

**Valarezo v HP Jamsta Hous. Dev. Fund Co. Inc.**

2023 NY Slip Op 31398(U)

April 28, 2023

Supreme Court, New York County

Docket Number: Index No. 158491/2017

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. LYLE E. FRANK **PART** **11M**

*Justice*

-----X

CRISTIAN VALAREZO, DIANA CABRERA,  
  
Plaintiff,

**INDEX NO.** 158491/2017

**MOTION DATE** 11/09/2020,  
12/22/2020

- v -

**MOTION SEQ. NO.** 002 003

HP JAMSTA HOUSING DEVELOPMENT FUND COMPANY  
INC.,CJ PLAZA ONE LLC,BRP JAMSTA TC OWNER  
LLC,CNY CONSTRUCTION LLC

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 69, 71, 73, 75, 77, 79, 81, 83, 85, 86, 88, 90, 92, 94, 96, 98, 100, 102, 104, 110

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 67, 68, 70, 72, 74, 76, 78, 80, 82, 84, 87, 89, 91, 93, 95, 97, 99, 101, 103, 105, 106, 107, 108, 109, 111, 112, 113

were read on this motion to/for JUDGMENT - SUMMARY.

This action arises out of injuries allegedly sustained by plaintiff when he was struck by a rod at a construction site. Plaintiff, Cristian Valarezo, moves for summary judgment as to his claims pursuant to Labor Law 240 (1), motion seq. 002. Defendants, HP Jamsta Housing Development Fund Company, Inc., CJ Plaza One LLC, BRP Jamsta Tc Owner LLC and CNY Construction LLC, oppose plaintiff’s motion and move for summary judgment, motion seq. 003, seeking dismissal of all Labor Law claims.

Facts

On July 10, 2017, plaintiff was employed by Kingdom Associates, Inc. ("Kingdom") and was hired to perform construction/excavation work with at the construction site located at 147 40 Archer Avenue, Jamaica, New York ("subject site"). Defendants CJ Plaza, BRP Jamsta and HP

Jamsta are the owners of the subject site. Defendant CNY Construction LLC ("CNY") was the general contractor of the subject site and hired various subcontractors, including Kingdom, as the foundation/excavation subcontractor.

Plaintiff was struck by a piece of steel rod that was approximately 9-10-foot long, that plaintiff alleges was unsecured and improperly hoisted. The rod fell and struck plaintiff, knocking him to the ground unconscious. It must be noted that plaintiff does not know what caused the rod to fall nor has there been any admissible evidence submitted to establish how the accident occurred.

### **Summary Judgment Standard**

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

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

Plaintiff moves for summary judgment on the issue of liability under Labor Law §240(1), while defendants oppose and move separately for the same relief (motion sequence 003). For the reasons set forth below, plaintiff's motion is denied.

*Labor Law §240(1)*

It is well established law that an accident alone does not establish a Labor Law § 240 (1) violation or causation. (*Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280 [2003]; *Rudnik v Brogor Realty Corp.*, 45 AD3d 828 [2d Dept 2007]; *Forschner v Jucca Co.*, 63 AD3d 996 [2d Dept 2009]. Rather, the protections afforded by this section are invoked only where plaintiff demonstrates that he was engaged in an elevation-related activity and the failure to provide him with a safety device was the proximate cause of his injuries. *See id.*

To prevail on summary judgment in a falling object case under the scaffold law, “the injured worker must demonstrate the existence of a hazard contemplated under that statute and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein” *Fabrizi v 1095 Ave. of Americas, L.L.C.*, 22 NY3d 658, 662 [2014].

In support of his motion, plaintiff repeatedly avers that the record is uncontroverted regarding the cause of plaintiff’s injury as an “unsecured improperly hoisted load.” A review of the record however establishes otherwise. Plaintiff does not testify that he knows what caused the accident and the deposition testimony of defendants are of witnesses that did not witness the accident. Plaintiff attempts to establish its prima facie case based on inadmissible evidence, specifically the Department of Buildings complaint and violation and the OSHA abstract. The record is devoid of any admissible evidence demonstrating that at the time of the accident the subject bar was in fact being hoisted and was unsecured. Accordingly, plaintiff has failed to establish a prima facie entitlement to judgment as a matter of law.

