

**Flynn v Empire State Realty Trust, Inc.**

2019 NY Slip Op 33384(U)

November 14, 2019

Supreme Court, New York County

Docket Number: 160020/2017

Judge: Alexander M. Tisch

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH

PART IAS MOTION 18EFM

Justice

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INDEX NO. 160020/2017

FRANCIS FLYNN, DORANNE TELBERG,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 002

- v -

EMPIRE STATE REALTY TRUST, INC., AMERICON  
CONSTRUCTION, INC., D/B/A AMERICON HITT,

DECISION + ORDER ON  
MOTION

Defendant.

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EMPIRE STATE REALTY TRUST, INC., AMERICON  
CONSTRUCTION, INC., D/B/A AMERICON HITT

Third-Party  
Index No. 565727/2019

Plaintiff,

-against-

PYRAMID FLOOR COVERING, INC.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 63, 68, 69, 70, 71, 72

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

Plaintiff commenced the instant action seeking damages for personal injuries allegedly sustained on June 5, 2017 at a construction site while employed as a carpenter by non-party Ess & Vee Acoustical Contractors. (Ess) (NYSCEF Doc. No. 57 [plaintiff's affidavit] at ¶ 2). Upon the foregoing papers, plaintiff moves for partial summary judgment on his Labor Law § 240(1) and § 241(6) claims. In support of plaintiff's motion, plaintiff submits his affidavit, the affidavit of non-party co-worker witness Christopher Abrams, and affidavit of non-party co-worker and foreman Frank Cioppa.

## BACKGROUND

Plaintiff's employer Ess was hired by defendant AMERICON CONSTRUCTION, INC d/b/a AMERICON HITT (AMERICON) to perform work at the building located at 111 W 33rd Street/112 W 34th Street<sup>1</sup> (premises) in the County, City and State of New York, owned by defendant EMPIRE STATE REALTY TRUST, INC. (EMPIRE) (*id.* at ¶ 2-3).

Plaintiff was hired to perform the framing and sheet rocking of the walls and ceiling of the lobby of the premises (*id.* at ¶ 2-4). The lobby was covered in makeshift and unsecured "scrap plywood" flooring to cover the unfinished, uneven and hole-filled concrete lobby floors (see *id.* at ¶ 5-6).

On the day of his accident, and in preparation for his task in the reconstruction of the lobby, plaintiff was carrying two pieces of sheetrock through the lobby (*id.* at ¶ 6). While carrying these pieces of sheetrock, Plaintiff stepped over a steel beam on the floor with his right foot (*id.*). Plaintiff's left foot stepped into a two-inch wide and three to four-inch deep hole in between two pieces of unsecured plywood flooring and into one of the holes in the concrete below the plywood, described as being four by ten inches (*id.*). Plaintiff fell forward, dropped the two sheets of sheetrock and began screaming in pain (*id.*).

Plaintiff's coworker, Christopher Abrams, witnessed Plaintiff's fall in the same manner as Plaintiff alleges. In particular, Abrams saw plaintiff's entire foot and ankle go through the flooring and down about four inches (NYSCEF Doc. No. 60 [affidavit of Christopher Abrams] at ¶ 8).

Plaintiff's foreman on the job, Frank Cioppa, did not see the accident, but when he was notified of the same, he went to the accident site and saw that plaintiff's foot was in a gap in

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<sup>1</sup> The premises has two addresses for one building.

between two pieces of plywood that were not fastened together (NYSCEF Doc. No. 59 [affidavit of Frank Cioppa] at ¶ 4). Cioppa also saw that plaintiff's foot was in a hole in the concrete below the gap in between the plywood that in total, went four inches down (*id.*). Cioppa then reported this incident to a Mr. Merrill of AMERICON (*id.*).

### DISCUSSION

“[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” (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). Failure to make such prima facie showing requires a denial of the motion (*id.*). The “evidence must be viewed in the light most favorable to the nonmoving party” (Valentin v Parisio, 119 AD3d 854, 855 [2d Dept 2014]). Further, “[i]n considering a motion for summary judgment, the function of the court is not to determine issues of fact or credibility, but merely to determine whether such issues exist” (Rivers v Birnbaum, 102 AD3d 26, 42 [2d Dept 2012; see Ferrante v American Lung Assn., 90 NY2d 623, 631 [1997]), and the summary judgment motion “should not be granted where there are facts in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (Ferguson v Shu Ham Lam, 59 AD3d 388, 389 [2d Dept 2009]).

