

<b>Bautista v Lendlease (US) Constr. LBM Inc.</b>
2022 NY Slip Op 33941(U)
November 22, 2022
Supreme Court, New York County
Docket Number: Index No. 156680/2019
Judge: Lynn R. Kotler
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

EDISSON FAJARDO BAUTISTA

INDEX NO. 156680/2019

- v -

MOT. DATE

LENDLEASE (US) CONSTRUCTION LBM INC. et al.

MOT. SEQ. NO. 002

The following papers were read on this motion to/for \_\_\_\_\_

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

ECFS DOC No(s). \_\_\_\_\_

Notice of Cross-Motion/Answering Affidavits — Exhibits

ECFS DOC No(s). \_\_\_\_\_

Replying Affidavits

ECFS DOC No(s). \_\_\_\_\_

This is an action to recover damages for personal injuries allegedly sustained by a union laborer on August 6, 2018, when, while working at a construction site located at the Jacob Javitz Center, 665 West 34<sup>th</sup> Street, New York, New York (the Premises), a concrete barrier fell onto his hand.

In motion sequence number 002, plaintiff Edison Fajardo Bautista (plaintiff) moves for summary judgement as to liability on his Labor Law § 240[1] claim as against defendants Lendlease (US) Construction LBM Inc. (Lendlease), Turner Construction Company (Turner), the City of New York (City), New York Convention Center Development Corporation (NYCCDC) and New York Convention Center Operating Corporation (NYCCOC). Defendants oppose the motion.

**Relevant Facts**

On the day of the accident, the Premises was owned by NYCCDC. NYCCDC, through various channels, hired Lendlease and Turner, in a joint venture (the Joint Venture), to act as the general contractor for a project at the Premises that entailed constructing portions of an expansion at the Premises (the Project). The Joint Venture, in turn, subcontracted temporary site fence modification work to non-party PJP Installers, Inc. (PJP). Plaintiff was an employee of PJP.

At his 50-H hearing, plaintiff testified that he was employed as a laborer for PJP on the Project at the Premises. PJP's work primarily included installing perimeter security (fencing and barricades), scaffolding and sidewalk bridges. Plaintiff's foreman was "Fernando" (plaintiff's 50-H, at 17) (later identified as Fernando Lua). Lua was the only person who supervised and directed plaintiff. Plaintiff testified that the accident occurred outside, in between two areas of excavation. In the morning that day, Lua instructed PJP workers to install concrete barriers around the Project's perimeter. To do so, Lua would use a forklift to lift and move the heavy concrete barricades into place.

Dated: 11/22/22

  
\_\_\_\_\_  
HON. LYNN R. KOTLER, J.S.C.

1. Check one:

CASE DISPOSED  NON-FINAL DISPOSITION

2. Check as appropriate: Motion is

GRANTED  DENIED  GRANTED IN PART  OTHER

3. Check if appropriate:

SETTLE ORDER  SUBMIT ORDER  DO NOT POST

FIDUCIARY APPOINTMENT  REFERENCE

On the day of the accident, Lua positioned the barrier onto the concrete floor. According to plaintiff the barrier was flush to the concrete. After the barrier was in place, one of Lua's superiors indicated that a 500-to-600-pound section of barrier needed to be moved approximately "30 inches" (*id.* at 27). According to plaintiff, Lua "was in a rush" and did not want to utilize the forklift to move a barrier such a short distance, so he directed plaintiff and two of his coworkers, "Sergio and Nacho," to "lift [the barrier] up and move it" (*id.* at 27). To do so, they used three-to-four-foot metal rods that they wedged "underneath the concrete barrier" (*id.* at 32) and used to leverage the barrier up. They would then move it, bit by bit, into place and lower it down.

Plaintiff testified that as the workers, utilizing the metal rods, lifted the barrier up, one of his coworkers slipped or tripped, which caused the barrier to crash down. The rod and the barricade caught and crushed plaintiff's index finger (*id.* at 61 ["the cement hit the metal rod and the metal rod hit [his] finger"]), severing a part of it.

According to plaintiff, Lua did not want to use the forklift because he wanted to move the barrier "like fast" and because the forklift's blades were not "thin enough to go underneath" the barrier (*id.* at 65). Specifically, Lua told plaintiff that "we were four and with the metal rods we could move it faster than with the forklift" (*id.* at 65).

Plaintiff's deposition testimony largely tracks with his 50-H testimony. He reiterated that Lua was his supervisor, and that Lua had access to, and used, the forklift. He also stated that Lua declined to use the forklift because moving the barrier by hand was "faster" (plaintiff's tr at 140). Plaintiff testified that the barrier was "sitting on these wooden blocks" which allowed the workers to slide two metal bars under the barrier (*id.* at 145-146), and each worker took one end on either side of the barrier, in order to lift it. Then "the person next to [plaintiff] tripped and let go of the metal and all the weight of the barrier came on top of [him]" (*id.* at 160). Plaintiff further testified that he was "not sure" whether the object that caught and crushed his finger was the metal rod or the barrier itself (*id.* at 162).

Mark Beatini testified that on the day of the accident, he was Lendlease's safety manager. Beatini's responsibilities included performing daily walkthroughs and safety monitoring. He also prepared inspection logs and daily reports. The Joint Venture was the general contractor for the Project, which entailed the construction of an addition to the Javitz Center. The Joint Venture coordinated the trades and had the authority to stop work if it was being done unsafely. It also hired all subcontractors, including PJP – plaintiff's employer. PJP was hired to install "sidewalk bridges, overhead protection" and the site fence (Beatini tr at 21). Beatini could not recall whether PJP installed its own fence or just manipulated preexisting fencing. He also did not know whether PJP had its own forklifts at the Project.

Beatini did not witness the accident. He testified that he believed that plaintiff's hand had been caught "underneath the barrier" itself (*id.* at 52). He did not know why the barrier was being moved. Beatini was shown a copy of a Joint Venture incident report, which noted that the accident occurred while PJP employees were "using pipes to lift the Jersey Barriers in an upwards motion" (*id.* at 60). Beatini testified that trying to lift a barrier with pipes "would not be proper" (*id.* at 60). Rather, a "forklift or some other type of machine or dolly" should have been used to lift the barrier (*id.* at 60). Failing to use such machinery was "very poor judgment" (*id.* at 61). Beatini did not know if a forklift or other similar machinery was available at the time of the accident.

Francisco Lua testified that on the day of the accident, he was PJP's supervisor at the Project. Lua was responsible for making sure PJP workers did their job and that "everything is secured" (Lua tr. at 8). PJP had a foreman on site, but it was a different person every day. He reported to PJP's foreman.

Lua testified that there were daily safety meetings, one of which involved safety when moving barriers and fences. He testified that "[t]hey told us to use a forklift that would have the capacity to pick up what we needed to pick up" (*id.* at 15).

He was present at the Premises on the day of the accident. Earlier in the day, the barriers had been moved into place by a forklift operated by an engineer belonging to a different trade. Lua directed the operator as to where to place the barriers (*id.* at 16). Lua never directly operated a forklift at the Project (*id.* at 38). The barrier was then placed on top of two four-by-four-foot pieces of wood to allow the forklift to deposit the barrier and leave the area. PJP then had to manipulate the barrier to remove the piece of wood from under the barrier.

Lua testified that he instructed plaintiff and his two coworkers, Sergio and Nacho “not to put their hands under any piece of steel pipe, concrete, anything that has a hole” (*id.* at 24) and to “take out the wood from the top part” (*id.* at 26). They would then “leverage” the barrier – lifting it slightly with metal bars – so that the wood could be removed (*id.* at 29). According to Lua, at the time of the accident, plaintiff’s coworkers were using the metal bars to lift the barrier while plaintiff was attempting to remove the wood from beneath the barrier.

Lua testified that he did not see the accident itself. He did not see anyone fall, nor did he see plaintiff place his hand underneath the barrier (*id.* at 34). Lua also testified as follows: “I didn’t see it[,] but I know pretty much how it happened. He did not grab the wood from the top part, he grabbed it from the bottom” (*id.* at 35). Lua testified that he explicitly warned the other PJP workers not to grab the wood from underneath.

Ignacio Ruiz testified that on the day of the accident, he was a laborer employed by PJP. He worked on the Project and witnessed the accident. At the time of the accident, Lua tasked Ruiz, plaintiff and one other worker, Sergio, to remove wood from under a barricade.

To remove wood from beneath a barrier, “you grabbed the piece of wood on the top and then two inches to the side” (Ruiz tr at 19). He further explained “you never put your hand under [the wood]” (*id.* at 19). At the time of the accident, Ruiz, Lua and Sergio were lifting the barrier while plaintiff was tasked with removing the wood (*id.* at 21). Plaintiff had “one or two fingers” under the wood when “for some reason [they] lost leverage on the barrier . . . and the barrier came down on the piece of wood and it caught [plaintiff’s] finger” (*id.* at 28). Ruiz further testified that “usually a forklift is used to remove the wood” (*id.* at 34).

## **DISCUSSION**

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court’s function on these motions is limited to “issue finding,” not “issue determination” (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Plaintiff moves for summary judgment in his favor as to liability on his Labor Law § 240 (1) claim against defendants. Labor Law § 240[1], also known as the Scaffold Law, provides, as relevant:

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.”

Labor Law § 240[1], which is known as the Scaffold Law, imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury (*Gordon v. Eastern Railway Supply, Inc.*, 82 NY2d 555 [1993]). The statute provides in pertinent part as follows:

All contractors and owners and their agents, ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a premises 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.

Labor Law § 240 protects workers from “extraordinary elevation risks” and not “the usual and ordinary dangers of a construction site” (*Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d 841 [1994]). “Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)” (*Narducci v. Manhasset Bay Associates*, 96 NY2d 259 [2001]).

Section 240[1] was designed to prevent 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 (*Runner v. New York Stock Exchange, Inc.*, 13 NY3d 5999 [2009] quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). The protective devices enumerated in Labor Law § 240 [1] must be used to prevent injuries from either “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” (*Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1991]).

Here, plaintiff has established that his finger was crushed when the 500-to-600-pound barrier fell while he and his coworkers were lifting it up with a metal rod. Accordingly, the barrier is a falling object. To prevail in a falling object case, a plaintiff must show the existence of a hazard contemplated under section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein. “Essentially, the plaintiff must demonstrate that at the time the object fell, it either was being ‘hoisted or secured,’ or ‘required securing for the purposes of the undertaking’” (*Fabrizi v 1095 Ave. of Americas, L.L.C.*, 22 NY3d 658, 662-63 [2014] [internal quotation marks and citation omitted]).

The record reflects that the barrier was being lifted at the time of the accident via a metal rod used as a lever by plaintiff and his coworkers in order to remove a piece of wood from underneath the barrier. The record also reflects that the proper way to lift such a barrier was to use machinery, such as a forklift, to hoist it up (Ruiz tr at 34 [“usually a forklift is used to remove the wood”]; Beatini tr at 60 [a “forklift or some other type of machine or dolly” should have been used to lift the barrier]). Here, the metal rods used as levers were insufficient to secure the barrier for the purposes of the undertaking – i.e. removing the wood from underneath the barrier. Accordingly, the barrier was insufficiently secured in violation of Labor Law § 240 (1).

In opposition, defendants argue that plaintiff was instructed to not place his hands underneath anything, and that his failure to heed this instruction made him a recalcitrant worker. The recalcitrant worker defense “requires a showing that the injured worker refused to use the safety devices that were provided by the owner or employer” (*Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 563 [1993]). Here, defendants identify no other safety device they provided; aside from the instruction to plaintiff to avoid placing his hands in a dangerous position – i.e. an instruction to avoid an unsafe practice. Importantly, “[a]n employer’s instructions ‘to avoid an unsafe practice is not sufficient to substitute for providing a worker with a safety device to allow him to complete his work safely’” (*Plaku v 1622 Van Buren LLC*, 198 AD3d 431, 432 [1st Dept. 2021], quoting *Vasquez v Cohen Bros. Realty Corp.*, 105 AD3d 595, 598 [1st Dept. 2013]).

As defendants have not identified a safety device provided by the owner or employer that plaintiff refused to use, defendants have not established that plaintiff was a recalcitrant worker. To that end, plaintiff's decision to place his hand in a precarious position goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 461 [1985]). Indeed, "[i]t is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]; see e.g., *Granieri v 500 Fifth Ave. Assoc.*, 223 AD2d 450, 451 [1st Dept 1996] [culpable conduct related to the improper placement of a ladder does not defeat a claim under section 240 (1)]).

To the extent that defendants argue that a one-to-four-inch drop is not a significant elevation differential as contemplated by the statute (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 605 [2009] [a hazard must arise from a "physically significant elevation differential"]), such argument is unavailing. A minor elevation differential "[cannot] be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating even over the course of a relatively short descent (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 10 [2011], quoting *Runner*, 13 NY3d at 605). Applying *Wilinski*, plaintiff's accident arose from a physically significant elevation differential, given the large and heavy nature of the barrier that struck plaintiff, even though it was only a few inches above ground.

As far as defendants argue that there were two versions of the accident – one where plaintiff was directed to move the barrier 30 inches, and one where he was directed merely to lift the barrier to remove wood from underneath – such argument does not raise a question of fact. "Where credible evidence reveals differing versions of the accident, one under which defendants would be liable and another under which they would not, questions of fact exist making summary judgment inappropriate" (*Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442 [1st Dept 2012]; see also *Santiago v Fred-Doug 117, L.L.C.*, 68 AD3d 555, 556 [1st Dept 2009]; *Bradley v IBEX Constr., LLC*, 54 AD3d 626, 627 [1st Dept 2008]). Here, under either version of the accident, defendants' failure to provide sufficient protection to prevent plaintiff from a gravity related risk was a proximate cause of his injuries. Thus, plaintiff is entitled to summary judgment in his favor as to liability on his Labor Law § 240 (1) claim.

The court has reviewed the parties' remaining contentions and finds them unavailing.

Accordingly, it is hereby **ORDERED** that plaintiffs Edisson Fajardo Bautista's motion, pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants Lendlease (US) Construction LBM Inc., Turner Construction Company, the City of New York, New York Convention Center Development Corporation and New York Convention Center Operating Corporation, is granted in its entirety.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

11/22/22  
New York, New York

So Ordered:

  
Hon. Lynn R. Kotler, J.S.C.