

**Leonard v City of New York**

2022 NY Slip Op 34550(U)

February 9, 2022

Supreme Court, Bronx County

Docket Number: Index No. 24893/2015E

Judge: Lucindo Suarez

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 19

Mtn. Seq. # 6

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BRIAN LEONARD,

Index No.: 24893/2015E

Plaintiff,

- against -

**DECISION and ORDER**

THE CITY OF NEW YORK AND NEW YORK CITY  
TRANSIT AUTHORITY, GEB-DB JOINT VENTURE,  
D&B ENGINEERS AND ARCHITECTS PC and  
GIBBONS, ESPOSITO, AND BOYCE ENGINEERING PC,

Defendants.

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PRESENT: Hon. Lucindo Suarez

The issue in Defendants the City of New York's and New York City Transit Authority's (collectively "NYC") summary judgment motion is whether they established their *prima facie* burden for a dismissal of Plaintiff's Labor Law §241(6). This court holds NYC established their *prima facie* burden for a dismissal of Plaintiff's Labor Law §241(6) claim and Plaintiff failed to raise any triable issues of fact to preclude the dismissal.<sup>1</sup>

According to Plaintiff, on the day of his accident he was employed by non-party DeBoe Construction, Inc., who was hired to install new water main and sewer lines at the subject construction site. Plaintiff testified that on the day of his accident, he was part of a crew that was removing wooden sheeting from inside of a trench in order to allow the trench to be backfilled with soil. He alleges that as he was standing at street level on the edge of the trench, he observed that the trench's wall collapsed causing a steel beam to roll onto his coworker's leg. He testified that he then climbed into the trench to come to the aid of his co-worker. He claims that his

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<sup>1</sup> Plaintiff voluntarily discontinued his Labor Law §§240(1), 200, and common negligence claims, therefore, the only remaining claim that will be addressed herein is his Labor Law §241(6) claim.

accident occurred as he was attempting to lift the steel beam off his co-worker's leg when he pulled his back, causing injury to his lower back.

Labor Law §241(6), imposes a nondelegable duty of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety" to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. *Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 693 N.E.2d 1068, 670 N.Y.S.2d 816 (1998). The standard of liability under Labor Law §241(6), requires that a plaintiff allege that an owner or general contractor breached a specific rule or regulation containing a positive command. *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993). In addition, Labor Law §241(6), requires that a plaintiff establish that a violation of a safety regulation was the proximate cause of the accident. *See Gonzalez v. Stern's Dept. Stores*, 211 A.D.2d 414, 622 N.Y.S.2d 2 (1st Dep't 1995).

Plaintiff alleges violations of Industrial Codes 12 NYCRR §§23-4.2(a), and 23-4.4(a)(b)(c)(f).<sup>2</sup>

12 NYCRR § 23-4.2(a) in relevant part provides: "[w]henever any person is required to work in or is lawfully frequenting any trench or excavation five feet or more in depth ... such sides or banks shall be provided with sheeting and shoring ... Additional protection against slides and cave-ins shall be provided whenever necessary..." In addition, 12 NYCRR § 23-4.4(a)(b)(c)(f) in relevant part provides: "[w]here any excavation is not protected by sloped sides or banks ... such excavation shall be protected by sheeting, shoring, and bracing... [s]hores, struts ... shall be adequately braced to withstand the loads intended to be imposed thereon..."

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<sup>2</sup> Plaintiff abandoned all other predicates not asserted herein, and as such those claims are dismissed to that extent. *Burgos v. Premier Props. Inc.*, 145 A.D.3d 506, 42 N.Y.S.3d 161 (1st Dep't 2016); *see also 87 Chambers, LLC v. 77 Reade, LLC*, 122 A.D.3d 540, 998 N.Y.S.2d 15 (1st Dep't 2014).

[e]ach earth-supported shore, strut or brace shall bear against a footing of sufficient area and stability to prevent any subsidence, yield or shifting of such shore, strut or brace... [a]ny type of cross bracing ... shall be securely fastened and shall be prevented from shifting or slipping by adequately fastened scabs or blocks.”

NYC contends that Industrial Codes 12 NYCRR §§23-4.2(a) and 23-4.4(a)(b)(c)(f) are inapplicable to the facts at bar. NYC argues since the instant Industrial Codes regulate the sheeting, shoring, and bracing of trenches Plaintiff failed to demonstrate that his injury was proximately caused by a violation of said Industrial Codes. Furthermore, NYC argues that there is no binding appellate authority that the “danger invites rescue” doctrine is applicable under a Labor Law §241(6) or that the facts at bar support the applicability of said doctrine.

In opposition, Plaintiff posits that the admissible evidence before this court is that the subject trench at the construction site was approximately 16 or 17 feet in depth, therefore, rendering the instant Industrial Codes applicable to the facts at bar. Moreover, Plaintiff claims that since it was uncontroverted that the subject trench’s wall partially collapsed it is without question that each of the instant Industrial Codes were violated.

This court finds that when granting a plaintiff’s summary judgment motion concerning liability as to Industrial Codes 12 NYCRR §§23-4.2(a) and 23-4.4(a)(b)(c)(f) Appellate Courts have routinely required that plaintiff’s injuries be proximately caused by the collapse of a trench wall. *cf. Smith v. Robert Marini Bldr., Inc.*, 83 A.D.3d 1188, 921 N.Y.S.2d 371 (3d Dep’t 2011) [the court found that plaintiff came forward with sufficient evidence to establish a claim based upon 12 NYCRR §23-4.2(a) when he testified while at the bottom of the trench, a portion of the side wall of the trench collapsed, burying him in clay]; *see also Bell v. Bengomo Realty, Inc.*, 36 A.D.3d 479, 829 N.Y.S.2d 42 (1st Dep’t 2007) [the court found that violations of 12 NYCRR

§§23-4.2(a) and 23-4.4(a) were supported by plaintiff's evidence, consisting of his deposition testimony that he sustained injuries when the ground under his feet gave way, causing him to fall into a open trench]; *see also Wells v. Br. Am. Dev. Corp.*, 2 A.D.3d 1141, 770 N.Y.S.2d 161 (3d Dep't 2003) [the court reversed the trial court's decision and order, which dismissed Plaintiff's Labor Law §241(6) claim premised upon 12 NYCRR §§23-4.2 and 23-4.4 as it found that plaintiff testimony that he was taking measurements when he felt the ground go out beneath him causing him to fall into a pit was sufficient to sustain his Labor Law §241(6) claim premised upon said Industrial Codes].

Therefore, this court finds NYC demonstrated their *prima facie* burden for a dismissal of Plaintiff's Labor Law §241(6) claim. Although it was undisputed that the subject trench's wall partially collapsed, therefore, violating 12 NYCRR §§23-4.2(a) and 23-4.4(a)(b)(c)(f) Plaintiff nonetheless failed to show or raise any triable issues of fact that his lower back injury resulting from his attempt to lift the steel beam off his co-worker's leg was proximately caused by the collapse. Thus, this court finds the cited Industrial Codes are inapplicable to the facts at bar.

Furthermore, the public policy governing the "danger invite rescue" doctrine was to prevent a plaintiff from being found contributorily negligent, as a matter of law, when he voluntarily placed himself in a perilous situation to prevent another from suffering serious injury. *Guarino v. Mine Safety Appliance Co.*, 25 N.Y.2d 460, 255 N.E.2d 173, 306 N.Y.S.2d 942 (1969). Any legal issues concerning Plaintiff's contributory negligence played no part in this court's determination to dismiss Plaintiff's Labor Law §241(6) claim, thus, this court finds the "danger invite rescue" doctrine wholly inapplicable to the facts at bar.

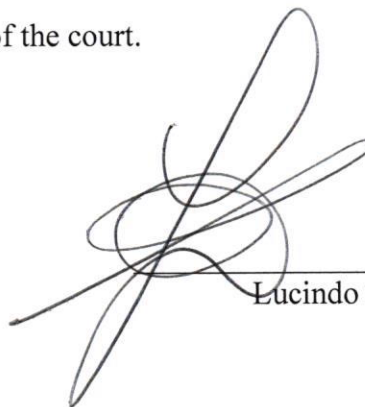
Accordingly, it is

ORDERED, that Plaintiff's Labor Law §§240(1), 200, and common law negligence claims are withdrawn; and it is further

ORDERED, that NYC's application to dismiss Plaintiff's Labor Law §241(6) claim is granted.

This constitutes the decision and order of the court.

Dated: February 9, 2022

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right, positioned above a horizontal line.

Lucindo Suarez, J.S.C.