

**Ordaz v KSB Broadway Assoc.**

2023 NY Slip Op 32409(U)

July 17, 2023

Supreme Court, New York County

Docket Number: Index No. 161236/2018

Judge: Paul A. Goetz

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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. PAUL A. GOETZ **PART** **47**

*Justice*

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MIGUEL ANGEL ORDAZ,

Plaintiff,

- v -

KSB BROADWAY ASSOCIATES, KSB BROADWAY ASSOCIATES, LLC, BLDG MANAGEMENT CO., INC.,

Defendants.

-----X

KSB BROADWAY ASSOCIATES, KSB BROADWAY ASSOCIATES, LLC, BLDG MANAGEMENT CO., INC.

Plaintiffs,

-against-

JERRICK ASSOCIATES, INC.

Defendant.

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INDEX NO. 161236/2018

MOTION DATE 04/20/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON MOTION**

Third-Party  
Index No. 595668/2019

The following e-filed documents, listed by NYSCEF document number (Motion 001) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68 were read on this motion to/for JUDGMENT - SUMMARY.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Miguel Ordaz on May 21, 2018, when, while working at 247 West 87th Street, New York New York (the premises), the scaffold and ladder he was standing on allegedly fell out from underneath him, causing him to fall. Plaintiff moves for summary judgment pursuant to CPLR § 3212 on his Labor Law §§ 240 (1) and 241 (6) claims as against defendants KSB Broadway Associates, KSB Broadway Associates, LLC (collectively KSB), and BLDG Management Co., Inc.'s (BLDG).

Plaintiff argues that defendants did not provide an adequate elevation device nor adequate protection from gravity-related risks. Defendants respond that plaintiff fails to supply sufficient evidentiary support to establish entitlement to summary judgment as a matter of law and issues of fact exist as to whether plaintiff's and /or plaintiff's foreman's actions were the sole proximate cause of his injuries, and whether plaintiff was a recalcitrant worker. Plaintiff replies that it is not necessary for him to proffer what precisely caused the scaffold and ladder to collapse in order to prevail on his summary judgment motion, defendants had a non-delegable duty under the Labor Law that cannot be overcome by plaintiff's or the foreman's alleged negligence, and plaintiff was not a recalcitrant worker since there was no reasonable alternative elevation or safety device that plaintiff refused.

### **BACKGROUND**

Plaintiff, an employee of third-party defendant Jerrick Associates, Inc. (Jerrick), was hired to perform caulking and re-sealing work on a large glass wall located in the atrium of the lobby of the premises (Radna Affirm, ¶ 2, NYSCEF Doc No 40). KSB owned the premises and BLDG managed it (*id.* at ¶ 6).

On the date of the accident, May 21, 2018, Jerrick workers set up a metal pipe scaffold in the courtyard on the outside of the glass wall—three sections of scaffold, each six feet high, were placed on top of each other to create an eighteen-foot-high scaffold to perform the caulking work (Plaintiff's First EBT, pp 94-95, 105-15, NYSCEF Doc No 56; Plaintiff's Second EBT, p 23, NYSCEF Doc No 57). However, the scaffold was still not high enough for plaintiff to perform his job so the Jerrick foreman, "Darro," directed the workers to build a makeshift ladder on top of the third level of the scaffold (NYSCEF Doc No 56, pp 115-16). Plaintiff, Darro, and another co-worker, Alfonso, built the ladder out of ten-foot wood planks for the sides and screwed wood

