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

**PRESENT:** **HON. SABRINA KRAUS** **PART** **57TR**

***Justice***

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STEPHEN CLARKE,

Plaintiff,

- v -

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendant.

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**INDEX NO.** 158033/2018

**MOTION DATE** 4/20/2023

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 47, 48, 49

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

## BACKGROUND

Plaintiff commenced this action for personal injuries he alleged he sustained on September 1, 2015, when he fell into a manhole. At the time plaintiff was working for Osmose Utilities Services, Inc., who was under contract with defendant to inspect manholes.

Defendant has moved for summary judgment and dismissal of the complaint. For the reasons stated below, the motion is granted.

## ALLEGED FACTS

In 2015, the Environmental Health and Safety division of Consolidated Edison contracted with Osmose, an inspection contractor that inspects manholes and service boxes within the City of New York to perform underground inspections of network distribution equipment, including manholes and service boxes throughout the City of New York. Plaintiff was employed by Osmose as a crew member on the day of the accident. Plaintiff's responsibilities included

supporting the foremen, setting up the worksite, passing tools down to the foreman inside the manhole and taking down the setup after the work was finished.

Plaintiff learned how to set up and break up down the materials used for manhole repair by Osmose. There were two supervisors present on the day of Plaintiff's accident, both were Osmose employees. Plaintiff's direct supervisor was Kevin McShane. On the day of the accident, plaintiff received his work assignment from McShane. The tools that he needed to complete the job were on the Osmose truck. When Plaintiff arrived at the job location, the Osmose crew got out of the Osmose truck and began to offload the equipment. The Osmose truck was parked alongside the manhole.

Plaintiff put down cones to protect the workers from ongoing traffic. After he set up the cones, plaintiff opened the manhole using a crowbar. He placed the manhole cover to the side and went back to the truck to grab poles to assemble the barricades. On his way back to the manhole after he retrieved the poles, he took five or six steps from the truck and fell into the manhole he had just opened. Plaintiff was wearing a helmet and a harness at the time of the alleged incident.

Wissert was a senior specialist with Environmental Health and Safety for Consolidated Edison at the time of the incident. Wissert described the work of Osmose as follows:

> Consolidated Edison has to inspect so many structures a year. You know, were mandated to inspect our structures, Osmose supplements Consolidated Edison in doing that, doing these inspections. And again, they are checking the structures for anything pertaining to safety, the mechanic is looking at cables, the cables sometimes deteriorate from, a lot of times from roadway salt, so they are getting into the structures. We give them, from I understand, you know, a lot of structures in a particular neighborhood to check. The structures – you know Manhattan is very hard there may be parked cars, so they would be given a block of structures to check in a particular area in the evenings into earlier morning hours to try to get into as many as they can get into.

(NYSCEF Doc # 35 at page 22 lines 14-25; page 23 lines 2-6).

Osmose employees use safety equipment such as, barricades, cones, and traffic alert signs, however, the safety equipment is not provided by defendant.

**DISCUSSION**

To prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851 (1985)*; Zuckerman v. City of New York,* 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital,* 68 NY2d 320, 324 [1986]).

However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez,* 68 NY2d at 324).

"[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso,* 50 AD3d 535,544 [1st Dept 2008]). "On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact" (*Martin v Citibank, N.A.,* 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong,* 2 AD3d 166,168 [1st Dept 2003] ["The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues"], *citing Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395, 404 [1957]).

***Plaintiff Was Not Engaged in A Protected Activity Under the Labor Law***

Assessing the viability of any Labor Law claim requires a threshold determination as to whether Plaintiff was engaged in work entitled to protection under the Labor Law.

Labor Law Sections 200, 240 and 241(6) are "limited to affording protection for those actually employed to work on a construction site… i.e. a plaintiff must demonstrate that he was both permitted or suffered to work on building or structure and that he was hired by someone, be it owner or contractor, or their agent for that purpose." *Blandon v. Advance Contracting Co. Inc.*, 264 A.D.2d 550 (1st Dept. 1999); *Mordkofsky v. C.V. Development Corp.*, 76 N.Y.2d 573 (1990*); Lombardi v. Stout*, 80 N.Y.2d 290 (1992); *Spaulding v. S.H.S. Bay Ridge LLC*, 305 A.D.3d 400 (2d Dept. 2003). A plaintiff is not entitled to the protections of Labor Law Sections 200, 240(1), or 241(6) if he was not hired to perform construction related work. *Gibson v. Worthington Division-of-McGraw-Edison, Co.*, 585 N.E.2d (1991).

Plaintiff was a member of a crew assigned to inspect manholes, among other things. There was no construction project. He was not engaged in erection, demolition, repairing, altering, painting, cleaning or pointing of a structure so as to entitle him to the protection of the Labor Law. S*ee eg Martinez v City of New York* 9 NY2d 322 (1999).

Additionally, falling into a manhole is not one of the gravity related dangers intended to be covered by Labor Law § 240(1). *Masullo v City of New York* 253 AD2d 541 (1998); *Cunha v City of New York* 18 MIsc.3d 1104(A)(2007).

***There Is No Evidence of Any Negligence by Defendant***

Labor Law §200 codifies the common-law duty to provide employees with a safe place to work. *See Bradley v. Morgan Stanley & Co., Inc.*, 21 A.D.3d 866, 868 (2d Dept. 2006); *Ross v. Curtis-Palmer Hydro-Electric Company*, 81 N.Y.2d 494, 505 (1993). This section applies to

owners, and their agents. *Everitt v. Nozkowski*, 285 A.D.2d 442 (2d Dept. 2001). Cases involving Labor Law 200 fall into two broad categories: namely, those where workers are injured as a result of a dangerous or defective condition at a work site, and those involving the manner in which the work is performed. *Ortega v. Puccia*, 57 A.D.3d 54 (2d Dept. 2008).

When a claim arises out of an alleged dangerous premises condition, a property owner or general contractor may be held liable in common-law negligence and under Labor Law 200 when the owner or general contractor has control over the work site and either created the dangerous condition causing an injury or failed to remedy the dangerous or defective condition while having actual or constructive notice of it. *Abelleira v. City of New York*, 120 A.D.3d 1163 (2d Dept. 2014); *Shaughnessy v. Huntington Hospital Association*, 147 A.D.3d 994, 997 (2d Dept. 2017); *Eversfield v. Brush Hollow Realty LLC*, 91 A.D.3d 814 (2d Dept. 2012).

Where a plaintiff claims to implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law Section 200 unless it had the authority to supervisor or control the performance of the work. Specifically, "liability can only be imposed against a party who exercises actual supervision or control of the injury-producing work.' *Naughton v. City of New York*, 94 A.D.3d 1 (1st Dept. 2012).

Under either theory, there is no evidence of any negligence by defendant. The record does not establish that defendant supervised plaintiff's work, that defendant created the dangerous condition or had actual or constructive notice of it. Defendant did not supervise, direct or control plaintiff's work. Further, there is no evidence that defendant created any dangerous condition. Rather, plaintiff uncovered the manhole just moments before the alleged accident.

Because the record is devoid of any negligence by defendant, the Labor Law §200 and common law negligence claims must be dismissed as a matter of law.

WHEREFORE it is hereby:

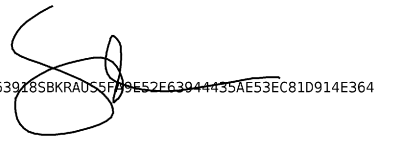
ORDERED that defendant's motion is granted and the action is dismissed; and it is further

ORDERED that, within 20 days from entry of this order, defendant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.




5/9/2023
DATE

SABRINA KRAUS, J.S.C.

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