

<b>Garcia v SAF L I LLC</b>
2023 NY Slip Op 34373(U)
December 12, 2023
Supreme Court, Kings County
Docket Number: Index No. 513988/2016
Judge: Wayne P. Saitta
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At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at 360 Adams Street, Brooklyn, New York, on the 12<sup>th</sup> day of December, 2023.

P R E S E N T:

Hon. Wayne P. Saitta, Justice.

-----X  
HIPOLITO GARCIA,

Plaintiff,

Index No. 513988/2016

-against-

SAF LI LLC, FED LI LLC, GSM LI LLC, and ICA LI LLC,

DECISION AND ORDER  
MS #3 and MS # 4

Defendants,

The following papers numbered on this motion:

NYSCEF Doc Numbers

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and Affidavits  
(Affirmations) Annexed \_\_\_\_\_

30-31, 54-57, 99

Answering Affidavit (Affirmation) \_\_\_\_\_

42-43, 73

Reply Affidavit (Affirmation) \_\_\_\_\_

70, 113, 117, 118

Supplemental Affidavit (Affirmation) \_\_\_\_\_

Pleadings – Exhibits \_\_\_\_\_

32-40, 44-53, 71-79, 114-116, 58-69, 74-77

Stipulations – Minutes \_\_\_\_\_

Filed Papers \_\_\_\_\_

This action arises from a construction accident in which Plaintiff was injured when the trench wall of the excavation site in which he was working collapsed and buried him up to his waist.

Defendants SAF LI LLC, FED LI LLC, GSM LI LLC, and ICA LI LLC (Defendants) owned the property where the accident took place. As part of a renovation, Defendants needed to have a fire hydrant in its parking lot relocated. Defendants hired a contractor,

non-party Stasi Brothers Asphalt (Stasi), to excavate a trench. Stasi was Plaintiff's employer.

On April 28, 2015, Stasi was engaged in digging the trench in Defendants parking lot so that the fire hydrant could be moved. Plaintiff alleges that while this work was going on, and while he was standing in the trench, a portion of the wall of the trench caved in and injured him.

Plaintiff moves for summary judgment on liability against Defendants on his claims pursuant to Labor Law § 241(6), Labor Law § 241(6), Labor Law § 200 and common law negligence.

Defendants cross-move to dismiss Plaintiff's claims pursuant to Labor Law §240(1), § 241(6) § 200 and common law negligence.

### **Labor Law § 240(1)**

Plaintiff moves for summary judgment on the issue of liability pursuant to Labor Law § 240(1) against Defendants.

Defendants cross-move to dismiss Plaintiff's claims pursuant to Labor Law §240(1).

Defendant makes two arguments: first, that trench collapses do not come within the scope of § 240(1), and second, that Plaintiff was the sole cause of the accident because he was told not to enter the trench.

### **Trench collapse**

Defendants cite the decision in *Ferreira v. Village of Kings Point*, 68 AD3d 1048 (2d Dept 2009), where the Second Department affirmed the dismissal of a § 240(1) claim where a plaintiff was injured in a trench collapse, holding that trench collapses are not

within the class of hazards against which Labor Law § 240(1) was intended to guard (*see Ferreira*, 68 AD3d 1048). Similar to the present case, the plaintiff in *Ferreira* was injured in a trench which a co-worker was digging with a backhoe, while he was completing the excavation by hand.

However, *Ferreira*, and the cases cited by the Court in that case, all predated the Court of Appeals decision in *Runner v. New York Stock Exch., Inc.*, 13 NY3d 599 [2009]. Since the decision in *Runner*, the fact that a Plaintiff was not working at an elevation does not necessarily take a worker outside of the protections of § 240(1).

Defendants did cite one post *Runner* trial court decision from Richmond County which held that trench collapses are not covered by § 240(1) (*Rodriguez v. Trades Constr. Servs. Corp.*, 2012 NY Slip Op 32135(U)). However, the cases cited in this decision to support that proposition were all pre-*Runner* cases.

Since *Runner*, below grade trench collapses have been held to come within the protections of § 240(1) (*Rivas v. Seward Park Housing Corporation*, 219 AD3d 59 [1st Dept 2023]).

“[T]he single decisive question [in this connection] is 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” (*Rivas* at 64, quoting *Runner v. New York Stock Exch., Inc.*, 13 NY3d 599,603 [2009]).

Here, like in *Rivas*, Plaintiff’s injuries were the direct consequence of Defendants “failure to provide adequate protection against a risk arising from a physically significant elevation differential” (*Rivas* at 64).

The trench in the present case was approximately seven feet deep at the time of Plaintiff’s accident. Plaintiff testified that he is 62 inches tall, approximately five feet and

two inches, and the wall he was working on in front of him collapsed on him, covering him in soil up to his waist. There was, therefore, well over a one-foot height differential between the top of the wall and Plaintiff.

The Court in *Rivas* held “[t]here was, therefore, well over a one-foot height differential between the top of the earthen wall and the top of plaintiff’s head. That height differential cannot be characterized as de minimis in light of the extent of that differential, the amount of dirt that poured into the trench when the right wall collapsed suddenly, and the amount of force the dirt was capable of generating” (*Rivas* at 64, quoting *Runner* at 605). The Court in *Rivas* continued “[m]oreover, the earthen wall, which required securing for the purposes of the undertaking, collapsed because of the effects of gravity, and the makeshift shoring plainly failed to provide adequate protection against the risk arising from the physically significant elevation differential” (*Rivas* at 64).

As in *Rivas*, the harm to Plaintiff “flowed directly from the application of the force of gravity to the earthen wall; [P]laintiff’s injury is directly attributable to the risk posed by the physically-significant elevation differential” (*Rivas* at 64).

#### **Sole proximate cause**

Defendant argues that Plaintiff was the sole proximate cause of his injuries because he entered the trench, during the excavation phase, before the trench could be shored and after being instructed not to do so.

Plaintiff testified that on the day of his accident he was working with one other co-worker, Victor, who was operating the excavating machine and who was his supervisor on that job. Plaintiff also stated that Victor instructed him to go inside the ditch to expose the pipe that they were excavating. Plaintiff stated that when the excavation machine was in use, he would climb out of the trench.

Defendant in opposition submits an affidavit from Ken Pellegrino, Operations Manager of Stasi. Pellegrino stated that on the day of Plaintiff's accident he assigned Plaintiff to assist the excavator and directed him not to go into the trench. Pellegrino testified to the same in his deposition.

Q. Tell me about your team. How many people made up the Stasi team that day?

A. Two guys.

Q. Who were the two people?

A. Hipolito [Plaintiff] and this other guy, Victor.

...

Q. And how about the other person, Hipolito, what was his responsibility that day?

A. Just to watch the excavator dig and make sure he didn't hit anything. Really just to be his eyes on the ground.

Q. So you didn't expect Mr. Garcia to use a shovel at any time that day?

A. No.

...

Q. Did you have any conversations with Hipolito Garcia that morning?

A. I spoke to both of them at the same time, Victor and Hipolito.

Q. So, aside from saying, "from point A to point B" was there any other conversations you had with them?

A. I told them, "Just have him watch you". Meaning, I told Victor, "Have Hipolito watch you". And I actually told him, "Don't go in the trench. Just let him watch you".

Pellegrino also agreed that Plaintiff was expected to take direction from Victor.

Q. And just generally speaking, did you expect Mr. Garcia to take the instructions of Mr. Galindo, if they were provided, there on the jobsite that day in April 2015?

A. Yes

Plaintiff, contests that he was told by Pellegrino not to go into the trench.

There remain questions whether Pellegrino gave Plaintiff instructions or if Pellegrino relied on Victor to communicate his instructions to Plaintiff, and whether Plaintiff, who speaks only Spanish, understood the instructions.

However, whether or not Pellegrino instructed Plaintiff not to go into the trench, Defendants have produced no evidence to contradict Plaintiff's testimony that he was instructed by Victor, who spoke Spanish, to go into the trench after Pellegrino left the site.

Pellegrino left the site before the accident occurred and he could not offer any evidence as to whether Plaintiff was instructed by Victor to enter the trench.

The fact that Victor, Plaintiff's supervisor, told him to enter the trench establishes that Plaintiff's actions were not the sole proximate cause of the accident, even if Pellegrino did tell him not to enter the trench.

Therefore, Plaintiff's motion as to Labor Law § 240(1) must be granted and Defendants' motion as to Labor Law § 240(1) must be denied.

### **Labor Law § 241(6)**

Plaintiff moves for summary judgment on the issue of liability pursuant to Labor Law § 241(6) against Defendants.

Defendants cross-move to dismiss Plaintiff's claims pursuant to Labor Law §241(6).

"To establish a cause of action for a violation of Labor Law § 241(6), a plaintiff must plead and prove a violation of a specific provision of the [Industrial] Code" (*Galarraga v. City of New York*, 54 AD3d 308, 309 [2d Dept 2008]).

In his affidavit, Plaintiff states that on the day of his accident that there was no shoring, sheeting or any system installed to prevent against a trench collapse. Plaintiff has plead violations of § 23-4.2 and § 23-4.4 of the Industrial Code. Plaintiff moves for summary judgment only as to § 23-4.2(a) and § 23-4.2(b).

Industrial Code § 23-4.2(a) provides in part:

Whenever any person is required to work in or is lawfully frequenting any trench or excavation five feet or more in depth which has sides or banks with slopes steeper than those permitted in Table I of this Subpart, such sides or banks shall be provided with sheeting and shoring in compliance with this Part (rule).

Industrial Code § 23-4.2(b) provides for the option of utilizing sloping instead of shoring, specifically:

Where the sides or banks of a trench or area type excavation may be sloped back without causing subsidence or damage to buildings, structures, utilities, roads, streets, highways or similar facilities, sloping of the excavation sides or banks may be used as protection in lieu of the sheeting and shoring required by this Part (rule), . . . provided such sloping conforms to the values set forth in Table I of this Subpart.

Plaintiff argues that no such sheeting or shoring was provided as required by Industrial Code § 23-4.2(a) and that Defendants opted to use vertical excavation instead of sloping as required by Industrial Code § 23-4.2(b). Plaintiff argues, as a result, that no means of protection against collapse or cave-ins was provided.

Plaintiff also submits an affidavit and report from Leo Debobes, a Certified Safety Professional, who opines that Defendants actions (or inaction) were in violation of sections 23-4.2(a) and 23-4.2(b) of the Industrial Code for failing to provide sloping, shoring or bracing to protect against the collapse of the trench wall.

However, Defendant submits an affidavit from Andrew Yarmus, a Professional Engineer, who stated that shoring of a trench must occur after the excavation of the trench, or at least each section of a trench, has taken place, and that shoring cannot take place either before or immediately concurrent with the excavation of a trench or trench section.

Yarmus' affidavit is sufficient to raise a question of fact whether the failure to shore the trench while it is in the process of being dug violated the cited Industrial Code provisions. Therefore, both Plaintiff's and Defendants' motions as to § 241(6) must be denied.

## Labor Law § 200 and Common Law Negligence

Plaintiff moves for summary judgment on the issue of liability pursuant to Labor Law § 200 against Defendants.

Defendants cross-move to dismiss Plaintiff's claims pursuant to Labor Law § 200.

“Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work” (*Ferrero v. Best Modular Homes, Inc.*, 33 AD3d 847, 850 [2d Dept 2006]). “An implicit precondition to this duty ‘is that the party charged with that responsibility have the authority to control the activity bringing about the injury’” (*id.*, quoting *Reilly v. Newireen Assoc.*, 303 AD2d 214, 219 [1st Dept 2003]).

“Where the alleged defect or dangerous condition arises from the subcontractor's methods and the owner or general contractor exercise no supervisory control over the operation, no liability attaches to the owner or general contractor under the common law or under Labor Law § 200” (*Ferrero v. Best Modular Homes, Inc.*, 33 AD3d at 850]).

Plaintiff's accident arose from the means and methods employed by his employer, non-party Stasi, and the Defendants did not control or supervise Plaintiff's work.

While Defendants had general supervisory authority over the project, such general authority is an insufficient basis for liability under Labor Law § 200 (*see Harrison v. State*, 88 AD3d 951 [2d Dept 2011]; *see also Debenedetto v. Chetrit*, 190 AD3d 933 [2d Dept 2021]; *Lombardi v. New York*, 175 AD3d 1521 [2d Dept 2019]; *Poulin v. Ultimate Homes, Inc.*, 166 AD3d 667 [2d Dept 2018]).

To be liable pursuant Labor Law § 200, a defendant must supervise or bear responsibility for the manner in which the specific work which caused the accident was

performed (*see Erickson v. Cross Ready Mix, Inc.*, 75 AD3d 519 [2d Dept 2010]; *Enos v. Werlatone, Inc.*, 68 AD3d 712 [2d Dept 2009]).

Therefore, Plaintiff's Labor Law § 200 and common law claims must be dismissed.

WHEREFORE, it is ORDERED that the portion of Plaintiff's motion for summary judgement on his claim pursuant to Labor Law § 240(1) is Granted; and it is further,

ORDERED, that that portion of Defendants' cross-motion to dismiss Plaintiff's Labor Law § 240(1) is Denied; and it is further,

ORDERED, that that portion of Plaintiff's motion for summary judgement on his claim pursuant to Labor Law § 241(6) is Denied ; and it is further,

ORDERED, that that portion Defendants' cross-motion to dismiss Plaintiff's Labor Law § 241(6) claims is Denied; and it is further,

ORDERED, that that portion of Plaintiff's motion for summary judgement on his claim pursuant to Labor Law § 200 is Denied and common law negligence; and it is further,

ORDERED, that that portion of Defendants' cross-motion to dismiss Plaintiff's Labor Law § 200 and common law negligence claims is Granted.

This constitutes the decision and order of the Court.

ENTER,



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J.S.C.