

**Humphrey v Vanderbilt Prop. Mgt. LLC**

2024 NY Slip Op 32010(U)

June 11, 2024

Supreme Court, Kings County

Docket Number: Index No. 519128/2019

Judge: Francois A. Rivera

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of June 2024

HONORABLE FRANCOIS A. RIVERA

-----X  
DONOVAN HUMPHREY

Plaintiff,

- against -

VANDERBILT PROPERTY MANAGEMENT LLC,  
and 146 EAST 49TH STREET OWNER'S CORP.,

Defendants.  
-----X

**DECISION & ORDER**

Index No.: 519128/2019

Oral Argument: 4/18/2024

Ms. 8 & 9

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed on December 29, 2023, under motion sequence number eight, by Donovan Humphrey (hereinafter plaintiff) for an order pursuant to CPLR 3212 and Labor Law § 240 (l) granting summary judgment to plaintiff on liability and dismissing defendants' Vanderbilt Property Management LLC and 146 East 49<sup>th</sup> Street Owner's Corp. (hereinafter defendants) affirmative defense of comparative fault. The motion is opposed.

- Notice of motion
- Affirmation in support
- Memorandum of law in support
- Statement of material facts
  - Exhibits A-G
- Amended notice of motion
- Affirmation in opposition
- Memorandum of law in opposition
- Counter Statement of material facts
  - Exhibit A
- Memorandum of law in reply
  - Exhibit A

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of cross-motion filed on February 23, 2024, under motion sequence number nine, by defendants Vanderbilt Property Management LLC and 146 East 49<sup>th</sup> Street Owner's Corp. for an order denying plaintiff's motion for summary judgment and granting defendants' motion for partial summary judgment dismissing plaintiff's Labor Law § 240 (l) claim.

-Notice of cross-motion

## BACKGROUND

On August 29, 2019, plaintiff commenced the instant action for damages for personal injury by filing a summons and verified complaint with the Kings County Clerk's Office (KCCO). On October 16, 2019, defendants Vanderbilt Property Management LLC and 146 East 49th Street Owner's Corp. interposed and filed a joint verified answer. As relevant to the motion, the defendants first affirmative defense alleged that the plaintiff was injured due to his own carelessness and negligence. On November 1, 2023, plaintiff filed a note of issue.

The verified complaint alleges one hundred and fifty-one allegations of fact in support of a single cause of action for negligence asserted against defendants Vanderbilt Property Management LLC and 146 East 49th Street Owner's Corp. The verified complaint and plaintiff's deposition testimony alleges the following salient facts. On February 25, 2019, plaintiff was working as a plumbing assistant for Arthur C. Klem at 146 49th Street in New York, New York, 10017 (hereinafter the subject premises). At the time of the accident, 146 East 49th Street Owners Corp. was the owner of the subject premises and Vanderbilt Property Management LLC was the property management

company. While ascending the stairs with his tool case, the plaintiff tripped and fell down the defective staircase. The second step from the landing was rusted, rotted, wobbly, and broke. In addition, the handrail was shaky and loose, providing no support. The defendants had notice of the defective condition of the second step, but failed to take any action to remedy it prior to plaintiff's accident.

### LAW AND APPLICATION

It is well established that summary judgment may be granted only when no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320, 325 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of material issues of fact (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81, 81 [2003]).

A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324). "A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions" (*Poon v Nisanov*, 162 AD3d 806 [2d Dept 2018], quoting CPLR 3212 [b]). "The moving party's submissions must show 'that there

is no defense to the cause of action or that the cause of action or defense has no merit”

(*Poon v Nisanov*, 162 AD3d at 806, quoting CPLR 3212 [b]).

***Plaintiff's Motion for Summary Judgment on the Labor Law 240(1) Claim***

The plaintiff has moved for an order pursuant to CPLR 3212 granting summary judgment to the plaintiff on the issue of liability on its claim of a violation of Labor Law § 240 (1) asserted against defendants Vanderbilt Property Management LLC and 146 East 49th Street Owner's Corp. A plaintiff moving for partial summary judgment on a Labor Law § 240 (1) must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*Robinson v. East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]; *Williams v 520 Madison Partnership*, 38 AD3d 464, 464-465 [1st Dept 2007]). “The plaintiff need not demonstrate that the [safety device] was defective or failed to comply with applicable safety regulations,” but only that it “proved inadequate to shield [plaintiff] from harm directly flowing from the application of the force of gravity to an object or person” (*Williams*, 38 AD3d at 465, citing *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 561 [1993]).

