

**Gutierrez v 610 Lexington Prop., LLC**

2019 NY Slip Op 31547(U)

May 30, 2019

Supreme Court, New York County

Docket Number: 162787/2015

Judge: Kathryn E. Freed

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

**PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM**

*Justice*

-----X INDEX NO. 162787/2015

FLAVIO GUTIERREZ,

Plaintiff,

MOTION SEQ. NO. 001, 002

- v -

610 LEXINGTON PROPERTY, LLC, RFR HOLDING LLC, RFR REALTY LLC, PAVARINI MCGOVERN, LLC,

**DECISION AND ORDER**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 93, 94, 95

were read on this motion to/for JUDGMENT - SUMMARY

Motion Sequence Numbers 001 and 002 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by a union laborer on April 16, 2015 while working at a construction site located at 610 Lexington Avenue, New York, New York (the Premises), he was allegedly struck by an unsecured piece of construction material that was being lowered from above.

In motion sequence number 001, plaintiff Flavio Gutierrez moves, pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants 610 Lexington Property, LLC (610 Lex), RFR Holding LLC (Holding), RFR Realty, LLC (Realty) (collectively the owner defendants) and Pavarini McGovern LLC (Pavarini) (collectively defendants). In motion sequence number 002 defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint against them.

## FACTUAL AND PROCEDURAL BACKGROUND

On the day of the accident, the Premises was owned by the owner defendants. The owner defendants retained Pavarini as general contractor on a project at the Premises that entailed the construction of a new 60-story residential building (the Project). Pavarini in turn hired non-party Navillus Contracting (Navillus), plaintiff's employer, to build the concrete superstructure of the building.

### *Plaintiff's Deposition Testimony*

Plaintiff testified at his deposition that on the day of the accident, he was a union laborer employed by Navillus. His work at the Project included stripping and stacking concrete forms at the construction site. He was solely directed by a Navillus supervisor named "Alberto" (plaintiff's tr at 102).

On the day of the accident, the Premises was under construction. While some floors had been assembled above his work floor, the ceiling was not finished, and the exterior walls were not built. At the beginning of the day, he was assigned a partner. Plaintiff's task was to stand on the ground and receive "metals" passed down to him from Navillus workers situated on a scaffold above him (*id.* at 115). He explained that the material he received was part of a temporary mold, or form, around the concrete Navillus was installing at the Premises. He estimated that each piece of the form was approximately 5-by-8 feet and weighed 250 pounds.

Shortly before the accident, someone "moved [his] coworker" so that he no longer had a partner (*id.* at 121). Then, a worker from above passed down a piece of the form that "had a nail in it" (*id.*). Plaintiff testified that, when he took hold of the form, he "touched the nail" on its underside, which caused him to release his grip (*id.* at 135). At that moment, the worker above

“let go of [the form]” and “the piece went against [plaintiff]” (*id.* at 135 and 136). Plaintiff then “went backwards with the piece” and fell to the ground (*id.* at 136).

When asked if the form came down on top of him, plaintiff testified that “[i]t didn’t land on top of [him]” (*id.* at 139). However, he also testified that “everything came on top of [him]” when he fell (*id.* at 140).

### ***Deposition Testimony of Navillus’ Foreman Alberto Rodriguez***

Rodriguez testified that he was plaintiff’s foreman on the day of the accident. Navillus was hired to install all concrete superstructure on the Project, including the floors, walls and columns. To shape the concrete, Navillus workers put plywood forms around rebar steel “ribs” (Rodriguez tr at 12). Then, rubber molds were inserted inside the forms to create an architectural pattern. The concrete was then poured into the form. Once the concrete cured, the form was removed and then the rubber was removed. Each piece of the form was approximately four-by-eight feet and three-quarter inches thick, and approximately 40 to 50 pounds. The rubber was about the same size and weighed approximately 150 to 180 pounds.

Rodriguez directed plaintiff and a coworker to stand on the finished concrete floor while Navillus workers on a scaffold above him stripped the forms from the ceiling and passed them down to him. Plaintiff stacked the forms together for later use on the next floor. According to Rodriguez, Navillus did not use ropes, pullies or hoists to lower the forms because “you don’t need it” (*id.* at 49).

Although Rodriguez did not witness the accident, he was a few feet away when it happened. He heard plywood hitting the concrete floor. A few moments later, he turned around and saw plaintiff standing next to a piece of plywood on the floor, holding his hand. Plaintiff removed his

work glove from his hand and showed Rodriguez a cut. Rodriguez never saw plaintiff laying on the ground.

***Deposition Testimony of Realty's Vice President of Construction Services Charles Rosmarino***

The responsibilities of Rosmarino, vice-president of construction services for Realty, included the development of new construction and major renovations. He confirmed that 610 Lex was the owner of the Premises, that Realty was a property management and development company, and that Holding was Realty's holding company. He also confirmed that 610 Lex retained Pavarini as a general contractor on the Project.

The owner defendants did not direct or have the authority to stop work at the Project. All they could do if they became aware of an unsafe condition was notify Pavarini.

***Deposition Testimony of Pavarini's Construction Superintendent A.B. Olevic***

Olevic testified that, on the day of the accident, he was construction superintendent for Pavarini, the general contractor on the Project. Specifically, Pavarini was hired by the owner defendants "to build the entire building" (Olevic tr at 33). Pavarini hired nonparty Site Safety to oversee safety at the Project. The Site Safety manager would walk the work site daily to monitor safety.

Olevic did not regularly walk the construction site, but he had the authority to stop work if he saw an unsafe practice or situation. Typically, he would just address issues with his subcontractors' foremen.

### *The Accident Reports*

In support of their motion, defendants provided a copy of an unsigned “Injury/Accident Report,” dated April 28, 2015 (12 days after the accident) (the Accident Report) (defendants’ notice of motion, exhibit L). The Accident Report reflects that plaintiff was injured by “Manually Handled Material” (*id.*).

Defendants also provided a copy of Navillus’ “Employer’s Report of Work-Related Injury/Illness” form, known as a C-2 Report (the C-2 Report) (*id.*, exhibit M). The C-2 Report is dated April 23, 2015 (seven days after the accident). It states that plaintiff was “stripping plywood on underside of 5th floor (5’ x 12’ sheet)” and that “he was being handed [a] sheet of plywood when he cut his hand on a nail, dropped plywood” (*id.*).

### **LEGAL CONCLUSIONS**

“[T]he 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 demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must “assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions” (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the

motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

***The Labor Law § 240 (1) Claim (Motion Sequence Numbers 001 and 002)***

Plaintiff moves for summary judgment in his favor as to liability on his Labor Law § 240 (1) claim against defendants. Defendants move for summary judgment dismissing said claim against them.

Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

“All contractors and owners and their agents . . . 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) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person” (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

Importantly, Labor Law § 240 (1) “is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed” (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]). That said, not every worker who falls at a construction site is afforded the protections of Labor Law § 240 (1), and “a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace”

(*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010]). Instead, liability “is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein” (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

Therefore, to prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff’s injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]).

Here, plaintiff alleges that he was injured by a falling object – i.e. the form – that was not properly secured so as to prevent it from falling onto plaintiff during the process of lowering it from the scaffold to the floor. In order to recover damages for a violation of Labor Law § 240 (1) under a falling objects theory, a plaintiff must demonstrate that the object that fell was in the process of being hoisted or secured at the time of the accident, or that it “was a load that required securing for the purposes of the undertaking at the time it fell” (*Cammon v City of New York*, 21 AD3d 196, 200 [1st Dept 2005] [internal quotation marks and citation omitted]; *see also Quattrocchi v F.J. Sciamè Const. Corp.*, 11 NY3d 757, 758-59 [2008][“falling object” liability under Labor Law § 240(1) is not limited to cases in which the falling object is in the process of being hoisted or secured]).

In opposition to plaintiff’s motion and in support of their own motion, defendants argue that Labor Law § 240 (1) was not violated because plaintiff’s accident did not involve a gravity related hazard and, therefore no safety device was necessary. However, it is uncontested that plaintiff injured his hand on a nail embedded in the form, which caused him to mishandle the form while it was being lowered which, in turn, caused the form to fall unsecured and with plaintiff, to

the floor. Plaintiff's testimony that the form "went against [him] and [he] went backwards with the piece" is also uncontested (plaintiff's tr at 136).

Defendants argue that nothing fell directly on top of plaintiff. However, a plaintiff does not have to be physically struck by a falling object for his accident to be within the ambit of Labor Law § 240 (1) (*Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 604 [2009] [It does not matter "whether the object has hit the worker. The relevant inquiry . . . is, rather, whether the harm flows directly from the application of the force of gravity to the object"]; see also *Skow v Jones, Lang & Wooten Corp.*, 240 AD2d 194, 195 [1st Dept 1997] ["That plaintiff neither fell from a height nor was struck by a falling object does not require dismissal of his section 240 (1) claim, the proof being sufficient to show that his injury was caused by his effort to prevent [an object] from falling"]). In fact, "[i]t is enough that the injury was a foreseeable consequence of defendants' failure to provide and place a proper protective device where one was called for" (*Kollbeck v 417 FS Realty*, 4 AD3d 314, 314 [1st Dept 2004], quoting *Sasso v NYMED Inc.*, 238 AD2d 799, 800 [3d Dept 1997]).

Plaintiff has established his prima facie entitlement to summary judgment in his favor on the Labor Law § 240 (1) claim against defendants because the unwieldy nail-studded form that was being lowered to plaintiff constituted "a load that required securing for the purposes of the undertaking" (*Cammon*, 21 AD3d at 200 [internal quotation marks and citations omitted]; accord *Mora v Sky Lift Distrib. Corp.*, 126 AD3d 593, 595 [1st Dept 2015]). In addition, given the form's size (either 4-by-8 or 5-by-12 feet), weight (at least 50 pounds), and the fact that nails protruded from it, it was foreseeable that plaintiff might mishandle the form when he received it from the workers on the scaffold (see *Jones v 414 Equities LLC*, 57 AD3d 65, 79 [1st Dept 2008] ["the determination of the type of protective device [, if any,] required for a particular job turns on the

foreseeable risks of harm presented by the nature of the work being performed”]; *Ortega v City of New York*, 95 AD3d 125 [1st Dept 2012]). Accordingly, instead of being passed down freehand, the form should have been secured by a safety device, and the failure to provide such device to control the descent of the heavy, nail-studded form was a proximate cause of plaintiff’s accident (*Kollbeck v 417 FS Realty*, 4 AD3d at 314).

In addition, since Rodriguez did not witness the accident or the effect of the form on plaintiff, defendants’ reliance on his testimony that he never saw plaintiff laying on the ground is insufficient to create an issue of fact as to whether the form actually “went against” plaintiff and forced him to the ground, thereby rendering the accident elevation-related.

Further, the unsworn Accident Report and the C-2 Report do not raise a question of fact regarding the nature of plaintiff’s accident. Neither report conflicts with plaintiff’s consistent testimony that he stuck his hand on a nail and lost his grip on the form, which caused the form to push him backwards before it fell, unimpeded, to the ground (*see e.g. Rom v Eurostruct, Inc.*, 158 AD3d 570, 570 [1st Dept 2018] [an “unsworn accident report containing a statement from a coworker that plaintiff lost his balance and fell” from a ladder “did not contradict plaintiff’s consistent testimony that he fell because the ladder suddenly moved”]).

Defendants also argue that Labor Law § 240 (1) was not violated because the scaffold afforded plaintiff protection from falling objects. This argument is unpersuasive. While the scaffold may have protected plaintiff from the risk of the form falling while it was in the process of being stripped from the concrete, it did not protect him from “the distinctly separate, elevation-related hazard” created by the need to transfer the form from the scaffold to the floor below (*Sasso v NYMED Inc.*, 238 AD2d at 800). Defendants have not established that they provided a sufficient safety device to protect plaintiff from harm directly flowing from the application of the force of

gravity on the form while it was in the process of being lowered, as required by Labor Law § 240 (1) (*John v Baharestani*, 281 AD2d at 118).

