SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** 12

Justice

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RAFAEL VASQUEZ,

Plaintiff,

- v -

42 BROAD STREET WEST OWNER LLC, BANTA HOMES CORP.,

Defendants.

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INDEX NO. 157476/2019

MOTION DATE

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 67-83, 85, 86, 88-101

were read on this motion for summary judgment.

By notice of motion, defendants/third-party plaintiffs move pursuant to CPLR 3212 for an order summarily dismissing the complaint against them. Plaintiff opposes and cross moves for an order granting summary judgment on liability on his Labor Law § 240(1) claim. Defendants oppose the cross motion.

I. PERTINENT BACKGROUND

In his pleadings, plaintiff alleges that while working at construction site at 42 Broad Street West, Mount Vernon, in Westchester County, the ground beneath his right foot collapsed, causing him to fall and sustain injuries. (NYSCEF 1).

Based on defendants' statement of material facts (NYSCEF 73) and plaintiff's response to it (NYSCEF 89), the following facts are undisputed:

(1) At the time of plaintiff's accident, a construction project was ongoing at the premises with the goal of building a new 16-story building thereon;

(2) Defendant 42 Broad Street West Owner, LLC was the owner of premises, while defendant Banta Homes Corp was the general contractor;

(3) Banta hired N&G Construction, LLC as a subcontractor for the project;

(4) Plaintiff was employed by N&G;

(5) While plaintiff was working at the site, he was injured when ground below him collapsed; and

(6) Defendants did not provide directions to plaintiff at the site.

II. DEFENDANTS' MOTION

A. Labor Law § 240(1) claim

1. Contentions

Defendants argue that plaintiff's accident was not caused by an elevation-related risk. Rather, the sinkhole constitutes a usual and ordinary danger of working at a construction site. (NYSCEF 83).

Plaintiff argues that the accident is covered by Labor Law § 240(1) as he fell into a hole due to defendants' failure to provide adequate safety devices to prevent him from doing so. Moreover, his accident resulted from the foreseeable collapse or failure of a permanent structure, contending that the area where he had fallen had been improperly backfilled and compacted three days earlier, thereby causing the formation of the sinkhole. (NYSCEF 88).

In reply, defendants assert that as the hole was not an unsecured opening or part of the construction work, and neither existed nor was apparent until it collapsed after plaintiff stood on it, there is no Labor Law § 240(1) violation, and they observe that plaintiff does not identify a safety device that should have been provided to keep him from falling into the hole. Moreover, they argue, the sinkhole is not a "structure" nor was its collapse foreseeable. (NYSCEF 95).

2. Analysis

Pursuant to Labor Law § 240(1):

> All contractors and owners and their agents, . . . in the erection, demolition, repair, 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, hangars, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

Labor Law § 240(1) "was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder 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." (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], *quoting Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *Naughton v City of New York*, 94 AD3d 1, 8 [1st Dept 2012]). The statute protects workers against " 'special hazards' that arise when the work site is either elevated or positioned below the level where 'materials or load [are] hoisted or secured.' " The special hazards are "limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured." (*Ross*, 81 NY2d at 502). The statute thus imposes a " 'flat and unvarying' duty upon the owner and contractor despite any contributing culpability on the part of the worker" (*Bland v Manocherian*, 66 NY2d 452, 461 [1985]; *Morales v Spring Scaffolding Inc.*, 24 AD3d 42, 49 [1st Dept 2005]), even if they exercise no supervision or control over the work performed (*Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280, 287 [2003]), and it is liberally construed (*Koenig v Patrick Constr. Corp.*, 298 NY 313, 319 [1948]; *Quigley v Thatcher*, 207 NY 66, 68 [1912]).

Liability under Labor Law § 240(1) requires a showing that either safety equipment was provided but was defective or that no such equipment was provided and should have been. (*See*

Ortiz v Varsity Holdings, LLC, 18 NY3d 335 [2011] [to prevail on summary judgment, plaintiff must establish existence of safety device of kind enumerated in statute that could have prevented fall]; *Narducci v Manhasset Bay Assoc*, 96 NY2d 259, 267 [2001] [liability contingent on existence of hazard contemplated in section 240(1) and failure to use, or inadequacy of, safety device of kind enumerated therein]).

