

**Lemache v MIP One Wall St. Acquisition LLC**

2019 NY Slip Op 32116(U)

July 19, 2019

Supreme Court, New York County

Docket Number: 158212/2016

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

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INDEX NO. 158212/2016

LUIS LEMACHE,

MOTION SEQ. NO. 002

Plaintiff,

- v -

MIP ONE WALL STREET ACQUISITION LLC, GILBANE  
RESIDENTIAL CONSTRUCTION, LLC, and GILBANE BUILDING  
COMPANY,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion to/for

SUMMARY JUDGMENT

In this Labor Law action, defendants MIP One Wall Street Acquisition LLC (“MIP”), Gilbane Residential Construction, LLC (“GRC”), and Gilbane Building Company (“GBC”) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint of plaintiff Luis Lemache (“Lemache”) in its entirety. Lemache opposes the motion and cross-moves, pursuant to CPLR 3212, for summary judgment on his common law negligence and Labor Law §§ 200 and 240(1) causes of action. Defendants oppose the cross motion. After oral argument, and after a review of the parties’ papers and the relevant statutes and caselaw, it is ordered that the motion and cross motion are decided as follows.

**FACTUAL AND PROCEDURAL BACKGROUND:**

The accident that led to the commencement of this suit took place on April 2, 2016. (Doc. 43 at 2.) Plaintiff Lemache was employed as a construction laborer by non-party Titan Industrial Corp. (“TIC”) to work at a jobsite located at 1 Wall Street in Manhattan. (*Id.*; Docs. 32 at 3; 33 at 6.) Defendant GRC-GBC,<sup>1</sup> the general contractor on the site (Doc. 43 at 2), had hired TIC as a subcontractor (*id.*; Doc. 38 at 27–28). Defendant MIP was the owner of the subject premises. (Doc. 43 at 3.)

At the time of his accident, Lemache and his coworkers had been instructed by Fernando Arevalo (“Arevalo”), a foreman employed by TIC, to relocate a planter on the ground floor of the premises for the installation of new turnstiles the following week. (Docs. 32 at 5–7; 36 at 12.) The planter, which was made of concrete, was approximately 8 feet long, 2–3 feet wide, 3 feet high (Doc. 43 at 2), and was filled to the top with dirt (Doc. 32 at 4). As foreman, Arevalo instructed Lemache and the other workers to roll the planter over a row of pipes while he drove a bobcat to push the planter from behind. (Docs. 32 at 5; 43 at 2.) As they began moving the planter, however, one pipe suddenly rolled over Lemache’s right foot, which allegedly caused him severe injuries. (Doc. 43 at 2.)

Lemache commenced the instant action on September 29, 2016, by filing a summons and complaint. (Doc. 33.) In the complaint, he alleged causes of action for common law negligence (*id.* at 12–14) and violations of New York Labor Law §§ 200, 240(1), and 241(6) (*id.* at 14–19). Defendants filed their answer on October 24, 2016. (Doc. 34.) Plaintiff served his bill of particulars

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<sup>1</sup> The deposition testimony of Angelica Sepulveda (“Sepulveda”), a GRC employee who acted as the superintendent on the site, establishes that defendants GRC and GBC are the same entity. (Docs. 38 at 14; 43 at 3.) Thus, this Court will call the entity “GRC-GBC.”

on December 30, 2016, wherein he alleged that the “planter fell on [his] foot causing serious injuries.” (Doc. 35 at 2.)

