Adao v 54 Assoc., LLC
2011 NY Slip Op 32676(U)
October 6, 2011
Sup Ct, NY County
Docket Number: 101632/09
Judge: Emily Jane Goodman
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SCANNED ON 10/17/2011

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17
--X
JOAO JOSE ADAO,

Plaintiff,

-against-

Index No. 101632/09

54 ASSOCIATES, LLC, 53 COMPANY, LLC,
DIGBY MANAGEMENT COMPANY, LLC,
HUGH CHRYSLER ENGINEERING CO, LLC,
HUGH CHRYSLER CONTRACTING CO, LLC,
CONSOLIDATED EDISON, INC. and
CONSOLIDATED EDISON OF NEW YORK,

Defendants.
--X

FILED

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NEW YORK
COUNTY CLERK'S OFFICE

EMILY JANE GOODMAN, J.S.C.:

Motion sequence numbers 002, 003, 004, and 005 are consolidated for disposition.

This action arises out of a workplace accident which occurred on November 1, 2008 at the premises located at 59 East 54th Street in Manhattan (the premises). Plaintiff Joao Jose Adao, a laborer, alleges that he was injured when a sidewalk flagstone fell on top of him while he was performing excavation work in front of the premises.

In motion sequence number 002, plaintiff moves, pursuant to CPLR 3212, for an order: (1) granting him partial summary judgment on the issue of liability under Labor Law §§ 200, 240, and 241 against defendants 54 Associates, LLC and 53 Company, LLC (collectively, 54 Associates), Digby Management Company, LLC (Digby), Consolidated Edison, Inc. and Consolidated Edison of New York; and (2) setting this matter down for an immediate trial on the issue of damages.

In motion sequence number 003, defendants Consolidated Edison, Inc. and Consolidated Edison of New York (together, Con Ed) move, pursuant to CPLR 3212, for summary judgment

dismissing the complaint and all cross claims asserted against them.

In motion sequence number 004, defendants 54 Associates and Digby move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against them.

In motion sequence number 005, defendants Hugh Chrysler Engineering Co., LLC and Hugh Chrysler Contracting Co., LLC (together, Hugh Chrysler) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims as against them.

BACKGROUND

54 Associates owned the premises on the date of the accident. Digby was the management company that hired nonparty Effective Plumbing to install a 98-gallon BTU gas-fired hot water heater in the cellar of a commercial and office building on the premises. Con Ed owned the gas main in the roadway. Plaintiff was a laborer employed by nonparty Felix Associates, LLC, which was hired by Con Ed to install a gas service connection from the roadway gas main to a gas pipe sleeve located in the building foundation wall. Hugh Chrysler was hired by Effective Plumbing to perform engineering services.

Plaintiff testified at his deposition that, on Saturday, November 1, 2008, his gang was performing excavation work (Plaintiff EBT, at 40). Plaintiff stated that the boundaries of the excavation work site were marked prior to Felix's arrival on the site, indicating where to make the cuts to make the connection to open up a trench (*id.* at 56). According to plaintiff, there were three markings, one made by Con Ed, and the other two made by Felix's foreman, Horatio Dosantos, to indicate where the gas line was to be set (*id.* at 56-57, 59). On the date of the accident, plaintiff's foreman instructed plaintiff that the trench was to extend from the gas main

in the roadway to the building foundation wall at a depth of about four feet (*id.* at 96, 97). Plaintiff stated that shoring was not used for the trenches because the dirt was compact and the trench was not deep enough to require shoring (*id.* at 97). Plaintiff's foreman ordered that whenever excavation work "get[s] to five feet or deeper you have to brace it and put wood around it" (*id.* at 217).

In order to excavate the trench, plaintiff and other Felix workers broke the top layer of concrete and black top, and used a back hoe to remove the materials (*id.* at 83-84). Plaintiff stated that, on one occasion, an inspector from Con Ed stopped Felix's workers from working, responding to a concern that the back hoe could disrupt the building's electrical wires (*id.* at 86-87). The workers then resumed the excavation with a small jack hammer and a shovel (*id.* at 92). When the workers reached the area directly in front of the building, the workers did not remove the sidewalk, and instead began digging underneath the sidewalk, for the length of the concrete slab (the flagstone) (*id.* at 102-103). Once the area underneath the flagstone was tunneled out, plaintiff's foreman directed plaintiff to dig underneath the sidewalk in order to locate the gas sleeve extending from the building (*id.* at 138, 164-165). As plaintiff was walking backwards to leave the excavation area, a large piece of concrete fell on him, and struck his head, back and shoulders (*id.* at 180-183).

Debra Fechter testified that she is a manager of Bronxland Management Company, which does business under the name of Digby (Fechter EBT, at 7, 9). Digby entered into a contract with Effective Plumbing for the installation of the hot water heater in the basement (*id.* at 37). Effective Plumbing installed a new hot water heater in the basement (*id.* at 18-19). According to Fechter, William Penninipede of Con Ed determined that the existing Con Ed line was

insufficient and that a new gas line had to be installed (*id.* at 30). Fechter testified that Digby was aware that Con Ed was installing a new gas line, and that Con Ed was going to open up the sidewalk in front of the building to install the gas line (*id.* at 42).

Russell Harris testified that he is a construction representative employed by Con Ed (Harris EBT, at 7). Harris took photographs of the accident scene (*id.* at 39-40, 41). Harris did not authorize the excavation in that particular trench, and arrived at the job site after plaintiff's accident and was not present when Felix employees were excavating or digging (*id.* at 132, 145, 146). Con Ed's EHNS representative and quality assurance department conducted an investigation into the accident that same day (*id.* at 56-57). Harris testified that he had the authority to stop any work performed in an unsafe manner or in a way that did not comply with laws or regulations (*id.* at 106). In addition, he had the authority to instruct contractors to use specific types of protection (*id.* at 110). According to Harris, Felix's foreman supervised the excavation work (*id.* at 142). Harris believed that digging should not have been performed underneath the sidewalk, and subsequently wrote a report indicating that the tunneling was performed in an unsafe manner (*id.* at 143-144, 147).

William Penninipede testified that he is a Con Ed commercial service representative (Penninipede EBT, at 6). Penninipede testified that the Con Ed engineering department provided the layout of the worksite to Felix, indicating the point of entry and marking off the distance from the building wall and the portion of the surrounding sidewalk (*id.* at 15-16).

Hugh Chrysler testified that he is a New York State licensed professional engineer and the principal of Hugh Chrysler Engineering Co., LLC and Hugh Chrysler Contracting Co., LLC (Chrysler EBT, at 7, 8). Mr. Chrysler testified that he entered into an oral agreement with

Effective Plumbing to ascertain that the chimney could safely vent the combustion products created by the new installation of the hot water heater, and to ascertain whether there was asbestos on site (*id.* at 21, 22).

Plaintiff commenced the instant action against 54 Associates, 53 Company, Digby, Hugh Chrysler, and Con Ed on February 5, 2009, seeking recovery for common-law negligence and violations of Labor Law §§ 200, 240, and 241. In plaintiff's third supplemental bill of particulars, plaintiff alleges that defendants violated various OSHA regulations and the following sections of the Industrial Code: 23-1.7 (a) (1); 23-1.7 (a) (2); 23-4.1 (a); and 23-4.1 (b) (Third Supplemental Bill of Particulars, ¶¶ 4-8). In its answer, Con Ed asserts a cross claim for common-law indemnification and contribution against 54 Associates and Digby. Hugh Chrysler's answer also contains cross claims against 54 Associates and Digby for common-law indemnification, contribution, failure to procure insurance, and contractual indemnification.

DISCUSSION

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). "On a motion for summary judgment, issue-finding, rather than issue-determination, is key" (*Shapiro v Boulevard Hous. Corp.*, 70 AD3d 474, 475 [1st Dept 2010]).

Labor Law § 240 (1)

Plaintiff moves for partial summary judgment on the issue of liability against 54 Associates, Digby, and Con Ed under Labor Law § 240 (1). Plaintiff contends that he is entitled to judgment because he was struck by a falling piece of cement from the upper portion of the tunnel above him. Additionally, plaintiff asserts that defendants failed to provide bracing or other means of securing the upper portion of the recently excavated tunnel under which plaintiff was required to work. Plaintiff submits an affidavit from his purported expert, Kathleen V. Hopkins, a certified site safety manager, who states, based upon her review of the record, that "[h]ad proper and safe stays, blocks, braces, irons, and other devices been provided to shore the overhead sidewalk flag, the plaintiff would have been provided proper protection and the plaintiff's accident and injuries would not have occurred" (Hopkins Aff., ¶ 16).