planks in between to create four rungs (NYSCEF Doc No 56, p 116-18; NYSCEF Doc No 57, p 31). They also screwed a piece of wood at the base of the ladder onto the scaffold as a backstop to prevent the ladder from sliding backwards whereas the top of the ladder leaned against the building above the glass (NYSCEF Doc No 57, pp 30, 34). As plaintiff began ascending the ladder to perform his caulking work the scaffold started going sideways causing the ladder to slip and fall, which in turn caused plaintiff to fall (*id.* at pp 34-38). Plaintiff sustained injuries to his skull, wrist, knee, back and neck (NYSCEF Doc No 40, ¶ 4). Plaintiff testified that he could not recall if he was wearing a harness or if he was tied off at the time of the accident (NYSCEF Doc No 57, p 39). Plaintiff also testified that no one ever told him he needed to wear a safety belt or needed to tie off while on the scaffold (*id.* at pp 39-40). Additionally, no one was bracing or holding the ladder as plaintiff ascended it, there were no railings on the scaffold, and plaintiff did not have a harness on nor was he tied off in any way (NYSCEF Doc No 40, ¶ 5).

### DISCUSSION

“It is well settled 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’” (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action” (*Cabrera v Rodriguez*, 72 AD3d 553, 553-54 [1st Dept 2010]).

“The court’s function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility” (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-11 [1st Dept 2010] [internal citations omitted]). The evidence presented on a summary judgment motion must be examined “in the light most favorable to the non-moving party” (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

*Labor Law § 240 (1)*

Labor Law § 240 (1), also known as the Scaffold Law, provides, in relevant part:

All contractors and owners and their agents . . . 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.

Labor Law § 240 (1) “imposes absolute liability on building owners and contractors whose failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker” (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011] [internal quotation marks and citation omitted]). To prevail on a Labor Law § 240 (1) cause of action, the plaintiff must establish that the statute was violated, and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287-89 [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]).

The legislative intent behind the statute is to place “ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident” (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citations omitted]). Therefore, the statute should be liberally construed to achieve the purpose for which it was framed (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]).

Labor Law § 240 (1) requires that ladders and other safety devices be “so constructed, placed and operated as to give proper protection” to a worker (*see also Klein v City of New York*, 89 NY2d 833, 833–34 [1996]; *Lipari v AT Spring, LLC*, 92 AD3d 502, 503-04 [1<sup>st</sup> Dept 2012]). It is well established that the “failure to properly secure a ladder to insure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240 (1)” (*Plywacz v 85 Broad St. LLC*, 159 AD3d 543, 544 [1st Dept 2018] [internal quotation marks and citation omitted]). “It is sufficient for purposes of liability under section 240 (1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent” (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]). The plaintiff is not required to show that the ladder was defective (*Perez v NYC Partnership Hous. Dev. Fund Co., Inc.*, 55 AD3d 419, 420 [1st Dept 2008]).

Here, plaintiff testified that as he ascended the ladder on top of the scaffold, the “scaffold started going sideways and the makeshift ladder followed the scaffold and that’s when [the ladder] slipped” (NYSCEF Doc No 57, p 37). The plaintiff fell approximately twenty feet from

the top of the scaffold down to the ground (NYSCEF Doc No 40, ¶ 4). In view of this testimony, plaintiff has made a *prima facie* showing of entitlement to summary judgment on his Labor Law §240 (1) claim (*see Blake*, 1 NY3d at 289, n 8).

Contrary to defendants' argument that plaintiff does not meet his *prima facie* burden because he does not provide sufficient facts as to how the fall occurred, whether he wore a harness or was tied off, and fails to submit expert testimony, "[a] lack of certainty as to what preceded plaintiff's fall to the floor below does not create a material issue of fact" (*Vergara v SS 133 W. 21, LLC*, 21 AD3d 279, 280 [1st Dept 2005]). Additionally, expert testimony is not required to plead a Labor Law violation—plaintiff's own testimony is sufficient (*see Ortega v City of New York*, 95 AD3d 125 [1st Dept 2015]).

To the extent defendants argue that plaintiff or foreman Darro was the sole proximate cause of his accident by constructing and using the makeshift ladder, such argument is also unpersuasive for when an "owner or contractor has failed to provide adequate safety devices to protect workers from elevation-related injuries and that failure is a cause of plaintiff's injury, [n]egligence, if any, of the injured worker is of no consequence" (*Orellano*, 292 AD2d at 291 [internal quotation marks and citations omitted]). In any event, any action on the part of plaintiff in using the ladder goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action because the statute imposes absolute liability once a violation is shown (*Encarnacion v 3361 Third Ave. Hous. Dev. Fund Corp.*, 176 AD3d 627, 629 [1st Dept 2019]; *Blake*, 1 NY3d at 290 ["if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it"]).

Additionally, defendants' argument that plaintiff was a recalcitrant worker is unpersuasive. To find plaintiff recalcitrant, defendants must establish that plaintiff knew "both

that [adequate safety devices] were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured” (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]; *see also Jastrzebski v North Shore School Dist.*, 223 AD2d 677, 679 [2d Dept 1996], *affd* 88 NY2d 946 [1996] [the recalcitrant worker defense is “premised upon the principle that the statutory protection does not extend to workers who have adequate and safe equipment available to them but refuse to use it”] [citation and internal quotation marks omitted]). Here, there is no evidence that plaintiff was directed to use a harness or tie himself off, and refused to follow this instruction for no good reason (NYSCEF Doc No 57, p 40).

Therefore, defendants have failed to raise a question of fact sufficient to overcome plaintiff’s *prima facie* entitlement to summary judgment in his favor on his Labor Law § 240 (1) claim.

Accordingly, plaintiff is entitled to summary judgment on his Labor Law § 240 (1) claim as against defendants.

*Labor Law 241 (6)*

Labor Law § 241 (6) provides, in relevant part, as follows:

All contractors and owners and their agents, . . . when constructing or demolishing buildings to doing any excavation in connection therewith, shall comply with the following requirements:

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6. All 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 commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, . . . shall comply therewith.

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection for workers and to comply with specific safety rules which have been set forth by the Commissioner of the Department of Labor (*St. Louis v Town of N. Elba*, 16 NY3d 411, 413 [2011]). “The duty to comply with the Commissioner’s safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable” (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). In addition, “[t]he [Industrial Code] provision relied upon by [a] plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles” (*id.*, citing *Ross*, 81 NY2d at 504-05). Therefore, in order to prevail on a Labor Law § 241 (6) claim, “a plaintiff must establish a violation of an implementing regulation which sets forth a specific standard of conduct” (*Ortega v Everest Realty LLC*, 84 AD3d 542, 544 [1st Dept 2011]), and that the violation was a proximate cause of the injury (*see Egan v Monadnock Constr., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

To support his Labor Law § 241(6) claim, plaintiff relies on Industrial Code 12 NYCRR (IC) § 23-5.1 (j) (1), which provides that “the open sides of all scaffold platforms, except those listed in the exception below, shall be provided with safety railings constructed and installed in compliance with this Part.” IC § 23-1.15 details how the railing must be installed on the scaffold.

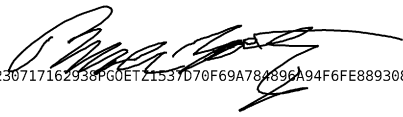
Plaintiff testified that on the top level of the scaffold there were no guardrails and that is sufficient to meet his *prima facie* burden (*see* NYSCEF Doc No 56, p 115). Defendants argue that plaintiff fails to admit evidence as to whether the pipe scaffolding was defective or improperly constructed. However, IC § 23-5.1 (j) (1) addresses only the necessity for scaffolding to have railings, not requirements for building the scaffold. Therefore, defendants fail to raise an issue of fact.

Accordingly, plaintiff is entitled to summary judgment on his Labor Law § 241 (6) claim as against defendants predicated on 12 NYCRR (IC) § 23-5.1 (j) (1).

**CONCLUSION**

It is hereby

ORDERED that plaintiff's motion for summary judgment on his Labor Law §§ 240 (1) and 241 (6) as against defendants is granted.

  
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7/17/2023  
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PAUL A. GOETZ, 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