The following depositions have been held in this matter: Plaintiff was deposed on June 19, 2017. (Doc. 36.) Contrary to the allegation in his bill of particulars that the planter fell on his foot, he instead testified that the pipes “stepped”<sup>2</sup> on his foot while they were rolling the planter. (*Id.* at 13.) Angelica Sepulveda (“Sepulveda”), a GRC-GBC employee who acted as the superintendent on the site (Doc. 43 at 3), was deposed on August 1, 2017 (Doc. 38). She testified that GRC-GBC had the right to stop any work that it deemed unsafe at the project. (*id.* at 36) and that it also supervised the work that was being done (*id.* at 38). Although she admitted that she would have selected another means of relocating the planter (*see* Doc. 38 at 86 (“I would have certainly removed all the soil from inside the planter because that is the majority of the weight.”)), she stated that GRC-GBC did not typically direct TIC employees “how to do their work. We just make sure that it’s being performed” (*id.* at 92). Arevalo, who testified as a non-party witness on March 14, 2018 (Doc. 39), said that he had been instructed by GRC-GBC to move the planter (*id.* at 16–17), but that it was up to him to figure out how the planter was to be moved (*id.* at 19). Nobody from GRC-GBC observed how the planter was being moved. (*Id.* at 52.)

Plaintiff also submits an expert affidavit by Kathleen Hopkins (“Hopkins”), a New York City certified site safety manager, who opines that defendants are liable under Labor Law §§ 200, 240(1), and 241(6). (Doc. 46.) The note of issue was filed on June 28, 2018. (Doc. 40.)

Defendants now move, pursuant to CPLR 3212, for summary judgment to dismiss the complaint in its entirety. (Doc. 31.) In support of their motion, they argue that Lemache’s Labor Law § 200 and common law negligence causes of action should be dismissed because they did not

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<sup>2</sup> Both parties have interpreted this as meaning that one of the pipes rolled onto Lemache’s foot. (*See* Docs. 43 at 2 (affirmation of plaintiff); 47 at 7 (affirmation of defendants).)

exercise supervisory authority or control over the work that was being done. (*See* Doc. 32 at 12.) Rather, they assert that it was non-party TIC that directed plaintiff's work. (*Id.*) With respect to § 240(1), they maintain that this cause of action must be dismissed because the pipe rolled, and did not fall, over plaintiff's foot. (*Id.* at 14–15.) Regarding § 241(6), they insist that the Industrial Code provisions relied on by plaintiff are either inapplicable or too general to confer liability under the Labor Law. (*Id.* at 15–22.)

Plaintiff cross-moves,<sup>3</sup> pursuant to CPLR 3212, for summary judgment in his favor on his causes of action for common law negligence and Labor Law §§ 200 and 240(1). (Doc. 42.) In regard to § 240(1), plaintiff maintains that he was “indisputably involved in a hoisting operation,” in that he and his coworkers had to lift the planter approximately one inch off the ground so that they could position it over the pipes. (Doc. 43 at 11.) Thus, he contends this was a height-elevated risk which § 240(1) was meant to protect. (*Id.* at 12–13.) He also cites to Hopkins' affidavit and to her opinion therein that defendants were statutorily required to provide safety devices to move the planter safely. (*Id.* at 13.) Because they did not do so, he argues that they are absolutely liable under § 240(1). (*Id.*) In regard to his § 200 and common law negligence claims, Lemache asserts that defendants were aware of the “unsafe condition” of moving the planter—insofar as they were aware of alternative methods of transporting it—and that they failed to protect him from that unsafe condition. (*Id.* at 15–16.) Again, plaintiff cites to Hopkins' affidavit in support of this argument. (*Id.* at 16.)

In opposition to the cross motion, defendants first argue that Hopkins' expert affidavit is inadmissible because it was only exchanged after they filed the instant motion (Doc. 47 at 2), it

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<sup>3</sup> This Court notes that the papers submitted by Lemache's attorney do not attempt to raise an issue of fact in opposition to defendants' arguments for summary judgment. (*See* Docs. 43; 48.) Rather, Lemache only argues why he should be granted summary judgment on his Labor Law §§ 200 and 240(1) causes of action. (*See* Docs. 43; 48.)

does not have a certificate of conformity even through it was notarized in New Jersey (*id.* at 3), and it was “obviously” tailored in such a way as to raise a triable issue of fact in response to their motion (*id.* at 2–3). Plaintiff claims that the expert affidavit is admissible evidence. (Doc. 48 at 2–3.)

### LEGAL CONCLUSIONS:

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The movant must produce sufficient evidence to eliminate any issues of material fact. (*Id.*) If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. (*See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006].) If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied. (*See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978].)

#### a. Hopkins’ Affidavit.

As a preliminary matter, this Court finds that Hopkins’ expert affidavit must be considered in support of plaintiff’s cross motion. The arguments proffered by defendants on this issue are simply unconvincing. First, they argue that her affidavit should be disregarded because it was never exchanged or noticed as per CPLR 3101(d) until after the note of issue was filed. (Doc. 47 at 2.) However, a “party’s failure to disclose its experts . . . prior to the filing of a note of issue and certificate of readiness does not divest a court of the discretion to consider an affirmation or

affidavit submitted by that party's experts in the context of a timely motion for summary judgment." (*Rivers v Birnbaum*, 102 AD3d 26, 31 [2d Dept 2012].) Second, while defendants point out that Hopkins' affidavit was notarized in New Jersey but lacks a certificate of conformity, "the courts are not rigid about this requirement. As long as the oath is duly given, authentication of the oathgiver's authority can be secured later, and given *nunc pro tunc* effect if necessary." (*Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 AD3d 672, 673 [1st Dept 2009].) This Court will therefore consider her affidavit.

Since defendants' remaining arguments regarding Hopkins' affidavit address the substance of her opinions, this Court will consider those contentions below.

**b. The Common Law Negligence and Labor Law § 200 Causes of Action.**

"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, 143 [1st Dept 2012].) Generally, personal injury claims under this statute and the common law fall into two categories: "[1] those arising from an alleged defect or dangerous condition existing on the premises and [2] those arising from the manner in which the work was performed." (*Cappabianca*, 99 AD3d at 143–44 (bracketed numbering added).) Thus, an owner or general contractor is liable under § 200 if they created the defective condition or had actual or constructive notice of it (the first category), (*see id.* at 144), or if they actually exercised supervisory control over the injury-producing work (the second category) (*see id.*).

Here, this Court finds that summary judgment dismissing plaintiff's cause of action under Labor Law § 200 is warranted on the basis that defendants exercised no supervisory control over

the work that produced his injury. Plaintiff himself testified that it was Arevalo, TIC's foreman, who controlled his work:

- Q: The way the plant[er] was moved with the pipes underneath it, who decided to move it that way?  
A: The foreman.  
Q: That's Fernando [Arevalo]?  
A: Yes, sir.

(Doc. 36 at 23.) Moreover, although Sepulveda, the GRC-GBC superintendent, testified that GRC-GBC exercised general supervisory authority<sup>4</sup> over the worksite (Doc. 38 at 38), she also testified that GRC-GBC did not typically direct TIC employees "how to do their work. We just make sure that it's being performed" (Doc. 38 at 92). Indeed, that it was TIC—rather than defendants MIP or GRC-GBC—who exercised control over plaintiff's work is confirmed by Arevalo:

- Q: That was your job, correct?  
Mr. Smith: Objection.  
A: To move the planter.  
Q: And it was up to you to figure out how to do that, correct?  
Mr. Smith: Objection.  
A: That was the only way.  
Q: I know but just listen to my question, okay. It was your responsibility to figure out how this was going to be done; is that correct?  
Mr. Smith: Objection.  
A: Yes.

(Doc. 39 at 19.)

Plaintiff hardly attempts to argue to the contrary. (See Doc. 48 at 3 (maintaining that "it is unnecessary to prove an owner or contractor's supervision and control over the Plaintiff if the contractor created the unsafe condition or had notice and failed to remedy the unsafe condition"

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<sup>4</sup> With respect to Sepulveda's deposition testimony in this regard, this Court notes that "[g]eneral supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled *the manner in which the plaintiff performed his or her work . . .*" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007].)

before devoting the rest of his arguments to why defendants had notice of the alleged unsafe condition); *see also* Doc. 43 at 14–16 (arguing that defendants were aware that the planter was being moved, but not arguing that they exercised authority over its relocation.) Even if it could somehow be said that MIP and GRC-GBC exercised supervisory control by virtue of the fact that they were the owner and the general contractor at the site, respectively, it has been held that such “[g]eneral supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled *the manner in which the plaintiff performed his or her work . . .*” (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007].) That “manner” was indubitably chosen by TIC vis-à-vis Arevalo. Nor does Hopkins’ expert affidavit establish defendants’ exercise of control over plaintiff’s work. Although Hopkins opines that defendants are liable under § 200 because they “failed to ensure compliance with” it (Doc. 46 at 8), the “general duty to supervise the work and ensure compliance with safety regulations does not amount to supervision and control of the work site . . .” (*Buccini v 1568 Broadway Assocs.*, 250 AD2d 466, 469 [1st Dept 1998].) Thus, the branch of defendants’ motion seeking to dismiss plaintiff’s common law negligence and Labor Law § 200 claims is granted.

In a similar vein, this Court further rejects plaintiff’s contention that a showing of supervisory control is unnecessary since his accident was caused by a dangerous condition of which defendants allegedly had notice. (*See* Doc. 48 at 3.) (*See McParland v Travelers Ins. Co.*, 302 AD2d 328, 328 [1st Dept 2003] (rejecting the argument that actual or constructive notice is sufficient to make a defendant liable under § 200).) He asserts that defendants are liable under § 200 because they had “clear” notice of the dangerous condition of the planter (Doc. 48 at 3–4), since it was defendant GRC who instructed TIC, his employer, to relocate it (Doc. 43 at 15). This argument is unavailing because the cause of plaintiff’s injury—the pipe that rolled over his foot—

was not a defective condition inherent in the property of which defendants could be charged with having notice (i.e., the pipe does not fit within the first category of liability under § 200), but was rather created by the manner in which plaintiff performed his work (i.e., the pipe fits within the second category of liability, but, as concluded above, the defendants are not liable on that ground for lack of supervisory control). (See *Dalanna v City of New York*, 308 AD2d 400, 400 [1st Dept 2003] (employing the same reasoning).) Nothing in Hopkins' expert affidavit suggests otherwise. (Doc. 46 at 8–9.) Thus, the branch of plaintiff's cross motion seeking summary judgment on his common law negligence and Labor Law § 200 causes of action is denied.

**c. The Labor Law § 240(1) Cause of Action.**

“Labor Law § 240(1) applies to both ‘falling worker’ and ‘falling object’ cases.” (*Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 267 [2001].) Unlike § 200, liability under § 240(1) does not require notice of a defect or the exercise of supervisory authority by the defendant. (See *Lombardi v Stout*, 80 NY2d 290, 295 [1992].) Liability pursuant to § 240(1) is therefore absolute. (*Id.*) At the outset, this Court notes that Lemache does not allege that he fell; rather, he asserts in his bill of particulars that an object—the planter—fell on him (Doc. 35 at 2) and that he “was indisputably involved in a hoisting operation” (Doc. 43 at 11). Thus, the narrow issue before this Court under § 240(1) is whether this is a “falling object” situation for which defendants are liable.

In lawsuits based on a falling object, plaintiffs must demonstrate a violation of § 240(1) and show that such violation was a proximate cause of injury. (See *Kupiec v Morgan Contr. Corp.*, 137 AD3d 872, 873 [2d Dept 2016].) In doing so, the plaintiff “must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell, while being hoisted or secured, *because of* the absence or inadequacy of a safety device of the kind enumerated

in the statute.” (*Narducci v Manhasset Bay Assocs.*, 96 NY2d at 268 [2001]; *see also Doucoure v Atl. Dev. Group, LLC*, 18 AD3d 337, 338–39 [1st Dept 2005].)

