

**Sagan v TS 405 Lexington Owner, L.L.C.**

2023 NY Slip Op 34799(U)

August 21, 2023

Supreme Court, Kings County

Docket Number: Index No. 506409/2019

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

At IAS Part 99 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, Brooklyn, NY 11201, on the \_\_\_ day of \_\_\_\_\_ 2023.

**AUG 21 2023**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 99

**DECISION  
and  
ORDER**

-----X  
MAREK SAGAN,

Plaintiff,

-against-

Index No.: 506409/2019  
Motion Date: 5/17/2023  
Mot. Seq. 4

TS 405 LEXINGTON OWNER, L.L.C., and  
TISHMAN SPEYER PROPERTIES, L.P.,

Defendants.  
-----X

After oral argument, the following papers were read on this motion pursuant to CPLR 2219(a):

<u>Papers</u>	NYSCEF DOC. #
Plaintiff's motion for summary judgment on the issue of liability against Defendants, TS 405 Lexington Owner, LLC and Tishman Speyer Properties, LP, under Labor Law 240(1), pursuant to CPLR 3212 dated November 29, 2022; attorney affirmation of Evi Kallfa, Esq., affirmed on November 29, 2022; Affidavit of Douglas D. Miller, President of Occupational Safety Consultants, sworn to on November 29, 2022; affidavit of plaintiff Marek Sagan, sworn to on November 29, 2022; Exhibits A-H.....	82-93
Defendant TS 405 Lexington Owner and Tishman Speyer Properties' attorney affirmation of Vincent F. Terrasi, Esq., in opposition, affirmed on March 27, 2023; Affidavit of Terence Fagan, employee of Nicholson & Galloway, Inc., sworn to on March 27, 2023; Affidavit of William O'Halloran, sworn to on March 27, 2023; Exhibits A-B.....	96-100
Plaintiff's attorney affirmation of Evi Kallfa, Esq., affirmed on May 15, 2023, in Reply; Supplement affidavit of Douglas D. Miller, sworn to on May 15, 2023; Exhibits I-J.....	102-104

MONTELIONE, RICHARD J., J.

This action was commenced by filing the summons and complaint on March 22, 2019. Issue was joined by service of the answer on behalf of both defendants on May 6, 2019. This action involves a claim for personal injuries under Labor Law §§ 200; 240(1) and 241(6) as a result of an accident that occurred on December 31, 2018 while plaintiff was employed by non-party Nicholson & Galloway, Inc. The subject premises where the accident occurred is the seventeenth floor of the Chrysler Building located at 405 Lexington Avenue, New York, New York. Defendant TS 405 Lexington Owner, LLC was the lessee of the premises and is alleged to

*Sagan v TS 405 Lexington Owner, L.C.C., and Tishman Speyer Properties, L.P.*, Index No. 506409/2019

have acted as the designated agent of defendant Tishman Speyer Properties, L.P., the owner of the premises.

Plaintiff now moves for partial summary judgment pursuant to CPLR 3212 on the issue of liability under Labor Law § 240(1) which is also known as the Scaffold Law. Plaintiff was a mason for non-party Nicholson & Galloway, Inc. working on a roof on the 17<sup>th</sup> floor at the subject premises and in the process of removing and reinstalling façade stones. In order to accomplish the work, plaintiff and his co-worker transferred the façade stone from one “chain fall hoist” onto the other for the purposes of setting the stone. Plaintiff alleges that as the hoisting tower lifted, he was struck from behind and was pulled forward and to the ground by the hoist he was operating causing injury. The setting stones each weighed between 1,500 to 2,000 pounds. Plaintiff claims that he did not set up the hoisting tower or the counterweights attached to the load beams. Plaintiff provided an affidavit from Douglas D. Miller, an expert on various types of scaffolds, scaffold systems, and hoisting systems who opined that the “hoisting tower was not properly constructed to safely support the load that was applied to it” and it was the “failure of the hoisting tower that led to the injuries that (plaintiff) claims.” Further, the “hoisting mechanism was not properly anchored by a licensed rigger.” Mr. Miller states that a licensed rigger was needed under NYC Construction Code Section 28-404.1 which reflects, “(i)t shall be unlawful to hoist or lower any article on the outside of any building in the city unless such work is performed by or under the direct and continuing supervision of a person licensed as a rigger under the provision of this article.” *See also* New York City, N.Y., Rules, Tit. 1, § 104-20, New York City, N.Y., Rules, Tit. 1, § 104-20, Supervisory Responsibilities of a Licensed Rigger.

The defendants provided the court with an affidavit from Terence Fagan who supervised the work of Nicholson & Galloway, Inc.’s workers and was responsible for making sure the construction jobsite was compliant with OSHA and all pertinent safety codes, investigating and determining and reporting unsafe activity and workplace accidents. Mr. Fagan was the foreman on the job site on the date of the accident, and he states that he has personal knowledge that the project was supervised by Special Rigger, Andrew D. Wilson, one of the owners of Nicholson & Galloway, Inc. On the day of the accident, plaintiff was responsible for reinstalling coping stones on the parapet wall which had been previously removed by plaintiff in the months prior to the date of the accident and opined that plaintiff did not need a Rigger’s license to perform his job. Mr. Fagan was not personally present and did not witness the accident but opined that the counterweights were not properly placed on the opposite end of the scaffold which should have been done by plaintiff and there was “nothing wrong with the scaffold or the hoist tower and that the tie back prevented the equipment from falling to the street.” The investigation report prepared by Mr. Fagan states the following:

On 12-31-18 at 11:20 am Marek Sagan and Victor Antoniak were about to set a coping stone on drop W1. Marek was on the roof using the chain fall to lift the stone. Victor was on the swing stage scaffold. Marek chainfalled the stone up off the roof. Then Marek pushed the stone so it rolled out on the beam dolly. As Marek rolled the stone the scaffold lifted up on the back side. The stone went down and rested on the work platform of the swing stage scaffold. The rear of hoisting tower swung around and went over the wall. Everything washed up by the tieback that was on the

*Sagan v TS 405 Lexington Owner, L.C.C., and Tishman Speyer Properties, L.P.*, Index No. 506409/2019

front of the beam. We all then secured the stone and all the components of the hoisting tower. We pulled safely back up onto the roof. Marek Sagan failed to hook up the counter-weights to the back of the beam on the hoisting tower that was the cause of the incident.

Defendants also provided an affidavit from William O'Halloran, the Safety Director and Labor Supervisor for Nicholson and Galloway, Inc. According to Mr. O'Halloran, he also indicated the project was supervised by Special Rigger, Andrew D. Wilson, one of the owners of Nicholson & Galloway, Inc.

### Legal Analysis

There is no issue of fact that this is a gravity related accident contemplated to be covered under Labor Law § 240(1). *See* Labor Law § 240:

1. 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.

*See also Brown v Dynamic Installation Corp.*, 65 Misc 3d 1225(A), 119 NYS3d 702, 2019 NY Slip Op 51850(U), 2019 WL 6140058, at \*7 [Sup Ct 2019]:

Importantly, Labor Law § 240 (1) “is designed to protect workers from gravity-related hazards such as falling from a height, 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 citation omitted] ). “As has been often stated, the purpose of Labor Law § 240 (1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, ‘those best suited to bear that responsibility’ instead of on the workers, who are not in a position to protect themselves” (*John*, 281 AD2d at 117, quoting *Ross*, 81 NY2d at 500).

Labor Law § 240(1) makes the owner strictly liable except when plaintiff is the sole proximate cause of his injury. *See Koba Mushkudiani, respondent, v Racanelli Constr. Group, Inc., et al., appellants, et al., defendants. Additional Party Names: Fleet Fin. Group, Inc., X & Y Dev. Group, LLC*, 2021-01064, 2023 WL 5064219, at \*1 [2d Dept Aug. 9, 2023] “ ‘Although comparative fault is not a defense to the strict liability of the statute, where the plaintiff is the sole proximate cause of his or her own injuries, there can be no liability under Labor Law § 240(1). A plaintiff may be the sole proximate cause of his or her own injuries when, acting as a ‘recalcitrant worker,’ he or she misuses an otherwise proper safety device, chooses to use an

*Sagan v TS 405 Lexington Owner, L.C.C., and Tishman Speyer Properties, L.P.*, Index No. 506409/2019

inadequate safety device when proper devices were readily available, or fails to use any device when proper devices were available” (*Lojano v. Soiefer Bros. Realty Corp.*, 187 AD3d 1160, 1162 [citations omitted]; see *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39–40).” The duty under Labor Law § 240(1) is non-delegable “irrespective of whether (owner) exercised supervision or control over the work” and “without regard for the negligence, if any, of the injured worker so long as the breach was the proximate cause of the injury.” See *Buckley v Radovich*, 211 AD2d 652, 652-54, 621 NYS2d 638, 639, 1995 WL 27861 [2d Dept 1995]. Here, the failure of the scaffold is the proximate cause of the accident. The court accepts defendants’ argument that the defendant did not have to be a licensed rigger, but the defendants do not address the requirement under NYC Construction Code Section 28-404.1 that it is unlawful to “hoist or lower any suspended article, including but not limited to suspended scaffolds...unless such work is performed by or under the direct and continuing supervision of a person licensed as a rigger.” A violation of this regulation is some evidence of negligence. See *Yenem Corp. v 281 Broadway Holdings*, 18 NY3d 481, 964 NE2d 391, 941 NYS2d 20, 2012 NY Slip Op 01096, 2012 WL 443945 [2012]

The Court in *Mora v 1-10 Bush Term. Owner, L.P.*, 214 AD3d 785, 785-86, 186 NYS3d 51, 53-54, 2023 NY Slip Op 01287, 2023 WL 2506316 [2d Dept 2023] summarizes the legal standard to apply in labor law cases involving Labor Law 240(1):

