

**Lopez-Cruz v CM 1535 Undercliff LLC**

2024 NY Slip Op 34817(U)

October 11, 2024

Supreme Court, Bronx County

Docket Number: Index No. 31210/2019E

Judge: Myrna Socorro

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, IAS PART 9**

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**HECTOR LOPEZ-CRUZ AND ROBERTO  
MEZA,**

**Index №. 31210/2019E  
Motion seq #4 and #5**

**Plaintiffs,**

**-against-**

**DECISION & ORDER**

**Hon. Myrna Socorro, J.S.C.**

**CM 1535 UNDERCLIFF LLC AND  
RESIDENTIAL MANAGEMENT (NY), INC.,**

**Defendants.**  
-----X

Recitation as required by CPLR §2219, the following papers were read on the motion by the plaintiffs (Seq. No. 4) for **summary judgment** noticed for December 16, 2022, and on the motion by defendants (Seq. No. 5) for **summary judgment** noticed for February 3, 2023, and both motions marked submitted on April 24, 2024.

Papers	NYSCEF Doc. No.
<b>Motion seq #4</b>	
Notice of Motion by Plaintiffs – Affirmation in Support, Statement of Material Facts, and Exhibits	# 67-93, 134
Defendants CM 1535 Undercliff LLC’s and Residential Management (NY), Inc.’s Affirmation in Opposition and Exhibits	# 118-125, 135
Plaintiffs’ Reply Affirmation	#126-127
<b>Motion seq #5</b>	
Notice of Motion by Defendants CM 1535 Undercliff LLC and Residential Management (NY), Inc. – Affirmation in Support, Statement of Material Facts, and Exhibits	#96-111
Plaintiffs’ Affirmation in Opposition and Response to Statement of Material Facts	#115-117
Defendants CM 1535 Undercliff LLC’s and Residential Management (NY), Inc.’s Reply Affirmation	#128

Motion by the plaintiffs (Seq. No. 4), for an order pursuant to CPLR §3212, granting judgment on the Labor Law §§§240(1), 241(6), 200 and/or common-law negligence claims against defendants, and motion by defendants (Seq. No. 5), for an order pursuant to CPLR §3212, dismissing the plaintiffs’ Labor Law §§§§240(1), 240(2), 241(6), and 200 claims as against them, are decided as follows:

According to the plaintiffs, on the day of the accident, they were employed by non-party Create-It Construction, Inc. (“Create-It”) as a plumber (Hector Lopez-Cruz) and plumber’s assistant (Roberto Meza) to perform work in an apartment located on the first floor of a building at 1535 Undercliff Avenue, Bronx County. It is undisputed that defendant CM 1535 Undercliff, LLC was the owner of the building and defendant Residential Management (NY), Inc. (“Residential Management”) was the property management company of the building. The plaintiffs were retained to repair a water leak in the bathroom of the subject apartment. Plaintiffs testified that they worked in the building for about two months before the accident occurred. Plaintiff Lopez-Cruz testified that Create-It was hired for a project to replace the entire pipe system for the building’s drainage. He testified that he observed water leakage from the bathroom in the subject apartment into the basement prior to the accident. He and plaintiff Meza observed damage and cracks in the basement ceiling and that the beams appeared “rotten.” (NYSCEF Doc No. 74, plaintiff Hector-Lopez TR-51). He testified that he received instructions and was assigned tasks from his manager at Create-It (Moti Kramer). Plaintiff Meza testified that he received his instructions from plaintiff Lopez-Cruz. Before the accident occurred, plaintiff Lopez-Cruz testified that he determined that the water leak stemmed from the pipes underneath the tub in the bathroom of the subject apartment and observed “puddles of water on the floor that had been there for a very long time” in the area in the basement underneath the bathtub (NYSCEF Doc No. 74, plaintiff Lopez-Cruz TR-60-61). He testified that he proceeded to fix the leak by removing the bathtub with plaintiff Meza’s assistance. He further testified that after he removed the bathtub, he went to speak to the apartment’s tenant and returned to the apartment bathroom to assess the drainage issue. He testified that as he bent down to observe the rotten pipes on the floor, the bathtub area of the floor collapsed causing him and plaintiff Meza to fall about thirteen to sixteen feet to the basement floor.

Preliminarily, the plaintiff did not submit opposition to the branch of defendants’ summary judgment motion seeking dismissal of the Labor Law §240(2) claim. Therefore, the branch of defendants’ summary judgment motion seeking to dismiss the Labor Law §240(2) claim, is granted without opposition.

