

Melendez v Truffles II, LLC
2023 NY Slip Op 35192(U)
March 27, 2023
Supreme Court, Bronx County
Docket Number: Index No. 27287/2018E
Judge: Lucindo Suarez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Mtn. Seq. # 2

SAMUEL MELENDEZ,

Index No.: 27287/2018E

Plaintiff,

- against -

DECISION and ORDER

TRUFFLES II, LLC,

Defendant.

	<u>PAPERS NUMBERED</u>
Defendant's Notice of Motion, Affirmation in Support, Statement of Material Facts, Exhibits	NYSCEF Doc. No. 42-48
Plaintiff's Notice of Cross-Motion, Affirmation in Opposition/Support, Exhibits, Memorandum in Opposition/Support, Statement of Material Facts, Response to Statement of Material Facts	NYSCEF Doc. No. 52-61
Defendant's Affirmation in Opposition to Cross-Motion and in Reply	NYSCEF Doc. No. 64

Upon the enumerated papers¹, and due deliberation had thereon, this Court finds:

The threshold issue is whether Plaintiff was engaged in a protected activity under Labor Law 240(1) and 241(6), then whether Plaintiff is entitled to judgment against Defendant Truffles II, LLC under Labor Law 240(1), and whether Defendant Truffles II, LLC otherwise demonstrated

¹ Although Plaintiff does not demonstrate good cause for the delay, or otherwise offer an explanation for said delay, this Court will consider the merits of Plaintiff's untimely cross-motion to the extent it sought judgment on his Labor Law 240(1) claim as it was based on the same issues raised in Defendant Truffles II, LLC's summary judgment motion as it sought to dismiss the Labor Law 240(1) claim. *See Jarama v 902 Liberty Ave. Hous. Dev. Fund Corp.*, 161 AD3d 691 [1st Dept. 2018].

Further, as the CPLR or Uniform Rule 202.8-b(e) do not expressly recognize the right to serve a reply on a cross-motion, and no prior leave of court was sought by Plaintiff to do so, this Court declines to review or address the contentions raised in said Plaintiff's reply papers to his cross-motion (NYSCEF Doc. No. 65). [CPLR 2214].

its entitlement to dismissal of Plaintiff's complaint with respect to the Labor Law 240(1) and 241(6) claims.²

This Court holds the accident fall within the protective purview of Labor Law 240(1) and 241(6) and Plaintiff is entitled to judgment. Defendant Truffles II, LLC, however, is entitled to dismissal of Plaintiff's Labor Law 241(6) claim.

According to Plaintiff, on the day of the accident, he was employed as a union handyman at the Truffles building. He testified that, on the date of the accident, his supervisor, Marion, the building superintendent, instructed him to perform "emergency" work at a residential apartment unit within the Truffles building in anticipation of a new tenant moving in. He alleges that he was tasked by Marion to perform repair work that was not part of a punch list or in line with his usual duties and responsibilities for that day. Plaintiff performed various tasks on the date of the accident, including plastering, spackling, and painting walls in the unit.

Before the accident occurred, Plaintiff was provided a six-foot A-frame ladder from Marion to perform the task of shaving or planing the top of a wooden door in order for it to close properly. He testified that he "opened the ladder completely, put the clip down, ma[d]e sure that it was completely open and ma[d]e sure it was steady." Plaintiff also testified that he made sure that the ladder was not "wiggling" and situated on a flat surface, and that the subject ladder was not missing any parts and was working properly. Plaintiff claims that he was shaving the door when the ladder moved and fell sideways causing him to fall off the ladder and sustain injury. In his affidavit, he affirms that he stood on the ladder about 2-3 rungs from the top and he was caused to fall from a height of 3-4 feet from the floor below.

² As Plaintiff, in his Affirmation in Support of Cross Motion and in Opposition to Motion (NYSCEF Doc. No. 53), discontinued his Labor Law 200/common law negligence, 240(2), and 240(3) claims, this Court will not address these claims further herein.