“ ‘Labor Law § 240(1) imposes a nondelegable duty [and absolute liability] upon owners and general contractors and their agents to provide safety devices necessary to protect workers from risks inherent in elevated work sites’ ” (*Von Hegel v. Brixmor Sunshine Sq., LLC*, 180 A.D.3d 727, 728, 115 N.Y.S.3d 712, quoting *Caiazzo v. Mark Joseph Contr., Inc.*, 119 A.D.3d 718, 720, 990 N.Y.S.2d 529). To prevail on a Labor Law § 240(1) cause of action, a plaintiff must prove (1) that the defendant violated Labor Law § 240(1), and (2) that such violation was a proximate cause of his or her injuries (see *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d 280, 771 N.Y.S.2d 484, 803 N.E.2d 757). Where there is no statutory violation, or where the plaintiff is the sole proximate cause of his or her own injuries, there can be no recovery under Labor Law § 240(1) (see *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d at 290, 771 N.Y.S.2d 484, 803 N.E.2d 757). “[W]here an accident is caused by a violation of the statute, the plaintiff’s own negligence does not furnish a defense” (*Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 39, 790 N.Y.S.2d 74, 823 N.E.2d 439).

“Whether a device provides proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his or her materials” (*Melchor v. Singh*, 90 A.D.3d 866, 868, 935 N.Y.S.2d 106). Specifically, with respect to accidents involving ladders, “liability will be imposed when the evidence shows that the subject ladder was ... inadequately secured and that ... the failure to secure the ladder, was a substantial factor

*Sagan v TS 405 Lexington Owner, L.C.C., and Tishman Speyer Properties, L.P.*, Index No. 506409/2019

in causing the plaintiff's injuries" ( \*\*54 *Canas v. Harbour at Blue Point Home Owners Assn., Inc.*, 99 A.D.3d 962, 963, 953 N.Y.S.2d 150 [internal quotation marks omitted]; see *Von Hegel v. Brixmor Sunshine Sq., LLC*, 180 A.D.3d at 729, 115 N.Y.S.3d 712). Here, the injured plaintiff's deposition testimony that the accident occurred when the ladder he was standing on was struck by a falling pipe and fell over was sufficient to establish, prima facie, the plaintiffs' entitlement to judgment as a matter of law on the issue of liability on the Labor Law § 240(1) cause of action (see *Avila v. Saint David's Sch.*, 187 A.D.3d 460, 133 N.Y.S.3d 18; *Guaman v. Ansley & Co., LLC*, 135 A.D.3d 492, 492, 22 N.Y.S.3d 829; *Gonzalez v. AMCC Corp.*, 88 A.D.3d 945, 946, 931 N.Y.S.2d 415; *Durmiaki v. International Bus. Machs. Corp.*, 85 A.D.3d 960, 960, 925 N.Y.S.2d 628).

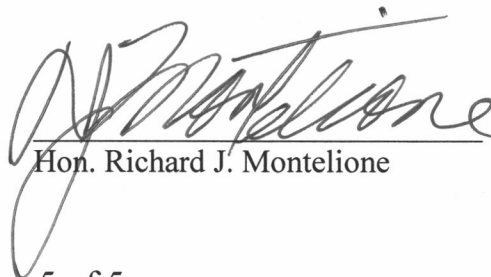
There is no question of fact that the scaffold failed and both parties agree that the scaffold failed because weights were not properly placed on the supporting beams. Defendants asserts that it was plaintiff's responsibility to do so, and plaintiff testified that he was not responsible but his co-worker "Antonio" was responsible as "this was Antonio's responsibility because he had special license for it." (NYSCEF DOC. #89, p. 31, LL-16-21). Terence Fagan, an employee of Nicholson & Galloway, Inc., plaintiff's employer and non-party, states that he was the foreman at the time and the project was supervised by Special Rigger, Andrew D. Wilson, one of the owners of Nicholson & Galloway, Inc. Notwithstanding defendants' argument that plaintiff was the cause of the accident given his failure to hook up the counterweights to the back of the beam on the hoisting tower, his negligence is not enough to defeat a finding of strict liability under the statute given the fact that he cannot be the sole proximate cause of his injuries as the project was supervised by a Special Rigger. *Mora v 1-10 Bush Term. Owner, L.P.*, supra. Further, there is no evidence that plaintiff is a recalcitrant worker which would not make Labor Law § 240(1) applicable. See *Koba Mushkudiani, respondent, v Racanelli Constr. Group, Inc., et al., appellants, et al., defendants. Additional Party Names: Fleet Fin. Group, Inc., X & Y Dev. Group, LLC*, supra.

Based on the foregoing, it is

ORDERED that plaintiff's motion to find defendants strictly liable as a matter of law under Labor Law § 240(1) is GRANTED (MS#4); and it is further

ORDERED that any other request for relief is denied.

This constitutes the decision and order of the Court.



Hon. Richard J. Montelione

5 of 5

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KINGS COUNTY CLERK  
FILED