

<b>Burton v One Flatbush Ave. Prop. LLC</b>
2021 NY Slip Op 33694(U)
March 1, 2021
Supreme Court, Kings County
Docket Number: Index No. 523452/17
Judge: Carolyn E. Wade
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At an IAS Term, Part 84 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 1st day of March, 2021.

P R E S E N T:

HON. CAROLYN E. WADE,

Justice.

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DAVID AGUSTINE BURTON,

Plaintiff,

- against -

Index No. 523452/17

ONE FLATBUSH AVENUE PROPERTY LLC, SLATE PROPERTY GROUP LLC AND DANYA CEBUS CONSTRUCTION, LLC,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc. Nos.

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion, Affidavits  
(Affirmations) and Memorandum of Law  
Opposing Affidavits (Affirmations)  
and Opposing Memorandum of Law \_\_\_\_\_  
Reply Affidavits (Affirmations)

29-48, 49-64  
67, 93-98  
97, 100

Upon the foregoing papers, and after oral argument, plaintiff David Agustine Burton moves for an Order, granting him summary judgment against the defendants pursuant to Labor Law § 240(1) (motion sequence # 2). Defendants One Flatbush Avenue Property LLC, Slate Property Group LLC and Danya Cebus Construction, LLC, move for an Order granting them summary judgment, dismissing the plaintiff's Verified Complaint (motion sequence # 3).

The underlying action was commenced by plaintiff David Agustine Burton ("Plaintiff") to recover damages for serious injuries that he allegedly sustained while hoisting a 60-pound electric jackhammer to demolish a concrete block. At the time of the accident, Plaintiff was

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employed as a concrete contractor by non-party Perimeter Concrete Corp. Plaintiff alleges that the defendants, *inter alia*, failed to provide him with adequate safety devices in violation of Labor Law §§ 200, 240(1), and 246(1), and is liable under common law negligence. Defendants One Flatbush Avenue Property LLC, and Slate Property Group LLC<sup>1</sup> are the owners of One Flatbush Avenue in Brooklyn, New York (“Subject Premises”); while, co-defendant Danya Cebus Construction, LLC (“Danya Cebus”) was the Construction Manager of the project (collectively, “Defendants”).

After a meticulous examination of the respective submissions, this Court finds as follows:

Plaintiff’s Motion for Summary Judgment pursuant to Labor Law § 240(1) (motion sequence # 2)

Labor Law § 240(1) requires owners, contractors, and their agents to provide workers with proper safety devices to protect against “such 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]). “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” *Id.* at 500.

Jeffrey Yachmetz (“Yachmetz”), the chief operating officer of defendant Slate Property Group, testified at a deposition, on behalf of his employer, and co-defendant One Flatbush Avenue Property LLC (Exhibit “8,” pg. 11 of Plaintiff’s motion). Plaintiff notes that Yachmetz conceded that both companies did not provide safety devices to workers at the jobsite. Yachmetz

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<sup>1</sup> Slate Property Group is a managing member and 15% stakeholder in One Flatbush Avenue Property LLC.

averred that the subcontractors were responsible for providing all of the equipment. However, the prevailing authority above holds that such a duty is non-delegable.

Albert de los Santos, Danya Cebus' construction superintendent, similarly testified that his employer did not provide any type of scaffolding for Perimeter employees to use while operating the jackhammer (Exhibit "9," pgs. 51-52 of Plaintiff's motion). While de los Santos testified that Danya Cebus was hired solely as the construction manager, the contract between it and One Flatbush Avenue Property LLC stated that it "shall administer, manage, supervise, direct, coordinate and cause the proper and efficient performance of furnishing, through Subcontractors or its own forces, of all work, labor, materials, equipment, tools and General Conditions Work required for the complete construction and/or installation of the Project" (Exhibit "13," Section 4.1.1, pg. 12 of Plaintiff's motion). Likewise, the subcontract between Danya Cebus and Perimeter Concrete Corp. states that the former is to provide "[a]ll materials and equipment" (Exhibit "14," para. 26.1, pg. 17 of Plaintiff's Motion). In fact, the Defendants do not deny that they were unresponsive to Plaintiff's Notice to Admit, dated 4/30/2018; thereby, impliedly conceding that One Flatbush Avenue Property LLC retained Danya Cebus Construction LLC as the general contractor at the Subject Premises.

Plaintiff further supported his contentions with an affidavit from Thomas R. Parisi, a professional engineer, who opined that the use of a scaffold or an elevated work platform was necessary to safely use the jackhammer to break apart the concrete block that was 3 – 3 ½ feet above him. Defendants' expert, Yoandi Interian, P.E., cited a section of the Danya Cebus-Perimeter Contract, which stated that the Trade Contractor (Perimeter) would furnish labor, and erect/dismantle any scaffold required to complete the work. However, Labor Law § 240(1), and

the case law cited above reinforce that an owner, general contractor, or their agents, can not delegate the responsibility of providing a scaffold, or other necessary device to a third-party. Defendants have not established that Plaintiff was provided with a scaffold or ladder on the date of the accident.<sup>2</sup> Moreover, the purported presence of a scaffold at the work site does not discharge Defendants of their Labor Law § 240(1) duties.

Defendants maintain that Labor Law § 240(1) is inapplicable to this action on the ground that Plaintiff did not suffer from an elevation related hazard. However, Plaintiff aptly cited *Collela v. Port Authority of New York & New Jersey*, 2012 NY Slip Op 32222(U) [Sup Ct, N.Y. Cty. 2012], where the court found that the plaintiff's injury fell within the ambit of Labor Law § 240(1), as his jackhammer fell when he used it to break a ledge that was 3 to 3 ½ feet above the surface that he was standing on.

Given the testimony and prevailing legal authority cited above, this Court finds that the Defendants are liable under Labor Law § 240(1).

**Defendants' Motion for Summary Judgment (motion sequence #3)**

As a preliminary matter, this Court credits Defendants' contention that Plaintiff's Labor Law § 241(6) claim must be **dismissed**, as he fails to plead a violation of specific Industrial Codes.

Given this Court's ruling under motion sequence #2 that Defendants are liable for violating Labor Law § 240(1), the branch of the instant motion which seeks summary judgment as to this section is **denied**.

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<sup>2</sup> Plaintiff testified at his deposition that in the days preceding the accident, he was engaged in a different assignment- "smoothing out walls," for which he was furnished a ladder or a "small scaffold" (Exhibit "2," pg. 48 of Plaintiff's deposition).

Lastly, “[l]abor Law section 200 codifies the common-law duty of an owner or contractor to provide workers with a reasonably safe place to work [citations omitted]” (*King v. Vilette*, 155 AD3d 619 [2<sup>nd</sup> Dept. 2017]). “[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 [citation omitted]” *Id.* at 622.

In the instant case, the subject contract and subcontract both memorialize that Danya Cebus had the authority to supervise and control the performance of Plaintiff’s work. Notably, the Flatbush/Danya Cebus Agreement states that the latter “shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures for the Work, and for coordinating all portions of the Work under the Contract Documents” (Section 4.9.1, pg. 19 of the Contract). In fact, de Los Santos, Danya Cebus’ construction superintendent, testified at his deposition that he “could stop the activity from continuing or even starting” (de Los Santos’ deposition, pg. 61). However, there is no evidence that either Flatbush One Property LLC or Slate Property Group LLC supervised or controlled the means and methods of the work; thus, the Labor Law § 200 claim is dismissed against them.

Accordingly, based upon the above, Plaintiff’s Motion for Summary Judgment under Labor Law § 240(1) (motion seq. #2) is **GRANTED**. Consequently, the branch of Defendants’ Motion for Summary Judgment (motion seq. #3), for an Order seeking dismissal of Plaintiff’s Labor § 240(1) claim is **DENIED**. Defendants’ Motion is **GRANTED solely to the extent** that the Labor Law § 241(6) claim is **dismissed** against all of the Defendants. Moreover, the Labor Law § 200 claim and common law negligence claims are **dismissed** solely against defendants

Flatbush One Property LLC and Slate Property Group LLC. The Labor Law § 200 and common law negligence claims will remain as asserted against Danya Cebus.

This constitutes the Decision and Order of the Court.

E N T E R,



HON. CAROLYN E. WADE, J.S.C.

Hon. Carolyn E. Wade  
Supreme Court Justice

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