

**Maya v Liberty 58-40 Borden Ave. LLC**

2023 NY Slip Op 32274(U)

July 6, 2023

Supreme Court, Kings County

Docket Number: Index No. 512674/2019

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6th day of July 2023

HONORABLE FRANCOIS A. RIVERA

-----X  
EDWIN MAYA,

Plaintiff,

-against-

LIBERTY 58-40 BORDEN AVENUE LLC and  
LIBERTY COCA-COLA BEVERAGES LLC,

Defendants.  
-----X

**DECISION & ORDER**  
Index No. 512674/2019

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed on June 28, 2022, under motion sequence number two, by defendants Liberty 58-40 Borden Avenue LLC and Liberty Coca-Cola Beverages LLC (hereinafter collectively as the defendants) for an order pursuant to CPLR 3212 dismissing all the claims of plaintiff Edwin Maya (hereinafter the plaintiff), for common-law negligence; violations of Labor Law §§ 200, 240(1), 240(2), 240(3) and 241(6); violations of various OSHA Rules, ANSI/ASSE, Multiple Dwelling Law and the Administrative Code of the City of New York.

- ◆ Notice of Motion
- ◆ Affirmation in Support
  - Exhibits A-G
- ◆ Statement of Material Facts

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed on June 28, 2022, under motion sequence number three, by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment on the plaintiff's claim under Labor Law § 241(6).

- ◆ Notice of Motion<sup>1</sup>
- ◆ Affirmation in Support
  - Exhibits 1-16

<sup>1</sup> The plaintiff's motion also serves as opposition to the defendants' motion.

- ◆ Statement of Material Facts
- ◆ Affirmation in Opposition
- ◆ Counter Statement of Material Facts
- ◆ Affirmation in Reply

## BACKGROUND

On June 7, 2019, the plaintiff commenced the instant action for damages for personal injury by filing a summons and verified complaint with the Kings County Clerk's office (hereinafter KCCO). On August 19, 2019, the defendants interposed and filed their joint verified answer with the KCCO.

The verified complaint contains sixty-eight allegations of fact in support of three causes of action. The plaintiff has asserted claims that the defendants violated Labor Law §§ 200, 240(1), 240(2), 240(3) and 241(6), among other things.

In particular, the plaintiff has alleged personal injuries arising from an incident that occurred on May 2, 2019, at a building in Maspeth, New York (hereinafter the subject premises), a facility owned by defendant Liberty 58-40 Borden Avenue, LLC. Defendant Liberty Coca-Cola Beverages, LLC (hereinafter Liberty Coke) operated its business out of the subject premises and had hired the plaintiff's employer, Century Overhead Doors (hereinafter Century), to perform repairs to its electric roll-up doors on an as needed basis.

The plaintiff, while employed by Century, alleged that he sustained injuries by electric shock while he was standing on a ladder performing repair work on an electric door motor in one of the facility's docking bays located in the loading dock area of the subject premises.

The plaintiff's verified bill of particulars has alleged that defendants were negligent and that they violated Labor Law §§ 200, 240(1), 240(2), 240(3) and 241(6), as well as Industrial Code sections 23-1.5, 23-1.7, 23-1.13, 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-5 and 23-9.6. The plaintiff has also alleged that Defendants violated the Occupation Safety and Health Administration (OSHA) rules as they pertain to construction, including but not limited to sections 1926.20, 1926.95, 1926.104, 1926.200, 1926.404, 1926.405, 1926.416, 1926.432, 1926.501, 1926.502, 1926.451, 1926.452, 1926.453, 1926.651, 1926.1053, 1926.1060 and 1910.333. The plaintiff has further alleged that defendants violated the Administrative Code of the City of New York §§ 26-228, 26-235, 27-127, 27-128, 27-3024, 27-3030, 27-3102, 27-3105, 27-3107, 27-3109, and 27-3130. Furthermore, the plaintiff has alleged violations of the American National Standards Institute (ANSI)/ the American Society of Safety Engineers (ASSE) rule A10.8-2001 and Multiple Dwelling Law § 78.

#### LAW AND APPLICATION

The plaintiff did not oppose the branch of the defendants' motion which sought dismissal of the plaintiff's complaint alleging violation of Labor Law §§ 200, 240 (1), 240 (2), and 240 (3). The plaintiff also did not oppose that branch of the defendants' motion which sought dismissal of the plaintiff's complaint alleging violation of the OSHA rules as they pertain to construction, including but not limited to sections 1926.20, 1926.95, 1926.104, 1926.200, 1926.404, 1926.405, 1926.416, 1926.432, 1926.501, 1926.502, 1926.451, 1926.452, 1926.453, 1926.651, 1926.1053, 1926.1060 and 1910.333.

The plaintiff did not oppose the branch of the defendants' motion which alleges that

the defendants violated Administrative Code §§ 26-228, 26-235, 27-127, 27-128, 27-3024, 27-3030, 27-3102, 27-3105, 27-3107, 27-3109, and 27-3130. Furthermore, the plaintiff did not oppose the branch of the defendants' motion which alleged that the defendants violated ANSI/ASSE rule A10.8-2001 and Multiple Dwelling Law § 78.

Consequently, all these claims asserted by the plaintiff are deemed abandoned by the plaintiff's failure to oppose the defendants' motion to dismiss them (*see Elam v Ryder Sys., Inc.*, 176 AD3d 675, 676 [2d Dept 2019], citing *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2d Dept 2017]; *see also Kronick v L.P. Thebault Co.*, 70 AD3d 648, 649 [2d Dept 2010], citing *Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003]).

The defendants have also moved to dismiss the plaintiff's claim that the defendants violated Labor Law § 241(6), as was predicated upon 12 NYCRR §§ 23-1.5, 23-1.7, 23-1.13, 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-5 and 23-9.6.

The plaintiff opposed this branch of the defendants' motion to the extent that the defendants sought dismissal of plaintiff's claims that it violated Section 241(6) of Labor Law as was predicated upon 12 NYCRR 23-1.5, 23-1.13., 1.13(b)(1), 1.13(b)(3), 1.13(b)(4) and 1.13 (c)(1)(ii).

The plaintiff, however, did not oppose the defendants' motion to dismiss the plaintiff's claim that the defendants violated New York State Labor Law 241(6), as was predicated upon 12 NYCRR 23-1.7, 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-5 and 23-9.6. Consequently, all these claims asserted by the plaintiff are deemed abandoned by the plaintiff's failure to oppose the defendants' motion to dismiss them (*see Elam*, 176 AD3d

at 676).

The Court will next address the contested sections that remain, to wit, Industrial Code §§ 23-1.5(c)(3), and 23-1.13 and its various subsections. The defendants have argued that Industrial Code 23-1.5(c)(3) is insufficiently specific to support a Labor Law § 241(6) cause of action. However, numerous recent cases have held otherwise (*see Opalinski v City of New York*, 205 AD3d 917 [2d Dept 2022]); *Perez v 286 Scholes St. Corp.*, 134 AD3d 1085 [2d Dept 2015]; *Gomez v 670 Merrick Road Realty Corp.*, 189 AD3d 1187 [2d Dept 2020]); *see also Misicki v Caradonna*, 12 NY3d 511 [2009]). Accordingly, Industrial Code 23-1.5(c)(3) is hereby held to be sufficiently specific, and that portion of defendants' motion is denied.

The defendants, further, argue that dismissal of both Industrial Codes §§ 23-1.5(c)(3) and 23-1.13 and its subsections is warranted because the defendants were neither the parties that initially turned the power off, nor the parties that turned the power back on at the time of the accident. However, the Court finds that defendants have failed to demonstrate prima facie entitlement to judgment as a matter of law, as they rely solely upon circumstantial evidence that is insufficient to sustain their burden. Therefore, the defendants' motion for summary judgment as to Labor Law § 241(6), as premised upon Industrial Code §§ 23-1.5(c)(3) and 23-1.13 and its subsections, is denied, and the Court need not reach the sufficiency of the plaintiff's opposition (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]).

The plaintiff has also moved for summary judgment on his Labor Law § 241(6) claim as was predicated upon 12 NYCRR 23-1.13 (b) (4). The plaintiff's evidentiary

submission has established that the defendants are statutory defendants under the statute, and that the plaintiff was engaged in a covered activity at the time he was injured after contacting the live circuit. The plaintiff having established his prima facie entitlement, the burden thus shifts to the defendants to demonstrate a triable issue of fact. The Court finds that the defendants have met this burden by demonstrating a triable issue of fact as to whether they were the parties who violated that Industrial Code section. Accordingly, the plaintiff's motion for summary judgment is denied.

### CONCLUSION

The motion by defendants Liberty 58-40 Borden Avenue LLC and Liberty Coca-Cola Beverages LLC for an order pursuant to CPLR 3212 dismissing all the claims of plaintiff Edwin Maya for common-law negligence; violations of Labor Law §§ 200, 240(1), 240(2), and 240(3); violations of various OSHA Rules, ANSI/ASSE, Multiple Dwelling Law and the Administrative Code of the City of New York is granted as those causes of action are deemed abandoned.

The motion by defendants Liberty 58-40 Borden Avenue LLC and Liberty Coca-Cola Beverages LLC for an order pursuant to CPLR 3212 dismissing all the claims of Edwin Maya for violation of Labor Law § 241(6) as was predicated upon 12 NYCRR §§ 23-1.5, 23-1.7, 23-1.13, 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-5 and 23-9.6. is granted in part and denied in part.

It is granted as to those claims predicated upon 12 NYCRR §§ 23-1.7, 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-5 and 23-9.6 as those claims are abandoned.

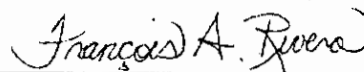
It is denied as to those claims predicated upon 12 NYCRR §§ 23-1.5(c)(3), and 23-

1.13 and its various subsections.

The motion by plaintiff Edwin Maya for an order pursuant to CPLR 3212 granting summary judgment on the plaintiff's claim under Labor Law § 241(6) as predicated upon 12 NYCRR 23-1.13 (b) (4) is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:



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J.S.C.

**HON. FRANCOIS A. RIVERA**  
**J.S.C.**