

**Llerena v 975 Park Ave. Corp.**

2024 NY Slip Op 34949(U)

November 4, 2024

Supreme Court, Bronx County

Docket Number: Index No 27073/2020E

Judge: Myrna Socorro

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.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART IA9

-----X  
Jonathan Llerena,  
Plaintiff,

Index No. 27073-2020E  
Motion Seq. # 1 & 2

-against-

975 Park Avenue Corporation, Charles H. Greenthal  
Management Corp. and Nova Construction  
Services LLC,  
Defendants.

**DECISION & ORDER**  
**Hon. Myrna Socorro, J.S.C.**

-----X

The following papers were read on the motion by the Defendants 975 Park Avenue Corporation, Charles H. Greenthal Management Corp. and Nova Construction Services LLC (Seq. No. 1) for **summary judgment** submitted on January 26, 2024, and on the motion by plaintiff (Seq. No. 2) for **summary judgment** submitted on January 26, 2024:

Papers	NYSCEF Doc(s).
<b>Motion Seq. No. 1</b>	
Defendants' Notice of Motion for Summary Judgment, Statement of Material Facts, Affirmation in Support and Exhibits	# 30-41
Plaintiff's Response to Statement of Material Facts, Affirmation in Opposition, and Exhibits	#47-50
<b>Motion Seq. No. 2</b>	
Plaintiff's Notice of Motion for Summary Judgment, Affirmation in Support, Statement of Material Facts, and Exhibits	# 51-61
Defendant's Response to Statement of Material Facts and Memorandum of Law in Opposition	#68-69
Plaintiff's Reply Affirmation	#70

The instant action was commenced on July 8, 2020, for an accident that occurred on January 20, 2020, at 975 Park Avenue, New York, NY, when plaintiff fell on a suspended scaffold on an exterior façade project being performed at the subject premises. Defendants now move for summary judgment (motion seq #1) to dismiss plaintiff's Labor Law §§ 240(1), 241(6) and 200 claims, and his common law negligence claims. Plaintiff also moves for summary judgment (motion seq #2) as

against (1) defendant 975 Park, as the owner of the subject premises, (2) defendant Greenthal, as managing agent for 975 Park, and (3) defendant Nova, as the general contractor for the construction project based on Labor Law §240(1). Plaintiff also seeks summary judgment on his Labor Law §241(6) claim as predicated on Industrial Code 23-5.8(g).

In support of its motion, defendants argue that plaintiff's claim under Labor Law § 240(1) must be dismissed because plaintiff was not subject to a gravity-related incident as he never fell from a height nor was struck by an object improperly hoisted or inadequately secured. They further argue that plaintiff's Labor Law § 241(6) claim must be dismissed because plaintiff has failed to establish that defendants violated a specific industrial code. Lastly, they argue that the Labor Law § 200 and common law negligence claims must be dismissed because plaintiff acknowledged that no direction, supervision and control was provided by defendants and does not allege that defendants had knowledge of any hazard.

Plaintiff opposes the motion. First, plaintiff argues that defendants' motion relies on the affidavit of non-party Marvin Monzon, and that this Court should not consider it as Mr. Monzon was never exchanged as a fact witness in this action until his affidavit was included in defendants' moving papers. However, even if the Court considers the affidavit, it is plaintiff's position that the affidavit cannot refute plaintiff's testimony that the suspended scaffold moved backwards at the time of the accident as Mr. Monzon was not a witness to the accident. Further, plaintiff argues that the work plaintiff was performing at the time of the accident falls within Labor Law § 240(1)'s protection because he was working at an elevation of 10 or 11 stories. Further, he argues that the device proved inadequate to shield plaintiff from harm directly flowing from the application of the force of gravity.

### **Summary Judgment Standard**

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].

### **Review**

The following facts are undisputed: at the time of the accident, plaintiff worked for non-party Kostan Inc. as a mechanic; plaintiff's direct supervisor and foreman on the project was "Marvin"; plaintiff received all of his instructions from his foreman Marvin; on the day of accident, plaintiff's foreman instructed him to perform brick demolition utilizing a chipping hammer; plaintiff performed the work with his partner, Adam Puk; at the time of the accident, plaintiff was utilizing a chipping gun when the scaffold moved, which resulted in his arm getting stuck in a hole, pulling his shoulder and causing pain; the scaffold moved away from the wall approximately one foot; and plaintiff then fell to the floor of the scaffold due to the pain he experienced in his shoulder.

### **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." Labor Law §240(1) was enacted "in recognition of the exceptionally dangerous conditions posed by elevation differentials at work sites... for workers laboring under unique gravity-related hazards." *Misseritti v Mark IV Const. Co., Inc.*, 86 NY2d 487, 491 [1995].

Upon a review of the motion papers, this court finds that defendants made a prima facie showing that the subject accident did not involve a gravity-related hazard/risk. In opposition, plaintiff failed to raise an issue of fact. Plaintiff argues that because plaintiff was working at an elevation of 10 or 11 stories, the protections under Labor Law § 240(1) apply. However, "[t]hat plaintiff fell while he was at an elevated level does not render the injury a result of an elevation-related risk, as the accident occurred at the same level of plaintiff's work site." *Reyes v Magnetic Const., Inc.*, 83 AD3d 512, 513 [1st Dept 2011]. Here, it is undisputed that plaintiff was working at an elevated level at the time of

the accident, however, his alleged injuries did not arise out of the risk posed by that elevation. Accordingly, **plaintiff's Labor Law §240(1) claim must be DISMISSED.**

### **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].

Plaintiff claims numerous violations of safety regulations in his bill of particulars. However, in their Affirmation in Opposition to defendants' motion, plaintiff withdraws his claims with respect to Industrial Code §§ 23-1.7, 23-1.30, 23-1.31, 23-1.32, 23-5.3, 23-5.4, 23-5.5, 23-5.6, and 23-5.7. Plaintiff only maintains his claims that defendants violated Industrial Code § 23-5.1, 23-5.2, 23-5.8 (including 23- 5.8(g)), 23-5.9, and 23-5.10.

As correctly argued by defendants in their moving papers, with respect to Industrial Code § 23-5.1, 23-5.9, and 23-5.10, even though these provisions consist of multiple subsections, plaintiff has failed to cite to the specific subsection(s) or subdivision(s) that he claims defendants violated, which warrants the dismissal of same. *See Caminiti v Extell W. 57<sup>th</sup> St. LLC*, 166 AD3d 440 [1<sup>st</sup> Dept 2018], quoting to *McLean v Tishman Constr. Corp.*, 144 AD3d 534 [1<sup>st</sup> Dept 2016], wherein the First Department found that dismissal of the Labor Law § 241(6) claim predicated on certain Industrial Codes should have been dismissed “since plaintiff failed to specify any particular subsection(s) and subdivision(s) of these provisions.”

Industrial Code § 23-5.2 states: “The use of any scaffold of a type not named, specified or described in this Part (rule) is prohibited unless such scaffold has been granted a special approval.” Upon a review of the moving papers, this Court finds that defendants have made a prima facie showing that Industrial Code § 23-5.2 is inapplicable as the subject scaffold utilized at the time of the accident (i.e. a suspended scaffold) is specifically addressed within the Industrial Code. In opposition, plaintiff fails to specifically address Industrial Code § 23-5.2 and therefore fails to raise an issue of fact.

Industrial Code § 23-5.8(g) states: “Tie-ins. Every suspended scaffold shall be tied in to the building or other structure at every working level. Window cleaners' anchors shall not be used for such tie-ins and other means shall be provided.” In support of its motion to dismiss plaintiff’s claim as predicated on Industrial Code § 23-5.8(g), defendants submit the affidavit of Marvin Monzon, plaintiff’s foreman at the time of the accident, who states that immediately after the accident, he “inspected the suspended scaffold on which Plaintiff was working and found that it was secured to the building wall at either end of the suspended scaffold with expansion bolts, and the scaffold was firmly in place against the wall. It did not move during my inspection...”

In opposition, plaintiff argues that the affidavit of Mr. Monzon should not be considered by the Court as he was never exchanged as a fact witness in this action until his affidavit was included in defendants’ moving papers. Plaintiff further argues that even if the Court considers Mr. Monzon’s affidavit, he was not a witness to the accident and therefore cannot rebut plaintiff’s testimony that the suspended scaffold moved backwards at the time of the accident. Plaintiff argues that since the scaffold “moved backwards at the time of the accident, it is clear that the subject suspended scaffold was not properly tied to the building, and that the failure to do so was a proximate cause of Plaintiff’s accident.”

