

**Cicale v Hines 1045 Ave. of the Ams. Invs. LLC**

2023 NY Slip Op 33641(U)

October 17, 2023

Supreme Court, New York County

Docket Number: Index No. 150513/2017

Judge: Shlomo S. Hagler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHLOMO S. HAGLER PART 17

Justice

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ANTHONY CICALÉ, TRACEY CICALÉ,
Plaintiff,

INDEX NO. 150513/2017

MOTION DATE 09/21/2022

MOTION SEQ. NO. 003

- v -

HINES 1045 AVENUE OF THE AMERICAS INVESTORS
LLC, HINES INTERESTS LIMITED PARTNERSHIP, 7BP
OWNER, LLC, STRUCTURE TONE, INC., PACOLET
MILLIKEN ENTERPRISES, INC.,

DECISION + ORDER ON
MOTION

Defendant.

-----X

HINES 1045 AVENUE OF THE AMERICAS INVESTORS LLC,
HINES INTERESTS LIMITED PARTNERSHIP, 7BP OWNER,
LLC, STRUCTURE TONE, INC., PACOLET MILLIKEN
ENTERPRISES, INC.

Third-Party
Index No. 595550/2017

Plaintiff,

-against-

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Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 78, 79, 80, 81, 82,
83, 84, 85, 86, 87, 88, 90, 92, 93, 94, 95, 97, 98, 100, 102, 103, 104, 107, 111, 112, 114, 115

were read on this motion to/for JUDGMENT - SUMMARY

This is an action for personal injuries allegedly sustained by plaintiff on July 7, 2016
while working as a journeyman carpenter employed by third-party defendant Jacobson & Co.,
Inc. at a construction site located at 1038 Avenue of the Americas, New York, NY on the 2nd
floor (the "Premises").

Defendants/Third-Party Plaintiffs Hines 1045 Avenue of the Americas Investors, LLC,
Hines Interests Limited Partnership, 7BP Owner, LLC, Structure Tone, LLC f/k/a Structure

Tone, Inc and Pacolet Milliken Enterprise, Inc. (“defendants”) move for summary judgment dismissing plaintiff’s complaint.

By Interim Decision & Order, dated January 26, 2023 (NYSCEF Doc. No. 107), this Court granted defendants’ motion for summary judgment to the extent of dismissing plaintiff’s claims predicated on Labor Law § 200 and Labor Law § 241 (6). The only issue remaining is defendants’ motion for summary judgment dismissing plaintiff claims under Labor Law § 240 (1).

### BACKGROUND

#### *Plaintiff’s Deposition Testimony*

Plaintiff’s duty on the day of the subject accident was to frame doors and door boxes at the Premises (Plaintiff’s Deposition Tr. at 28 [NYSCEF Doc. No. 82]). Plaintiff and his co-worker were installing door bucks which are frames that hold doors in place (*id.* at 44-45). Prior to the accident, plaintiff had installed three doors at the Premises (*id.* at 51). The floor where plaintiff was working was a raised floor located on the second floor (*id.* at 53). Plaintiff and his co-worker observed that this fourth door (the fourth door that plaintiff worked on that day) was already framed into the concrete slab and the header was installed making it impossible “to get a door buck in” (*id.* at 55). Plaintiff and his co-worker needed to remove floor tiles beneath the door frame and to break up sheet rock underneath the computer raised floor (*id.* at 57-58, 62). To loosen the frame, plaintiff and his co-worker loosened screws, known as “zippies”, beneath the tile floor (*id.* at 58-59). By loosening the screws, plaintiff and his co-worker were able to move the stud over several inches, install the door buck and move the door buck back into place (*id.* at 64-66).

Thereafter, plaintiff and his co-worker noticed that the door was not level (it was “a quarter of an inch out on the right side”) and unscrewed two zippies that connected the header to the right stud in order to move the right stud to the left (*id.* at 68-70). Plaintiff then determined that the door was still not level, and as a result, plaintiff had to go back underneath the raised computer floor to loosen the zippies for a second time (*id.* at 70). Plaintiff describes the subject accident as follows:

Q. So when you were loosening those two zippies for the second time, because the door was about a quarter inch out, is that when your accident occurred?

A. Yes

Q. How did the accident occur?

A. When I loosened up the zippies, the door came down, it shifted in my hand.

Q. Well, what came down?

A. The header, that was supposed to be down – adjusted to the stud. I guess the weight of the door buck, on top of the computer raised floor, the whole door just shifted down (*id.* at 70).

Q. Okay, so what exactly came down then the entire door or –

A. No, the track—the track—there was a bottom track and a top track, which was only three inches of the way. Everything was going through the floor (*id.* at 72-73).

Q. Right, on the concrete floor there was a track?

A. Yes, shot into the concrete slab.

Q. And four inches above that was another track?

A. Yes.

Q. Was that the track that you say came down on you?

A. Yes. The whole right corner came down. Something shifted. I couldn't see what was going on (*id.* at 74).

Plaintiff testified that he had very limited room to accomplish his task, and that prior to his arrival, the steps needed to prepare the area done by other workers were done backwards (*id.* at 73). Plaintiff's foreman said to put the door buck in “the best way we could” (*id.* at 75).

