

<b>Bugos v LC White Plains, LLC</b>
2008 NY Slip Op 33133(U)
November 18, 2008
Supreme Court, New York County
Docket Number: 107382/03
Judge: Barbara R. Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **BARBARA R. KAPNICK**

PART 12

*Justice*

Index Number : 107382/2003

BUGOS, ALVIN

vs

LC WHITE PLAINS LLC.

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO.

107382/03

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

1 this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

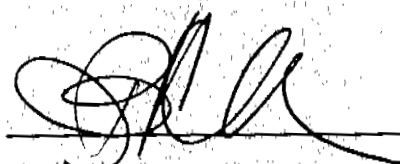
NOV 21 2008

**COUNTY CLERK'S OFFICE  
NEW YORK**

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 11/18/08



J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IA PART 12

-----X

ALVIN BUGOS and LILLIAN BUGOS,  
  
Plaintiffs,

DECISION/ORDER  
Index No. 107382/03  
Motion Seq. No. 002

- against -

LC WHITE PLAINS, LLC,  
CAPPELLI ENTERPRISES, INC.,  
FULLER DEVELOPMENT COMPANY,  
GEORGE A. FULLER CO., INC.  
and HRH CONSTRUCTION COMPANY,

Defendants.

-----X

BARBARA R. KAPNICK, J.:

**FILED**

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NEW YORK**

Plaintiffs seek in this action to recover damages for personal injuries sustained by plaintiff Alvin Bugos pursuant to Labor Law §§ 240(1), 241(6) and 200 and for common law negligence.

At the time of the accident on March 13, 2003, plaintiff Alvin Bugos, a laborer employed by non-party Carlton Concrete ("Carlton"), was working at the Main Mamaroneck Urban Renewal Project, Project Number WPUR-13, located on Main Street in White Plains, New York. Defendant LC White Plains LLC ("LC White") was the owner of the premises. Defendant HRH Construction Company ("HRH") was the construction manager.

Plaintiff was in the process of assisting in the removal of steel support I-beams from an elevator shaftway located in one of

the buildings being constructed at the site, when he allegedly kneeled down at the edge of the shaftway and placed his hand on a wooden support beam to support his weight. Plaintiff claims that the support beam suddenly shifted and gave way, causing him to lose his balance and to fall down the open shaft.

Plaintiffs now move for an order pursuant to CPLR § 3212 granting summary judgment under Labor Law § 240(1) on the ground that defendants LC White and HRH failed to provide plaintiff Alvin Bugos with adequate safety devices in the shaftway, such as planking, netting, harnesses, lanyards, complete scaffolds and/or lifelines to prevent him from being exposed to an elevation related risk.

Plaintiffs further argue that they have established a violation of Labor Law § 241-a which provides as follows:

Any men working in or at elevator shaftways, hatchways and stairwells of buildings in course of construction or demolition shall be protected by sound planking at least two inches thick laid across the opening at levels not more than two stories above and not more than one story below such men, or by other means specified in the rules of the board.

Defendants argue in opposition to the motion that: (i) there can be no liability pursuant to Labor Law § 240(1) because plaintiff Alvin Bugos' conduct was the sole proximate cause of his

accident (see, *Blake v Neighborhood Hous. Servs of New York City*, 1 NY3d 280 [2003]); (ii) there can be no liability pursuant to Labor Law § 241-a because plaintiff was, in fact, provided with appropriate safety devices, i.e., "other means specified in the rules of the board" (see, 12 NYCRR § 23-2.5[b][5]);<sup>1</sup> and (iii) even if this Court finds that a violation of Labor Law §§ 240(1) and/or 241-a existed, there is an issue of fact as to whether or not said violation was a substantial factor in causing his accident.

Defendants have submitted a sworn affidavit from Carlton's General Foreman, Brian Walsh, who claims that "Mr. Burgos [sic] was provided with a safety harness and given specific instructions along with all Carlton Employees to use them when exposed to heights, including work to be performed in elevator shafts." He

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<sup>1</sup> Pursuant to 12 NYCRR § 23-2.5(b)(5),

Where persons are required to perform any work at intermediate levels between stories in an elevator shaft, such persons shall be provided with protection against falling. Such protection shall be either an approved life net installed in compliance with this Part (rule) or planking at least two inches thick full size or other material of equivalent strength. Such protection shall be located not more than two stories or 30 feet, whichever is less, below the point in the elevator shaft where such persons are working. In lieu of an approved life net or substantial covering, such persons may use approved safety belts or harnesses securely attached to hanging lifelines in compliance with this Part (rule) [emphasis supplied].

further claims that had plaintiff "followed the specific instructions given and used the safety harness, lanyard and safety cable provided, he could not have fallen into the elevator shaft as he has alleged."

Defendants have also submitted a sworn affidavit from William Moscatelli, a journeyman mason employed by Carlton at the project, who claims that he "and all the other Carlton employees were issued harnesses to use while working" on the project, "and were specifically instructed to use them when exposed to heights and elevation differentials."

Mr. Moscatelli further claims:

3. Around the elevator shafts on the project were steel cables which were used as anchors for fall protection. Available lanyards were used to connect the harness to the steel cable. Instructions were given to all Carlton employees to wear harnesses and hook them up to the safety cable using a lanyard when exposed to the open elevator shaft.

4. On March 13, 2003, I was working with Alvin Burgos [sic], a laborer working for Carlton Concrete. Prior to the accident, I was instructed to install a steel I-beam within an elevator shaft. To accomplish the task, the existing shaft/hole cover had to be removed. This protection consisted of pieces of 4 x 4 wood which was placed over the elevator shaft. Sheets of plywood were placed over the 4 x 4's. A steel cable for fall protection was located across the hole opening.

5. With Mr. Burgos's [sic] assistance, we pulled the plywood and 4 x 4s backwards away from the hole and then I walked away. When I went over to the elevator shaft, I saw that Mr. Burgos [sic] had fallen into the opening.

6. Mr. Burgos [sic] was not wearing a safety belt at the time in violation of Carlton's safety rules and the instructions given.

Plaintiffs contend that a careful review of these affidavits demonstrates the lack of detail necessary to give them credibility. In addition, plaintiffs dispute defendants' claim that plaintiff Alvin Bugos was provided with proper protection (see, *Cohen v Memorial Sloan-Kettering Cancer Center*, 50 AD3d 97 [1st Dep't 2008]).


**FILED**  
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Based on the papers submitted and the oral argument held on the record on June 25, 2008, this Court ~~finds~~ that there are outstanding issues of fact as to whether or not plaintiff Alvin Bugos was provided with adequate safety devices, such as harnesses or lanyards, to prevent his fall, and as to whether his conduct was the sole proximate cause of his accident.

Accordingly, plaintiffs' motion for summary judgment on their claim pursuant to Labor Law § 240(1) and based on a violation of Labor Law § 241-a must be denied.

This constitutes the decision and order of this Court.

Dated: November 18, 2008

  
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BARBARA R. KAPNICK  
J.S.C.

**BARBARA R. KAPNICK**  
J.S.C.