

**Rodriguez v BSREP UA Heritage LLC**

2019 NY Slip Op 32659(U)

September 6, 2019

Supreme Court, New York County

Docket Number: 151770/17

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

JOSEPH RODRIGUEZ et al.

INDEX NO. 151770/17

- v -

MOT. DATE

BSREP UA HERITAGE LLC

MOT. SEQ. NO. 002

The following papers were read on this motion to/for summary judgment
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits
NYSCEF DOC No(s).
NYSCEF DOC No(s).
NYSCEF DOC No(s).

This action arises from personal injuries sustained at a construction site. Plaintiffs move for partial summary judgment on the issue of liability with respect to the Labor Law § 240[1] claim. Defendant, the owner of the construction site, opposes the motion and cross-moves for summary judgment dismissing plaintiffs' claims. Plaintiffs withdrew the Labor Law § 200 and common law negligence claims but otherwise oppose the cross-motion. Plaintiffs further request that the court search the record and grant them summary judgment on the Labor Law § 241[6] claim. Issue has been joined and the motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

The relevant facts are largely undisputed. On February 8, 2017, plaintiff Joseph Rodriguez ("Rodriguez") was a construction worker employed by non-party Colgate Scaffolding ("Colgate") to perform sidewalk shed erection at 1309 5th Avenue in Manhattan (the "premises" or "jobsite"). At the time of the accident, Rodriguez was climbing a fiberglass ladder to reach the platform of the sidewalk shed when the unsecured ladder slipped and tipped over, causing Rodriguez and the ladder to fall approximately six feet to the ground. Rodriguez was asked at his deposition: "Did you do anything to secure the ladder before you used it?" He responded: "There was nothing to secure. Just put it on the sidewalk shed."

Rodriguez described the collapsing of the ladder as follows: "[i]t slipped and then tipped over." Rodriguez further testified:

- Q. So when you say it slipped, you meant the footing slid on the sidewalk?
A. Yes, ma'am.
Q. It was an extension ladder, right?

Dated: 9/6/19

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER
3. Check if appropriate: [ ] SETTLE ORDER [ ] SUBMIT ORDER [ ] DO NOT POST
[ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

A. Yes, ma'am.

Q. Was it opened up?

A. No. It was part of two ladders and somebody from the job site took it apart to make two different ladders. It was a forty foot extended ladder and it came out to two ten foot ladders.

Q. Do you know who took it apart?

A. No, ma'am.

Q. Are you aware before you used the ladder that it was two parts of the ladder taken apart?

A. At the time it was being used, no, I didn't know.

Q. When did you find that out?

A. When all the --

Q. Was that after you fell?

A. Yes.

Q. Did you look at the footings on the base of the ladder before you used it?

A. Yes, ma'am.

Q. Can you describe that to me?

A. It was straight.

Rodriguez stated that he fell on his left side and landed on the sidewalk. As a result of the accident, Rodriguez sustained open lower extremity fractures requiring multiple surgeries. The owner of the fiber-glass ladder is unknown.

Plaintiff has provided the affidavit of Juan Ayala, a coworker who witnessed plaintiff's accident. He states in relevant part:

On the date of Joe Rodriguez's accident ... were in the process of erecting a sidewalk shed. There was an extension ladder that had been set up at the access point for the sidewalk shed that our crew was using to gain access to and from the sidewalk shed. Joe was climbing up the sidewalk shed when the ladder suddenly collapsed and fell, causing Joe to fall to the ground as well. It was clear that Joe was in a lot of pain and we tried to do our best to keep him calm until an ambulance arrived.

The ladder was not tied off in any manner at the time of the accident. As stated above, not only did Joe fall, but the ladder fell to the ground with him as well. It appears that the ladder was some sort of an extension ladder that had been modified or fabricated on site. I do not know whose ladder it was.

