

**Aguilera v OPRA III, LLC**

2024 NY Slip Op 30619(U)

February 28, 2024

Supreme Court, New York County

Docket Number: Index No. 155967/2020

Judge: Sabrina Kraus

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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. SABRINA KRAUS PART 57M**

*Justice*

-----X

LUIZ AGUILERA, DENISE AGUILERA,

Plaintiff,

- v -

OPRA III, LLC, HUDSON MERIDIAN CONSTRUCTION  
GROUP, LLC,

Defendant.

-----X

**INDEX NO.** 155967/2020

**MOTION DATE** 10/02/2023,  
10/26/2023

**MOTION SEQ. NO.** 003 004

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103 were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 104, 105, 106, 107 were read on this motion to/for SUMMARY JUDGMENT.

**BACKGROUND**

This is an action to recover damages for personal injuries allegedly sustained by Plaintiff Luiz Aguilera (Aguilera) when he was struck by a pipe while on a ladder during the course of his employment on a construction project located at 120 Old Post Road in Rye, New York (“premises”) on June 29, 2020, causing him to sustain injuries to his neck and shoulder. Plaintiffs assert causes of action for violations of Labor Law §§240(1), 240(2), 240(3), 200, 200(1), 241(1), 241(2), 241(3), 241(4), 241 (5), and 241(6) and common law negligence, and for loss of consortium on behalf of plaintiff Denise Aguilera. Defendant Hudson Meridian Construction Group, LLC (“Hudson”) was the general contractor on the project, that was hired by defendant OPRA III, LLC (“OPRA”) the purported owner of the premises.

### **PENDING MOTIONS**

On September 19, 2023, plaintiffs moved for an order pursuant to CPLR § 3212(c) granting them partial summary judgment on the issue of liability on their Labor Law §240(1) claim. (Mot. Seq. 3)

On October 9, 2023, defendants moved for an order granting them summary judgment. (Mot. Seq. 4).

The motions are consolidated herein for determination and granted to the extent set forth below.

### **RELEVANT FACTS**

Aguilera testified that he began working for non-party Nationwide Mechanical, Inc. (“Nationwide”) in January 2020 as a sprinkler fitter. Beginning in April or May 2020, until the time of his accident, he was working at a project for the construction of a new residential building complex at 120 Old Post Road in Rye, New York (“jobsite”). His supervisor was Bruno Graca (“Graca”) the owner of Nationwide, who would assign his daily work. He testified that he never received any on the job safety training. At the time of the accident, he was working alone connecting sprinkler pipes in the ceiling above a stairway on the first floor using an eight-foot-tall A-Frame ladder, which belonged to Graca. To do this, he would lock the ladder into place, stand on the third step of the ladder to reach pipes that were a little above eye level, and connect a “cap” to the pipe. The pipes that he was connecting had already been installed by another contractor. While descending the ladder after placing a cap on a pipe, a pipe fell on his left shoulder, causing him to fall off the ladder and hit the ground. He described the pipe as a four-inch pipe that was leaning against the wall when it fell on him. He did not know why the pipe

was there, or who placed it there, but had observed it prior to his accident. He estimated that the pipe was approximately eight feet long.

John Gregory, Assistant Superintendent for Hudson, testified that he became aware of Aguilera's accident when a co-worker informed him that Aguilera was struck by a pipe that he was lifting up and dropped the pipe on his shoulder/neck area. He prepared an accident report afterwards, which included the following description of the accident: "worker was installing sprinkler pipe in the garage level. Upon lifting pipe into the hanger, it slipped and hit him in the neck/shoulder area on the left hand side."

Graca testified there was no specific supervisor for Nationwide at the jobsite, and that Nationwide did not have a custom and practice for how workers would be supervised on jobsites. They would do toolbox talks and provide supervision, but not daily. He trained Aguilera in some job-related tasks, and he also learned on the job from other experienced employees. He testified that pipes would not be stored vertically on a jobsite because they can't stand on their own. He did not witness the accident but testified that Aguilera told him that the pipe he was working on fell on his shoulder when he turned around to reach for a drill or fitting. The standpipe was not attached to anything and was placed vertical on the staircase with the help of Mr. Aguilera's helper. His understanding was that at the time of the accident Aguilera tried to connect the pipe himself, although he said that proper procedure would be to have one worker hold the pipe in place while some else ties the coupling. He was unaware of a pipe being left in the stairway by someone else.

## DISCUSSION

### *Summary Judgment Standard*

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. CPLR § 3212(b); *Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 (2019). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; “conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” *Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 (2016), quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 (1988). In deciding the motion, the evidence must be viewed in the “light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference.” *O’Brien v Port Auth. of New York and New Jersey*, 29 NY3d 27, 37 (2017).

### ***Labor Law §§ 240(2), 240(3), 200, 200(1), 241(1), 241(2), 241(3), 241(4), 241(5), 241(6) and Common Law Negligence Claims***

Plaintiffs represent that they do not oppose the portions of defendants’ motion that seeks dismissal of their Labor Law §§ 200, 241(6) and common law negligence claims. Additionally, they offer no opposition to the portions of defendants’ motion that seeks to dismiss their Labor Law §§ 240(2), 240(3), 200(1), 241(1), 241(2), 241(3), 241(4), and 241(5) claims. Thus, those claims are deemed abandoned and dismissed.

