

Mosquera v TF Cornerstone Inc.
2023 NY Slip Op 35188(U)
March 2, 2023
Supreme Court, Bronx County
Docket Number: Index No. 23663/2016E
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Mtn. Seqs. # 2

JULIO MOSQUERA,

Plaintiff,

Index No.: 23663/2016E

- against -

DECISION and ORDERTF CORNERSTONE INC., 455 WEST 37 LLC. and
MIDTOWN WEST A GC LLC.,

Defendant.

	PAPERS NUMBERED
Plaintiff's Notice of Motion, Affirmation in Support, Exhibits, Statement of Material Facts, Memorandum of Law (Mtn. Seq. # 2)	NYSCEF Doc. No. 33-43
Defendants Cross-Motion; Affirmation in Support, Exhibits, Statement of Material Facts	NYSCEF Doc. No. 46-59
Affirmation in Opposition to Motion, Exhibits, Counter Statement of Facts	NYSCEF Doc. No. 60-66
Plaintiff Affirmation in Opposition to Motion, Exhibits, Counter Statement of Facts, Memorandum of Law	NYSCEF Doc. No. 72-77
Reply Affirmation, Exhibits (Mtn. Seq. # 2)	NYSCEF Doc. No. 81

Upon the enumerated motion papers, and due deliberation:

Defendant 455 West 37th LLC. is the owner of the subject premises, and Defendant TF Cornerstone Inc. was the managing agent at the time of the lost. Plaintiff Julio Mosquera moves for partial summary judgment against Defendants TF Cornerstone, Inc., 455 West 37 LLC., and MidTown West A GC LLC on the 240(1) labor law claims.

Plaintiff seeks to recover damages for personal injuries sustained July 3, 2015, when in the course of his employment with Zupko, the paint subcontractor, he slip/fell off the edge of a bathtub in 455 West 37th street, while painting a bathroom. Defendants cross-move for summary judgment dismissing Plaintiff labor law 240(1) claim. For reasons that follow, Plaintiff's motion for partial summary judgment is granted.

Plaintiff's fall from the edge of the bathroom tub is within the purview of an "elevation related accident" mandating liability under labor law 240(1) and Defendants failed to make any

showing that Plaintiff deliberately refused to obey a direct and immediate instruction to use an available safety device, or a standing order to not stand on the edge of the tub. Because it went unrefuted “... there was no room to place a ladder inside the bathroom ...”, Plaintiff cannot be faulted for failing to use a safety device that could not be effectively used, and cannot be held responsible for the adaptations in work that Plaintiff was forced to make.

FACTS

On July 3, 2015, at approximately 9:00 a.m., Plaintiff was injured while working within an apartment “bathroom” located 455 37th Street, New York, NY (Mosquera EBT of September 24, 2018, pp. 59–60, ll. 59–60, at NYSCEF Document Number 36).

At the time of the incident, Plaintiff was working for Zupko Painting (Mosquera EBT of September 24, 2018, p. 16, ll. 18–24 at NYSCEF Document Number 36); and was assigned to this job by his employer, Zupko Zubovic (Mosquera EBT of September 24, 2018, p. 62, ll.18–22, at NYSCEF Document Number 36).

When Plaintiff first started, he received one week of training from Mr. Zubovic; and has since remained employed for 20 years as a painter; and taught many young painters how to do the job. It’s fair to say Plaintiff is familiar with safe use of ladders, as well as the practice to utilize ladders, while doing painting on apartments. (Mosquera EBT of September 24, 2018, p. 63, ll. 12– 22; p. 65, ll.14–21; pp. 65–66, ll. 22–3, at NYSCEF Document Number 36).

There were two ladders present and available within the apartment where the incident occurred: a 6’ and 8’ A-frame ladders, both in good working condition (Mosquera EBT of September 24, 2018, p. 66, ll. 4–20; p. 67, l. 21, at NYSCEF Document Number 36).

Other than his employer, Mr. Zubovic, Plaintiff did not receive any directions or instructions on how to do the job from anybody else (Mosquera EBT of September 24, 2018, p.

77 ll. 5–8, at NYSCEF Document Number 36). And, other than getting keys or access to apartments from the “Doorman”, Plaintiff did not receive any instructions (Mosquera EBT of September 24, 2018, pp. 77–79, ll. 20–3, at NYSCEF Document Number 36).

THE ACCIDENT

Plaintiff stands 5’10” tall. Plaintiff estimated that the bathroom where the incident occurred had an 8’ high ceiling and the size of the bathroom was approximately 15’ long x 8’ wide. (Mosquera EBT of September 24, 2018, p. 33, ll. 10–11; p. 86, ll. 2–8; p. 90, ll. 2–5 at NYSCEF Document Number 36).¹

According to Plaintiff, the accident occurred while he was painting an apartment bathroom. He stood at the bottom of the tub or he was “standing on the edge” of the bathtub when he slipped. Plaintiff testified he had two A-frame ladders in the apartment; but decided to stand on the edge of the bathtub to paint the ceiling/wall corners in the bathroom because the ladder [when opened] would be too wide and would not fit to allow him to paint those areas. Plaintiff could not use rollers in the location of the bathroom that he painted at the time of the accident; he had to use a paint brush [and not a roller] because with regard to the area he was painting, which he referred to as the “cut work” [the very corner where the ceiling meets the top of the wall], a roller would not fit; the roller could not get inside between the corners; and only the brush could. No other fall protection, other than these two ladders, was made available. (Mosquera EBT of April 11, 2019, p. 57, ll. 12–22, at NYSCEF Document Number 37). Plaintiff tried to straighten his body, he suddenly slipped, fell backwards, landing in a sitting/seated position onto the bathtub floor, and striking multiple parts of his body when he fell (Mosquera

¹ Mr. Mosquera testified to standing on the edge of the tub, he confirmed that he was never told by anyone to stand on the edge of the tub to do his painting.” (Mosquera EBT of April 11, 2019, p. 43, ll. 21–25, at NYSCEF Document Number 37).

EBT of April 11, 2019, pp. 28, pp. 39-40; 43, l. 15; p. 43, ll. 2-6, pp. 59-60, 86-88 at NYSCEF Document Number 37).²

Plaintiff's practice, when painting bathrooms, was to stand on the edge of the tub and in fact, over the years, had painted over one hundred bathrooms like that, and had never fallen. (Mosquera EBT of April 11, 2019, p. 45, ll.14-24; pp. 47-48, ll. 25-5; p. 52, ll. 24-25; p. 66, ll. 7-12 at NYSCEF Document Number 37).

Peter Marinello employed as a doorman by Defendant Cornerstone testified he was the managing agent at the twenty-four story residential/commercial rental building, and that Zupko provided painting services (see NYSECF Doc. No.3- at pages Exhibit 4, p. 7-12). Mr. Marinello testified that he was made aware of plaintiff's accident when he received a call from Mr. Zupko that there was an accident in the apartment; and if Mr. Marinello could go and check to see what happened (see Exhibit 4, pp. 20-21). He saw plaintiff in the apartment laying on the floor; and called for an ambulance; and the ambulance took plaintiff to Bellevue (see Exhibit 4, pp. 21, 31-32). The accident occurred in Apt. 526 (see Exhibit 4, p. 19).

Mr. Marinello confirmed that there were only two A-frame ladders that Zupko had at the subject site [there was no other fall protection] (see Exhibit 4, pp. 12-13).

Mr. Marinello testified that after the accident plaintiff [through Julio, the porter, who acted as a Spanish interpreter] told Mr. Marinello that plaintiff slipped and fell off the edge of the bathtub (see NYSECF Doc. No.3- Exhibit 4, pp. 30-31).

² Plaintiff's accident occurred as he was standing on the edge of the bathtub, holding the paint brush with his right hand and leaning against the wall by the bathtub with his left hand [and holding the paint can]; as he tried to straighten his body, he suddenly slipped, fell backwards, landing in a sitting/seated position onto the bathtub floor, and striking multiple parts of his body when he fell (see Exhibit 3.). (Mosquera EBT of April 11, 2019, p. 58, ll.14-18; pp. 59-60, 86-88, at NYSCEF Document Number 37).

Plaintiff's motion for partial summary judgment and Defendants cross-motion are consolidated for purposes of disposition.

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) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites" (*McCarthy v Turner Constr., Inc.*, 17 N.Y.3d 369, 374, 953 N.E.2d 794, 929 N.Y.S.2d 556; *see Corchado v 5030 Broadway Props., LLC*, 103 A.D.3d 768, 768, 962 N.Y.S.2d 185) and 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 A.D.2d 114, 118, 721 N.Y.S.2d 625 [1st Dept 2001]) . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC.*, 33 A.D.3d 693, 695, 823 N.Y.S.2d 416 [2d Dept 2006] [internal citations omitted]).

