

**Soto v 2024 Creston Ave. Realty, LLC**

2014 NY Slip Op 32652(U)

September 18, 2014

Supreme Court, Bronx County

Docket Number: 307770/2012

Judge: Jr., Kenneth L. Thompson

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

9/23/2014

C

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX IA 20 \_\_\_\_\_ X  
ANGEL SOTO

Index No 307770/2012

Plaintiff,

**DECISION/ORDER**

-against-

**Present:**

**HON. KENNETH L. THOMPSON, Jr.**

2024 CRESTON AVENUE REALITY, LLC., and ESSEN  
MEDICAL ASSOCIATES, P.C.

Defendants. X

2024 CRESTON AVNEUE REALITY, LLC and ESSEN  
MEDICAL ASSOCIATES, P.C.

Third-Party Plaintiffs,

-against-

A&A BUILDERS, INC.,

Third- Party Defendants

X

The following papers numbered 1 to 3 read on this motion, Summary Judgment,

No	On Calendar of July 15, 2014	PAPERS NUMBERED
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----		<u>1-2</u>
Answering Affidavit and Exhibits-----		
Replying Affidavit and Exhibits-----		<u>3</u>
Affidavit-----		
Pleadings -- Exhibit-----		
Memorandum of Law-----		
Stipulation -- Referee's Report --Minutes-----		
Filed papers-----		

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Plaintiff moves pursuant to CPLR 3212 for partial summary judgment under Labor Law 240(1) and 241(6) on the issue of liability. Defendants cross-move pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's causes of action under Labor Law 240(1) and 241(6).

This action arose as a result of personal injuries sustained by plaintiff in a fall from a scaffold. Plaintiff is the sole owner of the third-party defendant, A&A Builders, Inc., (A&A). Plaintiff was employed in replacing broken shingles,

installing a new roof and redoing the porch and window casings. A&A was under contract to do this work with defendants. In performing such work plaintiff erected a scaffold that was borrowed from another contractor that was under contract with defendants. While plaintiff stood on the scaffold while dismantling it, plaintiff pulled on a rusted piece of scaffold tubing, and when it finally released plaintiff lost his balance.

#### LABOR LAW 240(1)

With respect to defendants' argument that plaintiff is not entitled to Labor Law 240(1) protection, the "Court of Claims further opined that: "It would be illogical for the Legislature to have enacted a statute affirmatively requiring safe scaffolding and other devices for the protection of workers while denying similar protection to the very same (and other) workers when they erect and demolish such devices." (Supra, at 515.) We agree with the reasoning of the Court of Claims and note that other cases have held that Labor Law § 240 (1) applies even in those situations when the scaffold which is alleged to have failed was in the process of being dismantled or constructed (see, e.g., *Reed v State of New York*, 249 AD2d 719 [partially dismantled scaffold tipped, causing plaintiff to fall]; *Pritchard v Murray Walter, Inc.*, 157 AD2d 1012 [plaintiff fell to his death through floor of scaffold he was in the process of dismantling]; *Engel v Nedwidek*, 91 AD2d 794 [plaintiff injured \*198 while dismantling scaffold].") (*Kyle v City of New York*, 268 A.D.2d 192, 197-198 [1<sup>st</sup> Dept 2000]).

"Contrary to the defendant's contention, the Supreme Court properly denied

that branch of its cross motion which was to dismiss the plaintiffs' cause of action to recover damages for violation of Labor Law § 240 (1). Labor Law § 240 (1) imposes a nondelegable duty upon owners and general contractors to provide safety devices to protect workers from elevation-related risks (see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]; *Barr v 157 5 Ave., LLC*, 60 AD3d 796 [2009]). “To impose liability pursuant to Labor Law § 240 (1), there must be a violation of the statute and that violation must be a proximate cause of the plaintiff's injuries” (*Tama v Gargiulo Bros., Inc.*, 61 AD3d 958, 960 [2009]; see *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]).

“Where there is no statutory violation, or where the plaintiff is the sole proximate cause of his or her own injuries, there can be no recovery under Labor Law § 240 (1)” (*Treu v Cappelletti*, 71 AD3d 994, 997 [2010]; see *Silvas v Bridgeview Invs., LLC*, 79 AD3d 727 [2010]).” (*Canosa v Holy Name of Mary R.C. Church*, 83 A.D.3d 635, 637 [2<sup>nd</sup> Dept 2011]). The facts in *Canosa* are similar to the facts in the case at bar, with the exception that In the case at bar, there was a rusted inadequate scaffold tubing that caused plaintiff to pull on the tubing to disassemble it, which caused him to lose his balance when the tubing became unstuck.

LABOR LAW 241(1)

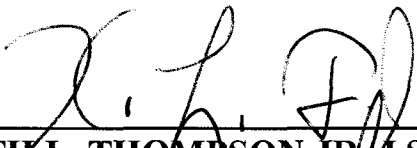
Plaintiff alleges violation of Labor law 241(6) under three provisions of the Industrial Code. 12 NYCRR 23–5.1(b) is inapposite as the provision concerns scaffold footing or anchorage which is inapplicable to the facts of this case. With respect to 12 NYCRR 23-5.1(c), the issue of whether the scaffold could hold four

times its weight and whether the horizontal and diagonal bracing was adequate is immaterial as the scaffold did not collapse. Finally with respect to 12 NYCRR 23-5.1(h), the requirement that the scaffold be removed under the supervision of a designated person was met as the sole owner and contractor of third-party defendant, A&A, was removing the scaffold.

Accordingly, plaintiff's motion is granted to the extent that partial summary judgment on liability is found against defendants under Labor Law 240(1). The branch of plaintiff's motion that seeks summary judgment on its labor Law 241(6) claim is denied. Defendants' motion is granted to the extent that plaintiff's Labor Law 241(6) claim is dismissed. The branch of defendants' motion that seeks summary judgment under labor Law 240(1) is denied.

The foregoing shall constitute the decision and order of this Court.

Dated: SEP 18 2014

  
\_\_\_\_\_  
KENNETH L. THOMPSON JR. J.S.C.