

Gomes-Sanchez v Levy
2021 NY Slip Op 31213(U)
March 12, 2021
Supreme Court, New York County
Docket Number: 156282/2016
Judge: Francis A. Kahn III
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. FRANCIS A. KAHN, III</u>	PART	IAS MOTION 32
	<i>Acting Justice</i>		
	-----X	INDEX NO.	<u>156282/2016</u>
	GUILLERMO GOMES-SANCHEZ and MARISOL ESPALLAT,	MOTION DATE	_____
	Plaintiffs,	MOTION SEQ. NO.	<u>001, 002</u>

- v -

ANTON LEVY, ABIGAIL LEVY, HIGH LINE
CONSTRUCTION GROUP LLC, KING HOIST &
SCAFFOLDING, INC and 1136 TENANTS'
CORPORATION,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 44-56, 93-95,101, 102; (Motion 002) 57-92, 96-100

were read on the motions to/for SUMMARY JUDGMENT

Upon the foregoing documents, the motions are decided as follows:

Defendants Anton and Abigail Levy own Penthouse 14C, a co-operative apartment, located at 1136 Fifth Avenue, New York, New York and Defendant 1136 Tenants' Corporation ("1136") owns the co-operative apartment building. After entering into an alteration agreement with 1136, the Levys hired Defendant High Line Construction Group ("High Line") as a general contractor to renovate their apartment. High Line subcontracted with Causeway Contracting, LLC ("Causeway") for the demolition and masonry work.

On June 22, 2016, while employed by Causeway as a laborer, Plaintiff Guillermo Gomes-Sanchez performed demolition work in the subject apartment. While standing on the fourth or fifth rung of the ladder, Plaintiff was handed a grinder tool and an electrical extension cord for the purpose of cutting out metal framework that was seven feet overhead. Plaintiff placed the grinder, which lacked a safety guard, on a rung of the ladder so he could connect it to the extension cord. Not realizing the grinder was already switched "on", when Plaintiff plugged-in the grinder the blade immediately began turning and it fell from the rung on the ladder and towards and striking the Plaintiff in the hand. As a result, Plaintiff moved on the ladder, causing the ladder to move, and Plaintiff fell off the ladder to the ground below in a standing position.

On July 28, 2016, Plaintiff and his wife¹ commenced this action by filing a summons and complaint asserting causes of action in negligence, Labor Law §§200, and 241[6] against

¹ Plaintiff's wife, Marisol Espallat, maintains an action for loss of consortium not pertinent in deciding the motions before the Court.

Defendants. On March 20, 2017, Plaintiffs amended their complaint to add a cause of action under Labor Law §240[1] against Defendants². On April 11, 2017, Defendants answered the amended complaint.

Plaintiff now moves (Motion Seq. 001) for partial summary judgment on liability on his Labor Law §240[1] action against High Line. Defendants Anton Levy, Abigail Levy, Highline and 1136 also move (Motion Seq. 002) for summary judgment dismissing Plaintiffs' complaint.

"[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, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez v Prospect Hospital*, 68 NY2d at 324; *see also Smalls v AJI Industries, Inc.*, 10 NY3d 733, 735 [2008]). 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 material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

As to Plaintiff's motion, "Labor Law § 240(1) imposes 'upon owners, contractors, and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work' for failure to provide workers proper protection from elevation-related hazards" (*see Yaguachi v Park City 3 and 4 Apartments, Inc.*, 185 AD3d 635 [2d Dept 2020] quoting *Aslam v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 135 AD3d 790, 791 [2d Dept 2016] quoting *Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]). "The purpose of the statute is to protect workers... 'from the pronounced risks arising from construction work site elevation differentials'" (*Villa v East 85th Realty, LLC*, 189 AD3d 1661 [2d Dept 2020] quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603; *see also Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *Simmons v City of New York*, 165 AD3d 725, 726-727 [2d Dept 2018]). The protections of the statute are triggered where a worker's "task creates an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against" (*Soto v J.Crew Inc.*, 95 AD3d 721, 722 [1st Dept 2012] quoting *Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]). "[L]iability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Kebe v Greenpoint-Goldman Corp.*, 150 AD3d 453, 453-454 [1st Dept 2017] quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). "In order to recover under section 240(1), the plaintiff must establish that the statute was violated and that such violation was a proximate cause of his or her injury" (*Zoto v 259 West 10th, LLC*, 189 AD3d 1523 [2d Dept 2020] citing *Barreto v Metropolitan Transp. Auth.*, 25 NY3d at 433).

