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

PRESENT: Hon. Doris Ling-Cohan PART 36

Index Number : 105861/2008
DOS SANTOS, CELESTINO
VS
CONSOLIDATED EDISON
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	5
Replying Affidavits	6

Cross-Motion: ☑ Yes ☐ No 3, 4

Upon the foregoing papers, it is ordered that this motion + cross- motion for summary judgment are decided in accordance with the attached memorandum decision.

FILED

APR 13 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4-11-2011

JUDGE DORIS LING-COHAN 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: PART 36

----------X

CELESTINO DOS SANTOS,

Plaintiff,

-against-

CONSOLIDATED EDISON OF NEW YORK, INC.,
Defendant.

----------X

Index №.: 105861/08
Motion seq.: 02

DECISION AND ORDER

DORIS LING-COHAN, J.S.C.:

This case arises from an incident on the evening of April 15, 2007, in which plaintiff Celestino Dos Santos received burns to approximately 46% of his body when he fell into a main valve manhole filled with boiling water on Broad Street, near its intersection with Water Street in New York, New York. Defendant Consolidated Edison of New York, Inc. (Con Ed) has moved for summary judgment on plaintiff's causes of action under Labor Law §§ 200, 240 (1), and 241 (6), as well as his claim for common-law negligence. Plaintiff withdrew his claims under Labor Law §§ 200 and 241 (6), as well as his claim for common-law negligence. Plaintiff, however, opposes Con Ed's motion with respect to his Labor Law § 240 (1) claim, and brought a cross motion for partial summary judgment as to Con Ed's liability under such section of the Labor Law.

On the day of the accident, a nor'easter storm was in progress. Notice of Motion, Exh. E, at 67. During major storms, defendant Con Ed, which owns the manhole into which plaintiff fell, visits certain manhole locations in New York City to inspect for "vapor conditions." *Id.*, Exh. J, at 19-23. Con Ed maintains an extensive steam distribution system in New York City,

and it defines a "vapor condition" as "a steam vapor or heat resulting from a defect in the distribution system or from an outside water source coming in contact with distribution piping" (*Id.* at 105).

On the day of the accident, Con Ed's own capabilities with respect to checking for and remedying vapor conditions were overwhelmed, so it retained Felix Associates, LLC (Felix) to go to certain locations to check the water levels in manholes. *Id.*, Exh. H, at 47-48. If the water was above a certain level, the Felix employees were to pump the water from the manholes. Id., Exh. F, at 1-2. One of these locations was on Broad Street, just north of Water Street.

The date of the accident was a Sunday and a scheduled day off for plaintiff, a Felix employee, who was called in to participate in checking water levels and pumping out water from Con Ed manholes. *Id.*, Exh. D, at 34-37. Plaintiff had never done this type of work before, although he had previously worked on Con Ed steam pipe manholes in other capacities. *Id.* at 26, 37. He was paired with Miguel Marmolejos, another Felix employee, who did have experience with this kind of work. Notice of Cross-Motion, Exh. F, at 4. Both workers were dispatched from the Felix yard by foreman Tony Rodrigues, who swore in an affidavit, that he instructed plaintiff and Marmolejos to be aware of their surroundings, due to poor visibility and heavy rains, and to remove manhole covers together, with one worker breaking the seal and the other pulling off the cover. *Id.* at 7. Rodrigues also swore that he instructed the pair to protect against falls by placing sawhorses and a four-foot metal gate around the uncovered manhole. *Id.* at 7.

Plaintiff and Marmolejos left the Felix yard in the Bronx and drove to Manhattan in a truck which, according to plaintiff's deposition testimony, contained sawhorses, cones, pumps

and certain tools, such as shovels and jackhammers. *Id.*, Exh. G, at 47-48. At the first location, the water levels were normal, and no pumping was required. *Id.* at 49-50. Next, the pair traveled to the site of the accident. *Id.* at 54.

