

<b>Rapisarda v Laboratory Inst. of Merchandising, Inc.</b>
2022 NY Slip Op 31052(U)
April 26, 2022
Supreme Court, New York County
Docket Number: Index No. 150180/2020
Judge: Sabrina Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

*Justice*

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SALVATORE RAPISARDA

Plaintiff,

- v -

THE LABORATORY INSTITUTE OF MERCHANDISING,  
INC.,

Defendant.

-----X

INDEX NO. 150180/2020

MOTION DATE 4/26/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for SUMMARY JUDGMENT.

**BACKGROUND**

This is a negligence action to recover damages for alleged serious injuries sustained by plaintiff Salvatore Rapisarda as a result of a construction related accident that occurred on January 17, 2019 at The Laboratory Institute of Merchandising, Inc.

**ALLEGED FACTS**

On January 17, 2019 at approximately 11:30 a.m, plaintiff, working in the course of his employment with MJZ Services LLC d/b/a Maximum Welding, was painting a multi-story fire escape structure as part of a larger refurbishment project at The Laboratory Institute of Merchandising, Inc., a college located at 12 E. 53rd Street, New York, NY. The accident occurred while plaintiff was near the top of a 22' ladder, when the center articulating mechanism broke, causing the ladder to collapse and, causing plaintiff to fall to a platform below.

At the time of the accident, plaintiff was painting a portion of the fire escape structure as part of a larger refurbishment job that included significant cleaning, repair, refurbishing, welding, priming and painting. Plaintiff needed to paint a section of the fire escape that was approximately 12-17' above the platform below. To reach this height, plaintiff used a multi-position ladder. By making adjustments to the center articulating mechanism, a multi-position ladder, can be altered to be used as an inverted V-shaped stepladder, a 90-degree leaning ladder, on staircases, or other uneven surfaces, as a straight ladder or other configurations. To reach the work height, plaintiff was using the multi-position ladder in its straight ladder configuration, which was the only way the ladder would be long enough to reach his work area. While standing on the ladder, painting the underside of a platform above, plaintiff heard a loud crack as the center articulating mechanism of the multi-position ladder broke, causing the ladder to come apart at its center, causing plaintiff to fall approximately 6-8 feet to the platform below his elevated working height. As plaintiff fell, he struck many body parts, including his head, which caused him to lose consciousness. When he awoke, he saw that the ladder was in two pieces.

Plaintiff alleges serious injuries as a result of the accident.

### **PENDING MOTION**

On August 27, 2021, plaintiff moved for an order pursuant to CPLR §3212 granting partial summary judgment to the plaintiff on the issue of liability under Labor Law §240(1). On April 26, 2022, the court heard oral argument and reserved decision. For the reasons stated below, the motion is granted.

### **DISCUSSION**

Summary judgment must be granted where a party has tendered evidentiary proof in admissible form demonstrating the absence of any material issues of fact. *See Alvarez v.*

*Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). As stated by the Court of Appeals, "...when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated." *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 (1974). It is well established that to defeat a motion for summary judgment, a triable issue of fact must be shown to be "real, not feigned, since a sham or frivolous issue will not preclude summary relief." *Fender v. Prescott*, 101 A.D.2d 418, 425 (1st Dept. 1984), *aff'd*, 64 N.Y.2d 1077 (1985); *see also Towners Org. v. Glockhurst Corp.*, 160 A.D.2d 597 (1st Dept. 1990) ("[M]ere surmise, suspicion and accusation are insufficient to defeat summary judgment"). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions, are insufficient to successfully oppose a motion for summary judgment. *See Gilbert Frank Corporation v. Federal Insurance Company*, 70 N.Y.2d 966 (1988); *Cabrera v. Rodriguez*, 71 A.D.3d 553 (1st Dept. 2010). Where there is no legal merit to a cause of action, or where a question of fact is not raised, summary judgment should be granted. *See Land.Com, Inc. v. Kleiner*, 29 A.D.3d 744 (2d Dept. 2006) (*citing Fresh Meadow Country Club, Inc. v. Village of Lake Success*, 158 A.D.2d 581 (2d Dept. 1990)).

***Plaintiff Established A Prima Facie Case for Liability Pursuant To Labor Law §240(1)***

Section 240(1) of the Labor Law of the State of New York, commonly referred to as the "scaffold law" sets forth in pertinent part that:

All contractors and owners ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or a 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 are so constructed, placed and operated as to give proper protection to a person so employed.

The statute imposes absolute liability upon both owners and contractors where a breach of this statutory duty proximately causes an injury. *Rocovich v. Consolidated Edison Company*, 78 N.Y.2d 509, 513; *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 500; *Gordon v. Eastern Railway Supply. Inc.*, 82 N.Y.2d 555.