In this case, contrary to Defendants' assertion, Plaintiff was engaged in a cover activity under Labor Law §240[1] since it is undisputed that Plaintiff was standing four or five rungs up on an unsecured ladder when he was handed the grinder and extension cord to cut metal overhead as part of his demolition work (*see eg Riffo-Velozo v. Village of Scarsdale*, 68 AD3d

² On December 7, 2018, Plaintiffs discontinued their action against Defendant King Hoist & Scaffolding, Inc.

839 [2d Dept 2009]). Likewise, it is uncontested that Plaintiff's ladder moved before his fall. "The failure to properly secure a ladder so as to hold it steady and erect during its use constitutes a violation of Labor Law §240[1]" (*Dasilva v A.J. Contracting Co.*, 262 AD2d 214 [1st Dept 1999] citing *Kijak v 330 Madison Ave. Corp.*, 251 AD2d 152 [1st Dept 1998]). By Plaintiff's deposition testimony, he makes a *prima facie* showing that the movement of the ladder "was a substantial factor in causing [his] injuries" (see *Canas v Harbour at Blue Point Home Owners Assoc.*, 99 AD3d 962, 963 [2d Dept 2012]; see also *Baugh v New York City School Constr. Auth.*, 140 AD3d 472 [2d Dept 2016]).

Plaintiff having demonstrated his entitlement to summary judgment, it was incumbent upon High Line to raise a triable issue of fact (see *Von Hegel v Brixmor Sunshine Sq., LLC*, 180 AD3d 727, 729 [2d Dept 2020]). Such a triable issue boils down to the lack of a statutory violation "and that Plaintiff's own acts or omissions were the sole cause of the accident" (*id.*, citing *Bermejo v New York City Health & Hosps. Corp.*, 119 AD3d 500, 502 [2d Dept 2014] quoting *Blake v Neighborhood Hous. Servs.*, 1 NY3d at 289, fn 8).

In its opposition, Defendant fails to raise a triable issue. It is of no moment that Plaintiff found nothing wrong with the ladder or that he did not experience any problems with the ladder before his accident. It also does not matter that the ladder did not fall or strike Plaintiff as Plaintiff is not asserting Labor Law §240[1] liability under the falling object theory. For this analysis, all that is relevant is that the ladder did not remain steady when Plaintiff performed his work (see *Schultze v 585 West 214th Street Owners Corp.*, 228 AD2d 381 [1st Dept 1996]). Indeed, even the authority relied upon by High Line stands for the proposition that evidence that the ladder was inadequately secured supports a finding of a Labor Law §240[1] violation (see *Hugo v Sarantakos*, 108 AD3d 744, 745 [2d Dept 2013]; *Blake v Neighborhood Hous. Servs.*, 1 NY3d at 284-289).

Defendants' attempt to cast Plaintiff's use of the grinder (plugging it in while the grinder was in the "on" position) to be the sole proximate cause of his accident fails to raise an issue of fact. In *Plywacz v 85 Broad Street LLC*, (159 AD3d 543 [1st Dept 2018]), directly before Plywacz's fall from an unsecured ladder, a suction cup that he had attached to steel wall panels came loose (see *Plywacz v 85 Broad Street LLC*, 159 AD3d at 544). In *DelRosario v United Nations Federal Credit Union*, (104 AD3d 515 [1st Dept 2013]), DelRosario was standing on an unsecured A-frame ladder when he was struck in the face by a live, exposed electrical wire (see *DelRosario v United Nations Federal Credit Union*, 104 AD3d at 515). In *Dasilva v A.J. Contracting Co.*, (262 AD2d 214 [1st Dept 1999]), DaSilva fell from an unsecured A-frame ladder when it was struck by a section of pipe he had cut (*id.*). In each case, the Plaintiff was awarded partial summary judgment on liability under Labor Law §240[1] irrespective of their contribution to their fall because the ladder failed to provide proper protection (see *Plywacz v 85 Broad Street LLC*, 159 AD3d at 543-544; *DelRosario v United Nations Federal Credit Union*, 104 AD3d at 515; *Dasilva v A.J. Contracting Co.*, 262 AD2d at 214).