Con Ed moves for summary judgment in its favor, arguing that section 240 does not apply because plaintiff was struck by an overhanging piece of sidewalk that was not being hoisted or secured and was not a hazard relating to elevation differentials as contemplated by the statute. Con Ed also submits an affidavit from its purported expert, Joseph C. Cannizzo, P.E., who states, based upon his review of the deposition testimony and bill of particulars, that:

> "At the time of the incident, plaintiff was not working at an elevation, no hoisting was being performed and the portion of the concrete that fell was neither required to be nor in the process of being secured. The absence of scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces (which in excavations are horizontal members to support stringers or walers which in turn support sheeting or shoring placed against the side walls of a trench or pit to prevent caving in of the earthen walls), irons, ropes to give proper protection to employees, is unrelated to the incident. The underside of the concrete fell from the mass of the sidewalk thickness was at sidewalk level. Furthermore, plaintiff's expert does not explain how any of the devices she cited would have prevented the incident from occurring"

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(Cannizzo Aff., ¶ 9).

In moving for summary judgment dismissing plaintiff's section 240 (1) claim, 54 Associates and Digby argue that they did not contract for the work involved in plaintiff's accident. 54 Associates and Digby further contend that the work was being performed under the sidewalk, and thus, they had no duty to maintain the underside of the sidewalk or seek out latent defects under the sidewalk. According to 54 Associates and Digby, excavation is not a protected activity under Labor Law § 240 (1). 54 Associates and Digby also maintain that the concrete slab did not fall due to the inadequacy of a safety device, because the trench was not deep enough to require bracing or shoring.

Labor Law § 240 (1) provides, in pertinent part, 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, 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."

Labor Law § 240 (1) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which proximately causes an injury (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). "'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*, 81 NY2d at 501). To impose liability under Labor Law § 240 (1), the plaintiff need only prove a

violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices), and that the statutory violation proximately caused his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]).

It is well established that section 240 (1) covers elevation-related hazards, and not the "usual and ordinary dangers of a construction site" (*Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 843 [1994]; *see also Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 489 [1995], *rearg denied* 87 NY2d 969 [1996]).

Initially, the court notes that Con Ed has not argued that may be liable under the statute as an owner, contractor or agent thereof. Accordingly, the court will not address this issue, which is deemed admitted for the purposes of the motion. 54 Associates and Digby argue that they cannot be liable under Labor Law § 240 (1) because they were not owners of the property where plaintiff's accident occurred and did not contract for the work. "[T]he term 'owner' is not limited to the titleholder of the property where the accident occurred and encompasses a person 'who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit'" (*Scaparo v Village of Ilion*, 13 NY3d 864, 866 [2009], quoting *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]). Here, there is no dispute that 54 Associates owned the building in which the gas pipe sleeve was located, which required the excavation work that caused plaintiff's injury (*see Larosae v American Pumping, Inc.*, 73 AD3d 1270, 1272 [3d Dept 2010] [adjacent property owner qualified as an "owner" under Labor Law where work was being performed in part for his benefit]). Accordingly, 54 Associates has failed to demonstrate that it was not an "owner" within the meaning of the Labor Law.

In contrast, Digby has established that it cannot be liable.

> "When the work giving rise to [the nondelegable duties of the owner or general contractor] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control [the work] does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241"

(*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]; *see also Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005] ["unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law"]). Digby submits evidence that plaintiff's foreman gave him instructions to perform his excavation work on the date of his accident (Plaintiff EBT, at 138). Plaintiff never had any conversations with Digby (*id.* at 61-62).

The court next turns to whether plaintiff was subjected to an elevation-related hazard. It is well settled that "not every object that falls on a worker[] 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 enumerated therein . . ." (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). In a falling object case, the statute only applies when the object is in the process of being hoisted or secured (*id.* at 268), or when the object "required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]). The plaintiff must also show that the object fell "*because of* the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci*, 96 NY2d at 268). Here, the sidewalk flagstone was not in the process of being hoisted or secured. Thus, the issue is whether the flagstone required securing for the purposes of the undertaking.