#### Labor Law § 240(1)

“Labor Law § 240(1), often called the ‘scaffold law,’ provides that ‘[a]ll contractors and owners \* \* \* shall furnish or erect, or cause to be furnished or erected \* \* \* 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 [construction workers employed on the premises]” (Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494, 500

[1993] [alteration in original]). The statute was designed to prevent accidents in which protective devices “proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person” (*id.* at 501 [emphasis removed]). The statute, which lists safety devices “used in connection with elevation differentials, evinces a clear legislative intent to provide ‘exceptional protection’ for workers against the ‘special hazards’ that arise when the work site [] is itself elevated” (*id.* at 500-01). These “special hazards” however, “do not encompass any and all perils that may be connected in some tangential way with the effects of gravity. . . . [but] are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object” (*id.* [emphasis removed]). Specifically, the statute is meant to protect against a “difference between the elevation level of the required work and a lower level” (Rocovich v Consol. Edison Co., 78 NY2d 509, 514 [1991]). “The right of recovery afforded by the statute does not extend to other types of harm, even if the harm in question was caused by an inadequate, malfunctioning or defectively designed” safety device (*id.*).

In order to meet his prima facie burden, plaintiff must demonstrate a violation of the statute and proximate causation (Blake v Neighborhood Hous. Services of New York City, Inc., 1 NY3d 280, 288 [2003]). Here, plaintiff has failed to meet his burden in proving a statutory violation. Plaintiff has not shown that there was a violation of Labor Law § 240(1) because plaintiff’s fall was not a “special hazard” or gravity-related accident covered by the statute (see Ross, 81 NY2d at 500-01). The premises here was not elevated as there was no “difference between the elevation level of the required work and a lower level” (see Rocovich, 78 NY2d at 514). In fact, plaintiff was working on the same level in which his fall took place and did not fall from a height (see Ross, 81 NY2d at 500-01).

Further, “a hole of th[e] dimension [of approximately 12 inches by 16 inches] does not present an elevation-related hazard to which the protective devices enumerated in the statute are designed to apply” (Alvia v Teman Elec. Contr., Inc., 287 AD2d 421, 422 [2d Dept 2001]). Similarly, a hole of the dimensions present in the case at bar is “the type of ‘ordinary and usual’ peril a worker is commonly exposed to at a construction site” (see id., quoting Misscritti v Mark IV Constr. Co., 86 NY2d 487, 489 [1995]).

The case at bar is similar to the Alvia case, where the plaintiff’s reliance on the decision in Robertti v Chang (227 AD2d 542 [2d Dept 1996]), as is the case here, was misplaced. In Robertti, the collapse of the floor lead to a worker falling into the partially collapsed area (Robertti, 227 AD2d at 542). The Robertti court focused on the fact that “a *collapsed floor* has been held to constitute prima facie evidence of a violation of Labor Law § 240 (1)” (id. [emphasis added]). Specifically, the plaintiff in that case stepped onto a temporary flooring which proceeded to partially collapse (id.). The “resulting opening” from the collapse of the floor that caused the plaintiff “to fall [] partially through present[ed] an elevation-related risk” (id. at 543). Because Robertti fell through a collapsed floor, even partially, the court found a violation of Labor Law § 240 (1) (id.).

The Alvia court determined that in Robertti “the collapse of the temporary flooring posed the risk of a fall to the floor below while in [Alvia] such a risk was not presented due to the dimensions of the hole and the permanence of the floor (Alvia, 287 AD2d at 422). This is analogous to the case at bar. Here, the dimensions of the gap or hole through which plaintiff fell were at most four by ten inches wide and four inches deep, and at the bottom of the four inches was concrete (NYSCEF Doc. No. 57 [plaintiff’s affidavit] at ¶ 6). There was no risk here for plaintiff to fall through the hole to a lower floor, due to the permanence and dimensions of the

floor (Alvia, 287 AD2d at 422). Thus, there was no differentiation of the “elevation level of the required work and a lower level” and no violation of Labor Law § 240 (1) (see Rocovich, 78 NY2d at 514).<sup>2</sup>

Accordingly, that branch of the plaintiff’s motion seeking partial summary judgment on Labor Law § 240(1) is denied, and upon defendant’s request (NYSCEF Doc. No. 68 [defendant’s affirmation] at ¶¶ 15, 20) and searching the record (see Merritt Hill Vineyards Inc. v Windy Hgts. Vineyard, Inc., 61 NY2d 106, 110 [1984]), the claim is dismissed.

### **Labor Law § 241(6)**

Labor Law § 241(6) “requires owners and contractors to ‘provide reasonable and adequate protection and safety’ for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor” (Ross, 81 NY2d at 501-02). To succeed on a Labor Law § 241(6) claim, the plaintiff must show a violation of the Industrial Code (id.).

