendants Metropolitan Transportation Authority (MTA) and MTA Construction and Development Company (MTACD) are an "owner" under Labor Law §§ 240 and 241, and whether defendants Railworks Transit Inc. and Railworks Corporation are either a "contractor" or "agent" under Labor Law §§ 240 and 241 (*see* NYSCEF Doc. Nos. 104 and 105). The court also gave the parties the opportunity to submit a written stipulation that, for the purpose of those statutes, "the MTA (and/or other defendants) is an 'owner' for the purposes of Labor Law §§ 240 (1) and 241 (6), and that defendant Railworks Transit, Inc. (and/or other defendants) is a 'contractor' or 'agent'" (*id.*).

As the movant, plaintiff has the prima facie burden of establishing not only that a violation of Labor Law § 240 (1) occurred, but also must establish whether the MTA and MTACD can each be held statutorily liable for those violations as an "owner" or "agent," and whether the other defendants can be held statutorily liable as a "contractor" or "agent" of the "owner." The affirmation of plaintiff's counsel does assert that MTA is "the site owner," and that Tutor Perini is a "general contractor and/or construction manager" (see affirmation of plaintiff's counsel in support of motion ¶ 26). However, the affirmation is silent with respect to the roles of the other named defendants.

In supplemental papers, plaintiff argues that, because the MTA admitted in paragraph 11 of its answer that it contracted with Tutor Perini for certain services for the project, it therefore admitted to its ownership of the project site (supplemental affirmation of plaintiff's counsel ¶¶ 5-6 [NYSCEF Doc. No. 108]). This argument fails.

The amended verified complaint alleges that the MTA and MTACD were owners of the premises (see plaintiff's Exhibit C in support of motion, complaint ¶¶ 16, 22 [NYSCEF Doc. No. 53). However, these allegations were expressly denied in

defendants' answer (see plaintiff's Exhibit D in support of motion, answer ¶¶ 7-8 [NYSCEF Doc. No. 54]). Defendants' admission that the MTA contracted with Tutor Perini therefore cannot be interpreted as an admission that the MTA owned the premises.

As plaintiff points out, "[c]ourts have held that the term 'owner' is not limited to the titleholder of the property where the accident occurred and encompasses a person 'who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit'" (*Scaparo v Village of Ilion*, 13 NY3d 864, 866 [2009]). However, the existence of a contract alone does not prove the MTA's or MTACD's interest in the property.

Plaintiff has not proven either that the MTA or MTACD is the title owner of the property where the incident occurred or that the MTA has "some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest" (*Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 51 [2004]). Ownership of a construction project does not constitute any kind of *property interest* in the premises where the alleged violations of Labor Law § 240 (1) occurred.

This court recognizes that, with respect to large scale construction projects involving the subway, such as the East Side Access project, proof of the MTA's title to the particular parcel or area underground where a worker is injured can be a time consuming, complex endeavor. For that reason, this court suggested in this court's interim decision and order dated April 28, 2025 that the parties could stipulate that the MTA is an "owner" for the purposes of the Labor Law, as the MTA has done in other cases (*see Ferrante v Metro. Transp. Auth*., 46 Misc 3d 1207[A], 2015 NY Slip Op 50015[U], *11 [Sup Ct, NY County 2015] ["the MTA does not dispute its potential liability as an owner under the Labor Law"], *affd as mod* 133 AD3d 423 [1st Dept 2015]; *see also* NYSCEF Doc. No. 92 in *Dempsey v Metropolitan Transp. Auth*., Index No. 150824/2019 [stipulation as to ownership]; see also NYSCEF Doc. No. 183 in *Singh v Long Island Rail Road*, Index No. 152487/2022 [stipulation as to ownership and discontinuance without prejudice as to other defendants]). Unfortunately, that was not done here.

The only party which has not contested that it could be held liable for a violation of Labor Law § 240 (1) is Tutor Perini, the contractor.

Thus, the branch of plaintiff's motion for summary judgment in his favor as to liability on Labor Law § 240 (1) claims against defendants is granted only as to Tutor Perini, and is denied as to all other defendants. The branch of defendants' motion for summary judgment dismissing plaintiff's Labor Law § 240 (1) claims is denied.

Notwithstanding the denial of this branch of plaintiff's motion for summary judgment as to the other defendants, to "salvag[e] something of value from a motion for full or partial summary judgment that must otherwise be denied" (*Phillip v D & D Carting Co., Inc.*, 136 AD3d 18, 25 [2d Dept 2015] [citation and internal quotation marks

omitted]), the court exercises its discretion, pursuant to CPLR 3212 (g), to deem the following facts as established for all purposes:

(1) Plaintiff was not given proper protection under Labor Law § 240 (1); and the statute was violated;
(2) Plaintiff was not the sole proximate cause of the incident;
(3) The violation of Labor Law § 240 (1) was a substantial factor in causing the incident.

II. Plaintiff's Labor Law § 241 (6) claims

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]).

Plaintiff does not oppose dismissal of his Labor Law § 241 (6) claims based upon any alleged violations other than Industrial Code (12 NYCRR) § 23-1.7(b) (1) (i). These uncontested provisions are therefore deemed abandoned (*Lacruise v Memorial Sloan-Kettering Cancer Ctr.*, 245 AD3d 645, 646 [1st Dept 2026]; *Romano v New York City Tr. Auth.*, 213 AD3d 506, 508 [1st Dept 2023]). Thus, defendants are granted summary judgment dismissing all claims under Labor Law § 241 (6) predicated on violations other than 12 NYCRR 23-1.7 (b) (1) (i).

12 NYCRR 23-1.7 (b) (1) (i) is sufficiently specific for liability under Labor Law § 241 (6) (*See Rooney v. D.P. Consulting Corp.,* 204 AD3d 428, 429 [1st Dept 2022]). It states, in relevant part:

> "(b) Falling hazards. (1) Hazardous openings. (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).

Defendants argue that 12 NYCRR 23-1.7 (b) (1) is not applicable to this case because it "applies to openings deep enough for a person to fall all the way though" (Defendants' memorandum of law in support of summary judgment at 23 [NYSCEF Doc. No. 71]). Specifically, they argue that because plaintiff testified that the hole was approximately two to three feet deep, the opening was not deep enough for plaintiff to fall all the way through, citing *Romeo v Propery Owner (USA) LLC* (61 AD3d 491, 492 [1st Dept 2009]) and *Favaloro v Port Authority of N.Y. & N.J.* (191 AD3d 524, 525 [1st Dept 2021]).

In opposition, plaintiff argues that 12 NYCRR 23-1.7(b) (1) is applicable to his accident because the opening was large enough for his body to fit through the opening (*see* affirmation of plaintiff's counsel in opposition at 12 [NYSCEF Doc. No. 84]).

The court agrees with defendants.

"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]). 12 NYCRR 23–1.7(b) "applies to hazardous openings of significant depth and size" (*Lupo v Pro Foods, LLC*, 68 AD3d 607, 608 [1st Dept 2009]). Here, plaintiff testified that the drain was three feet wide by three feet long, and "roughly about three feet" deep (Plaintiff's EBT at 47, lines 8-15; at 101, lines 15-18). The depth of the opening is not deep enough for 12 NYCRR 23-1.7(b) (1) to apply (*see Favaloro,* 191 AD3d at 525 ["No measurement in the record supports an inference that plaintiff could have fallen all the way through the hole"]; *Romeo*, 61 AD3d at 492 ["18-inch depth to the subfloor did not present significant depth and size to warrant the protection of the provision"]; *see Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002] [collecting cases]).

Accordingly, defendants are granted summary judgment dismissing plaintiff's Labor Law § 246 (1) claims based on a violation 12 NYCRR 23-1.7 (b). As there are no remaining provisions which can serve as a predicate for a violation of Labor Law § 241 (6), plaintiff's Labor Law § 241 (6) claims are dismissed in their entirety. The branch of plaintiff's motion for summary judgment in his favor as to liability under Labor Law § 241 (6) against defendants is denied.

III. Plaintiff's Labor Law § 200 and common-law negligence claims

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."

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 N.Y. State Elec. & Gas Corp.,* 82 NY2d 876, 877 [1993]).

