Ting Wang Lin v Flushing Point Holding LLC
2019 NY Slip Op 34025(U)
September 3, 2019
Supreme Court, Queens County
Docket Number: 700478/2017
Judge: Salvatore J. Modica
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: PART 37

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TING WANG LIN,

Plaintiff,

-- against --

FLUSHING POINT HOLDING LLC, et al.,

Defendants.

And a Third-Party Action.

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DECISION AND ORDER
Index No. 700478/2017
HON. SALVATORE J. MODICA

Motion Sequence Number 2

The following numbered papers, found on NYSCEF, were read on this motion by plaintiff seeking summary judgment on his Labor Law section 240(1) claim, and on the cross motion by defendant for summary judgment dismissing plaintiff's complaint, both pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits	E47-E60
Answering Affirmation - Exhibit	E62-E63
Notice of Cross Motion - Affirmation - Exhibits.....	E65-E76
Answering and Reply Affirmations	E78-E79
Reply Affirmation	E80

SALVATORE J. MODICA, J.:

Plaintiff, a laborer with nonparty, Triborough Construction Company ("Triborough"), while working in a building owned by defendant, located at 131-02 40th Road, Flushing, Queens County, New York, was allegedly caused to fall from a ladder to the floor, sustaining serious injuries, on July 6, 2016. Defendant had purchased the building in 2015 with the intent to demolish it and erect a new building, and all of the tenants therein were in the process of vacating the building when plaintiff's accident occurred. One tenant, Flushing Point Building Supply, had hired Triborough to disassemble its warehouse, and reassemble it at a new location.

At the time of the accident, plaintiff claims he was removing materials from metal, floor-to-ceiling, bolted shelving units, in anticipation of dismantling the shelving units. He was standing on a single-frame extension ladder, which he found at the site, attempting to

hand his partner some metal rods he had removed from the shelving unit, when the ladder "slipped," and he and the ladder fell to the concrete floor, injuring himself. Plaintiff commenced this action in January 2017, alleging violations of Labor Law sections 200, 240, and 241. Plaintiff now moves for summary judgment on his Labor Law section 240(1) cause of action.

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented . . . . This drastic remedy should not be granted where there is any doubt as to the existence of such issues . . . or where the issue is 'arguable'" [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *see also, Rotuba Extruders v.Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927, 928 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; *see Charlery v Allied Transit Corp.*, 163 AD3 914 [2d Dept 2018]; *Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).

"[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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *see Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2d Dept 2014]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Labor Law section 240 (1) protects a worker from "specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured," and, to be applicable, the harm must flow "directly ... from the application of the force of gravity to an object or person" *(Ross v Curtis Palmer Hydro-Electric Company,* 81 NY2d 494, 501 [1993]). Such statute should be construed as liberally as possible for the accomplishment of the purpose of imposing absolute liability for a breach which proximately causes an injury (*see, Nicometi v Vineyards of Fredonia, LLC,* 25 NY3d 90 [2015]; *Fabrizi v 1095 Ave. of the Ams., LLC,* 22 NY3d 658 [2014]; *Misseritti v Mark IV*

Construction Co, Inc., 86 NY2d 487 [1995]; *Zamora v 42 Carmine St. Associates, LLC,* 131 AD3d 531 [2d Dept 2015]), and the duty imposed upon owners, contractors and lessees that control the work being performed pursuant to it is nondelegable (*see McCarthy v Turner Constr., Inc., 17 NY3d 369 [2011];Rocovich v Consolidated Edison Co.*, 78 NY2d 509 [1991]; *Vicuna v Vista Woods, LLC, 168 AD3d 1124 [2d Dept 2019]; Scofield v Avante Contracting Corp, 135 AD3d 929 [2d Dept 2016]).*

Liability is imposed where there exists a hazard contemplated under the statute; a failure to utilize a, or the use of an inadequate, safety device enumerated therein; and "plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential " (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see, Wilinski v 334 East 92nd Housing Development Fund Corp.*, 18 NY3d 1 [2011]; *Jones v City of New York*, 166 AD3d 739 [2d Dept 2018]).