Andriy Vash, employed by third-party Tower Road Construction as a project manager, testified at his deposition that he was informed by the site safety manager named Fernando that Rodriguez "fell off

the sidewalk shed." Vash did not have any personal knowledge of plaintiff's accident. The parties have also provided a copy of an incident report generated by Colgate in connection with plaintiff's accident which states in pertinent part:

Joseph was at site with his crew on the sidewalk bridge (Change Order work). The bridge was about 8 feet high. At the time of the accident, Joseph was using customer's ladder to climb up to our existing bridge and during his climb, the ladder gave out (slipped out) and Joseph fell down to street injuring his left leg. No other person was hurt.

Finally, defendant has submitted the affidavit of Michael O'Farrell, Colgate's Secretary-Treasurer, who claims that plaintiff was "the senior person from Colgate on site the day of his accident and as such was responsible for the safety of himself and his crew." O'Farrell further states:

It was Colgate's regular practice to have its trucks loaded in our yard by our warehouse/yard workers with all equipment needed for each job on a daily basis. This always included a working ladder that was suitable to be used on each job site along with ropes and any other materials necessary to secure the ladder. All of our ladders and other equipment are inspected regularly, typically, with every usage, to make sure they are in working order and have no defects. If Mr. Rodriguez and his crew were scheduled to be constructing or adding to an existing sidewalk bridge on the day his accident occurred, these materials including but not limited to a suitable ladder and the materials necessary to secure it, were required to be on the truck as a matter of our mandatory business procedure and protocol. Further, based on our safety training and his required OSHA certifications he would have been well aware of how to properly use a ladder, when it needed to be secured and how to go about securing it.

Plaintiffs argue that they are entitled to summary judgment on the issue of liability on the Labor Law § 240[1] claim. Defendant opposes the motion and argues that it is entitled to summary judgment on the grounds that Rodriguez was the sole proximate cause of his own accident. Defendant relies on the affidavit of George H. Pfreunds Schuh, P.E., an engineering consultant with expertise in performing forensic investigations. Pfreunds Schuh highlights discrepancies with plaintiff's testimony, claims that "there is no evidence that the ladder [] Rodriguez was using at the time of the alleged accident was defective or inappropriate for providing access to the elevated sidewalk shed/bridge" nor is there any "evidence that the rail bottoms did not have adequate, slip-resistant feet or that the detached ladder section was not intended to be used by itself." Otherwise, Pfreunds Schuh disagrees with Rodriguez' claim that the use of a metal extension ladder at the jobsite would have been an unsafe electrical hazard. Pfreunds Schuh opines that Rodriguez knew or should have known that the ladder should have been secured.

Defendant further argues that that Rodriguez should have used the extension ladder on his truck which he had driven to the work site, as well as ropes located thereon which could have been used to secure the ladder Rodriguez fell from. Defendant further argues that the Labor Law § 241[6] claim should be dismissed because plaintiff cannot prove the violation of an applicable section of the Industrial Code. Meanwhile, plaintiffs argue that the court should search the record and grant them summary judgment on the Labor Law 241[6] claim premised on the violation of Industrial Code § 23-1.21

## Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR § 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary

judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

At the outset, the court largely rejects the purported discrepancies defendant's expert has identified with respect to Rodriguez' testimony as immaterial to the substantive legal arguments raised in this motion. That he testified he fell from a ten-foot portion of a forty-foot extension ladder is of no moment. Plaintiff's expert notes that two-part extension ladders are typically comprised of two equal parts. Plaintiff's testimony that the ladder was forty feet and comprised of two ten-foot parts is an inconsequential error in his testimony. No one knows who the ladder belonged to and photographs of the ladder reveal that the portion which plaintiff fell from was at least thirteen feet.

Nor is Vash's testimony sufficient to raise a triable issue of fact as to how the accident happened. Vash had no personal knowledge of the accident and merely relied on hearsay to form his own opinion of how plaintiff fell. Further, the incident report as well as the affidavit of plaintiff's coworker conforms with plaintiff's own version of events. Therefore, the relevant facts are not in dispute (see *infra*).