The verified complaint as amplified by the plaintiff's bill of particulars and supplemental bills of particulars do not allege a claim for a violation of Labor Law § 240 (1). The verified complaint, bill of particulars, and supplemental bills of particulars only allege a single cause of action for common law negligence.

Inasmuch as there is no plead cause of action for a violation of Labor Law § 240 (1), the plaintiff's motion for an order granting summary judgment in plaintiff's favor on the issue of liability on such a claim is necessarily denied.

***Plaintiff's Motion for Dismissal of the Defendant's Affirmative Defenses***

The plaintiff also has moved for an order pursuant to CPLR 3211 (b) striking the affirmative defense of comparative fault asserted in the answer of defendants Vanderbilt Property Management LLC and 146 East 49th Street Owner's Corp.

"[W]here affirmative defenses 'merely plead conclusions of law without any supporting facts,' the affirmative defenses should be dismissed pursuant to CPLR 3211 (b)" (*Bank of Am., N.A. v 414 Midland Ave. Assoc., LLC*, 78 AD3d 746, 750 [2d Dept 2010], quoting *Fireman's Fund Ins. Co. v. Farrell*, 57 AD3d 721, 723 [2d Dept 2008]). CPLR 3211 (b) provides that a party may move for judgment dismissing one or more defenses on the ground that a defense is not stated or has no merit. "When moving to dismiss, the plaintiff bears the burden of demonstrating that the affirmative defenses 'are without merit, as a matter of law, because they either do not apply under the factual circumstances of the case or [they] fail to state a defense'" (*Shah v. Mitra*, 171 AD3d 971, 974 [2d Dept 2019], quoting *Bank of Am., N.A. v 414 Midland Ave. Assoc., LLC*, 78 AD3d 746 [2d Dept 2010]). Here, the plaintiff did not meet that burden.

On a motion pursuant to CPLR 3211 (b), the court should apply the same standard it applies to a motion to dismiss pursuant to CPLR 3211 (a) (7), and the factual assertions of the defense will be accepted as true (*Shah v Mitra*, 171 AD3d at 974, quoting *Wells*

*Fargo Bank, N.A. v Rios*, 160 AD3d 912, 913 [2d Dept 2018]). “Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed” (*Shah v Mitra*, 171 AD3d at 974, quoting *Wells Fargo Bank, N.A. v Rios*, 160 AD3d 912, 913 [2d Dept 2018]). In opposition to the motion, the defendants argued that the plaintiff choosing to use the allegedly defective stairway with plaintiff’s tool cart is evidence of conduct potentially contributing to plaintiff’s own accident. The Court finds that there is some doubt about the availability of this defense. Therefore, the plaintiff’s motion to dismiss the affirmative defense of culpable conduct is denied.

***Defendants’ Motion for Summary Judgment Dismissing the Plaintiff’s Labor Law 240***

***(1) Claim***

By notice of cross-motion the defendants Vanderbilt Property Management LLC and 146 East 49th Street Owner’s Corp. sought an order pursuant to CPLR 3212 dismissing any claims by the plaintiff alleging a violation under Labor Law § 240 (1). Contrary to the requirements of CPLR 2214, the defendants offered no law, facts, or argument in support of the branch of the motion seeking to dismiss any claims by the plaintiff alleging a violation under Labor Law § 240 (1). By their failure to specifically explain what they were seeking, the cross-motion may be denied on that basis (*see Abizadeh v Abizadeh*, 159 AD3d 856, 857 [2d Dept 2018]). However, because there is no plead cause of action for a violation of Labor Law § 240 (1) the defendants’ motion is denied as moot.

**CONCLUSION**

The branch of the motion by plaintiff Donovan Humphrey for an order pursuant to CPLR 3212 granting summary judgment to plaintiff on the issue of liability on its claims asserted against defendants Vanderbilt Property Management LLC and 146 East 49th Street Owner's Corp. for a violation of Labor Law § 240 (1) is denied.

The branch of the motion by plaintiff Donovan Humphrey for an order pursuant to CPLR 3211 (b) order striking the affirmative defense of comparative fault asserted in the verified answer of defendants Vanderbilt Property Management LLC and 146 East 49th Street Owner's Corp. is denied.

The cross-motion by defendants Vanderbilt Property Management LLC and 146 East 49th Street Owner's Corp. for an order pursuant to CPLR 3212 dismissing any claims by the plaintiff alleging a violation under Labor Law § 240 (1) is denied as moot.

The foregoing constitutes the decision and order of this Court.

ENTER:

  
\_\_\_\_\_  
J.S.C.  
HON. FRANCOISA RIVERA