

Lindsay v CG Maiden Member LLC
2022 NY Slip Op 32348(U)
July 15, 2022
Supreme Court, New York County
Docket Number: Index No. 159454/2017
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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INDEX NO. 159454/2017

NATHANIEL LINDSAY,

MOTION DATE 04/22/2022

Plaintiff,

MOTION SEQ. NO. 003

- v -

CG MAIDEN MEMBER LLC, THE CHETRIT GROUP LLC,
FIVE STAR CARTING, LLC, FIVE STAR CARTING NY,
LLC, FIVE STAR CARTING, INC., COD MECHANICAL
CORP., and PLBG, INC.,

DECISION + ORDER ON
MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 97, 98, 99, 100, 101,
102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 122, 123, 124, 125,
126, 127, 128, 129, 130, 131, 132, 133

were read on this motion to/for JUDGMENT - SUMMARY

In this action to recover damages for personal injuries arising from alleged common-law
negligence and violations of Labor Law §§ 200, 240(1), and 241(6), the plaintiff moves pursuant
to CPLR 3212 for summary judgment on the issue of liability on his causes of action alleging
violations of Labor Law §§ 240(1) and 200 and common-law negligence insofar as asserted
against the defendant Five Star Carting, LLC (Five Star). Five Star opposes the motion. The
motion is granted.

On April 4, 2015, the plaintiff was employed by Plaza Management as an assistant chief
engineer for a building located at 65 Broadway, New York, New York (the building). At the time,
Jack Kelly was the plaintiff's superior and the chief engineer for the building. In April 2015, Five
Star, the construction manager at the building, was undertaking demolition work on the 14th
floor of the building. The plaintiff claimed that, on April 4, 2015, he was working in the building
with Kelly when they were alerted to water leaking onto the 13th floor due to a severed water
pipe on the 14th floor, where Five Star was performing major demolition work. The plaintiff

claimed that, in response, he and Kelly acquired two A-frame ladders and attempted to fix the pipe that was located on the ceiling, approximately 12 feet above the floor. After working on the pipe for nearly 40 minutes, the plaintiff claimed that he and Kelly were able to slow the leak enough to enable them to install a plug to stop the water. The plaintiff claimed, however, that, while he held the pipe still with one hand and worked with his other hand to get the plug in, his foot began to slip off the fourth rung of the ladder, which was wet from the leaking water. After his foot slipped, the plaintiff claimed that the ladder moved and he attempted to brace himself by holding onto the plug with his wrench, whereupon he heard a "pop" in his right shoulder and could no longer hold himself up, causing him to fall on his back onto debris on the floor. The plaintiff claimed that he was not provided with any safety equipment to prevent his slip and fall from the ladder and that the ladder did not provide him with sufficient protection from the dangers inherent in working from a height.

Although Five Star does not deny that the plaintiff was working in the building while it was performing demolition work at the time of the alleged incident, it contests the date when the plaintiff claimed he was injured. Five Star thus disputes whether the incident occurred as the plaintiff described it, based solely on its contention that the plaintiff's contentions lack credibility.

On October 24, 2017, the plaintiff commenced this action against CG Maiden Member, LLC. The plaintiff first amended the summons and complaint on March 7, 2018, to add The Chetrit Group, LLC, as a defendant, and again on March 22, 2018, to add Five Star Carting, LLC, Five Star Carting NY, LLC, Five Star Carting, Inc., COD Mechanical Corp., and PLBG, Inc. as defendants. On October 16, 2020, CG Maiden Member was discontinued from the action. On December 3, 2020, COD Mechanical Corp. and PLBG, Inc. were discontinued from the action. On December 30, 2021, the plaintiff filed the Note of Issue and Certificate of Readiness. On February 25, 2022, the plaintiff timely made the instant motion.

In his complaint, the plaintiff alleged that Five Star was the construction manager for the building at the time of his accident. The plaintiff also alleged that his injuries were caused by

Five Star's violation of applicable statutes and laws, including sections 200, 240(1), and 241(6) of the Labor Law. The plaintiff further alleged that Five Star was negligent in knowingly allowing a dangerous, trap-like condition to be present at the building, and failing to take suitable precautions against the dangerous condition. Finally, the plaintiff alleged that Five Star was negligent in the hiring and supervision of its employees and those responsible for the maintenance and upkeep of the construction occurring in the building at the time of his accident. In his bill of particulars, the plaintiff alleged that Five Star was negligent in causing and allowing him to fall from an unsafe, unsecured, and unstable ladder. The plaintiff also alleged that Five Star failed to provide proper safety protection and protection from falls from a height, and permitted him to be on a ladder and perform construction work without a spotter. The plaintiff further alleged that Five Star permitted the ceiling on the 14th floor to leak and failed to repair to it. Finally, the plaintiff alleged that Five Star failed to conform to the requirements of the Labor Law by violating sections 200, 240, and 241 thereof.

