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| <b>Roper v Gilbane Residential Constr., LLC</b>  |
| 2024 NY Slip Op 35040(U)   |
| October 29, 2024   |
| Supreme Court, Queens County   |
| Docket Number: Index No. 724499/2020   |
| Judge: Karina E. Alomar  |
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Short form Order

**NEW YORK SUPREME COURT-QUEENS COUNTY**

Present: HONORABLE **KARINA E. ALOMAR**  
JUSTICE

IAS PART 23

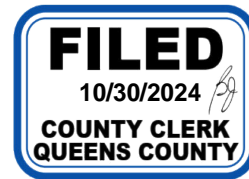
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COLLEEN ROPER,

Plaintiff,

Index No.: 724499/2020  
Motion Date: 09/26/2024  
Motion Seq. No.: 1

-against-

GILBANE RESIDENTIAL CONSTRUCTION, LLC,  
GILBANE INC., STRUCTURETECH NEW YORK,  
INC., GO HPS, LLC, GO HPS LIHTC LLC, and  
SOUTH POINT HOUSING DEVELOPMENT FUND  
CORPORATION,



Defendants.

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The following numbered papers 22 to 41 read on this: (1) motion by defendants for an order pursuant to CPLR §3212 dismissing plaintiff’s complaint; and (2) plaintiff’s cross-motion for an order pursuant to CPLR § 3212 granting summary judgment in favor of Plaintiff on (a) her Labor Law §§ 240[1] and 241[6] claims against Defendants Gilbane Residential Construction, LLC, and South Point Housing Development Fund Corporation, and on (b) her Labor Law §200 claims against Defendants Gilbane Residential Construction, LLC

| PAPERS  | NUMBERED       |
|---|----------------|
| Notice of Motion, Affidavit, Exhibits.....      | EF No: 23 – 30 |
| Notices of Cross-Motion, Affidavit, Exhibits... | EF No: 35 – 39 |
| Affirmations in Reply, Exhibit.....             | EF No: 40 – 41 |

Upon the foregoing cited papers, it is hereby decided that defendants’ motion for an order pursuant to CPLR §3212 dismissing plaintiff’s complaint, and plaintiff’s cross-motion for summary judgment against defendants Gilbane Residential Construction, LLC (“Gilbane LLC”), and South Point Housing Development Fund Corporation (“South Co.”), are decided as follows:

Plaintiff commenced the instant Labor Law action on December 16, 2020, to recover for personal injuries allegedly sustained as the result of a work-related accident which occurred on July 30, 2020, at the construction site located at 5728 2<sup>nd</sup> Street, Long Island City, NY 11101 (the “premises). It is alleged that plaintiff while working as a carpenter for SBF Construction Inc. (“SBF Inc”) was caused to be injured after an SBF Inc. foreman had cut loose the bundle of Doka beams without warning and caused them to spill onto plaintiff. Plaintiff alleges that she was knocked down, with the Doka beams landing on her abdomen and legs. There were allegedly at least two dozen beams that were caused to spill with plaintiff further alleging that each wooden

beam was approximately 6 to 7 inches wide, approximately 14 feet long, and weighed approximately 25 to 40 pounds each.

Defendant South Co. was owner of the premises where the construction site was located. Whereas defendant, Gilbane LLC, was the general contractor that hired SBF Inc.

### **Gilbane LLC and SBF Contract**

In support of their motion defendants submit, inter alia, the trade contractor agreement between Gilbane LLC and SBF Inc.

Article 1 Section 1.2 reads in part as follows:

[SBF Inc] shall be held accountable for...the following: furnish all labor, staff, administration, and supervision; furnish supply and/or install all equipment, material, supplies, tools, machinery, apparatus, scaffolding, hoisting, transportation, unloading and handling...

Article 9 Section 9.1 reads in part as follows:

[SBF Inc] shall within twenty-four (24) hours for emergencies involving life-safety and within forty-eight (48) hours for non-emergency life-safety matters of receipt of notice from the Construction Manager proceed to promptly and continuously, until complete, takedown all portions of the Work and remove from the grounds and Project site all materials, equipment and/or Work which the Construction Manager, Architect, the Owner, or their authorized representatives shall fail to approve or shall condemn as unsound, defective, improper, non-compliant, or in any way failing to conform strictly to the Contract Documents or this Agreement. The Trade Contractor shall at its own expense promptly repair, remedy, replace and correct such Work regardless of whether Trade Contractor disagrees with the reason for such Work being condemned or rejected...

Article 10 Section 10.2 reads in part as follows:

[Gilbane LLC] shall not give instructions or orders directly to employees or workers of [SBF Inc], except to persons designated as authorized representative of [SBF Inc].

