

<b>Haddock v Turner Constr. Co.</b>
2010 NY Slip Op 32484(U)
September 9, 2010
Supreme Court, New York County
Docket Number: 115367/08
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
HON. CAROL EDMOND

PRESENT:

PART 35

Index Number : 115367/2008

HADDOCK, STEVEN

vs

TURNER CONSTRUCTION CO.

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. 115367/2008  
MOTION DATE 8/23/2010  
MOTION SEQ. NO. 003  
MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

**FILED**  
AUG 13 2010  
NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by plaintiff, Steven Haddock, for summary judgment (CPLR §3212) against defendants Lincoln Center for the Performing Arts, Inc. and JDP Mechanical, Inc., pursuant to Labor Law §240 (1), is granted; and it is further

ORDERED that the branch of the cross-motion by defendants for summary judgment dismissing plaintiff's Labor Law §240 (1) claim is denied; and it is further

ORDERED that the branch of the cross-motion by defendants for summary judgment dismissing plaintiff's Labor Law §200 and §241 (6) claims is granted and said claims are hereby severed and dismissed; and it is further

ORDERED that the matter is set down for an inquest on damages; and it is further

ORDERED that the plaintiff shall file the note of issue by December 20, 2010, as previously ordered, and the parties shall report to Part 40, located at 60 Centre Street, New York, New York, Room 242, before J.H.O. Ira Gammerman on January 24, 2011, 9:30 a.m. for an assessment of damages against defendants Lincoln Center for the Performing Arts, Inc. and JDP Mechanical, Inc.; and it is further

ORDERED that plaintiff Steven Haddock serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 9/9/2010

HON. CAROL EDMOND J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/JUDG.  SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----X  
STEVEN HADDOCK,

Plaintiff,

Index No. 115367/08

-against-

TURNER CONSTRUCTION COMPANY,  
LINCOLN CENTER FOR THE PERFORMING  
ARTS, INC. and JDP MECHANICAL, INC.,

Defendants.

-----X  
HON. CAROL ROBINSON EDMEAD, J.S.C.

FILED  
SEP 13 2010  
NEW YORK  
COUNTY CLERKS OFFICE

MEMORANDUM DECISION

In this Labor Law and negligence action, plaintiff, Steven Haddock (“plaintiff”) moves for summary judgment (CPLR §3212) against defendants Lincoln Center for the Performing Arts, Inc. (“LC”) and JDP Mechanical, Inc. (“JDP”) (collectively, “defendants”), on his Labor Law §240 (1) claim. Defendants oppose the motion and cross-move for summary judgment dismissing plaintiff’s complaint, or in the alternative, for summary judgment dismissing his Labor Law §§200 and 241(6) claims.

*Background Facts*

Plaintiff was injured on December 11, 2007, while descending a ladder when working at the premises located at 140 West 65th Street, New York, New York (the “Premises”) as an employee of Hugh O’Kane Electric Co., LLC (“O’Kane Electric”). JDP was a general contractor and LC was the owner for the purposes of this Labor Law action. Plaintiff was installing a large pull-box with electric wiring in the ceiling at the elevation of at least ten feet off the ground. To perform this work, he set up an eight-foot A-frame ladder, which was not equipped with

protective “rubber feet.” Some construction debris was on the painted concrete floor. On the day of the injury, plaintiff went up and down the ladder several times without incident. However, attempting to descend the last time, after one step, the ladder “shook and fell over very quickly,” causing him to fall to the ground, resulting in a severed biceps tendon.

Plaintiff claims that his injuries were caused by defendants' negligence in causing and permitting unsafe and hazardous conditions to exist at the site at the time of the plaintiff's accident, and that defendants violated Labor Law §§200, 240 (1) and 241 (6).

On or about April 13, 2009, one of the three named defendants, Turner Construction Company (“Turner”), moved for summary judgment dismissing the complaint as against Turner. In response, plaintiff cross-moved for summary judgment against all the defendants. By Order dated September 8, 2009, this court dismissed the Complaint against Turner, severing and dismissing the action against it. The same order denied plaintiff's cross-motion for summary judgment on its Labor Law §240 (1) claim as to LC and JDP as premature, without prejudice, on the ground that defendants did not have an opportunity to depose plaintiff and “complete discovery pertaining to the circumstances surrounding plaintiff's alleged descent and shifting of the ladder, and explore a defense to this claim.”

