

**Bonestell v Gen-Plus, Inc.**

2007 NY Slip Op 30037(U)

March 8, 2007

Supreme Court, Ulster County

Docket Number: 0050047

Judge: George B. Ceresia

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ULSTER

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MICHAEL BONESTELL,

Plaintiff,

-against-

Index No.: 05-0047

RJI No.: 55-05-00948

GEN-PLUS, INC. and MICHAEL TISCHLER,

Defendants.

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All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

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### **DECISION/ORDER**

George B. Ceresia, Jr., Justice

Plaintiff commenced the instant action seeking recovery for injuries sustained when the base of a ladder slid out, causing him to fall. Plaintiff has moved for partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1) against defendant Gen-Plus, Inc. (hereinafter defendant). Defendant has cross-moved for summary judgment dismissing those portions of the complaint seeking recovery pursuant to Labor Law §§ 200 and 241 (6). There being no opposition to that portion of the cross-

motion addressed to Labor Law § 200, such claim shall be dismissed.

Summary judgment is a drastic remedy which should only be granted when it is clear that there are no triable issues of fact (see Andre v Pomeroy, 35 NY2d 361, 364 [1974]). “[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see also Bush v St. Clare's Hosp., 82 NY2d 738, 739 [1993]). In order to meet this burden when seeking dismissal of a cause of action, a party must submit evidence which negates any meritorious cause of action encompassed by the pleadings (Franceschi v Consolidated Rail Corp., 142 AD2d 915 [3d Dept 1988]; see also Hirsh v Bert's Bikes and Sports, 227 AD2d 956 [4th Dept 1996]; Wilder v Rensselaer Polytechnic Inst., 175 AD2d 534 [3d Dept 1991]). Once the movant has established a right to judgment as a matter of law, the burden shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of material fact (see Zuckerman v City of New York, 49 NY2d 557 [1980]). In general, the Court will then view the evidence in a light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference, and determine whether there is any triable issue of fact (see Boyce v Vazquez, 249 AD2d 724, 726 [3d Dept 1998]; Martin v Briggs, 235 AD2d 192, 196 [1st Dept 1997]; Simpson v Simpson, 222 AD2d 984, 986 [3d Dept 1995]).

Plaintiff was injured while installing vinyl siding on the soffit and fascia near the peak of the roof of an addition to defendant Tischler's residence. He was about to hang a piece of vinyl siding when the base of the ladder upon which he was working slipped out, causing the ladder and plaintiff to fall. The record establishes that defendant did not direct or control the work. It is also unclear whether defendant or plaintiff's employer owned the ladder which was the instrumentality of plaintiff's injuries. However, there is no indication of any defect in the ladder itself. Rather, the record establishes that the fall was caused by the manner of placement of the ladder.

Defendant contends that summary judgment is inappropriate because the fall was unwitnessed, plaintiff has not identified or alleged any defect in the ladder, and plaintiff placed the ladder himself without assistance from anyone else, which constituted the sole proximate cause of the accident. It is well settled that the fact that a fall is unwitnessed does not preclude an award of summary judgment on such issue (see Rivera v Dafna Constr. Co., 27 AD3d 545 [2d Dept 2006]; Ewing v ADF Constr. Corp., 16 AD3d 1085 [4th Dept 2005]; Darling v Solomon, 227 AD2d 851 [3d Dept 1996]; Macutek v Lansing, 226 AD2d 964 [3d Dept 1996]). Plaintiff's employer testified in his examination before trial that he did not witness the accident, but was in the immediate vicinity when it happened. He heard a loud crash and immediately went to investigate. He found the ladder upon which plaintiff had been working lying on the ground perpendicular to the wall of the addition with the top of the ladder still against the wall. Plaintiff was still on

top of the ladder in the process of getting up from a horizontal position. Such proof is consistent with plaintiff's testimony in his examination before trial that the ladder slid down the wall when the feet of the ladder kicked out. There is no indication that plaintiff's version of the circumstances surrounding his injury is false or fabricated, or that it contains any significant inconsistencies. As such, the fact that his fall was unwitnessed does not preclude summary judgment. There is also no requirement that the ladder have some physical defect, as the statute also requires that ladders be properly placed (see Ball v Cascade Tissue Group-N. Y., \_\_ AD3d \_\_, 2007 N.Y. Slip Op. 00436 [3d Dept 2007]).

Defendant contends that because plaintiff was responsible for the placement of the ladder, plaintiff's conduct was the sole proximate cause of the fall, citing *inter alia* Blake v Neighborhood Hous. Servs. of N. Y. City, (1 NY3d 280 [2003]). However, the plaintiff in Blake admitted that the ladder he had been using was not defective and was properly placed in a stable position with no need to have it steadied during use (*id.* at 284). The jury apparently found that the sole reason for plaintiff's fall was his misuse of the ladder and failure to lock certain extension clips.

The issue of sole proximate cause has spawned a number of apparently inconsistent appellate decisions. For instance, the Appellate Division, Third Department, in Danton v Van Valkenburg, (13 AD3d 931 [3d Dept 2004]), held that summary judgment was properly denied based upon evidence that a fall may have been caused by

plaintiff's negligence in leaning too far, rather than because the ladder bent and collapsed. However, in the same year, the Appellate Division, Third Department, held that the "fact that plaintiff may have been extending or reaching from the ladder would implicate comparative negligence, which is not a defense to a section 240(1) action. Accordingly, we conclude that plaintiff's motion for partial summary judgment should have been granted." (Gilbert v Albany Med. Cent., 9 AD3d 643, 645 [3d Dept 2004]).

