SHORT FORM ORDER

INDEX No. 16-03094
CAL. No. 19-00585OT

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM J. CONDON
Justice of the Supreme Court

MOTION DATE 8-13-19 (001 & 002)
MOTION DATE 8-23-19 (003)
ADJ. DATE 10-01-19
Mot. Seq. # 001 - MG
002 - MG; CASEDISP
003 - MD

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THOMAS BONKOSKI,

Plaintiffs,

- against -

CONDOS BROTHERS CONSTRUCTION CORP., SACHI CONTRACTORS, INC., BAPS MELVILLE, LLC., and BAPS NORTHEAST DEVELOPMENT, INC.,

Defendants.

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RST

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CONDOS BROTHERS CONSTRUCTION CORP., SACHI CONTRACTORS, INC., BAPS MELVILLE, LLC., and BAPS NORTHEAST DEVELOPMENT, INC.,

Third-Party Plaintiff,

- against -

PREFERRED PLUMBING & HEATING, INC.,

Third-Party Defendants.

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Upon the following papers numbered 1 to 84 read on these motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1- 24, 25 -39, 40 - 61 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 62 - 64, 65 - 66, 67 - 68, 69 - 70, 71- 72, 73 - 74 ; Replying Affidavits and supporting papers 75 - 76, 77 - 78, 79 - 80, 81 - 82, 83 - 84 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (001) by defendant Condo Brothers Construction Corp., the motion (002) by defendants BAPS Melville, LLC, BAPS Northeast Development, Inc., and Sachi Contractors, Inc., and the motion (003) by plaintiff Thomas Bonkoski, are consolidated for the purpose this determination; and it is further

ORDERED that the motion (001) by defendant Condo Brothers Construction Corp., for, inter alia, summary judgment dismissing the complaint and cross claims against it is granted; and it is

ORDERED that the motion (002) by defendants BAPS Melville, LLC, BAPS Northeast Development, Inc., and Sachi Contractors, Inc., for, inter alia, summary judgment dismissing the complaint against it is granted; and it is

ORDERED that the motion (003) by plaintiff Thomas Bonkoski for summary judgment in his favor on the issue of liability is denied.

Plaintiff Thomas Bonkoski commenced this action to recover damages for personal injuries he allegedly sustained on November 6, 2015, while working on the construction of the BAPS Shri Swarminarayan Mandir Temple located at 26 Deshon Street in Melville, New York. Plaintiff allegedly was injured when he fell through an unmarked, broken, and or defective manhole cover that had been installed at an earlier phase of the construction project. As a result, plaintiff allegedly suffered injuries to his neck, left shoulder, elbow, and knee. The premises is owned by defendant BAPS Melville, LLC, and/or BAPS Northeast Development, Inc. (herein collectively known as "BAPS"). BAPS retained

defendant Sachi Contractors, Inc. ("Sachi"), as the general contractor for the project, and Sachi retained several subcontractors to perform work at the premises, including defendant Condos Brothers Construction Corp. ("Condo Bros."), and plaintiff's employer, Preferred Plumbing & Heating, Inc. ("PPH"). By way of his complaint, plaintiff alleges causes of action against defendants for common law negligence and violations of Labor Law §§ 240 (1), 241 (6) and 200. Thereafter, defendants asserted cross claims against each other and commenced a third-party action against PPH. However, the parties subsequently executed a stipulation discontinuing the third-party action against PPH on January 18, 2019.

Condos Bros now move for summary judgment dismissing the complaint and cross claims against it on the grounds that it cannot be held liable under the Labor Law because it was a mere subcontractor at the time of the alleged accident, it had completed all its work at the premises more than one month before plaintiff injured himself, and plaintiff failed to state actionable claims against it under the Labor Law. Additionally, Condos Bros seek dismissal of the cross claims against it on the basis it never entered any agreement requiring it to defend or indemnify any of the co-defendants in the action, and that it neither caused or contributed to plaintiff's accident. Sachi and BAPS also move for summary judgment dismissing plaintiff's complaint. They argue that they never exercised any supervision or control over plaintiff's work, that plaintiff failed to set forth the violation any applicable sections of the Industrial Code in support of his Labor Law § 241 (6) claim, and that Labor Law § 240 (1) is not applicable under the circumstances of this case, as plaintiff's fall through the manhole cover was the result of an ordinary and usual danger at a worksite. As to their cross claims against Condos Bros, Sachi and BAPS assert that though unsigned, Condos Bros performance of work pursuant to a subcontract referenced in the letter of intent they executed in Sachi's favor evinces Condos Bros' intent to be bound by the terms of the subcontract, which included an obligation to indemnify the owner and general contractor of the worksite against any claims of injuries that arose out of or resulted from Condos Bros' work.