"[T]here are 'two broad categories' of personal injury claims [under Labor Law § 200]: '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'" (*Rosa v 47 E. 34th St. (NY), L.P.*, 208 AD3d 1075, 1081 [1st Dept 2022], quoting *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]).

> "Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it. 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 [internal citations omitted]; *see also Toussaint v Port Auth. of N.Y. & N.J.*, 38 NY3d 89, 94 [2022] [to recover under Labor Law § 200 "a plaintiff must show that an owner or general contractor exercised some supervisory control over the operation"]).

Here, the incident did not arise out of the means and methods of plaintiff's work, but rather an allegedly dangerous condition on the work site.

Defendants maintain that they did not have actual or constructive notice of the alleged defect, and that there is no evidence that defendants created the alleged defect (defendants' memo of law in support of motion, at 8).

Plaintiff contends that Tutor Perini exercised actual control over plaintiff's work area, and therefore had either actual or constructive notice of the loose, unsecured plywood (plaintiff's memo of law in support of motion at 16). Plaintiff relies on Schwing's testimony that Tutor Perini had installed temporary drain covers on the project site.

Defendants did not meet their prima facie burden of summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims. Defendants

did not prove that they lacked actual or constructive notice because they failed to offer evidence as to when the plywood cover was last inspected before the incident (*Castro v City of New York*, —AD3d—, 2026 NY Slip Op 01845 [1st Dept Mar. 26, 2026]; *Bowden v Summit Glory Prop. LLC*, 238 AD3d 629, 630 [1st Dept 2025]; *Cavedo v Flushing Commons Prop. Owner, LLC*, 217 AD3d 561, 562 [1st Dept 2023]).

To the extent that defendants argue that there is no evidence that they created the alleged defect, "[m]erely pointing to gaps in an opponent's evidence is insufficient to satisfy the movant's burden" (*Hairston v Liberty Behavioral Mgt. Corp*., 157 AD3d 404, 405 [1st Dept 2018]).

Therefore, the branch of defendants' motion for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims is denied.

Plaintiff failed to meet his prima facie burden for summary judgment in his favor as to defendants' liability under Labor Law § 200. First, plaintiff addresses only the liability of Tutor Perini, and not the other defendants. Second, plaintiff has not demonstrated, as a matter of law, that Tutor Perini either caused or created the condition, or had actual or constructive notice that the plywood cover was inadequately secured or could not support the weight of the plaintiff.

As discussed above, Schwing testified that Tutor Perini installed the covers of the drains on track beds, but there was a possibility that others who worked in the area or who had worked on the drains had re-installed the covers (Schwing EBT, at 16, lines 5-12). To the extent that the plywood cover broke, shifted, or bent under the plaintiff's weight due to an improper installation, an issue of fact arises as to whether Tutor Perini or another entity had improperly installed the plywood cover.

The parties' remaining arguments have been considered and found unavailing.

CONCLUSION AND ORDER

Accordingly, it is hereby **ORDERED** that plaintiff George Alikakos's motion for summary judgment (Seq. No. 002) is **GRANTED IN PART TO THE EXTENT THAT** plaintiff is granted partial summary judgment in his favor as to liability on his Labor Law § 240 (1) against defendant Tutor Perini Corporation; and it is further

ORDERED that the other branches of plaintiff's motion for summary judgment are otherwise denied; and it is further

ORDERED that, pursuant to CPLR 3212 (g), the following facts are deemed established for all purposes:

(1) Plaintiff was not given proper protection under Labor Law § 240 (1); and the statute was violated;
(2) Plaintiff was not the sole proximate cause of the incident;

(3) The violation of Labor Law § 240 (1) was a substantial factor in causing the incident; and it is further

ORDERED that defendants' motion for summary judgment dismissing the complaint is **GRANTED IN PART TO THE EXTENT THAT** plaintiff's Labor Law § 241 (6) claims against defendants are dismissed; and it is further

ORDERED that the other branches of defendants' motion for summary judgment is denied; and it is further

ORDERED that the remainder of the action shall continue.

ENTER:

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4/18/2026
DATE

RICHARD TSAI, J.S.C.

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
SEQ NO. 002		**GRANTED**		**DENIED**	X	**GRANTED IN PART**	**OTHER**
SEQ NO. 003		**GRANTED**		**DENIED**	X	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**