

<b>Wozniak v HLM Holdings, LLC</b>
2015 NY Slip Op 32739(U)
January 9, 2015
Supreme Court, Erie County
Docket Number: 800521/2013
Judge: Henry J. Nowak
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**STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE**

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**MICHAEL WOZNIAK,**

**Plaintiff,**

vs.

**HLM HOLDINGS, LLC,  
EI TEAM INC.**

**Defendants.**

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**MEMORANDUM DECISION**

**INDEX NO. 800521/2013**

**HON. HENRY NOWAK, J.S.C.  
Justice Presiding**

Plaintiff commenced this action seeking damages for injuries he sustained in a construction site accident that occurred on February 14, 2012, when he stepped into an uncovered trench in the area where he was working and fell forward, injuring his left arm. Defendants move for summary judgment seeking dismissal of plaintiff's causes of action based on Labor Law §§ 240 (1) and 241 (6). Plaintiff does not oppose defendants' motion insofar as it seeks dismissal of the § 240 (1) cause of action, but plaintiff does oppose dismissal of the § 241 (6) cause of action.

In order to maintain a cause of action under Labor Law § 241 (6), a plaintiff must prove that the accident was caused as the result of the violation of a specific regulation contained in the Industrial Code (*see Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 505 [1993]). In moving for summary judgment, defendants assert that plaintiff's accident was not the result of a

violation of an applicable regulation under the Industrial Code. Specifically, defendants contend that 12 NYCRR 23-1.7 (e) (1) and 12 NYCRR 23-1.7 (e) (2), the regulations asserted in plaintiff's bill of particulars, do not apply to the facts of this case. In opposition, plaintiff asserts that there are issues of fact with respect to whether those regulations apply and, moreover, 12 NYCRR 23-1.7 (b) (1) (i) also applies to the subject accident. While Section 23-1.7 (b) (1) (i) was not cited in his bill of particulars, plaintiff argues that he is entitled to raise this regulation for the first time in opposition to defendants' motion for summary judgment. Plaintiff also argues that the defendants are not prejudiced by his reliance on this regulation because the testimony revealed that plaintiff fell into an unguarded and uncovered opening, i.e. the trench, and defendants conceded that the trench did not have a cover. In reply, defendants argue that plaintiff may not rely on an Industrial Code regulation not expressly pleaded in the bill of particulars and, in any event, Section 23-1.7 (b) (1) (i) does not apply to the facts of this case.

Sections 23-1.7 (e) (1) and (2) entitled "Tripping and other hazards" provides:

(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

(2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Addressing subsection (e) (2) first, this court sees nothing in the evidence that would support the conclusion that plaintiff's accident was caused, in whole or in part, "from accumulations of dirt and debris[,] . . . from scattered tools and materials[, or] from sharp

projections.” While it presents a closer question, this court concludes that there is an issue of fact as to whether the area where plaintiff fell and was injured constitutes a passageway inasmuch as he had to cross over the trench, a “condition[ ] which could cause tripping,” in going to and from the area where his work was being performed (12 NYCRR 23-1.7 [e] [1]; *see Rosenberg v Krupinski Gen. Contrs.*, 284 AD2d 523, 524 [2d Dept 2001]).

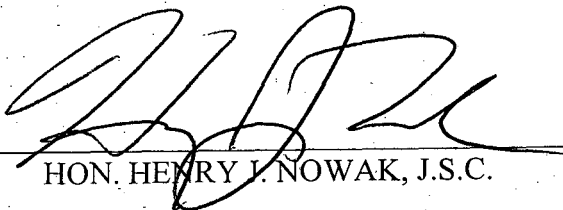
This court further concludes that plaintiff could properly rely on 12 NYCRR 23-1.7 (b) (1) (i) for the first time in opposition to defendants’ motion (*see Harris v Rochester Gas & Elec. Corp.*, 11 A.D.3d 1032, 1033 [4th Dept 2004]). Here, as in *Harris*, defendants were “aware through the allegations in the complaint and plaintiff’s deposition testimony” that the trench was alleged to be a hazardous opening that caused plaintiff to fall (*id.*; *see also Gizowski v State of New York*, 66 AD3d 1348, 1349 [4th Dept 2009]).

On the merits, there are issues of fact with respect to whether plaintiff’s accident was caused by a violation of Section 23-1.7 (b) (1) (i). This regulation provides that “[e]very 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 constructed and installed in compliance with this Part (rule).” While defendants assert that the type of opening necessary to violate this rule must be large enough for a person to fall completely through, the application of Section 23-1.7 (b) (1) (i) in the Fourth Department has not been limited to holes that are large enough for a person to fall through (*see Pilato v Nigel Enterprises, Inc.*, 48 AD3d 1133, 1134-1135 [4th Dept 2008]; *Ellis v J.M.G., Inc.*, 31 A.D.3d 1220, 1221 [4th Dept 2006]; *Luckern v. Lyonsdale Energy Ltd. Partnership*, 281 A.D.2d 884, 885-886 [4th Dept 2001]).

Based on the foregoing, defendants' motion is granted, in part – the Labor Law § 240 (1) cause of action is dismissed, and the Labor Law § 241 (6) cause of action is dismissed insofar as it is based on the alleged violation of 12 NYCRR 23-1.7 (e) (2). The motion is otherwise denied.

Submit order.

DATED: January 9, 2015



HON. HENRY J. NOWAK, J.S.C.