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"[T]he determination of the type of protective device required for a particular job turns on the foreseeable risks of harm presented by the nature of the work being performed" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 268 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]). Thus, in *Narducci*, the Court of Appeals held that Labor Law § 240 (1) did not apply because the "glass that fell on plaintiff was not a material being hoisted or a load that required securing for the purposes of the undertaking," noting that no one had worked on the window from which the glass fell, and that the glass that fell was part of the pre-existing structure (*Narducci*, 96 NY2d at 268). In *Outar*, the plaintiff, a track worker, was injured when a track dolly, which had been left completely unsecured on a five-foot bench wall adjacent to the worksite, fell on him (*Outar*, 286 AD2d 671, 672 [2d Dept 2001], *affd* 5 NY3d 731 [2005]). The Court of Appeals held that the "elevation differential between the dolly and plaintiff was sufficient to trigger Labor Law § 240 (1)'s protection, and the dolly was an object that required securing for the purposes of the undertaking" (*Outar*, 5 NY3d at 732).

Here, plaintiff has made a prima facie showing of entitlement to judgment under the statute. Plaintiff was struck by a falling piece of cement from the upper portion of the tunnel above him. There was a significant and foreseeable risk that cement would collapse during excavation under the sidewalk. Furthermore, it is undisputed that the cement was not secured or braced in any way (*see Greaves v Obayashi Corp.*, 55 AD3d 409, 409-410 [1st Dept 2008], *lv dismissed* 12 NY3d 794 [2009] [plaintiff who was standing on scaffold while working on wall, when wall collapsed, was entitled to partial summary judgment under Labor Law § 240 (1); "plaintiff was struck by falling objects that could have been, but were not, adequately secured by one of the devices enumerated in the statute"]; *Ortlieb v Town of Moline*, 307 AD2d 679, 680 [3d

Dept 2003] [plaintiff was subjected to elevation-related hazard when pipe rolled into trench because his work site was positioned below level where pipe was secured and his injury was the result of being struck by a falling object that was improperly hoisted or inadequately secured]).[1]

Although Con Ed's expert, Joseph C. Cannizzo, P.E., states that "[t]he underside of the concrete sidewalk from which a delaminated thickness of concrete fell from the mass of the sidewalk thickness was at sidewalk level" (Cannizzo Aff., ¶ 9), plaintiff was not working at sidewalk level; rather, plaintiff was crouching down on his knees while working in the trench (Plaintiff EBT, at 175). Moreover, "[t]here is no bright-line minimum height differential that determines whether an elevation hazard exists" (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 9 [1st Dept 2011]). "The relevant inquiry . . . is [] whether the harm flows directly from the application of the force of gravity to the object" (*Runner*, 13 NY3d at 604). Furthermore, contrary to Cannizzo's statement, plaintiff is not required to present evidence as to how any of the safety devices would have prevented his accident (*see Noble v AMCC Corp.*, 277 AD2d 20, 21 [1st Dept 2000] ["Nor was plaintiff required to present evidence as to which particular safety devices would have prevented his injury"]).

Accordingly, plaintiff is entitled to partial summary judgment on the issue of liability under Labor Law § 240 as against 54 Associates and Con Ed. The issue of plaintiff's damages shall await the trial of this action.

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[1]Although Con Ed and 54 Associates rely upon cases from the Second and Fourth Departments relating to trench collapses (*see Natale v City of New York*, 33 AD3d 772 [2d Dept 2006]; *Vitaliotis v Village of Saltaire*, 229 AD2d 575 [2d Dept 1996]; *Rogers v County of Niagara*, 209 AD2d 1034 [4th Dept 1994], *lv denied* 1995 WL 42441 [1995]), the court finds these cases to be distinguishable. In those cases, the plaintiffs were not subjected to elevation-related hazards.

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Labor Law § 241 (6)

Labor Law § 241 (6) provides, in relevant part, as follows:

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work . . . shall comply therewith."