This Court finds Defendant Truffles II, LLC's contention that Plaintiff is not entitled to the protections afforded under Labor Law 240(1) and 241(6) because he purportedly was engaged in routine maintenance work unavailing. Plaintiff was shaving the door as part of the repair work on the door which required him to scrape or shave the top of the door, followed by sanding and painting the door after portions of the door were cut. Plaintiff also indicated that the repair of the subject door was only performed occasionally and not part of his regular duties. Therefore, this Court finds Plaintiff was engaged in a "repair" as contemplated by the statute as the injury-producing work was part of a larger project to prepare the apartment for occupancy by a new tenant, and he was tasked to perform other tasks at the premises, including painting and spackling the walls. Defendant Truffles II, LLC offered no evidence that would raise a triable issue of fact that the repair of the door in this case was a result of normal wear and tear and was expected to be regularly maintained. *See Rodriguez v Milton Boron, LLC*, 199 AD3d 537 [1st Dept. 2021]; *see also Soriano v St. Mary's Indian Orthodox Church of Rockland, Inc.*, 118 AD3d 524 [1st Dept. 2014].

This Court further finds Plaintiff established his *prima facie* burden of a Labor Law 240(1) violation as he demonstrated that Truffles II, LLC failed to properly secure the subject ladder, to ensure that it remained steady and erect while being used, which served as a proximate cause of the accident. *See Ping Lin v 100 Wall St. Prop. L.L.C.*, 193 AD3d 650 [1st Dept. 2021]; *Merino v Continental Towers Condominium*, 159 AD3d 471 [1st Dept. 2018]; *Wasilewski v Museum of Modern Art*, 260 AD2d 271 [1st Dept. 1999]. "It is well settled that a statutory violation is established if a scaffold or ladder shifts, slips, or collapses, thereby causing injury to a worker." *Castillo v TRM Contr. 626, LLC*, 211 AD3d 430 [1st Dept. 2022] [citing *Panek v County of Albany*, 99 NY2d 452, 458 [2003]].

In opposition, Defendant Truffles II, LLC failed to raise triable issues of fact or otherwise, failed to establish *prima facie* his entitlement to dismissal of the Labor Law 240(1) claim. Any sole proximate cause argument fails if Defendant's statutory violation served as a proximate cause for the accident, thus, Plaintiff cannot be solely to blame for it. *See Blake v Neighborhood Hous. Servs. of NY City, Inc.*, 1 NY3d 280 [2003]. Moreover, Plaintiff is not required to demonstrate that the subject ladder was defective in order to satisfy his burden as to the Labor Law 240(1) claim. *See Hill v City of New York*, 140 AD3d 568 [1st Dept. 2016].

In support of his Labor Law 241(6) claim, Plaintiff cites Industrial Code 23 NYCRR §23-1.21(b)(4) (General requirements for ladders; Installation and use), therefore, abandoning all other predicates not raised in his legal arguments, and as such, those claims are dismissed to that extent. *See Burgos v. Premier Props. Inc.*, 145 AD3d 506 [1st Dept. 2016]; *see also 87 Chambers, LLC v. 77 Reade, LLC*, 122 AD3d 540 [1st Dept. 2014].

Since Plaintiff is entitled to summary judgment as to liability on his Labor Law 240(1) claim, the Court need not address the Labor Law 241(6) claim. However, were the Court to reach this claim, the Court finds Industrial Code 12 NYCRR §23-1.21(b)(4) must be dismissed as inapplicable as Plaintiff testified that he made sure the ladder he used was opened completely, steady, not "wiggly," was on a flat surface, and that the ladder was not missing any parts. Plaintiff's testimony and affidavit established that there was no violation of this provision of the Industrial Code as he never alleged that the ladder lacked proper footings or that he performed his work on the ladder from a height between six and ten feet above the ladder footing.

Accordingly, it is

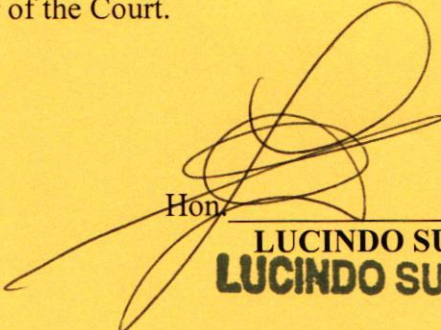
ORDERED, that Defendant Truffles II, LLC's summary judgment motion seeking dismissal of Plaintiff's complaint, is granted in part; and it is further

ORDERED, that Plaintiff's Labor Law 241(6) claim is dismissed; and it is further

ORDERED, that Plaintiff's cross-motion seeking summary judgment on his Labor Law 240(1) claim, is granted.

This constitutes the Decision and Order of the Court.

Dated: March 27, 2023


Hon. LUCINDO SUAREZ, J.S.C.
LUCINDO SUAREZ, J.S.C.