

<b>Higgins v Benchmark Bldrs., Inc.</b>
2016 NY Slip Op 31168(U)
June 13, 2016
Supreme Court, New York County
Docket Number: 162324/2014
Judge: Gerald Lebovits
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**NEW YORK STATE SUPREME COURT  
NEW YORK COUNTY: PART 7**

CONNOR HIGGINS and SABRINA HIGGINS,

Index No.: 162324/2014  
**DECISION/ORDER**  
Motion Sequence Nos. 01-~~02~~

Plaintiffs,

-against-

BENCHMARK BUILDERS, INC., 120 WALL  
COMPANY, L.L.C., and 120 WALL PROPERTY  
OWNER, LLC,

Defendants.

Recitation, as required by CPLR 2219 (a), of the papers reviewed on (1) plaintiffs' CPLR 3212 motion for partial summary judgment on the issue of liability under Labor Law § 240(1) (Motion Sequence 1); (2) defendants' CPLR 3212 cross-motion for summary judgment (Motion Sequence 1); and (3) defendants' CPLR 3212 motion for partial summary judgment on the issue of lost-income damages (Motion Sequence 2):

<b>Papers</b>	<b>Numbered</b>
Plaintiffs' Notice of Motion & Affidavit in Support .....	1
Defendants' Affirmation in Opposition & in Support of Cross-Motion.....	2
Plaintiffs' Reply Affirmation.....	3
Plaintiffs' Affirmation in Opposition to Defendants' Cross-Motion.....	4
Defendants' Notice of Motion & Affidavit in Support .....	5
Plaintiffs' Affirmation in Opposition.....	6
Defendants' Reply Affirmation .....	7
Plaintiffs' Affidavit of Errol O. Flynn Jeffrey Miller in Support .....	8
Plaintiffs' Affidavit of Jeffrey Miller in Support.....	9

*Dillon Horowitz & Goldstein, LLP*, New York (Michael M. Horowitz, Esq.), for plaintiffs.  
*Goldberg Segalla, LLP*, Garden City, (Jeffrey Migdalen, Esq.) for defendants.

Gerald Lebovits, J.

The court consolidates motion sequence numbers 1 and 2 for disposition.

Plaintiff Connor Higgins and his spouse commenced this action against defendants for injuries he sustained while working as a plasterer employed by a subcontractor of defendant Benchmark Builder, Inc. (Benchmark). Defendant 120 Wall Property Owner, LLC (120 Wall Owner), owns the building known as 120 Wall Street, the work site where plaintiff Connor Higgins' injuries occurred. Plaintiff asserts violations of Labor Law §§ 200, 240 (1), and 241 (6) and common-law negligence. Plaintiff moves for partial summary judgment on the issue of liability under Labor Law § 240 (1). Plaintiffs' spouse asserts derivative claims for loss of

spousal services and consortium. Defendants cross-move for summary judgment on plaintiffs' Labor Law and common-law-negligence claims. Defendants also move for partial summary judgment on the issue of lost-income damages.

## **I. Plaintiffs' Motion for Partial Summary Judgment**

Summary judgment is proper when no genuine issue of material fact is in dispute requiring a trial. (*Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) Plaintiff Connor Higgins testified at his examination before trial (EBT) that during the course of his work, which consisted of plastering the ceiling at defendants' work site from atop a scaffold, he "[j]ust stepped backwards" and fell approximately five or six feet to the floor below. (Plaintiffs' Aff, Exh D, Higgins EBT at 110.) Plaintiff Connor Higgins further testified that the scaffold from which he fell did not have any guardrails or other safety features. (Plaintiffs' Aff, Exh D, Higgins EBT at 97.) Plaintiff sustained multiple injuries to his neck, back, and shoulders. (Plaintiffs' Aff, at ¶ 6.) Defendants argue that plaintiffs' motion should be denied because whether the scaffold provided "proper protection" and whether plaintiff was the "sole proximate cause" of his injuries are questions of fact. (Defs' Aff ¶ 53.)

### *Labor Law § 240 (1)*

Plaintiffs are entitled to judgment as a matter of law on the issue of liability under Labor Law § 240 (1). In *Morrison v City of New York*, the plaintiff was injured when he slipped and fell while ascending a scaffold at the defendant's work site. (306 AD2d 86, 86 [1st Dept 2003].) The Court held that the defendant's "liability was established as a matter of law by the fact that the scaffold [defendants] provided plaintiff, which admittedly had no guard rails, safety nets or lifelines, did not prevent plaintiff from falling." (*Id.*) As to proximate causation, plaintiff need show only that his injuries are attributable, at least in part, to defendants' failure to provide adequate protection. (*See Laquidara v HRH Const. Corp.*, 283 AD2d 169 [1st Dept 2001].)

In support of their motion, plaintiffs offer the affidavits of Errol O. Flynn and Jeffrey Miller. (Plaintiffs' Aff, Exh C.) Flynn was working alongside plaintiff atop the same scaffold, and Miller was working nearby; both Flynn and Miller witnessed plaintiffs' fall. (Plaintiffs' Aff, Exh C, Flynn Affidavit at ¶ 5; Miller Affidavit at ¶ 3.) Flynn and Miller state that the scaffolds in question lacked guardrails, or other safety features, and that they were not otherwise provided with safety devices. (Plaintiffs' Aff, Flynn Affidavit at ¶ 7; Miller Affidavit at ¶ 4.) Because defendants do not refute plaintiffs' evidence that the scaffolds lacked any type of safety device sufficient to prevent plaintiffs' fall, plaintiffs are entitled to partial summary judgment on the issue of liability under Labor Law § 240 (1).

## **II. Defendants' Cross-Motion**

That branch of defendants' cross-motion seeking summary judgment and dismissal of plaintiffs' claims under Labor Law §§ 200 and 241 (6), as well as for common-law negligence, is denied because material issues of fact exist.

*Labor Law §§ 200 and 241 (6)*

Labor Law § 200 codifies “the common-law duty imposed upon an owner or general contractor to provide construction site workmen with a safe place to work.” (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981].) By contrast, Labor Law § 241 (6) requires that plaintiff “specifically plead and prove the violation of an applicable Industrial Code regulation.” (*Garcia v 225 E. 57th St. Owners, Inc.*, 96 AD3d 88, 91 [1st Dept 2012].)

Defendants’ first argument — that plaintiff was the “sole proximate cause” of his injuries — is insufficient, as a matter of law, in this case. This court’s determination that plaintiff Connor Higgins is entitled to summary judgment on the issue of liability under Labor Law § 240 (1) is necessarily decided on the basis of undisputed evidence that plaintiff’s injuries were caused, at least in part, by defendants’ failure to install guardrails on the subject scaffold or otherwise to safeguard plaintiff. (*See Laquidara*, 283 AD2d at 169.) Defendants’ remaining arguments are based on defendants’ alleged compliance with the NYC Building Code and OSHA regulations. Plaintiff alleges multiple Industrial Code violations, but defendants assert only that they complied with local and federal regulations. Defendants do not cite any legal authority regarding whether their compliance with New York City and OSHA regulations also satisfied Industrial Code requirements. Although the absence of railings is dispositive of the issue of liability under Labor Law § 240 (1), for purposes of Labor Law § 241 (6), the mere absence of railings is not determinative. Material issues of fact exist about whether defendants were Industrial Code compliant. With respect to plaintiff’s common-law negligence claim, material issues of fact exist about whether the absence of railings was reasonable under the circumstances. Because issues of fact exist about the reasonableness of defendants’ conduct and their compliance with applicable Industrial Code regulations, defendants’ cross-motion must be denied in its entirety.

### **III. Defendants’ Motion for Summary Judgment**

Defendants move for summary judgment on the issue of lost-income damages. Plaintiff argues that this court should disregard the instant motion in that it constitutes a successive motion in light of defendants’ January 19, 2016, cross-motion. Even if the second motion were not duplicative of the first, “parties will not be permitted to make successive fragmentary attacks upon a cause of action but must assert all available grounds when moving for summary judgment.” (*Debevoise & Plimpton LLP v Candlewood Timber Group LLC*, 102 AD3d 571, 572 [1st Dept 2013].) Successive summary-judgment motions may be entertained upon a showing of “newly discovered evidence or other sufficient justification.” (*Jones ex rel. Cline v 636 Holding Corp.*, 73 AD3d 409 [1st Dept 2010]; *accord Varsity Tr., Inc. v Bd. of Educ. of City of New York*, 300 AD2d 38, 39 [1st Dept 2002] [holding that disposition of the matter to avoid “burdening the resources of the court and movants with a plenary trial” is a sufficient justification to the rule against successive summary-judgment motions].)

It is not readily apparent whether these exceptions apply in this case. Defendants’ instant motion is not based on any newly discovered evidence but rather on the alleged lack of evidence about plaintiff’s pre-accident income, which, according to defendants, was requested but not provided by Euro Build Construction, Inc. (Euro Build), plaintiff’s employer at the time of the accident. Plaintiff offers in its opposition papers copies of plaintiff’s Euro Build employment records indicating plaintiff’s roughly \$300 a day pre-accident income. (Plaintiffs’ Aff, Exh D.)

Defendants' argument that the court should not consider this evidence because "plaintiff's counsel did not disclose these records prior to the filing the note of issue" is unpersuasive. (Defs' Aff, ¶ 3.) Notwithstanding an apparently inadvertent misstatement of Euro Build's mailing address, defendants were given the authorization necessary to access plaintiffs' employment and income records in plaintiffs' March 3, 2015, response to defendants' combined demands. (See Def's Aff, Exh F.) Nearly one year elapsed from the date of defendants' first, and presumably only, failed attempt to contact Euro Build and the filing of the instant motion. (See Def's Reply, Exh A.)

In light of this evidence, defendants are not entitled to summary judgment on the issue of lost income. Defendants' principal argument on this motion is the lack of evidence about plaintiff's employment and income with Euro Build. (Def's Aff, ¶ 30.) The only other evidence offered in support, plaintiffs' 2013 tax returns and a W-2 from another of plaintiff's previous employers, is not dispositive of the issue of plaintiff's alleged lost income. (Defs' Aff, Exh F.) Plaintiff bears the burden of offering proof of lost income to a degree of reasonable certainty. (*Ferguson v City of New York*, 73 AD3d 649, 650 [1st Dept 2010].) However, "[t]he credibility of the witnesses and the resolution of conflicting proofs are matters properly for determination by a jury." (*Kane v Coundorous*, 11 AD3d 304, 304 [1st Dept 2004].) In consideration of the Euro Build records, and because defendants' remaining arguments concern only alleged discrepancies between plaintiff's tax returns and plaintiff's EBT testimony (see Defs' Aff, ¶¶ 11-16), defendants' motion for partial summary judgment on the issue of lost income is denied.

Accordingly, it is ORDERED that plaintiffs' CPLR 3212 motion for partial summary judgment on the issue of liability under Labor Law § 240 (1) is granted; and it is further

ORDERED that defendants' cross-motion for summary judgment on plaintiffs' Labor Law and common-law negligence claims is denied; and it is further

ORDERED that defendants' CPLR 3212 motion for partial summary judgment on the issue of lost income damages is denied; and it is further

ORDERED that counsel for plaintiffs is directed to serve a copy of this order with notice of entry upon the defendants and the Clerk of the Court, who is directed to enter judgment accordingly.

This is the court's decision and order.

Dated: June 13, 2016



J.S.C.

**HON. GERALD LEBOVITS**  
J.S.C.