

**Vargas v AP-Tech Contr. Corp.**

2021 NY Slip Op 34163(U)

September 9, 2021

Supreme Court, Queens County

Docket Number: Index No. 707360/18

Judge: Darrell L. Gavrin

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.

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DARRELL L. GAVRIN  
Justice

IA PART 27

MIGUEL VARGAS,

Index No. 707360/18

Plaintiff,

Motion

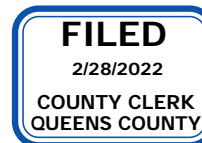
Date

February 23, 2021

- against-

Motion

Cal. No.



AP-TECH CONTRACTING CORP., EL-KAM  
REALTY CO., ELY SAMUELS, and S C  
MANAGEMENT CORP.,

Motion

Seq. No. 2

Defendants.

The following papers read on this motion by plaintiff for an order granting summary judgment on the issue of liability against defendants, pursuant to CPLR 3212 with respect to plaintiff's claims, pursuant to Labor Law § 240 (1) and § 241 (6).

	<u>Papers Numbered</u>
Notices of Motion - Affirmation - Exhibits .....	1
Affirmation in Opposition by Def. Ap-Tech Contracting Corp. - Exhibits .....	2
Reply Affirmation .....	3

Upon the foregoing papers it is ordered that the motion is determined as follows:

Pursuant to the decision dated February 23, 2021, the marking of the instant motion as "adjourned" from November 12, 2019 to March 17, 2020, was inadvertently not entered in the computer by the Part Clerk and as a result, the motion was not marked "fully submitted" until February 23, 2021. The cross motion by defendants, EL-KAM Realty Co., Ely Samuel and SC Management Corp., filed on February 16, 2021, and all papers filed thereafter, will not be considered herein as they were untimely filed.

This is an action for personal injuries allegedly sustained by plaintiff in a construction site accident that occurred on or about May 3, 2018, when he fell from an elevated scaffold while performing construction work at premises located at 517 East 75<sup>th</sup> Street ("premises"), County, City and State of New York. Plaintiff moves for summary judgment on the issue of

liability, pursuant to Labor Law § 240 (1) and § 241 (6) against defendants.<sup>1</sup> Defendant, Ap-Tech Contracting Corp. (“Ap-Tech”) opposes.

Defendant, El-Kam Realty Co. owned the premises, which was operated by defendants, Ely Samuels and SC Management Corp. Defendant, Ap-Tech was retained as a general contractor for the construction project at the premises, pursuant to an agreement dated June 30, 2016. Defendant, Ap-Tech hired plaintiff’s employer, J&G Construction Services Inc. via subcontract executed on April 22, 2018.

Labor Law § 240 (1) protects a worker from “specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured,” and, to be applicable, the harm must flow “directly ... from the application of the force of gravity to an object or person” (*Ross v Curtis Palmer Hydro-Electric Company*, 81 NY2d 494 [1993]). Such statute should be construed as liberally as possible for the accomplishment of the purpose of imposing absolute liability for a breach which proximately causes an injury (*see Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90 [2015]; *Fabrizi v 1095 Ave. of the Ams., LLC*, 22 NY3d 658 [2014]), and the duty imposed upon owners, contractors and their agents is non-delegable, rendering them liable regardless of whether they supervise or control the work, for failure to provide proper protection from elevation-related hazards (*see Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426 [2015]; *McCarthy v Turner Constr., Inc.*, 17 NY3d 369 [2011]).

Liability is imposed where there exists a hazard contemplated under the statute; a failure to utilize a safety device, or the use of an inadequate, safety device enumerated therein; and “plaintiff’s injuries were 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 [2009]; *see Wilinski v 334 East 92<sup>nd</sup> Housing Development Fund Corp.*, 18 NY3d 1 [2011]; *Kandatyán v 400 Fifth Realty, LLC*, 155 AD3d 848 [2d Dept 2017]).

A *prima facie* case under Labor Law § 240 (1) requires a showing that a defendant’s statutory violation was a proximate cause of the plaintiff’s injury (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 [2003]; *Gordon v Eastern Ry. Supply*, 82 NY2d 555 [1993]). “Once the plaintiff makes a *prima facie* showing, the burden then shifts to the defendant, who may defeat plaintiff’s motion for summary judgment only if there is a plausible view of the evidence—enough to raise a fact question—that there was no statutory violation and that plaintiff’s own acts or omissions were the sole cause of the accident” (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d at 289 n. 8).

---

<sup>1</sup> To the extent that plaintiff also seeks summary judgment, pursuant to Labor Law § 200, plaintiff’s bare and conclusory statement does not entitle plaintiff to summary judgment as to section 200.

