

**Marquez v Trustees of Columbia Univ. in the City of
N.Y.**

2011 NY Slip Op 33182(U)

November 29, 2011

Sup Ct, NY County

Docket Number: 104744/09

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joan A. Madden
Justice

PART 11

Marquez, Teodoro

INDEX NO.

104744/09

MOTION DATE

6/30/11

MOTION SEQ. NO.

002

MOTION CAL. NO.

- v -

Trustees of Columbia U.

and cross motion

The following papers, numbered 1 to _____ were read on this motion *to*/for Summary Judgment.

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 is decided in accordance with the attached Memorandum Decision + Order.

FILED

DEC 12 2011

COUNTY CLERK'S OFFICE
NEW YORK

Dated: November 29, 2011

[Signature]
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: IAS PART 11

-----X
TEODORO MARQUEZ,

Plaintiff,

-against-

Index No. 104744/09

TRUSTEES OF COLUMBIA UNIVERSITY IN
THE CITY OF NEW YORK,

Defendant.

-----X
JOAN A. MADDEN, J.:

In this action arising out of a construction site accident, plaintiff Teodoro Marquez moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law § 240 (1) against defendant Trustees of Columbia University in the City of New York (Columbia). Columbia opposes the motion and cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint, or alternatively, for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim.

BACKGROUND

Plaintiff was allegedly injured on November 3, 2008, while performing plastering work at a construction site located at 606 West 116th Street in Manhattan (the premises). Plaintiff allegedly fell from an unsecured A-frame ladder while working in an apartment on the 11th floor of the building. Columbia was the owner of the construction site. Plaintiff was an employee of Izzo Construction Corp. (Izzo), which was hired by Columbia to perform plastering work.

Plaintiff testified at his deposition that, in early November of 2008, he was working as a painter for Izzo on a job at the premises (Plaintiff EBT, at 30). Plaintiff is five feet six inches tall (*id.* at 10). Plaintiff stated that he was working on the 11th floor of the building, but could not

recall the apartment number (*id.* at 30). According to plaintiff, he used six-foot A-frame ladders provided by Izzo to perform his work (*id.* at 26). On the date of the accident, plaintiff was working with his co-worker, Juan Portillo, another painter (*id.* at 31). Plaintiff testified that he was plastering the ceiling of a two-bedroom apartment, and was working in the bedroom (*id.* at 33, 46). There was nothing on the floor of the bedroom (*id.* at 47).

While working on the ladder, plaintiff held a metal plate containing plaster in his left hand, and used a spatula with his right hand (*id.* at 48, 49). Plaintiff moved the ladder several times, and always moved the ladder into the open position (*id.* at 51, 60). He checked the brackets on the ladder each time before ascending the ladder (*id.* at 51, 60). Plaintiff did not have any difficulties using the ladder before his accident (*id.* at 52). Plaintiff stated that he refilled his plate with plaster within 5 or 10 minutes before the accident (*id.* at 53). According to plaintiff's testimony, while he was on top of the ladder, the ladder moved and then fell, causing him to fall backwards to the floor; his feet were on the "last rung before getting to the top" of the ladder at the time (*id.* at 55, 58, 59, 62).¹ Plaintiff further testified that the ladder was not defective (*id.* at 62). Plaintiff stated that his co-worker Juan was in the living room at the time, but did not witness his fall (*id.*). Plaintiff called Juan to come to the bedroom after he fell (*id.* at 64). Felix Sanchez, the office manager for Izzo, came to the area of the accident about an hour-and-a-half later (*id.* at 74, 75).

Hans Rehnstedt testified that he is the Director of Housing Renovations for Columbia (Rehnstedt EBT, at 8-9). Rehnstedt procured various contractors to perform renovation work in

¹When asked at his deposition where his feet were at the time his accident occurred, plaintiff stated that they were "[o]n top, on the last rung of the ladder" (Plaintiff EBT, at 55). However, he later clarified that it was the "last rung before getting to the top" (*id.* at 58).

Apartment 114 at the premises (*id.* at 15). Izzo did plastering and painting work, which was performed near the end of the job (*id.* at 35-36). Columbia did not provide any ladders to Izzo for the work (*id.* at 36). According to Rehnstedt, the ceilings in the apartment were around nine or nine-and-a-half feet high (*id.* at 38).

Plaintiff commenced the instant action on April 6, 2009, asserting the following claims:

(1) common-law negligence; (2) violation of Labor Law § 200; (3) violation of Labor Law § 240 (1); and (4) violation of Labor Law § 241 (6). In its answer, Columbia admitted that it owned, operated, and controlled the subject premises (Answer, ¶ 5).

Plaintiff now moves for partial summary judgment on the issue of liability under Labor Law § 240 (1) against Columbia. Plaintiff argues that he is within the special class of workers entitled to protection under Article 10 of the Labor Law, because he was injured while performing plastering work. Plaintiff asserts that Columbia, as the owner of the construction site, is liable under Labor Law § 240, since he fell from an unsecured ladder that shifted, moved, and fell beneath him, and was not provided with any safety equipment to prevent him from falling. In addition, plaintiff maintains that his injuries were proximately caused by Columbia's failure to comply with the statute.

To support his position, plaintiff submits an affidavit, in which he avers that his accident occurred when he was plastering the ceiling in one of the bedrooms of the apartment (Plaintiff Aff., ¶ 8). Plaintiff states that each time he got on the ladder he checked to make sure that the brackets or spreaders were locked so the ladder would stay in the open position (*id.*). According to plaintiff, "the ladder suddenly moved, shifted and fell down" while he was plastering the ceiling (*id.*, ¶ 9). Plaintiff fell about five feet to the floor (*id.*). Plaintiff also states that his co-

worker, Juan Portillo, was in the living room at the time of the accident (*id.*). Portillo therefore did not witness the accident (*id.*). Plaintiff states that he was not given any safety equipment, such as a belt, hardhat, safety rope, safety line, tail line, or harness to prevent him from falling from the ladder, and that no one was holding the ladder (*id.*, ¶ 10).

In opposing plaintiff's motion, and in cross-moving to dismiss the complaint, Columbia argues that plaintiff has failed to show that it was negligent or violated the Labor Law. Specifically, Columbia asserts that plaintiff was the sole proximate cause of his accident, since he fell while laughing at a joke his co-worker told him, and not because the ladder was defective. In support of its position, Columbia submits an affidavit from Felix Sanchez, a project manager employed by Izzo in November 2008 (Sanchez Aff., ¶¶ 2, 3). According to Sanchez, on November 3, 2008, plaintiff was working with Juan Patella painting and plastering the interior of an apartment located at the premises (*id.*, ¶ 7). Sanchez states that, on that date, he received a telephone call from plaintiff who told him that he had fallen from a ladder, and that he immediately went to attend to plaintiff (*id.*, ¶ 8). Sanchez further states that "[w]hen I entered the apartment where Mr. Marquez was working, I saw Mr. Marquez sitting on a five gallon compound bucket. He told me he was standing on a 6 foot A-frame fiberglass ladder when Juan Patella said something to him and he laughed and lost his balance and fell to the ground" (*id.*). Additionally, Sanchez states that Izzo only used six-foot A-frame fiberglass non-collapsible ladders (*id.*, ¶ 10). According to Sanchez, he later confirmed with Juan Patella that "plaintiff fell from the ladder while joking with him" (*id.*, ¶ 12). Sanchez was unaware that any ladders used by Izzo were defective (*id.*, ¶ 11).

Columbia also argues that plaintiff was the sole proximate cause of his accident, and

could not have fallen in the manner he describes, given that (1) plaintiff is five feet six inches tall, (2) plaintiff was standing on the top rung of a 6-foot ladder before his accident occurred, and (3) the height of the ceiling in the apartment was between nine and nine-and-a-half feet. According to Columbia, there is no sworn testimony or other admissible evidence which corroborates plaintiff's description of the accident.

In opposition to Columbia's cross motion and in reply, plaintiff argues that he is not required to prove that the ladder was defective, that any contributory negligence on his part is irrelevant, and that his description of the accident need not be corroborated. Furthermore, plaintiff contends that what Juan "Patella" told Sanchez is hearsay. In any case, plaintiff submits another affidavit in reply, in which he denies that Juan told him a joke and that he ever said so to Sanchez (Plaintiff Reply Aff., ¶ 2). Plaintiff also states that he was in a different room than Juan Portillo at the time of the accident (*id.*). Additionally, plaintiff states that he was not on the top rung of the ladder before his accident; rather, he was standing on the last step/rung of the ladder before the top step (*id.*, ¶ 3). Plaintiff explains that the top step of the ladder is not a working step (*id.*). According to plaintiff, he was not standing up straight on the ladder; rather, he was working in a bent position on the ladder (*id.*, ¶ 4). Plaintiff also contends that, even if the accident occurred as Sanchez says that it did, there is no evidence that plaintiff was the sole proximate cause of the accident.

In reply to the cross motion, Columbia responds that plaintiff misused the ladder by standing on its top rung while it was in an open position. Columbia contends that plaintiff's use of the ladder is a textbook example of a misuse of the ladder. To support this argument, Columbia submits a printout from OSHA's website which apparently depicts a worker standing

on the top rung of a ladder, and states that “[t]his is improperly using the top rung of this step ladder to work from” (Brochetelli Reply Affirm., Exh. A, at 2). Columbia asserts that there is no evidence that the six-foot ladder was an inadequate device for the task of plastering a nine or nine-and-a-half foot-ceiling.

DISCUSSION

“It has long been settled that 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 to eliminate any material issues of fact from the case’” (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Once the [moving party] establishes a prima facie entitlement to such relief as a matter of law, the burden shifts to the [nonmoving party] to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding the grant of summary judgment” (*DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Labor Law § 240 (1), commonly known as the “Scaffold Law,” mandates that owners:

“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 legislative intent behind the statute is to place ultimate responsibility for safety practices on owners and general contractors, rather on workers, who “are scarcely in a position to protect themselves from accident” (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513,

520, *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citations omitted]).

“Thus, section 240 (1) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused an injury” (*Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 559 [1993]). To succeed under Labor Law § 240 (1), the plaintiff must prove: (1) a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices); and (2) that the statutory violation was a proximate cause of his or her injuries (*Jones v 414 Equities LLC*, 57 AD3d 65, 69 [1st Dept 2008]).

Labor Law § 240 (1) requires that ladders and other safety devices be “so constructed, placed and operated as to give proper protection” to a worker (Labor Law § 240 [1]; *see also Klein v City of New York*, 89 NY2d 833, 833-834 [1996]). It is well established that the “failure to properly secure a ladder to insure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240 (1)” (*Bruce v 182 Main St. Realty Corp.*, 83 AD3d 433, 437 [1st Dept 2011] [internal quotation marks and citation omitted]; *see also Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 252 [1st Dept 2008]; *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004]). “It is sufficient for purposes of liability under section 240 (1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent” (*McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 334 [1st Dept 2008], quoting *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]). The plaintiff is not required to show that the ladder was defective (*Perez v NYC Partnership Hous. Dev. Fund Co., Inc.*, 55 AD3d 419, 420 [1st Dept 2008]).

In *Yu Xiu Deng v A.J. Contr. Co.* (255 AD2d 202 [1st Dept 1998]), the First Department held that partial summary judgment was properly granted to a plaintiff who fell off a ladder,

notwithstanding some discrepancies as to how the accident occurred. “Whether the ladder on which plaintiff was working tipped as a result of plaintiff losing her balance when she lost control of the sheetrock she was handling, or, indeed, whether plaintiff fell off the ladder without it having tipped at all, are not material issues of fact. Plaintiff’s negligence, if any, is of no consequence” (*id.*, citing *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). The Court further stated that “it is clear that the ladder did not prevent plaintiff from falling and there is no dispute that no safety devices, other than the ladder, were provided” (*id.* at 202-203).

