

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D25455
W/kmg

_____AD3d_____

Argued - November 19, 2009

A. GAIL PRUDENTI, P.J.
JOSEPH COVELLO
PLUMMER E. LOTT
SANDRA L. SGROI, JJ.

2008-09567

DECISION & ORDER

Peter Ferreira, appellant, v Village of Kings Point,
respondent, et al., defendant.

(Index No. 21195/06)

Edelman Krasin & Jaye PLLC (Pollack, Pollack, Isaac & De Cicco, New York, N.Y.
[Brian J. Isaac and Jillian Rosen], of counsel), for appellant.

Ahmuty, Demers & McManus, Albertson, N.Y. (Brendan T. Fitzpatrick of counsel),
for respondent.

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Nassau County (Martin, J.), entered September 24, 2008, as granted those branches of the motion of the defendant Village of Kings Point which were for summary judgment dismissing the Labor Law § 240(1) cause of action and so much of the Labor Law § 241(6) cause of action as alleged violations of 12 NYCRR 23-4.2 and 12 NYCRR 23-4.4 insofar as asserted against it.

ORDERED that the order is modified, on the law, by deleting the provision thereof granting that branch of the motion of the defendant Village of Kings Point which was for summary judgment dismissing so much of the Labor Law § 241(6) cause of action as alleged violations of 12 NYCRR 23-4.2 and 12 NYCRR 23-4.4 insofar as asserted against it and substituting therefor a provision denying that branch of the motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

The defendant Carlo Lizza & Sons Paving, Inc., performed work on a roadway

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drainage project on behalf of the defendant Village of Kings Point in connection with several roadways within the Village. During the course of that work, it was discovered that the water mains beneath one of the roadways required repair. The local water authority hired the plaintiff's employer, a plumbing contractor, to make the repairs to the water main. In the course of making those repairs, the plaintiff's coworker was using a backhoe to excavate the ground to the level of the water main, while the plaintiff followed behind the backhoe on foot, finishing the excavation of the resulting trench by hand. While the plaintiff was so engaged, the side of the trench collapsed, burying him to his chest, briefly pinning his arms, and injuring him. He commenced this action against the Village, among others, alleging violations of, inter alia, Labor Law §§ 240(1) and 241(6).

Labor Law §§ 240(1) and 241(6) impose liability on “all owners”, without regard to encumbrances” and “[their] duty to provide safe working conditions is nondelegable regardless of control” (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 560). Although there must be “some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest” in order for liability to be imposed under these provisions of the Labor Law (*Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 51), the burden placed upon a defendant seeking summary judgment on the ground that it is not an owner is a heavy one (*see Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 341-342).

Here, the Village's conclusory assertion that there was no nexus between it and the plaintiff was insufficient to satisfy its burden on its motion for summary judgment (*see S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341). Moreover, although the Village presented un rebutted evidence that it had no control over the repair project occurring on its property, such a showing is not sufficient to remove it from the Labor Law § 240(1) definition of “owner” (*see e.g. Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d at 341-342; *Coleman v City of New York*, 91 NY2d 821, 822-823; *Celestine v City of New York*, 59 NY2d 938, *affg* 86 AD2d 592, 593; *DeSabato v 674 Carroll St. Corp.*, 55 AD3d 656, 658; *Romero v J&S Simcha, Inc.*, 39 AD3d 838). Accordingly, the Village did not satisfy its prima facie burden of demonstrating that it is not liable as an owner under Labor Law §§ 240(1) and 241(6). Consequently, the Supreme Court erred in determining that it was entitled to summary judgment on that basis.

As an alternative ground for the affirmance of the Supreme Court's determination regarding the plaintiff's Labor Law § 240(1) cause of action (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546), the Village argues that trench collapses do not fall within the ambit of that Labor Law section. Since trench collapses are not within the class of hazards against which Labor Law § 240(1) was intended to guard (*see Natale v City of New York*, 33 AD3d 772, 774; *O'Connell v Consolidated Edison Co. of N.Y.*, 276 AD2d 608, 610; *Vitaliotis v Village of Saltaire*, 229 AD2d 575), the Village established its prima facie entitlement to judgment as a matter of law dismissing the plaintiff's Labor Law § 240(1) cause of action insofar as asserted against it. In opposition, the plaintiff failed to raise a triable issue of fact. Accordingly, the Supreme Court properly granted that branch of the Village's motion which was for summary judgment dismissing the Labor Law § 240(1) cause of action insofar as asserted against it.

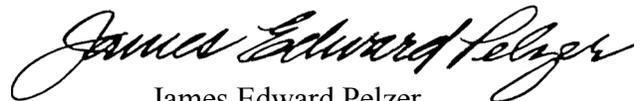
The Village also contends that the plaintiff does not have a viable Labor Law § 241(6) cause of action since the provisions of the Industrial Code upon which he relies, namely 12 NYCRR

23-4.2 and 12 NYCRR 23-4.4, are not sufficiently specific to sustain his claim. Contrary to the Village's contention, the Industrial Code provisions relied upon by the plaintiff set forth detailed requirements regarding the bracing and shoring of trenches and, as such, are sufficiently specific to support a claim under Labor Law § 241(6) (*see Garcia v Silver Oak USA*, 298 AD2d 555). Accordingly, the Supreme Court should have denied that branch of the defendant's motion which was for summary judgment dismissing so much of the plaintiff's cause of action under Labor Law § 241(6) as is based upon alleged violations of sections 23-4.2 and 23-4.4 of the Industrial Code.

The parties' remaining contentions are without merit.

PRUDENTI, P.J., COVELLO, LOTT and SGROI, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style with a large initial "J".

James Edward Pelzer
Clerk of the Court