

Yagual v Hudson Canal LLC

2024 NY Slip Op 34956(U)

November 20, 2024

Supreme Court, Bronx County

Docket Number: Index No. 24640/2020E

Judge: Myrna Socorro

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

-----X
HENRY S. YAGUAL,

Plaintiff,

-against-

**HUDSON CANAL LLC, CANAL HUDSON
LLC, EXPRESS BUILDERS JB INC., and
PRIME PIPING & HEATING INC.,**

Defendants.
-----X

Index №. 24640/2020E

Motion seq #3

DECISION & ORDER

Hon. Myrna Socorro, J.S.C.

The following papers were read on the motion by the plaintiff (Seq. No. 3) for **summary judgment** noticed for October 23, 2023, and submitted on May 1, 2024, and on the cross-motion by defendants Hudson Canal, LLC and Express Builders JB Inc. (Seq. No. 3) for **summary judgment** noticed for January 5, 2024, and submitted on May 1, 2024.

Papers	NYSCEF Doc. No.
Notice of Motion by Plaintiff – Affirmation in Support, Statement of Material Facts, and Exhibits	# 102-111
Notice of Cross-Motion by Defendants Hudson Canal, LLC & Express Builders JB Inc. – Affirmation in Support, Statement of Material Facts, Memorandum of Law in Support, and Exhibits	# 118-129
Plaintiff’s Affirmation in Opposition to Cross-Motion and in Further Support of Motion, Exhibit, Counter Statement of Material Facts	# 130-132
Reply Affirmation by Defendants Hudson Canal, LLC & Express Builders JB Inc.	# 135

Motion by the plaintiff, for an order pursuant to CPLR §3212, granting judgment on the Labor Law §240(1) and/or §241(6) claims against defendants Hudson Canal, LLC (“Hudson Canal”) and Express Builders JB Inc. (“Express”), and cross-motion by defendants Hudson Canal and Express, for an order pursuant to CPLR §3212, dismissing the plaintiff’s complaint in its entirety, are decided as follows:

According to the plaintiff, on the day of the accident, he was employed by a non-party HVAC subcontractor (Berry's Cooling & Heating LLC) as a helper to assist with installation of air conditioners and ducts at a building located at 219 Hudson Street, New York County. Defendant Hudson Canal allegedly owned the building. As admitted in the cross-moving defendants' answer, Express was a contractor that retained plaintiff's employer, Berry's Cooling & Heating LLC, to perform work at the subject premises. The plaintiff testified that he worked at the building for two to three months prior to his accident. He testified that when he arrived at the building on the date of the accident, he met "Bill," his foreman. The plaintiff testified that Bill instructed him to seal the ducts after their installation by applying the sealant over the ductwork with a brush. He further testified that in order to perform the sealing, Bill provided him with a six-foot aluminum A-frame ladder, a brush, and sealant. The plaintiff described the ladder as "a little bit old" (NYSCEF Doc #110, plaintiff's TR-50). The plaintiff testified that when he observed the ladder was missing rubber on two of its feet, he complained to Bill about the ladder's condition and was instructed to continue working. He testified that he ascended the ladder to the second rung from the top and stood on the same step with both feet. He testified that he placed the sealant on a support on the ladder and that the accident occurred when he was dipping the brush with sealant and was attempting to apply it to the ductwork when the ladder moved causing him to fall backward with the ladder falling to its side.

Preliminarily, by stipulation of discontinuance, dated October 6, 2020, plaintiff's action against defendant Prime Piping & Heating Inc. was discontinued without prejudice.

In support of his motion for summary judgment, the plaintiff submitted, *inter alia*, the deposition testimonies of the plaintiff, Joel Jacobs (an owner of Hudson Canal), and Shulem Adler (job site manager for Express), and a copy of the subcontract between Express and Berry's Cooling & Heating, LLC. Adler testified that he was present at the building every day but that he did not witness the plaintiff's accident. Jacobs testified that Adler, on behalf of Express, had the authority to control the means and methods of the plaintiff's work but also did not witness the subject accident. The plaintiff, therefore, argues that defendants Hudson Canal and Express violated Labor Law 240(1) as said defendants failed to provide him with adequate safety devices while performing his work. Plaintiff further argues that the same defendants are liable under Labor Law §241(6) by

violating Industrial Codes 12 NYCRR §§ 23-1.21(b)(3), (b)(4)(ii), and (e)(3) as it relates to proper ladder conditions and footings.

In support of their motion for summary judgment seeking dismissal of the plaintiff's complaint, defendants Hudson Canal and Express submit, *inter alia*, the deposition testimonies of the parties. Said defendants argue that they cannot be held liable under Labor Law §240(1) as the ladder provided was not defective and there are issues of fact as to the happening of the accident based on surveillance video following the alleged fall from the ladder. They also contend that the plaintiff's 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 plaintiff's work. Defendants Hudson Canal and Express 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 AD 3d 479; 699 NYS 3d 30 [1st Dept. 2018]; *Meredian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD 3d 508; 894 NYS 2d 422 [1st 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 facie 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 plaintiff established his *prima facie* burden of a Labor Law §240(1) violation by showing that his injuries resulted from a gravity-related fall stemming from the failure of defendants Hudson Canal and Express to provide an adequate safety device in the form of a ladder with adequate footings to protect the plaintiff against the hazards associated with the performance

of elevated work, a failure of which proximately caused his accident. *See Ordonez v One City Block, LLC*, 191 AD3d 412 [1st Dept 2021]; *see also Deschaine v Tricon Constr., LLC*, 187 AD3d 599 [1st Dept 2020]; *Sanchez v Bet Eli Co. Del. LLC*, 177 AD3d 478 [1st Dept 2019]. “It is well settled that a statutory violation is established if a scaffold or ladder shifts, slips, or collapses, thereby causing injury to a worker.” *Castillo v TRM Contr. 626, LLC*, 211 AD3d 430 [1st Dept 2022] [citing *Panek v County of Albany*, 99 NY2d 452, 458 [2003]].

In opposition, defendants Hudson Canal and Express failed to raise triable issues of fact or otherwise demonstrate *prima facie* that they provided the plaintiff with an adequate safety device to protect him from falling to comport with the statute. Any sole proximate cause argument fails if said defendants’ statutory violation served as a proximate cause for the accident, thus, the plaintiff 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 defendants Hudson Canal and Express 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]. To the extent that said defendants argue that surveillance video depicts an upright ladder several feet away from plaintiff, the video was not sufficiently authenticated by plaintiff or any other witness. *See Sanchez v MC 19 E. Houston LLC*, 216 AD3d 443 [1st Dept 2023]. Plaintiff specifically testified that the ladder in the video was not the one he fell from.

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 Codes 12 NYCRR §§ 23-1.21(b)(3) (Ladders and ladderways; General requirements for ladders; Maintenance and replacement), 23-1.21(b)(4)(ii) (Ladders and ladderways; General requirements for ladders; Installation and use), and 23-1.21(e)(3) (Ladders and ladderways; Stepladders; Stepladder footing), 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 § 23-1.21(b)(3), the court finds that plaintiff demonstrated his *prima facie* entitlement to judgment on his Labor Law §241(6) claim as predicated upon a violation of § 23-1.21(b)(3) as the plaintiff testified that the ladder he was provided did not have proper footings. *See Stankey v Tishman Constr. Corp. of N.Y.*, 131 AD3d 430 [1st Dept 2015]. Defendants failed to raise a triable issue of fact with respect to this predicate.

Industrial Code 12 NYCRR § 23-1.21(b)(4)(ii) require that all ladder footings be firm. The court also finds that plaintiff made out a *prima facie* entitlement to judgment on his Labor Law §241(6) claim as predicated on this provision where a lack of rubber footings on the ladder constitutes a violation. *See Rivera v Suydam 379 LLC*, 216 AD3d 495 [1st Dept 2023]; *see also Estrella v GIT Indus., Inc.*, 105 AD3d 555 [1st Dept 2013] [citing *Soodin v Fragakis*, 91 AD3d 535 [1st Dept 2012]].

As for an alleged violation of Industrial Code 12 NYCRR § 23-1.21(e)(3), which governs the use of stepladders 10 feet or more above the footing, there is a triable issue of fact as to whether the plaintiff was working 10 feet or more above ladder footings or whether plaintiff was using a “stepladder” such that defendants’ failure to secure said ladder violated this provision.

Labor Law §200 and/or Common-Law Negligence

Defendants Hudson Canal and Express moved for summary judgment seeking dismissal of the Labor Law §200 and common-law negligence claims. Although the record demonstrates that defendants Hudson Canal and Express did not direct, supervise, or control the means and methods of the plaintiff's 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]. Said defendants failed to establish *prima facie* that they neither created nor had notice of a hazardous condition resulting in the plaintiff's injuries to support dismissal of the Labor Law §200 and common-law negligence claims against them. *See Padilla v Touro Coll. Univ. Sys.*, 204 AD3d 415 [1st Dept 2022]. Defendants Hudson Canal and Express submitted no evidence of when the work site was last inspected before the accident. *See id.*; *see also Kolakowski v 10839 Assoc.*, 185 AD3d 427 [1st Dept 2020]; *Pereira v New Sch.*, 148 AD3d 410 [1st Dept 2017].

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,

ORDERED, that the summary judgment motion by the plaintiff (Seq. No. 3) seeking judgment on the Labor Law §240(1) and §241(6) claims against defendants, is **GRANTED IN PART**; and it is further

ORDERED, that the plaintiff is awarded judgment as to liability with respect to the Labor Law §240(1) claim as against defendants Hudson Canal and Express; and it is further

ORDERED, that the plaintiff is awarded to judgment as to liability with respect to the Labor Law §241(6) claim against defendants Hudson Canal and Express in violation of Industrial Codes 12 NYCRR §§ 23-1.21(b)(3) and (b)(4)(ii); and it is further

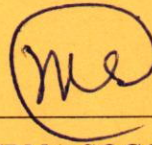
ORDERED, that the cross-motion for summary judgment by defendants Hudson Canal and Express (Seq. No. 3) seeking dismissal of the plaintiff's complaint is, **DENIED**; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment accordingly; and it is further,

ORDERED, the counsel for plaintiff shall serve a copy of this order with notice of entry upon all parties within thirty (30) days of the upload of this order in NYSCEF.

This constitutes the decision and order of this court.

Dated: November 20, 2024



HON. MYRNA SOCORRO, J.S.C.