Labor Law § 241 (6) requires owners, contractors, and their agents to "provide reasonable and adequate protection and safety" for workers performing the inherently dangerous activities of construction, excavation and demolition work. To succeed under Labor Law § 241 (6), a plaintiff must: (1) plead and prove the violation of a concrete and applicable specification of the New York State Industrial Code, which contains a "specific, positive command, rather than a reiteration of common-law standards" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349 [1998] [internal quotation marks and citation omitted]); and (2) establish that any breach of the statute was a proximate cause of the injuries sustained (*Colon v Lehrer, McGovern & Bovis*, 259 AD2d 417, 419 [1st Dept 1999]).

Plaintiff's third supplemental bill of particulars alleges violations of 12 NYCRR 23-1.7 (a) (1), 12 NYCRR 23-1.7 (a) (2), 12 NYCRR 23-4.1 (a) and 12 NYCRR 23-4.1 (b) (Third Supplemental Verified Bill of Particulars, ¶¶ 4, 5, 6, 7). Plaintiff moves for summary judgment based upon these four regulations, and Con Ed, 54 Associates, and Digby move for summary judgment dismissing plaintiff's section 241 (6) claim, asserting that plaintiff has failed to identify

a specific or applicable Industrial Code section.[2] The court turns to the disputed Industrial Code provisions.

12 NYCRR 23-4.1 (a) and (b)

Plaintiff argues that defendants violated Industrial Code sections 23-4.1 (a) and (b) because they failed to use "sheet piling, bracing, or other equivalent means" to prevent the cave-in of the sidewalk flag.

Con Ed argues that section 23-4.1 (a) does not apply, because the concrete sidewalk that fell was not a "structure." With respect to section 23-4.1 (b), Con Ed maintains that this subsection is inapplicable since a side failure, bank failure, or cave-in did not occur.

54 Associates and Digby contend that sections 23-4.1 (a) and (b) are too general and are also inapplicable, because plaintiff had completed his digging and tunneling at the time of his accident, and was in the process of walking back to the surface. Thus, according to 54 Associates and Digby, the collapse was not a result of the loss of stability created by the excavation.

Section 23-4.1, which governs excavation operations, provides as follows:

> "(a) Stability of structures. Except in hard rock, whenever any excavation is to be performed in the vicinity of buildings, structures or utilities, the integrity, stability and structural adequacy of such buildings, structures or utilities shall be maintained at all times by the use of underpinning, sheet piling, bracing or other equivalent means to prevent damage to or failure of foundations, walls, supports or utility facilities and to prevent injury to any person. Such underpinning, sheet piling, bracing or equivalent means shall be inspected at least once each day or more often if conditions warrant. Every such

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[2]Plaintiff's third supplemental bill of particulars also alleges violations of various OSHA regulations. However, it is well established that OSHA regulations cannot serve as a predicate for a violation of section 241 (6) (*Kocurek v Home Depot, U.S.A.P.*, 286 AD2d 577, 580 [1st Dept 2001]).

inspection shall be conducted by an experienced, designated person.

"(b) Prohibited entry. No person shall be suffered or permitted to enter any trench or similar excavation where he may be exposed to side or bank failure or cave-in unless proper safeguards for his protection have been provided"

(12 NYCRR 23-4.1).

Courts have held that section 23-4.1 (a) is sufficiently specific to support a section 241 (6) claim (*Sainato v City of Albany*, 285 AD2d 708, 711 [3d Dept 2001]). The regulation "'appears to primarily be aimed at protecting against collapses [of structures] associated with a loss of stability created by the excavation'" (*Scarso v M.G. Gen. Constr. Corp.*, 16 AD3d 660, 661 [2d Dept], *lv dismissed* 5 NY3d 849 [2005], quoting *Sainato*, 285 AD2d at 711). In addition, the First Department has apparently found section 23-4.1 (b) to be sufficiently specific (*see Caldas v City of New York*, 284 AD2d 192 [1st Dept 2001]). Here, it appears that the sidewalk flagstone collapsed as the result of a loss of stability from the recently excavated tunnel, and the court concludes that there are triable issues of fact as to whether the sidewalk flagstone or entire sidewalk constitutes a "structure" within the meaning of section 23-4.1 (a). A "structure" has been defined as "[s]omething constructed, such as a building" (American Heritage Dictionary of the English Language [4th ed 2000]). Furthermore, the court finds that there are questions of fact as to whether the collapse qualifies as a "cave-in" for purposes of section 23-4.1 (b). A "cave-in" is defined as a "collapse, as of a tunnel or structure" (*id.*).[3]

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[3]While 54 Associates and Digby argue that plaintiff had already completed his task of excavation, plaintiff was still in the trench when he was injured (Plaintiff EBT, at 180-183). Sections 23-4.1 (a) and (b) do not require that the loss of stability or cave-in occur simultaneously with the excavation. Moreover, although Con Ed's expert states that the term "cave-in" means the separation of a mass of soil or rock materials from the side of an excavation (Cannizzo Aff., ¶ 18), the plain language of the regulation does not support this interpretation.