Notwithstanding such inconsistencies, it appears that in order for plaintiff's conduct to constitute the sole proximate cause of a fall sufficient to take it out of the protection of the Labor Law, there must be proof that the plaintiff was misusing the ladder (see Morales v Spring Scaffolding, 24 AD3d 42, 48 [1st Dept 2005]; Morin v Machnick Bldrs., 4 AD3d 668, 670 [3d Dept 2004]). Negligence by a plaintiff in the placement of a ladder does not constitute a defense to liability (see Morin v Machnick Bldrs., 4 AD3d at 670).

The facts of the instant case appear indistinguishable from those in Morin. The plaintiff therein was injured when the ladder upon which he was working slipped away from a wall because it had been placed upon an icy surface. The Court concludes that plaintiff's proof that the base of the ladder slipped out, causing the ladder to fall, constitutes a prima facie showing of a violation of Labor Law § 240 (1), thereby meeting his burden on the motion for summary judgment of liability (see Gilbert v Albany Med. Ctr., 9 AD3d at 644; Morin v Machnick Bldrs., 4 AD3d at 670; Tavarez v Weissman, 297

AD2d 245 [1st Dept 2002]; Squires v Robert Marini Bldrs., 293 AD2d 808 [3d Dept 2002]; Smith v Pergament Enters. of S.I., 271 AD2d 870 [3d Dept 2000]).

Defendants have failed to offer any proof that plaintiff was in any sense misusing the ladder at the time of his fall nor have they raised any other triable issue of fact concerning liability pursuant to Labor Law § 240 (1). It is therefore determined that plaintiff is entitled to partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1).

In order to recover pursuant to Labor Law § 241(6), plaintiff must show a violation of a regulation which imposes a specific standard, not a general one (see Lawyer v Rotterdam Ventures, 204 AD2d 878, 880-881 [3d Dept 1994]). Plaintiff's bill of particulars alleges that defendants violated 12 NYCRR § 23-1.21. It has been held that the provisions of 12 NYCRR § 23-1.21 (b) (4) are sufficiently specific to impose liability (see Sopha v Combustion Eng'g., 261 AD2d 911, 912 [4th Dept 1999]). Clause ii of such paragraph provides "[a]ll ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings." Plaintiff's employer testified in his examination before trial that the ladder was placed on an icy plywood surface. Plaintiff testified in his examination before trial that the ladder slid down the wall. The circumstances of the fall give rise to an inference that the base of the ladder slipped out away from the wall because it was placed on a slippery surface. Defendant has clearly failed to meet its burden of conclusively establishing that the

regulation was not violated or that the violation did not proximately cause the fall.

Plaintiff also contends that defendant violated clause iv of such paragraph. Clause iv provides in part “[w]hen work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used.” Plaintiff contends that because he was working more than 10 feet above the ladder footing, the ladder was required to be secured at the upper end and that the lower end must have been held in place by a person or tied to a secure anchorage. However, the requirement of securing the upper end is on its face intended to protect against side slipping. The instant accident did not involve side slipping, and as such, the alleged violation could not have been a proximate cause of the fall. Moreover, it is uncontroverted that the ladder was equipped with rubber safety feet. As such, there was no requirement under the regulation that the ladder be held or tied down at its base. It is therefore determined that defendant has made a prima facie showing of a right to summary judgment dismissing the Labor Law § 241 (6) claim based upon an alleged violation of 12 NYCRR § 23-1.21 (b) (4) (iv).

Plaintiff has submitted an affidavit from a safety engineer opining that there was a violation of Labor Law § 240 (1). He also opined that the ladder should have been held in place by a person at the bottom of the ladder. However, the affidavit does not address the exception for ladders equipped with safety feet. Moreover, since the issues involve

construction of the regulation, the expert opinion is not probative or sufficient to oppose the cross-motion for summary judgment (see M & E Mfg. Co. v Frank H. Reis Inc., 258 AD2d 9, 13 [3d Dept 1999]). Plaintiff has therefore failed to raise a triable issue of fact on such issue.

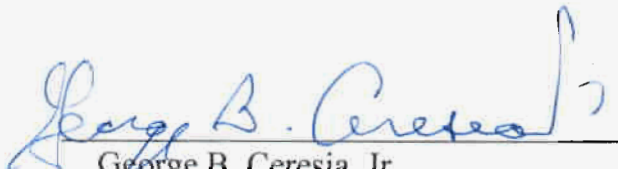
Accordingly it is

**ORDERED** that plaintiff's motion for partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1) is hereby granted, and it is further

**ORDERED** that defendant's cross-motion to dismiss plaintiff's claims pursuant to Labor Law §§ 200 and 241 (6) is hereby granted to the extent that plaintiff's claims pursuant to Labor Law § 200 and claims based upon an alleged violation of 12 NYCRR § 23-1.21 (b) (4) (iv) are hereby dismissed.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorneys for plaintiff, who are directed to enter this Decision/Order without notice and to serve defendant's counsel with a copy of this Decision/Order with notice of entry.

Dated: Troy, New York  
March 8, 2007

  
George B. Ceresia, Jr.  
Supreme Court Justice

Papers Considered:

Notice of Motion dated December 11, 2006; Affirmation of David J. Clegg, Esq. dated December 11, 2006 with Exhibits A-C annexed; Affidavit of Michael Bonestell sworn to

December 11, 2006;  
Affidavit of Joseph J. McHugh sworn to December 8, 2006;

Notice of Cross-Motion dated February 6, 2007; Affirmation of Rosemarie P. Boyd, Esq. dated February 6, 2007 with Exhibits A-I annexed;

Affirmation of David J. Clegg, Esq. dated February 15, 2007 with Exhibits D-G annexed;  
Reply Affirmation of David J. Clegg, Esq. dated February 15, 2007;

Reply Affirmation of Rosemarie P. Boyd, Esq. dated February 21, 2007.