The plaintiff must demonstrate that, at the time of the subject occurrence, the safety device provided required securing for the purpose of the undertaking at hand, and failed due to "the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]). "The availability of a particular safety device will not preclude liability 'if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures' " (*Munzon v Victor at Fifth, LLC*, 161 AD3d 1183, 1184 [2d Dept 2018], *quoting Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006]; *see, Yaucan v Hawthorne Vil., LLC*, 155 AD3d 924 [2d Dept 2017]). Where there is no statutory violation, or where a securing device of the type enumerated in the statute would not be necessary (*see, Rocovich v Consolidated Edison Co.*, 78 NY2d 509; *Garcia v Market Assoc.*, 123 AD3d 661 [2014]; *Moncayo v Curtis Partition Corp.*, 106 AD3d 963 [2013]), or where the plaintiff's actions are the sole proximate cause of his or her own injuries (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 [2003]; *Loretta v Split Dev. Corp.*, 168 AD3d 823 [2d Dept 2019]; *Nalvarte v Long Is. Univ.*, 153 AD3d 712 [2017]; *Melendez v 778 Park Ave. Bldg. Corp.*, 153 AD3d 700 [2017]), there can be no recovery under Labor Law §240 (1).

"To recover on a cause of action pursuant to Labor Law section 240(1), a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident" (*Przyborowski v A & M Cook, LLC*, 120 AD3d 651, 653 [2014]; *see Berg v Albany Ladder Co., Inc.*, 10 NY3d 902 [2008]; *Jones v City of New York*, 166 AD3d 739; *Escobar v Safi,*150 AD3d 1081 [2d Dept 2017]; *Benavidez-Portillo v G.B. Const. and Dev., Inc.*, 149 AD3d 681 [2d Dept 2017]). Such statute is not applicable unless plaintiff's injuries result from an elevation-related risk and the inadequacy of the safety device, which was the proximate cause of the injury (*see Fabrizi v 1095 Ave. of the Ams.,*

LLC, 22 NY3d 658; *Simmons v City of New York*, 165 AD3d 725 [2d Dept 2018]; *Carillo v Circle Manor Apts.*, 131 AD3d 662 [2d Dept 2015]). "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 Assoc.*, 96 NY2d 259, at 267; *see Santos v Condo 124, LLC*, 161 AD3d 650 [1st Dept 2018]; *Guallpa v Canarsie Plaza, LLC*, 144 AD3d 1088 [2d Dept 2016]).

Liability under Labor Law section 240 (1) is a question of fact, except when the device, the ladder herein, collapses, moves, falls or otherwise fails to support the plaintiff, for no apparent reason (*see, Seferovic v Atlantic Real Estate Holdings, LLC*, 127 AD3d 1058 [2d Dept 2015]; *Ramirez v Metropolitan Transp. Auth.*, 106 AD3d 799 [2d Dept 2013]; *Godoy v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 104 AD3d 646 [2013]; *Melchor v Singh*, 90 AD3d 866). In the case at bar, plaintiff was required to use the ladder to reach the metal bars on the shelves, and alleged that the ladder "slipped," and was propelled to the ground with him (*see, Poalacin v Mall Props., Inc.*, 155 AD3d 900 [2d Dept 2017]). Consequently, liability under 240 (1) has been, prima facie, demonstrated.

Based upon the evidence presented, plaintiff has satisfied his prima facie burden of demonstrating that the subject accident involved a Labor Law section 240(1) type accident; that the ladder provided was inadequate in and of itself to protect plaintiff against its movement in the course of plaintiff's work; and that additional securing devices were necessary to adequately protect plaintiff from falling (*see, Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762). As plaintiff has demonstrated, albeit prima facie, that a statutory violation was a proximate cause of his injuries, plaintiff cannot be determined to be the sole proximate cause of the accident (*see, Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280; *Weininger v Hagedorn & Co.*, 91 NY2d 958 [1998]; *Repalo v MJRB Kings Highway Realty, LLC.*, 163 AD3d 1023 [2d Dept 2018]).

The defendant, in opposition, has failed to show that "plaintiff's injuries did not result from the type of elevation related hazard to which the statute applies" (*Parker v 205-209 East 57th Street Associates, LLC*, 100 AD3d 607, 609 [2012]). Defendants' claim that plaintiff was merely "engaged in removing construction materials from shelving" at the time of his accident, and such activity was not one falling "within the scope of Labor Law 240(1)," is without merit. "Labor Law § 240(1) protects workers from elevation-related hazards while they are involved in the erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure" (*Selca v Dutchess Heritage Square Partners, LLC*, 115 AD3d 734, 735 [2d Dept 2014]; *see, Martinez v City of New York*, 93 NY2d 322 [1999]). The shelving plaintiff was working on was a "structure" (*see, Joblon v Solow*, 91 NY2d 457, 464 [1998]), and the act of "[d]emolition, for purposes of the statute ... specifically includes 'dismantling'" (*Karie v South Shore Record Mgt., Inc.*, 118 AD3d 955, 956 [2d Dept 2014]),

which was the objective of the work plaintiff was engaged in when the accident occurred. Plaintiff's task at the time of the accident, *i.e.*, clearing the material from the shelves, was a necessary duty which was "ancillary" to the act of dismantling (*see, Prats v Port Auth. of NY & NJ*, 100 NY2d 878, 882 [2003]). Affording a required liberal construction, such activity falls within the protective ambit of the statute (*see, Bonilla-Reyes v Ribellino*, 169 AD3d 858 [2d Dept 2019]).

The defendant, in addition, has attempted to raise a triable issue of fact as to whether plaintiff was the sole cause of his own injuries (*see, Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280; *Loretta v Split Dev. Corp.*, 168 AD3d 823; *Nalvarte v Long Is. Univ.*, 153 AD3d 712; *Melendez v 778 Park Ave. Bldg. Corp.*, 153 AD3d 700), by referring to plaintiff's testimony that he was working with a partner who was not holding the ladder at the time of the accident. The plaintiff's failure to request that his coworker hold the ladder cannot establish that the plaintiff was the sole proximate cause of the accident, as a coworker is not a statutorily designated safety device (*see, Noor v City of New York*, 130 AD3d 536 [1st Dept 2015]), and comparative negligence is not a defense to the strict liability of the scaffold law (*see, Orellana v 7 West 34th Street, LLC*, 173 AD3d 886 [2d Dept 2019]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280).

The defendant, moreover, has failed to proffer evidence, expert or otherwise, demonstrating that plaintiff failed to employ the proper procedure to accomplish the task at hand; that he did not move the ladder to the proper position to perform the task; or that he, himself, caused the ladder to fall to the ground (*see, e.g., Gelvez v Tower 111, LLC*, 166 AD3d 547 [1st Dept 2018]; *Nalvarte v Long Is. Univ.*, 153 AD3d 712 [2d Dept 2017]; *Caban v Plaza Constr. Corp.*, 153 AD3d 488 [2d Dept 2017]; *Bermejo v New York City Health & Hosps. Corp.*, 119 AD3d 500 [2d Dept 2014]). As such, defendant's arguments fail to raise an issue of fact sufficient to rebut plaintiff's prima facie entitlement (*see Cabrera v Arrow Steel Window Corp.*, 163 AD3d 758 [2d Dept 2018]; *Alvarez v Vingsan, L.P.*, 150 AD3d 1177 [2d Dept 2017]), and plaintiff's motion seeking summary judgment on liability, under Labor Law section 240(1), is granted.

Defendant's cross motion seeks summary judgment dismissing the complaint. Initially, plaintiff opposes the cross motion on the ground that it is untimely, stating that the court-ordered deadline for making summary judgment motions was April 29, 2019, and defendant's motion was filed on July 15, 2019, without leave of the court, pursuant to CPLR 3212 (a), citing *Brill v City of New York*, 2 NY3d 648 (2004), and its progeny. Such opposition is without merit. In the case at bar, plaintiff has made a timely motion for summary judgment. As such, defendant's untimely cross motion for summary judgment may be considered, since it has been made on nearly identical grounds (*see, Sikorjak v City of New York*, 168 AD3d 778 [2d Dept 2019]; *Sheng Hai Tong v K&K 7619, Inc.*, 144 AD3d 887 [2d

Dept 2016]; *Vitale v Astoria Energy II, LLC*, 138 AD3d 981 [2d Dept 2016]; *Wernicki v Knipper*, 119 AD3d 775 [2d Dept 2014]).

The defendant sought dismissal of the cause of action against it based upon Labor Law section 200, which is a codification of the common-law duty imposed upon an owner and general contractor or agent to provide construction site workers with a safe place to work (*see, Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]; *Allen v Cloutier Constr. Corp.*, 44 NY2d 290 [1978]; *Amster v Kromer*, 157 AD3d 922 [2d Dept 2018]; *DeMilo v Weinberg Bros., LLC*, 122 AD3d 895 [2d Dept 2014]; *Nicoletti v Iracane*, 122 AD3d 811 [2d Dept 2014]).

In order to be held liable for injuries, pursuant to Labor Law section 200 or for common-law negligence, where, as here, plaintiff's claim arises out of the methods or manner of the work, "recovery against the owner or general contractor cannot be had ... unless it is shown that the party to be charged had the authority to supervise or control the performance of the work" (*Ortega v Puccia*, 57 AD3d 54, 61 [2008]; *see, Rodriguez v Mendlovits*, 153 AD3d 566 [2017]). The right to generally supervise the work, stop the work if a safety violation is noted, or to monitor compliance with contract specifications or safety regulations, is insufficient to impose liability under Labor Law § 200 or common law negligence (*see, Derosas v Rosmarin Land Holdings, LLC*, 148 AD3d 988 [2017]; *Messina v City of New York*, 147 AD3d 748 [2017]).

In the case at bar, defendant-owner has submitted sufficient evidence to, prima facie, demonstrate entitlement to summary judgment by demonstrating it did not have the authority to, nor did it, exercise supervisory control over the contractor's means and methods of performing the subject work, and that it did not have constructive notice of any unsafe method utilized by plaintiff (*see, Guallpa v Canarsie Plaza, LLC*, 144 AD3d 1088 [2016]; *Ortega v Puccia*, 57 AD3d 54). Inasmuch as plaintiff has not opposed the branch of defendant's cross motion seeking to dismiss the cause of action based on Labor Law section 200, plaintiff has failed to raise a triable issue of fact sufficient to withstand the dismissal of such cause of action (*see, Status Gen. Dev., Inc. v 501 Broadway Partners, LLC*, 163 AD3d 740 [2d Dept 2018]). Accordingly, that branch of defendant's motion is granted.

The branch of defendant's cross motion seeking dismissal of the cause of action in the complaint based on violations of Labor Law § 240 (1), parallel, in form and substance, the aforementioned opposition argument defendant made to plaintiff's motion seeking summary judgment based on that statute, which argument was rejected. The same arguments and law are proffered, and the same result ensues. Defendant has failed to demonstrate entitlement to summary judgment, as its evidence has failed to eliminate all issues of fact with regard to whether it violated its nondelegable duty toward plaintiff, and that plaintiff's actions were

the sole cause of his accident, as the contributory or comparative negligence of the plaintiff are not defenses to a section 240(1) claim (*see, Blake v Neighborhood Hous. Servs. of N. Y. City*, 1 NY3d 280; *Cacanoski v 35 Cedar Place Assoc., LLC*, 147 AD3d 810). Consequently, said branch of defendant's cross motion is denied.

Defendant also moves to dismiss plaintiff's cause of action based upon Labor Law § 241 (6), which imposes a nondelegable duty on owners, contractors and their agents to provide reasonable and adequate protection and safety to persons employed in construction, excavation or demolition work, and to comply with the safety rules and regulations promulgated by the Commissioner of the Department of Labor (*see, Misicki v Caradonna,* 12 NY3d 511 [2009]; *Rizzuto v L.A. Wenger Contr. Co.,* 91 NY2d 343; *Seales v Trident Structural Corp.*, 142 AD3d 1153 [2016]; *Norero v 99-105 Third Ave. Realty, LLC*, 96 AD3d 727 [2012]). The ultimate responsibility for safety practices at building construction sites lies with the owner and general contractor (*see, Allen v Cloutier Constr. Corp.*, 44 NY2d 290).

Thus, defendant, being the owner of the subject workplace, had a nondelegable duty to assure safety at the job site, and plaintiff need not demonstrate supervision or control to establish the liability of said defendant (*see, St. Louis v Town of North Elba*, 16 NY3d 411 [2011]; *Zaino v Rogers*, 153 AD3d 763 [2017]). To succeed in denying summary judgment under this section, said defendants must establish either that the Industrial Code sections allegedly violated cannot serve as a predicate for liability pursuant to Labor Law section 241 (6), because they merely set forth general standards of care for employers, "a recitation of common-law safety principles," and did not involve a violation of a provision of the Industrial Code that set forth "a specific standard of conduct," applicable safety requirements or standards, which was a proximate cause of plaintiff's accident (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414; *see, Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]; *Kosinski v Brendan Moran Custom Carpentry, Inc.*, 138 AD3d 935 [2016]; *Torres v City of New York,* 127 AD3d 1163 [2015]), or that such sections did not apply in this case or were not violated (*see, Tuapante v LG-39, LLC*, 151 AD3d 999 [2017]; *Cruz v Cablevision Systems Corp.*, 120 AD3d 744 [2014]; *Ulrich v Motor Parkway Props., LLC*, 84 AD3d 1221 [2011]).

Plaintiff's pleadings assert that defendants violated sections 23-1.6 and 23-1.21 (b) of the Industrial Code Rules. The defendant contended "that those sections of the Industrial Code are either not specific enough to give rise to the duty imposed by Labor Law section 241(6), or are inapplicable to the facts of this case" (*Karanikolas v Elias Taverna, LLC*, 120 AD3d 552, 555 [2014]). Plaintiff has opposed this branch of defendants' motion solely with regard to Rules 23-1.21 (b) (4) (iv), thereby effectively abandoning the remaining violations by failing to support them in his opposition to this motion to dismiss.

The contested provision may serve as predicates for liability under Labor Law section 241(6), as it involves a violation of a "specific, positive command" or "concrete specification" of the Industrial Code (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 505; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d at 350; *see, Rodriguez v 250 Park Avenue, LLC*, 161 AD3d 906 [2d Dept. 2018]; *Carey v Five Bros., Inc.*, 106 AD3d 938 [2d Dept 2013]; *Forschner v Jucca Co.*, 63 AD3d 996 [2d Dept. 2009]).

Rule 23-1.21 (b) (4) (iv) refers, in pertinent part, to work "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 ... by mechanical means." Defendant has failed to make a prima facie showing that such Rule was inapplicable, and did not apply to the facts herein (*see, Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494; *Lopez v New York City Dept. of Environmental Protection*, 123 AD3d 982 [2014]; *Kozlowski v Ripin*, 60 AD3d 638 [2009]), or that such violation was not a proximate cause of plaintiff's accident. Consequently, the branch of defendant's motion seeking to dismiss the cause of action predicated upon the Labor Law section 241(6) violation is denied.

The parties' remaining contentions and arguments either are without merit, or need not be addressed in light of the foregoing determinations.

Accordingly, plaintiff's motion seeking summary judgment on liability on its cause of action based on Labor Law section 240(1) is granted. The cross motion by defendant seeking summary judgment dismissal of the complaint is granted as to the branch claiming under Labor Law section 200, and such claim is dismissed. The cross motion, however, is denied with regard to the branches claiming under Labor Law sections 240(1) and 241(6).

The parties are expected to be in the Trial Scheduling Part in Jamaica, on September 11, 2019, at 9:30 a.m. promptly, for trial.

The foregoing constitutes the decision, order, and opinion of the Court.

Dated: Jamaica, New York
September 3, 2019

Honorable Salvatore J. Modica
J.S.C.

8