They left the truck running, with the headlights pointing toward the manhole for better visibility. *Id.* at 56. Plaintiff testified that while he was still putting on his rain suit and rubber boots, Marmolejos started to put up the sawhorses. *Id.* at 57. When he finished putting on his rain boots, plaintiff put out cones to ward off oncoming traffic. *Id.* As plaintiff approached the front of the truck, a gust of wind blew the sawhorses out of place and plaintiff ran to the back of the truck to obtain materials with which to hammer the sawhorses together, so that they would be less likely to be moved by the wind. *Id.* at 61-62. While plaintiff was at the back of the truck, and without plaintiff's knowledge, Marmolejos removed the manhole cover by himself. *Id.* at 68. Plaintiff walked to the front of the truck and began to cobble together the sawhorses. *Id.* at 62-63. A gust of wind blew plaintiff backwards as he handled two sawhorses. *Id.* at 68-70. He dropped the sawhorses, stumbled backwards two or three steps, and fell into the uncovered manhole. *Id.* at 69-71.

Marmolejos heard plaintiff's screams from Water Street, where he was recovering the sawhorse which had blown away. *Id.* at 37-38. When he returned, he found plaintiff's lower half submerged in boiling water, as plaintiff kept himself from falling further into the manhole with arms placed on the street. *Id.* at 38-39. Marmolejos helped plaintiff out of the manhole. *Id.* at 39-40.

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the

absence of any material issues of fact" (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once the movant has made such a showing, the burden shifts to the party opposing the motion to produce evidence in an admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Con Ed argues that it is entitled to summary judgment, as plaintiff's Labor Law § 240 (1) claim is untenable as a matter of law because plaintiff was not working on either a building or a structure, there was no elevation hazard at the time of the accident, and plaintiff was not engaged in any of the protected activities enumerated in the statute. Plaintiff argues, conversely, that the manhole is a structure, he fell as a result of an elevation hazard, and he was engaged in a protected activity.

LABOR LAW § 240 (1)

Labor Law § 240 (1), entitled "Scaffolding and other devices for use of employees," provides in relevant part:

> 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.

The Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused plaintiff's injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]). As a general principle, the statute is to be liberally construed to accomplish its

purpose of better protecting workers engaged in certain dangerous employments (*Sherman v Babylon Recycling Ctr.*, 218 AD2d 631 [1st Dept 1995]).

STRUCTURE

A "structure," in the context of Labor Law § 240, is defined as "'any production or piece of work artificially built up or composed of parts joined together in some definite manner'" (*Lewis-Moors v Contel of New York, Inc.*, 78 NY2d 942, 943 [1991], quoting *Caddy v Interborough R.T. Co.*, 195 NY 415, 420 [1909]). Courts have construed this definition liberally, to include a grave vault (*Ciancio v Woodlawn Cemetery Assn*, 249 AD2d 86 [1st Dept 1998]), a landfill (*Bockmier v Niagara Recycling, Inc.*, 265 AD2d 897 [4th Dept 1999]), a buried gas pipeline (*Covey v Iroquois Gas Transmission Sys.*, 218 AD2d 197 [3d Dept 1996], *affd* 89 NY2d 952 [1997]), above-ground television cable lines (*Girty v Niagara Mohawk Power Corp.*, 262 AD2d 1012 [4th Dept 1999]), and a log truck (*Hutchins v Finch, Pruyn & Co.*, 267 AD2d 809 [3d Dept 1999]).

As to the building or structure requirement, Con Ed cites to the definition of structure from *Lewis-Moors v Contel of New York, Inc.* (78 NY2d at 943), and argues, implicitly, that a manhole does not qualify as a structure because it is not "built up."

Plaintiff argues that a manhole is a structure in that it is a piece of work artificially built up and consisting of component parts joined together in a definite manner. Plaintiff submits the deposition testimony of Con Ed employee Saumil Shukla, a vice president for steam operations, who testified that a manhole is a "subsurface concrete structure" and described its construction:

Q: Manholes, generally how are they constructed?

A: Essentially a manhole is constructed so you have access to a piece of equipment, being a valve, or an expansion joint, or something, and a pipe, steam pipe would go through the manhole, and it's just a box to permit someone to enter the manhole for access to that equipment.

Q: But the box you are referring to, is that a concrete box?

A: Yes, it's a concrete box with four walls, and a concrete base, typically, and on top there is a manhole. There is a chimney, typically 32 inches wide, some places might be wider, allowing for personnel to get into the structure.

Q: When you say chimney, you mean that's the actual manhole opening?

A: Where the manhole cover would go, and the opening. There could be more than one. Typically on a steam system there is more than one chimney or cover on a manhole

(Shukla Deposition, at 16-17).

Plaintiff contends that Con Ed's focus on the "built up" portion of the definition of "structure" is sophistic, as a number of things built underground are clearly structures, and manholes are plainly one of them since they are constructed, designed, and built according to certain standards. This court agrees.

A manhole is a structure under the *Lewis-Moors* definition, as it is a piece of work composed of parts joined together in a definite manner.

ELEVATION

Generalizing from the type of safety devices called for by the Legislature, the Court of

Appeals has held that the hazards contemplated by section 240 (1) "are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Recently, the Court of Appeals has distilled this inquiry to the "single decisive question" of "whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" *(Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

Courts have found that an uncovered manhole constitutes a physically significant elevation differential in certain circumstances, but not in others. In *Allen v City of Buffalo* (161 AD2d 1134 [4th Dept 1990]), the Court found an elevation risk which qualified for protection under the statute where plaintiff accessed his subterranean work through one of 50 manholes in a field and the manholes were obscured by snow. Where plaintiff's work is unrelated to the uncovered manhole he is injured by, however, courts have found that the absence of an elevation risk precluded protection under the statute (*see Masullo v City of New York*, 253 AD2d 541, 542 [2d Dept 1998]; *Cunha v City of New York*, 18 Misc 3d 1104[A], 2007 NY Slip Op 52404[U], *4 [Sup Ct, NY County 2007]). The divergence in these cases relates to foreseeability, since "a worker who is caused to fall or is injured by the application of an external force is entitled to the protection of the statute only if the application of that force was foreseeable" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

Con Ed cites to *Masullo v City of New York* (253 AD2d 541, *supra*) and *Cunha v City of*

New York (18 Misc 3d 1104[A], 2007 NY Slip Op 52404[U], *supra*) for the proposition that uncovered manholes do not qualify for protection under the statute. Con Ed argues that plaintiff is especially not entitled to protection since his work did not require him to go into the manhole. Moreover, Con Ed contends that it was wind, rather than an elevation risk, which caused plaintiff's accident.

Plaintiff argues that Con Ed's own safety protocol requires two barriers to be placed around open manholes, and that its own employees testified that there is an elevation risk involved in working at manholes. Moreover, plaintiff argues that the fact that the accident happened underlines the point that safety railings should have been in place at the time that the manhole cover was removed.

Plaintiff's accident involved a risk arising from a physically significant elevation differential. The present case is analogous to *Allen*, in that here vapor obscured the manhole, as snow obscured the manhole in *Allen* (161 AD2d at 1134). Moreover, the elevation requirement is satisfied because plaintiff's fall into the manhole was foreseeable since his work involved checking water levels in manholes, and pumping water from overfilled manholes in conditions that included low visibility and high winds. While wind and hot water also played roles in plaintiff's injuries, height differential and gravity are plainly contributing proximate causes of plaintiff's accident.

ACTIVITY

A plaintiff can only recover under section 240 (1) if, at the time of her accident, she was engaged in one of the seven activities enumerated by the statute: erection, demolition, repairing, altering, painting, cleaning or pointing. Conversely, the statute does not cover routine

maintenance, which the Court of Appeals has defined as "work that does not rise to the level of an enumerated term such as repairing or altering" (*Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]). A worker who fixed a malfunctioning fluorescent light fixture, and whose task included replacing sockets and reconnecting wires, has been held to be engaged in repair for purposes of the statute (*Piccione v 1165 Park Ave., Inc.*, 258 AD2d 357 [1st Dept 1999]). Routine maintenance, on the other hand, has been found where the worker repaired normal wear and tear to an air conditioner during monthly maintenance (*Esposito v New York City Indus. Dev. Agency,* 1 NY3d 526 [2003]), and where fixing a common problem on a cable box required loosening a few screws, draining water from the box, and perhaps replacing a part (*Abbatiello v Lancaster Studio Assocs.*, 3 NY3d 46 [2004]).

