

New York Labor Law §240: Are Trench Wall Collapses Covered?

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New York Labor Law §240(1) imposes absolute liability on owners and general contractors who fail to provide adequate and sufficient safety devices, resulting in a worker's injury.

It is well settled that "not every hazard or danger encountered in a construction zone falls within the scope of Labor Law §240(1) as to render the owner or contractor liable for an injured worker's damages." *Misseritti v. Mark IV Constr. Co.*, 86 N.Y.2d 487, 490 (1995).

The central issues in determining the applicability of Labor Law §240(1) are whether the injury resulted from a gravity-related incident, generally from a falling object hitting a worker or a worker falling from a height, and whether the worker was "erect[ing], demoli[shing], repairing, altering, painting, cleaning or pointing... a building or structure."

In the context of Labor Law §240(1), courts interpret the term "structure" liberally as "any production or piece of work artificially built up or composed of parts joined together in some definite manner," which historically courts



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have applied to holes and trenches. *Caddy v. Interborough R.T. Co.*, 195 N.Y. 415, 88 N.E. 747, 20 N.Y. Ann. Cas. 198 (N.Y. 1909).

However, there is currently a marked split among the appellate departments in New York concerning whether an injury resulting from a trench wall collapse is protected under Labor Law §240(1).

First Department

The First Department has ruled in *Rivas v. Seward Park Hous. Corp.*, 219 A.D.3d 59, 66 (1st Dept. 2023), that accidents involving a below-graded trench wall collapse implicate Labor Law §240(1) despite case law from other departments holding otherwise.

The claim arose when, during an exploratory excavation to find a leak in a building's external water pipes, the worker knelt to excavate the pipe and subsequently became buried when the wall of the 12-foot trench in which he was working collapsed. He testified that only two of the four walls were secured by trenching.

The First Department overruled the trial court and reversed the finding that the defendants were entitled to summary judgment dismissing the case.

The Rivas court ruled that the trench wall collapse was directly caused by the effect of gravity and, as the worker was kneeling in the trench at the time of the accident, there was a significant elevation level differential.

Thus, because the worker was altering the structure of the trench and the parties failed to provide the worker with sufficient safety equipment or protection from a gravity-related risk, Labor Law §240(1) was implicated.

In a footnote, The First Department noted that there was no direct controlling authority on this issue and that the trial court "was bound to follow the on-point precedents from our sister departments" which held that trench wall collapses were not governed by Labor Law §240(1).

However, the First Department further stated that it was "not so bound" and declined to "follow the Appellate Division authority identified by [the] Supreme Court."

Second Department

The Second Department has held that trench collapses are not within the class of hazards that Labor Law §240(1) was intended to guard against. The court held in *Natale v. City of New York*, 33 A.D.3d 772, 774 (2d Dept. 2006), that the involvement of the force of gravity in the

accident is not enough on its own to invoke Labor Law §240(1).

Rather, the worker had to show that the object which caused the injury fell while being hoisted or secured because of the inadequacy or absence of safety equipment. The walls of an excavated trench, to the Second Department, did not satisfy these contemplated criteria intrinsic to Labor Law §240(1)'s plain language.

Similarly, in *Ferreira v Village of Kings Point*, 56 A.D.3d 718, 719 (2d Dept. 2008), the court found that the Village of Kings Point was not liable where a worker was half buried by a collapsing trench wall that he was excavating by hand. The Second Department again noted that trench wall collapses were not within the intended class of hazards contemplated by Labor Law §240(1).

Third Department

The claim in *Pinheiro v. Montrose Improvement Dist.*, 224 A.D.2d 777, 778 (3d Dept. 1996) arose when falling earth and stones from the walls of a trench injured a worker installing a pipeline. The court specifically cited the Court of Appeals decision in *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 514 (N.Y. 1991), where the Court of Appeals noted:

The contemplated hazards [of Labor Law §240(1)] are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured.

In *Pinheiro*, the court reasoned that although gravity was a cause of the injury, the walls of a trench were not being "hoisted or secured," and

thus the collapse of the trench walls did not implicate Labor Law §240(1).

Fourth Department

The Fourth Department has consistently held that Labor Law §240(1) does not apply to trenches nor excavations. In *Staples v Amherst*, 146 A.D.2d 292 (4th Dept. 1989), the wall of a ten-to-11-foot-deep excavated trench collapsed as the worker attempted to shore the sides of the trench with sheets of plywood. The town of Amherst did not provide the workers with any protection or safety devices.

The Fourth Department noted that if Labor Law § 240(1) were to apply to trench excavations, Labor Law §241(6) would be rendered superfluous, as Labor Law §241(6) specifically applies to the shoring of excavation sites. In keeping with the legislature's intent that Labor Law §241(6) requires excavation sites to be safeguarded, the court in *Staples* declined to apply §240(1).

In *Kelleher v. First Presbyterian Church*, 158 A.D.2d 946, 946-47 (4th Dept. 1990), a worker was injured when the wall of a five-to-six-foot-deep trench collapsed. It was undisputed that the trench was not shored; no shields were provided to protect the worker; and the direct supervisor on the job ignored the excavator's advice that the trench be shored.

While the court noted that the defendants had a duty to provide workers with a safe working environment, that duty did not arise under Labor Law §240(1), citing the court's previous decision in *Staples*. Similarly, in *Rogers v. County of Niagara*, 209 A.D.2d 1034, 1034 (4th

Dept. 1994), the court held that the trial court properly dismissed the plaintiff's Labor Law §240(1) claim but reinstated the plaintiff's Labor Law §241(6) claim where the wall of a trench collapsed and injured a worker.

Conclusion

While the Second, Third, and Fourth Departments have generally held that Labor Law §240(1) does not apply to trench wall collapses, the First Department recently reached the opposite conclusion in *Rivas*.

The Second, Third, and Fourth Departments agree that a trench wall collapse is not within the intended class of hazards covered by Labor Law §240(1). However, the First Department in *Rivas* held that the "earthen wall...required securing for the purposes of the undertaking," thus placing trench wall collapses in the "falling object" category of labor law claims.

Significantly, *Rivas* also noted that the cases in the three sister departments were decided years before the Court of Appeals cases of *Runner v New York Stock Exch., Inc.*, 13 N.Y.3d 599, (N.Y. 2009), and *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 N.Y.3d 1 (N.Y. 2011), which greatly expanded the reach of the Labor Law, specifically with regard to falling objects.

Accordingly, this discrepancy in the treatment of trench wall collapses by the various departments makes this issue ideal for review by the Court of Appeals.

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