*Plaintiff's Motion for Summary Judgment*

After the parties completed discovery<sup>1</sup>, plaintiff filed this motion as to liability on his §240 (1) claim. Plaintiff argues that defendants' witness's testimony has not added anything to the essential facts of this case and has not established a defense to liability since said witness has

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<sup>1</sup> The deposition of plaintiff took place on January 15, 2010 and the deposition of the defendants' witness, Greg Garrison, the project manager for JDP, took place on June 8, 2010.

no personal knowledge of the accident. Thus, his testimony did not controvert plaintiff's version of the occurrence of the accident.

Plaintiff argues that defendants, as the owner and the general contractor, are liable for any violation of §240 (1) causing injury to a plaintiff as a construction worker exposed to an elevation-related risk who fell off the ladder because it was inadequate to protect him from injury. Plaintiff's injuries were proximately caused by defendants' failure to supply plaintiff with a ladder which was sufficiently safe. Thus, plaintiff argues, the failure of defendants to secure the ladder "by any means whatsoever" constitutes a *prima facie* violation of Labor Law §240 (1) as a matter of law.

Plaintiff further argues that the only evidence available regarding the proximate cause of the accident is the injured plaintiff's own uncontroverted testimony that the ladder tipped over causing him to fall. His testimony on that subject is neither inconsistent with other accounts nor contradicted by any other evidence. Nor is it relevant that the ladder was not defective or that plaintiff himself placed the ladder. There is no evidence by which a jury could reasonably find that the failure to secure the ladder was not a proximate cause of the plaintiff's injuries and, thus, summary judgment is mandated.

#### *Defendants' Opposition and Cross-Motion*

Defendants argue that plaintiff's complaint should be dismissed because none of plaintiff's claims are supported by any evidence. With respect to plaintiff's §200 claim, there is no evidence that defendants directed or controlled plaintiff's work, or that they had actual notice of a dangerous or defective condition. Neither can plaintiff establish his §241 (6) claim since

there is no evidence that any of the sections of the New York Industrial Code, cited by plaintiff,<sup>2</sup> was violated. As to his §240 (1) claim, plaintiff was provided with a non-defective ladder, which he inspected, installed and used for several hours without any problem until this accident occurred. Plaintiff testified that no safety devices, other than the ladder, were necessary to perform his work. There is no evidence that “rubber feet” were required to stabilize the ladder, or that their absence was the proximate cause of the accident. And, plaintiff himself cannot explain what caused the ladder to shake and tip, causing him to fall. Even though there is no testimony to contradict plaintiff’s account of the events, plaintiff’s own testimony is insufficient to establish a *prima facie* violation.

In opposition to plaintiff’s motion, defendants contend that plaintiff’s motion should be denied because there are issues of fact as to (1) whether the ladder provided proper protection for plaintiff under the statute and (2) whether plaintiff’s foot slipped from the ladder when he attempted to descend it. Plaintiff’s testimony is not credible and a jury could find that plaintiff simply lost his footing, given his testimony that the ladder was not defective and he properly placed it on the floor.

*Plaintiff’s Reply*<sup>3</sup>

Plaintiff argues that defendants offered no rebuttal evidence to raise an issue of fact and their cross-motion is simply “a tactic to get the last word on the motion.” Defendants’ argument

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<sup>2</sup> In his §241 (6) claim, plaintiff alleges violations of the Industrial Code, 12 NYCRR §§23-1.7, 23-1.21, 23-1.30 and 23-2.4.

<sup>3</sup> Plaintiff consented to dismissal of the claim under §200, and intends to pursue his §241 (6) claim only in the event the court finds an issue of fact as to whether plaintiff slipped from the ladder since that would also create an issue of fact as to whether defendants violated the Industrial Code (12 NYCRR §23-1.7 (d), which would support a Labor Law §241 (6) claim.

that a jury would not believe plaintiff's testimony is not a substitute for admissible evidence required to defeat summary judgment. Where a plaintiff's injury is due to falling off a ladder, plaintiff is not required to prove that the ladder was defective or why it fell. The burden is on defendants to submit evidence that they provided plaintiff with a sufficient safety device.

Defendants offered no evidence to contradict plaintiff's version of the accident.

Plaintiff maintains that there is no dispute that no safety devices, other than the ladder, were provided to plaintiff. Under the existing case law, when evidence establishes that a ladder tips over causing injury to a worker, there is a presumption that the ladder "was not good enough to afford proper protection," and it is a *prima facie* violation of the statute. The First Department held that the failure to secure a ladder to insure that it remains stable and erect, constitutes a violation of § 240 (1). And, it is irrelevant that the ladder was not defective since it is not the presence of the device but its failure to afford a worker proper protection that establishes the violation of the statute.

Further, argues plaintiff, even if he cannot explain precisely why the ladder tipped, he nevertheless should be granted judgment on liability since sufficient evidence demonstrates that the failure to provide a safe and secured ladder was a contributing cause of the accident. And, defendants have not offered any evidence that plaintiff was the sole proximate cause of the accident, to contradict plaintiff's testimony that the ladder shook, moved and fell.

#### *Defendants' Reply*

Defendants address solely the portion of plaintiff's §241 (6) claim. Since plaintiff denies that he slipped, and there is no evidence that the ladder was slippery, Industrial Code §23-1.7 (d) (slipping hazards) is not applicable. Thus, plaintiff's §241 (6) claim should be dismissed.

### *Analysis*

A proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issue of fact (CPLR §3212 [b]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212 [b]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (CPLR §3212 [b]; *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

*Plaintiff's Motion: Labor Law §240(1)*

Labor Law §240(1)<sup>4</sup> imposes absolute liability upon an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (*Ernish v City of New York*, 2 AD3d 256, 768 NYS2d 325 [1st Dept 2003], citing *Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880 [1985]). In enacting this statute, the legislative intent was to protect workers “by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor (1969 NY Legis Ann, at 407), instead of on workers, who are scarcely in a position to protect themselves from accident” (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520, 493 NYS2d 102 [1985][citation omitted]). The statute imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559, 606 NYS2d 127 [1993]; *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 500 [1993], *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). In order to prevail on a §240 (1) claim, the injured worker must show that the violation of the statute was a proximate cause of his injuries (*Ernish v City of New York*, 2 AD3d 256, 768 NYS2d 325 [1st Dept 2003]).

It is well settled that the “failure to secure a ladder to insure that it remains stable and erect while the plaintiff was working on it constitutes a violation of Labor Law § 240 (1) as a

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<sup>4</sup> Section 240 (1), entitled “Scaffolding and other devices for use of employees,” states:

“All contractors and owners and their agents,[ . . . ] who contract for but do not direct or control the work, 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.”

matter of law” (*Montalvo v J. Petrocelli Const., Inc.*, 8 AD3d 173, 780 NYS2d 558 [1st Dept 2004]; *Devlin v Sony Corp. of Am.*, 237 AD2d 201, 655 NYS2d 762 [1st Dept 1997], citing *McNair v Salamon*, 199 AD2d 170, 171 [1st Dept 1993]).

“Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection” (*Montalvo v J. Petrocelli Const., Inc.*, 8 AD3d 173, citing *Schultze v 585 W. 214th St. Owners Corp.*, 228 AD2d 381, 644 NYS2d 722 [1st Dept 1996]).

In *McNair v Salamon*, plaintiff, an electrician's helper, was injured when he fell from a ten foot “A” frame ladder while attempting to push a wire “snake” through a conduit pipe. The only witness to the accident was the plaintiff himself. He testified that he fell when the ladder, which was not secured in any way and did not have any rubber shoes or pads on the bottom, simply slipped out from under him. It was admitted by plaintiff at trial that the ladder was in “good shape” and that the ground was level. The court found that, because the ladder was not secured in any way and did not have any nonskid devices on its feet, plaintiff was not provided with proper protection in direct violation of Labor Law §240 (1) (*McNair v Salamon*, at 170).

Here, it is undisputed that plaintiff was a construction worker and the type of work performed by plaintiff (installing a large pull-box in the ceiling at the elevation of at least ten feet off the ground) falls within the protection of §240 (1). It is also undisputed that the ladder was not equipped either with “rubber feet” or any other safety devices to secure the ladder ensuring its stability. Thus, since the ladder was not sufficient to ensure proper protection within the meaning of the statute, violation by defendants of Labor Law § 240 (1) has been established as a matter of law.

Furthermore, plaintiff demonstrated that defendants’ violation of the statute was a

proximate cause of plaintiff's injuries, by showing that, absent "rubber feet" or any other safety devices, the ladder shook and tipped, causing plaintiff to fall resulting in injury (*see Ernish v City of New York*, 2 AD3d 256, 768 NYS2d 325 [1st Dept 2003],  *citing John v Baharestani*, 281 AD2d 114 [2001]). This constituted a *prima facie* showing of a statutory violation, proximately causing his injuries (*see Zimmer v Chemung County Performing Arts*, 65 NY2d 513 [1985]).

While the only evidence available regarding the proximate cause of the accident is the injured plaintiff's own testimony and affidavit, defendants failed to controvert this showing or to establish that the ladder was "so constructed, placed and operated as to give proper protection" to plaintiff in accordance with §240 (1). Defendants' witness testified that he had no personal knowledge of the accident. The court finds that defendants' unsubstantiated speculations that plaintiff's foot may have slipped when he attempted to descend the ladder, or that plaintiff's own testimony is not credible, are insufficient to raise an issue of fact as to whether the failure to secure the ladder was not the proximate cause of the plaintiff's injuries (*Zimmer, supra*, at 524; *MacNair v Salamon*, 199 AD2d 170; *Fernandez v MHP Land Associates*, 188 AD2d 417, 591 NYS2d 835 [1st Dept 1992]).

Moreover, that the ladder was not defective and placed flat and steady on the concrete floor, and that plaintiff inspected and used it for several hours prior to the fall without indication of any problems, is immaterial to the issue of defendants' liability (*Singh v Hanover Estates*, 276 AD2d 394, 714 NYS2d 713 [1st Dept 2000] [plaintiff established a *prima facie* case with evidence that, as he was descending from a 10-foot high scaffold, it tipped, causing him to fall to the ground; that plaintiff had been using the scaffold for a month prior to the accident without indication of any problems was insufficient to raise an issue of fact as to whether the accident

was due solely to plaintiff's fault]; *Schultze v 585 West 214th Street Owners Corp.*, 228 AD2d 381, 644 NYS2d 722 [1st Dept 1996][whether the ladder slipped on its own, or may have even been secured, slipped or gave way, makes no difference with respect to defendants' liability. Defendants were obligated to ensure that the ladder was secured to something stable]). Thus, whether the floor on which the ladder stood was sturdy is an immaterial issue of fact that does not preclude summary judgment, as it is undisputed that defendants failed to secure the ladder or provide any safety devices (*Devlin v Sony Corp.*, *supra*). Thus, the court finds plaintiff's uncontroverted testimony sufficient to show that the violation of the statute was a proximate cause of his injuries.

Therefore, plaintiff's motion for summary judgment as to liability under Labor Law § 240 (1) is granted.

#### *Defendants' Cross-Motion*

Based on the above grant of plaintiff's summary judgment motion, the branch of defendants' cross-motion for summary dismissal of the § 240 (1) claim is denied.

As to the remaining claims, plaintiff consented to dismissal of his §200 claim. Further, plaintiff does not intend to pursue his §241 (6) claim in the absence of the courts' finding of the issue of fact as to whether plaintiff slipped, and as stated above, defendant's unsubstantiated speculation that plaintiff's foot may have slipped when he attempted to descend the ladder is insufficient to raise an issue of fact. Thus, the branch of defendants' motion to dismiss plaintiff's §§200 and 241 (6) claims is granted and these claims are severed and dismissed.

#### *Conclusion*

Based on the foregoing, it is hereby

ORDERED that the motion by plaintiff, Steven Haddock, for summary judgment (CPLR §3212) against defendants Lincoln Center for the Performing Arts, Inc. and JDP Mechanical, Inc., pursuant to Labor Law §240 (1), is granted; and it is further

ORDERED that the branch of the cross-motion by defendants for summary judgment dismissing plaintiff's Labor Law §240 (1) claim is denied; and it is further

ORDERED that the branch of the cross-motion by defendants for summary judgment dismissing plaintiff's Labor Law §200 and §241 (6) claims is granted and said claims are hereby severed and dismissed; and it is further

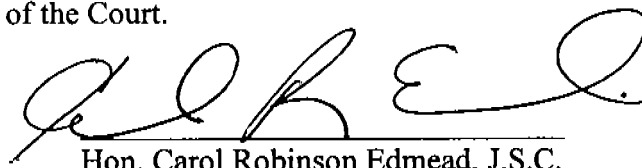
ORDERED that the matter is set down for an inquest on damages; and it is further

ORDERED that the plaintiff shall file the note of issue by December 20, 2010, as previously ordered, and the parties shall report to Part 40, located at 60 Centre Street, New York, New York, Room 242, before J.H.O. Ira Gammerman on January 24, 2011, 9:30 a.m. for an assessment of damages against defendants Lincoln Center for the Performing Arts, Inc. and JDP Mechanical, Inc.; and it is further

ORDERED that plaintiff Steven Haddock serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: September 9, 2010



Hon. Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**

