

<b>Robbins v LIC Dev. Owner, L.P.</b>
2020 NY Slip Op 31393(U)
May 13, 2020
Supreme Court, Kings County
Docket Number: 511434/17
Judge: Dawn M. Jimenez-Salta
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At an IAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 13<sup>th</sup> day of May, 2020.

P R E S E N T:

HON. DAWN JIMENEZ SALTA,  
Justice.

-----X

CAREY ROBBINS, JR.,  
Plaintiff,

- against -

Index No. 511434/17

LIC DEVELOPMENT OWNER, L.P. AND  
HUDSON MERIDIAN CONSTRUCTION GROUP  
LLC,  
Defendants.

-----X

The following e-filed papers read herein:

NYSCEF NO.

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	81-89, 90-116
Opposing Affidavits (Affirmations) _____	121-124, 125
Reply Affidavits (Affirmations) _____	126

Upon the foregoing papers, plaintiff Carey Robbins, Jr. (plaintiff) moves for an order, pursuant to CPLR 3212, seeking partial summary judgment in his favor on the issue of liability for his Labor Law § 240 (1) claim. Defendants LIC Development Owner, L.P. (LIC Development) and Hudson Meridian Construction Group LLC (Hudson)

(collectively, defendants) move for an order seeking summary judgment dismissing plaintiff's Labor Law §§ 240 (1), 241 (6), 200 and common-law negligence claims.

### ***Background and Procedural History***

On March 21, 2017, a construction project was underway at the premises located at 28-30 Jackson Avenue in Queens, New York. The premises were owned by LIC Development which contracted with Hudson to provide construction management services. Hudson subcontracted with non-party Lippolis Electric (Lippolis) to perform electrical work at the premises. Plaintiff was employed by Lippolis as an electrician. He was tasked with installing pipes in the ceiling of the parking garage located at the premises. The ceiling was approximately fifteen feet high. The pipes were for the eventual running of wires in order to provide electricity to the premises. On the date of the accident, plaintiff was performing this task with his co-workers, Harold Rhames (Rhames), Desmond McKenzie (McKenzie) and Jean Villarson (Villarson). Plaintiff testified that they had been installing this piping for several days prior to the accident. In order to perform this task, the workers stood on 10-foot A-frame ladders while installing the three-foot-long, four-inch diameter pipes overhead. Plaintiff and his co-workers used couplings to connect the pipes at various junctures in the piping.

During his deposition, plaintiff could not recall the exact details of the incident and was, at times, confused. However, he testified that he, along with his co-workers, Villarson and McKenzie, were each on one of the ladders installing the pipe while Rhames

remained on the ground to determine if the pipe had been properly inserted. Plaintiff testified that he and Villarson had installed a section of pipe, and that he thinks he had asked McKenzie to hold the pipe while he descended the ladder to retrieve a coupling. Plaintiff further testified that as he was looking downward into the box of couplings, he heard someone shout “Look out” and that was the last thing he remembered. The record indicates that it was later revealed that the plaintiff was struck in the back of the head by a piece of pipe that fell from above.

Plaintiff commenced the instant action by filing a summons and complaint on or about June 9, 2017. The parties stipulated to extend defendants’ time to answer to August 11, 2017. On or about October 23, 2018, plaintiff filed his Note of Issue and Certificate of Readiness, as directed by a Final Pre-Note Conference order dated October 18, 2018, notwithstanding outstanding discovery. On or about October 25, 2018, defendants moved to vacate the Note of Issue or to extend the time to file dispositive motions. On November 9, 2018, the court denied defendants’ request to vacate the Note of Issue, directed the completion of outstanding discovery and extended the deadline for filing summary judgment motions to June 26, 2019. Thus, the instant motions are timely.

### *Discussion*

Plaintiff moves for partial summary judgment in his favor on his Labor Law § 240 (1) cause of action. He argues that the statute was violated as he was struck by an inadequately secured piece of pipe that fell from a height. Plaintiff further argues that the

ladders he and his co-workers were given to perform their work were inadequate safety devices for the task being performed. Plaintiff testified that he did not know if one of his co-workers dropped the pipe that struck him; only that he got hit on the head with it and was knocked unconscious. Thus, he claims it was inadequately secured. He further contends that he and his co-workers should have been provided with a lift to perform the work rather than ladders, and that they had requested that one be provided. In this regard, plaintiff contends that a lift would have elevated/raised the workers, as well as the equipment, to the area where the pipes needed to be installed, and therefore the pipe would have fallen onto the lift's platform rather than on the ground below, thereby preventing the instant accident. Accordingly, he maintains the ladder was an inadequate safety device to safely perform the work which involved installing pipe on a fifteen-foot ceiling.

In opposition to plaintiff's motion, and in support of that branch of their own motion seeking summary judgment dismissing plaintiff's Labor Law § 240 (1) claim, defendants argue that plaintiff was the sole proximate cause of the accident. In this regard, defendants contend that plaintiff was provided proper protection, and that there was no absence or inadequacy of a safety device that caused his alleged injuries. Defendants argue that plaintiff's injuries were caused solely by his own negligent conduct in descending the ladder before securing the pipe with coupling, or failing to request one of his co-workers to ascend the ladder and hold the pipe. Defendants further argue that the harm was not the direct consequence of the application of the force of gravity to an object, and that plaintiff

fails to demonstrate that the pipe was in the process of being hoisted or required securing at the time it fell.

Defendants further contend that plaintiff cannot demonstrate that the pipe actually struck him or what caused the pipe to fall. In support of this contention, defendants point to plaintiff's testimony as follows:

Q: Was it the pipe that we've been talking about? Was that what fell and hit you on the head or other part of your body?

A: Well see that part I didn't know about. I don't know what hit me, the only thing I heard was somebody said, "Look out," and that's the last I [sic] (Robbins tr at 97-99).

Defendants maintain that plaintiff's failure to install his piece of pipe properly and to secure it with the coupling was the sole proximate cause of the accident. Defendants argue that the pipe did not fall while being hoisted or secured because of an inadequate safety device enumerated in the statute. Rather, defendants maintain that the pipe fell because of plaintiff's failure to tighten the screws in the existing coupling prior to descending the ladder to get another coupling or, at a minimum, because he failed to ask one of his co-workers to hold the pipe.

In support of their argument, defendants submit affidavits from plaintiff's co-workers, all of whom offer factual accounts of the incident that differ from that of plaintiff. For instance, Rhames states that, at the time of the accident, plaintiff was working on one ladder and Villarson was on the other ladder, while Rhames remained on the ground with their other co-worker, McKenzie. Rhames states that Villarson was holding a 90 degree

bent pipe and plaintiff inserted his end of a different three-foot long straight pipe into the coupling at the end of the bent pipe, and then plaintiff descended the ladder to see if the pipe was straight, at which point that piece of the pipe came out of the coupling and struck plaintiff on the head (Rhames aff at ¶ 8-10). McKenzie submits a statement that basically mirrors that of Rhames and notes that he did not observe plaintiff secure the pipe or ask any of their co-workers to hold the pipe that ultimately struck him (McKenzie aff at ¶ 9).

In addition, Villarson submits an affidavit in which he described the happening of the accident as follows:

“While on the ladder, I was holding a 90-degree bent pipe which ended with a coupling. While he was on the ladder, Mr. Robbins put a 45" and 4" wide straight pipe into the coupling at the end of my 90-degree bent pipe. I saw Mr. Robbins let go of his side of the pipe before securing it with the coupling and go down the ladder. Mr. Robbins did not appear to secure his pipe properly with the coupling before leaving the ladder. The pipe was hanging down and I was too far away to hold on to it. The pipe that Mr. Robbins was holding came out of the coupling attached to my 90-degree bent pipe and struck him while he was standing on the ground” (Villarson aff at ¶ 9-12).

All of the co-workers aver that the area they were working in was not an area normally exposed to falling objects or materials.

Defendants also point out that plaintiff admits that he never told his co-workers that he was coming down off the ladder when he left the pipe unsecured in the coupling. Thus, as he failed to adequately secure the coupling and failed to notify his co-workers he was descending the ladder in order to retrieve another coupling, defendants maintain that

plaintiff's own actions were the sole proximate cause of the accident. Accordingly, defendants argue that plaintiff's Labor Law § 240 (1) claim should be dismissed.

In reply, plaintiff argues that, even in the fabricated accounts provided in the affidavits submitted by his co-workers, a Labor Law § 240 (1) violation is still established herein. He contends that his co-workers were all aware that the pipe that fell was not properly inserted, and observed plaintiff come down off the ladder. However, plaintiff points out that none of his co-workers tried to secure the pipe, which he maintains needed securing for the purposes of the undertaking. Plaintiff contends that the fact that conflicting versions of the accident have been submitted does not preclude summary judgment on the issue of Labor Law § 240 (1) liability as the statute was violated under either version. Plaintiff further contends that under the account proffered by defendants' employee affiants, they told him the pipe was not straight at which point he got off the ladder to check the alignment, and none of his co-workers used one of the available ladders to secure the pipe at that time. Plaintiff argues that a worker cannot be the sole proximate cause of an accident where, as here, a co-worker's actions contributed to the accident. Plaintiff further points to his testimony that he had asked for lifts to perform this work, but that none were provided. He maintains that such equipment would have prevented the accident as the pipe would have fallen onto the lift rather than down to the ground where it struck him. Plaintiff argues that inadequate ladders, the failure to provide a lift, and the failure of one of his co-workers to either adequately secure or attempt to secure the pipe are all inadequate safety measures that caused or contributed to the accident. Accordingly,

he maintains that there cannot be a finding that he was the sole proximate cause of the accident.

