Singh v Barreiro
2021 NY Slip Op 33689(U)
June 11, 2021
Supreme Court, Bronx County
Docket Number: Index No. 29706/2018E
Judge: Lucindo Suarez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

C

NEW YORK SUPREME COURT – COUNTY OF BRONX

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

Onkar Singh and Sarbjit Kaur,

Plaintiff,

- against -

Mercedes Barreiro and Renato A. Rios,

Defendants.

Index №. 29706/2018E

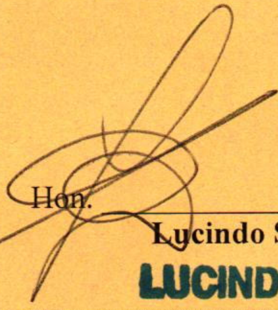
Hon. **Lucindo Suarez**
Justice Supreme Court

The following papers numbered ____ to ___were read on this motion **(NYSCEF Motion Seq. No. 2**) for noticed on _______and duly submitted as **Nos.** __ on the Motion Calendar of ____________

NYSCEF Sequence 2	Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	26-52
Cross Motion – Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits, Memorandum of Law	55-63
Reply Affidavit	64-66

Upon the foregoing papers, the motion by Plaintiff is decided, in accordance with the annexed decision and order.

Dated: **June 11, 2021**



Hon. ____________________
Lucindo Suarez, J.S.C.
LUCINDO SUAREZ, J.S.C.

1. CHECK ONE.. ☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS.. ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE........................ ☐ SETTLE ORDER ☐ SUBMIT ORDER

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

Onkar Singh and Sarbjit Kaur,

Plaintiff,

Index No. 29706/2018E

- against -

DECISION and ORDER

Mercedes Barreiro and Renato A. Rios,

Defendants.

Hon. Lucindo Suarez

Plaintiffs move for summary judgment pursuant to Labor Law §§240(1) and 241(6). Defendants oppose the motion. This court finds that Plaintiffs are entitled to judgment concerning their Labor Law §§240(1) and 241(6) claims.

Plaintiffs commenced this action to recover damages for injuries that Plaintiff Onkar Singh[1] allegedly sustained on June 20, 2018, when he fell from a scaffold while "pointing" bricks (i.e., replacing the mortar in the joints between the bricks) on a building owned by the Defendants.

According to Plaintiff's deposition testimony, he and a helper, nonparty Irfan Ellahi, were lowering the scaffold at the time the accident occurred. The scaffold was controlled by ropes and pulleys, which required that Plaintiff and his helper manually "ease up" on the ropes. Plaintiff was equipped with a safety harness, lanyard and a safety line. The lanyard attached to the safety line by means of a clip, which was able to move the safety line up and down.

According to the Plaintiff, the safety clip that connected his lanyard to the safety line became jammed, and he therefore removed the safety clip from the safety line. Plaintiff admitted that he did not tell Ellahi that the clip was jammed, because he did not want to "bother" or "startle" his co-worker.

---

[1] "Plaintiff" herein in the singular refers to plaintiff Onkar Singh unless otherwise indicated. Plaintiff Sarbjit Kaur is Plaintiff Singh's wife and she has asserted derivative claims only.

Plaintiff intended to re-connect his lanyard to the safety line when the scaffold had been lowered to the correct position. However, before he could do so, the scaffold suddenly swung down toward the ground.

It was later ascertained that a "block" (the mechanism which houses the pulleys) failed, causing one side of the scaffold to fall, and causing the Plaintiff to slip off the scaffold to the ground below. Plaintiff's expert examined the scaffold and confirmed that there had been a catastrophic failure of one of the blocks, such that the rope was free of any tension. He also examined the safety clip and ascertained that it was "jammed" and thus would not slide along the safety line as the scaffold moved.

Ellahi (Plaintiff's co-worker) did not see Plaintiff pull on his safety clip to dislodge it, but he did see plaintiff unhook the safety device. Shortly after Plaintiff unhooked his safety harness, the rope came out from the pulley and the scaffold fell toward one side. Ellahi observed Plaintiff fall through the scaffold to the floor. After the accident occurred, Mr. Ellahi noticed that the pulley was broken; however, he did not find any issues with the pulley prior to Plaintiff's accident. Ellahi did not fall from the scaffold.

Defendant's expert, Angela Levitan, an engineer, stated in her affidavit that based upon her review and inspection, to a reasonable degree of engineering certainty, that the scaffold and safety equipment that Plaintiff was using at the time of his fall did not violate Labor Law §240(1) as the type of scaffolding used by Plaintiff, a suspended scaffold, was suitable for the job being performed. Based upon her inspection and a review of the parties' testimony, there was no evidence that anything was wrong or defective with the equipment prior to the Plaintiff's accident, and thus, there is no evidence that Labor Law §240(1) was violated.

Labor Law §240(1)

Labor Law §240(1) applies where elevation-related risks are at involved in the work.