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

Defendant moves to dismiss all of plaintiff’s labor law claims. For the reasons indicated below, defendants’ motion is granted in part.

*Labor Law §200 and common law negligence claims*

"Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Edwards v State Univ. Constr. Fund*, 196 AD3d 778, 780 [2021] [internal quotation marks and citations omitted]; see *Wiley v Marjam Supply Co., Inc.*, 166 AD3d 1106, 1109 [2018], lv denied 33 NY3d 908 [2019]). Liability under Labor Law § 200 "generally falls into two broad categories: instances involving the manner in which the work is performed, and instances in which workers are injured as a result of dangerous or defective premises conditions at a work site" *Abelleira v City of New York*, 120 AD3d 1163, 1164 [2nd Dept 2014]; see *Cantalupo v Arco Plumbing & Heating, Inc.*, 194 AD3d at 689 [2nd Dept 2021]. Those two broad categories of actions are where a worker's injuries arise as a result of dangerous or defective premises conditions at a work site, and those involving injuries arising from the method and the manner in which the work is performed (see *Modugno v Bovis Lend Lease Interiors, Inc.*, 184 AD3d 820, 822 [2nd Dept 2020])

Here, defendants have established that they were neither on notice of a dangerous or defective condition nor did they control the means and methods of the work that resulted in the injury. In opposition, plaintiff contends that CNY, as the general contractor had the ability to stop the work thus establishing liability, this argument however fails to raise a triable issue of fact. As discussed above, the cause of the accident whether it be operator error or an improperly hoisted load, has not been established, in any scenario though CNY was not in control of them means and methods of the work conducted by Kingdom, plaintiff's employer.

*Labor Law §241(6)*

It is well settled law that for there to be liability pursuant to Labor Law § 241(6), there must be a violation shown of the Industrial Code. See e.g., *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993] (§241(6) imposes a non-delegable duty upon owners and general

contractors and their agents for violation of the statute). Moreover, the regulation alleged to have been breached must be a specific and applicable to the facts at bar. (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]).

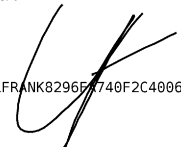
During oral argument plaintiff conceded that there are only four Industrial Code sections that he contends are applicable to the instant action, New York State Industrial Code Sections 12 NYCRR 23-6.1(c) (1), 23-6.1(d) and (e) and 23-6.2(c).

The Industrial Codes section 23-6.1(c)(1) requires that "Only trained, designated persons shall operate hoisting equipment and such equipment shall be operated in a safe manner at all times"; Industrial Codes section 23-6.1(d), which requires that "... suspended loads shall be securely slung and properly balanced before they are set in motion". Industrial Codes section 23-6.1(e)(1) provides that signal system is required while hoisting material. Industrial Codes section 23-6.2(c) provides that "Fittings. All hooks, shackles and other fittings subject to tension or shear shall be drop-forged. The use of deformed or damaged hooks, shackles, chains or other fittings is prohibited. All suspended pulley blocks, sheaves, well wheels or similar devices shall be moused or securely fastened, or safety hooks shall be used."

Defendants argue that there is no evidence that the Industrial Codes cited are applicable to the facts of this matter or that hoisting ropes played a role in the happening of the accident. Similarly, the court finds that defendants have failed to meet their burden to affirmatively establish that the subject Industrial Codes are not applicable. Notably, defendants' motion is silent as to the happening of the accident, it repeatedly rebuffs plaintiff's contention while relying on inadmissible evidence to argue that the accident was caused by operator error. As such, questions of fact preclude a finding of judgment as a matter of law in favor of the defendants. Accordingly, it is hereby

ADJUDGED that plaintiff's motion is denied; and it is further  
 ORDERED that defendants motion is granted in part and plaintiff's claim pursuant to  
 Labor Law § 200 is dismissed, defendant's motion is otherwise denied.

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4/28/2023

DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE