

Amaya v 174 Duane, LLC

2021 NY Slip Op 33881(U)

May 3, 2021

Supreme Court, Kings County

Docket Number: Index No. 512838/2018

Judge: Carl J. Landicino

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.

At an IAS Term, Part 81 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 3rd day of May, 2021.

PRESENT:

CARL J. LANDICINO, J.S.C.

-----X

NERY AMAYA,

Index No.: 512838/2018

Plaintiff,

DECISION & ORDER

- against -

174 DUANE, LLC,

Motion Sequence #2

Defendant.

-----X

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	28-35,
Opposing Affidavits (Affirmations).....	39,
Reply Affidavits (Affirmations)	41,
Memorandum of Law.....	36,

After a review of the papers and oral argument the Court finds as follows:

This lawsuit arises out of a workplace accident that allegedly occurred on November 14, 2017. Plaintiff, Nery Amaya (hereinafter the "Plaintiff") alleges in his Complaint that on that date he suffered personal injuries after he fell from a ladder while working as an employee for non-party Cardinal Construction. The accident apparently occurred at 174 Duane Street, New York, New York (hereinafter the "Premises"). At the time of the alleged incident, the Premises were purportedly owned by Defendant 174 Duane, LLC (hereinafter "Defendant"). The Plaintiff's complaint raises causes of action for common law negligence, and violations of Labor Law 200, 240 and 241(6).

The Plaintiff moves (motion sequence #2) for an order pursuant to CPLR 3212 granting summary judgment on the issue of liability as it relates to his Labor Law 240(1) claim. The Plaintiff contends that he was injured while performing plastering and caulking work on a ladder. Specifically, the Plaintiff alleges that the A-frame ladder he was using suddenly shook and caused him to fall. The Plaintiff contends that this fact is sufficient to meet his *prima facie* burden relating to his Labor Law 240(1) claim. Plaintiff argues that he has demonstrated that the ladder did not serve to provide the Plaintiff with an adequate safety device.

The Defendant opposes the Plaintiff's motion. The Defendant contends that no violation of Labor Law 240(1) occurred given that the A-frame ladder the Plaintiff was provided with was in perfect working order. The Defendant contends that the Plaintiff's deposition testimony shows that he had used the ladder before and does not support the Plaintiff's position that the ladder was defective. As a result, the Defendant contends that the Plaintiff has failed to meet his *prima facie* burden and the motion should be denied.

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to

establish the existence of material issues of fact which require a trial of the action.” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 558-559, 610 N.Y.S.2d 50 [2d Dept 1994].

Labor Law 240(1)

Labor Law 240 (1) is designed to protect workers on construction sites from elevation-related risks. Section 240(1) of the Labor Law States as follows:

“All contractors and owners and their agents ... 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.”

Labor Law 240(1) provides exceptional protection for workers against the special hazards that arise when the work site itself is either elevated or positioned below the level where materials are being hoisted.” *Walker v. City of New York*, 72 AD3d 936, 937, 899 N.Y.S.2d 322, 323 [2d Dept 2010]. In order 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” *Delahaye v Saint Anns School*, 40 AD3d 679, 682 [2007]; *see Berg v Albany Ladder Co., Inc.*, 10 NY3d 902, 904 [2008]; *Robinson v East Med. Ctr., L.P.*, 6 NY3d 550 [2006]. “Liability may, therefore, be imposed under the statute only where 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.’” *Nicometi v. Vineyards of Fredonia, LLC*, 25 N.Y.3d 90, 97, 30 N.E.3d 154, 158 [2015].

