

**Montesdeoca v 101-19 37th Ave. LLC**

2018 NY Slip Op 30812(U)

May 4, 2018

Supreme Court, Queens County

Docket Number: 27647/11

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEIS IA Part 2  
Justice

\_\_\_\_\_  
JOSE MONTESDEOCA and SONIA  
MONTESDEOCA,  
Plaintiffs,

Index No: 27647/11  
Motion Date: 1/12/18

101-19 37<sup>TH</sup> AVENUE LLC, UNITED  
FOUNDERS, LTD, SAAL MAANGEMENT  
CORP., AND FERAYDOUN POURATIAN,  
ALPHA BUILDER INC., and LESS  
ENGINEERING, P.C.,

Motion Seq. No.: 8

Defendants,

\_\_\_\_\_  
101-19 37<sup>th</sup> AVENUE LLC,

Third-Party Plaintiff,

-against-

SAMUEL FELDMAN LUMBER CO., INC., and  
FELDMAN LUMBER INDUSTRIES, INC.,

Third-Party Defendants.

\_\_\_\_\_  
UNITED FOUNDERS LTD, and FERAYDOUN  
POURATIAN,

Second Third-Party Plaintiffs,

-against-

SAMUEL FELDMAN LUMBER CO., INC., and  
FELDMAN LUMBER INDUSTRIES, INC.

Second Third-Party Defendants

\_\_\_\_\_

The following papers read on this motion by plaintiffs for partial summary judgment in favor of plaintiff Jose Montesdeoca against defendants 101-19 37th Avenue LLC, United Founders Ltd. (United Founders) and Fereydoun Pouratian on the issue of liability under Labor Law § 240(1), and to set the matter down for a jury trial on the assessment of damages; and this cross motion by defendants United Founders and Pouratian pursuant to CPLR 3212 for summary judgment dismissing the claims asserted against defendant United Founders.

Papers  
Numbered

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Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiffs commenced this action to recover damages for personal injuries sustained by plaintiff Jose Montesdeoca, alleging violations of Labor Law §§ 200, 240(1), 240(2), 240(3) and 241(6), and common-law negligence. Plaintiff Sonia Montesdeoca asserts a derivative claim. On December 3, 2011, plaintiff Jose Montesdeoca delivered sheetrock materials by tractor-trailer truck, on behalf of his employer, third-party defendant/second third-party defendant Samuel Feldman Lumber Co., Inc. (SFLC), a supplier of construction materials, to a construction project on a premises in Corona, New York, owned by defendant 101-19 37th Avenue LLC. The project involved the completion of the subdivision and interior of a pre-existing structure on the property, including building a partition wall in the basement. When plaintiff Jose Montesdeoca arrived at the site, he parked the truck on the street, and was met by an individual at the job site who directed him to put the materials in the rear of the building. Plaintiff Jose Montesdeoca used a forklift, supplied by his employer and which had been attached to the truck, to carry loads of the sheetrock and pallets of compound and boxes from the truck to near the back of the building. Plaintiffs claim that after Montesdeoca dropped off a load with the forklift, one of the forklift wheels became stuck in a hole in the ground, which had been covered by unsecured plywood. Plaintiff Jose Montesdeoca allegedly got off the forklift and walked around it to inspect the wheel. He claims that he was standing next to the forklift, when the ground beneath him collapsed, causing him to fall into the hole and land in the basement of the building. The hole allegedly was a purposefully designed opening (as opposed to a naturally occurring condition), leading from the ground next to the building, to the building's basement, and the plywood itself was covered with dirt. Defendant Fereydoun Pouratian, a member of defendant

101-19 37th Avenue LLC at the time of the accident, owned United Founders, the general contractor for the construction project.

Issue has been joined. Plaintiffs move for partial summary judgment in favor of plaintiff Jose Montesdeoca against defendants 101-19 37th Avenue LLC, United Founders and Pouratian on the issue of those defendants' liability under Labor Law § 240(1). Plaintiffs argue that plaintiff Jose Montesdeoca was engaged in a protected activity at the time of his accident, the accident occurred as a result of an elevation-related risk, and his injuries were caused by an inadequate or non-existent safety device. Plaintiffs assert the hole in the ground was not properly barricaded, and that the unsecured plywood cover was an inappropriate safety measure to guard against an person falling into the hole. They also assert that the cover failed and caused plaintiff Jose Montesdeoca to fall several feet down the hole to the basement below.

Defendants United Founders Ltd. and Pouratian oppose the motion by plaintiff, and cross move for summary judgment dismissing the claims asserted against defendant United Founders. Defendants United Founders and Pouratian contend that plaintiff Jose Montesdeoca is not entitled to the protections of Labor Law § 240(1) because Montesdeoca, as an employee of SFLC, was not performing construction work at the worksite at the time of the accident, but rather was engaged in delivery of sheetrock materials, and that such delivery is not a covered activity under the statute. Defendants United Founders and Pouratian also contend that the delivery of sheetrock materials was made at ground level, and therefore plaintiff Jose Montesdeoca was not engaged in work that posed an elevation-related risk. Defendants United Founders and Pouratian further contend that the type of work being performed by plaintiff Jose Montesdeoca at the time of the accident does not entitle him to protection under Labor Law § 241(6), and the claimed Industrial Code violations are inapplicable and not casually related to the facts. Defendants United Founders and Pouratian additionally contend that plaintiff Jose Montesdeoca is not within the special class of workers designed to be protected under Labor Law § 200, and United Founders did not exercise direct supervision or control over the "injury-producing circumstances."

Defendant 101-19 37th Avenue LLC opposes the motion by plaintiff and appears in support of the cross motion by defendants United Founders and Pouratian. Plaintiffs oppose the cross motion by defendants United Founders and Pouratian asserting that it is untimely served and that denial of the cross motion is required in the absence of any showing of "good cause."

The note of issue was filed on March 31, 2017, and by so-ordered stipulation dated May 23, 2017, the time for the parties to move for summary judgment was extended to September 30, 2017. The motion by plaintiffs is timely made. The cross motion by

defendants United Founders and Pouratian, however, is untimely insofar as it was served on November 15, 2017.

A cross motion for summary judgment made after the expiration of the statutory 120-day period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief “nearly identical” to that sought by the cross motion (*see Paredes v 1668 Realty Associates, LLC*, 110 AD3d 700 [2d Dept 2013]; *Alexander v Gordon*, 95 AD3d 1245, 1247 [2d Dept 2012]; *Grande v Peteroy*, 39 AD3d 590, 591-592 [2d Dept 2007]).

Here, plaintiffs’ motion for partial summary judgment is addressed to the cause of action asserted by plaintiff Jose Montesdeoca against defendants 101-19 37th Avenue LLC, United Founders and Pouratian under Labor Law § 240(1). To the extent the cross motion by defendants United Founders and Pouratian likewise is addressed to the Labor Law § 240(1) claim asserted against defendant United Founders, that branch of the untimely cross motion for summary judgment dismissing such cause of action against defendant United Founders shall be entertained (*see Whitehead v City of New York*, 79 AD3d 858 [2d Dept 2010]; *Osario v BRF Constr. Corp.*, 23 AD3d 202, 203 [1st Dept 2005]). However, with respect to the branch of the cross motion by defendants United Founders and Pouratian for summary judgment dismissing the causes of action against defendant United Founders based upon violation of Labor Law §§ 200, 240(2), 240(3) and 241(6), and common-law negligence, plaintiffs do not address those claims in their motion. Thus, the branch of the cross motion by defendants United Founders and Pouratian for summary judgment, dismissing the causes of action against defendant United Founders based upon violation of Labor Law §§ 200, 240(2), 240(3) and 241(6), and common-law negligence, is not made on nearly identical grounds as the timely motion, and defendants United Founders and Pouratian have offered no explanation or excuse for the untimeliness of that portion of their cross motion (CPLR 3212[a]). Under such circumstances, that branch of the cross motion by defendants United Founders and Pouratian for summary judgment dismissing the causes of action asserted against defendant United Founders based upon Labor Law §§ 200, 240(2), 240(3) and 241(6), and common-law negligence is denied as untimely (*see Vitale v Astoria Energy II, LLC*, 138 AD3d 981 [2d Dept 2016]).

With respect to the branch of the motion by plaintiffs for partial summary judgment pursuant to Labor Law § 240(1) against defendants 101-19 37th Avenue LLC, United Founders and Pouratian, and that branch of the cross motion by defendants United Founders and Pouratian for summary judgment dismissing the cause of action pursuant to Labor Law § 240(1) asserted against defendant United Founders, Labor Law § 240(1) imposes a nondelegable duty upon owners, general contractors and their agents to provide necessary and appropriate protection to workers employed in the “erection, demolition, repairing,

altering, painting, cleaning or pointing of a building or structure” (Labor Law § 240[1]; *see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). The statutory protection afforded by Labor Law § 240(1) is intended to encompass only elevation-related hazards which result in injury to workers as a result of inadequate or missing safety equipment (*see Bland v Manocherian*, 66 NY2d 452, 457-459 [1985]). As a threshold matter, to come within the statutory protection afforded by Labor Law § 240(1), a worker must, at the time of the accident, have been engaged in a “covered activity,” i.e. one of the statute’s enumerated activities (*see Prats v Port Autho. of N.Y. & N.J.*, 100 NY2d 878, 880-881 [2003]; *Jock v Fien*, 80 NY2d 965, 968 [1992]). Where the type of work in which the injured plaintiff was engaged does not come within one of the activities enumerated in the statute, the worker will be entitled to the protection of the statute if the work in which the worker is engaged is sufficiently necessary and incidental to one of the enumerated activities (*see e.g. Lombardi v Stout*, 80 NY2d 290 [1992]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509; *Vera v Low Income Mktg. Corp.*, 145 AD3d 509 [2d Dept 2016]; *Shields v St. Marks Housing Associates, L.P.*, 230 AD2d 903 [2d Dept 1996]; *Vilardi v Berley*, 201 AD2d 641 [2d Dept 1994]; *Martin v Back O’Beyond*, 198 AD2d 479 [2d Dept 1993]; *see also La Fontaine v Albany Mgt.*, 257 AD2d 319, 320 [3d Dept 1999]; *cf. Haines v Dick’s Concrete Co., Inc.*, 84 AD3d 732 [2d Dept 2011]).

A party is deemed to be an agent of an owner or general contractor under the Labor Law when that party has supervisory control and authority over the work being done where a plaintiff is injured (*see Linkowski v City of New York*, 33 AD3d 971, 974–975 [2d Dept 2006]; *see Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]; *Herrel v West*, 82 AD3d 933, 933 [2d Dept 2011]). Plaintiffs have failed to demonstrate prima facie that at the time of the accident, defendant Pouratian had an ownership interest in the property in his individual capacity, or was hired or retained in his personal capacity as the general contractor, or agent of defendant 101-19 37th Avenue LLC or United Founders, with the authority to supervise and control the work. Although defendant Pouratian admittedly was a member of defendant 101-19 37th Avenue LLC at the time of the accident, a member of a limited liability company is not liable for the liabilities of the company, whether arising in tort, contract or otherwise, solely by reason of such status as a member (*see Grammas v Lockwood Assoc., LLC*, 95 AD3d 1073, 1074 [2d Dept 2012]) or acting in such capacity, or participating as an employee, consultant, contractor or otherwise, in the conduct of the business of the company (*see Limited Liability Company Law* § 609[a]). Nor have plaintiffs alleged any facts to support piercing the corporate veil of defendant 101-19 37th Avenue LLC (*see Limited Liability Company Law* § 609[a]). To the extent that defendant Pouratian is alleged to have entered into a construction contract with defendant 101-19 37th Avenue LLC, and played a supervisory role in the project, plaintiffs have failed to show prima facie that Pouratian did so in his personal capacity, rather than in his representative capacity as the sole owner/officer

of defendant United Founders. That branch of the motion by plaintiffs for summary judgment on the issue of liability on the Labor Law § 240(1) cause of action against defendant Pouratian is denied.

With respect to the branch of the motion by plaintiffs for partial summary judgment pursuant to Labor Law § 240(1) against defendants 101-19 37th Avenue LLC and United Founders, and that branch of the cross motion by defendants United Founders and Pouratian for summary judgment dismissing the cause of action pursuant to Labor Law § 240(1) asserted against defendant United Founders, the delivery of construction-related materials to the construction site is a covered activity where, as here, it was necessary and incidental to the construction/renovation work (*see Vera v Low Income Mktg. Corp.*, 145 AD3d 509 [2d Dept 2016]; *Curley v Gateway Communications Inc.*, 250 AD2d 888, 890 [3rd Dept 1998]; *Ploof v B.I.M. Truck Serv.*, 53 AD2d 750, 751 [3d Dept 1976], *lv denied* 40 NY2d 803 [1976]; *cf. Haines v Dick's Concrete Co., Inc.*, 84 AD3d 732, 734 [2d Dept 2011]; *Bish v Odell Farms Partnership*, 119 AD3d 1337 [4<sup>th</sup> Dept]). In addition, by virtue of his delivery activities, plaintiff Jose Montesdeoca was exposed to the risk of falling through a hole in the ground outside the building to a lower level, namely the building's basement. The hole had no barricade or warning around it, and had only an unsecured piece of dirty plywood covering it (*see Nasuro v PI Associates, LLC*, 49 AD3d 829 [2d Dept 2008]; *Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693 [2d Dept 2006]; *Brandl v Ram Builders*, 7 AD3d 655 [2d Dept 2004]; *Segarra v All Boroughs Demolition & Removal*, 284 AD2d 321 [2d Dept 2001]; *Griffin v MWF Dev. Corp.*, 273 AD2d 907 [2d Dept 2000]; *Aiello v Rockmor Elec. Enter.*, 255 AD2d 470 [2d Dept 1998]; *Klos v New York City Tr. Auth.*, 240 AD2d 635 [2d Dept 1997]; *Carpio v Tishman Constr. Corp.*, 240 AD2d 234 [1st Dept 1997]).

In opposition to the prima facie showing by plaintiffs that defendants 101-19 37th Avenue LLC and United Founders violated Labor Law § 240(1) by failing to provide or erect a safety device or a warning around the hole, necessary to give proper protection to plaintiff Jose Montesdeoca, defendants 101-19 37th Avenue LLC, United Founders and Pouratian assert that plaintiff Jose Montesdeoca assumed the risk of falling into the hole by getting too close to the hole as he inspected the forklift's stuck wheel.<sup>1</sup>

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Muhammad Motha, an owner of defendant Alpha Builder Inc., a subcontractor on the project, testified at his deposition that plaintiff Jose Montesdeoca fell into the hole as Montesdeoca attempted to pull the forklift wheel out of the hole. Motha, however, admitted that he did not witness such attempt or the accident, and as such, his testimony is based upon hearsay. "While hearsay statements may be used to oppose motions for summary judgment, they cannot, as here, be the only evidence submitted to raise a triable issue of fact" (*Rallo v Man-Dell Food Stores, Inc.*, 117 AD3d 705, 706 [2d Dept 2014]; *Pontes v F&S Contracting, LLC*, 146 AD3d 829 [2d Dept 2017]) (*see also Kupiec*

Even assuming that plaintiff Jose Montesdeoca was negligent in getting too close to the hole, defendants 101-19 37th Avenue LLC, United Founders and Pouratian have failed to demonstrate Montesdeoca had been warned about the existence of the hole and unreasonably disregarded it, or the danger was readily apparent. As a consequence, they have failed to raise a triable issue of fact as to whether the conduct of plaintiff Jose Montesdeoca was the sole proximate cause of his accident (*see Yaucan v Hawthorne Village, LLC*, 155 AD3d 924 [2d Dept 2017]). Nor did defendants United Founders and Pouratian demonstrate their prima facie entitlement to judgment as a matter of law dismissing the claim based upon violation of Labor Law § 240(1) insofar as asserted against defendant United Founders. Accordingly, the branch of plaintiffs' motion for summary judgment on the issue of liability on the Labor Law § 240(1) cause of action against defendants 101-19 37th Avenue LLC and United Founders is granted, and that branch of the cross motion by defendants United Founders and Pouratian for summary judgment dismissing that cause of action insofar as asserted against defendant United Founders is denied.

Dated: May 4 , 2018

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J.S.C.

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*v Morgan Contracting Corp.*, 137 AD3d 872 [2d Dept 2016] [the deposition testimony of witnesses who did not have personal knowledge of the facts of the accident or the condition of a scaffold at the time of the accident was inadmissible hearsay on the issue of whether the plaintiff's conduct was the sole proximate cause of his injuries]). No other evidence has been presented relative to the claim by Motha that plaintiff was attempting to pull the forklift wheel out of the hole when he fell into it. Plaintiff Jose Montesdeoca, moreover, denied having tried to pull the forklift out of the hole prior to the accident.