Finally, that defendants provided plaintiff with a coworker to help him control the form as it descended is of no moment as “a coworker is not a safety device contemplated by the statute” (*Noor v City of New York*, 130 AD3d 536, 541 [1st Dept 2015] [internal quotation marks and citations omitted]). That plaintiff’s coworker was “moved” to another area is also unimportant (plaintiff’s tr at 121). Such repositioning does not constitute an unforeseeable superseding act that would break any causal connection between defendants’ violation of section 240 (1) and plaintiff’s injuries (*see Hajderli v Wiljohn 59 LLC*, 71 AD3d 416, 416-417 [1st Dept 2010] [holding that it was entirely unforeseeable – and therefore a superseding cause of the plaintiff’s accident – where the plaintiff was on a ladder when his supervisor “pulled it away,” causing him to fall]).

Thus, plaintiff is entitled to summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants, and defendants are not entitled to summary judgment dismissing said claim against them.

#### ***The Labor Law 241 (6) Claims (Motion Sequence 002)***

Defendants move to dismiss the Labor Law § 241 (6) claims as against them on the ground that each of the Industrial Code sections alleged to have been violated are inapplicable to the instant action. Although plaintiff lists multiple violations of the Industrial Code in the bill of particulars, plaintiff does not oppose their dismissal. Therefore, the unopposed provisions are deemed abandoned (*Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] [“Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that

a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section”)).

Thus, defendants are entitled to summary judgment dismissing the Labor Law § 241 (6) claim.

***The Common-Law Negligence and Labor Law § 200 Claims (Motion Sequence Number 002)***

Defendants move to dismiss the common-law negligence and Labor Law § 200 claims against them on the ground that they did not supervise or control the means or methods of the work that caused plaintiff’s injury. Importantly, plaintiff does not oppose this portion of defendants’ motion.

Labor Law § 200 “is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work” (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Labor Law § 200 (1) states, in pertinent part, as follows:

“All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.”

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: (1) when the accident is the result of the means and methods used by a contractor to do its work, and (2) when the accident is the result of a dangerous condition that is inherent in the premises (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ*

of *Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]; see also *Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]).

“Where a plaintiff’s claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work” (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 909 [2d Dept 2011]). Specifically, “liability can only be imposed against a party who exercises actual supervision of the injury-producing work” (*Naughton v City of New York*, 94 AD3d 1, 11 [1st Dept 2012]).

However, where an injury stems from a dangerous condition on the premises, an owner may be liable in common-law negligence and under Labor Law § 200 “when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice” (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011], quoting *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2d Dept 2008]).

Since plaintiff was injured when an insufficiently secured form fell, his accident clearly arose from the means and methods of work performed at the Premises.

Defendants have provided evidence that they did not supervise or control the removal of the forms from the concrete at the Project. Nor did they supervise or control the transfer of the forms from the scaffold to the floor. Accordingly, defendants have sufficiently established their prima facie entitlement to summary judgment dismissing the common-law negligence and Labor Law § 200 claims.

Thus, as plaintiff does not oppose dismissal of these claims, defendants are entitled to dismissal of the common-law negligence and Labor Law § 200 claims against them.

This Court has considered the parties' remaining arguments and finds them to be unavailing.

Therefore, in light of the foregoing, it is hereby:

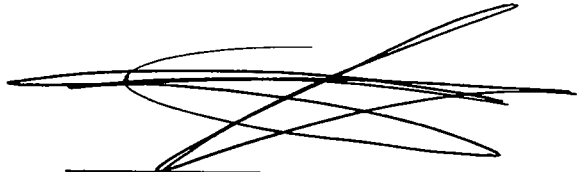
**ORDERED** that plaintiff Flavio Gutierrez's motion (motion sequence number 001), pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against defendants 610 Lexington Property LLC, RFR Holding LLC, RFR Realty LLC and Pavarini McGovern LLC (collectively defendants) is granted; and it is further

**ORDERED** that defendants motion (motion sequence number 002), pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241 (6) claims is granted, and the motion is otherwise denied; and it is further

**ORDERED** that the remainder of this action shall continue; and it is further

**ORDERED** that the parties are to appear for a previously scheduled conference in the Early Settlement Conference Part on June 4, 2019 at 2:15 p.m.; and it is further

**ORDERED** that this constitutes the decision and order of the court.

  
KATHRYN E. FREED, J.S.C.

5/30/2019  
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE
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	<input type="checkbox"/>		<input type="checkbox"/>	DENIED