

**Carpenito v Hudson Yards N. Tower Tenant LLC**

2020 NY Slip Op 32593(U)

August 11, 2020

Supreme Court, New York County

Docket Number: 152415/2018

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

*Justice*

-----X

THOMAS CARPENITO,

Plaintiff,

- v -

HUDSON YARDS NORTH TOWER TENANT LLC, HUDSON  
YARDS NORTH TOWER HOLDINGS LLC, 50 HYMC  
OWNER LLC, 50 MYMC HOLDINGS LLC, HUDSON YARDS  
CONSTRUCTION LLC, HUDSON YARDS CONSTRUCTION  
II LLC, TISHMAN CONSTRUCTION CORPORATIION,

Defendant.

-----X

HUDSON YARDS NORTH TOWER TENANT LLC, HUDSON  
YARDS NORTH TOWER HOLDINGS LLC, 50 HYMC OWNER  
LLC, 50 MYMC HOLDINGS LLC, HUDSON YARDS  
CONSTRUCTION LLC, HUDSON YARDS CONSTRUCTION II  
LLC, TISHMAN CONSTRUCTION CORPORATIION

Plaintiff,

-against-

FIVE STAR ELECTRIC CORP.

Defendant.

-----X

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595508/2018

The following e-filed documents, listed by NYSCEF document number (Motion 002) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 106

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 67, 68, 69, 70, 71, 72, 103, 107, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125

were read on this motion to/for PRECLUDE.

Motion Sequence Numbers 002 and 003 are consolidated for disposition. The motion (MS002) for summary judgment on liability by plaintiff pursuant to Labor Law § 240(1) is

granted. The motion (MS003) by defendants to *inter alia* compel the deposition of a non-party witness is denied.

### **Background**

This action arises out of a purported construction accident involving plaintiff on January 27, 2018 in Hudson Yards. Plaintiff, an electrician, claims he suffered serious injuries when a roof panel fell on him while he was working on the construction of a shanty. At the time of the accident, plaintiff was a few steps up on a ladder.

In opposition, third-party defendant Five Star Electric Corp (“Five Star”) claims that plaintiff failed to establish that the ladder was defective or that his injuries were caused by the lack of a secure ladder. Five Star claims that not every worker who falls is entitled to summary judgment under Section 240(1). It also argues that plaintiff did not show that the roof panels fell from a significant height to fall under Section 240(1).

Defendants also oppose and claims that critical non-party witness testimony is outstanding, plaintiff failed to show his accident was caused by an unsecured ladder and plaintiff cannot show that the object that hit him fell from a significant elevation. They focus on their efforts to obtain the testimony of Eric Jeter, plaintiff’s coworker. Defendants point out that Mr. Jeter did not appear for a deposition after they issued a subpoena in January 2020. They conclude that the instant motion is premature based on this lack of evidence.

Defendants also point out that the changes in the errata sheet for plaintiff’s deposition are material changes that should be disregarded by the Court. They direct the Court to plaintiff’s response to a question about what caused his accident, where he was struck and many other answers (*see* NYSCEF Doc. No. 74 at 12-16).

In reply, plaintiff emphasizes that there is no dispute that he was struck by a heavy roof panel that fell on him while working. He observes that the told defendants in September 2018 that Eric Jeter was a co-worker and witness to the accident and defendants' inability to secure a deposition of this witness over the last few years should not prevent plaintiff from obtaining summary judgment. Plaintiff disputes that the changes to the errata sheet should compel denial of his motion.

### **Discussion**

To be entitled to the remedy of summary judgment, the moving party "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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec*,

*Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

### **Labor Law § 240(1)/ MS002**

“Labor Law § 240(1), often called the ‘scaffold law,’ provides that all 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-Elec. Co.*, 81 NY2d 494, 499-500, 601 NYS2d 49 [1993] [internal citations omitted]). “Labor Law § 240(1) was designed to prevent those types of 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” (*id.* at 501).

“[L]iability [under Labor Law § 240(1)] is contingent on a statutory violation and proximate cause . . . violation of the statute alone is not enough” (*Blake v Neighborhood Hous. Servs. of NY City*, 1 NY3d 280, 287, 771 NYS2d 484 [2003]).

On the day of the accident, plaintiff testified that he was assigned to dismantle and relocate a shanty (NYSCEF Doc. No. 60 at 27). Plaintiff contends he was helping to reassemble the shanty (on a different floor) and was a few steps up on a ladder when he was struck by a roof panel from above (*id.* at 118-19). He observed that the ladder he stepped up on was secure before getting on it (*id.* at 118). Plaintiff did not recall every detail of the accident but did remember realizing that the “ladder was down, I remember me and the ladder, I mean we, the ladder on me, the panels were on me” (*id.* at 120).

The Court grants the motion. The fact is that whether the ladder was secure is not the only basis for a Labor Law § 240(1) claim. It can also be based on a falling object and, here, plaintiff estimated the shanty was about ten feet tall (*id.* at 95). Although defendants and Five Star devote significant time arguing that there is an issue of fact about whether the accident involved a significant elevation, they did not produce a single witness that contradicts that a roof panel fell on plaintiff from above. That is exactly the type of accident where Labor Law § 240(1) applies.

“§ 240(1) is not implicated in all gravity-related accidents but is limited to such specific gravity-related accidents as being struck by a falling object that was improperly hoisted or inadequately secured” (*Brown v VJB Const. Corp.*, 50 AD3d 373, 376, 857 NYS2d 56 [1st Dept 2008]). “[T]he extent of the elevation differential is not necessarily determinative of whether an accident falls within the ambit of Labor Law § 240(1)” (*id.* [granting summary judgment where a beam fell only three and a half feet]). Here, the undisputed evidence shows that a roof panel fell on plaintiff while he was a few steps up on a ladder, causing him to fall off the ladder. The exact height of the roof panel above plaintiff does not operate as a bright line rule about whether plaintiff can recover under this Labor Law provision. The essence of such a claim is its gravity-related nature and the Court finds that plaintiff met his burden here.

To the extent that defendants complain about the statements in the errata sheet, they should have made a motion to strike it if they believed it contained impermissible substantive changes. Raising it only in opposition many months after the errata sheet was filed is not a compelling argument.

And the lack of a deposition from plaintiff’s coworker, Mr. Jeter, is of no moment. As plaintiff points out, he identified Mr. Jeter in September 2018 (and provided his address) in

response to a discovery demand (NYSCEF Doc. No. 78 at 4). Defendants had ample opportunity to secure his deposition. It was not plaintiff's responsibility to produce his co-worker for a deposition. Moreover, the Court did not rely on Mr. Jeter's affidavit in making the instant determination. Defendants and Five Star did not offer anything to sufficiently dispute how the accident occurred.

### MS003

In this motion, brought by order to show cause, defendants seek an order compelling the deposition of non-party witness Eric Jeter. In opposition, plaintiff points out that a note of issue was filed on October 19, 2019 and motions for summary judgment were later filed (Motion Sequence Numbers 002 and 004).

The Court denies the motion. As an initial matter, there has been a note of issue filed since October 2019 and defendants have not moved to strike that note of issue. It is axiomatic that the filing of a note of issue signifies that discovery is completed. If they disagreed, they should have sought the necessary relief. Instead, they waited until January 2020 (and a month and a half after plaintiff had already moved for summary judgment) to compel the deposition of a witness they knew about since September 2018. That does not set forth sufficient circumstances for this Court to permit discovery to continue after the note of issue was filed.

The fact is that defendants made a strategic choice in this case; they knew about Mr. Jeter for over a year but declined to subpoena him until he submitted an affidavit in support of plaintiff's motion for summary judgment. Unfortunately, that was long after the note of issue had been filed.

Accordingly, it is hereby

ORDERED that the motion (MS002) by plaintiff for summary judgment as to liability on its Labor Law § 240(1) claim is granted; and it is further

ORDERED that the motion (MS003) by defendants to compel the deposition of a non-party witness is denied.

8/11/2020

DATE



ARLENE P. BLUTH, 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