

<b>Hayes v HHC TS Reit LLC</b>
2015 NY Slip Op 30731(U)
May 1, 2015
Supreme Court, New York County
Docket Number: 151482-2012
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

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CHRISTOPHER HAYES and DANIELLE HAYES,

Plaintiffs,

Index No. 151482-2012

-against-

**DECISION/ORDER**

Motion Sequence 001

HHC TS REIT LLC, EXTELL DEVELOPMENT  
COMPANY and LEND LEASE (US) CONSTRUCTION  
LMB INC.,

Defendants.

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**HON. GEORGE J. SILVER, J.S.C.**

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Collective Exhibits Annexed.....	<u>1, 2, 3</u>
Notice of Cross-Motion, Affirmation in Support of Cross-Motion and Opposition to Motion, Memorandum of Law & Collective Exhibits.....	<u>4, 5, 6, 7</u>
Affirmation in Opposition to Cross-Motion and in Reply to Motion.....	<u>8</u>

In this Labor Law action, plaintiffs Christopher Hayes (Hayes) and Danielle Hayes (collectively plaintiffs) move pursuant to CPLR § 3212 for an order granting them summary judgment on the issue of liability. Defendants HHC TS Reit, LLC, Extell Development Company and Lend Lease (US) Construction LMB, Inc. (Lend Lease) (collectively defendants) cross-move for summary judgment dismissing the complaint<sup>1</sup>.

Hayes, a steamfitter, testified at his deposition that he and his partner, Richard DiAndrea (DiAndrea) were running fuel oil lines vertically from the floors in the building up to generators on the roof. Hayes described the fuel oil pipes as extra heavy black pipe, one and half inches in diameter and ten feet long. Hayes was working as the welder, DiAndrea was responsible for putting the lowering the pipe into place and leveling it. Hayes did not assist DiAndrea with placing the bottom of the pipe in the coupling. Hayes further testified that DiAndrea was responsible for leveling the pipe before Hayes welded it and that to do so, DiAndrea used a pipe

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<sup>1</sup> Plaintiffs do not oppose the portion of defendants' cross-motion seeking dismissal of Hayes' Labor Law § 241 [6] claim. Accordingly, that claim is dismissed.

clamp, which DiAndrea would loosen in order to level the pipe. When asked if the pipe clamp was a put in place temporarily, Hayes testified “[y]ou out you pipe clamp on after we are done the you tack them to the pipe to keep them secure. They are there. I don’t know why they are not there at that moment.” Hayes further testified that the pipe clamps get tack welded to the pipe and that the clamps would be tack welded “just to keep them secure in case something does happen.” According to Hayes, DiAndrea would lower the pipe into a sleeve from the floor above where Hayes was working and Hayes would then weld the pipe coupling. After the pipe lowered into a sleeve from the floor above and placed in the coupling, Hayes had to wait for DiAndrea to come down from the floor above before he could begin welding the pipe because DiAndrea acted as fire watch in the event Hayes was set on fire while welding. Hayes also testified that DiAndrea would hold the pipe plumb while it was being welded.

At the time of the accident, Hayes was working on the 23<sup>rd</sup> floor and DiAndrea was on the 24<sup>th</sup> floor. Hayes testified that he heard a loud bang from the 24<sup>th</sup> floor and that he looked up the pipe sleeve. Hayes claims that when he looked up the sleeve, he was hit in the face with dirt and debris. The pipe then came down and crushed Hayes’ right big toe, nearly severing it. Hayes testified that he believed the pipe had already been put in place in the weld coupling by DiAndrea when it struck him. Hayes also testified that he was not sure how DiAndrea secured the pipe or what DiAndrea did while he was on the 24<sup>th</sup> floor above as Hayes’ focus was on welding the pipe. Hayes testified that he did not know whether someone banged the pipe just prior to when it struck his toe.

DiAndrea states in an affidavit that in order to install the fuel oil pipe, he would go to floor above where he and Hayes were working and would lower the pipe into the socket weld coupling on the floor below. Once the pipe was placed in the socket weld coupling, DiAndrea would attach a temporary securing clamp to the pipe and set it on top of two pieces of Kindorf strut that spanned the diameter of the hole. DiAndrea would then come down a floor and level the pipe. After leveling the pipe, DiAndrea would act as fire watch as Hayes welded the pipe to the coupling. After the welding was completed, DiAndrea would go back to the floor above and remove the temporary clamp. DiAndrea claims that as he was setting the temporary clamp for the pipe that struck Hayes, he noticed a group of laborers cleaning an stripping the floor approximately five-to-ten feet away from where he was working. After DiAndrea completed his work he walked down to the floor below where Hayes was working. DiAndrea heard the sound of the pipe striking the floor which was followed by screaming from Hayes. DiAndrea saw debris on Hayes’ face and shoulders and the fuel oil pipe was lying next to Hayes. DiAndrea avers that after the accident he could see that the temporary clamp had been knocked off and that the Kindorf struts were no longer aligned.

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]; *Bendik v Dybowski*, 227 AD2d 228 [1<sup>st</sup> Dept 1996]). This standard requires that the proponent of a motion for summary judgment 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 issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 NE2d 642, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562, 404 NE2d 718, 427 NYS2d 595 [1980]; *Silverman v Perlbinde*r, 307 AD2d 230

[1<sup>st</sup> Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1<sup>st</sup> 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]).

To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR § 3212 [b]). Thus, 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 (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717, 497 NE2d 680, 506 NYS2d 313 [1986]; *Zuckerman*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1<sup>st</sup> 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*, 49 NY2d at 562). The opponent “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist” and “the issue must be shown to be real, not feigned, since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1<sup>st</sup> Dept 1983], *affd.*, 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Stewart M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 385 NE2d 1238, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 386 NE2d 258, 413 NYS2d 650 [1978]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347 [1<sup>st</sup> Dept 1998]). Summary judgment is a drastic remedy that should only be employed where no doubt exists as to the absence of triable issues (*Leighton v Leighton*, 46 AD3d 264 [1<sup>st</sup> Dept 2007]). The key to such procedure is issue-finding, rather than issue-determination (*id.*).

Despite defendants’ urging, the court will not reject DiAndrea’s affidavit in support of plaintiffs’ motion. Defendants claim that seven weeks after Hayes’ accident, DiAndrea gave a statement to an investigator in which he provided a markedly different description of where he and Hayes were when the accident occurred than is set forth in the affidavit. Defendants submit an affidavit from the investigator who claims he memorialized DiAndrea’s recollection of the accident in a two page statement which DiAndrea signed in the investigator’s presence. The investigator claims DiAndrea’s signed statement is annexed to the affidavit. However, the typed, two page purported statement by DiAndrea annexed to defendants’ cross-moving papers is unsigned and unsworn. A party opposing a motion for summary judgment must submit evidence in admissible form or demonstrate an acceptable excuse its failure to do so (*Zuckerman*, 49 NY at 562). Defendants have done neither. The court, therefore, will not consider the statement allegedly made DiAndrea’s submitted in support of defendants’ cross-motion.

Section § 200 [1] of the Labor Law codifies an owner’s or general contractor’s common-law duty of care to provide construction site workers with a safe place to work (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 [1<sup>st</sup> Dept 2012]; *Perrino v Entergy Nuclear Indian Point 3, LLC*, 48 AD3d 229, 230 [1<sup>st</sup> Dept 2008]). Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed (*see Cook v Orchard Park Estates, Inc.*, 73 AD3d 1263, 1264

[3<sup>rd</sup> Dept 2010]). Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1<sup>st</sup> Dept 2011]). The notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken (*Mitchell v N.Y. Univ.*, 12 AD3d 200 [1<sup>st</sup> Dept 2004]; *Canning v Barneys N.Y.*, 289 AD2d 32 [1<sup>st</sup> Dept 2001]). Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work (*Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1<sup>st</sup> Dept 2011]; *Dalanna v City of New York*, 308 AD2d 400 [1<sup>st</sup> Dept 2003]).

Here, it is undisputed that laborers from Local 79 were responsible for debris removal at the job site. It is also undisputed that Lend Lease's foreman exercised supervisory control over the laborers' work. Hayes' testimony that he was hit in the face with dirt and debris when he looked up the pipe sleeve and that he heard a loud bang from the 24<sup>th</sup> floor immediately prior to the accident, coupled with DiAndrea's claim that he saw laborers sweeping and stripping the 24<sup>th</sup> floor five-to-ten feet away from the where he was working, is sufficient circumstantial evidence linking defendants to the alleged injury-causing work of the laborers (*see Torres v City of New York*, 83 AD3d 557 [1<sup>st</sup> Dept 2011]). While it is true that DiAndrea does not identify who the laborers worked for or even state that they were responsible for causing the pipe to fall, a jury could logically infer from the evidence that the laborers described by DiAndrea were the Local 79 laborers responsible for debris clean-up. A jury could also logically infer that the laborers were working in the vicinity of the pipe based upon Hayes' testimony that he was struck with dirt and debris when he looked up the hole and that the loud bang heard by Hayes was the laborers coming into contact with the pipe. Since there are sufficient facts and conditions from which the negligence of defendants and the causation of the accident by that negligence may be reasonably inferred (*see Affenito v PJC 90<sup>th</sup> St. LLC*, 5 AD3d [1<sup>st</sup> Dept 2004]), defendants' cross-motion for summary judgment dismissing Hayes' Labor Law § 200 claim is denied.

Labor Law § 240 [1] states that: "All contractors and owners and their agents, except owners of one and two-family dwellings 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." Labor Law § 240 (1) imposes a nondelegable duty upon the owner and contractor to provide proper and adequate safety devices to protect workers at an elevation from falling (*Lajqi v New York City Tr. Auth.*, 23 AD3d 159 [1<sup>st</sup> Dept 2005]). To establish a cause of action under section 240 [1], a plaintiff must prove both that the statute was violated and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287, 803 NE2d 757, 771 NYS2d 484 [2003]). Section § 240 [1] does not apply automatically every time a worker is injured by a falling object (*see Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662-663, 985 NYS2d 416, 8 NE3d 791 [2014]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267, 750 NE2d 1085, 727 NYS2d 37 [2001]; *see also DeRosa v Bovis Lend Lease LMB, Inc.*, 96 AD3d 652, 654 [1<sup>st</sup> Dept 2012]). The "decisive

question is whether the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603, 922 NE2d 865, 895 NYS2d 279 [2009]). The worker must establish that the object fell because of the inadequacy or absence of a safety device of the kind contemplated by the statute (*Fabrizi* at 662-663; see *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 9-10, 959 NE2d 488, 935 NYS2d 551 [2011]). In order for something to be deemed a safety device under the statute, it must have been put in place "as to give proper protection" for the worker (Labor Law § 240 [1]).

In *Fabrizi*, the Court of Appeals held that a building owner and a general contractor were entitled to summary dismissal of a plaintiff's Labor Law § 240 [1] claim because a compression coupling, which plaintiff claimed was inadequate and caused a conduit to fall on his hand, was not a safety device "constructed, placed and operated as to give proper protection" from the falling conduit (22 NY3d 658). In so holding, the Court of Appeals found that the compression coupling's only function was to keep the conduit together as part of the conduit/pencil box assembly, that the coupling had been installed a week before the incident and that it was serving its intended purpose until a change order was issued and the plaintiff dismantled the conduit/pencil box assembly (*id.* at 663). The Court held that the plaintiff's argument that the compression coupling was an inadequate safety device extended the reach of Labor Law § 240 beyond its intended scope to any component that may lend support to a structure (*id.*).

Here, Hayes has not established that the pipe clamp was a safety device constructed, placed and operated so as to give him proper protection from the pipe becoming dislodged from the weld coupling and falling. DiAndrea states in his affidavit that in order to install the pipe he would first lower it into the weld coupling and then attach the temporary pipe clamp. Thereafter he would go down to the floor where Hayes was working in order to level the pipe. Since DiAndrea also claims that when Hayes was injured he had already completed his work on the floor above, that he had walked down the stairs to the 23<sup>rd</sup> floor where Hayes was working, and that he was on the same floor as Hayes when he heard the sound of the pipe strike the ground and Hayes screaming, it can reasonably be assumed that DiAndrea had already placed the pipe into the weld coupling prior to Hayes' accident. Hayes, however, implied that DiAndrea would actually hold the pipe level while DiAndrea was on the floor above when Hayes testified that while the pipe was being welded "he [DiAndrea] is up there holding it plumb." While DiAndrea claims that the pipe clamp was a temporary device which was to be removed when Hayes completed the welding process, Hayes testified that pipe clamps were put on "after we are done" and that they were tack welded to the pipe in order to keep the pipe secure. Moreover, Hayes testified that the pipe clamp actually had to be loosened in order for the pipe to be leveled and he was not sure if a pipe clamp was used on every floor. It is not apparent how a pipe clamp that may or may have been installed temporarily, that may or may not have been used on every floor, which may or may not have been installed after the pipe had been welded, and which apparently had to be loosened before the pipe could be leveled would serve as a safety meant to prevent the pipe from dislodging from the weld coupling and falling. Therefore, plaintiffs have failed to establish that the pipe clamp was meant to function as a safety device in the same manner as those device enumerated in Labor Law § 240 [1] (*Fabrizi*, 22 NY3d at 663).

Similarly, defendants' have failed to establish as a matter of law that the pipe clamp was not

a safety device but was only used to keep the pipe straight during the leveling process and that the hoisting of the pipe had been completed prior to plaintiff's accident when the pipe had been lowered into the weld coupling. The opinions offered by defendants' counsel regarding the purpose of the pipe clamp are of no probative value (*see generally Johnson v Phillips*, 261 AD2d 269 [1<sup>st</sup> Dept 1999]) and defendants have not establish their prima facie entitlement to dismissal of plaintiffs' complaint.

In accordance with the foregoing, it is hereby

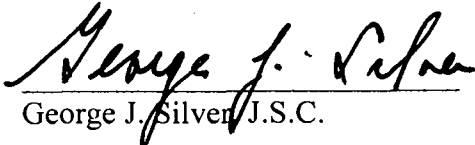
ORDERED that plaintiffs' motion for summary judgment is denied; and it is further

ORDERED that defendants' cross-motion for summary judgment is granted solely to the extent that plaintiff's Labor Law § 241 [6] cause of action is dismissed; and it is further

ORDERED that the parties are to appear for a pre-trial conference on June 30, 2015 at 9:30 a.m. in Part 10, room 422 of the courthouse located at 60 Centre Street, New York, New York 10007; and it is further

ORDERED that plaintiffs, as movants, is to serve a copy of this order, with notice of entry, upon defendants within 20 days of entry.

Dated: 5/1/15  
New York County

  
George J. Silver J.S.C.  
**HON. GEORGE J. SILVER**