The ground-level hole into which plaintiff fell is not the type of condition that may serve as a basis for a Labor Law § 240(1) claim. In *Meslin v New York Post*, the Court dismissed such a claim, finding that the plaintiff's injury, resulting when he walked at ground level and stepped on a pipe, causing him to fall into a three-foot hole, did not involve an elevation-related risk. (30 AD3d 309 [1st Dept 2006]; *see also Wrobel v Town of Pendleton*, 120 AD3d 963 [4th Dept 2014] [plaintiff's fall into hole while walking at ground level not caused by defendant's failure to provide safety devices]; *Carey v Five Bros., Inc.*, 106 AD3d 938 [2d Dept 2013] [dismissing plaintiff's claim arising from fall into uncovered manhole]; *Wynne v B. Anthony Const. Corp.*, 53 AD3d 654 [2d Dept 2008] [dismissing Labor Law § 240(1) claim as plaintiff's accident occurred when dump truck he was driving fell into hole that formed suddenly under roadway, causing roadway to collapse; plaintiff working at ground level at time and not exposed to risk against which safety devices would have protected him]; *Miller v Weeden*, 7 AD3d 684 [2d Dept 2004] [plaintiff 's accident not covered by Labor Law § 240(1) as he stepped into uncovered hole at ground level, was not working on ladder or elevated work site; scaffolding, hoists, ladders or other protective devices inapplicable]; *E'Egidio v Frontier Ins. Co.*, 270 AD2d 763 [3d Dept 2000], *lv denied* 95 NY2d 765 [2000] [as plaintiff's worksite not elevated, misstep into hole in permanent floor did not involve elevation-related risk]; *Panepinto v L.T.V. Steel Co., Inc.*, 207 AD2d 1006 [4th Dept 1994] [claim properly dismissed as plaintiff working at ground level when

he fell into hole]). Even if the area had recently been improperly backfilled, it is of no legal significance.

Defendants thus establish their entitlement to an order dismissing plaintiff's Labor Law § 240(1) claim, and plaintiff raises no triable issue in opposition.

B. Labor Law § 200 and common law negligence claims

1. Contentions

Defendants deny having supervised, controlled, or directed plaintiff's work, nor did they create the alleged dangerous condition or have actual or constructive notice of it. They rely on their employee's testimony that he had walked the site daily and saw no signs of a sinkhole and that no prior incidents relating to a sinkhole had been reported, and plaintiff's testimony that he had seen no sinkholes before the accident and that the sinkhole had appeared suddenly and without warning. Moreover, they maintain, as plaintiff's employer had backfilled the site three days earlier, the dangerous condition was created by N&G, not them. (NYSCEF 83).

Although plaintiff concedes that defendants neither supervised nor controlled his work, he alleges that they created the dangerous condition, thereby obviating the need to show that they had notice of it. He relies on his expert's opinion that the formation of the sinkhole was foreseeable and would have been detected had defendants properly inspected the backfilling work and contends that defendants may be held liable for their contractor's negligent backfilling work. (NYSCEF 88).

2. Analysis

At issue here is whether defendants created the dangerous condition, or whether they had actual or constructive notice of it. An owner or general contractor will be held liable for the work of a subcontractor that creates a dangerous condition only if it supervised the work related to the

condition. (*Krencik v Oakgrove Constr., Inc.*, 186 AD3d 567 [4th Dept 2020]).

It is undisputed that N&G backfilled the area where plaintiff fell, and thus it, not defendants, created the dangerous condition. Whether N&G was defendants' agent is irrelevant as defendants themselves did not create the condition, and plaintiff offers no proof raising a triable issue. And, having conceded that defendants did not supervise or control N&G's work, plaintiff raises no triable issue as to defendants' liability under Labor Law § 200 or common law negligence. (*See Letterese v A & F Commercial Builders, L.L.C.*, 180 AD3d 495 [1st Dept 2020] [claims properly dismissed against contractor as condition that led to accident was caused by plaintiff's employer's work, which contractor did not supervise or control]).

Moreover, there is no evidence that defendants had actual or constructive notice of the sinkhole. Plaintiff himself testified that it appeared, suddenly and without warning, beneath his feet as he stood on the ground. Given such testimony, plaintiff's expert evidence is not only speculative but immaterial.

C. Labor Law § 241(6) claim

Plaintiff has limited the Industrial Code violations related to his Labor Law claim to §§ 23-1.7(b) and 23-1.23(a), thereby waiving his reliance on any other violations.

Section 23-1.7(b)(1) pertain to hazardous openings, and provides that:

> (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).
>
> (ii) Where free access into such an opening is required by work in progress, a barrier or safety railing constructed and installed in compliance with this Part (rule) shall guard such opening . . .
>
> (iii) Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows: (a) Two-inch planking . . . installed not more than one floor or 15 feet, whichever is less, beneath the opening; or (b) An approved life net installed not more than five feet beneath an opening; or (c) An

> approved safety belt with attached lifeline which is properly secured to a substantial fixed anchorage.

Section 23-1.23(a) deals with earth ramps and runways, and provides that:

> Earth ramps and runways shall be constructed of suitable soil, gravel, stone or similar embankment material. Such material shall be placed in layers not exceeding three feet in depth and each such layer shall be properly compacted except where an earth ramp or runway consists of undisturbed material. Earth ramp and runway surfaces shall be maintained free from potholes, soft spots or excessive unevenness.

1. Contentions

Defendants argue that the Code sections relied on by plaintiff are inapplicable to his accident. Specifically, the ground on which plaintiff was standing before it collapsed was neither an earth ramp nor a runway, and the sinkhole is not properly characterized as a "hazardous opening." (NYSCEF 83).

Plaintiff contends that there are triable issues as to whether the sinkhole was a hazardous opening and whether the ground constituted an earth ramp or runway. (NYSCEF 88).

2. Analysis

There is no evidence that the sinkhole into which plaintiff fell constitutes a "hazardous opening" as defined by the Industrial Code. (*See e.g., Santos v Condo 124 LLC*, 161 AD3d 650 [1st Dept 2018] [subsection of code dealing with hazardous openings not applicable to accident where plaintiff fell through floor due to missing planks as "the hole into which (plaintiff) fell was not required by the work being performed, and nothing about (plaintiff's) work required him to be near the edge of an opening."]; *Belladares v Southgate Owners Corp.*, 40 AD3d 667 [2d Dept 2007] [as plaintiff fell when floor he was standing on collapsed, causing him to fall into hole, subsection inapplicable]).

Nor is there evidence that the ground was an earth ramp or runway. (*See Carrera v*

Westchester Triangle Hous. Dev. Fund Corp., 116 AD3d 585 [1st Dept 2014] [as plaintiff fell on muddy ground, accident did not occur on earth ramp or runway]; *Doty v Eastman Kodak Co.*, 229 AD2d 961 [4th Dept 1996], *lv denied* 89 NY2d 855 [1996] [regulation did not apply as plaintiff did not slide down ramp or runway]).

III. PLAINTIFF'S MOTION

Plaintiff's cross-motion was timely interposed. (*See Alonzo v Safe Harbors of the Hudson Dev. Fund Co., Inc.*, 104 AD3d 446 [1st Dept 2013] [plaintiff's cross motion made after deadline for summary judgment motions was timely as defendant moved for summary judgment dismissing plaintiff's Labor Law claims and plaintiff cross-moved for judgment on same claims]).

Nevertheless, given the findings above, plaintiff is not entitled to summary judgment on his Labor Law § 240(1) claim.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for an order summarily dismissing the complaint against them is granted, and the complaint is dismissed in its entirety, and the clerk is directed to enter judgment accordingly; and it is further

ORDERED, that plaintiff's cross motion for summary judgment is denied.

12/16/2021
DATE

BARBARA JAFFE, J.S.C.

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