

**Hernandez-Hernandez v 3033 Roberts Ave. Owners,  
LLC**

2024 NY Slip Op 34967(U)

October 4, 2024

Supreme Court, Bronx County

Docket Number: Index No. 20256/2019E

Judge: Myrna Socorro

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This opinion is uncorrected and not selected for official publication.

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

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PEDRO HERNANDEZ-HERNANDEZ, Index No. 20256/2019E  
Plaintiff(s), Motion seq #1

-against-

**DECISION & ORDER**

3033 ROBERTS AVENUE OWNERS, LLC and Hon. Myrna Socorro, J.S.C.  
COD MECHANICAL CORP.,  
Defendant(s).

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The following papers were read on this motion (Seq No. 1) for **SUMMARY JUDGMENT** submitted on April 24, 2024.

Papers	NYSCEF Doc.
Notice of Motion by Defendant 3033 Roberts Avenue Owners, LLC – Affirmation in Support and Exhibits	# 24-34
Plaintiff’s Affirmation in Opposition and Exhibits	# 35-39
Defendant 3033 Roberts Avenue Owners, LLC’s Reply Affirmation	# 42

Motion by Defendant 3033 Roberts Avenue Owners, LLC (hereinafter “Owners”), for an Order pursuant to CPLR §3212, granting Defendant Owners summary judgment dismissing Plaintiff’s complaint is decided as follows:

According to the Plaintiff, on the date of his accident, he was employed by non-party “Hilario” to perform work at a three-story house located at 3033 Roberts Avenue, Bronx County. He testified that, on the date of the accident, he was instructed to remove a fixture from the third-floor bathroom. He further testified that the only equipment he was provided was a hammer and a small crowbar. He testified that he was instructed to remove the three foot by three foot mirror from the bathroom wall. After removing the bottom screws on the mirror, Plaintiff asked for a ladder to remove the screws affixing the top portion of the mirror to the wall. As no ladder was available, he stood on the edge of the bathtub to remove the top screws. After removing the top screws, and attempting to move the mirror, a portion broke off and struck Plaintiff’s left forearm and left knee.

In support of its motion for summary judgment, Owners submitted, inter alia, Plaintiff’s deposition testimony and the deposition of Nicholas Germanakos (“Germanakos”) on behalf of Owners.

Germanakos testified that he is an owner of the Owners company with his wife and was not present at the time of the accident. Owners contends that the Labor Law §200 claim should be dismissed as Owners did not direct, control or supervise Plaintiff's work. Furthermore, Owners also argues that the Labor Law §240 (1) claim should be dismissed as Plaintiff was not engaged in a protected activity under this statute. Lastly, Owners contends that the Industrial Codes cited by Plaintiff in support of his claim under Labor Law §241(6) are inapplicable or not sufficiently pled in detail.

### **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 [1<sup>st</sup> Dept. 2018]; *Meredian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD 3d 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 §241(6)**

As an initial matter, Plaintiff does not oppose the branch of Owners' motion to dismiss the Labor Law 241(6) claim. Accordingly, plaintiff's Labor Law §241(6) claims are dismissed.

### **Labor Law §240(1)**

Labor Law §240 (1) applies to workers "employed" in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (*Stoneham v Joseph Barsuk, Inc.*, 41 NY3d 217, 220 [2023] citing *Dahar v Holland Ladder & Mfg. Co.*, 18 NY3d 521 [2012]). If an employee is engaged in an activity covered by §240 (1), "contractors and owners" must "furnish or erect" enumerated safety devices "to give proper protection" to the employee. "Whether a plaintiff is

entitled to recovery under [section] 240 (1) requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies” (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011]). To make this determination, a court must examine the “type of work the plaintiff was performing at the time of injury” (*Joblon v Solow*, 91 NY2d 457, 465 [1998]).

The Court of Appeals has held that “[n]ot every worker 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 (2001), citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 (1993). Labor Law 240 (1) does not apply every time an employee is injured as “the result of an elevation differential” (*Stoneham*, 41 NY3d 217, 221 [2023]).

Here, Owners failed to demonstrate its prima facie entitlement to dismissal of Plaintiff’s Labor Law §240 (1) claim. As the only person with knowledge of the details of the accident, Plaintiff’s testimony was insufficient to eliminate all questions of fact as to whether Plaintiff’s work removing the mirror was part of a larger demolition construction project and, whether a ladder was a safety device required to be furnished to perform the mirror removal (*see Stoneham*, 41 NY3d 217 [2023]).

#### **Labor Law §200/common law**

Labor Law §200 codifies landowners’ and general contractors’ common-law duty to maintain a safe workplace (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 505 [1993]). Claims under this statute fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-44 [1st Dept 2012]). Where an alleged defect or dangerous condition arises from a subcontractor’s methods over which the defendant exercises no supervisory control, liability will not attach under either the common law or Labor Law 200 (*Lombardi v Stout*, 80 NY2d 290 [1992]). Thus, Labor Law §200 applies only to owners and contractors who actually exercise control or supervision over the work and had actual or constructive notice of the unsafe condition (*see Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 272 [1st Dept 2007]). However, Labor Law §200 does not impose vicarious liability on owners and general contractors where the injury was caused by the manner and means of the work, including the equipment used. The owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work (*Cappabianca*, 99 AD3d 139, 145 [1st Dept 2012]).

This Court finds Owners demonstrated its prima facie entitlement to dismissal of Plaintiff’s Labor Law §200 claim. Plaintiff testified that he never spoke to the owners and was hired and supervised solely by “Hilario.” In fact, Plaintiff testified that “Hilario” instructed Plaintiff on which tasks to complete and denied Plaintiff’s request for a ladder. Furthermore, Germanakos testified that he was out of the country and had no knowledge that Plaintiff was hired by “Hilario.” Liability under Labor

Law §200 only attaches where the owner or contractor had the “authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition” (*Cappabianca*, 99 AD3d 139, 145 [1st Dept 2012]). As such, “Hilario’s” actions do not impose vicarious liability onto Owners (*id.*).

Accordingly, it is hereby,

**ORDERED**, that defendant 3033 Roberts Avenue Owners LLC’s summary judgment motion seeking dismissal of Plaintiff’s complaint is **granted in part** and it is further,

**ORDERED**, that defendant 3033 Roberts Avenue Owner LLC’s request seeking dismissal of Plaintiff’s Labor Law §241(6) and §200 claims are **Granted**; and it is further

**ORDERED**, that defendant 3033 Roberts Avenue Owner LLC’s request seeking dismissal of Plaintiff’s Labor Law §240(1) is **Denied**; and it is further

**ORDERED**, that the Clerk of the Court is directed to enter judgment dismissing Plaintiff’s Labor Law §241(6) and §200 claims as against defendant 3033 Roberts Avenue Owner LLC, **only**; and it is further,

**ORDERED**, that the counsel for Defendant 3033 Roberts Avenue Owners, LLC shall serve a copy of this Order with Notice of Entry upon all parties within fifteen (15) days of the upload of this Order in NYSCEF; and it is further

**ORDERED** that the parties are to appear for a Pre-Trial Conference on November 14, 2024 at 9:30 A.M.

This constitutes the Decision and Order of this Court.

Dated: October 4, 2024

  
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**HON. MYRNA SOCORRO, J. S. C.**