

**Quiceno v Rifkin**

2003 NY Slip Op 30003(U)

December 12, 2003

Supreme Court, New York County

Docket Number: 5\_30011/5030

Judge: Marcy S. Friedman

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

MARCY S. FRIEDMAN

PRESENT: \_\_\_\_\_

PART 57

Justice

0115030/2001

QUICENO, NORLEY

VS

RIFKIN, BEATRICE

SEQ 3

PARTIAL SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion ~~to~~/for summary judgment

Notice of Motion/ & Cross-motions Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1, 2, 3	_____
4	_____
5, 6	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion and cross-motions

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

SCANNED  
DEC 18 2003

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 12/12/03

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

---

NORLEY QUICENO, x

*Plaintiff(s),*

Index No.: 115030101

- against -

DECISION/ORDER

BEATRICE RIFKIN, HAROLD RIFKIN, HELEN  
SUNSHINE, HERBERT KROSNEY, ELLEN  
SHOCKRO, CONSTANCE NORRIS, ESTATE OF  
BERNARD KROSNEY and GRANTOR  
RETAINED INCOME TRUST dated April 26,  
1988, individually and d/b/a/ PHILIP WEISS  
COMPANY, GLUCK VENTURES, LTD. f/k/a  
JOSEPH GLUCK FABRICS, INC., d/b/a 4324  
COMPANY, OLMSTEAD PROPERTIES, INC.,  
HARRINGTON a/k/a HARRINGTON  
ENGINEERING, MIGEL RUMIE a/k/a MIGUEL  
ANGEL a/k/a MIGUEL ANGELES d/b/a MIGUEL  
ANGEL INTERIORS, and ABRAHAM A.  
ROSEN,

*Defendant(s).*

---

x

In this Labor Law action brought under sections §§ 200, 240(1), and 241(6), plaintiff sues for damages allegedly sustained in a fall from a ladder while working at a construction site at 43 West 24<sup>th</sup> Street on March 14, 2000. Plaintiff moves against all defendants for partial summary judgment as to liability on his Labor Law § 240(1) cause of action. Defendants John Harrington Construction, Inc. and John Harrington, individually (s/h/a Harrington Engineering, JDH Coatings and Construction Inc.) (“Harrington”), cross-move for partial summary judgment dismissing plaintiffs causes of action under §§ 200 and 241(6). Defendants Beatrice Rifkin,

Harold Rifkin, Helen Sunshine, Herbert Krosney, Ellen Shockro, Constance Norris, Estate of Bernard Krosney and Grantor Retained Income Trust, Philip Weiss Company, Gluck Ventures, Ltd. f/k/a Joseph Gluck Fabrics, Inc., the Estate of Abraham A. Rosen (s/h/a Abraham A. Rosen), and Olmstead Properties, Inc. (collectively “Olmstead”) also cross-move for partial summary judgment dismissing plaintiffs Labor Law § 241(6) claim.

As a threshold matter defendants argue that plaintiffs motion should be denied as untimely. The motion is untimely because served more than 60 days after the filing of the note of issue in violation of the Supreme Court, New York County rules. (Rule 17 [NYLJ].) However, the motion was brought within 120 days of the filing of the note of issue (see CPLR 3212 [a]), and is potentially dispositive. The court will accordingly exercise its discretion to entertain the motion. (See Trump Vil. Section 3. Inc. v New York State Hous. Fin. Agency, 307 AD2d 891 [1<sup>st</sup> Dept 2003]. See also Gonzalez v 98 Mag Leasing Corp., 95 NY2d 124 [2000].)

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment “the opposing party must ‘show facts sufficient to require a trial of any issue of fact’ (CPLR 3212, subd. [b]).” (Zuckerman v City of New York, *supra*, at 562.)

Labor Law §240(1) provides:

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.

“The purpose of the section is to protect workers by placing the ‘ultimate responsibility’ for worksite safety on the owner and general contractor, instead of the workers themselves.” (Gordon v Eastern Ry. Supply. Inc., 82 NY2d 555, 559 [1993]; Rocovich v Consolidated Edison Co., 78 NY2d 503, 513 [1991].) “Thus, section 240(1) imposes absolute liability on owners, contractors, and their agents for any breach of the statutory duty which has proximately caused injury.” (Gordon, 82 NY2d at 559.)

It is further settled that “the availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures.” (Conway v New York State Teachers’ Retirement Sys., 141 AD2d 957, 958-959 [1988]. Accord Smizaski v 784 Park Ave. Realty, Inc., 264 AD2d 364, 365 [1<sup>st</sup> Dept 1999], mod 715 NYS2d 631 [2000].) A defendant’s liability under Labor Law §240(1) “is established as a matter of law by [its] failure to provide safety devices adequate to prevent plaintiffs injuries.” (Laauidara v HRH Constr. Corp., 283 AD2d 169 [1<sup>st</sup> Dept 2001].)

At the time of his accident, plaintiff was employed by defendant Miguel Angel Interiors (“Angel”) as a plastering laborer.’ Defendant Harrington was the general contractor at the premises and sub-contracted with Angel for renovation of the premises. The Olmstead

---

<sup>1</sup> Plaintiffs employer (s/h/a Migel Rumie a/k/a Miguel Angel a/k/a Miguel Angeles d/b/a Miguel Angel Interiors), has not appeared in this action and is in default.

defendants were the owners and/or managing agent. Plaintiff alleges that at the time of his accident, he fell from a ladder while plastering the lobby wall at the premises. The parties agree that dried plaster had collected on the rungs of the ladder, although they dispute whether it was plaster from previous work or from plaintiffs work on the date of the accident.

In moving for partial summary judgment on his §240(1) cause of action, plaintiff does not allege that the ladder itself was structurally defective. Rather, he contends that the ladder provided inadequate protection. In opposition, defendants allege that plaintiffs acts were the sole proximate cause of his injury, and that the ladder adequately protected him.

Plaintiff testified at his deposition that he was working on a metal A-frame ladder that was provided by his employer Angel (P.'s Dep. at 18, 22, 36), and that the ladder was "in good shape." (Id. at 24.) He further testified that at the time of the accident, he "went down and the ladder moved. I don't know how it happened. As I was going down I fell and I really fell." (P.'s Dep. at 37.) He also stated "I was at the top of this ladder and I went down some rungs and then I fell. I don't know if it was because the ladder moved or there was some plaster on it and I slipped." (Id.) He further testified that when he was at the top of the ladder he "felt it was moving, it was shaking" (id. at 71), and that the ladder moved when he started going down. (Id. at 73.) Plaintiff also submitted an affidavit attesting that "[i]n using the ladder, I was not provided with any safety devices to protect me from injury." (P.'s Aff. In Support at 3.)

Plaintiffs testimony that he was not provided with additional safety devices, that the rungs of the ladder were coated with plaster, and that the ladder moved and shook prior to his fall makes a prima facie showing that defendants failed to provide adequate protection to plaintiff

and that this failure was a proximate cause of his injuries. (See Orellano v 29 E. 37<sup>th</sup> St. Realty Corp., 292 AD2d 289, 291 [1<sup>st</sup> Dept 2002]; Cruz v Tumer Constr. Co., 279 AD2d 322 [1<sup>st</sup> Dept 2001].)

In opposition to the motion, defendants fail to raise a triable issue of fact as to whether plaintiffs acts were the sole proximate cause of his injuries. In so holding, the court rejects their apparent contention that the allegedly good condition of the ladder prior to the accident raises an issue of fact as to whether plaintiffs acts caused his accident. (See Cruz v Turner Constr. Co., 279 AD2d 322, supra.)

Defendants also rely on an unsworn medical report which attributes the following statement to plaintiff: “ ‘[A]ll of a sudden’, he missed a step causing him to lose his balance, twist his body and he fell to the ground. (See Report of Dr. Navedo-Rivera dated April 13, 2000.) This testimony is insufficient to show that plaintiffs misstep was the sole cause of his accident, under these circumstances in which it is undisputed “that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent.” (Orellano, 292 AD2d at 291.) Similarly, the fact that plaintiff gave more than one explanation as to the possible cause of his fall does not bar partial summary judgment as to liability given the uncontested evidence that the absence of adequate safety devices was at least one cause of the fall. (See id.)

Defendants’ further claim that plaintiff mispositioned the ladder, and therefore was the sole proximate cause of his accident, is also unavailing. In support of this claim, defendants rely on the testimony of the premises superintendent, Louis Salazar, that the ladder was incorrectly positioned because the steps were facing the wall. (See Salazar Dep. at 27-28, 49-51.) However, Mr. Salazar observed the ladder only after the accident: He stated that he did not see the work

area before the accident. (Id. at 57.) Moreover, plaintiff testified that when he fell, the ladder also fell. (P.'s Dep. at 38.) Under these circumstances in which plaintiff's testimony is uncontradicted and defendant fails to offer any evidence that the ladder was in the same condition before and after the accident, Mr. Salazar's testimony cannot serve to raise a triable issue of fact as to whether plaintiff mispositioned the ladder.

In the alternative, defendants appear to dispute that plaintiff fell from the ladder. In support of this contention they rely upon the testimony of Mr. Salazar that plaintiff's co-worker told him [Salazar] that plaintiff's injuries occurred from his cutting his hand with a spatula, rather than from falling off the ladder. (See Salazar Dep. at 54-55.) While defendants correctly contend that hearsay may be used in opposition to a motion for summary judgment, "this is true only where it is not the only evidence offered, where the declarant is presumably available to testify in accordance with his or her prior statement or where there is a reasonable excuse for failing to submit the evidence in admissible form." (Stankowski v Kim, 286 AD2d 282, 283 [1<sup>st</sup> Dept 2001] [internal citations omitted], lv dismissed 97 NY2d 677.) None of these circumstances are present here. The record does not contain any prior sworn statement by the co-worker, and defendants merely conclusorily allege in their reply papers that the co-worker is unavailable to testify.

Finally, defendants' contention that plaintiff was the sole witness to his accident does not preclude summary judgment, where, as here, defendants do not submit any evidence in admissible form as to the circumstances of the accident. (See Cruz v Turner Constr. Co., 279 AD2d 322, supra; Klein v City of New York, 222 AD2d 351 [1<sup>st</sup> Dept 1995], aff'd 89 NY2d 833 [1996].)

The court accordingly holds that plaintiff is entitled to summary judgment as to liability on his Labor Law §240(1) cause of action. In view of this holding, the court does not reach defendants' cross-motions which seek dismissal of plaintiffs Labor Law §§ 200 and 241(6) causes of action.

It is hereby ORDERED as follows:

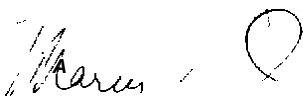
Plaintiffs motion is granted to the extent of awarding plaintiff partial summary judgment as to liability against all defendants on plaintiffs Labor Law §240(1) cause of action; and it is further

ORDERED that an assessment of damages on the Labor Law §240(1) cause of action shall be held at the time of trial, or after any other disposition of the underlying action, upon the filing of a note of issue, if not already filed, and payment of the proper fees, if any; and it is further

ORDERED that defendants' cross-motions are denied in their entirety.

This constitutes the decision and order of the court

Dated: New York, New York  
December 12, 2003

  
\_\_\_\_\_  
MARCY FRIEDMAN, J.S.C.