

**Rosado v 4616 Fort Hamilton Props., LLC**

2022 NY Slip Op 34952(U)

March 7, 2022

Supreme Court, Kings County

Docket Number: Index No. 503062/2018

Judge: Devin P. Cohen

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Supreme Court of the State of New York  
County of Kings

Index Number 503062/2018  
Seq. 004

Part 91

**DECISION/ORDER**

FRANKLIN ROSADO,

Plaintiff,

against

4616 FORT HAMILTON PROPERTIES, LLC., 1020  
ROGERS, LLC,

Defendants.

4616 FORT HAMILTON PROPERTIES LLC,

Third-Party Plaintiff

against

PROFESSIONAL GRADE ALUMINUM CORP.,

Third-Party Defendant.

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

**Papers Numbered**

Notice of Motion and Affidavits Annexed . . . . .	<u>1</u>
Order to Show Cause and Affidavits Annexed . . . . .	<u>2</u>
Answering Affidavits . . . . .	<u>3</u>
Replying Affidavits . . . . .	<u>Var</u>
Exhibits . . . . .	<u>Var</u>
Other . . . . .	<u>    </u>

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Upon the foregoing papers,<sup>1</sup> plaintiff's motion for summary judgment on his Labor Law § 240(1) claim only and only against defendant 4616 Fort Hamilton is decided as follows:

**Factual Background & Procedural History**

Plaintiff Franklin Rosado was a laborer for Professional Grade Construction on August 30, 2017 (Rosado Aff. at ¶ 3). On that date, Mr. Rosado was performing demolition on the roof

<sup>1</sup> Defendant filed a sur-reply in further opposition of the plaintiff's motion. However, this court does not consider sur-replies without express authorization of the court to submit further briefing. Accordingly, the court has not considered defendant's sur-reply in reaching this decision.

of a property located at 1020 Rogers Avenue, Brooklyn, NY 11201 (*id.*). It is undisputed that 4616 Fort Hamilton Properties, LLC (“4616”) owned the premises prior to the plaintiff’s accident (4616 Answer at ¶ 3). Mr. Rosado alleges that his supervisor instructed him to perform work on the roof when he arrived on August 30, despite Mr. Rosado’s contention that “every time we took a step on the roof it would sink and depress” (Rosado Aff. at ¶ 4–5). While working on the roof, the plaintiff fell through, and claims that he was injured when he caught himself by extending his arms to avoid falling through completely (*id.* at ¶ 6). Mr. Rosado finally states that he was not provided with any safety devices, including scaffolds, ladders, harnesses, or lanyards (*id.* at ¶ 7).

On July 30, 2019, Justice Lizette Colon issued a discovery order on consent instructing that plaintiff appear for a deposition on October 10, 2019, and that the defendant 4616 present a representative to be deposed on October 16, 2019. Justice Colon then issued an order on December 4, 2019 on consent, ordering the plaintiff to be deposed on January 23, 2020 and to present for an independent medical examination on February 23, 2020—defendant 4616 was to then be deposed on February 4, 2020. On March 6, 2020, Justice Colon issued another discovery order directing the plaintiff to appear on June 9, 2020 to be deposed and defendant 4616 to be deposed on June 16, 2020.

On June 23, 2020, Justice Lawrence Knipel issued an order, *inter alia*, conditionally precluding the defendant from offering evidence at trial if it failed to produce a representative for an EBT on or before July 8, 2020. That order did not contain a date for the plaintiff to appear for a deposition or otherwise reference the plaintiff’s deposition. Finally, Justice Knipel issued a second preclusion order on July 1, 2020, which ordered that Hamilton’s deposition be completed on or before September 30, 2020. That order decided that “if defendant [Hamilton] fails to

comply with any portion of this order, defendant [Hamilton] is precluded from testifying or offering evidence at the trial of this matter.” This final order also did not include a date for or otherwise reference the plaintiff’s deposition.

### **Plaintiff’s Motion for Summary Judgment**

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant’s showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Labor Law § 240 (1) imposes upon owners and general contractors a non-delegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). The purpose of the statute is to safeguard workers from “gravity-related accidents [such] as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured” (*Ross v Curtis Palmer Hydro Electric Co.*, 81 NY2d 494, 501 [1993]). To prevail on his Labor Law § 240(1) claim, plaintiff must prove that defendants violated the statute and that the violation was a proximate cause of the accident (*Escobar v Safi*, 150 AD3d 1081, 1082 83 [2d Dept 2017]).

Mr. Rosado submits an affidavit stating that he was engaged in the demolition of a property at the time of his injury. Demolition is explicitly enumerated as work covered by Labor Law § 240 (1) (“All contractors and owners and their agents . . . in the . . . demolition . . . of a building or structure . . . shall furnish or erect [proper safety devices]”). The plaintiff further provides the affidavit of certified safety manager Kathleen Hopkins. Ms. Hopkins opines that

the plaintiff should have been provided with either a “safety harness and lifeline, or other fall protection, such as plywood planking” (Hopkins Aff. at ¶ 8). Ms. Hopkins concludes that “the Plaintiff’s fall into an opening/hole when the roof collapsed/caved in, which resulted in the Plaintiff’s injuries, was indisputably a gravity based [sic] accident” (*id.* at ¶ 10). Based on the plaintiff’s allegations that he was doing demolition work at the time of accident and that he was not provided with adequate safety measures in either the form of safety equipment or the construction of scaffolds or braces), the plaintiff has made out a prima facie case of the owner-defendant’s liability under Labor Law § 240 (1).

In opposition to the plaintiff’s motion, the defendant alleges that Mr. Rosado willfully refused to appear for his depositions, that the instant motion is therefore premature, and finally that Justice Knipel’s conditional preclusion orders are not in themselves preclusion orders, and that the defendant is therefore not precluded from offering evidence at the time of trial. Importantly, the defendant neither provides any positive evidence to rebut the plaintiff’s contentions, nor does the defendant provide any evidence that the plaintiff caused his depositions to be adjourned. The only argument that defendant offers is that the plaintiff has not been deposed and, therefore, the deposition of the defendant was not yet required.


However, Justice Knipel’s conditional preclusion orders are the dispositive signposts for the procession of discovery in this case, and these preclusion orders became “absolute” when the defendant was not deposed pursuant to those orders (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 83 [2010]). While it is ordinarily preferred that the depositions of the parties be completed before a summary judgment motion is made, “any party may move for summary judgment in any action, after issue has been joined” (CPLR 3212 [a]). While it is unclear from the record whether the plaintiff ever appeared for a deposition, the plaintiff did provide the affidavit of Mr.

Rosado, which is evidence in admissible form sufficient to meet his prima facie burden. The defendant does not produce evidence in admissible form and is precluded from producing any evidence at trial.

Accordingly, Mr. Rosado's motion for summary judgment (Seq. 004) is granted as to his § 240 (1) claim against only defendant 4616 Fort Hamilton Properties, L.L.C. This action shall *proceed to trial on plaintiff's remaining claims.*

This constitutes the decision and order of the court.

March 7, 2022  
**DATE**

  
**DEVIN P. COHEN**  
Justice of the Supreme Court

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