In support of his motion, the plaintiff submitted the pleadings, copies of the various conference orders issued throughout discovery, and a copy of Five Star's proposal to perform demolition work on the 14th floor of the building, along with invoices, credit memos, checks made out to Five Star, and a lien waiver by and between Plaza Management and Five Star. The plaintiff also submitted his own deposition transcript, the deposition transcripts of Kelly and Five Star's sales manager/estimator, Marc Valenti, the Note of Issue, and copies of the stipulations of discontinuance against CG Maiden Member, LLC, COD Mechanical Corp., and PLBG, Inc. In opposition, Five Star submitted medical records from Island Musculoskeletal Care, MD, P.C., the deposition transcript of Sandra Chimato, who managed the records for that medical practice, a Notice to Admit dated November 4, 2021, and the plaintiff's response to the Notice to Admit dated November 9, 2021, along with the deposition transcript of Plaza Management's property manager, Ezie Bryks, and e-mail communications from Bryks regarding the flooding of the 13th floor of the building that Five Star had caused during demolition. Five

Star also submitted the incident report completed by the plaintiff, the plaintiff's Worker's Compensation Board C-3 application form, Plaza Management's Worker's Compensation Board C-2 accident reporting form, and letters from the plaintiff's orthopedist dated January 29, 2016 and October 19, 2016.

It is well settled that the movant on a summary judgment motion "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. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (see CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (see *Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *id.*; *Medina v Fischer Mills Condo Assn.*, 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 403-404 [1st Dept 2017]; see *Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr.*, 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (see

Koulermos v A.O. Smith Water Prods., 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

Labor Law § 240(1) provides, in pertinent part, that

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

The statute “imposes absolute liability on building owners and contractors whose failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker” (*Laverty v 1790 Broadway Assoc., LLC*, 2017 NY Slip Op 32309[U], *4, 2017 NY Misc LEXIS 4148 [Sup Ct, NY County, Oct. 27, 2017], quoting *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011]). To establish liability, the plaintiff must prove a violation of the statute and that the violation was a proximate cause of his or her injuries (*see id.*). “The plaintiff need not demonstrate that the [safety device] was defective or failed to comply with applicable safety regulations, but only that it proved inadequate to shield [plaintiff] from harm directly flowing from the application of the force of gravity to an object or person” (*Soriano v St. Mary's Indian Orthodox Church of Rockland, Inc.*, 118 AD3d 524, 526 [1st Dept 2014] [internal quotation marks and citation omitted]).

The inexplicable shifting of a ladder establishes prima facie liability under Labor Law § 240 (*see Carchipulla v 6661 Broadway Partners, LLC*, 95 AD3d 573, 574 [1st Dept 2012]; *Harrison v V.R.H. Constr. Corp.*, 72 AD3d 547, 547 [1st Dept 2010]; *Hart v Turner Constr. Co.*, 30 AD3d 213, 214 [1st Dept 2006]). Failure to properly secure a ladder, so that it remains steady and erect while being used, is a violation of Labor Law § 240(1) (*see Hill v City of New York*, 140 AD3d 568, 569 [1st Dept 2016]; *see also Milligan v Tutor Perini Corp.*, 191 AD3d 437, 437-438 [1st Dept 2021] [finding liability under Labor Law § 240(1) where a wet and slippery ladder did not have additional safety devices to prevent plaintiff's fall]; *Montalvo v J.*

Petrocelli Constr., Inc., 8 AD3d 173 [1st Dept 2004] [holding that even though an object hit the ladder and caused it to shake, plaintiff was injured, at least in part, due to defendant's failure to secure the ladder with adequate safety devices]; *Morin v Machnick Bldrs., Inc.*, 4 AD3d 668, 670 [3d Dept 2004] [partial summary judgement awarded on the issue of liability where safety equipment supplied was inadequate in preventing ladder from slipping on sheet of ice]).

The plaintiff has established his prima facie entitlement to judgment as a matter of law on the issue of liability on his Labor Law § 240(1) cause of action. The plaintiff demonstrated that he was performing emergency repair work in the course of a demolition project on a wet, unsecured ladder, when he slipped on a wet rung and the ladder moved away from him. The plaintiff attempted to hold on to a nearby object, but ultimately fell to the ground below. The plaintiff also established that the ladder was not properly secured, as required by the Labor Law. The plaintiff demonstrated, through Kelly's deposition testimony, that the two of them were at the building on the day of the incident for reasons unrelated to the leak when they received a phone call from Five Star that repairs were needed on the 13th floor. Kelly testified that they could not get the valve to the pipe to shut completely and water kept coming out. He testified that, although he was not facing the plaintiff, he heard a pipe wrench hit the floor and when he turned around, he saw the plaintiff falling back. When asked whether the plaintiff was secured, Kelly testified that, "there's no way he could have been secured at it."

In opposition to the plaintiff's showing that he was not provided with proper protection at the time of the incident, Five Star failed to raise triable issues of fact. The crux of Five Star's opposition is that there are questions of credibility regarding material facts that require a trial. Five Star avers that there are inconsistencies regarding the date of the incident, some of the plaintiff's medical records do not expressly attribute his shoulder pain to a traumatic event, and the plaintiff's incident report and Worker's Compensation Board claim form do not mention a fall of any kind. Issues of credibility are not properly before the court on this motion, as it is not the court's function to assess credibility on a motion for summary judgment (*see Ferrante v Am.*

Lung Assn., 90 NY2d 623, 631 [1997]). The court may not weigh credibility of affiants unless it clearly appears that the issues are not genuine, but feigned (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). Moreover, a “shadowy semblance” of an issue is not enough to defeat a summary judgment motion (*S. J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974], quoting *Hanrog Distrib. Corp. v Hanioti*, 10 Misc 659, 660 [Sup Ct, N.Y. County 1945]). Five Star has not established that the issues of fact that it claims to have raised were raised in response to issues that the plaintiff had merely feigned.

In any event, the plaintiff has properly addressed the issues raised by Five Star. First, in plaintiff's response to Five Star's Notice to Admit, the plaintiff denied that he personally entered the accident date on the Workers' Compensation C-3 claim form, in which it was typewritten that the accident occurred on 4/1/2015. He asserted that, in fact, he had intended it to read as 4/4/2015. The plaintiff also denied that the handwritten portions of the form were completed at the time he signed it. In addition, in the Workers' Compensation C-2 form submitted by his employer, that employer identified the date of accident as April 4, 2015. Finally, in his response, the plaintiff explained that the date set forth on his incident report statement, annexed as Exhibit C to Five Star's Notice to Admit, was an error, and that he meant to write 4/4/2015 instead of 4/6/2018. Aside from this, multiple other documents submitted by Five Star, including medical records, and the incident and Worker's Compensation reports, identify the date of the incident or injury as April 4, 2015.

With regard to the plaintiff's medical records from Island Musculoskeletal Care MD, P.C., the court notes that the visit date indicated therein is September 18, 2015, months after the alleged date of the incident. Contrary to Five Star's contention that the records do not attribute his shoulder pain to a traumatic event, they in fact state “[t]his is an eval of a 44 year old right handed male status-post a *work related injury* on April 4, 2015” (emphasis added). While Five Star hones in on the part of the records that explains that the repetitive nature of the plaintiff's job caused the plaintiff to develop pain in his neck and right shoulder, elbow, and wrist, Five

Star does not proffer evidence or case law that negates the plaintiff's proof that he was injured after slipping on the rungs of the ladder, or that he indeed fell from the ladder. The nature and extent of the plaintiff's injuries are irrelevant in the context of this motion, which involves only the issue of Five Star's liability (*see Gramigna v Morse Diesel*, 210 AD2d 115, 116 [1st Dept 1994]; *Pandolfo v RCPI 600 Fifth Holdings, LLC*, 2017 NY Slip Op 30186[U], *16, 2017 NY Misc LEXIS 318 [Sup Ct, NY County, Jan. 27, 2017]).

Five Star contends that both an incident report prepared by the plaintiff and the Workers' Compensation C-3 claim form did not mention a fall of any kind. While those documents did not explicitly mention a fall per se, they nonetheless were consistent with the plaintiff's deposition testimony and the statement of facts submitted with the instant motion. The incident report mentioned that "there was a leak coming from a leaking valve that wasn't holding, I climbed a ladder with two wrenches and valve to stop leaking . . . my shoulder give way, a snap in my shoulder and I drop the two [wrenches]." Additionally, the Worker's Compensation form stated that the injury occurred when "using pipe wrenches on ladder." The alleged omissions and purported inconsistencies, even if they were not refuted by the plaintiff, are irrelevant to the dispositive issues of whether Five Star provided the plaintiff with proper protection under the Labor Law and whether he was injured as a consequence the dangers of gravity (*see Ortiz v Burke Ave. Realty, Inc.*, 126 AD3d 577, 578 [1st Dept 2015]). Five Star simply adduces no evidence, other than these alleged "omissions" from various documents, that the plaintiff did not slip on the wet rungs of a ladder, that the ladder did not itself slip, or that the plaintiff was not injured as a proximate result of such a slip and fall. Hence, it failed to raise a triable issue of fact in opposition to the plaintiff's showing.

In any event, it is irrelevant for purposes of liability under Labor Law § 240(1) whether the plaintiff fell to the ground after slipping on the rungs or was injured solely because he was compelled to grab onto a nearby object and hang by his arm from a height, as "Labor Law § 240(1) may apply where a plaintiff is injured as a result of his or her attempt to prevent a fall

from a ladder" (*Lopez-Dones v 601 W. Assoc., LLC*, 98 AD3d 476, 479 [2d Dept 2012]). In *Lopez-Dones*, the ladder in question did not fall to the floor, but, rather, came into contact with a nearby air conditioning duct, while the plaintiff, who lost her footing, immediately reacted to the impact by grabbing onto a metal rod extending from the ceiling. The plaintiff had to twist her body in order to reach the metal rod, and was able to hook her leg into the ladder, get the ladder back to its upright position, and regain her footing on the ladder. Since she was injured in the course of these maneuvers, Labor Law § 240(1) was applicable regardless of the fact that she did not fall, and summary judgment was awarded to the plaintiff on the issue of liability on her Labor Law § 240(1) cause of action (*see Lacey v Turner Constr. Co.*, 275 AD2d 734, 735 [2d Dept 2000] [Labor Law § 240(1) is applicable where ladder moved and lost contact with the wall, and, in saving himself from falling to the ground, plaintiff injured his back]; *see also Matthews v Bank of Am.*, 107 AD3d 495, 495 [1st Dept 2013] [plaintiff was not required to show that she fell completely off the ladder to the floor so long as the harm directly flowed from the application of the force of gravity to an object or person]).

In light of the foregoing, summary judgment on the issue of liability on the Labor Law § 240(1) cause of action thus must be awarded to the plaintiff.

Labor Law § 200 is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work (*see Hartshorne v Pengat Tech. Inspections, Inc.*, 112 AD3d 888, 889 [2d Dept 2013]); *see also Comes v NY State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Kennedy v McKay*, 86 AD2d 597 [2d Dept 1982]). There are two distinct standards applicable to section 200 cases, depending on the situation involved—where the accident is the result of the means and methods used by the general contractor to do its work, and where the accident is the result of a dangerous premises condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796 [2d Dept 2007]). Where, as here, the allegation is that a general contractor failed to provide adequate protection from the effects of gravity by providing a ladder that was inadequate to

provide such protection, the plaintiff is thus claiming an injury due to the means and methods of the ongoing construction, rather than an unsafe condition on the premises (see *Santos v Avalon Bay Communities, Inc.*, 2022 NY Slip Op 31141[U], *6, 2022 NY Misc LEXIS 1765, *7-8 [Sup Ct, N.Y. County, Apr. 6, 2022]). To find an owner, general contractor, or statutory agent liable under Labor Law § 200 for defects or dangers arising from the means, methods, or materials of the work, it must be shown that the owner, general contractor, or statutory agent had authority to supervise or control the injury-producing work (see *Comes v New York State Elec. & Gas Corp.*, 82 NY2d at 877). However, “general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed” (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; see *Bednarczyk v Vornado Realty Trust*, 63 AD3d 427 [1st Dept 2009]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378 [1st Dept 2007]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523 [2d Dept 2007]).

Here, the plaintiff has established, prima facie, that Five Star had actual supervisory control or input into how his work was performed by submitting his own deposition testimony, the testimony of Kelly, the demolition proposal, and invoice records. He established that Five Star notified Plaza Management that the water pipe had broken, and directed Plaza Management to undertake the repair. In opposition, Five Star failed to raise triable issues of fact. Five Star contended only that the email and deposition testimony of property manager Bryks constituted proof that the flooding incident in which the plaintiff was alleged to have been injured occurred on March 30, 2015, and not April 4, 2015. Bryks's testimony, however, does not support Five Star's suggestion that the accident may not have occurred at all, as he testified that Kelly had notified him of the plaintiff's accident, although he could not remember the precise date. In any event, Bryks testified that the email was not generated in the regular course of the business of Plaza Management, and that he sent the email personally to the contractor with whom he was meeting on the day after he transmitted the message. While his email

established that there was a flood on March 30, 2015, it does not disprove that there was also an additional serious leak, with concomitant flooding, on April 4, 2015, particularly because both Kelly and the plaintiff expressly testified at their depositions that flooding from leaking pipes, and their need to respond to them, occurred on more than one occasion. It also does not disprove that the accident did not occur as the plaintiff described it. As such, summary judgment must be awarded in favor of the plaintiff on his causes of action to recover for common-law negligence and violation of Labor Law § 200.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is granted, and he is awarded summary judgement on the issue of liability on the causes of action to recover for common-law negligence and for violation of Labor Law §§ 200 and 240(1) insofar as asserted against the defendant Five Star Carting, LLC.

This constitutes the Decision and Order of the court.

7/15/2022
DATE


JOHN J. KELLEY, J.S.C.

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"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	OTHER
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: