

**Wynn v 595 Dean LLC**

2024 NY Slip Op 33144(U)

August 27, 2024

Supreme Court, Kings County

Docket Number: Index No. 524521/2021

Judge: Devin P. Cohen

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**Supreme Court of the State of New York  
County of Kings**

**Index Number** 524521/2021  
Seqs. 002

Part LL1M

**DECISION/ORDER**

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

\_\_\_\_\_  
YUNIK WYNN,

Plaintiff,

against

595 DEAN LLC, TF CORNERSTONE GROUP LLC, TF  
CORNERSTONE INC., TFC PACIFIC PARK GC LLC,  
TOTAL SAFETY CONSULTING LLC, MICHAEL E  
FITZPATRICK, and JOSEPH SPINA III,

Defendants.

**Papers Numbered**

Notice of Motion and Affidavits Annexed . . . .	<u>1</u>
Order to Show Cause and Affidavits Annexed. . . .	<u>2</u>
Answering Affidavits . . . . .	<u>3</u>
Replying Affidavits . . . . .	_____
Exhibits . . . . .	<u>Var.</u>
Other . . . . .	_____

Upon the foregoing papers, plaintiff’s motion for summary judgment (Seq. 002), is decided as follows:

**Introduction and Factual Background**

Plaintiff commenced this action to recover for damages he claims to have sustained on September 8, 2021 at 595 Dean Street, Brooklyn, NY (Complaint at ¶ 79). Plaintiff testified that he was a concrete worker who was picking up reshores, later identified as Doja jacks, and stacking them into a pile (Wynn EBT at 18–19). The Doja jacks were sixteen feet tall and weighed approximately fifty pounds (*id.* at 48). Plaintiff claims that when he turned around, he saw that a jack which had been supporting the floor above was falling toward him (Wynn EBT at 46). Plaintiff testified that he did not know what made the jack fall or whether it was previously secured to the ceiling (*id.* at 46–48, 50). Plaintiff testified that the top part of the jack hit him (*id.* at 47).

It is undisputed that plaintiff signed an employee statement following his accident. Plaintiff's statement reads: "I was carrying a reshore jack on my left shoulder, when another reshore jack landed on the one I was carrying and hit me on the head." Defendants also provide an incident report purportedly prepared by the site safety director, Michael Fitzpatrick. The report contains a statement from Neil Soares, plaintiff's co-worker, that reads in part: "As I started to remove the reshores I saw a shadow out of the corner of my eye that when the jack hits his jack in the front of his jack the back of his jack popped up and hit him in the back of his head and neck." Neither Mr. Fitzpatrick nor Mr. Soares has been deposed.

### Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

### **Labor Law § 240 (1)**

Liability under Labor Law § 240 (1) is "absolute" where the failure of a safety device enumerated by the statute is the proximate cause of the plaintiff's accident (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 N.Y.3d 280, 287 [2003] [citing *Haimes v. New York Tel. Co.*, 46 N.Y.2d 132, 136 (1978) and *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 500 (1993)]).

Plaintiff contends that he was performing covered work, that while performing that work he was struck by an unsecured falling Doja jack, and that the failure to properly secure the jack was the proximate cause of his accident. In opposition, defendants argue that the plaintiff's

motion is premature; plaintiff is the only party that has been deposed, and no non-party depositions have been conducted. Defendants advance multiple potential defenses, including that the plaintiff was not performing covered work and that the plaintiff was the sole proximate cause of his accident because he caused the upright jack to fall, and argue that further discovery is necessary for defendants to substantiate these arguments.

A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment since further discovery may lead to relevant evidence (*Martinez v 305 W. 52 Condominium*, 128 AD3d 912 [2d Dept 2015]; *Pinella v Crescent St. Corp.*, 176 AD3d 985 [2d Dept 2019]). Here, defendants argue that further discovery may reveal, *inter alia*, whether the jack that plaintiff was carrying struck the upright jack that he claims struck him, whether that upright jack was secured, and therefore whether the plaintiff may have been the sole proximate cause of his accident. In the light of the outstanding discovery, plaintiff's motion is denied as premature.

#### **Labor Law § 241 (6)**

To prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show that he was (1) on a job site, (2) engaged in qualifying work, and (3) suffered an injury, (4) the proximate cause of which was a violation of an Industrial Code provision (*Moscato v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]). Plaintiff predicates his Labor Law § 241 (6) claim on alleged violations of 12 NYCRR 23- 2.2 (a) (structurally safe shores), (b) (inspection by designated persons), and (c) (1) (proper seating, top and bottom, of shores and reshores).

Plaintiff's Labor Law § 241 (6) claim depends on substantially the same allegations as his Labor Law § 240 (1) claims. Therefore, for the same reasons as in the foregoing section, plaintiff's motion is denied as premature with respect to Labor Law § 241 (6).

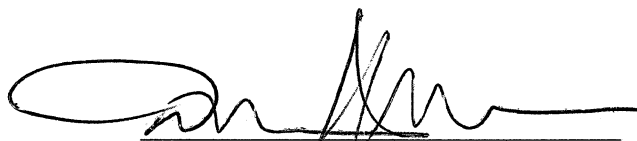
**Conclusion**

Plaintiff's motion for summary judgment (Seq. 002) is denied.

This constitutes the decision of the court.

August 27, 2024

**DATE**



**DEVIN P. COHEN**

Justice of the Supreme Court