Based on the evidence submitted, plaintiff cannot sustain a § 240(1) claim against defendants. Although he claims in his bill of particulars that the planter fell on him (Doc. 35 at 2), this allegation is rebutted by his deposition testimony that the pipes “stepped” on his foot while he and the other workers were rolling the planter (Doc. 36 at 13). In their papers, both parties consistently interpret this as meaning that one of the pipes rolled onto Lemache’s foot. (*See Docs. 43 at 2 (affirmation of plaintiff); 47 at 7 (affirmation of defendants).*) It is well-settled that a plaintiff must establish that the “object fell . . . because of the absence or inadequacy of a safety device of the kind enumerated in the statute.” (*Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 268 [2001].) It is impossible for this Court to conceive how a pipe, which was already rolling on the ground, could have fallen on plaintiff. To the contrary, all the evidence shows that this accident was not “related to the effects of gravity where protective devices are called for . . . .” (*Rocovich v Consol. Edison Co.*, 78 NY2d 509, 514 [1991].) There was no “physically significant elevation differential” here. (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009] (“[T]he single decisive question is whether plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a *physically significant elevation differential.*”) (emphasis added).) Again, although Hopkins opines that defendants should have used a hoist to move the planter (Doc. 46 at 4), her expert affidavit is unhelpful to plaintiff, since relocating the planter was simply not a hoisting operation involving a difference in height elevations.

The branch of defendants’ motion seeking summary judgment to dismiss plaintiff’s Labor Law § 240(1) cause of action is therefore granted. Conversely, the branch of plaintiff’s cross motion seeking summary judgment on § 240(1) is denied.

**d. The Labor Law § 241(6) Cause of Action.**

Finally, this Court finds that plaintiff's Labor Law § 241(6) cause of action must be dismissed. To establish liability under Labor Law § 241(6), a plaintiff "must 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].) In their motion, defendants addressed the various Industrial Code provisions on which Lemache's § 241(6) claim was predicated. (Doc. 32 at 15–22.) Defendants point out that Lemache failed to oppose the branch of their motion seeking summary judgment to dismiss his § 241(6) cause of action. (Doc. 47 at 2.) Neither did he move for summary judgment on that claim. (*Id.*; *see also* Doc. 43.) Because plaintiff did not address § 241(6) and the pertinent Industrial Code provisions in his papers (*see generally* Docs. 43; 48 (moving for summary judgment in plaintiff's favor on Labor Law §§ 200 and 240[1])), they are deemed abandoned. (*See Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012] ("Where a defendant so moves [for summary judgment], 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.")) Therefore, Lemache's Labor Law § 241(6) claim must also be dismissed, rendering his complaint dismissed in its entirety.

In accordance with the foregoing, it is hereby:

**ORDERED** that the motion by defendants MIP One Wall Street Acquisition LLC, Gilbane Residential Construction, LLC, and Gilbane Building Company seeking summary judgment dismissing the complaint in its entirety pursuant to CPLR 3212 is granted; and it is further

**ORDERED** that the cross motion by plaintiff Luis Lemache seeking summary judgment on his common law negligence and Labor Law §§ 200 and 240(1) causes of action pursuant to CPLR 3212 is denied; and it is further

**ORDERED** that counsel for the moving defendants is directed to serve, within 30 days from service of a copy of this order with notice of entry, the Clerk of the Court (60 Centre Street, Room 141B), together with a copy of this order with notice of entry and proof of service of the foregoing on counsel for plaintiff; and it is further

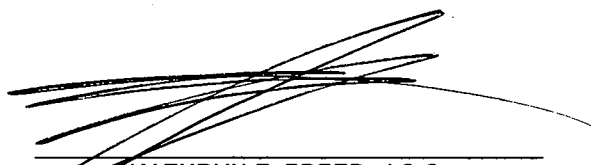
**ORDERED** that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

**ORDERED** that the Clerk of the Court shall enter judgment dismissing the action; and it is further

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

7/19/2019

DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: