

**Cordova v 653 Eleventh Ave. LLC**

2020 NY Slip Op 30873(U)

February 20, 2020

Supreme Court, Bronx County

Docket Number: 26121/2015

Judge: Lucindo Suarez

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 19

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Mtn. Seqs. # 3, 4

ORBIL CORDOVA,

Index No.: 26121/2015

Plaintiff,

- against -

**DECISION and ORDER**

653 ELEVENTH AVENUE LLC.,

Defendant.

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PRESENT: Hon. Lucindo Suarez

The issue in Defendant's and Plaintiff's summary judgment motions is whether they respectively established their *prima facie* burdens entitling each to judgment on Plaintiff's Labor Law §§240(1) and 241(6) claims. This court finds that Defendant established its *prima facie* burden for a dismissal of Plaintiff's Labor Law §§240(1) and 241(6) claims and Plaintiff failed to raise any triable issues of fact to preclude Defendant's application for summary judgment.

I. Labor Law §240(1)

Labor Law §240(1), imposes absolute liability on building owners, contractors, and their agents whose failure to provide adequate protection to workers employed on a construction site proximately causes injury to a worker. *Santos v. Condo 124 LLC*, 161 A.D.3d 650, (1st Dep't 2018). To establish liability under Labor Law §240(1), a plaintiff must show that the statute was violated, and that the violation was a proximate cause of the injury. *Id.* In addition, a plaintiff must demonstrate that the injury was attributed to a specific gravity-related injury such as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. *See Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.*, 18 N.Y.3d 1, 959 N.E.2d 488, 935 N.Y.S.2d 551 (2011).

According to Plaintiff, on the day of loss he was employed by a sub-contracting company, A M & G Waterproofing LLC., (“AM&G”) to complete façade work at the subject construction site. Plaintiff testified that in order to gain access to his work area he had to ascend a ladder to a sidewalk bridge. He testified that when he was ascending the ladder to reach the sidewalk bridge, he felt the ladder shake and move causing him to fall to the ground and sustain injuries.

Defendant contends that Plaintiff’s mere allegation that he fell from a ladder does not establish a Labor Law §240(1) violation. Defendant argues that the ladder Plaintiff fell from was not in a defective/dangerous condition, that it was properly secured when Plaintiff ascended it, and that the ladder did not malfunction. Defendant relied upon the testimony of Plaintiff’s supervisor, Angel Gonzales, who witnessed the accident and photographed the subject ladder shortly thereafter.

According to Mr. Gonzales, he observed Plaintiff falling for no apparent reason, that the ladder was in good condition, properly secured, and that the ladder was not defective. Moreover, Defendant claims that the picture that Mr. Gonzales took of the ladder depicted the ladder properly placed on a smooth flat surface, with its rubber feet flat on the ground, and that it was properly secured both at the top of the ladder and at its midpoint. In addition, Defendant relied upon the affidavit of James Flanagan, Director of Engineering and Security at the construction site.

Mr. Flanagan averred that he responded to the scene of Plaintiff’s accident shortly after it transpired, and that he personally observed Plaintiff on the ground as a result of falling off the ladder. He further averred that he directed his staff to take a picture of the subject ladder and that upon comparison with Mr. Gonzales’ picture both were a fair and accurate depiction of the ladder

shortly after Plaintiff's accident. He further asserts that both pictures depicted the ladder identically placed and secured at the top and middle.

Lastly, Defendant proffers security video footage taken of Plaintiff's accident. The video displays Plaintiff ascending the ladder and falling therefrom. However, Defendant argues that the video displays that the ladder did not shake or move as Plaintiff contends but that the ladder remained erect and stationary.

Plaintiff argues that he is a member of the special class of workers entitled to safety provision of Article 10 of the Labor Law. In addition, Plaintiff contends that he established his *prima facie* burden in demonstrating that Defendant violated the Labor Law, which proximately caused his accident because the record is uncontroverted that he fell from an unsecured ladder without proper safety equipment nor fall protection when the ladder moved and shook. Moreover, Plaintiff contends that the photographs taken by Mr. Gonzales and Mr. Flanagan's staff and the surveillance video of Plaintiff's accident should not be considered by this court as same was not properly authenticated and therefore inadmissible. Lastly, Plaintiff argues that even assuming, *arguendo*, that the ladder was properly secured, the fact that no worker was placed to hold the bottom of the ladder to secure it from slipping was a violation of the Labor Law, which proximately caused his accident.

This court finds that the photographs of the ladder taken by Mr. Gonzales and Mr. Flanagan's staff were properly authenticated via the testimony of Mr. Gonzales and the averment of Mr. Flanagan that said pictures were a fair and accurate representation of the ladder shortly after Plaintiff's accident. *See Moore v. Leaseway Transp. Corp.*, 49 N.Y.2d 720, 402 N.E.2d 1160, 426 N.Y.S.2d 259 (1980). Therefore, same is admissible evidence and will be considered by this court.

Further, this court finds that Mr. Flanagan's affidavit properly laid the foundation for the surveillance video to be considered as admissible evidence. He averred that he and the security manager of the subject construction site, Jason Cuello, shortly after Plaintiff's accident reviewed the security video and saved the portions that depicted Plaintiff's accident. In addition, he averred that the surveillance video was saved with no alterations or edits of any kind. Furthermore, he averred that he compared the surveillance video that was provided to this court and that same was a true and accurate copy of the original video. Lastly, this court notes that Plaintiff at his deposition confirmed that he was the person depicted in the video falling from the ladder. Therefore, this court finds that the surveillance video was properly authenticated and can be considered as admissible evidence for the purposes of the instant motion. *See Zegarelli v. Hughes*, 3 N.Y.3d 64, 814 N.E.2d 795, 781 N.Y.S.2d 488 (2004).

Thus, this court finds that after a reviewing and considering Defendant's admissible evidence that it established its *prima facie* burden for a dismissal of Plaintiff's Labor Law §240(1) claim as it demonstrated that on the day of loss it provided Plaintiff with a non-defective or malfunctioning extension ladder that was properly secured. *Ellerbe v. Port Auth. of NY & New Jersey*, 91 A.D.3d 441, 936 N.Y.S.2d 39 (1st Dep't 2012). Moreover, this court finds that Plaintiff's testimony that the ladder shook and moved in absence of some other form of admissible evidence to demonstrate same was insufficient to raise a triable issue of fact even more so when considering Defendant's overwhelming evidence that the ladder did not malfunction and that it was properly secured.

## II. Labor Law §241(6)

Labor Law §241(6), imposes a nondelegable duty of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety" to persons employed in,

or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. *Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 693 N.E.2d 1068, 670 N.Y.S.2d 816 (1998). The standard of liability under Labor Law §241(6), requires that a plaintiff allege that an owner or general contractor breached a specific rule or regulation containing a positive command. *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993).

Plaintiff alleges that Defendant violated 12 NYCRR §23-1.21(b)(4)(ii), which provides that “all ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings.” Additionally, Plaintiff alleges that Defendant violated 12 NYCRR §23-1.21(b)(4)(iv)<sup>1</sup>, which provides that “[w]hen work is being performed from ladder rungs between six and ten 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.”

Plaintiff argues that 12 NYCRR §23-1.21(b)(4)(ii) was violated by Defendant because the subject ladder’s footing was not firm. In addition, Plaintiff argues that Defendant violated 12 NYCRR §23-1.21(b)(4)(iv) because no worker was holding the subject ladder when Plaintiff was ascending same, and that at a minimum there are triable issues of fact as to the sufficiency of the

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<sup>1</sup> Plaintiff abandoned all other predicates, and the claims are dismissed to that extent. *Burgos v. Premier Props. Inc.*, 145 A.D.3d 506, 42 N.Y.S.3d 161 (1st Dep’t 2016); *87 Chambers, LLC v. 77 Reade, LLC*, 122 A.D.3d 540, 998 N.Y.S.2d 15 (1st Dep’t 2014).

purported ties used with regard to the top portion of the ladder.

Defendant contends that with respect to 12 NYCRR §23-1.21(b)(4)(ii), Plaintiff failed to establish that there was a violation of same as the photos of the ladder taken shortly after Plaintiff's accident depicts that the ladder had rubber feet that were resting flat directly on the asphalt street. With respect to 12 NYCRR §23-1.21(b)(4)(iv), Defendant posits that because Plaintiff was using the ladder as a means to access his work area and that he was not performing any work therefrom that said Industrial Code is inapplicable as applied here.

This court finds that with respect to 12 NYCRR §23-1.21(b)(4)(ii), there is no evidence nor did Plaintiff ever testify that the asphalt street underneath the ladder's footing was in a slippery condition or that his injury resulted from the ladder's footing slipping. *See Campos v. 68 E. 86th St. Owners Corp.*, 117 A.D.3d 593, 988 N.Y.S.2d 1 (1st Dep't 2014). Lastly, this court finds that 12 NYCRR §23-1.21(b)(4)(iv), is inapplicable to the facts at bar as Plaintiff testified that he did not use the ladder as a work platform but rather he used it as means to access his work area. *See Artoglou v. Gene Scappy Realty Corp.*, 57 A.D.3d 460, 869 N.Y.S.2d 172 (2d Dep't 2008). Moreover, it is unclear whether plaintiff was standing on a rung of the ladder that was at least 10 feet off the ground at the time of his fall, precluding a finding, as a matter of law, that 12 NYCRR §23-1.21(b)(4)(iv) was violated. *See Terc v. 535 Coster Realty Inc.*, 176 A.D.3d 562, 112 N.Y.S.3d 12 (1st Dep't 2019).

Accordingly, it is

ORDERED, that Defendant's summary judgment motion (Mtn. Seq. # 3) seeking to dismiss Plaintiff's Labor Law §§240(1) and 241(6) claims is granted; and it is further

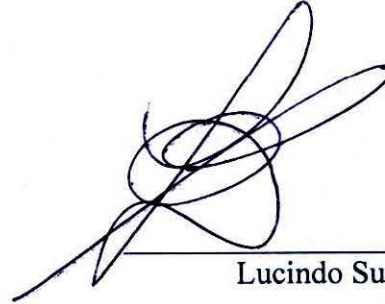
ORDERED, that Plaintiff's summary judgment motion (Mtn. Seq. # 4) seeking liability on his Labor Law §§240(1) and 241(6) claims is denied; and it is further

ORDERED, that Plaintiff's Labor Law §§240(1) and 241(6) claims are dismissed; and it is further

ORDERED, that the Clerk of Court shall enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: February 20, 2020



Lucindo Suarez, J.S.C.

**LUCINDO SUAREZ, J.S.C.**