This Court exercises its discretion and will consider Mr. Monzon’s affidavit in the instant summary judgment motion. *See Quiroz v Mem. Hosp. for Cancer and Allied Diseases*, 202 AD3d 601, 603 [1st Dept 2022], wherein the First Department affirmed the lower Court’s decision to consider an affidavit despite defendants’ failure to disclose him as a witness in response to plaintiff’s discovery demands and the preliminary conference order. As in *Quiroz v Mem. Hosp. for Cancer and Allied Diseases*, plaintiff cannot claim surprise or prejudice since he knew at all times of the presence at the job site of his own foreman, who he identified as “Marvin” at his deposition. This Court acknowledges that in *Quiroz v Mem. Hosp. for Cancer and Allied Diseases*, the subject affidavit was supplied four months before the note of issue was filed, whereas here the affidavit was provided post-note. However, to the extent that he deems it necessary, plaintiff is hereby granted leave to file a motion for further post-note discovery as it relates to the affidavit of Mr. Monzon.

Upon a review of the motion papers, the branch of defendants’ and plaintiff’s motion seeking summary judgment on plaintiff’s Labor Law § 241(6) claim as predicated on Industrial Code § 23-5.8(g) is **DENIED**. Even though Mr. Monzon was not present at the time of the accident, his sworn statement that “immediately after the incident” he inspected the subject scaffold and that it was secured to the building raises an issue of fact as to whether Industrial Code § 23-5.8(g) was violated.

### Labor Law §200/Common-Law Negligence

Labor Law §200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work. See *Licata v AB Green Gansevoort, LLC*, 158 AD3d 487 [1st Dept 2018]. Pursuant to Labor Law § 200, “liability for an injury resulting from a dangerous condition at the work site may be imposed on the owner where the owner either exercised supervision and control over the work or had actual or constructive notice of the unsafe condition.” *Higgins v 1790 Broadway Assoc.*, 261 AD2d 223, 225 [1st Dept 1999]. “A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed” *Torres v Perry St. Dev. Corp.*, 104 AD3d 672, 676 [2013], quoting *Ortega v Puccia*, 57 AD3d 54, 62 [2008]. “[T]he right to generally supervise the work, stop the contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law §200 or for common-law negligence” *Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 684 [2010], quoting *Gasques v State of New York*, 59 AD3d 666, 668 [2009].

In its motion, defendants argue that they did not have control over the means and method of plaintiff's work and that plaintiff concedes that he received all of his instructions from Marvin, Kostan's foreman. Further, defendants argue that they did not have any notice of any alleged hazardous condition prior to plaintiff's accident. As to defendants 975 Park and Greenthal, the Court finds that they have established entitlement to judgment with respect to plaintiff's Labor Law § 200/common law negligence claim as there is no evidence that they had actual or constructive notice of the alleged unsafe condition nor did they exercise supervision and control over the work. However, as to defendant Nova, Nova failed to establish entitlement to judgment as to the Labor Law § 200/common-law negligence claims as Nova's contract specifically required Nova to supervise the work and therefore, they had authority to control the construction site. Accordingly, **plaintiff's Labor Law §200 and common law negligence claims is DISMISSED only as to defendants 975 Park and Greenthal.**

Accordingly, it is hereby

### As to motion seq. #1

**ORDERED** that Defendants' motion for summary judgment seeking dismissal of plaintiff's Labor Law § 240(1) is **GRANTED**; and it is further

**ORDERED** that Defendants' motion for summary judgment seeking dismissal of plaintiff's Labor Law § 241(6) claim is **GRANTED ONLY TO THE EXTENT** that plaintiff's Labor Law § 241(6) claim as predicated on Industrial Code §§ 23-1.7, 23-1.30, 23-1.31, 23-1.32, 23-5.1, 23-5.2, 23-5.3,

23-5.4, 23-5.5, 23-5.6, 23-5.7, 23-5.9, and 23-5.10 are **DISMISSED**; and it is further

**ORDERED** that Defendants' motion seeking dismissal of plaintiff's Labor Law §200 and common law negligence claims is **GRANTED ONLY TO THE EXTENT** that said claims are **DISMISSED** as against defendants 975 Park and Greenthal; and it is further

**As to motion seq #2**

**ORDERED** that plaintiff's motion seeking summary judgment of his Labor Law § 240(1) claim is **DENIED**; and it is further

**ORDERED** that plaintiff's motion seeking summary judgment of his Labor Law § 241(6) claim as predicated on Industrial Code 23-5.8(g) is **DENIED**; and it is further

**ORDERED**, that the parties shall file their Notice of Entry of this Decision and Order within twenty (20) days from the date hereof; and it is further

**ORDERED**, that the parties shall appear for a Pre-Trial Conference on January 9, 2025 at 9:30 A.M.

This constitutes the decision and order of this court.

**Dated: November 4, 2024**



---

Hon. Myrna Socorro, J.S.C.