In the case at bar, plaintiff has established his *prima facie* entitlement to judgment as a matter of law on the Labor Law § 240 (1) claim against defendants (*see People v Ultimate Homes, Inc.*, 166 AD3d 667 [2d Dept 2018]; *Brandl v Ram Builders, Inc.*, 7 AD3d 655 [2d Dept 2004]). Plaintiff testified at his deposition that on the date of the accident, his job involved erecting scaffolding together with three of his colleagues; that plaintiff was ordered by a foreman to climb up a scaffold and perform work while standing on top of a platform, elevated ten feet above the sidewalk; and that plaintiff's job was to stand on top of the scaffold platform and receive materials and supplies, including pipes, plants and eight-foot long beams. Plaintiff further testified that he had been working on top of the platform for approximately two hours when the platform "opened," collapsing under him and causing him to fall ten feet below to the ground. Moreover, plaintiff testified that the platform was not placed well, was not secure and moved when plaintiff was on it; that there were no safety gears provided or being used; and that earlier that day, plaintiff complained about his safety to the foreman, but was told the scaffold could not be safely secured until the end, when the job was finished.

In opposition, defendant, Ap-Tech failed to raise a triable issue of fact. Contrary to defendant, Ap-Tech's contention, the injured plaintiff's conduct cannot be deemed the sole proximate cause of the accident where, as here, a violation of Labor Law § 240 (1) is a proximate cause of it (*see Blake*, 1 NY3d at 290-92; *Brandl*, 7 AD3d at 656). Furthermore, defendant, Ap-Tech averred that summary judgment is premature on the ground that depositions of defendants and that of potential witnesses are outstanding, however, "failed to demonstrate how further discovery may reveal or lead to relevant evidence or that facts essential to oppose the motion were exclusively within the knowledge or control of [] plaintiff[]" (*Robinson v Bond St. Levy, LLC*, 115 AD3d 928 [2d Dept 2014]); *Yiming Zhou v 828 Hamilton, Inc.*, 173 AD3d 943 [2d Dept 2019]).

Accordingly, that branch of plaintiff's motion seeking summary judgment on Labor Law § 240 (1), is granted as against defendant, Ap-Tech and is granted, without opposition as against defendants, El-Kam Realty Co., Ely Samuels and SC Management Corp.

"Labor Law § 241 (6) imposes a non[-]delegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers" (*Aragona v State*, 147 AD3d 808 [2d Dept 2017]). "To establish liability under Labor Law § 241 (6), a plaintiff or a claimant must demonstrate that his [or her] injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case" (*Id.* at 809; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 501-02).

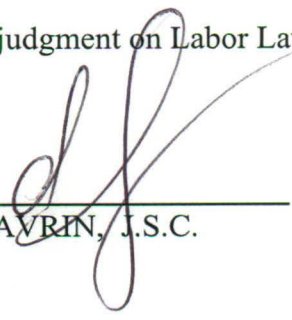
In the case at bar, plaintiff has alleged violations of various sections of the Industrial Code in his bill of particulars and instant motion, including 12 NYCRR 23-1.16 (b) [safety belts and harnesses], 23-1.7 (b)(1) [hazardous openings], 23-5.1 (b) [scaffold footing or anchorage], 23-5.1 (h) [scaffold erection and removal], and 23-5.1 (j) [safety railings]. In his motion, plaintiff also alleges violations of 12 NYCRR 23-1.18 [sidewalk sheds and barricades] and 23-1.7 (f) [vertical passage], however, as plaintiff did not plead violations of these sections in his

bill of particulars, they cannot be considered herein.

The court finds that 12 NYCRR § 23-1.16, which set a standard for safety belts, is not applicable in this action where plaintiff testified that he was not provided with any such devices (see *Rau v Bages N Brunch, Inc.*, 57 AD3d 866 [2d Dept 2008]). The court further finds that while plaintiff has demonstrated that a sustainable Labor Law § 241 (6) claim exists, issues of fact preclude summary judgment with respect to the alleged violations. A violation of a provision of the Industrial Code is merely “some evidence of negligence,” and it is left for the trier of fact to determine the proximate cause of plaintiff’s injury (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]; see *Seaman v Bellmore Fire Dist.*, 59 AD3d 515 [2009]).

Accordingly, that branch of plaintiff’s motion seeking summary judgment on Labor Law § 241 (6), is denied.

Dated: September 9, 2021

  
\_\_\_\_\_  
DARRELL L. GAVRIN, J.S.C.

