

Clairmont v LV Prop.Two, LLC
2021 NY Slip Op 31374(U)
April 9, 2021
Supreme Court, Kings County
Docket Number: 511118/2018
Judge: Richard Velasquez
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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 9th day of APRIL, 2021

P R E S E N T:
HON. RICHARD VELASQUEZ, Justice.

-----X
VINCENT CLAIRMONT,

Plaintiff,

-against-

Index No.: 511118/2018
Decision and Order
Motion Seq. No. 3, 4

LV PROPERTY TWO, LLC and LV PROPERTY THREE, LLC,

Defendants,

-----X

The following papers NYSCEF Doc #'s 33 to 53 read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause	
Affidavits (Affirmations) Annexed _____	33-42; 49-50
Opposing Affidavits (Affirmations) _____	43-48; 51
Reply Affidavits (Affirmations) _____	52, 53

After having heard Oral Argument on DECEMBER 9, 2020 and upon review of the foregoing submissions herein the court finds as follows:

Defendants, LV PROPERTY TWO, LLC and LV PROPERTY THREE, LLC move pursuant to CPLR 3212 for an order dismissing the complaint of the plaintiff and all cross-claims on the grounds that no liability for the occurrence of the accident may be attributed to them.(MS#3). Plaintiff cross-moves for an order finding summary judgment in favor of the plaintiff against the defendants on the issue of liability under Labor Law 240(1). (MS#4).

This is an action to recover damages for personal injuries allegedly sustained by

the plaintiff, on Wednesday, April 4, 2018 at as a result of an accident which occurred at the premises located at 22 Charlton Street, New York, New York. The premises are owned by defendants, LV Property Two, LLC, and LV Property Three, LLC. See NYSCEF Doc. No 45. It is alleged that as plaintiff was descending the ladder he fell when the ladder kicked out due to a defective spreader brace on the ladder, he also alleges there were no co-employees available to stabilize the ladder. It is undisputed plaintiff was an employee of Downtown Interiors, the general contractor at the construction site. Shoubert Moise Philippe, an employee of the electrical sub-contractor submitted an affidavit See *NYSCEF Doc. No 44*, which states he did not witness the fall but was instructed by his supervisor to bring plaintiff ice and assisted him, after the accident occurred. Said affidavit also states that Mr. Moise saw that the ladder's spreader brace was in a defective broken condition. *Id at paragraph 3.*

ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trail of the action. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.

A motion for summary judgment is a drastic measure and to be used sparingly (*Wanger v. Zeh*, 45 Misc2d 93 [SupCt., Albany County], aff'd 26 AD2d 729 [3rd Dept 1965]). Summary judgment is proper when there are no issues of triable fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986].) Issue finding rather than issue determination is its function (*Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957].) The evidence will be construed in the light most favorable to the one moved against (*Weiss v. Garfield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. The moving party must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. (*Zuckerman v. City of New York*, 49 NY2d 557 [1990].) Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v. Algaze*, 84 NY2d 1019 [1995]).

Labor Law § 200 & Common Law Negligence

“Labor Law 200(1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work” (*Ortega v. Puccia*, 57 AD3d 54, 60, 866 NYS2d 323). “[W]hen a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work” (*id.* at 61, 866 NYS2d 323). *Goodwin v. Dix Hills Jewish Center*, 144 AD3d 744, 41 NYS3d 104, 2016 NY Slip Op. 07293. **“A defendant has the authority to supervise or control the work for purposes of Labor Law 200 when that defendant bears the responsibility**

for the manner in which the work is performed” (*Ortega v. Puccia*, 57 AD3d at 62, 866 NYS2d 323). “[T]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law 200 or for common-law negligence” (*Austin v. Consolidated Edison, Inc.*, 79 AD3d 682, 684, 913 NYS2d 684 [internal quotation marks omitted]; see *Cambizaca v. New York City Tr. Auth.*, 57 AD3d 701, 871 NYS2d 220). The court would also like to note that **“Tenants who either contract for or control and supervise the work may be held liable under these statutes”** (see *Wendel v Pillsbury Corp.*, 205 AD2d 527, 528-529 [1994]; cf. *Garcia v Market Assoc.*, 123 AD3d 661, 665 [2014]), “but tenants who neither contract for nor control and supervise the work may not be held liable under them” (see *Ferluckaj v Goldman Sachs & Co.*, 12 NY3d at 319-320; *Garcia v Market Assoc.*, 123 AD3d at 665; *Guzman v L.M.P. Realty Corp.*, 262 AD2d 99, 99-100 [1999]); quoting, *Rizo v. 165 Eileen Way, LLC*, 169 A.D.3d 943, 946, 94 NYS3d 157 (2nd Dep’t 2019).