### **Plaintiff's Deposition Transcript**

In support of their motion, defendants submit, inter alia, plaintiff's deposition transcript dated April 11, 2023. Plaintiff averred that she had been working for SBF Inc and at the job site for only a couple of weeks before the accident. Plaintiff was working on the second floor of the building, which was the topmost floor that had been built at that stage of construction. Workers for SBF Construction had been using a crane to move the beams up to the second floor in bundles that were fastened together with metal bands. The beams involved in Plaintiff's accident were not being hoisted at the time of Plaintiff's accident and had already been dropped off on the second

floor earlier in the day. One or more bundles of beams sat in a stack that came up to about Plaintiff's chest level.

Plaintiff averred that the process for un-bundling the Doka beams was for a worker to yell out "heads up" before cutting loose the two metal bands that held each bundle together. At the time of the subject accident, Plaintiff was returning to her workstation following a break. Plaintiff averred that, while she was walking by the middle of the floor, she "heard a ping" and was suddenly struck by the Doka beams. Plaintiff further averred that her foreman, Alex, had cut loose the bundle of Doka beams without warning and caused at least two dozen beams to spill onto her. Plaintiff was struck by the beams, was knocked down, and as she laid down more Doka beams spilled over her from her legs to her stomach.

Plaintiff averred that the general contractor for the construction project, Gilbane LLC, on only one occasion, while plaintiff was performing certain work, had directed her to stop her work and directed her to a separate location to perform separate work. Plaintiff averred that on that singular occasion the Gilbane LLC "safety guy" directed her to help reconstruct certain safety rails. Plaintiff averred that Gilbane LLC and not SBF Inc would be the entity that would direct her as to where she would work notwithstanding her previous testimony that on only one occasion did Gilbane LLC ever direct her to work on a different task.

Moreover, plaintiff averred that she knew Gilbane LLC as the entity in charge of safety and that on no occasion did Gilbane LLC ever direct her on how to perform her work.

#### **Stephen Boyd's Deposition Transcript on behalf of defendant Gilbane LLC**

In opposition to plaintiff's cross motion, defendants submit, inter alia, the deposition transcript dated July 24, 2023, of Stephen Boyd, Gilbane LLC's construction executive. Mr. Boyd averred that as part of his duties as a construction executive he was in charge of field operations, scheduling, and making sure "all the trades are on site [and] the right personnel are in place."

Mr. Boyd averred that he would occasionally interact with SBF Inc's construction safety manager, but SBF Inc was in charge of supervising their own employees. Gilbane LLC did not direct, supervise, or control the work of SBF Inc. Mr. Boyd also averred that the Doka beams were owned by SBF Inc and supplied to by SBF Inc's own supplier. Mr. Boyd is not aware of how SBF Inc stacked and secured their Doka beams on-site.

Mr. Boyd averred he believes no investigation of the accident was performed because Gilbane LLC was not aware of any accidents having occurred on July 30, 2020, before the commencement of this action.

#### **Expert Affidavit of Kathleen Hopkins**

In support of her cross motion, plaintiff submits, inter alia, the affidavit of Kathleen Hopkins, certified site safety manager. Ms. Hopkins averred that "it is a known hazard in the construction industry that there is a dangerous hazard when cutting such steel banding straps. When cut, the steel strapping will rebound releasing the bound material suddenly and uncontrolled." Ms. Hopkins found that "no barricades, fencing, stays, blocks, braces, irons, ropes,

or the equivalent had been erected around the area of the temporarily stored Doka beams being unbanned to prevent anyone from inadvertently entering the hazardous area where the banding straps were being cut and away from the falling beams.”

### Discussion

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*see, Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent “to lay bare his or her proof and demonstrate the existence of triable issues of fact.” (*see, Alvarez*, 68 NY2d at 324; *see also, Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept 2006]). However, failure to make prima facie showing of entitlement to judgment requires denial of the motion, regardless of the sufficiency of the opposing papers. When the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 8 NY2d 8 [1960]; *Rebecchi v Whitmore*, 172 AD2d 600 [1991]).

#### *Plaintiff’s Labor Law §200 Claim*

Section § 200 of the Labor Law is not a strict liability statute but a “negligence statute” codifying the owner’s or general contractor’s common law duty to maintain a safe workplace (*see Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876, 877 [1993]). An owner, lessee or contractor will be held liable for a violation of Labor Law § 200 and common law negligence when the injury complained of falls into one of two categories; 1) those involving the manner in which the work was performed, or 2) those where workers are injured as a result of a dangerous condition at the work site (*see Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]).