Turning to the merits of the Plaintiff's application, the Court finds that the Plaintiff has failed to meet his *prima facie* burden. In support of his application, the Plaintiff relies on the deposition of the Plaintiff and the deposition of Greg Altshuler, a purported principal of the Defendant at the time of the alleged incident. During his deposition, the Plaintiff was asked if he used both hands to apply the caulk with the caulking gun while standing on the ladder and he stated "[y]es." He then stated that at the time of the accident "I was putting the caulking, the ladder shook, I lost balance, and that's how I fell." (See Plaintiff's Motion, Exhibit "G", Pages 60-61). The Plaintiff contends that he does not need to show the precise manner in which the accident occurred and instead can merely show that the ladder collapsed or otherwise failed to provide sufficient security to him. However, a fall from a ladder alone is not sufficient to find a violation of Labor Law 240(1). See *Blake v. Neighborhood Hous. Servs. of New York City, Inc.*, 1 N.Y.3d 280, 291, 803 N.E.2d 757, 764 [2003].

The authority cited by the Plaintiff to support the sufficiency of his argument is inapposite. See *Ramirez v. I.G.C. Wall Sys., Inc.*, 140 AD3d 1047, 1049, 35 N.Y.S.3d 159 [2d Dept 2016] (make shift ladder); *Raynor v. Quality Plaza Realty, LLC*, 84 AD3d 774, 775, 922 N.Y.S.2d 791 [2d Dept 2011] (extension ladder); *Melchor v. Singh*, 90 AD3d 866, 867, 935 N.Y.S.2d 106 [2d Dept 2011] (extension ladder); *Monioudis v. City of New York*, 82 AD3d 945, 945, 918 N.Y.S.2d 580, 581 [2d Dept 2011] (ladder collapsed); *Montalvo v. J. Petrocelli Const., Inc.*, 8 AD3d 173, 780 N.Y.S.2d 558 [1st Dept 2004] (metal object struck Plaintiff). In the instant matter, the Plaintiff claims that the A-frame ladder shook, and he fell. This is insufficient to establish, *prima facie*, that the ladder was an inadequate safety device. *Joseph v. 210 W. 18th, LLC*, 189 AD3d 1384, 1385, 134 N.Y.S.3d 775 [2d Dept 2020].

As stated, the Plaintiff's own statements demonstrated that triable issues of fact remain as to whether the alleged failure to provide the plaintiff with appropriate protection proximately caused his injuries. *Yao Zong Wu v. Zhen Jia Yang*, 161 AD3d 813, 814-15, 75 N.Y.S.3d 254, 256 [2d Dept 2018],

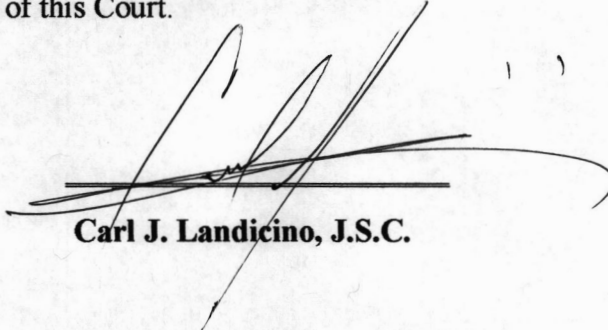
Delahaye v. Saint Anns Sch., 40 AD3d 679, 682, 836 N.Y.S.2d 233, 237 [2d Dept 2007]. During the Plaintiff's deposition, he stated that "I placed it and I made sure I secured it and I opened it well." (See Plaintiff's Motion, Exhibit 5, Page 51). When asked if he noticed any issues with the ladder he answered "[n]o." (See Plaintiff's Motion, Exhibit 5, Page 52). The Plaintiff also stated that "[e]very time I would go up, I would have to make sure that the ladder was good." (See Plaintiff's Motion, Exhibit 5, Page 54). Accordingly, the Plaintiff's motion is denied.

Based upon the foregoing, it is hereby ORDERED as follows:

Plaintiff's motion for summary judgment (motion sequence #2) is denied.

This constitutes the Decision and Order of this Court.

ENTER:



Carl J. Landicino, J.S.C.

2021 MAY 10 AM 10:21
 KINGS COUNTY CLERK
 FILED