In support of their motion for summary judgment, the plaintiffs submitted, *inter alia*, post-accident photographs of the debris and opening resulting from the floor collapse, deposition testimonies of the plaintiffs, Moshe Rottenberg (property manager at Residential Management), and Alexi Klaber (superintendent at Residential Management), a sworn affidavit of the apartment unit tenant, who averred that the leak condition existed over a period of years, and the expert engineering affidavit of Nicholas Bellizzi, P.E. Bellizzi opined that the water leak existed over a period of years and that defendants failed to provide the plaintiffs a safe, elevated work space such as proper shoring, scaffolds, braces and platforms. The plaintiffs, therefore, argue that the defendants violated Labor

Law §240(1) as the defendants failed to provide them with adequate safety devices and/or proper fall protection while performing their work. Plaintiffs further argue that the defendants are liable under Labor Law §241(6) by violating Industrial Code 12 NYCRR §23-1.7(b)(1) for failing to provide a compliant cover or safety railing over a hazardous opening. Finally, the plaintiffs contend that the defendants are liable under Labor Law §200 and/or common-law negligence as they had actual or constructive notice of a foreseeable hazardous condition.

In support of their motion for summary judgment seeking dismissal of the plaintiffs' complaint, the defendants submit, *inter alia*, deposition testimonies of the parties, a photograph of the subject basement, and a photograph of the concrete flooring. Defendants argue that they cannot be held liable under Labor Law §240(1) as the plaintiffs' actions were the sole proximate cause of their injuries and that the permanent floor collapse was unforeseeable. They contend that the plaintiffs' Labor Law §200 and/or common-law negligence claims should be dismissed as there is no evidence in the record that they supervised or controlled the means and methods of the plaintiffs' work. The defendants also seek dismissal of the Labor Law §241(6) claim on the grounds that none of the Industrial Code provisions apply to the herein facts.

### Summary Judgment

The court's function on a motion for summary judgment is issue finding rather than issue determination or assessing credibility. *Genesis Merchant Partners LP v Gilbride, Tusa, Last & Spellane LLC*, 157 AD3d 479 [1<sup>st</sup> Dept 2018]; *Meredian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508; 894 NYS 2d 422 [1<sup>st</sup> Dept 2010].

Summary judgment is a drastic remedy and is to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact. *See CPLR § 3212[b]*; *Friends of Thayer Lake LLC v. Brown*, 27 NY3d 1039; 33 NYS 3d 853 [2016]; *Vega v Restani Constr. Corp.*, 18 NY3d 499 [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 & Hosps. Corp.*, 22 NY3d 824, 833 [2014]. If the movant fails to make such prima face showing then the motion must be denied regardless of the sufficiency of the opposing papers *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY 2d 851; 487 NYS 2d 316 (1985)

Once the movant has made a prima facie showing, 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 Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.*, 68 NY 2d 320; 508 NYS 2d 923 [1986]; and *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a

motion for summary judgment. *See Banco Popular N. Am. v Victory Taxi Mgmt.*, 1 NY3d 381 [2004].

### **Labor Law §240(1)**

Labor Law §240(1) provides in part: “All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, 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.”

“The failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from accident.” *Cherry v Time Warner, Inc.*, 66 AD3d 233, 235 [1st Dept 2009] [citations and quotations omitted].

The Court of Appeals has held that “[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). 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 Assoc.*, 96 NY2d 259, 267 [2001], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993].

This court finds the plaintiffs established their *prima facie* burden of a Labor Law §240(1) violation that the plaintiffs’ injuries resulted from a gravity-related fall stemming from the failure of defendants to provide an adequate safety device to protect the plaintiffs against the hazards associated with the performance of elevated work and foreseeable given the scope of the plaintiffs’ work at the time of the accident. *See Mata v 371 1st St., LLC*, 226 AD3d 569 [1st Dept 2024]. Plaintiffs were confronted by an elevation-related hazard to which Labor Law §240(1) was applicable given that the plaintiff were assessing rotted pipes after removing a bathtub and debris in a bathroom of an apartment unit upon a complaint of a water leak and that the concrete floor on which they were working collapsed and gave way, regardless of whether the flooring was permanent. *See Kircher v City of New York*, 122 AD3d 486 [1st Dept 2014].

In opposition, the defendants failed to raise triable issues of fact or otherwise demonstrate *prima facie* that the floor collapse in this case was not foreseeable or that they provided the plaintiffs adequate safety devices to protect them against a gravity-related fall to comport with the statute.