In the present case, defendant, Mr. Richard Kellam submits an affidavit indicating he is the owner of the property because he is the sole member of the LLC¹. All documentary evidence in this matter, including Mr. Kellam’s own EBT dispute that claim and name the defendants LV Property One, LC Property Two, LLC as the property owner. Mr. Richard Kellam testimony puts him at the work site as the manager of the defendants LLC and having the ability to direct and control the work when he was there. Specifically, he testified as follows;

Q: What is your position, if any at LV Property One, LC Property Two, LLC?

¹ This is disputed. The deed and other records submitted do not support this assertion.

A. I'm the manager of their manager. Their manager managed LCs.

Q. Who is the manager of LV Property Two, LLC?

A. Company Manager, LC.

Q. Can I ask you to tell me the name the Company Manager?

A. LC. (See NYSCEF Doc. No. 41 pp.8 lines 3-15)

...

Q: Did you visit the property at 22 Charlton during the period that the remodeling began up until the incident date of April 4, 2018 did you visit the property over that period of time?

A: Yes.

Q: How many times, approximately time?

A: I didn't count, but periodic.

Q: Would you say once a month at least?

A: Could be.

Q: For what purpose did you visit the property?

A: Progress and direction.

...

Q: Who within LV, and I will use your terms, who within LC Two and Three would have contracted with the general contractors?

A: Only a company manager, LC as the manager of them would have been authorized or could have effectively done it.

Q: Who would have done that be Company Manager, LC?

A: It could have been any of their managers and I'm one of them. So it was probably me, but in some cases if I was not available there are other manager that could have orchestrated it. (See NYSCEF Doc. No. 41 at pp. 24)

As such Mr. Richard Kellam own testimony raises questions of fact as to whether defendants directed supervised and controlled the work.

In support of their motion for summary judgment under Labor 240(1) and 241(6), defendants assert their entitlement to the one-two family homeowner exception.

As per the deed of record in New York, as of the date of the accident the Virginia corporate defendants were the owners of the premises, having purchased same in 2014. Pursuant to the deed, defendant LV Property Two, LLC is a 56.42% owner and defendant LV Property Three, LLC is a 43.58% owner. See NYSCEF Doc. No. 45 The deed and all recorded documents including the Real Property Transfer Report are signed by Braxton Hill as Company Manager. See NYSCEF Doc. No. 46. Mr. Kellam

testified that at the time of the purchase, the building was occupied by at least one tenant, who continued to reside there and pay rent for some period after the purchase. See, EBT of Richard Kellam See NYSCEF Doc. No. 41 pp.16-17. Specifically, Mr. Richard Kellam testified the entire property was vacant when the work began in August of 2016. (See NYSCEF Doc. No. 41 pp.16 lines 17-20). As of the date of his deposition, Mr. Kellam had no intent to reside in the premises. See NYSCEF Doc. No. 41 pp.36-37. Mr. Kellam further testified that the premises were not owned by the captioned defendants, but rather by an entity known as Richmond Hillcrest, LLC. See NYSCEF Doc. No. 41 pp. 11. The signatory, as owner of the corporate entities on these documents is Braxton Hill. See, NYSCEF Doc. No 46. There is no reference to any Richard Kellam on any of the New York State recorded documents for the premises. According to the State of Virginia Corporate Commission Braxton Hill is also the owner and organizer of Richmond Hillcrest, and these defendants. See, NYSCEF Doc. No 47. The Virginia state corporate documents make no reference to any Richard Kellam as being an owner or in any way being connected to any of the defendants herein, or to any other LV entity.

In the present case, pursuant to the record before this court the premises is not a 1-2 family dwelling and the owner is a corporation. The Court acknowledges and notes, “corporate ownership of a property, in and of itself, does not preclude application of the homeowner exception to sections 240 and 241(6)” (*Lai-Hor Ng Yiu v. Crevatas*, 2011 NY Slip Op 21272, 14–15 [Sup Ct, Kings County 2011], *citing Baez v. Cow Bay Constr.*, 303 AD2d 528, 528–529 [2d Dept 2003], *lv denied* 2 NY3d 701 [2004] [defendant corporation entitled to exemption where the project upon which the injured plaintiff was

working involved construction of two single-family houses that the sole shareholder of defendant and his family planned to use for residential purposes]; *Telfer*, 245 AD2d at 621 [defendant apple orchard corporation, wherein husband and wife homeowners were president and secretary/treasurer of defendant, respectively, was entitled to homeowner's exemption because single-family home, which had been renovated and was located on orchard, was not used solely to advance commercial enterprise, and extent residence used for commercial purposes was de minimis] [*Castellanos v. United Cerebral Palsy Assn. of Greater Suffolk, Inc.*, 77 AD3d 879 [2d Dept 2010], *lv denied* 16 NY3d 704 [2011]; *quoting*, *Assevero v. Hamilton & Church Properties, LLC*, 35 Misc 3d 1222(A), 953 NYS2d 548 (Sup. Ct. 2012).

In the present case, there is nothing in this record that establishes the premises was owner occupied. As previously noted throughout this decision there is nothing in the record establishing Mr. Kellam is the owner of the defendant LLC. Moreover, Mr. Kellam testimony established he did not live there. The record before this court it is unclear as to whether or not, the defendant LLC owners used this premises solely to advance commercial enterprise. As such, there are questions of fact as to whether this exemption applies.

Labor Law § 240(1)

Labor Law § 240(1) provides:

“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.”

To prevail on a Labor Law § 240(1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (see *Berg v. Albany Ladder Co.*, 10 NY3d 902, 904, 861 NYS2d 607, 891 NE2d 723; *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287, 771 NYS2d 484, 803 NE2d 757; *Martinez v. Ashley Apts Co., LLC*, 80 AD3d 734, 735, 915 NYS2d 620). “[W]here a plaintiff’s own actions are the sole proximate cause of the accident, there can be no liability” (*Cahill v. Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39, 790 NYS2d 74, 823 NE2d 439; see *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d at 290, 771 NYS2d 484, 803 NE2d 757).

“Liability under Labor Law § 240(1) depends on whether the injured worker’s task creates an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against”. (*Salazar v. Novalex Contracting Corp.*, 18 NY3d 134, 139 [2011].) “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.*” (*Runner v. New York Stock Exchange*, 13 NY3d 599, 604 [2009] [quoting *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 501 (1993)].) In determining the applicability of the statute, the “relevant inquiry” is “whether the harm flows directly from the application of the force of gravity to the object.” (See *Runner v. New York Stock Exchange*, 13 NY3d at 604.) “The dispositive inquiry ... does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker.” (*Runner*

v. New York Stock Exchange, 13 NY3d at 603.) **“Rather, 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.”** (*Id.*)

“The purpose of the strict liability statute is to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction work site elevation differentials, and, accordingly, that there will be no liability under the statute unless the injury producing accident is attributable to the latter sort of risk.” (See *Runner v. New York Stock Exchange*, 13 NY3d at 603; see also *Davis v. Wyeth Pharmaceuticals, Inc.*, 86 AD3d 907, 909 [3d Dept 2011].) To prevail on a Labor Law § 240(1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (see *Berg v. Albany Ladder Co.*, 10 N.Y.3d 902, 904, 861 NYS2d 607, 891 NE2d 723; *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287, 771 NYS2d 484, 803 NE2d 757; *Martinez v. Ashley Apts Co., LLC*, 80 AD3d 734, 735, 915 NYS2d 620). “[W]here a plaintiff’s own actions are the sole proximate cause of the accident, there can be no liability” (*Cahill v. Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39, 790 NYS2d 74, 823 NE2d 439; see *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d at 290, 771 NYS2d 484, 803 NE2d 757).

Again, the legislative purpose underlying Labor Law § 240 (1) was to place “ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor” (*Bland v Manocherian*, 66 NY2d 452, 459, quoting 1969 NY Legis Ann, at 407) instead of on

workers, who "are scarcely in a position to protect themselves from accident." (*Koenig v Patrick Constr. Corp.*, 298 NY 313, 318.) To that end, "the Legislature determined that owners or contractors shall be liable for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure. Liability is not predicated on fault: it is imputed to the owner or contractor by statute and attaches irrespective of whether due care was exercised and without reference to principles of negligence" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521-522; *Crawford v Leimzider*, 100 AD2d 568, 569). A violation of the statute is not the equivalent of negligence and does not give rise to an inference of negligence. *Brown v. Two Exch. Plaza Partners*, 76 NY2d 172, 178–79, 556 NE2d 430 (1990).

In *Oakes v. Wal-Mart Real Estate Business Trust* (99 AD3d at 39), the Third Department in discussing the Court of Appeal's decision in *Willinski v. 334 E. 92nd Street Hous. Dev. Fund Corp.* (18 NY3d at 10), explained that, even though the Court of Appeals has rejected a "same level rule" that automatically precludes liability "where the base of a falling object ... and the injured worker are on the same level" (see *Oakes v. Wal-Mart Real Estate Business Trust*, 99 AD3d at 38), the Court of Appeals has not abandoned the requirement that there be a physically significant height differential between the plaintiff and the object in order to establish liability under Labor Law § 240(1). Indeed, as noted by the Third Department in *Oakes*, the Court of Appeals determined in *Willinski* that there was a four-foot differential between the Plaintiff and the pipes that fell on him, and that such differential was physically significant. *Oakes v. Wal-Mart Real Estate Business Trust* (99 AD3d at 39).

In *Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.* (84 NY2d 841, 844 [1994]), the Court of Appeals held that a worker “placing a 120–pound beam onto the ground from seven inches above his head with the assistance of three other co-workers ... was not faced with the special elevation risks contemplated by the statute.” Although *Rodriguez* preceded both *Runner* and *Willinski*, it was recently cited by the Court of Appeals in *Ortiz v. Varsity Holdings, LLC* (18 NY3d 335 [2011]) for the proposition that “[i]t is true that courts must take into account the practical differences between the usual and ordinary dangers of a construction site, and ... the extraordinary elevation risks envisioned by Labor Law § 240(1)’ “ (see *id.* at 339 [quoting *Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d at 843)]; see also *Oakes v. Wal–Mart Real Estate Business Trust*, 99 AD3d at 39.)].

In the present case, the plaintiff does assert a cause of action under Labor Law § 240 (1) because he had been exposed to an “elevation-related risk” arising from the inadequacy of the protective device (180 AD2d, at 390); *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499, 618 NE2d 82 (1993). In the present case, while at work on a construction site plaintiff was caused to fall from an unsecured defective ladder. **“It is by now well established that the duty imposed by Labor Law § 240 (1) is nondelegable and that an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work”** (see, e.g., *Haimes v New York Tel. Co.*, 46 NY2d 132, 136-137); quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500, 618 NE2d 82 (1993).

Here, it is undisputed that plaintiff was on an unsecured ladder when the ladder

shifted due to a defective spreader brace on the ladder causing the plaintiff to fall. The descriptions of how the accident occurred establish the proximate cause of plaintiff's injury was a "physically significant" elevation differential between the object that fell and plaintiff. Moreover, it is clear, that the plaintiff's injuries were "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" because there was nothing to secure the ladder and the ladder provided was in a defective condition. Therefore, as a result, it also cannot be said that the plaintiff was the sole proximate cause of this accident. Accordingly, plaintiffs motion for partial summary judgment as to their Labor Law 240(1) claim is granted. Defendants request for summary judgment dismissing plaintiffs 240(1) and 241(6) claim is hereby denied.

Accordingly, Defendants motion pursuant to CPLR 3212 dismissing the complaint is hereby denied, for the reasons stated above. (MS#3). Plaintiff's motion for summary judgment under Labor Law 240(1) is hereby granted, for the reasons stated above. (MS#4).

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
APRIL 9, 2021

ENTER FORTHWITH:



HON. RICHARD VELASQUEZ