***Labor Law § 240 (1)***

Labor Law § 240 (1), states, in relevant part, that:

All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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 purpose of Labor Law § 240 (1) is to protect workers “from the pronounced risks arising from construction work site elevation differentials” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see also Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Consequently, Labor Law § 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a protected task (*see Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2009], *lv dismissed* 13 NY3d 857 [2009]; *see also Ienco v RFD Second Ave., LLC*, 41 AD3d 537 [2007]; *Ortiz v Turner Constr. Co.*, 28 AD3d 627 [2006]). The duty to provide the required “proper protection” against elevation-related risks is nondelegable; therefore, owners, contractors and their agents are liable for the

violations even if they have not exercised supervision and control over either the subject work or the injured worker (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [owner or contractor is liable for Labor Law § 240 (1) violation “without regard to . . . care or lack of it”]). Moreover, to establish liability under Labor Law § 240 (1), a plaintiff must demonstrate that the defendants violated the statute and that this violation was a proximate cause of his injuries. If the plaintiff’s conduct was the sole proximate cause of his injuries, liability under Labor Law § 240 (1) does not attach (*see Melchor v Singh*, 90 AD3d 866, 867 [2011]; *see also Tomlins v DiLuna*, 84 AD3d 1064, 1065 [2011]; *Herrnsdorf v Bernard Janowitz Constr. Corp.*, 67 AD3d 640, 642 [2009]; *Chlebowski v Esber*, 58 AD3d 662, 663 [2009]).

Labor Law § 240 (1) requires owners and contractors to provide workers with appropriate safety devices to protect against “such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Importantly, Labor Law § 240 (1) “does not automatically apply simply because an object fell and injured a worker; [a] plaintiff must show that the object fell . . . because of the absence or inadequacy of a safety device of the kind enumerated in the statute” (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 663 [2014] quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]). “While a plaintiff is not required to present evidence as to which particular safety devices would have prevented the injury, the risk requiring a safety device must be a foreseeable risk inherent in the work” (*Carlton v City*

of New York, 161 AD3d 930, 932 [2018] quoting *Niewojt v Nikko Constr. Corp.*, 139 AD3d 1024, 1027 [2016]; see *McLean v 405 Webster Ave. Assoc.*, 98 AD3d 1090 [2012]).

Here, the court finds that plaintiff is entitled to partial summary judgment, and may recover damages for a violation of Labor Law § 240 (1), as the pipe that fell and struck him, which was in the process of being installed, “required securing for the purposes of the undertaking at the time it fell” (*Cammon v City of New York*, 21 AD3d 196, 200 [2005] quoting *Narducci*; 92 NY2d at 268; see *Matthews v 400 Fifth Realty LLC*, 111 AD3d 405,406 [2013] [a grate that fell while in the process of being installed was a falling object as contemplated by Labor Law § 240 (1) and “not an inherent risk involved in working at a construction site”]; *Gabrus v New York City Hous. Auth.*, 105 AD3d 699, 699 [2013]; *Dedndreaj v ABC Carpet & Home*, 93 AD3d 487, 488 [2012] [“Plaintiff established his prima facie entitlement to summary judgment by showing that defendants’ failure to provide an adequate safety device proximately caused a pipe that was in the process of being hoisted to fall and strike him”]).

Moreover, as there were no adequate protective devices in place, such as a lift or netting, to secure the pipe from falling to the ground below during its installation, Labor Law § 240 (1) is applicable since plaintiff’s injuries were “the direct consequence of [defendants’] failure to provide adequate protection against [that] risk” (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 10, [2011]; see *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009] [holding that “the single decisive question is whether plaintiff’s injuries were the direct consequence of a failure to provide adequate protection

against a risk arising from a physically significant elevation differential]; *Dedndreaj v ABC Carpet & Home*, 93 AD3d 487, 488 [2012] [“[p]laintiff established his prima facie entitlement to summary judgment by showing that defendants’ failure to provide an adequate safety device proximately caused a pipe that was in the process of being hoisted to fall and strike him”). It is undisputed that no protective device designed to catch the falling pieces of pipe was utilized in connection with the plaintiff’s work (see *Tylutki v Tishman Techs.*, 7 AD3d 696, 696 [2004]). Indeed, although plaintiff’s own testimony was contradictory at times, and in conflict with the accounts of his co-workers, it is undisputed that the pipe fell while being installed and nothing was provided to prevent it from falling and striking a worker below such as plaintiff.

In opposition, the court finds that defendants have failed to raise a triable issue of fact regarding their contention that plaintiff’s own actions were the sole proximate cause of his accident. To establish their “sole proximate cause” theory, defendants were required to present “some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff [was] the sole proximate cause of his . . . injuries” (*Flowers v Harborcenter Dev., LLC*, 155 AD3d 1633, 1635 [2017] quoting *Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [2007]). The court notes that although the affidavits submitted by McKenzie and Villarson indicate that plaintiff failed to secure his end of the pipe prior to descending the ladder to retrieve the coupling, such conduct would render plaintiff contributorily negligent, a defense not available under Labor Law § 240 (1) (see *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280

[2003]), and “the injured’s culpability, if any, does not operate to reduce the owner/contractor’s liability for failing to provide adequate safety devices” (*Stolt v General Foods Corp.*, 81 NY 2d, 918, 920 [1993]; *see Garzon v Viola*, 124 AD3d 715, 717 [2015]). Contrary to the defendants’ contention, the plaintiff was exposed to a gravity-related hazard within the meaning of Labor Law § 240 (1) (*see Tylutki*, 7 AD3d at 696; *Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619 [2003]). Accordingly, plaintiff’s motion for partial summary judgment in his favor on his Labor Law § 240 (1) claim is granted and that branch of defendants’ motion seeking dismissal of said claim is denied.

### ***Labor Law § 241 (6)***

Defendants also seek summary judgment dismissing plaintiff’s Labor Law § 241 (6) claim. Labor Law § 241 (6) provides, in pertinent part, as follows:

“All 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 persons employed therein or lawfully frequenting such places.”

The statute 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 [1998]; *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 [1978]). In order to prevail on a Labor Law § 241 (6) claim, it must be predicated “upon violations of specific codes, rules, or regulations applicable to the circumstances of the accident” (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 53 [2011]). In support of his Labor Law § 241 (6) claim, plaintiff’s verified bills of particulars allege violations of 12 NYCRR §§ 23-1.2, 23-1.4, 23-1.5, 23-1.7, 23-1.8, 23-1.10, 23-1.12, 23-1.13, 23-1.15, 23-1.16, 23-1.17, 23-1.18, 23-1.19, 23-1.21, 23-1.30 and 23-2.1. Defendants argue that these sections are either not sufficiently specific to support plaintiff’s Labor Law § 241 (6) claim or are inapplicable. However, plaintiff fails to oppose this branch of the motion and, therefore, has abandoned his reliance upon the above-referenced code provisions (*see Perez v Folio House, Inc.*, 123 AD3d 519, 520 [2014]). Accordingly, that branch of defendants’ motion seeking dismissal of plaintiff’s Labor Law § 241 (6) claim is granted (*see Videan v NRG Energy, Inc.*, 149 AD3d 1533, 1534-1535 [2017]; *Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [2012] [“[w]here a defendant so moves [for summary judgment], it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section”]).

### ***Labor Law § 200 and Common-Law Negligence***

That branch of defendants’ motion seeking to dismiss plaintiff’s Labor Law § 200 and common-law negligence claims against them is granted. Defendants have established

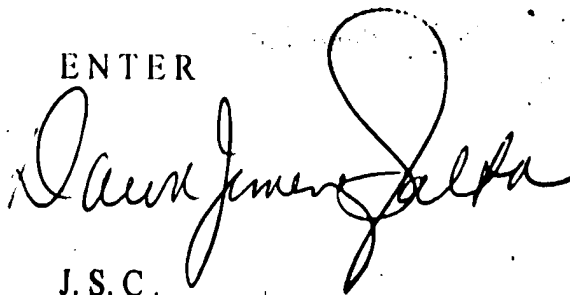
that they did not supervise or control the plaintiff's work. Plaintiff himself testified that he worked only under the direction of the Lippolis foreman, Javier Ruiz. Inasmuch as plaintiff fails to oppose this branch of defendants' motion, defendants are entitled to dismissal of said claims against them (*see Gaetano Dev. Corp. v Lee*, 121 AD3d 838, 840 [2014]; *Matter of Agoglia v Benepe*, 84 AD3d 1072, 1075 [2011]; *Rivera v Anilesh*, 32 AD3d 202, 204-05 [2006], *affd*, 8 NY3d 627 [2007]; *Genovese v Gambino*, 309 AD2d 832, 833 [2003]). Accordingly, that branch of defendants' motion seeking dismissal of plaintiff's Labor Law § 200 and common law negligence claims is granted.

#### **Conclusion**

Plaintiff's motion seeking partial summary judgment as to liability under his Labor Law § 240 (1) claim is granted. That branch of defendants' motion seeking summary judgment dismissing plaintiff's Labor Law § 240 (1) claim is denied. Those branches of defendants' motion seeking dismissal of plaintiff's Labor Law §§ 241 (6), 200 and common-law negligence claims are granted and said claims are hereby dismissed.

This constitutes the decision, order and judgment of the court.

ENTER



J. S. C.

Hon. Dawn Jimenez-Salta  
Justice of the Supreme Court