

Moore v DMD Contr. NY LLC

2024 NY Slip Op 32051(U)

June 17, 2024

Supreme Court, New York County

Docket Number: Index No. 158337/2020

Judge: Mary V. Rosado

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

-----X

HOWARD MOORE,

Plaintiff,

- v -

DMD CONTRACTING NY LLC A/K/A DMD CONTRACTING
LLC, STV CONSTRUCTION, INC., NEW YORK CITY
HOUSING AUTHORITY,

Defendant.

-----X

DMD CONTRACTING NY LLC A/K/A DMD CONTRACTING
LLC, STV CONSTRUCTION, INC., NEW YORK CITY
HOUSING AUTHORITY

Plaintiff,

-against-

SAFETY DYNAMICS, LLC

Defendant.

-----X

DMD CONTRACTING NY LLC A/K/A DMD CONTRACTING
LLC, STV CONSTRUCTION, INC., NEW YORK CITY
HOUSING AUTHORITY

Plaintiff,

-against-

MEDCO ELECTRIC INC.

Defendant.

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INDEX NO. 158337/2020

MOTION DATE 12/23/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595125/2022

Second Third-Party
Index No. 595252/2023

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 105, 106, 107, 108, 109, 110, 111, 112, 114, 133, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 162, 163, 164, 168

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, and after oral argument, which took place on October 24, 2023 with Jesse M. Minc, Esq. appearing for Plaintiff Howard Moore (“Plaintiff”), Kelly A. McGee, Esq. appearing for Defendants/Third-Party Plaintiffs/Second Third-Party Plaintiffs DMD Contracting NY LLC a/k/a DMD Contracting LLC (“DMD”), STV Construction, Inc. (“STV”) and New York City Housing Authority (“NYCHA”) (collectively “Defendants”), and Eduardo Maffia, Esq. appearing for Third-Party Defendant Safety Dynamics, LLC (“Safety Dynamics”), Plaintiff’s motion for summary judgment on his Labor Law §§240(1) and 241(6) claims is granted in part and denied in part. STV’s cross-motion for summary judgment seeking dismissal of all claims and crossclaims against it is granted.

A. Background

1. Pertinent Facts

This is a Labor Law §§ 240(1) and 241(6) action arising from Plaintiff’s fall on December 5, 2019 at the Jacob Riis Houses, Building 15, located at 749 FDR Drive, New York, New York (the “Building”) (*see generally* NYSCEF Doc. 1). At the time of his accident, Plaintiff was working as a lather for third-party Defendant Medco (NYSCEF Doc. 127 at 63:9-17). Plaintiff would receive instruction, including the location to work and blueprints for construction, from a Medco superintendent (NYSCEF Doc. 43 at 69:2-14).

There were trenches at the worksite on the date of the accident and Plaintiff was trying to descend into the trench (NYSCEF Doc. 127 at 73:6-9). Plaintiff testified that the trenches were approximately six feet deep (*id.* at 73:11-18). Medco created the trenches (NYSCEF Doc. 127 at 76:25; 77:2). Plaintiff testified that Medco laborers and a Medco supervisor named Chafic Elkady (“Mr. Elkady”) were responsible for making sure that ladders were returned to the Medco trailer (*id.* at 74:10-20).

On the date of the incident, the ladder which Plaintiff used to descend into the trench had already been placed (*id.* at 76:5-9). According to Plaintiff, it was a double or triple extension ladder (*id.* at 78:7-10). Plaintiff testified the ladder was approximately 7-8 feet long (*id.* at 93:2-10). Plaintiff fell while descending the ladder and the ladder fell with him (NYSCEF Doc. 127 at 85:6-11). He thought the ladder was on solid footing, but the ladder started to shake and he then fell (*id.* at 89:10-13). The feet of the ladder rested on rubble, dirt, concrete, and wood on the floor of the trench (NYSCEF Doc. 43 at 97:3-9). Plaintiff testified he never learned who put the ladder in the trench (NYSCEF Doc. 127 at 109:10-15).

DMD was the general contractor on site (NYSCEF Doc. 130 at 11:10-12). DMD was overseeing the installation of new underground gas distribution system, construction of flood barriers, construction of four ancillary buildings to house new electrical equipment, and updating interior finishes, among other things (*id.* at 15:7-24). NYCHA hired DMD directly (*id.* at 16:21-24). The contract was entered in approximately November of 2017 (*id.* at 17:5-7). Mr. Wagner, a representative of DMD, testified that DMD was responsible for the actual physical work while STV was responsible for oversight and serving as a liaison between NYCHA and DMD (*id.* at 20:17-22). Plaintiff testified that STV never instructed Plaintiff how to do his work (*id.* at 47:4-7).

DMD hired subcontractors (NYSCEF Doc. 130 at 21:12-14). DMD had authority over its own subcontractors to ensure their work was done in accordance with architectural plans and if the work deviated from the plans DMD would direct the subcontractor to correct the work (*id.* at 23:5-25). DMD hired Plaintiff's employer, Medco. (*id.* at 24:6-12).

DMD's representative testified that they did not have authority to direct Medco's work, but in the event of an emergency or unsafe act they would have the authority to direct somebody to stop that work. (*id.* at 28:2-8). Plaintiff however testified that DMD would supervise his work

and speak with Plaintiff's superintendent regarding rebar installation (NYSCEF Doc. 53 at 46:10-15).

DMD subcontracted with Site Safety Dynamics to serve as site safety manager (*id.* at 30:4-8). Site Safety Dynamics' safety manager was Barry McGregor (NYSCEF Doc. 130 at 30:11-14). Mr. McGregor would perform a walk-through of the job site every day (*id.* at 31:10-14). Mr. McGregor reported directly to DMD (*id.* at 33:21-23).

The trenches dug would have been a 3 to 4 feet deep (*id.* at 38:12-15). Mr. Wagner was unaware of any specific instruction to lathers to use short ladders to enter or exit the trench (*id.* at 49:14-20). Mr. Wagner testified that Mr. McGregor was responsible for directing the correction of an improperly placed ladder if observed (*id.* at 67:16-20).

An STV Representative, Peter O'Hanlon, testified that his responsibilities as a project manager with STV included coordinating the contractual requirements related to specific projects to make sure staff with the STV team were performing the duties their contract required (NYSCEF Doc. 131 at 20:13-21). As for the site of Plaintiff's accident, Mr. O'Hanlon testified STV's job was to make sure the contractor was meeting or exceeding the contractual requirements both as to completeness and standards (*id.* at 25:18-25; 25:2). STV did not perform any construction work at the work site, nor did they hire any subcontractors or oversee the work of any of the subcontractors. (*id.* at 29:14-25). STV instead performed quality control checks and would inform DMD of any discrepancies or deficiencies if the material was not matching (*id.* at 31:10-15). Once the deficiency was noted it was DMD's responsibility to correct it (*id.* at 32:9-12). Mr. O'Hanlon testified the quality control was more for finishes, such as making sure doors matched a certain design rather than structural components (*id.* at 36:5-13). Mr. O'Hanlon testified that STV did not

have the authority to instruct DMD regarding the means or methods of installation of the work (*id.* at 33:2-12).

With regard to the trenches on the site, Mr. O'Hanlon testified that trenches varied from three feet in depth to five feet in depth, with five feet deep trenches requiring a ladder to enter and exit (*id.* at 59:4-25; 60:2). Mr. O'Hanlon testified if he saw workers using a ladder to enter a trench in an unsafe manner, they would ask the worker not to use it until the ladder "was deemed safe" (*id.* at 77:10-20). He also informed that upon notice of an unsafe condition, Barry McGregor would inform the staff to "use it and set it up...in the proper manner." (*id.* at 77:21-25).

Barry McGregor provided deposition testimony (NYSCEF Doc. 126). He admitted he is a safety manager at Safety Dynamics (*id.* at 10:21-23). He admitted that he was working at the worksite at issue in December of 2019 and he would report to DMD's project manager (*id.* at 16:17-23). Mr. McGregor testified that if he saw a concern on the job, he would refer it to the superintendent but would not directly stop workers unless there was an immediate danger to life and health (*id.* at 42:17-24).

Mr. McGregor testified that the ladder which Plaintiff was using was built by one of the carpenters from Medco (*id.* at 31:19-24). He further testified that he would not be required to inspect the job-built ladders (*id.* at 32:21-25). However, he did say he observed job-built ladders on the project (*id.* at 33:9-10). Mr. McGregor testified he conducted five to six walkthroughs of the site per day to identify unsafe practices and hazardous conditions (*id.* at 43:2-17). He would sometimes walk with the superintendent of DMD (*id.* at 45:2-3). Mr. McGregor testified it would be an unsafe practice for someone to enter a 3-4-foot trench with an orange extension ladder because the ladder is too long for the trench (*id.* at 55:4-16). However according to Mr. McGregor a wooden ladder was present in the trench, not an orange extension ladder (*id.* at 56:5-10). Mr.

McGregor testified if he saw an extension ladder in the trench he would have told a superintendent to remove the ladder out of the trench and put in a more accessible ladder (*id.* at 58:19-25; 59:2-3). Mr. McGregor admitted that Medco employees were taking apart extension ladders to use for trench access which was considered a safety hazard (*id.* at 84:19-25; 85:7-16). He testified he had spoken with Medco's superintendent about ladders being used improperly and requesting certain ladders be removed (*id.* at 129:7-23). Prior to Plaintiff's accident, Mr. McGregor testified he provided pre-task instructions on how to use a ladder discussing ladder safety and access to trenches (*id.* at 72:2-15).

2. The Instant Motion

a. Plaintiff's Motion

Plaintiff argues he is entitled to summary judgment on his Labor Law § 240(1) claim against DMD, STV and NYCHA because the ladder provided to him failed to provide adequate protection to prevent him from falling into the trench (NYSCEF Doc. 40). Plaintiff argues that a fall into a three-foot deep trench constitutes a fall covered by § 240(1) and that Plaintiff's comparative fault is not a defense to a §240(1) claim.

Plaintiff argues he is entitled to summary judgment on his Labor Law §241(6) claims because the ladder used by Plaintiff was allowed to be placed on a floor contaminated with slippery footing. He further argues that both Mr. Wagner and Mr. McGregor admitted that the ladder was not a safe means of access to the trench.

Plaintiff's motion is opposed by Safety Dynamics. According to Safety Dynamics, Plaintiff's Labor Law § 240(1) claim is inappropriate for summary judgment due to issues of material facts. Safety Dynamics argues that there is a dispute as to whether Plaintiff was using an extension ladder or a wooden job-built ladder at the time of his fall. Safety Dynamics also argues

that there is an issue of fact as to whether Plaintiff fell from a loose ladder or some other means. Safety Dynamics argues that there is an issue of fact regarding which ladder was used precludes granting Plaintiff summary judgment on his Labor Law § 241(6) claims. DMD, STV and NYCHA likewise oppose on essentially the same basis.

In reply, Plaintiff argues it is not a material issue of fact whether Plaintiff used a job-built ladder or the extension ladder as defense witnesses admitted that job-built ladders were not always secured for trench access. Plaintiff argues it is not an issue of fact as to whether Plaintiff was the sole proximate cause because Defendants have the burden of proof of showing that Plaintiff refused to use a job-built ladder and there is no evidence that Plaintiff was ever told that a job-built ladder was required to enter or exit the trench.

b. STV's Cross-Motion

STV cross-moves for summary judgment arguing that it was solely the construction manager, and that it had no authority to supervise, manage, or control the work being done at the Building and therefore cannot be liable under Labor Law §§ 240(1) and 241(6). STV argues that it exercised no oversight over DMD nor did it hire any subcontractors or oversee the work of subcontractors at the Building.

Plaintiff opposes by arguing that STV may be considered a statutory agent whereby it is held vicariously liable for the owner, here NYCHA. In reply, STV largely reiterates that it cannot be liable as it was not delegated supervisory control or authority over the work which caused Plaintiff's injury.

B. Legal Analysis

1. Standard

“Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact.” (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party’s “burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

2. STV’s Cross-Motion

The Court will first address STV’s cross-motion, which is granted. The Court of Appeals has held that while construction managers of a work site are generally not responsible for injuries under Labor Law §240(1), they may be held liable under Labor Law § 240(1) as an agent of the property owner if the manager had the ability to control the activity which brought about the injury (*Walls v Turner Const. Co.*, 4 NY3d 861, 864 [2005]). The *Walls* Court provided four factors which may be utilized in determining whether a construction manager may be held vicariously liable as a statutory agent of the owner for purposes of Labor Law liability. These factors are: (1) a contract creating agency; (2) absence of a general contractor; (3) the agent’s duty to oversee the

construction site; and (4) the agent's authority to control activities at the work site and to stop any unsafe work practices. (*id.*).

It is undisputed that NYCHA did not delegate any authority to allow STV to control the means, methods, techniques, or sequences at the work site, which were expressly stated to remain the responsibility of the construction contractors (NYSCEF Doc. 141 at §4.1.2). Moreover, unlike *Walls*, there was a general contractor on site – namely DMD, who has not moved for summary judgment (NYSCEF Doc. 53 at 46:21-24).

This was buttressed by Mr. O'Hanlon's testimony, wherein he stated that STV did not perform any construction work at the work site, nor did they hire any subcontractors or oversee the work of any of the subcontractors. (NYSCEF Doc. 131 at 29:14-25). STV instead performed quality control checks which would identify DMD of any discrepancies or deficiencies if the material was not matching (*id.* at 31:10-15). Once the deficiency was noted it was DMD's responsibility to correct it (*id.* at 32:9-12). Mr. O'Hanlon testified the quality control was more for finishes, such as making sure doors matched a certain design rather than structural components (*id.* at 36:5-13). Mr. O'Hanlon testified that STV did not have the authority to instruct DMD regarding the means or methods of installation of the work (*id.* at 33:2-12). STV did not contract with Plaintiff's employer, nor did it provide the ladder which caused Plaintiff's injury.

An analogous combination of documentary and testamentary was recently held by the First Department to be sufficient to grant the construction manager summary judgment (*Diaz v P&K Contracting, Inc.*, 224 AD3d 405, 406 [1st Dept 2024]; *Mendriski v New York City Housing Authority*, 189 AD3d 410, 411 [1st Dept 2020] [NYCHA's contracted construction manager exercised only general supervisory authority and did not control the manner in which the injury-producing work was being performed]; *cf. Siegel v Delta Airlines, Inc.*, 209 NYS3d 408, 410 [1st

Dept 2024] [issue of fact as to whether defendant was statutory agent where purported agent described itself as a construction manager and general contractor, supervised and directed work, retained subcontractors including plaintiff's employer, and was solely responsible for all construction means, methods, and sequences]). Accordingly, STV's cross-motion is granted.

3. Plaintiff's Motion for Summary Judgment

Plaintiff's motion for summary judgment is granted in part and denied in part.¹ The Court finds that Plaintiff is entitled to summary judgment on his Labor Law § 240(1) claim against NYCHA as owner and DMD as the general contractor. Plaintiff has made a prima facie claim under Labor Law § 240(1) as he was a lather who was employed on a construction site at the Jacob Riis houses when he fell from an unsecured ladder multiple feet into a trench (*see, e.g. Castillo v TRM Contracting 626, LLC*, 211 AD3d 430-431 ["[i]t is well settled that a statutory violation is established if a scaffold or ladder shifts, slips, or collapses, thereby causing injury to a worker...[t]his rule pertains to a fall from a ladder in a closed position where, as here, the conditions of the workplace make it impossible for the worker to place the device in an open, secure position"]; *Rubio v New York Proton Management, LLC*, 192 AD3d 438, 439 [1st Dept 2021]; *Hill v City of New York*, 140 AD3d 568, 569 [1st Dept 2016] ["failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240(1)"]).

Although Defendants argue an issue of fact exists because Mr. McGregor testified that he saw a work-built ladder at the location of the accident in contravention of Plaintiff's testimony that there was an extension ladder, the Court finds this discrepancy is insufficient to deny summary judgment. As Plaintiff correctly points out, Mr. McGregor testified that even the job-built ladders

¹ The motion is denied only as to STV, who was dismissed from this case pursuant to the Court's granting of STV's cross motion.

used to enter the trench where Plaintiff was injured were not secured but merely leaned against the trench walls – therefore it is immaterial what ladder Plaintiff actually used because either ladder, being unsecured, could have easily slid on the rubbish in the trench upon Plaintiff's descent (*Cashamba v 1056 Bedford LLC*, 168 AD3d 638, 649 [1st Dept 2019]).

The Court likewise rejects Plaintiff's sole proximate cause defense as Plaintiffs have proffered no evidence that anyone ever instructed the Plaintiff not to use an extension ladder to descend into the trench. In fact, the deposition testimony from both Mr. McGregor and Mr. Wagner stated there was no rule or instruction given to any Medco workers regarding job-built ladders being used to descend into the trench. Therefore, Plaintiff's motion on his Labor Law §240(1) claim is granted. Because Plaintiff's Labor Law §240(1) claim is granted, Plaintiff's Labor Law § 241(6) claim is denied as academic (*Malan v FSJ Realty Group II LLC*, 213 AD3d 541, 542 [1st Dept 2023]; *Howard v Turner Constr. Co.*, 134 AD3d 523, 524 [1st Dept 2015]).

Accordingly, it is hereby,

ORDERED that Plaintiff Howard Moore is granted partial summary judgment on his Labor Law §240(1) claim against Defendants DMD Contracting NY LLC a/k/a DMD Contracting LLC and New York City Housing Authority; and it is further

ORDERED that Plaintiff Howard Moore's motion for summary judgment is denied as to Defendant STV Construction, Inc.; and it is further

ORDERED that Plaintiff Howard Moore's motion for summary judgment on his Labor Law §241(6) claim is denied as academic; and it is further

ORDERED that Defendant STV Construction Inc.'s motion seeking dismissal of Plaintiff's claims and all cross-claims against it is granted; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff Howard Moore shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF; and it is further ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

6/17/2024
DATE

Mary V Rosado Jsc
HON. MARY V. ROSADO, J.S.C.

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	