<u>12 NYCRR 23-1.7 (a) (1) and (a) (2)</u>

Plaintiff argues that defendants violated section 23-1.7 (a) (1) because the concrete sidewalk flag was not supported by a structure capable of supporting a loading of 100 pounds per square foot. As for section 23-1.7 (a) (2), plaintiff argues that defendants failed to provide "suitable overhead protection," and that he should not have been permitted to work under the concrete sidewalk flag.

Con Ed argues that section 23-1.7 (a) (1) does not apply because plaintiff's accident did not occur in an area "normally exposed to falling material or objects." Con Ed further argues that section 23-1.7 (a) (2) does not apply because plaintiff was required to work where he was injured.

54 Associates and Digby contend that section 23-1.7 (a) (1) and (a) (2) are inapplicable because the task of excavating trenches and digging tunnels does not normally expose a worker to falling objects or materials. 54 Associates and Digby point out that plaintiff testified that the trenches were not shored because they were not deep enough to require shoring.

Section 23-1.7 (a), entitled "Overhead hazards," states:

> "(1) Every place where persons are required to work or pass that is *normally exposed to falling material or objects* shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot.
>
> "(2) Where persons are lawfully frequenting areas exposed to falling material or objects *but wherein employees are not required to work or pass*, such exposed areas shall be provided with barricades, fencing or the equivalent in compliance with this Part (rule) to prevent inadvertent entry into such areas"

(12 NYCRR 23-1.7 [emphasis supplied]).

Here, although section 23-1.7 (a) (1) has been held to be sufficiently specific to support this claim (*Clarke v Morgan Contr. Corp.*, 60 AD3d 523, 524 [1st Dept 2009]), the regulation does not apply where an object unexpectedly falls on a worker in an area not normally exposed to such hazards (*Buckley*, 44 AD3d at 271). There is no evidence that the excavation trench was "normally exposed to falling material or objects." Plaintiff's expert does not even address this requirement (Hopkins Aff., ¶ 19). Section 23-1.7 (a) (2) is also inapplicable here because plaintiff was "required to work or pass" in the trench where he was injured (*see Perillo v Lehigh Constr. Group, Inc.*, 17 AD3d 1136, 1138 [4th Dept 2005]).

Accordingly, plaintiff has a valid Labor Law § 241 (6) claim only to the extent it is predicated on violations of Industrial Code sections 23-4.1 (a) and (b).

Labor Law § 200 and Common-Law Negligence

Plaintiff also moves for summary judgment under Labor Law § 200 against 54 Associates, Digby, and Con Ed. According to plaintiff, there is no question that these defendants exercised the requisite control over the worksite. Specifically, plaintiff notes that defendants knew or should have known that the retail store would be open on a Saturday, and that defendants had a duty and responsibility to ensure that safe means and methods were provided to excavate the trench.

Con Ed argues, in support of its own motion, that there is no evidence that it had supervisory control over plaintiff's work methods at the time of his accident. In support of this argument, Con Ed points out that its construction representative was not even at the job site until after plaintiff's accident. Con Ed further argues that there is no evidence that it had actual or

constructive notice of any alleged dangerous condition, since it did not perform the excavation at the site, and there is no evidence that the plans to connect the gas main to the sleeve contributed to the defective condition.

In moving for summary judgment, 54 Associates and Digby also argue that they did not direct or supervise plaintiff's work, and that they were unaware that Con Ed was planning to perform the work on the date of the accident. Additionally, 54 Associates and Digby argue that there is no evidence that they created or had notice of the allegedly defective sidewalk because: (1) they did not install the sidewalk; (2) there is no evidence of any complaints regarding the latent conditions under the sidewalk; and (3) there is no evidence demonstrating the length of time the latent defects were present in the sidewalk.