By way of a separate motion, plaintiff moves for summary judgment in his favor on the issue of liability with respect to his Labor Law claims against Sachi and BAPS. Plaintiff argues that a violation of Labor Law § 240 (1) is established where, as in this case, it is uncontroverted that he fell through an unguarded hole in the surface of a worksite, that the alleged violation of NYCRR 23-1.7 (b)(1)(i), which prohibits unguarded hazardous openings at worksites, is sufficiently specific and applicable to maintain his Labor Law § 241 (6) claim, and that the defendants are liable, pursuant to Labor Law § 200, for permitting the existence of the hazardous opening at their worksite. Condos Bros, Sachi, and BAPS all oppose plaintiff's motion.

At the outset, the court notes that defendants established, as a matter of law, that plaintiff failed to state a cause of action under Labor Law § 240 (1). Notably, while the concrete manhole covering may have been defective, the manhole in question, which was not connected in anyway to plaintiff's work, did not pose the type of gravity-related hazard or peril protected by the safeguards of Labor Law § 240 (1) (*see* ***Carey v Five Bros., Inc.***, 106 AD3d 938, 940, 966 NYS2d 153 [2d Dept 2013] [injuries suffered by plaintiff who fell through an open manhole "did not arise in the context of the 'special hazards' against which Labor Law § 240 (1) was designed to protect"]; ***Masullo v City of New York***, 253 AD2d 541, 677 NYS2d 162 [2d Dept 1998][Labor Law § 240 (1) found inapplicable because uncovered

Manhole unrelated to plaintiff's work was the type of 'ordinary and usual' peril a worker is commonly exposed to at a construction site]; *compare* ***Dos Santos v Consolidated Edison of N.Y., Inc.***, 104 AD3d 606, 963 NYS2d 12 [1st Dept 2013][Labor Law § 240 (1) applied where plaintiff and his co-worker were required to perform work at the top of the open manhole to pump out the subterranean water located therein]). In opposition, plaintiff failed to raise any triable issues sufficient to defeat defendant's prima facie showing (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Therefore, the branches of defendants' motions seeking summary judgment dismissing plaintiff's Labor Law § 240 (1) claim against them are granted.

As for plaintiff's Labor Law § 241(6) claim, inasmuch as plaintiff failed to address the branches of defendants' motions seeking dismissal of all but his Labor Law § 241 (6) claim alleging a violation of Industrial Code 12 NYCRR 23-1.7 (b)(1)(i), plaintiff is deemed to have abandoned the remainder of his Labor Law § 241 (6) claim predicated on the alleged violation of the other sections of the Industrial Code listed in his complaint (*see* ***Rodriguez v Dormitory Auth. of the State of N.Y.***, 104 AD3d 529, 962 NYS2d 102 [1st Dept 2013]; ***Kronick v L.P. Thebault Co., Inc.***, 70 AD3d 648, 892 NYS2d 895 [2d Dept 2010]; ***Cardenas v One State St., LLC***, 68 AD3d 436, 890 NYS2d 41 [1st Dept 2009]; ***Genovese v Gambino***, 309 AD2d 832, 833, 766 NYS2d 213 [2d Dept 2003]). In addition, the court finds that defendants demonstrated, prima facie, that Industrial Code 12 NYCRR 23-1.7 (b)(1)(i) is inapplicable under the circumstances of this case (*see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993][To recover under Labor Law § 241 (6), a plaintiff must allege the breach of a specific applicable Industrial Code]). Significantly, 12 NYCRR 23-1.7 (b)(1)(i) states, in relevant part, 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 . . . ." Thus, by its plain terms, the regulation addresses "[h]azardous openings." While plaintiff testified that the area surrounding the manhole cover was strewn with debris, plaintiff submitted no evidence that the concrete cover had already caved in, or was otherwise open. Rather, plaintiff's testimony indicates that the manhole was covered, albeit by a defective concrete cover, at the time of his accident. Indeed, plaintiff testified that the concrete cover partially caved in after he stepped on it, and that he could feel himself fall when a piece of the concrete cover "smash[ ] through."

Moreover, "[i]t has been repeatedly held that 12 NYCRR 23-1.7 (b)(1)(i) does not apply to openings that are too small for a worker to completely fall through (*see* ***Vitale v Astoria Energy II, LLC***, 138 AD3d 981, 30 NYS3d 213 [2d Dept 2016]; ***DeLiso v State of New York***, 69 AD3d 786, 787, 892 NYS2d 533 [2010]; ***Rice v Board of Educ. of City of N.Y.***, 302 AD2d 578, 579, 755 NYS2d 419 [2d Dept 2003]; ***Alvia v Teman Elec. Contr.***, 287 AD2d 421, 423, 731 NYS2d 462 [2d Dept 2001]). Therefore, where, as in this case, plaintiff testified that the concrete cover was only partially caved in, that his right leg and the remainder of his body prevented him from falling through, and that he injured only the portion of his left leg, from his tibia to his knee, it is apparent this was not the type of hole proscribed by the regulation. Plaintiff's papers, which contained unsubstantiated assertions by his attorney and expert concerning the possible condition of the manhole cover before plaintiff stepped on it failed to raise a triable issue in opposition (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595). Accordingly, the branches of defendants' motions seeking summary judgment dismissing plaintiff's Labor Law § 241 (6) claim against them are granted.