(*Narducci v Manhasset Bay Assocs.*, 96 N.Y.2d 259, 267 [2001]; *Bruce v. 182 Main St. Realty Corp.*, 83 A.D.3d 433, 921 N.Y.S.2d 42 [1st Dept. 2011] ["Labor Law §240(1) imposes a nondelegable duty on owners, even when the job is performed by a contractor the owner did not hire and of which it was unaware, and therefore over which it exercised no supervision or control.") The fact that a worker falls at a construction site, in itself, does not establish a violation of Labor Law §240(1). (*O'Brien v. Port Auth. of N.Y. & N.J.*, 29 N.Y.3d 27, 33, 74 N.E.3d 307, 310, 52 N.Y.S.3d 68, 71 [2017].)

Labor Law §240(1) "imposes absolute liability on building owners and contractors whose failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker." (*Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp.*, 18 N.Y.3d 1, 7, 959 N.E.2d 488, 935 N.Y.S.2d 551). "Whether a plaintiff is entitled to recovery under Labor Law §240(1) requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies." (*Id.* at 7.) However, "where 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 N.Y.3d 35, 39, 823 N.E.2d 439, 790 N.Y.S.2d 74 [2004]).

Plaintiff's submissions establish that he fell from a scaffold, which suddenly gave way while he was performing work on a construction project at premises owned by Defendants, and thus Plaintiff demonstrated his *prima facie* burden that he was injured as a result of Defendants' failure to provide him with proper protection against elevation-related risk. (*See* Labor Law §240[1]; *Pierrakeas v. 137 E. 38th St. LLC*, 177 A.D.3d 574, 114 N.Y.S.3d 318 [1st Dept. 2019]; *Sacko v. New York City Hous. Auth.*, 188 A.D.3d 546, 547, 132 N.Y.S.3d 611 [1st Dept. 2020]). Since "sound scaffolds … do not simply break apart" (*Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 286, 803 N.E.2d 757, 771 N.Y.S.2d 484 [2003]), plaintiff met his initial burden on this motion by showing that the scaffold collapsed, in part, causing him to fall (*see Szpakowski v. Shelby Realty, LLC*, 48 AD3d 268, 269, 851 NYS2d 487 [2008], lv denied 12 N.Y.3d 708, 906 N.E.2d 1089, 879 N.Y.S.2d 55 [2009];

Kind v. 1177 Ave. of the Ams. Acquisitions, LLC, 168 A.D.3d 408, 409, 91 N.Y.S.3d 394, 395 [1st Dept. 2019] ["The tilting or collapse of the scaffold was prima facie evidence of a violation of Labor Law § 240 (1)."])

While Defendants argue that Plaintiff may have done something to cause the scaffold to fail, by causing some type of lateral movement, this argument is unsupported by the record and based on mere speculation. (*Kind v. 1177 Ave. of the Ams. Acquisitions, LLC*, 168 A.D.3d 408, 409, 91 N.Y.S.3d 394, 395 [1st Dept. 2019] ["conclusion of the Department of Labor investigator that the scaffold tilted because plaintiff and his coworker caused a safety line to become caught in a spool for the scaffold's suspension cables was speculation unsupported by the evidence"].) Nor has it been shown that if Plaintiff somehow pulled on the rope incorrectly, this conduct would somehow constitute more than comparative negligence, and negate Defendants' duty to provide proper safety equipment.

Defendants also argue that Plaintiff's conduct in unhooking his lanyard clip was the sole proximate cause of the accident. In this regard, Defendants argue that the safety clip may not, in fact, have jammed. Defendants' expert did not examine the safety clip, and thus Plaintiff's expert's conclusion that the clip was jammed, based on an actual physical examination, is unrebutted.[2] Defendants' arguments are not based on an examination of the safety clip itself, but rather, on Plaintiff's failure to relate the reason he untied the clip to his co-worker immediately prior to the accident. This testimony does not in fact raise an issue of fact as it does not contradict Plaintiff's version of the events, which are supported by the report of Plaintiff's examining expert.

Assuming this testimony did raise an issue of fact, contrary to this court's ruling, the issue presented would be whether the failure of Plaintiff to use an available safety device, despite the failure

[2] As Plaintiff's expert stated in his affidavit, "I next inspected the safety lines and the safety clips, also known as a rope grabs or locks. There were two safety lines with safety clips in place. One of the two safety clips was jammed and would not travel on the safety line. I attempted to free the grab mechanism on the safety clip but, despite multiple attempts, I was unable to do so. This safety clip was obviously in a defective condition."

of the scaffold itself, would constitute the sole proximate cause of the accident. The First Department seems to have rejected such a defense in *Milewski v. Caiola,* 236 A.D.2d 320, 654 N.Y.S.2d 738 [1st Dept. 1997]) In that case, the plaintiff used a plank to traverse and elevator shaft and fell into the shaft. The defendant raised the defense of recalcitrant worker based on the failure to use a safety harness. In rejecting that defense, the First Department held that the failure of the safety device (i.e., the plank) was a "more proximate cause" of the accident:

> "Neither plaintiff's disregard of a co-worker's advice that the plank plaintiff was laying across the elevator shaft was unsafe, nor the conflicting deposition testimony concerning whether plaintiff was wearing a safety harness at the time of the accident, creates an issue of fact sufficient to support a recalcitrant worker defense (*see, Gordon v Eastern Ry. Supply*, 82 NY2d 555, 563; *Scorza v CBE, Inc.*, 231 AD2d 564; *Allan v Rochester Inst. of Technology*, 209 AD2d 929; *Koumianos v State of New York*, 141 AD2d 189). <u>In any event, even if plaintiff could be deemed recalcitrant for not having used the harness, no issue exists that the failure to provide proper safety planking was a more proximate cause of the accident</u> (*see, Gordon v Eastern Ry. Supply, supra*, at 562; *Aragon v 233 W. 21st St.*, 201 AD2d 353; *Koumianos v State of New York, supra*)." (*Milewski v. Caiola, supra,* 236 A.D.2d 320, 320-321.)

In *Smith v. State of New York* (180 A.D.3d 1270, 1271, 117 N.Y.S.3d 777, 778 [3d Dept. 2020]), the Third Department reached a similar conclusion. The decedent was standing on an elevated platform when two of the cables supporting the platform snapped, causing the decedent to slide off the platform. Defendant argued that decedent's failure to, *inter alia*, attach his harness and lanyard to an anchorage point on the platform, was the sole proximate cause of the accident. The Third Department held:

> "The Court of Claims, however, properly rejected this argument, aptly reasoning that decedent's omissions (not wearing a life jacket or tying off to an anchorage point) could not be the sole proximate cause of the accident when the precipitating event was the failure of the platform itself (see Fabiano v State of New York, 123 AD3d at 1264; Portes v New York State Thruway Auth., 112 AD3d at 1050-1051). <u>As the Court of Claims noted, decedent's failure to use additional safety devices amounts, at most, to comparative negligence, which does not preclude liability under Labor Law § 240 (1)</u> (see Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d at 39; Portes v New York State Thruway Auth., 112 AD3d at 1051; Kouros v State of New York, 288 AD2d at 567). Accordingly, the Court of Claims properly granted claimant partial summary

> judgment on the issue of liability under Labor Law § 240 (1)." (*Smith v State of New York, supra*, 180 A.D.3d at 1271 [Emphasis added].)

Accordingly, this court finds that even if an issue of fact was raised that the safety clip did not jam, and that Plaintiff's failure to attach the clip to the safety line constituted the failure to use an available and functioning safety device, the fact remains that the proximate cause of the accident was the failure of the scaffold itself. Therefore, Plaintiff's conduct was thus, at most, comparative negligence, which is not a defense to a Labor Law §240(1) claim.

Labor Law §241(6)

Labor Law §241(6) imposes on owners and contractors a nondelegable duty 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. To sustain a cause of action pursuant to Labor Law §241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code regulation that is applicable to the circumstances of the accident. (*Yaucan v. Hawthorne Vil., LLC,* 2017 N.Y. App. Div. LEXIS 8088, 2017 NY Slip Op 08035 [2d Dept. 2017]). "Whether a regulation applies to a particular condition or circumstance is a question of law for the court." (*Harrison v. State of New York*, 88 A.D.3d 951, 953, 931 N.Y.S.2d 662 [2d Dept. 2011]). As a prerequisite to a Labor Law §241(6) cause of action, a plaintiff must allege a violation of a concrete specification promulgated by the Commissioner of the Department of Labor in the Industrial Code. (*DelRosario v. United Nations Fed. Credit Union*, 104 A.D.3d 515, 961 N.Y.S.2d 389 [1st Dept. 2013] [citations omitted] [granting summary judgment to plaintiff based on Labor Law §241[6].)

12 NYCRR §23-1.16(b) provides: "(b) Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached

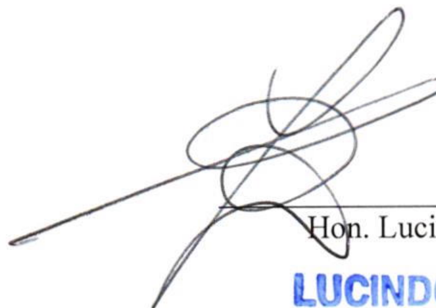
either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet." A violation of this provision gives rise to liability under Labor Law §241(6). (A*nderson v. MSG Holdings, L.P.*, 146 A.D.3d 401, 44 N.Y.S.3d 388 [1st Dept. 2017]). Plaintiff's testimony that the clip was jammed, which was supported by the testimony of Plaintiff's expert, who examined the clip established a violation of this Industrial Code and Defendants failed to raise any issues of fact concerning same. Therefore, it is not necessary to consider any other sections of the instant Industrial Code in view of the foregoing.

Accordingly, based upon the foregoing, it is hereby

ORDERED that Plaintiffs are granted summary judgment pursuant to Labor Law §§240(1) and 241(6).

This constitutes the decision and order of the court.

Dated: June 11, 2021



Hon. Lucindo Suarez, J.S.C

LUCINDO SUAREZ, J.S.C.