Similarly, in *Orellano* (292 AD2d at 290),

“There were no apparent defects in the ladder, nor was the floor on which the ladder rested defective. There were no protective devices on the ladder that would have prevented plaintiff’s fall. [Plaintiff], who was alone when the accident occurred, gave several explanations as to what caused him to fall. The ladder may have shifted as [plaintiff] reached to affix a bolt that was the furthest from where he was standing on the ladder, or his foot may have slipped from the ladder’s rung, or he may have simply lost his balance.”

The Court held that “[r]egardless of the precise reason for his fall or whether [plaintiff] acted negligently, or whether defendants were in complete compliance with the Industrial Code, [plaintiff] is entitled to summary judgment on the Labor Law § 240 (1) claim” (*id.*).

Here, plaintiff has shown that a statutory violation occurred, and that the violation was a proximate cause of his injuries. Plaintiff testified at his deposition that while he was on the ladder, the ladder “moved” and then fell, causing him to fall (Plaintiff EBT, at 57, 58, 62). Additionally, plaintiff states in his affidavit that, while he was plastering the ceiling, “the ladder suddenly moved, shifted and fell down” (Plaintiff Aff., ¶ 9). Plaintiff states that no one was holding the ladder (*id.*, ¶ 10). Therefore, plaintiff has established that the ladder was not an adequate safety device, and that he was not given any other safety devices to prevent him from

falling (*see Siegel v RRG Fort Greene, Inc.*, 68 AD3d 675 [1st Dept 2009] [“(p)laintiff made a prima facie showing of liability under section 240 (1) by his testimony that the ladder tipped, causing him and the ladder to fall”]; *Vega v Rotner Mgt. Corp.*, 40 AD3d 473, 473-474 [1st Dept 2007] [plaintiff satisfied his prima facie burden on his motion with his testimony that he fell to the ground when the unsecured ladder on which he was standing shifted]).

In opposing plaintiff’s motion, Columbia argues that plaintiff was the sole proximate cause of his accident. “[I]f adequate safety devices are provided and the worker either chooses for no good reason not to use them, or misuses them, then liability under section 240 (1) does not attach” (*Paz v City of New York*, 85 AD3d 519 [1st Dept 2011]; *see also Gallagher v New York Post*, 14 NY3d 83, 88 [2010]; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]). However, “the Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that ‘if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it’” (*Hernandez*, 49 AD3d at 253, quoting *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]).

Columbia relies on an affidavit from Felix Sanchez, a project manager employed by Izzo, in which he states that plaintiff “told him that he was standing on a 6 foot A-frame fiberglass ladder when [his co-worker] said something to him and he laughed and lost his balance and fell to the ground” (Sanchez Aff., ¶ 8). Although plaintiff claims that this statement constitutes inadmissible hearsay, it is admissible as an admission of a party opponent (*see Satra Ltd. v Coca-Cola Co.*, 252 AD2d 389, 390 [1st Dept 1998]). However, there is no evidence that plaintiff misused the ladder or failed to use an adequate safety device. While plaintiff stated at one point