In the instant case, while standing four or five rungs up on the ladder, Plaintiff plugged-in the grinder without checking the switch and his attempts to avoid the activated grinder caused the unsecured ladder to move and resulted in his fall. For the purposes of Labor Law §240[1], "[i]t is irrelevant whether Plaintiff initially lost his balance before or after the ladder wobbled"

(see *Plywacz v 85 Broad Street LLC*, 159 AD3d at 544). Since Plaintiff “was subject to an “elevation-related risk” and “the ladder did not prevent him from falling... the ‘core’ objective of Labor Law §240[1] was not met” (*Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 561 [1993]). Moreover as the failure of the ladder to provide proper protection was at least partly to blame for the accident, Plaintiff’s acts cannot constitute the “sole proximate cause” of the accident (see eg *Perrone v Tishman Speyer Props., L.P.*, 13 AD3d 146 [1st Dept 2004]; *Torres v Monroe College*, 12 AD3d 261 [1st Dept 2004]). Any claim that Plaintiff was to blame based upon his actions at the job site constitutes a claim of comparative negligence which is no defense to a Labor Law §240[1] claim (see generally *Cardona v New York City Hous. Auth.*, 153 AD3d 1179, 1180 [1st Dep’t 2017]; *Caceres v Standard Realty Assoc., Inc.*, 131 AD3d 433, 434 [1st Dep’t 2015]; *Stankey v Tishman Constr. Corp. of N.Y.*, 131 AD3d 430, 430 [1st Dept 2015]).

Lastly, Defendants’ claim that Plaintiff was a recalcitrant worker based upon his failure to utilize a scaffolding at the job site is misplaced. The Court of Appeals has held to sustain such a defense “requires a showing that the injured worker refused to use the safety devices that were provided by the owner or employer” (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 563 [1993]; see also *Stolt v General Foods Corp.*, 81 NY2d 918 [1993]). Although there is proof there was another safety device on site, a scaffold, there is no proof that Plaintiff expressly refused to utilize that device. Indeed, at the time of his accident, the scaffolding was not available to Plaintiff as it had been moved to another area of demolition for other workers to use. In the end, the mere existence of safety devices located somewhere on a construction site without more will not prove a recalcitrant worker and is insufficient to satisfy the obligation imposed by Labor Law §240[1] (see *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524 [1985]; *Laquidara v HRH Constr. Corp.*, 283 AD2d 169, 170 [1st Dept 2001]).

Therefore, Plaintiff’s motion for partial summary judgment on liability for his Labor Law §240[1] cause of action against High Line is granted.

Turning to Defendants’ motion for summary judgment, Defendants Anton and Abigail Levy seek dismissal of Plaintiff’s causes of action pursuant to Labor Law §§240[1] and 241[6] asserting that they are exempt from liability under these statutes since they fall under the exception contained in the statutes for the “owners of one and two-family dwellings who contract for but do not direct or control the work” (see Labor Law § 240[1] and 241[6]). In order for Defendants to receive the protection of the homeowner’s exemption, they “must show that (1) the premises consisted of a one-or two-family residence, and (2) the owner did not direct or control the work being performed” (*Marquez v Mascioscia*, 165 AD3d 912, 913 [2nd Dept 2018]).

The Levys made a *prima facie* showing that they were exempt from liability under the homeowner’s exemption as their submissions demonstrated that the contracted work being performed in their absence pertained to their primary residence and that they did not direct or control the work being performed (see *Bartoo v Buell*, 87 NY2d 362 [1996]; *Dasilva v Nussdorf*, 146 AD3d 859 [2nd Dept 2017]; *Kosinski v Brendan Moran Custom Carpentry, Inc.*, 138 AD3d 935, 937 [2nd Dept 2016]). As Plaintiff raised no argument in opposition on this issue, this branch of the motion is granted.

Defendants Anton and Abigail Levy further seek dismissal of Plaintiff's negligence and Labor Law §200 causes of action. It is well established that Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (see *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]; *Comes v NY State Elec. and Gas Corp.*, 82 NY2d 876 [1993]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]; *Villanueva v 114 Fifth Ave. Assoc. LLC.*, 162 AD3d 404 [1st Dept 2018]). For both Labor Law §200 and common-law negligence, in order to impose the requisite duty of care upon a party, that party must have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition (see *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d at 352; *Comes v NY State Elec. And Gas Corp.*, 82 NY2d at 877; *Ross*, 81 NY2d at 505; *Russin v Louis N. Picciano & Son*, 54 NY2d 311 [1981]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). In addition, liability under Labor Law §200 and common-law negligence requires actual or constructive notice of the dangerous condition that caused Plaintiff's injury (see *Makarius v Port Auth. of NY and N.J.*, 76 AD3d 805 [1st Dept 2010]; *Maldonado v Metro. Life Ins. Co.*, 289 AD2d 176 [1st Dept. 2001]). The notice must call attention to the specific defect or hazardous condition, and its specific location to be sufficient for corrective action to be taken (see *Gordon v American Museum of Nat. History*, 67 NY2d 863 [1986]; *Mitchell v New York Univ.*, 12 AD3d 200 [1st Dept 2004]).

As set forth in their deposition testimony, the Levys established *prima facie* that they did not have the authority to supervise or control the Plaintiff's actions and did not have actual or constructive notice of the alleged dangerous condition. Again, as Plaintiff raised no argument in opposition, this branch of Defendants' motion is granted.

As for Defendant 1136's motion for summary judgment, Defendant 1136 owns the cooperative apartment building in which the Levys' co-operative apartment is located and the accident occurred. As for Plaintiff's Labor Law §§240[1] and 241[6] claims, 1136 does not qualify for the homeowner exemption under those statutes (see *Nolasco v Soho Plaza Corp.*, 129 AD3d 924 [2d Dept 2015]; *DeSabato v 674 Carroll Street Corp.*, 55 AD3d 656 [2d Dept 2008]; see also *Nolasco v Soho Plaza Corp.*, 129 AD3d 924 [2d Dept 2015]; compare to *Guryev v Tomchinsky*, 20 NY3d 194, 201-202 [2012]). Moreover, contrary to its argument, 1136 is liable for any violation of Labor Law §§ 240[1] or 241[6] that proximately caused injury to Plaintiff, regardless of whether it contracted for, controlled or benefitted from the work in Levys' apartment (see *Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333 [2008]; *Gonzalez v 1225 Ogden Deli Grocery Corp.*, 158 AD3d 582 [1st Dept 2018]; see also *Coleman v City of New York*, 91 NY2d 821 [1997]). Accordingly, the branch of the motion for summary judgment dismissing Plaintiffs' complaint against Defendant since is denied for failure to make a *prima facie* case.

Defendant 1136 also seeks dismissal of Plaintiffs' negligence and Labor Law §200 causes of action arguing *inter alia* that it did not direct, control or supervise Plaintiff's work, supply tools or equipment to Plaintiff and did not have actual or constructive notice of the conditions that caused Plaintiff's accident to occur. In support of these arguments, 1136 relies on the deposition testimony and affidavit of Pascual Acosta, 1136's Resident Manager as well as the affidavit of Jim Miller, Executive Managing Director for Douglas Elliman Property Management, that managed the subject building. As such, 1136 established *prima facie* that they

did not have the authority to supervise or control the Plaintiff's actions and did not have actual or constructive notice of the alleged dangerous condition and therefore is not negligent or violative of Labor Law §200 as a matter of law (*see Melendez v 778 Park Ave. Bldg. Corp.*, 153 AD3d 700, 702-703 [2d Dept 2017]; *Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 699 [2d Dept 2016]; *consider Navarro v City of New York*, 75 AD3d 590 591-592 [2d Dept 2010]). In opposition, as Plaintiff failed to raise any issue of fact, this branch of Defendants' motion is granted.

The branch of Defendant Highline's motion to dismiss Plaintiff's cause of action pursuant to Labor Law §240[1] is denied based upon the Court's reasoning and ruling *supra*.

In support of the branch of the motion to dismiss Plaintiffs' Labor Law §241[6] cause of action, Defendants posit that none of the OSHA rules and regulations and Industrial Code provisions relied upon by Plaintiff provide a basis for liability. Any reliance by Plaintiff on alleged violation of OSHA regulation cannot support liability under Labor Law § 241[6], because such regulations are limited to the safety practices of an employer (*see eg Kocurek v Home Depot, U.S.A.P.*, 286 AD2d 577, 580 [1st Dept 2001]).

In opposing this motion, Plaintiff appears to have abandoned reliance on all the Industrial Code provisions cited in his bill of particulars and amended bill of particulars except one, 12 NYCRR § 23-1.5[c][3] (*see Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014]; *Foley v Con. Edison Co*, 84 AD3d 476, 478 [1st Dept 2011]). That section provides that "[a]ll safety devices, safeguards and equipment in use shall be kept sound and operable and shall be immediately repaired or restored or immediately removed from the job site if damaged". Contrary to Defendants' argument that section is sufficiently specific to support a Labor Law §241[6] claim and is applicable to the facts of this case (*see Contreras v 3335 Decatur Avenue Corp.*, 173 AD3d 496 [1st Dept 2019], *citing Jackson v Hunter Roberts Constr. Group, LLC*, 161 AD3d 666, 667 [1st Dept. 2018]). Here, as in *Contreras*, *supra*, Plaintiff testified that he was given a hand-held grinder without a safety guard to use and resulted in his injury. "This testimony raises a triable issue of fact as to whether defendant breached its nondelegable duty 'to provide reasonable and adequate protection and safety' to plaintiff" (*Contreras v 3335 Decatur Avenue Corp.*, 173 AD3d at 497 *citing Becerra v Promenade Apts. Inc.*, 126 AD3d 557, 558-559 [1st Dept 2015]; *Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 [2d Dept. 2015]; *see also* Labor Law §241[6]).

Therefore, the branch of Defendants' motion to dismiss Plaintiffs' Labor Law §241[6] cause of action is denied only with respect to 12 NYCRR § 23-1.5[c][3].

Finally, turning to the branch of Highline's motion to dismiss the Labor Law §200 and common-law negligence claims, as stated above, an owner or general contractor should not be held responsible under Labor Law §200 and common-law principles for the negligent acts of others over whom the owner or general contractor had no direction or control (*see James v Alpha Painting & Constr. Co., Inc.*, 152 AD3d 447 [1st Dept 2017]; *Hughes v Tishman Constr. Corp.*, 40 AD3d at 306; *Comes v NY State Elec. And Gas Corp.*, 82 NY2d at 877; *Ross*, 81 NY2d at 505; *Russin v Louis N. Picciano & Son*, 54 NY2d at 317). A contractor's general supervisory control is insufficient to impute liability since such a duty requires actual supervisory control or

input into how the work is performed (see *Sparendam v Lehr Constr. Corp.*, 24 AD3d 388, 389 [2005]; *Mitchell v New York Univ.*, *supra*). By the deposition testimony of Ed Kernan, Highline’s foreman/site supervisor, Highline made a *prima facie* showing that it did not control the manner in which Plaintiff performed his work and thus was not liable under Labor Law §200 or negligence theories (see *Dalanna v City of New York*, 308 AD2d 400 [1st Dept 2003]). In opposition as Plaintiff makes no argument in opposition, this branch of Defendants’ motion is granted.

Accordingly, it is

ORDERED that Plaintiff’s motion for partial summary judgment on liability on his Labor Law §240[1] cause of action against High Line Construction Group LLC, is granted, and it is further

ORDERED that Defendants Anton Levy and Abigail Levy’s motion for summary judgment dismissing Plaintiff’s complaint is granted in its entirety and Plaintiff’s claims under Labor Law §§240[1], 241[6] and 200 and for common-law negligence against these Defendants are dismissed, and it is further

ORDERED that Defendant 1136 Tenants’ Corporation’s motion for summary judgment dismissing Plaintiff’s complaint is denied except that Plaintiffs’ Labor Law §200 and common-law negligence claims are dismissed, and it is further

ORDERED that Defendant High Line Construction Group LLC’s motion for summary judgment dismissing Plaintiff’s complaint is denied except that Plaintiffs’ Labor Law §200 and common-law negligence claims are dismissed.

3/12/2021
DATE


FRANCIS A. KAHN, III, A.J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NOTED FOR DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE

HON. FRANCIS A. KAHN III
J.S.C.