

<b>Phillips v Blue Rio, LLC</b>
2019 NY Slip Op 32293(U)
July 3, 2019
Supreme Court, New York County
Docket Number: 153508/16
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

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LAWRENCE PHILLIPS,

Index No. 153508/16  
Motion Seq. No. 004

Plaintiff,

-against-

DECISION AND ORDER

BLUE RIO, LLC and BETTER DAYS  
CONSTURUCTION, LLC,

Defendants.

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**CAROL R. EDMEAD, J.S.C.:**

In a Labor Law action, defendants Blue Rio, LLC (Blue Rio) and Better Days Construction, LLC (Better Days) (collectively, Defendants) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Lawrence Phillips' (Phillips or Plaintiff) complaint. Plaintiff opposes only the part of the motion which seeks dismissal of his Labor Law § 240 (1) claim. Without moving, Plaintiff asks the court, in its opposition papers to search the record and grant him summary judgment on his Labor Law § 240 (1) claim.

**BACKGROUND**

Plaintiff alleges that he was injured, on April 14, 2015, while working as a laborer for nonparty M.C. & O. at a construction project in Mount Vernon. Plaintiff testified that he was carrying a 94-pound bag of cement to a cement mixer (NYSCEF doc No. 94 at 37). Plaintiff testified that a board on a platform he was standing on to reach the cement mixer snapped, and he fell backward with the cement bag landing on top of him (*id.* at 37-38).

As to the construction of the platform, Plaintiff testified that it was built by the masonry contractor on the project and that it consisted of boards suspended by cinderblocks:

- “Q: You said there were six of these cinderblocks in place?  
A: Yes, three on each side.  
Q: And they were stacked on top of each other, or something else?  
A: They were rigged up like real steps like.”

(*id.* at 39).

Plaintiff filed his complaint on April 26, 2016, alleging that Defendants are liable under Labor Law §§ 240 (1), 241-a, 241 (6), as well common-law negligence and Labor Law § 200.

### DISCUSSION

“Summary judgment must be granted if the proponent makes ‘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,’ and the opponent fails to rebut that showing” (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, “regardless of the sufficiency of the opposing papers” (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

Plaintiff has abandoned his claims pursuant to CPLR §§ 241-a, 241 (6), as well as CPLR 200 and common-law negligence. Thus, the branches of Defendants motions seeking dismissal of those claims is granted. All that remains, then, of both this motion and the action is Labor Law § 240 (1). That statute provides, in relevant part:

“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.”

The Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed

where a breach has proximately caused a plaintiff's injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]). A statutory violation is present where an owner or general contractor fails to provide a worker engaged in section 240 activity with "adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Where a violation has proximately caused a plaintiff's injuries, owners and general contractors are absolutely liable "even if they do not have a continuing duty to supervise the use of safety equipment" (*Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 [1st Dept 2011]).

Defendants do not argue that they are not proper Labor Law defendants. Instead, Defendants argue that Plaintiff could have performed his work without ascending the makeshift platform involved in his accident.

In support, Defendants cite to the testimony of Salvatore Picataggi (Picataggi). Picataggi was the project supervisor for Better Days, the general contractor on the project. Defendants rely on the following section of Picataggi's deposition, in which he is asked about Kingspan, another nonparty cement contractor on the project:

- "Q: Did you ever observe Kingspan workers using cinder blocks as the bases of a scaffold, in other words, to put a plank on top of cinder blocks to get up top a height?  
A: No, we don't do that.  
Q: You never observed anything like that?  
A: No, we don't do it. If there was something that I saw like that, I would stop them, but I never seen it.  
Q: Any contractor, you ever see anything like that?  
A: No.  
Q: If you had seen something like that, is that something that you would have noted in your daily report?  
A: Yeah, and I would have stopped it."

(NYSCEF doc No. 99 at 88-89).

Reading this testimony in the light most favorable to Plaintiff, it does not contradict Plaintiff's testimony as Plaintiff does not allege that the device in question was a "scaffold." Even if the question more closely tracked to Plaintiff's allegations, it would only raise an issue of material fact as to the manner of Plaintiff's accident. Thus, it cannot serve as a basis for summary judgment dismissing Plaintiff's Labor Law § 240 (1) claim.

Moreover, the pre-*Runner* cases on which Defendants rely, such as *Guercio v Metlife Inc.* (15 AD3d 153 [1st Dept 2005]) and *Brooks v City of New York* (212 AD2d 435 [1st Dept 1995]), are inapposite as they do not, as here, involve allegations that an accident was caused by a gravity related risk consisting of the combination of an elevation differential and lifting or sustaining a heavy weight. As there is a question of fact as to whether Plaintiff's injury resulted from a violation of section 240 (1), the branch of Defendants' motion seeking dismissal of that claim must be denied.

Finally, the court declines Plaintiff's invitation to search the record and grant him summary judgment. Doing so would, of course, prejudice Defendants, as they have not had an opportunity to oppose a motion that has not been made.

**CONCLUSION**

Accordingly, it is

ORDERED that Defendants' motion for summary judgment is granted only to the extent that Plaintiff's Labor Law §§ 241 (6) and 241-a claims, as well as Plaintiff's common-law negligence and Labor Law §200 claims are dismissed; and it is further

ORDERED that the remainder of Defendants' motion is denied; and it is further

ORDERED that counsel for Defendants is to serve a copy of this order, along with notice of entry, on all parties within 10 days of entry.

Dated: July 3, 2019

ENTER:



Hon. CAROL R. EDMEAD, JSC

**HON. CAROL R. EDMEAD**  
**J.S.C.**