

**Zarate v 791 Eighth Ave. LLC**

2024 NY Slip Op 32695(U)

August 1, 2024

Supreme Court, New York County

Docket Number: Index No. 162457/2019

Judge: Mary V. Rosado

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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. MARY V. ROSADO PART 33M

*Justice*

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ELISEO PEREZ ZARATE,  
  
Plaintiff,

INDEX NO. 162457/2019

MOTION DATE 07/20/2024

MOTION SEQ. NO. 001

- v -

791 EIGHTH AVENUE LLC,  
  
Defendant.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 39, 40, 41, 42, 43

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, Defendant 791 Eighth Avenue LLC’s (“Defendant”) motion for summary judgment dismissing Plaintiff Eliseo Perez Zarate’s (“Plaintiff”) Complaint is granted.

**I. Background**

On December 6, 2019, Plaintiff was employed as a food runner at a restaurant called Sombrero Restaurant (NYSCEF Doc. 27 at 17:4-14). The restaurant is located at 303 43rd Street, New York, New York (*id.* at 27:9-13). On December 6, 2019, he was asked by his manager to clean the windows of the restaurant (*id.* at 18:2-8). He used a ladder from the basement to clean the windows (*id.* at 28:2-4). Nobody directed Plaintiff to use the ladder (*id.* at 30). He also used a squeegee and water to clean the windows (*id.* at 31). Plaintiff conceded there was no construction work taking place at the restaurant on the date of his accident (*id.* at 48:7-11). He likewise conceded there were no ongoing repairs to the windows when he was cleaning (*id.* at 49:22-25). Prior to cleaning the windows, Plaintiff was in the kitchen (*id.* at 52). Every other tool Plaintiff

used to clean the windows, including soap and a squeegee, came from the dish washing station in the kitchen (*id.* at 70:6-12). Plaintiff had a squeegee in his hand and climbed up. The ladder ended up moving and Plaintiff fell.

The building where Plaintiff fell is owned by Defendant (NYSCEF Doc. 30). It is a four-story building with two ground floor retail spaces, one of which was leased by Plaintiff's employer, Sombrero Restaurant (*id.* at ¶¶ 4-5). An affidavit from Martin Hollander provides that cleaning windows was the obligation of Sombrero Restaurant and neither Defendant nor its managing agent had any role in cleaning the exterior windows (*id.* at ¶ 6). He also stated that neither Defendant nor its managing agent provided any equipment or tools to Plaintiff or his employer in order to clean the windows (*id.* at ¶ 8). Non-party Deysi Burton, Plaintiff's co-worker, testified that the ladder and squeegee Plaintiff used belonged to the restaurant (NYSCEF Doc. 29 at 25). Ms. Burton, a worker at the restaurant, further testified that Plaintiff had cleaned the windows prior to his accident, and other dishwashers would likewise clean the windows using a squeegee (*id.* at 13-14). Ms. Burton further testified that a ladder was not needed to clean the windows (*id.* at 22-24).

Plaintiff sued Defendant, the building owner, under various theories, including common law negligence, and violations of Labor Law §§ 200, 202, 240(1), and 241(6) (*see generally* NYSCEF Doc. 1). Defendant now seeks summary judgment dismissing Plaintiff's Complaint. Defendant argues the Labor Law §§ 200 and 202, and common law negligence claims are misplaced because Defendant exercised no direction or control over Defendant's workplace. It argues Labor Law § 202 does not apply because it exempts buildings from its scope which are six stories or less. Defendant argues the Labor Law § 241(6) claims should be dismissed because the accident did not arise out of construction, demolition, excavation, or renovation. Finally, Defendant argues the Labor Law § 240(1) claim should be dismissed because Plaintiff had an

adequate safety device, a two-meter-long squeegee, to clean the windows, and in any event, the cleaning of the windows of the restaurant was a routine task not entitled to the strict protections of the Labor Law.

In opposition, Plaintiff states that he does not oppose dismissal of his Labor Law §§ 240(2), 240(3), 241(6), 202 and 200 claims. Defendant's motion is granted as to these causes of action. However, he opposes dismissal of his Labor Law § 240(1) claim. Plaintiff argues that while staff usually cleaned the lower portions of the window, it was not routine to clean the higher portions of the window. In reply, Defendant argues the cleaning was routine and did not require any specialized equipment.

## **II. Discussion**

### **A. 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 [1<sup>st</sup> 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]).

## B. Cleaning and Labor Law § 240(1)

Defendant's motion to dismiss Plaintiff's Labor Law § 240(1) claim is granted. The Court of Appeals has held that workers who are engaged in routine maintenance that does not require specialized equipment or knowledge is not covered work under Labor Law § 240(1) (*Soto v J Crew Inc.*, 21 NY3d 562 [2013]).

Pursuant to *Soto*, a task can be characterized as "cleaning" under Labor Law § 240(1) if it:

- (1) is routine in the sense that it is the type of job that occurs on a daily, weekly or other relatively frequent and recurring basis as part of the ordinary maintenance and care of commercial premises;
- (2) requires neither specialized equipment or expertise, nor the unusual deployment of labor;
- (3) generally involves insignificant elevation risks typical to domestic or household cleaning; and
- (4) is unrelated to any ongoing construction, renovation, painting, alteration or repair project.

The Court of Appeals has more recently elaborated that the routine factor does not involve a fact-specific assessment of whether the cleaning was within the plaintiff's regular tasks, but rather if it is the type of work which would be expected to recur with relative frequency as part of the ordinary maintenance of a commercial property (*Healy v EST Downtown, LLC*, 38 NNY3d 998 [2022]).

Plaintiff's admission that other employees would clean the windows, corroborated by non-party Deysi Burton, shows that the window cleaning with soap, water, and a squeegee was part of the ordinary maintenance and care of the commercial premises. Thus, the first factor also militates against Plaintiff. Further, Plaintiff admitted that he had seen other dishwashers clean the restaurant's windows using a squeegee, water, and soap. This demonstrates that the window cleaning did not require specialized equipment or expertise, nor did it require subcontracting out

the work. Therefore, the second factor militates against Plaintiff. It is undisputed that the windows were on the first floor and other employees had been able to reach the upper parts of the window with an elongated squeegee. In other words, a ladder was not needed to conduct the cleaning work Plaintiff was carrying out. Thus, the third factor also militates against Plaintiff. Moreover, Plaintiff was cleaning the windows of the first-floor restaurant that employed him. It is undisputed that there was no ongoing demolition, construction, or repair at the time he was cleaning and therefore the fourth factor militates against Plaintiff.

All the factors provided by the Court of Appeals weigh against finding that Plaintiff's work was "cleaning" within the meaning of Labor Law § 240(1). As the only claim Plaintiff opposed dismissal of was his Labor Law § 240(1) claim, and all *Soto* factors weigh against finding Plaintiff's cleaning is covered by Labor Law § 240(1), Plaintiff's complaint is dismissed in its entirety (*see also Hull v Fieldpoint Community Ass'n, Inc.*, 110 AD3d 961 [2d Dept 2013] [regular maintenance, such as clearing gutters of debris, is not covered work under Labor Law § 240(1)]).

Simply put, Plaintiff was injured while performing a routine task of cleaning first floor windows. This was unconnected to any ongoing construction and required only the use of soap, water, and a squeegee. This is not "cleaning" within the meaning of Labor Law § 240(1).

*[The remainder of this page is intentionally left blank.]*

Accordingly, it is hereby,

ORDERED that Defendant’s motion for summary judgment dismissing Plaintiff’s Complaint is granted; and it is further

ORDERED that within ten days of entry, counsel for Defendant 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.

This constitutes the Decision and Order of the Court.

<u>8/1/2024</u> DATE					<u>Mary V Rosado JSC</u> HON. MARY V. ROSADO, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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					REFERENCE