#### Labor Law § 240[1]

Plaintiffs' motion for summary judgment on the issue of liability with respect to Labor Law § 240[1] must be granted. Labor Law § 240[1], which is known as the Scaffold Law, imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury (*Gordon v. Eastern Railway Supply, Inc.*, 82 NY2d 555 [1993]). The statute provides in pertinent part as follows:

All contractors and owners and their agents, ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a premises 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 protects workers from "extraordinary elevation risks" and not "the usual and ordinary dangers of a construction site" (*Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d 841 [1994]). "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)" (*Narducci v. Manhasset Bay Associates*, 96 NY2d 259 [2001]).

Section 240[1] was designed to prevent accidents in which the scaffold, hoist, stay, ladder 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 (*Runner v. New York Stock Exchange, Inc.*, 13 NY3d 5999 [2009] quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). The protective devices enumerated in Labor Law § 240 [1] must be used to prevent injuries from either "a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1991]).

Here, there is no dispute that Rodriguez was injured as the result of a fall from an unsecured ladder. The ladder was inadequate for its purpose because it was unsecured and ultimately slipped and fell. Therefore, plaintiffs have demonstrated *prima facie* liability with respect to the Labor Law § 240[1]

claim (see i.e. *Beauschesne v. City of New York*, 261 AD2d 491 [1st Dept 1999]; *Rosa v. R.H. Macy's Company, Inc.*, 272 AD2d 87 [1st Dept 2000]).

In turn, defendant has failed to even raise a triable issue of fact. Defense counsel's argument that Rodriguez was simply too "lazy" to get the ladder from his truck is not supported by the record. Rodriguez admitted that he had a metal extension ladder on his truck. However, Rodriguez further testified that he would use the ladders on the worksite and only use the ladder on his truck provided by his employer when it was necessary to do so. According to Rodriguez, all of the workers on the project were using the fiberglass ladder as a means of access to the sidewalk shed. Rodriguez' testimony is supported by the affidavit of his co-worker, Juan Ayala, who states that "[t]here was an extension ladder that had been set up at the access point for the sidewalk shed that our crew was using to gain access to and from the sidewalk shed." On this record, no reasonable factfinder could conclude that plaintiff knew that he was expected to use the ladder on his truck (see *Piotrowski v. McGuire Manor, Inc.*, 117 AD3d 1390 [4th Dept 2014]). The ladder on his truck was just another extension ladder. Therefore, it is of no moment that a "suitable" ladder was in a truck nearby.

The court also rejects defendant's argument that ropes which could have been used to secure the extension ladder were also readily available to plaintiff so as to render his failure to use them the sole proximate cause of his accident. First, O'Farrell's claims on this point are insufficient to establish that such ropes were even on the truck. That it was Colgate's typical business practice to load a truck with all the equipment needed to complete a job is simply too speculative from which a reasonable fact-finder could conclude that such ropes were on Rodriguez' truck on the date of his accident.

Defendant has a nondelegable duty to provide adequate safety devices. The unsecured ladder at the jobsite slipped and fell, and therefore plaintiff cannot be the sole proximate cause of his own accident (see *Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280 [2003]; cf. *Montgomery v. Federal Express Corp.*, 4 NY3d 805 [2005] [plaintiff sole proximate cause of his accident because he used a bucket instead of ladders that were readily accessible]; *Daley v. 250 Park Ave., LLC*, 126 AD3d 747 [2d Dept 2015] [triable issue of fact as to whether plaintiff mispositioned ladder he fell from and therefore sole proximate cause of his accident]). Relatedly, this is not a case where plaintiff improperly set up the ladder, thereby causing it to fall (see i.e. *Vouzianas v. Bonasera*, 262 AD2d 553 [2d Dept 1999]). The ladder was already set up when plaintiff arrived at the jobsite and his use of it was reasonable as a matter of law on these facts.

Defendant's factual opposition is otherwise unavailing, since its fact witnesses either have no personal knowledge of the specific instructions given to Rodriguez on the date of the accident or no personal knowledge of the subject jobsite whatsoever. Plaintiff's own experience is of no moment, either, on this record.

Finally, defendant cannot demonstrate that plaintiff did not have a good reason not to use the ladder in his work truck (see *Gallagher v. New York Post*, 14 NY3d 83 [2010]). The ladder which plaintiff fell from was already installed on the jobsite and there are no facts on this record from which a reasonable factfinder could conclude that plaintiff shouldn't have used the fiberglass ladder.

For all of these reasons, defendant cannot even raise a triable issue of fact as to whether plaintiff was the sole proximate cause of his own accident. Nor does the opinion of defendant's expert warrant a different result. Accordingly, plaintiff's motion for summary judgment on defendant's liability with respect to the Labor Law 240[1] claim is granted and defendant's cross-motion on this claim is denied.

#### Labor Law § 241[6]

Labor Law § 241[6] imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure that:

[a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

The scope of the duty imposed by Labor Law § 241[6] is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57<sup>th</sup> Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Plaintiff must allege violations of specific, rather than general, provisions of the Industrial Code (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]). Plaintiff asserts that Industrial Code § 23-1.21(3) and (4) was violated as a matter of law.

Industrial Code § 23-1.21 states in pertinent part as follows:

(3) Maintenance and replacement. All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist:

- (i) If it has a broken member or part.
- (ii) If it has any insecure joints between members or parts.
- (iii) If it has any wooden rung or step that is worn down to three-quarters or less of its original thickness.
- (iv) If it has any flaw or defect of material that may cause ladder failure.

(4) Installation and use.

- (i) Any portable ladder used as a regular means of access between floors or other levels in any building or other structure shall be nailed or otherwise securely fastened in place. Such a ladder shall extend at least 36 inches above the upper floor, level or landing or handholds shall be provided at such upper levels to afford safe means of access to or egress from the ladder. Such a ladder shall be inclined a maximum of three inches for each foot of rise.
- (ii) All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings.
- (iii) A leaning ladder shall be rigid enough to prevent excessive sag under expected maximum loading conditions.
- (iv) When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used.
- (v) The upper end of any ladder which is leaning against a slippery surface shall be mechanically secured against side slip while work is being performed from such ladder.

Here, Industrial Code § 23-1.21(4)(i) specifically provides that a ladder used to access between floors or other levels shall be properly fastened in place or secured and subsection (ii) of said regulation requires that footings must be firm. This regulation is sufficiently specific and the ladder from which plaintiff fell was unsecured. Further, since the ladder slipped, the footings could have not been firm. Therefore, plaintiff is entitled to summary judgment as to liability on his Labor Law § 241[6] claim as well. Defendant's sole argument as to this cause of action is that plaintiff's failure to secure the ladder is the only reason why it slipped and fell. This argument is rejected for the reasons already stated (see *supra*).

Accordingly, defendant's cross-motion for summary judgment dismissing the Labor Law § 241[6] cause of action is denied and upon the court's search of the record, the court grants plaintiff summary judgment on liability for defendant's violation of Labor Law § 241[6] premised upon Industrial Code § 23-1.21[4].

## CONCLUSION

In accordance herewith, it is hereby:

**ORDERED** that plaintiffs' motion for summary judgment on the issue of defendant's liability for violation of Labor Law § 240[1] is granted; and it is further

**ORDERED** that defendant's cross-motion is granted only to the extent that plaintiffs' Labor Law § 200 and common law negligence claims are severed and dismissed; and it is further

**ORDERED** that upon searching the record, plaintiffs are awarded partial summary judgment on the issue of defendants' liability with respect to plaintiff's Labor Law § 241[6] claim premised upon a violation of Industrial Code § 23-1.21; and it is further

**ORDERED** that defendant's cross-motion is otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

9/10/19  
New York, New York

So Ordered:

LD  
Hon. Lynn R. Kotler, J.S.C.