Additionally, where, as in this case, the alleged accident was caused by a hazardous or defective premises condition, an owner or contractor may only be held liable for a violation of Labor Law § 200 if they either created the dangerous condition that caused the accident or had actual or constructive notice of its existence (*see* ***Kuffour v Whitestone Const. Corp.***, 94 AD3d 706, 941 NYS2d 653 [2d Dept 2012]; ***Azad v 270 Realty Corp.***, 46 AD3d 728, 730, 848 NYS2d 688 [2d Dept 2007]). "To constitute constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time before the accident to permit the defendant an opportunity to discover and remedy it" (***Gordon v American Museum of Natural History***, 67 NY2d 836, 837, 501 NYS2d 646 [1986]). "Constructive notice will not be imputed where a defect is latent and would not be discoverable upon reasonable inspection" (***Curiale v Sharrotts Woods, Inc.***, 9 AD3d 473,475, 781 NYS2d 47 [2d Dept 2004]; *see* ***Lai v Ching Po Ng***, 33 AD3d 668, 823 NYS2d 429 [2d Dept 2006]).

Here, defendants established their prima facie entitlement to summary judgment dismissing the common law negligence and Labor Law § 200 claims against them by submitting evidence that plaintiff's accident arose out of a defective premises condition rather than alleged dangers in the means and method of his work, and that they neither created the alleged condition or possessed actual or constructive notice of its existence (*see* ***Johnson v Lend Lease Constr. LMB, Inc.***, 164 AD3d 1222, 83 NYS3d 215 [2d Dept 2018]; ***Hoffman v Brown***, 109 AD3d 791, 971 NYS2d 130 [2d Dept 2013]; ***Starling v Suffolk County Water Auth.***, 63 AD3d 822, 881 NYS2d 149 [2d Dept 2009]; ***Applegate v Long Is. Power Auth.***, 53 AD3d 515, 862 NYS2d 86 [2d Dept 2008]). Notably, as discussed above, plaintiff's own testimony indicates that the manhole in question was covered at the time of the alleged accident, and that the danger it posed was latent. In addition, Sachi's foreman testified that his daily inspections of the worksite did not reveal any dangerous conditions, including broken manhole covers, at or near the manhole where plaintiff's accident occurred. The foreman further testified that he did not receive reports of any defective manhole covers from any of the subcontractors working at the construction site, or from any of the Town of Huntington officials who inspected the drywells prior to plaintiff's accident.

Condos Bros also submitted unrefuted evidence that it completed its work at the construction site, including the installation of the subject manhole, almost three months before plaintiff's accident, and that its work was inspected and approved by Sachi, as well as by the Town of Huntington. Condos Bros also submitted an expert affidavit by James Parr, P.E., which states, among other things, that the manhole covers utilized by the contractor consisted of pressurized concrete capable of withholding 1200 pounds of weight, and that after Condos Bros finished its work and was absent from the worksite it was no longer responsible for management of site activities so as to preserve the integrity of the completed manholes. Plaintiff failed to raise any triable issue in opposition. The affidavit by plaintiff's expert speculates, without any substantiation, that the integrity of the manhole cover may have somehow been affected by the storage of construction supplies nearby, or by its proximity to a dumpster. The expert affidavit also impermissibly offers legal conclusions which are to be determined by the court (*see* ***Preston v APCH, Inc.***, 175 AD3d 850, 107 NYS3d 515 [4th Dept 2019]; ***Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP***, 301 AD2d 63, 69, 750 NYS2d 277 [1st Dept 2002]). As Condos Bros had been absent from the worksite for months prior to the accident, and did not maintain exclusive control of the manhole, plaintiff also is unable to raise a triable issue against the defendant under the theory of res ipsa loquitur (*see* ***Dermatossian v New York City Transit Authority***, 67 NY2d 219, 501

NYS2d 784 [1986]; ***Lococo v Mater Cristi Catholic High School***, 142 AD3d 590, 37 NYS3d 134 [2d Dept 2016]). Therefore, the branches of defendants' motions seeking dismissal of plaintiff's common law negligence and Labor Law § 200 claims against them are granted.

Furthermore, inasmuch as defendants have submitted evidence that they were not liable for plaintiff's injuries and did not negligently cause or contribute to the happening of the accident, the branch of the motion by BAPS and Sachi for judgment on their cross claims against Condos Bros for contribution and/or indemnification is denied, as moot (*see* ***McCarthy v Turner Constr., Inc.***, 17 NY3d 369, 929 NYS2d 556 [2011]; ***Di Giulio v City of Buffalo***, 237 AD2d 938, 655 NYS2d 215 [1st Dept 1997]). Likewise, having granted defendants summary judgment dismissing the complaint against them, plaintiff's motion for summary judgment in his favor on the issue of liability is denied, as moot.

Dated: 5-18-20

Hon. William J. Condon
J.S.C.

X **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**

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