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

PRESENT: JANE S. SOLOMON PART 55

Justice

Index Number : 106650/2008

LABBATE, JOSEPH

VS.

BAYROCK/ZAR SPRING

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 3/25/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	6

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum decision and order.

N.B. -- Compliance conference scheduled for 9/27/10 at 11 AM.

FILED

SEP 07 2010

COUNTY CLERK'S OFFICE NEW YORK

Dated: 9/1/10

JANE S. SOLOMON J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

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JOSEPH LABBATE,

Index No. 106650/08

Plaintiff,

DECISION AND ORDER

-against-

BAYROCK/ZAR SPRING LLC N/K/A
BAYROCK SAPIR ORGANIZATION LLC and
BOVIS LEND LEASE LMB, INC.,

Defendants.

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SOLOMON, J.:

Plaintiff moves for partial summary judgment as to liability in this action brought by an injured construction worker under Labor Law §§ 200, 240(1) and 241(6). The motion is decided as follows.

Plaintiff Joseph Labbate (Labbate) was employed on a high-rise construction site located at the intersection of Varick and Spring Streets in Manhattan, owned by defendant Bayrock/Zar Spring, LLC n/k/a Bayrock/Sapir Organization, LLC (Bayrock). Defendant Bovis Lend Lease LMB, Inc. (Bovis) was retained by Bayrock to perform construction work on the site; Bovis denies that it was the general contractor.

Labbate was employed by a concrete sub-contractor at the construction site. On October 22, 2007, he was stripping wood from concrete forms on the twenty-fourth and twenty-fifth floors. He was directed by his supervisor, identified only as "Danny", to go to the twenty-fifth floor and move pieces of plywood used in

connection with creating the concrete forms. Unbeknownst to Labbate, near the place where he was working there was a rectangular opening in the floor, approximately three feet by four feet in dimension, which is described as a "rebar cage" that would later be filled with concrete and rebar steel to serve as a support column between the twenty-fifth and twenty-fourth floors. Labbate did not know the opening was there because it was covered with a piece of plywood when he arrived.

After Labbate started working, an employee of another company removed the plywood cover from the opening without telling him. Labbate stepped back, and his foot and leg fell into the opening, allegedly causing him to sustain injuries. The accident was witnessed by "Vinnie", who worked for the same subcontractor as Labbate. Vinnie helped Labbate out of the "rebar cage", and later told him he had seen someone remove the cover.

Labbate commenced this lawsuit in 2008. A preliminary conference was held on March 2, 2009. Depositions of the parties were to be held on May 12 and 13, 2009; discovery was to end by November 30, 2009, and the note of issue to be filed by December 31, 2009. Plaintiff's deposition was held on May 12, 2009, but no other deadlines were met. Plaintiff's co-workers "Danny" and "Vinnie" have not been identified beyond their first names.

After the note of issue deadline had passed, Labbate

moved for summary judgment as to liability on his claims made under Labor Law §§ 240(1) and 241(6). Defendants oppose the motion principally on two grounds. First, they argue that discovery is not complete, and in particular, that "Danny" and "Vinnie" need to be located and deposed. This is not a legitimate basis for denying the motion, because summary judgment may be sought at any time after issue is joined (CPLR 3212[a]). Defendants have deposed Labbate, and there is no indication that they have been prevented from locating and identifying Labbate's co-workers.

Of greater significance is defendants' argument that Labbate has not made a prima facie showing that he is entitled to summary judgment under §§ 240(1) and 241(6).

Labor Law § 241(6)

Labor Law § 241(6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and contractors to comply with the specific safety rules set forth in the Industrial Code (*Ross* v. *Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). Accordingly, it is well settled that in order to support a cause of action under Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation

of an Industrial Code provision that is applicable given the circumstances of the accident, and sets forth a concrete standard of conduct rather than a mere reiteration of common-law principals (*Ross*, 81 NY2d at 502).

In seeking to establish that there has been a violation of §241(6), plaintiff points to Industrial Code Section 12 NYCRR 23-1.7(b)(1)(i). This section, entitled "Hazardous Openings," requires that 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 . . . ."

"Hazardous opening" is not defined in the regulation, however, interpretation of the Industrial Code and whether a particular condition is within the scope of the regulation is a question of law for the court to determine (*Messina v City of New York*, 300 AD2d 121 [1st Dept 2002]). In *Romeo v. Property Owner (USA), LLC*, the court determined that a 2 feet x 2 feet hole, 18 inches deep, in a computer floor "did not present significant depth and size to warrant the protection of [23-1.7(B)(1)(i)]" (61 AD3d 491, 492 [1st Dept. 2009]). By contrast, the court held in *Keegan v Swissotel New York, Inc.* that a hole eighteen inches square that was deep enough for plaintiff to fall into with one leg up to his buttocks, as here, is a "hazardous opening" within the scope of section 23-1.7(B)(1)(i) (262 AD2d 111 [1st Dept 1999], *lv to appeal dismissed*, 94 NY2d 858 [1999]).

The opening at issue in this case is a "hazardous opening" within the scope of section 23-1.7(B)(1)(i), because it was large enough for Labbate to fall through, and it presented a falling hazard, rather than just a tripping hazard. The hole went clear through to the next floor. Moreover, common sense and the nature of Labbate's accident, in that he was able to safely perform his work until the plywood cover was removed, shows a causal connection between the violation of section 23-1.7(B)(1)(i) and his injury. Therefore, Labbate has shown that Bayrock, as owner, is liable under § 241(6), subject to an apportionment of fault, because a jury may find that Labbate is partly responsible for failing to notice the opening once the cover was removed. Labbate is not entitled to summary judgment against Bovis, because it denies that it was a general contractor, and Labbate has not proffered sufficient evidence to prove that it was.

Labor Law § 240(1)

Although Labbate has shown that he would have benefitted from a cover on the opening, it does not necessarily follow that this accident is covered by Labor Law § 240(1). "Not every worker who falls at a construction site . . . gives rise to the extraordinary protections of Labor Law § 240(1). Rather, 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" (Narducci v Manhasset Bay Associates, 96 NY2d 259, 267 [2001]).[1] In *Carpio v Tishman Construction Corp. Of NY*, the court held that a worker whose leg fell three feet through a 10 x 14 inch wide shaft in the floor had a valid § 240(1) claim; this holding was dictated by "common sense" because the risk of injury presented was the gravity-related result of an elevation difference between the level of the required work and the lower level at the bottom of the shaft (240 AD2d 234, 235 [1st Dept 1997]).[2]

The facts of Labbate's accident are materially indistinguishable from those of *Carpio*. Moreover, as stated above, his accident is causally related to the failure to provide a cover for the opening; said covering is a safety device, albeit not one specifically enumerated in the statute.

Finally, while it appears that defendants have not

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[1] Labor Law § 240(1) provides that: "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."

[2] Recently, the First Department found that *Carpio* remains the law of this Department (*Salazar v Novalex Contracting Corp.*, 72 AD3d 418 [1st Dept 2010]).

diligently sought discovery or produced witnesses for deposition, there shall be a compliance conference to discuss outstanding disclosure and whether this lawsuit is trial-ready such that a note of issue may be filed. Accordingly, it hereby is

ORDERED that plaintiff's motion for partial summary judgment is granted in part to the extent that he is entitled to summary judgment as to liability on his claims under Labor Law § 241(6) and Labor Law § 240(1) as against defendant Bayrock, and the motion otherwise is denied; and it further is

ORDERED that counsel shall appear for a compliance conference in Part 55, 60 Centre Street, Room 432, New York, NY, on September 27, 2010, at 11 AM, of which courtesy copies hereof are notice.

Dated: September 1, 2010

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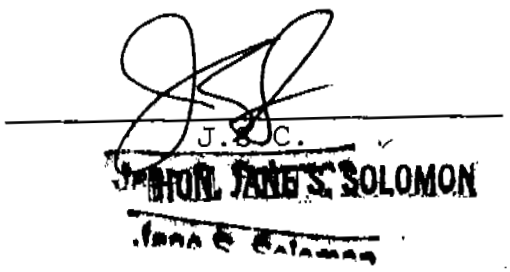

J.S.C.
HON. JANE S. SOLOMON