### ***Labor Law § 240(1)***

Plaintiffs contend they are entitled to summary judgment on the issue of liability on their Labor Law § 240(1) claim under either a falling worker or falling object theory. Defendants oppose and contend that they are entitled to summary judgment on this claim, arguing that

plaintiff is not protected by the statute as he was a recalcitrant worker, the pipe was not being hoisted or secured at the time of the accident, and the ladder was not defective.

In relevant part, Labor Law § 240(1) provides that contractors and owners, and their agents who erect a building or structure shall furnish or erect “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.” It is well settled that “[t]he extraordinary protections of Labor Law § 240(1) extend only to a narrow class of special hazards, and do ‘not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity.’” *Nieves v Five Boro Air Conditioning & Refrig. Corp.*, 93 NY2d 914, 915-916 (1999), quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 (1993); *see Misseritti v Mark IV Constr. Co. Inc.*, 86 NY2d 487, 491 (1995).

“Rather, 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 Associates*, 96 NY2d 259, 267 (2001). Moreover, Labor Law § 240(1) only applies to “exceptionally dangerous conditions posed by elevation differentials at work site” rather than the usual and ordinary hazards of construction. *See Misseritti*, 86 NY2d at 491.

Here, it is uncontroverted that Aguilera’s injury was caused by him falling off a ladder while installing pipe, and that no equipment was provided to to guard against the risk of falling from the ladder, and that his coworker was not stabilizing the ladder at the time of the fall. Thus, plaintiffs meet their *prima facie* burden of establishing liability under Labor Law § 240(1) pursuant to a falling worker theory. *See Caceres v Stanford Realty Assoc., Inc.*, 131 AD3d 433 (1st Dept 2015) (finding for plaintiff despite fact that ladder was not defective).

For a plaintiff to prevail on a § 240(1) claim under a falling object theory, he must demonstrate that “at the time the object fell, it either was being ‘hoisted or secured’ or ‘required securing for the purposes of the undertaking.’” *Fabrizi v 1095 Ave. of Americas, L.L.C.* 22 NY3d 658 (2014) (internal citations omitted).

“Where the injured worker's version of the accident is inconsistent with either his own previous account or that of another witness, a triable question of fact may be presented.” *Rodriguez v New York City Housing Authority*, 194 AD2d 460, 462 (1st Dept. 1993). Here, Aguilera was the sole eyewitness to his accident. That non-eyewitnesses testified to somewhat different versions of where the pipe fell from is immaterial, as under each account plaintiff was struck by an unsecured falling object. *See Singh v City of New York*, 191 AD3d 547 (1st Dept 2021); *Cashbamba v 1056 Bedford LLC*, 168 AD3d 638 (1st Dept 2019). Additionally, regardless of the account, the pipe was either being hoisted and secured, or required to be secured for the purposes of the undertaking. *Cf. Millette v Tishman Constr. Corp.*, 144 AD3d 113 (2d Dept 2016) (uncontroverted testimony showed plywood sheet that fell on plaintiff did not require securing for the purposes of the undertaking). Thus, plaintiffs meet their *prima facie* burden under a falling object theory as well.

In opposition, defendants’ contention that Aguilera was a recalcitrant worker is insufficient to raise a triable issue of fact. “A Labor Law § 240(1) claim will be dismissed where the plaintiff employee disobeyed an ‘immediate and active direction’ not to use a particular unsafe piece of equipment, and refused to use adequate safety devices when such were provided.” *Balthazar v Full Circle Constr. Corp.*, 268 AD2d 96 (1st Dept 2000); *see Phillips v Powercraft Corp.*, 126 AD3d 590 (1st Dept 2015). Such actions by a “recalcitrant worker” abrogate what is normally strict liability under the statute only where plaintiff’s own actions are

the sole proximate cause of the accident. *Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35 (2004).

Here, while Graca testified that ordinarily a second person would assist in connecting pipes, there is no indication in the record that Aguilera was warned or otherwise given an explicit instruction not to connect pipe alone. Additionally, there was no indication that he was offered, and refused to use any safety devices. *See Rodriguez*, 194 AD2d at 462.

Thus, plaintiffs are entitled to summary judgment as to liability on their Labor Law § 240(1) under either a falling object or falling worker theory, and the matter shall proceed to an inquest as to damages.

### **CONCLUSION**

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for partial summary judgment with respect to liability on its Labor Law § 240(1) claim (mot. seq. 3) is granted; and it is further

ORDERED, that defendants' motion for summary judgment (mot. seq. 4) is granted, to the extent that causes of action for violations of Labor Law §§ 240(2), 240(3), 200, 200(1), 241(1), 241(2), 241(3), 241(4), 241 (5), and 241(6) and common law negligence are dismissed as abandoned, and otherwise denied; and it is further


ORDERED that an immediate trial of the issues regarding damages shall be had before the court; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk's Office; and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that counsel appear for a virtual pre-trial conference on March 13<sup>th</sup>, 2024 at 2:30 PM, at which time a final trial date will be scheduled.

This constitutes the decision and order of this court.

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| <u>2/28/2024</u>      |  |   | <u>SABRINA KRAUS, J.S.C.</u>       |
| <b>DATE</b>           |  |   |                                    |
| CHECK ONE:            | <input type="checkbox"/> CASE DISPOSED                           | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION |                                    |
|                       | <input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED | <input checked="" type="checkbox"/> GRANTED IN PART       | <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 |