Con Ed characterizes plaintiff's work on the day of the accident as routine maintenance, analogizing to *Abbatiello*, as well as to *Barbarito v County of Tompkins* (22 AD3d 937, 938 [3d Dept 2005] [holding that removing links from a loose chain on an overhead garage door was routine maintenance because the work involved "only component replacement or adjustment necessitated by normal wear and tear"]), and *Jones v Village of Dannemora* (27 AD3d 844, 845 [3d Dept 2006] [holding that removing and de-watering sludge from a waste water treatment "lagoon" was routine maintenance rather than repair since there was "no indication that the lagoon was malfunctioning or inoperable as a result of the built-up sludge"]). Con Ed argues that plaintiff and his partner were engaged in routine maintenance since removing manhole covers to check the water level, and pumping out the excess water, is work routinely done when there are heavy rains and a risk of flooding. Moreover, Con Ed argues, plaintiff and his partner were engaged in routine maintenance rather than repair because they were going to leave the manhole

in the same structural condition as it was when they arrived.

Plaintiff argues that he was part of an emergency response team, which was dispatched to respond to heavy vapor conditions at Broad and Water Streets. Plaintiff submits an "Accident Investigation Report" prepared by Felix. The report describes the conditions on the date of the accident and the circumstances which led to plaintiff's arrival at the scene of the accident:

> Steam Distribution personnel were working on 12 hour shifts responding to an anticipated coastal nor'easter storm. The New York City forecast called for heavy rains (8.5 inches), excessive wind gusts (50-60 MPH) & high tides (7.5 feet). Contractor crews were supplementing Steam Distribution staffing in responding to vapor conditions and pumping flooded manholes. A Felix crew consisting of Mr. Celestino Dos Santos and Miguel Marmolejos was dispatched to respond to a heavy vapor condition at Broad Street north of Water Street

(Felix Accident Investigation Report, at 1).

Plaintiff notes that the "Accident Investigation Report" also states that at the time of the incident, a pumping station located directly west of the manhole was inoperable due to "an obstructed discharge pipe and electrical issues" and that a work order was in to repair the pumping station (*id.* at 7). However, plaintiff and Marmolejos were not dispatched to repair the pumping station. Additionally, plaintiff argues that there is no evidence submitted to the court which shows that Felix performed maintenance work for Con Ed.

In order to show that he was not engaged in routine maintenance, plaintiff submits a Con Ed manual, entitled "Emergency Response For Steam Distribution," which contains a description of a nor'easter in October 2001 that created conditions similar to the ones on the date of the

accident; the manual classifies the October 2001 storm as a "Full Scale" emergency.[1] Plaintiff also submits a Con Ed Steam Distribution Operations Procedure manual which describes some of of the dangers presented by vapor conditions, both to the steam distribution system itself and to the public. The manual defines a "hazardous steam condition" as one that "could cause injury or property damage; an example is steam vapor that obstructs the view of motorists or pedestrians" (Con Ed Steam Distribution Operations and Maintenance Instructions, at 108). Plaintiff argues that he was remedying a hazardous steam condition as defined by Con Ed's own materials.

In its reply and opposition to plaintiff's cross motion, Con Ed contends that plaintiff has attempted to blur the line between an emergency response and a repair, only the latter of which qualifies for the statute's protection.

In his own reply, plaintiff argues that if the court does not find as a matter of law that he was engaged in one of the enumerated activities, then he should be allowed more discovery on the question of subsequent repairs to the insulation of the pipe and to the adjacent pumping system. Plaintiff argues that Con Ed instructed its witness, Shukla, not to answer questions about subsequent repairs, even though they are relevant to the activity question, since Felix had an

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[1] The relevant portion of the manual provides:

> Example 6: October 23-25, 2001. A Nor'easter stalls over central New Jersey and dumps 10" of rain on lower Manhattan over a 45-hour period. Concerns about flooded manholes results in the turnoff of 10 miles of steam main south of Canal Street. Boilers at East River and HAGS are also turned off due to rising water levels compounded by high East River tides. Lower Manhattan steam pressure falls dramatically and the system south of Canal St is taken off line for 12 hours until the plants can be brought back on line when water infiltration is slowed down and tides fall. Gas Operations and Manhattan Electric Operation crews are asked to support Steam Dist. crews by helping to pump out manholes located in the worst flooded areas along Water Street.
> Incident Level: Full Scale

(Con Ed Emergency Response for Steam Distribution Manual, at 22).

ongoing relationship with Con Ed to repair pipes, and courts have relied on repairs done subsequent to a plaintiff's accident during a troubleshooting or emergency response to find that the plaintiff was engaged in repair for purposes of the statute (*see Alexander v Hart,* 64 AD3d 940 [3d Dept 2009] [holding that a worker was engaged in repair where he fell while troubleshooting a heating, ventilation, and air conditioning unit that continued to require troubleshooting months after the accident]; *Juchniewicz v Merex Food Corp.*, 46 AD3d 623 [2d Dept 2007] [holding that plaintiff was engaged in repair where he was injured in an emergency response to a refrigerator malfunction, which subsequently involved almost 30 hours of repairs]).

Initially, the court rejects plaintiff's argument that more discovery is needed on the question of subsequent repairs. In *Alexander* (64 AD3d at 943) and *Juchniewicz* (46 AD3d at 624), the subsequent repairs that the Courts considered were the same repairs which plaintiffs had been engaged to carry out. Here, any subsequent repair to the steam pipe, or the adjacent pump is irrelevant since plaintiff was not engaged to repair either of those things. Instead, plaintiff was engaged to check water levels and to pump water from manholes which were overfilled. The question is, does such work constitute repair or routine maintenance.

The court rejects Con Ed's argument that plaintiff was involved in routine maintenance since no structural change was to be made to the manhole. Analysis of structural change is more appropriate where the plaintiff claims to have been engaged in altering rather than repair (*see Panek v County of Albany*, 99 NY2d 452, 457-458 [2003]). Con Ed is correct, however, that plaintiff's work does not qualify as an enumerated activity simply because it was done in poor weather conditions, and plaintiff's focus on whether the conditions constituted an emergency is somewhat misplaced.

As the work in which plaintiff and his partner were engaged is carried out as a matter of course every time there are heavy rains and a threat of flooding in New York City, plaintiff was engaged in routine maintenance at the time of accident. Moreover, plaintiff and his partner were fixing a common problem, as in *Abbatiello* (3 NY3d at 53), where the Court found that plaintiff had not been engaged in repair while fixing a common problem caused by rainwater. Here, fixing the problem involved placing a pump in the manhole, and pumping out the water. This activity is more akin to the replacement of component parts found to be routine maintenance by the Court in *Esposito* (1 NY3d at 528), rather than the intricate light fixture work found to be repair in *Piccione* (258 AD2d at 358).

Since plaintiff was not engaged in repair, or any of the other activities enumerated by Labor Law § 240 (1), he does not qualify for the protection of the statute. As such, Con Ed's motion for summary judgment must be granted, while plaintiff's cross motion for partial summary judgment must be denied.

Accordingly, it is

ORDERED that the branches of defendant's motion which seek summary judgment dismissing plaintiff's claims under Labor Law §§ 200, 241 (6), and common-law negligence are denied as moot as plaintiff has withdrawn such claims; and it is further

ORDERED that plaintiff's cross motion for partial summary judgment on the issue of defendant's liability under Labor Law § 240 (1) is denied; and it is further

ORDERED that the branch of defendant's motion which seeks summary judgment dismissing plaintiff's claim under Labor Law § 240 (1) is granted; and it is further

ORDERED that defendant's motion for summary judgment is granted and the complaint

is dismissed with costs and disbursements to defendant as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: April 11, 2011

Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Dos Santos v. Con Ed, SJ, Labor Law 240 (1). john eckert.wpd