As the Court of Appeals stated, in *Ross v. Curtis-Palmer*, supra, at p. 501, "...labor Law Section 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person." Judge Titone reiterated, therein, the Court's prior opinion that § 240(1) "...evinces a clear legislative intent to provide 'exceptional protection' for workers against 'special hazards' that arise when the worksite ...is ...elevated" (citing *Rocovich*, 78 N.Y.2d 509, 514). Indeed, as stated by the Court of Appeals in its decision in *Rocovich*, at 514, "[t]he contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." The statute applies to the within action.

The work plaintiff was performing at the time of the accident came within the ambit of Labor Law §240(1). *Perry v. National Structures, Inc.*, 192 A.D.2d 1136 (4th Dept, 1993); *Montalvo v. J. Petrocelli Construction, Inc.*, 8 A.D.3d 173(1st Dept., 2004); *Orellano v. 29 East 37th Street Realty Corp.*, 292 A.D.2d 289 (1st Dept., 2002).

At the time of his accident, plaintiff was not provided that would allow him to safely work at a height. The Courts have long recognized that sound ladders and other safety devices do not simply break apart. *Stewart v. Ferguson*, 164 NY 553 [1900]. Failure to provide proper

safety devices at a worksite establishes an owner's and contractor's liability under Labor Law § 240(1), as a matter of law. *Zimmer v. Chemung*, 65 N.Y.2d 513 (1985), *reargument denied* 65 N.Y.2d 1054. Here, given the fact that the ladder upon which plaintiff was working broke in two, there was clearly an absence of proper safety devices sufficient to prevent, or break plaintiff's fall, which establishes a violation of the statute. A defective, breaking or collapsing safety device is by itself sufficient to establish a *prima facie* case of a Labor Law Section 240(1) violation. *Braun v. Dormitory Authority of State of N.Y.*, 118 A.D.2d 614 (2d Dept, 1986).

The "core objective" of Labor Law § 240(1) is to protect workers who are exposed to elevation-related risks and prevent them from falling. When that core objective has not been met, the statute has been violated. *Gordon v. Eastern Railway Supply, Inc.*, 82 N.Y.2d 555, 559; *Torino v. KLM Construction, Inc.*, 257 A.D.2d 541 (1st Dept, 1999); *Garcia v. 1122 East 180th Street Corp.*, 250 A.D.2d 550 (1st Dept., 1998).

In opposition defendant argues only that plaintiff's motion is premature because defendant has been deprived of deposing plaintiff to establish facts that plaintiff was a recalcitrant worker and/or the sole proximate cause of his accident.

However, it is well settled that opposition to summary judgment on claims of prematurity cannot be based upon mere speculation or conjecture. It cannot merely be a recitation of defenses that might be available in any case. Nor can it be a wish list of facts that the opposing party hopes, prays, and crosses fingers for. Rather, a party opposing summary judgment must "...identify what information is in the exclusive control of plaintiff that would raise a material issue of fact such that CPLR §3212(f) would warrant denial of the motion." *Erkan v McDonald's Corp.*, 146 AD3d 466, 467 (1st Dept 2017). *See also Singh v New York City Hous. Auth.*, 177

AD3d 475, 476 (1st Dept 2019); *DaSilva v. Haks Engrs., Architects & Land Surveyors, P.C.*, 125 A.D.3d 480(1st Dept. 2015).

The First Department, citing the Court of Appeals has held, that summary judgment is not to be denied on prematurity grounds when “Defendant has failed to present any ‘evidentiary basis [for its] suggest[ion] that discovery may lead to relevant evidence’.” *Progressive Northeastern Ins. Co. v Penn-Star Ins. Co.*, 89 AD3d 547, 548 [1st Dept 2011], citing *Bailey v. New York City Tr. Auth.*, 270 A.D.2d 156, 157 (2000).

Here all defendant has done is point to theories that are available in any Labor Law case.

Based on the foregoing, the motion is granted.

### **CONCLUSION**

WHEREFORE it is hereby:

ORDERED that plaintiff’s motion for an order pursuant to CPLR §3212 granting partial summary judgment on the issue of liability under Labor Law 240(1) is granted; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that the parties appear for a virtual Preliminary Conference on June 8<sup>th</sup>, 2022 at 12 pm; and it is further

ORDERED that this constitutes the decision and order of this court.

<u>4/26/2022</u>				<u>SABRINA KRAUS, J.S.C.</u>		
<b>DATE</b>						
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<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