Unlike §§ 240 and 241(6) of the Labor Law, liability will only be imposed upon an owner or general contractor under § 200 of the Labor Law where the worker’s injuries were sustained as a result of a dangerous condition at the work site, and then only if the defendant exercised supervisory control over the work performed at the site, or had sufficient authority to control the activity bringing about the injury in order to enable that defendant to avoid or correct an unsafe condition (*see Rizzuto v L.A. Wenger Constr. Co., Inc.*, 91 NY2d 343, 352 [1998]).

Where, the injury arises out of a “dangerous condition on the site,” rather than “the methods or materials” used by the worker or his employer, it is “not necessary to show that [the owner or general contractor] exercised supervisory control over the manner of performance of the injury producing work,” only that it “had notice of the condition” (*see Minorczyk v Dormitory Auth. of State of New York*, 74 AD3d 672 [1st Dept 2010]; *Seda v Epstein*, 72 AD3d 455 [1st Dept 2010]; *Murphy v Columbia Univ.*, 4 AD3d 200 [1st Dept 2004]). “General awareness” that a dangerous condition may be present is insufficient (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 838 [1986]). “The notice must call attention to the specific defect or hazardous condition and its specific location” (*see Mitchell v New York Univ.*, 12 AD3d 200, 201 [1st Dept 2004]). Furthermore, constructive notice of a defect requires that the “defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it” (*id.*).

“Where a defect is not inherent but is created by the manner in which the work is performed, the claim under Labor Law § 200 is one for means and methods and not one for a dangerous condition existing on the premises.” (*Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404 [1st Dept 2018]). However, “where an accident is alleged to involve defects in both the premises and the manner in which the work was performed, a defendant moving for summary judgment dismissing a cause of action alleging a violation of Labor Law § 200 is obligated to address the proof applicable to both liability standards.” (*Rodriguez v HY 38 Owner, LLC*, 192 AD3d 839 [2d Dept 2021]).

Here, plaintiff asserts that plaintiff’s testimony established that Gilbane had and did exercise actual control over SBF Inc employees at the construction site. Specifically, plaintiff had averred that on a singular occasion Gilbane LLC’s “safety guy” had directed her to work on a different task than one she had been working on, but also averred that Gilbane LLC had never directed her on how to perform her tasks.

Defendants assert that they have established through the Gilbane LLC-SBF Inc contract and plaintiff’s testimony that it did not direct, supervise, or control the work of SBF Inc.

Herein, there are issues of fact as to whether defendants exercised supervisory control over the work performed at the site or had sufficient authority to control the activity bringing about the injury in order to enable that defendant to avoid or correct an unsafe condition.

The Gilbane LLC-SBF Inc Contract provides that “[Gilbane LLC] shall not give instructions or orders directly to employees or workers of [SBF Inc], except to persons designated as authorized representative of [SBF Inc].” However, plaintiff testified that on one occasion a Gilbane LLC “safety guy” directed her to help construct safety railings on the construction site. Thus, demonstrating that at least on one occasion did Gilbane LLC exercise supervisory control over certain work performed at the site and directed employees to perform certain tasks albeit for safety reasons.

However, the parties fail to establish whether Gilbane LLC did or did not exercise supervisory control over the DOKA beam work-related tasks or if Gilbane LLC had directed the SBF foreman to unbind the DOKA Beams. As such, both parties’ motions are denied in as much as further discovery is required to determine the extent of Gilbane LLC’s supervisory control and/or authority over the particular work performed in relation to the DOKA beams.

Additionally, plaintiff’s contention that the injury arises out of a “dangerous condition on the site,” rather than “the methods or materials” used by the SBF foreman is undercut by plaintiff’s expert’s affidavit which provides that a safety zone or some type of barricade should have been established prior to the unbinding of the DOKA beams. Thus, the DOKA beams as they were stacked and bounded were not inherently defective but rather it was the failure to establish a safety zone or barricade that allowed the DOKE beams to spill over onto plaintiff.

*Plaintiff’s Labor Law §240(1) Claim*

Labor Law §240(1), commonly referred to as the “scaffold law,” provides, in relevant part:

All contractors and owners and their agents, except owners of 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 requirements of Labor Law § 240(1) are set forth in *Vasquez v Cohen Brothers Realty Corp.*, 105 AD3d 595 [1st Dept 2013]). The Court stated:

“An owner or its agent is liable under Labor Law Section 240(1) if the plaintiff was injured while engaged in an activity covered by the statute and [was] exposed to an elevation-related hazard for which no safety device was provided or the device provided was inadequate. The statute requires “owners and their agents” to provide workers with adequate safety devices when they engage in activities such as repairing or altering a building. The purpose of the statute is to protect workers by placing the ultimate responsibility for worksite safety on the owner, and Labor Law Section 240(1) imposes strict liability on the owner for a breach of the statutory duty which has proximately caused injury” (*Vasquez*, 105 AD3d at 597).

