

Garcia v 122-130 E. 23rd St. LLC
2022 NY Slip Op 30533(U)
February 18, 2022
Supreme Court, New York County
Docket Number: 153179/2019
Judge: Lori S. Sattler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

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JOSE GARCIA,

Plaintiff,

- v -

122-130 EAST 23RD STREET LLC,CM AND
ASSOCIATES CONSTRUCTION MANAGEMENT
LIMITED LIABILITY COMPANY,

Defendant.

INDEX NO. 153179/2019

MOTION DATE 12/03/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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122-130 EAST 23RD STREET LLC, CM AND ASSOCIATES
CONSTRUCTION MANAGEMENT LIMITED LIABILITY
COMPANY

Plaintiff,

-against-

TRIBESMEN GROUP, INC.

Defendant.

Third-Party
Index No. 595901/2019

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HON. LORI SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47 were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

In this personal injury action to recover damages due to a fall from a scaffold at a construction site, Plaintiff moves for an order granting summary judgment pursuant to CPLR 3212 on his Labor Law § 240(1) cause of action. Defendants/Third-Party Plaintiffs 122-130 East 23rd Street LLC and CM and Associates Construction Management Limited Liability Company (“Defendants”) oppose the motion.

It is undisputed that the accident occurred on March 14, 2019 at the premises known as 121 East 22nd Street (“Premises”). At the time of the accident, the premises were owned by 122-140 East 23rd Street LLC and there was a construction project of a new residential building underway. Defendant CM and Associates Construction Management Limited Liability Company was the general contractor and Third-Party Defendant Tribesmen Group Inc. was a subcontractor on the project, there to perform sheetrock and taping work. That company subcontracted work to Plaintiff’s employer, CIS Enterprises.

Plaintiff contends that he was brought in to perform taping work around lights on the garage ceiling at the Premises. He claims that a foreman named Julian Sabato (“Sabato”) told him he would need a scaffold to work, and he was sent along with his partner to another job site to obtain one. After returning to the Premises, he and his partner realized that the scaffolding bases were not compatible. Plaintiff states that he told Sabato about the incompatibility, including that the two bases used different screws and that they would not work, but was told “that’s what we have to work with.” He claims they assembled the scaffold and it then collapsed, causing him to fall. Plaintiff was not provided any other safety equipment to help prevent or brace his fall when the scaffold collapsed.

Defendants oppose the motion by submitting affidavits from various individuals all claiming they were told by Sabato that he instructed Plaintiff to wait until the proper parts were obtained and that Plaintiff put the scaffold together anyway. Defendants annex an unsigned affidavit from Sabato which states that he told Plaintiff to wait before constructing the scaffold. Counsel states that he spoke with Sabato about the contents of the affidavit but thereafter Sabato could not be located. Defendants assert that there is a question of fact as to whether Plaintiff’s

unilateral action was the proximate cause of the accident. They contend there can be no liability under Labor Law § 240(1) as a matter of law under these circumstances.

In a motion seeking summary judgment, the proponent “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Stillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad*, 64 NY2d, at 853).


Plaintiff’s motion for summary judgment on the cause of action under Labor Law § 240(1) is denied. Plaintiff fails to demonstrate the absence of any material issues of fact on the issue of liability (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Although it is undisputed that Plaintiff fell from a scaffold, he indicates that he knew the scaffold bases were not compatible and that they required different screws. Despite that knowledge, he got on the scaffold and it collapsed.

It is well established that where “plaintiff’s actions [are] the sole proximate cause of his injuries . . . liability under Labor Law § 240(1) [does] not attach” (*Weininger v Hagedorn & Co.*, 91 NY2d 958, 960 [1998]). Plaintiff implies that he was not the sole proximate cause of the accident because Sabato told him that he had to work with the scaffold pieces that he had brought from the other construction site. Like Defendants, he produces no affidavit from Sabato and his claim that he was instructed to put the scaffold together and use it are not supported by competent evidence to eliminate issues of fact regarding the circumstances of the construction of the scaffold. Considering Plaintiff’s failure to make a prima facie showing of entitlement to

judgment, the motion must be denied, and the Court will not address Defendants' similar failure to provide sufficient evidence to support their claim that Plaintiff disregarded a directive to wait until he received replacement parts.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the court.

<u>2/18/2022</u> DATE					 <hr/> LORI SATTLER, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input checked="" type="checkbox"/>
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/>	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/>	REFERENCE