It is well established that Labor Law § 200 is a codification of the common-law duty of property owners and general contractors to provide workers with a safe place to work (*Rizzuto*, 91 NY2d at 352; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Section 200 claims fall into two broad categories: those involving allegedly defective or dangerous premises conditions and those involving injuries from the manner in which the work is performed (*Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]). Where the plaintiff's injury stems from the manner in which the work is performed, the owner or general contractor may be liable only if it exercised supervision and control over the work (*O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805, 806 [2006]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]; *Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347, 350 [1st Dept 2006]; *Reilly v Newireen Assoc.*, 303 AD2d 214, 219-221 [1st Dept], *lv denied* 100 NY2d 508 [2003]). However, where the plaintiff's injury arises from a dangerous or defective premises condition,

the owner or general contractor may only be held liable if it created or had actual or constructive notice of the condition (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]; *Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

Here, the only evidence before the court indicates that plaintiff's accident stems from the means and methods of the excavation work, not a dangerous or defective premises condition (*see Cahill*, 31 AD3d at 350). However, there is no evidence that 54 Associates or Digby supervised or controlled plaintiff's excavation work. Plaintiff's foreman directed him to dig underneath the sidewalk (Plaintiff EBT, at 138). Plaintiff testified that he did not have any conversations with anyone from the building (*id.* at 61-62). Moreover, even if the owner or managing agent were aware that Con Ed was going to open up the sidewalk in front of the building and was using unsafe methods, "[m]ere notice of unsafe methods of performance is not enough to hold the owner or general contractor vicariously liable under this section [or in common-law negligence]" (*Colon*, 259 AD2d at 419).

As for Con Ed, plaintiff argues that this defendant had sufficient supervisory control over plaintiff's work to be liable under section 200 and common-law negligence, pointing to evidence that: (1) Con Ed made markings to indicate where the gas line was to be set; (2) a Con Ed inspector gave instructions to leave the sidewalk in front of the building for pedestrian use[4]; and (3) Con Ed had the authority to stop work for any unsafe conditions and to ensure compliance with the law and regulations.

Contrary to plaintiff's contention, there is no evidence that Con Ed supervised how

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[4]Plaintiff explained that the reason the workers were told to leave the sidewalk intact was because the company would receive a heavy fine (Plaintiff EBT, at 103).

plaintiff performed the excavation work. "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [defendant] controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed" (*Hughes*, 40 AD3d at 306). Although Con Ed made markings to indicate the gas line, gave instructions to leave the sidewalk intact to comply with the law, and had the authority to stop work (Plaintiff EBT, at 57, 103; Harris EBT, at 106), "general instructions. . . and monitoring and oversight of the timing and quality of the work [are] not enough to impose liability under section 200, [n]or is a general duty to ensure compliance with safety regulations or the authority to stop work for safety reasons" (*Dalanna v City of New York*, 308 AD2d 400 [1st Dept 2003] [citations omitted]; *see also Smith v McClier Corp.*, 22 AD3d 369, 371 [1st Dept 2005]). Further, there is no evidence indicating that Con Ed's markings caused or contributed to the accident. Therefore, the section 200 and common-law negligence claims against Con Ed are dismissed.

Hugh Chrysler's Motion

Hugh Chrysler also moves for summary judgment, contending that it was not hired to do any work that could have contributed to plaintiff's injuries.

Plaintiff has not opposed Hugh Chrysler's motion.

As previously noted, statutory agency under the Labor Law turns on whether the defendant had "supervisory control and authority over the work being done when the plaintiff is injured" (*Walls*, 4 NY3d at 864). Moreover, a contractor such as Hugh Chrysler does not owe a duty of care to noncontracting third parties such as plaintiff (*Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]; *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]; *Timmins v*

[* 20]

Tishman Constr. Corp., 9 AD3d 62, 66 [1st Dept], *lv dismissed* 4 NY3d 739 [2004], *rearg denied* 4 NY3d 795 [2005]). However, there are three exceptions to this general rule: (1) "where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk" (*Church*, 99 NY2d at 111); (2) "where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation" (*id.*); and (3) "where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*id.* at 112 [internal quotation marks omitted]).

Hugh Chrysler submits undisputed evidence that it was hired to ascertain whether the building's chimney could safely vent combustion products, and to ascertain whether there was asbestos on site (Chrysler EBT, at 21). Additionally, Hugh Chrysler had no supervision or control over the construction site or safety conditions (Chrysler Aff., ¶ 11). Hugh Chrysler did not draw any plans dealing with excavation in front of the premises (*id.*, ¶ 12). Hugh Chrysler was not on site after September 24, 2008 (*id.*, ¶ 9). In view of this evidence, Hugh Chrysler cannot be liable in common-law negligence or under the Labor Law (*see Hutchinson v City of New York*, 18 AD3d 370, 371 [1st Dept 2005] [engineering consultant could not be liable in common-law negligence or under the Labor Law where it was not present at the site, and did not supervise or control the work the worker was performing]).

Cross Claims Against 54 Associates and Digby

54 Associates and Digby also move for summary judgment dismissing the cross claims for indemnification, contribution, and breach of contract against them.

There is no opposition to this portion of 54 Associates and Digby's motion.

"Common-law indemnification is predicated on 'vicarious liability without actual fault'" on the part of the indemnitee (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept], *lv dismissed* 7 NY3d 864 [2006], quoting *Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 895 [1st Dept], *lv denied* 1 NY3d 504 [2003]). "To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters, Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *see also Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]). "Contribution is available where 'two or more tortfeasors combine to cause an injury' and is determined 'in accordance with the relative culpability of each such person [citations omitted]'" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept], *lv dismissed* 100 NY2d 614 [2003]). Given that 54 Associates and Digby have shown that they were not negligent, there is no basis for the common-law indemnification and contribution claims asserted against them. Accordingly, these claims are dismissed.

54 Associates and Digby are also entitled to summary judgment dismissing Hugh Chrysler's claims for contractual indemnification and failure to procure insurance, because Hugh Chrysler has not produced any contracts supporting such claims.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion (sequence number 002) of plaintiff Joao Jose Adao for partial summary judgment is granted under Labor Law § 240 (1) as against defendants 54 Associates,

LLC, 53 Company, LLC, Consolidated Edison, Inc. and Consolidated Edison of New York, with the issue of plaintiff's damages to await the trial of this action, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 003) of defendants Consolidated Edison, Inc. and Consolidated Edison of New York is granted to the extent of dismissing the Labor Law § 200/common-law negligence and Labor Law § 241 (6) claim, to the extent it is predicated on violations of 12 NYCRR 23-1.7 (a) (1) and (2), and is otherwise denied; and it is further

ORDERED that the motion (sequence number 004) of defendants 54 Associates, LLC, 53 Company, LLC and Digby Management Company, LLC is granted to the extent of

- (1) dismissing Digby Management Company, LLC from the action and the complaint is dismissed in its entirety as against said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant, and dismissing the Labor Law § 200/common-law negligence and Labor Law § 241 (6) claims, to the extent it is predicated on violations of 12 NYCRR 23-1.7 (a) (1) and (2), as against defendants 54 Associates, LLC and 53 Company, LLC,
- (2) dismissing the cross claims for common-law indemnification and contribution asserted by defendants Consolidated Edison, Inc., Consolidated Edison of New York, Hugh Chrysler Engineering Co., LLC, and Hugh Chrysler Contracting Co., LLC against them, and
- (3) dismissing the cross claims for contractual indemnification and failure to procure insurance asserted by defendants Hugh Chrysler Engineering Co., LLC and Hugh Chrysler Contracting Co., LLC against them, and is otherwise denied; and it is further

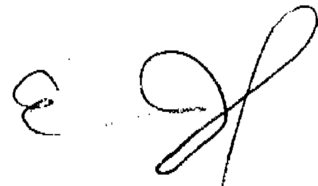
ORDERED that the motion (sequence number 005) of defendants Hugh Chrysler Engineering Co., LLC and Hugh Chrysler Contracting Co., LLC for summary judgment is granted and all claims and cross claims against said defendants are severed and dismissed with costs and disbursements as taxed by the Clerk, and the Clerk of the Court is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the parties email the court at afield@courts.state.ny.us forthwith to schedule a trial date.

This Constitutes the Decision and Order of the Court.

Dated: October 6, 2011

ENTER:



J.S.C.

EMILY JANE GOODMAN

FILED

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