

<b>Jia Ke Li v Williamsburg Workshop LLC</b>
2022 NY Slip Op 34181(U)
December 8, 2022
Supreme Court, New York County
Docket Number: Index No. 151060-2019
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

JIA KE LI

INDEX NO. 151060-2019

- v -

MOT. DATE

WILLIAMSBURG WORKSHOP LLC

MOT. SEQ. NO. 1 and 2

The following papers were read on this motion to/for
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits
ECFS DOC No(s).
ECFS DOC No(s).
ECFS DOC No(s).

This is a labor law action. There are two pending summary judgment motions, which are hereby consolidated for the court's consideration and disposition in this single decision/order. In motion sequence 1, third-party defendant Lion Joint Ventures LLC ("Lion") moves for summary judgment dismissing the third-party action asserted against it by defendant/third-party plaintiff Williamsburg Workshop LLC ("Williamsburg"). In motion sequence 2, plaintiff moves for partial summary judgment on liability on his Labor Law §§ 240[1] and 241[6] claims. Williamsburg opposes both Lion and plaintiff's motions. The motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available.

The relevant facts are as follows. Plaintiff's accident occurred on October 16, 2018. On the date, plaintiff was employed by Lion and working at a construction site located at 107 South 6th Street, Brooklyn, New York (the "premises"). The premises was owned by Williamsburg. Plaintiff specifically claims that he fell from a 10-12 foot high scaffold while power washing a brick wall when the power washer stopped causing plaintiff to fall forward. There is no dispute that plaintiff was not given a safety harness to wear on the date of the accident nor did the scaffold have guardrails.

Plaintiff maintains that Sections 240[1] and 241[6] predicated upon Industrial Code §§ 23-5.1(j) and 23-1.15 were violated as a matter of law and that Williamsburg as owner is statutorily liable. Williamsburg contends that there are questions of fact as to whether plaintiff was a recalcitrant worker or the sole proximate cause of the accident. Williamsburg points to Lion's witnesses' testimony that safety jackets which could be tied to the scaffold had been purchased and were available and that workers, including plaintiff, were required to wear them.

Dated: 12/8/22

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

- 1. Check one: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [X] OTHER
3. Check if appropriate: [ ] SETTLE ORDER [ ] SUBMIT ORDER [ ] DO NOT POST
[ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

Meanwhile, Lion maintains that it is entitled to summary judgment dismissing Williamsburg's third-party claims for contribution and common law indemnity because plaintiff did not suffer a grave injury within the meaning of the Workers' Compensation Law. Lion also seeks dismissal of Williamsburg's failure to procure insurance claim because there was no written contract requiring same. Williamsburg concedes that dismissal of the failure to procure insurance claim is warranted but argues that there are issues of fact as to whether plaintiff sustained a grave injury as defined by WCL §11.

## 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]).

### Section 240[1]

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]).

On this record, plaintiff has established that he fell from a 10-12 foot high scaffold while power washing a brick wall and that the scaffold he was working on did not have guardrails. Further, plaintiff has shown that he was not provided a safety harness. In turn, Williamsburg has failed to raise a triable issue of fact sufficient to defeat the motion. 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, Lion's witnesses testified vaguely

that safety jackets were provided and that they could have been tied to the scaffold. This testimony is insufficient for a jury to conclude that plaintiff was specifically provided a safety harness which would have prevented his accident and that he refused to use it. Nor has Williamsburg shown that plaintiff was the sole proximate cause of his accident (*see i.e. Rodriguez v. BSREP UA Heritage LLC*, 181 AD3d 537 [1st Dept 2020]). Plaintiff has established through his expert witness' affidavit that a safety harness would need to be anchored separate from the scaffold in order to be effective. Thus, assuming plaintiff was provided a safety harness which could have been anchored to the scaffold, this fact would not have prevented the accident. Accordingly, plaintiff is granted summary judgment on the issue of liability on his Section 240[1] claim.

### Section 241[6]

Labor Law § 241[6] imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure that:

[a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

The scope of the duty imposed by Labor Law § 241[6] is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57<sup>th</sup> Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Plaintiff must allege violations of specific, rather than general, provisions of the Industrial Code (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]).

The lack of a guardrail on the scaffold was a clear violation of Industrial Code §§ 23-5.1[j] and 23-1.15 which mandate guardrails on pipe scaffolds such as the one that plaintiff was using at the time of the accident. Since there is no dispute that this provision was violated, and that the violation was a proximate cause of his accident, plaintiff's motion on this claim is also granted.

### Third-party action

The court now turns to the third-party action against Lion, plaintiff's employer. Although plaintiff's bill of particulars alleges, *inter alia*, quadriplegia, Lion points to plaintiff's medical records which show that plaintiff does not have paraplegia nor sustained a "permanent and total loss of use of an arm, leg, hand or foot". Thus, Lion has come forward with sufficient proof to establish that plaintiff has not suffered a grave injury under WCL § 11. Plaintiff does not oppose Lion's motion. As for Williamsburg's opposition, it has failed to point to any evidence which would show that plaintiff did sustain a grave injury within the meaning of the law (*see i.e. Granite State Insurance Company v. Moklam Enterprises, Inc.*, 193 AD3d 616 [1st Dept 2021]). Accordingly, Lion's motion is also granted.

### CONCLUSION

In accordance herewith, it is hereby

**ORDERED** that plaintiff's motion for summary judgment on the issue of liability against defendant Williamsburg is granted on his Labor Law § 240[1] and 241[6] claims; and it is further

**ORDERED** that Lion's motion for summary judgment dismissing Williamsburg's third-party complaint against it 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:

12/8/22  
New York, New York

So Ordered:

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