Any sole proximate cause argument fails if the defendants' statutory violation served as a proximate cause for the accident, thus, the plaintiffs cannot be solely to blame for it. *See Blake v Neighborhood Hous. Servs. of NY City, Inc.*, 1 NY3d 280 [2003]; *see also Hoffman v SJP TS, LLC*, 111 AD3d 467 [1st Dept 2013]. Under a "falling worker" theory, strict liability here is imposed upon the defendants for their failure to provide an adequate safety device to shield the plaintiffs from a gravity-related fall. *See Plaku v 1622 Van Buren LLC*, 198 AD3d 431 [1st Dept 2021].

### **Labor Law §241(6)**

Labor Law §241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety" to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. *See Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]. The standard of liability under Labor Law §241(6), requires that a plaintiff allege that an owner or general contractor breached a specific rule or regulation containing a positive command. *See Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]. In addition, Labor Law §241(6) requires that a plaintiff establish that a violation of a safety regulation was the proximate cause of the accident. *See Gonzalez v Stern's Dep't Stores*, 211 AD2d 414 [1st Dept 1995].

In support of his Labor Law §241(6) claim, the plaintiff cites Industrial Code 12 NYCRR §23-1.7(b)(1) (Protection from general hazards; Falling hazards; Hazardous openings), therefore, abandoning all other predicates not raised in his legal arguments, and as such those claims are dismissed to that extent. *See Burgos v Premier Props. Inc.*, 145 AD3d 506 [1st Dept 2016]; *see also 87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540 [1st Dept 2014].

Insofar as the Labor Law §241(6) claim is predicated on a violation of 12 NYCRR §23-1.7(b)(1), the court finds that there are triable issues of fact as to whether the area through which the plaintiffs fell constituted a "hazardous opening" within the meaning of the provision. *See Bislam v Long Is. Jewish Hosp.*, 116 AD3d 475 [1st Dept 2014].

### **Labor Law 200 and/or Common-Law Negligence**

Plaintiffs and defendants moved for summary judgment on the Labor Law §200 and common-law negligence claims. The defendants demonstrated that they neither supervised nor controlled the injury-producing work. The record evidence demonstrated that the plaintiffs received all of their instructions from their employer. *See Siegel v Delta Airlines, Inc.*, 227 AD3d 516 [1st Dept 2024]; *see generally Polonia v 14 Sutton Tenants Corp.*, 210 AD3d 417 [1st Dept 2022].

Although the record demonstrates that the defendants did not direct, supervise, or direct the means

and methods of the plaintiffs' work, a defendant may still be held liable if it either created the dangerous condition or failed to remedy it despite having actual or constructive notice thereof. *See Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]. Here, the superintendent for defendant Residential Management, Klaber, testified that he observed leaks about one to two weeks prior to the subject accident in the basement area where the plaintiffs landed when they fell (NYSCEF Doc No. 54, Klaber (Residential Management) TR-43, 48). Accordingly, there are triable issues of fact as to whether defendants had notice of a hazardous condition and failed to timely remedy it thereby causing or contributing to the plaintiffs' injuries with respect to the integrity of the concrete flooring before its collapse. *See generally Herrero v 2146 Nostrand Ave. Assoc., LLC*, 193 AD3d 421 [1st Dept 2021].

Alternatively, plaintiffs request judgment on their Labor Law §200 claim under the doctrine of *res ipsa loquitur*. Under the doctrine of *res ipsa loquitur*, "an inference of negligence may be drawn solely from the happening of the accident upon the theory that certain occurrences contain within themselves a sufficient basis for the inference of negligence" (*Valdez v Upper Creston, LLC*, 201 AD3d 560, 561 [1st Dept 2022]). *Res ipsa loquitur* applies when a plaintiff establishes that "(1) the event is of the kind that ordinarily does not occur in the absence of someone's negligence; (2) the event was caused by an agency or instrumentality within the exclusive control of the defendant; (3) the accident was not due to any voluntary action or contribution on the part of the plaintiff" (*id.*). Where a plaintiff's *prima facie* evidence is so convincing that the inference of negligence arising therefrom is inescapable and unrebutted, summary judgment on liability is proper (*id.*). Here, the plaintiffs testified that they were retained to respond to the water leak complaint, had removed the existing bathtub, pipes and other debris in the area and was assessing the water damage when the bathroom floor collapsed. The plaintiffs therefore fail to demonstrate *prima facie* that the floor collapse was not due to any voluntary action or contribution on their part.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by either movant was not addressed by the court, it is hereby denied.

Accordingly, it is hereby,

**Motion seq #4**

**ORDERED**, that portion of plaintiff's motion seeking summary judgment against defendant as to Labor Law §240(1) is **GRANTED**; and it is further

**ORDERED** that portion of plaintiff's motion seeking summary judgment against defendant as to