Plaintiff argues that he is entitled to summary judgment as to liability on his Labor Law § 241(6) claim because defendants violated 12 NYCRR 23-1.7(b)(1)(i) in failing to “properly fasten and abut its makeshift plywood flooring and for permitting holes to exist in the plywood” (NYSCEF Doc. No. 49 [plaintiff’s affirmation] at ¶ 27). In opposition, defendants claim that the regulation is inapplicable to the facts of the case and, therefore, cannot serve as a predicate for Labor Law § 241(6) liability. Defendants argue specifically, that Rule 1.7(b)(1)(i) does not apply because the regulation applies to hazardous openings.<sup>3</sup>

<sup>2</sup> Plaintiff’s reliance on Blanco v CRP/IMOCO 350 West 42nd Street, LP. (2008 NY Slip Op 30124[U], 2008 WL 206962 [Sup Ct, NY County 2008]) is misplaced. In Blanco, the court held that the accident of the plaintiff in that case was not covered by Labor Law § 240(1) even though “the hole in which plaintiff fell was open to the floor below” (id.). The court found that it could not “determine as a matter of law that the subject hole posed an elevation-related hazard, rather than an ordinary hazard at a construction site that is not covered by section 240(1)” (id.).

<sup>3</sup> It should be noted that defendants have claimed that plaintiff’s § 241(6) claim should be denied due to failure to plead a violation of the specific Industrial Code Section 23-1.7(b)(1)(i). However, Plaintiff’s complaint alleges that

Rule 1.7(b)(1)(i) of Part 23 of the Industrial Code provides as follows:

(b) Falling hazards.

(1) Hazardous openings.

(i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).

The Court finds that plaintiff failed to meet his prima facie burden under Labor Law § 241(6) because Rule 1.7(b)(1)(i) is inapplicable to the facts of this case (see Alvia, 287 AD2d at 422-23). Although the regulation does not define a hazardous opening, courts have found that the regulation is “intended to protect workers from falling *through* an opening to the floor below and are inapplicable where the hole is too small for a worker to fall through” (see id. [emphasis added]; see also Bell v Bengomo Realty, 36 AD3d 479, 480–81 [1st Dept 2007]; Messina v City of New York, 300 AD2d 121, 123 [1st Dept 2002]; Moura v City of New York, 165 AD3d 434, 435 [1st Dept 2018]).

The Alvia court noted that “[t]he regulation provides that employees must be protected by planking installed not more than one floor or 15 feet beneath the opening, a life net five feet underneath the hole, or a safety belt with a lifeline. It is apparent that these measures are intended to protect workers from falling through an opening to the floor below” (id.). There, as similar to the case at bar and as discussed supra, the hole was 12 inches by 16 inches and the employee could not fall through. Thus, “based on the regulation as a whole, it [was] not meant to apply to the type of hole at issue [t]here” (id.). The same can be found here, as the hole plaintiff put his foot into was at most four by ten inches and at the bottom of the hole, four inches below, was concrete (NYSCEF Doc. No. 57 [plaintiff’s affidavit] at ¶ 6).

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the defendants were negligent “in causing and permitting a hole and/or gap to exist in the temporary plywood flooring” (NYSCEF Doc. No. 1 [plaintiff’s complaint] at ¶ 12), which may be sufficient notice that the Plaintiff would use section 23-1.7(b)(1)(i) as a predicate for § 241(6) liability.

Plaintiff solely relies on the holding of Keegan v Swisshotel N.Y., 262 AD2d 111 (1st Dept 1999); however, the instant case is distinguishable. The plaintiff in Keegan partially fell through an opening that lead to a different level, as he fell through an elevator shaft opening which went lower than the ground in which he was working (Keegan, 262 AD2d at 112). Here, there was no hole for plaintiff to fall through that would run the risk of falling to a floor below, as there was concrete four inches below at the bottom of the hole (NYSCEF Doc. No. 57 [plaintiff's affidavit] at ¶ 6).

Therefore, that branch of plaintiff's summary judgment motion on the Labor Law § 241(6) claim predicated on 12 NYCRR 23-1.7(b)(1)(i) is denied.

**CONCLUSION**

It is hereby ORDERED that plaintiff's motion for partial summary judgment is denied in its entirety and it is further

ORDERED that Plaintiff's Labor Law § 240(1) claim is dismissed. This constitutes the decision and order of the Court.

11/14/2019

DATE



ALEXANDER M. TISCH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE