

**Acosta v 74 Eldert Realty LLC**

2021 NY Slip Op 33884(U)

July 13, 2021

Supreme Court, Kings County

Docket Number: Index No. 520803/2018

Judge: Ingrid Joseph

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At an IAS Term, Part 83 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 13th day July, 2021.

**PRESENT:**

**HON. INGRID JOSEPH**

Justice.

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RAFAEL ACOSTA,

Plaintiff,

- against -

Index No. 520803/2018

74 ELDERT REALTY LLC and LIBERTY ONE CONSTRUCTION LLC,

Defendants.

-----X

LIBERTY ONE CONSTRUCTION LLC,

Third-Party Plaintiff,

- against -

S.B.S. TILES, INC.,

Third-Party Defendants.

-----X

The following e-filed papers considered herein:

E-Filed Papers Numbered

Notices of Motion/Affidavits/Exhibits Annexed .....	<u>132 - 141</u>
Opposition .....	<u>150-154; 155, 156</u>
Reply.....	<u>157</u>

In this labor law matter, plaintiff, Rafael Acosta (“plaintiff”), moves by Notice of Motion (Motion Sequence 5) for summary judgment on the issue of liability against defendant-owner, 74 Eldert Realty LLC, and defendant-general contractor, Liberty One Construction LLC.

This matter arises from an accident that occurred on September 12, 2018, when plaintiff was applying compound and taping drywall in a building with 11-foot high ceilings, located at 74 Eldert Lane, Brooklyn, New York. Plaintiff claims to have been standing on old, 5-foot high stilts, when he was caused to fall due to the breaking apart of the buckle mechanism that held

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plaintiff's left foot and leg in place on one of the stilts. Plaintiff claims that the taping and compound task, on stilts, exposed him to an elevation-related risk for which the defendants failed to provide adequate safety devices in violation of Section 240 (1) of the Labor Law. Additionally, plaintiff claims that the floor on which he was working was damp, covered with dirt, sheetrock, plaster, and pieces of metal, which violates Labor Law § 241 (6), Industrial Code Sections 23-1.7 (d) (slipping hazards), 23-1.7(e) (2) (tripping and other hazards), 23-5.22 (d) (stilt construction), 23-5.22 (e) (stilt elevation), 23-5.22 (f) (protection from hazards).

It is well settled that “the 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]).

Labor Law § 240 (1) imposes absolute liability on owners and contractors or their agents when their failure to protect workers employed on a construction site from the risks associated with falling objects proximately causes injury to a worker (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). For a defendant to be held liable under Labor Law § 240 (1), a plaintiff's injuries must be “the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *Wilinski*, 18 NY3d at 10). In cases where the issue involves a fall from stilts, the Court of Appeals has held that stilts do not implicate Labor Law § 240(1) when the plaintiff's alleged injuries are not caused by the failure of the stilts but rather, by a separate and unrelated hazard such as an ordinary tripping or slipping hazard (*See Melber v 6333 Main Street, Inc.*, 91 NY2d 759 [1998]).

In this case, it is undisputed that the plaintiff was working on stilts when he fell. In fact,

plaintiff provided testimonial evidence that his supervisor, Javier Ventimilla, informed plaintiff, the day prior to the incident, that he would be working a “high job” (Plaintiff’s Exhibit 1, pp. 22, 23, 25). However, plaintiff has provided differing narratives as to what actually occurred when he fell. Plaintiff has stated, *inter alia*, that he lost his balance; that he was moving toward the front section of the wall to apply compound when he *heard* the stilt beneath his left foot crack; and also, that he did not feel the strap loosen before he fell. Another version proffered by plaintiff is that the metal buckle for the strap that secured his foot to the stilt had broken, while the rest of the stilt remained secured to his left leg. These differences are substantial enough that the court finds plaintiff has failed to make a prima facie showing of an absence of material issues of fact on his Labor Law 240 (1) claim.

Regarding the Labor Law § 241 (6) cause of action, an owner, general contractor, or their agent, may be held vicariously liable for injuries to a plaintiff where the plaintiff establishes that the accident was proximately caused by a violation of an Industrial Code section stating a specific positive command that is applicable to the facts of the case (*Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 349-350 [1998]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821 [2d Dept 2017]).

Here, plaintiff asserts that the defendants failed to comply with Industrial Code Sections 1.7(d), 1.7(e)(2), 5.22(d), 5.22(e), and 5.22(f). However, the plaintiff provided no affidavit from an expert in the field, nor did plaintiff demonstrate how each alleged code violation was the proximate cause of his fall. Regarding Sections 1.7 (d) and (e)(2), the court finds that there exists issues of fact as to whether the debris on the floor was of the statutorily prohibited variety, or a build up of substances that naturally resulted during the course of plaintiff’s task of applying compound and tape to the wall. Further, though the plaintiff has consistently indicated that he was made to use his own stilts, which were old, it is unclear whether the buckle holding plaintiff’s left foot broke because the stilt was worn, or if the buckle broke as a consequence of the stilt slipping due to the condition of the floor on which plaintiff was walking. Moreover, plaintiff’s differing attestations regarding the height of his stilts and the conditions under which he was required to use the stilts also creates issues of fact. Thus, the court finds that he plaintiff has failed to establish prima facie entitlement to summary judgment as a matter of law on his

claims arising under Industrial Code Sections 5.22 (d), (e) and (f).

Accordingly, plaintiff's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

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HON. INGRID JOSEPH, J. S. C.

■ Hon. Ingrid Joseph  
Supreme Court Justice

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