However, not every worker who falls 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 A.D.3d 805, 807, 907 N.Y.S.2d 658 [1st Dept 2010]). The purpose of the statute is to "protect construction workers not from routine workplace risks (covered by workers compensation), but from the pronounced risks arising from

construction work site elevation differentials" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603, 922 N.E.2d 865, 895 N.Y.S.2d 279; *see Simmons v City of New York*, 165 AD3d 725, 726, 85 N.Y.S.3d 462).

Plaintiff is entitled to partial summary judgment against Defendants TF Cornerstone, Inc., 455 West 37 LLC., and MidTown West A GC LLC on the 240(1) labor law claims. Dispositive here is the recent Appellate Division First Department decision in *Vitucci v. Durst Pyramid LLC.*, 205 A.D.3d 441, 168 N.Y.S.3d 45 (1st Dept. 2022) where the plaintiff, who was employed by a nonparty plumbing company, was injured while he was installing a shower-curtain rod in a bathroom. The task required plaintiff to use a ladder; however, because there were appliance boxes on the floor of the bathroom, he did not have sufficient space to open an A-frame ladder. As a result, he stood on the rim of the bathtub to perform his work. The Appellate Division held: the motion court properly granted plaintiff's motion for partial summary judgment on his section 240(1) claim. Plaintiff established *prima facie* that he was entitled to judgment by evidence that he suffered harm that "flow[ed] directly from the application of the force of gravity" when he fell from the edge of the bathtub, which served as the functional equivalent of a scaffold or ladder (see *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604, 922 N.E.2d 865, 895 N.Y.S.2d 279 [2009]). The evidence showed that there was insufficient room inside the bathroom for plaintiff to use an A-frame ladder and that plaintiff instead was forced to reach the elevated work area by standing on the edge of the bathtub in order to install the shower-curtain rods. Plaintiff testified that standing on the edge of the tub was necessary because he otherwise would lack the necessary leverage to tighten the screws with an Allen wrench. *Id*

Similarly, Plaintiff's fall from the edge of the bathroom tub is within the purview of an "elevation related accident" mandating liability under labor law 240(1) and despite the evidence

of Plaintiff's twenty-year practice, when painting bathrooms, was to stand on the edge of the tub and in fact, and had painted hundreds of bathrooms like that: - Defendants failed to refute the evidence that "... there was no room to place a ladder inside the bathroom ..." or make any showing that Plaintiff deliberately refused to obey a direct and immediate instruction or standing order, not to stand on the edge of the tub. As is the law in this state, a Plaintiff cannot be faulted for failing to use a safety device that could not be effectively used and cannot be held responsible for the adaptations in work that Plaintiff was forced to make. *Id. Vitucci v. Durst Pyramid LLC.*, 205 A.D.3d 441, 168 N.Y.S.3d 45 (1st Dept. 2022)

As it relates to Plaintiff's labor law §241(6) claims, Defendants' cross-motion for summary judgment to dismiss is untimely, and the record is bare of good cause. (See, CPLR § 3212(a); *Jarama v. 902 Liberty Ave. Housing Development Fund Corp.*, 161 A.D.3d 691, 78 N.Y.S.3d 73 (1st Dept. 2018).

Accordingly, it is

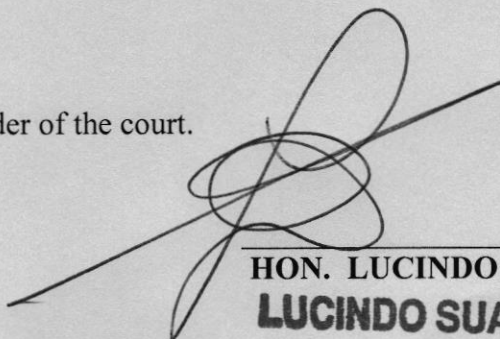
ORDERED, that Plaintiff's Julio Mosquera motion for partial summary judgment as to liability against Defendants TF Cornerstone, Inc., 455 West 37 LLC., and MidTown West A GC LLC on the Labor Law §§240(1) claims is granted; and it is further

ORDERED, that Plaintiff's Plaintiff labor law §200(common law negligence) claims are withdrawn; and it is further

ORDERED, that Defendants' cross-motion for summary judgment dismissing the complaint is denied, as untimely.

This constitutes the decision and order of the court.

Dated: March 2, 2023



HON. LUCINDO SUAREZ, J.S.C.
LUCINDO SUAREZ, J.S.C.