

**Tzurec v 353 E. 58 St Dev. LLC**

2023 NY Slip Op 32061(U)

June 23, 2023

Supreme Court, New York County

Docket Number: Index No. 153354/2020

Judge: David B. Cohen

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

**PRESENT: HON. DAVID B. COHEN PART 58**

*Justice*

-----X

RAMOS TZUREC,

Plaintiff,

- v -

353 EAST 58 ST DEVELOPMENT LLC, UPTOWN NEW  
YORK OWNERS LLC, CITY LIGHTS CONSTRUCTION,  
UPTOWN NEW YORK OWNERS LLC D/B/A CITY LIGHTS  
CONSTRUCTION

Defendants.

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INDEX NO. 153354/2020

MOTION DATE 10/12/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 61, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 89, 91, 101, 102, 103, 104, 105, 106, 107, 108

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Plaintiff moves pursuant to CPLR 3212, for an order granting him summary judgment on his Labor Law 240(1) claim against defendant 353 East 58 St. Development LLC (353 East).

353 East opposes.

**I. PROCEDURAL BACKGROUND**

In this action, plaintiff seeks damages for personal injuries he allegedly sustained on June 28, 2019 when he fell down a hole on the third floor of 353 East 58th Street, New York, NY (premises) while performing work on a construction project (project). Plaintiff alleges that 353 East violated Labor Law §§ 200, 240 (1), and 241 (6), and is liable under common law negligence (NYSCEF 1).

It is undisputed that defendant 353 owns the Premises. Before filing the instant motion, plaintiff discontinued the action as against all defendants other than 353 East (NYSCEF 58).

A. Interim Order and sur-replies

By Order dated May 16, 2023 (NYSCEF 101), this court gave plaintiff the opportunity to submit a supplemental affidavit by May 19, 2023, addressing documents that he failed to submit with his reply papers but were referenced therein. 353 East was required to file a sur-reply by May 26, 2023, which it did (NYSCEF 102). Plaintiff's time to file supplemental papers was subsequently extended, and on or about June 1, 2023 plaintiff filed the missing documents along with a sur-reply (NYSCEF 108). Therefore, this motion was fully submitted as of June 1, 2023, and no further papers were considered in deciding the instant motion.

B. Plaintiff's Deposition Testimony

At plaintiff's deposition held on November 2, 2021, he testified that at the time of the accident, he had been working on the project for five days, his daily work schedule ran from 7:00 am to 4:00 pm, and that he was supervised by an unnamed "Chinese guy" who relayed directions to an unnamed "Mexican guy" who "gave [plaintiff] orders." Plaintiff further testified that he only once received instructions as to workplace safety, on his first day on the project (NYSCEF 55).

Plaintiff's work included "making big holes" (*id.* at 51), tearing down structures, and removing debris from the premises (*id.* at 51-58). Plaintiff initially worked in the basement of the premises and began working on the third floor a day or two before his accident (*id.* at 51-56).

The day before the accident, plaintiff was instructed by "the Chinese guy" to go up to the third floor to tear down a wooden wall, door frames, and doors, and to start taking out debris (*id.* at 56-58).

The next day, "the Chinese guy, through the Mexican guy" told him "'You know what to do. Go upstairs and you know what to do,'" and sent him to the third floor (*id.* at 61-63, 67).

Plaintiff went to the third floor, where there was garbage and debris all over the floor (*id.* at 63, 75). Plaintiff's job was to "to pile up the debris and the garbage," which he understood to include a door that was lying on the floor (*id.* at,63, 76, 80).

Unaware that the door was covering a hole in the floor (*id.* at 64, 65, 68-69, 80), plaintiff "pulled the door", thereby uncovering the hole, which measured approximately "3 or 4 feet," and fell through it onto the floor below (*id.* at 63, 72-73, 75, 80).

At the time of the accident, no one else was on the third floor with plaintiff (*id.* at 66). He had never seen the subject hole before the accident and did not create it, nor was he ever told that there was a hole there (*id.* at 64, 67-69).

#### C. Deposition Testimony of 353 East

A member of 353 East testified that there was "a lot of improvement" done on the premises during the twenty years he has owned it (*id.* at 9) and that he usually hires "Sam Hai" as a contractor for jobs on the property (*id.* at 25). Hai "brings the coworkers or helpers" for the jobs and has two assistants, including one named "Alberto". No one other than Hai acted as a construction supervisor, and 353 East did not provide workers with any safety equipment (*id.* at 29-30). The member testified that he had never met plaintiff and had no direct knowledge of how the accident happened (*id.* at 33-35).

#### D. Sanchez affidavit

353 East submits an affidavit from Alberto Sanchez, who states that he was working for Hai on the project when plaintiff's accident occurred. The affidavit, which includes his current address within New York State, reads in relevant part:

5. I was present at 353 East 58th street the morning of the accident, before the alleged accident of Ramos Tzurec occurred.

6. Mr. Tzurec created the hole ("subject hole") from the third floor to the second floor the day before the accident in the establishment/building at 353 East 58<sup>th</sup> Street.
7. The day before the accident, I personally secured the hole after Mr. Tzurec cut it, covering it with a door and nailing the door to the floor.
8. In the morning of the date of the accident, I personally observed that the subject hole was secured and covered by a door and was screwed into place.
9. In the morning of the date of the accident, Mr. Ha [sic] and I left the establishment to go to Home Depot to buy materials.
10. Before leaving for Home Depot, Mr. Ha [sic] and I personally instructed Mr. Tzurec to not do anything until I got back from Home Depot.
11. While I was at Home Depot, the alleged accident involving Mr. Tzurec occurred. I was not in the establishment at the time the accident occurred.

(NYSCEF 86).

## II. DISCUSSION

It is well established that “the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). “Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution” (*Reif v Nagy*, 175 AD3d 107, 125 [1st Dept 2019], quoting *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]).

“[F]acts must be viewed in the light most favorable to the non-moving party” (*Matter of Larchmont Pancake House v Bd. of Assessors*, 33 NY3d 228, 252 [2019], quoting *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). If there is any doubt as to the existence of a

triable issue of fact, summary judgment must be denied (*Schmidt v One N.Y. Plaza Co. LLC*, 153 AD3d 427, 428 [1st Dept 2017]).

A. Admissibility of Sanchez affidavit

1. Contentions

A preliminary issue to be resolved is whether the Sanchez affidavit may be considered in opposition to plaintiff's motion.

Plaintiff objects to consideration of the affidavit on the ground that Sanchez was never disclosed as a witness before 353 East filed its opposition papers, as it failed to disclose Sanchez in response to a preliminary conference order and/or plaintiff's combined demands, which were both served on December 6, 2021 (NYSCEF 91).

353 East argues that it disclosed Sanchez as a potential witness in its Supplemental Response prior to its deposition, and, thus, Sanchez's affidavit should be considered in opposition to the motion (NYSCEF 102). It attaches an email from its counsel to plaintiff's counsel dated December 15, 2021 (NYSCEF 103), which reads in relevant part:

Given that defendant's deposition is scheduled to commence tomorrow morning at 10:00 a.m., we write to provide you with a quick supplement to defendant's discovery responses.

1. Defendant is aware of the following individuals who worked on the subject jobsite during the week of June 28, 2019:

...

b. Alberto Sanchez – address not known – believed to be living in Georgia (NYSCEF 106).

353 East also attaches a copy of plaintiff's counsel's response to the email, in which counsel acknowledges receipt of the email and asks, as pertinent here: "Can you confirm LKA

[last known address] (as opposed to current) and number for these people? Who are they working for?" (*id.*).

Plaintiff contends that the email from defense counsel does not constitute a formal witness disclosure as it did not contain Sanchez's last known address or phone number, nor did 353 East serve a formal disclosure thereafter. While plaintiff's counsel asked defense counsel to provide the missing information, he did not receive a response. Moreover, plaintiff argues that the email did not comply with the preliminary conference order, which required that the parties exchange the names and addresses of all witnesses (NYSCEF 108).

Plaintiff further asserts that 353 East's assertion that Sanchez's contact information was unknown until its counsel prepared its opposition papers is without merit as "it is clear that [Sanchez's] affidavit is prepared by counsel for the purposes of litigation," and that defense counsel withheld Sanchez's contact information, either willfully or negligently, which prevented plaintiff from speaking to or deposing Sanchez (NYSCEF 108).

## 2. Analysis

Generally, affidavits by undisclosed witnesses are not considered in opposition to a motion for summary judgment (*Martinez v 560-568 Audubon Realty LLC*, 196 AD3d 426, 427 [1st Dept 2021]). Further, when a party is in possession of a witness's address and fails to provide it in response to a discovery request, said party is precluded "from later offering proof regarding that information" (*Kontos v Koakos Syllogos "Ippocrates," Inc.*, 11 AD3d 661, 661 [2d Dept 2004] [witness affidavit was improperly submitted in opposition to summary judgment motion where "plaintiff offered no explanation for failing to disclose the surname and address of this witness until after the filing of the note of issue."])

However, even if a party fails to disclose a witness in response to discovery demands and/or a preliminary conference order, an affidavit by that witness may nevertheless be considered if the witness's name and/or address has been made known previously (*see Brown v Howson*, 129 AD3d 570, 571 [1st Dept 2015]), as the opposing party cannot claim that it was surprised or prejudiced by the information (*see Quiroz v Mem. Hosp. for Cancer & Allied Diseases*, 202 AD3d 601, 603 [1st Dept 2022] [the court providently exercised its discretion in considering the affidavit of undisclosed witness as “[p]laintiff cannot claim surprise or prejudice since he knew at all times of the presence at the job site of his own foreman, who was identified by name, by plaintiff and his counsel, at plaintiff's deposition”] [citations omitted]; *see also Pearson v City of New York*, 74 AD3d 1160, 1161-1162 [2d Dept 2010] [“Although the plaintiff failed to name the witness in response to the defendants’ discovery demands, the defendants had knowledge of his existence, since the plaintiff identified the witness... in her deposition testimony.

Here, 353 East identified Sanchez as a potential witness before its deposition, although it did not provide his address as it was then unknown. He was also identified during 353 East’s deposition and plaintiff testified that he was supervised by a Mexican guy, presumably Sanchez. Plaintiff was thus put on notice that Sanchez was likely a witness, and cannot claim to be surprised or prejudiced by his affidavit.

While plaintiff’s counsel asked for Sanchez’s address from defense counsel and did not receive it, there is no evidence that plaintiff took any further action to obtain it. Moreover, when plaintiff filed his note of issue, he certified that all discovery was complete, despite knowing that Sanchez’s address was outstanding (*see Quiroz*, 202 AD3d 603 [as information was provided several months before note of issue was filed, plaintiff had time to request additional discovery,

including deposition of witness]; *Mareneck v Bohemian Brethren Presbyt. Church*, 201 AD3d 471 [1st Dept 2022] [court erred in disregarding affidavit on ground that affiant was not disclosed as witness, as the witness was identified by name during deposition of another witness, and thus “plaintiff was made aware that the (witness) had relevant information . . . and had ample opportunity to request her deposition if desired.]].

Plaintiff also fails to show that 353 East’s claimed non-disclosure was willful or contumacious (*see Malcolm v Darling*, 233 AD3d 425 [2d Dept 1996] [absent finding that failure to disclose was willful or contumacious, preclusion of witness’s testimony unwarranted]).

The affidavit is therefore considered on this motion.

#### B. Labor Law § 240 (1) claim

Labor Law § 240 (1), also known as the Scaffold Law reads as follows:

Scaffolding and other devices for use of employees

“1. All contractors and owners and their agents, except owners of one and two family dwellings who contract for but do not direct or control the work, 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.

“[T]he Labor Law imposes absolute liability on owners and general contractors for injuries that are proximately caused by the failure to provide appropriate safety devices to workers subject to gravity-related risks” (*Ladd v Thor 680 Madison Ave LLC*, 212 AD3d 107, 111 [1st Dept 2022]). To prevail on a Labor Law § 240 (1) claim, plaintiff must show that the statute was violated, and that this violation was a proximate cause of his injuries (*See Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]). “[T]he single decisive question is whether plaintiff’s injuries were the direct consequence of a failure to provide

adequate protection against a risk arising from a physically significant elevation differential” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

A claim, under Labor Law § 240(1) “requires both a violation of the statute and causation” (*Mejia v Super P57 LLC*, , 215 AD3d 491, 491 [1st Dept 2023] *citing Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d at 288-289).

A defendant has no liability under Labor Law § 240 (1) when plaintiffs: (1) had adequate safety devices available, (2) knew both that" the safety devices "were available and that they were expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had they not made that choice.

(*Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167-1168 [2020] [internal quotation marks and citation omitted]).

Further, a plaintiff is not entitled to recover under Labor Law §240 (1) where he or she was recalcitrant, which requires a showing that the plaintiff deliberately refused to obey a direct and immediate instruction and that said failure was the sole proximate cause of his injury.

Here, plaintiff has met his prima facie burden on his Labor Law § 240 (1) claim based upon the undisputed fact that he fell down an unmarked, insufficiently secured hole while performing construction work for 353 East (*See Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 450 [1st Dept 2013] [Labor Law §240(1) is “violated when workers fall through unprotected floor opening”] [*citations omitted*]).

As to 353 East’s defense that plaintiff was recalcitrant, an “instruction to avoid an unsafe practice is not a sufficient substitute for providing a worker with a safety device to allow him to complete his work safely” (*See Vasquez v Cohen Bros. Realty Corp.*, 105 AD3d 595, 598 [1st Dept 2013]; *see also Hernandez v. 151 Sullivan Tenant Corp.*, 307 AD2d 207, 207 [1st Dept 2009] [“Inasmuch as defendant points to no immediate instruction to avoid an unsafe practice that plaintiff disobeyed, its attempt to portray him as a recalcitrant worker fails.”]; *Rivera v*

*Ambassador Fuel and Oil Burner Corp.*, 45 AD3d 275 [1st Dept 2007] [worker is not recalcitrant solely by disobeying general instruction not to use certain equipment”). Defendant therefore fails to create an issue of fact as to whether plaintiff was recalcitrant for failing to follow Sanchez’s alleged direction to “not do anything.” (*See Plaku v 1622 Van Buren LLC*, 199 AD3d 431 [1st Dept 2021] [defendants’ alleged instruction to not use dumpster was insufficient to raise triable issue as to whether plaintiff was recalcitrant]; *see also Lochan v H&H Sons Home Improvement, Inc.*, \_\_\_ AD3d \_\_\_, 2023 NY Slip Op 02305 [1st Dept 2023] [recalcitrant worker defense inapplicable when no safety devices were provided]).

353 East also argues that there is a triable issue as to whether the hole was properly secured based on Hai’s testimony that he nailed a door to the floor to cover the hole before plaintiff’s accident, which is controverted by plaintiff’s testimony that the door was not nailed to the floor. However, even if the door was secured by nails, it is undisputed that it was unmarked and thus failed to warn plaintiff that there was a hole underneath it (*cf Gallagher v Levien & Co.*, 72 AD3d 407, 408 [1st Dept 2010] [where there was conflicting testimony as to whether plywood covering hole was secured and marked, triable issue remained as to whether plaintiff’s injuries were caused by violation of Labor Law 240(1)]).

353 East’s argument that plaintiff was the sole proximate cause of the accident as he himself had created the hole a day or two before his accident and thus knew about its existence is unavailing (*see Pasceri v Keleher*, 169 AD3d 1403 [4th Dept 2019] [fact that plaintiff was allegedly aware of unsafe condition did not relieve defendants of duty to maintain premises in safe condition; awareness relevant only to plaintiff’s comparative fault]).

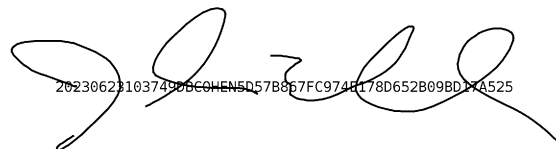
The parties’ remaining arguments have been considered and found unavailing.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff’s motion for summary judgment as to liability in his favor on his Labor Law § 240 (1) claim against 353 East 58 St. Development LLC is granted; and it is further

ORDERED, that the parties appear for a pretrial/settlement conference on October 25, 2023, at 11:30 am, in person.



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6/23/2023

DATE

DAVID B. COHEN, 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