at his deposition that his feet were on the top rung of the ladder, he subsequently explained that he was working from the rung below the top rung (Plaintiff EBT, at 55, 58). Additionally, in an affidavit submitted in reply, plaintiff states that he was standing on the second highest rung of the ladder at the time of his accident (Plaintiff Reply Aff., ¶ 3). Significantly, “[t]he ladder did not prevent plaintiff from falling; thus the ‘core’ objective of section 240 (1) was not met” (*Gordon*, 82 NY2d at 561). Furthermore, contrary to Columbia’s assertion, plaintiff is not required to prove that the ladder was defective (*see Perez*, 55 AD3d at 420). Even if plaintiff was negligent in losing his balance while on the ladder, plaintiff’s “[n]egligence, if any, . . . is of no consequence” (*Rocovich*, 78 NY2d at 513). Plaintiff need not prove the precise reason for his fall (*see Orellano*, 292 AD2d at 290; *Whalen v Sciame Constr. Co.*, 198 AD2d 501, 502 [2d Dept 1993] [although there was a question of fact as to the precise manner in which accident occurred, construction company was liable under section 240 (1) because it failed to rebut plaintiff’s showing that he fell from an unsecured ladder]). Thus, any factual questions regarding whether plaintiff was alone at the time of the accident and/or was joking with his co-worker when he lost his balance are insufficient to raise a triable issue of fact as to Columbia’s liability under section 240(1).

Finally, assuming *arguendo* that plaintiff’s accident was unwitnessed, Columbia has failed to raise an issue of fact as to whether plaintiff fell off a ladder or as to any material fact (*see Klein v City of New York*, 89 NY2d at 835; *Mannino v J.A. Jones Constr. Group, LLC*, 16 AD3d 235, 236 [1st Dept 2005] [unwitnessed fall from ladder did not bar summary judgment where there was no substantiated challenge to the plaintiff’s credibility]; *Perrone v Tishman Speyer Props., L.P.*, 13 AD3d 146, 147 [1st Dept 2004] [same]). For the same reason, the

absence of corroboration of plaintiff's version of the events is immaterial (*see Rodriguez v 3251 Third Ave. LLC*, 80 AD3d 434 [1st Dept 2011]).

While under certain circumstances a question of fact may be presented as to the plaintiff's credibility or the manner in which the accident occurred (*see Jones v West 56th St. Assoc.*, 33 AD3d 551, 552 [1st Dept 2006]; *Manna v New York City Hous. Auth.*, 215 AD2d 335, 335-336 [1st Dept 1995]; *Antunes v 950 Park Ave. Corp.*, 149 AD2d 332, 333 [1st Dept 1989]), this is not such a case. For instance, in *Jones*, the court found issues of fact as to liability when plaintiff testified at his deposition that he was injured in a fall from a scaffold; however, on the day after his accident, he stated that he wrenched his back and did not mention a fall from a scaffold (*Jones*, 33 AD3d at 552). In *Manna*, an issue of fact as to liability was presented where the worker presented evidence that he was struck by a cinder block thrown from a third-floor window by a co-worker named "Brian," the fact that the worker was cut on the head, that there were no safety nets or safety devices in place, and where the employer offered evidence that it never employed anyone named "Brian," and that no cinder blocks were ever found (*Manna*, 215 AD2d at 335-336). Similarly, in *Antunes*, a case relied upon by Columbia, there was a triable issue of fact as to whether the plaintiff fell from a ladder (*Antunes*, 149 AD2d at 333). In all of these cases, there was a plausible view of the evidence that there was no statutory violation. Here, in contrast, there is no dispute that plaintiff fell from a ladder while plastering the ceiling of the apartment.

Therefore, plaintiff is entitled to partial summary judgment on the issue of liability under Labor Law § 240 (1) against Columbia. Since plaintiff was not the sole proximate of his accident, Columbia's cross motion for summary judgment is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion (sequence number 002) of plaintiff Teodoro Marquez for partial summary judgment is granted on the issue of liability under Labor Law § 240 (1) against defendant Trustees of Columbia University in the City of New York, with the issue of plaintiff's damages to await the trial in this action; and it is further

ORDERED that the cross motion of defendant Trustees of Columbia University in the City of New York for summary judgment is denied; and it is further

ORDERED that the parties shall appear for a pre-trial conference in Part 11, room 351, 60 Centre Street on December 8, 2011 at 9:30 am.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

Dated: November 29, 2011