Furthermore, as to the happening of the accident, plaintiff testified as follows:

Q. So that right side of the track was loosened when you were loosening the zippies?

A. Yes, but there were still studs that supported the door, from the concrete up (*id.* at 77).

Q. So this top track, at the time of your incident collapsed?

A. It shifted down.

Q. How far down?

A. If there were four inches, and my hand is maybe two inches, it came all the way down and pinned my hand in there (*id.* at 78).

Q. What were you doing with your right hand, the moment the accident occurred?

A. After I loosened it [the zippie], the door had to come up very slightly to meet the line and I was trying to *lift it* [emphasis supplied].

Q. Your right hand was holding onto what?

A. As soon as I put my hand in there, it came down so fast.

Q. So was your hand touching anything at that moment?

A. I was like – yeah, - the hole –

Q. What I am asking is when you put your hand into the hole, the intention of moving –

A. It collapsed.

Q. Were you touching anything when it collapse[d]?

A. No (*id.* at 78-79).

### DISCUSSION

#### *Summary Judgment*

A party moving for summary judgment under CPLR 3212 “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” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The “facts must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the moving party has met this prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324). The moving party’s “[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*id.*).

#### *Plaintiff’s claim under Labor Law § 240 (1)*

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

“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) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person” (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Importantly, Labor Law § 240 (1) “is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed” (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

Not every worker who falls or is struck by a falling object at a construction site is afforded the protections of Labor Law § 240 (1), and “a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace” (*Makarius v Port Auth. of N.Y. & N.J.*, 76 AD3d 805, 807 [1st Dept 2010]). Instead, liability “is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein” (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

Therefore, to prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff’s injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]).

“Where a plaintiff’s actions [are] the sole proximate cause of his injuries.... liability under Labor Law § 240(1) [does] not attach. Instead, the owner or contractor must breach the statutory

duty under section 240(1) to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries. These prerequisites do not exist if adequate safety devices are available at the job site, but the worker either does not use or misuses them” (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [internal quotation marks and citations omitted]).

In support of their motion, defendants argue that there is no evidence that the subject accident is height related triggering the protection of Labor Law § 240 (1). Defendants contend that prior to the accident, the subject door had already been installed and that the accident occurred when plaintiff was merely adjusting it. Defendants claim that plaintiff was not holding onto anything when the door frame collapsed because of plaintiff removing the screws. Defendants argue therefore that at the moment of the incident, plaintiff was not in the process of hoisting an object.

Defendants also maintain that plaintiff was the sole proximate cause of the subject accident. Plaintiff and his co-worker were in exclusive control of the door and made each decision as they proceeded to do the work. Defendants contend that plaintiff’s supervisor failed to give plaintiff directions on how to repair the door.

In opposition, plaintiff argues that the door frame collapsed on plaintiff’s hand at least in part as a result of the force of gravity, and that an enumerated safety device could have prevented the subject accident, such as a hoist or wedge to support the door frame. Plaintiff refers to his deposition testimony wherein he testified that “after I loosened it [the zippie], the door had to come up very slightly to meet the line and I was trying to lift it.”

Plaintiff further argues that defendant fails to establish prima facie that plaintiff was the sole proximate cause of his accident. Plaintiff testified that his job was more difficult due to the

manner in which the door frame was initially installed. Plaintiff argues that he was told by his supervisor to level the frame as is, and was as such, following instructions from his supervisor when the accident occurred.

Here, plaintiff testified that he was trying to lift the door frame when it collapsed causing injuries to his hand. In *Czajkowski v City of New York*, 126 AD3d 543, 543 [1st Dept 2015], plaintiff was instructed to remove window frames and was injured “when the unsecured top half of the window he was removing fell out of the wall and crushed his hand.” The Court granted partial summary judgment under Labor Law § 240 (1).

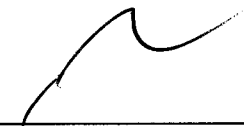
As such, defendants have failed to meet their *prima facie* burden of establishing that plaintiff’s accident did not result from an object which “fell while being hoisted or secured, because of the inadequacy of a safety device of the kind enumerated in [Labor Law § 240 (1)]” (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]). Moreover, defendant has failed to make a *prima facie* showing that plaintiff was the sole proximate cause of the accident.

#### CONCLUSION

On the basis of the foregoing, it is

ORDERED that the motion by defendants/third-party plaintiffs Hines 1045 Avenue of the Americas Investors, LLC, Hines Interests Limited Partnership, 7BP Owner, LLC, Structure Tone, LLC f/k/a Structure Tone, Inc and Pacolet Milliken Enterprise, Inc. for summary judgment

dismissing plaintiff's cause of action under Labor Law § 240 (1) is denied.

<u>10/17/2023</u>		
DATE		SHLOMO S. HAGLER, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE