Mustafaj v City of New York
2025 NY Slip Op 35259(U)
April 11, 2025
Supreme Court, Bronx County
Docket Number: Index No. 800323/2022E
Judge: Andrew J. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IA PART 4

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ISMAJL MUSTAFAJ,

Plaintiff,

-against-

THE CITY OF NEW YORK, et al.,

Defendants.

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Index №. **800323/2022E**

Hon. ANDREW J. COHEN

The following numbered papers were read on this motion (Seq. No. 003) to **SUMMARY JUDGMENT** noticed on **November 21, 2024** .

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No (s). 80 - 94
Answering Affidavit and Exhibits	No (s).
Replying Affidavit and Exhibits	No (s).

The motion is granted in accordance with the annexed Decision and Order.

This Constitutes the Decision and Order of this Court.

Dated: April 11, 2025

Hon. _____
ANDREW J. COHEN, J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☒ CASE STILL ACTIVE
2. MOTION IS..... ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

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Hon. ANDREW COHEN

DECISION & ORDER
(Motion Seq. Nos. 2 & 3)

Andrew J. Cohen, J.

In motion Sequence # 002, plaintiff Ismajl Mustafaj (hereinafter "plaintiff") moves for an Order granting plaintiff partial summary judgment as to liability on his Labor Law §240 (1) and Labor Law §241(6]) claims against defendants. The City of New York and the Department of Transportation of the City of New York (the "City" defendants) move, pursuant to CPLR §§ 3211 and 3212, for an order granting summary judgment and dismissing the complaint and all cross-claims in favor of the City defendants (Motion Sequence #003). Plaintiff's motion (002) is denied and City's motion (003) is granted for the following reasons.

Background

In this negligence action to recover damages for personal injuries plaintiff claims that, as he worked as a plumber for non-defendant O'Grady Plumbing at a construction project on a sidewalk and in the street in front of the buidling known as 4257 Katonah Avenue, Bronx, New York on June 11, 2021, he allegedly sustained an injury resulting from a metal pipe weighing approximately 400 pounds that fell into the trench that plaintiff was working in and struck plaintiff in the back. At the time of the incident, plaintiff was part of a team that was excavating and performing plumbing work in order to connect water service from the street to the building and was standing in a trench bending over and looking down at the bottom of the trench. The City of New York owned Katonah Avenue and the sidewalk abutting the property where the trenches were dug.

Plaintiff initiated this action against Themel Holdings, LLC ("Themel") and Village Cleaning and Equipment, LLC ("Village Cleaning"). The building was owned by defendant

Themel, which leased to defendant Village Cleaning. Ultimately, a number of other actions were consolidated and, consequently, the remaining defendants also include the City defendants.

Summary Judgment Standard

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]; *Friends of Thayer Loke LLC v Brown*, 27 NY3d 1039, 1043 [2015]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party (*Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824 [2014]).

Plaintiff's Motion (Seq. No. 002)

Plaintiff asserts that defendants, as owners and lessee, are strictly liable under Labor Law §§ 240 (1) and 241(6) because they failed to protect plaintiff from a falling pipe that should have been secured and failed to provide adequate safety devices. Plaintiff reasons that City defendants and Themel are strictly liable since the City of New York is the owner of the street and sidewalk, and Themel owned the building undergoing the renovation. Plaintiff asserts that defendant Village Cleaning, as a lessee who contracted for and benefited from the work, is the functional equivalent of an owner for the purposes of the Labor Law. In support of the motion, plaintiff submits, inter alia, a transcript of his 50-h hearing held on November 23, 2021 (NYSCEF Doc. No. 67); transcripts of plaintiffs EBT held on November 3 and November 13, 2023 (NYSCEF Doc. Nos. 68, 69); the EBT dated March 28, 2024 of Pjeter Paloka, the Property Manager for Themel Holdings, who also identified himself as Store Manager for Village Cleaning; the Affidavit of co-worker Zeqir Haluci (NYSCEF Doc. No. 74); and the plumbing proposal from the plaintiff's employer, O'Grady Plumbing (NYSCEF Doc. No. 75) for the to be done at 4257 Katonah Avenue.

Labor Law § 240 (1) provides, in relevant part, that all contractors and owners and their agents . . . "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the

performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed" and imposes on owners or general contractors and their agents a nondelegable duty and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks. The statute does not apply, however, to any and all perils connected in some tangential way with the effects of gravity, but rather only applies where the plaintiff's injuries result from an elevation-related risk and the inadequacy of a safety device" (*Lemus v New York B Realty Corp.*, 186 AD3d 1351, 1352, 128 NYS3d 878 [2d Dept 2020]). A plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*Soczek v 8629 Bay Parkway*, 193 AD3d 1093, 1094, 2021 NY Slip Op 02554 [2d Dept 2021].

First, the City defendants did not own the building or structure that contracted for the work, had no involvement in this project other than bureaucratic requirements that the plumbing contractor had to fulfill and had no duty to provide protection. Therefore, the City defendants are not the owners within the meaning of Labor Law. The plaintiff's motion also fails with respect to the other two defendants, Themel and Village Cleaning.

Regardless of which remaining defendants could be held strictly liable for a violation of Labor Law, the plaintiff has failed to make a prima facie showing of entitlement to summary judgment as a matter of law because there is no admissible evidence of a person with first-hand knowledge who witnessed the accident or the circumstances surrounding the accident. Based on the various documents in submission, it is unclear how or why the accident happened.

During plaintiff's 50-h hearing, plaintiff testified that he does not know how the accident happened (NYSCEF Doc. No. 67, Exhibit F, p. 32, Line 21) and speculated that the pipe was dropped by co-workers "by accident" who were "not paying attention." Plaintiff stated that he didn't see anything (Id., p.40 – 41). Similarly, plaintiff testified that co-workers, Zeqir, Darden and Shemsedim came after the accident happened (Id., p. 74 – 75). In his deposition, plaintiff speculates that the pipe may have been dropped and thus, plaintiff, by his own admissions, is not sure how the pipe fell into the trench (see Exhibit G, 83; Exhibit G2, 194, 202, 232).

Plaintiff's testimony is further sabotaged by his repeated refusal to use an interpreter. While he admits that he doesn't understand English very well, only understands "a little bit" and only understands "some" he insists on testifying without an interpreter (Id., p.10, beginning at

line 21). By choosing not to use an interpreter, plaintiff's answers to simple questions don't make sense, or are confusing, ambiguous or contradictory. For example, when asked whether he had been known by any other name, plaintiff repeated his name. He then stated that he was known as Johnson Jones, but that he did not know why and provides a confusing explanation (Id. beginning at p.11, line 7 and continuing on p.12)

Mr. Paloka, the property manager, stated during his EBT that he was not present at the time of the accident. Mr. Paloka does not know what a hoist or chock looks like (p. 44 – 45, 61). Mr. Paloka's account is that the foreman told him that two of his employees were standing near the pipes, and said that they placed the pipes close to the edge and a pipe had rolled in and fell on plaintiff. (Paloka EBT, NYSCEF Doc. No. 70, p. 107)

The vague affidavit of Haluci attempts to support some version of the accident: that a pipe somehow rolled from the edge of the excavation and that "No chocks or other devices were provided to secure the pipe to prevent it from rolling and falling. No overhead protection was in place over the excavation to protect the worker inside the excavation. No materials hoist was on site to lower the cast iron pipes into the excavation. No hard hats had been provided to the O'Grady Plumbing workers." (NYSCEF Doc. No. 74, Exhibit L, ¶ 5). This affidavit of a person who was not deposed fails to clarify whether or not Haluci had first hand knowledge or that he actually saw what happened, contradicts plaintiff's statement that there were no witnesses and that the pipe may have been dropped by accident by people who weren't paying attention, and therefore lacks probative value and is insufficient, standing alone, to support summary judgment. Castro v. N.Y. Univ., 5 A.D.3d 135 (1st Dept. 2004, citing *Republic Nat'l Bank v. Luis Winston, Inc.*, 107 A.D.2d 581 (1st Dept. 1985).

City Defendants' Motion (Seq. No. 003)

For the reasons stated above, the City defendants have demonstrated their entitlement to summary judgment as a matter of law. The City defendants did not own the building or structure that contracted for the work, had no involvement in this project other than bureaucratic requirements and had no duty to provide protection. Therefore, the City defendants are not the owners within the meaning of Labor Law. The plaintiff's contention that the Labor Law sections relied upon create a duty and/or absolute is misguided. to Any arguments not specifically addressed have been reviewed and have been found unavailing by this Court.

Accordingly, it is hereby

ORDERED that the plaintiff's motion (Mot. Seq. 2) is denied; and it is further

ORDERED that the City defendants' motion (Mot. Seq. 3) is granted.

This Constitutes the Decision and Order of this Court.

Dated: 4/11/2025 **Hon.** _____

ANDREW J. COHEN, J.S.C.