The purpose of Labor Law § 240(1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, those best suited to bear the responsibility, instead of on the workers, who are not in a position to protect themselves (*see John v Baharestani*, 281 AD2d 114, 117 [1st Dept 2001]). In order to accomplish its goal of preventing accidents, Labor Law §240(1) places the ultimate responsibility for the maintenance of safety practices and safety devices on the owners and the general contractors and their agents who “are best situated to bear that responsibility,” and not on the workers. (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 500 [1993]; *Rocovick*, 78 NY2d at 513.)

The Court of Appeals has repeatedly indicated that §240(1) “is to be construed as liberally as may be for the accomplishment of the purpose for which it was framed.” (*Martinez v City of New York*, 936 NY2d 322, 326 [1999]; *Melber v 6333 Main Street, Inc.*, 91 NY2d 759, 762 [1998].) It is well established that the duty imposed by §240(1) is non-delegable and that an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work.” (*Ross*, 81 NY2d at 500; *Rocovick*, 78 NY2d at 513). “Once the plaintiff makes a prima facie showing the burden then shifts to the defendant, who may defeat plaintiff’s motion for summary judgment only if there is a plausible view of the evidence—enough to raise a fact question—that there was no statutory violation and that plaintiff’s own acts or omissions were the sole cause of the accident.” (*Bermejo v New York City Health & Hosps. Corp.*, 119 AD3d 500, 989 NYS2d 490 [2d Dept 2014] citing *Berenson v. Jericho Water Dist.*, 33 AD3d 574, 822 NYS2d 145 [2d Dept 2006]).

“To recover under Labor Law § 240 (1), a plaintiff must demonstrate that there was a violation of the statute, and that the violation was a proximate cause of the accident.” (*Krarunzhiy v 91 Cent. Park W. Owners Corp.*, 212 AD3d 722 [2d Dept 2023], quoting *Meng Sing Chang v Homewell Owner's Corp.*, 38 AD3d 625 [2d Dept 2007]). “The extraordinary protections of Labor Law § 240 (1) extend only to a narrow class of special hazards and do ‘not encompass any and all perils that may be connected in some tangential way with the effects of gravity’.” (*Krarunzhiy*, 212 AD3d 722 [2d Dept 2023], quoting *Nieves v Five Boro Air Conditioning & Refrigeration Corp.*, 93 NY2d 914 [1999]). “The ‘special hazards’ referred to are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494 [1993]).

“The core objective of the statute in requiring protective devices for those working at heights is to allow them to complete their work safely and prevent them [or objects] from falling. Where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no section 240 (1) liability exists.” (*Krarunzhiy*, 212 AD3d 722 [2d Dept 2023]).

Here, the evidence presented demonstrates that the beams were stacked approximately to plaintiff’s chest level, each wooden beam was approximately 6 to 7 inches wide, approximately 14 feet long, and weighed approximately 25 to 40 pounds each, providing for a sufficient height differential within the scope of 240(1). However, triable issues of fact exist as to whether the beams fell on plaintiff because of the inadequacy of a safety device of the kind enumerated in 240(1). (*Ross v DD 11<sup>th</sup> Ave., LLC*, 109 AD3d 604 [2d Dept 2013]). As such, defendants have failed to make out a prima facie case for dismissal of plaintiff’s 240(1) claim, and their motion for summary judgment dismissing this claim must be denied, and plaintiff’s cross motion is also denied on the same basis.

#### *Plaintiff’s Labor Law §241(6) Claim*

Pursuant to Labor Law §241(6), all contractors, owners, and their agents are required to keep all areas in which construction work is being performed to be constructed, shored, equipped, guarded arranged operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The duty to comply with the commissioner’s regulations under Labor Law §241(6) is nondelegable. (*see, Long v Forest-Fehlhaber*, 55 NY2d 154, 159 (1982); *Allen v Cloutier Constr. Corp.*, [1978].) To support a cause of action pursuant to Labor Law § 241(6), plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision which sets forth specific safety standards. (*Plass v Solotoff*, 5 AD3d 365 [2d Dept 2004]; *D’Elia v City of New York*, 81 AD3d 682 [2d Dept 2011]). Here, plaintiff alleges that defendants violated Industrial Codes 12 NYCRR §23-1.7(a)(2) and (e)(2).

12 NYCRR §23-1.7(a)(2) reads in part as follows:

Where persons are lawfully frequenting areas exposed to falling material or objects but wherein employees are not required to work or pass, such exposed areas shall

be provided with barricades, fencing or the equivalent in compliance with this Part (rule) to prevent inadvertent entry into such areas.

Additionally, 12 NYCRR §23-1.7(e)(2) reads in part as follows:

Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Here, Industrial Code 12 NYCRR §23-1.7(a)(2) is inapplicable in as much as the accident occurred at plaintiff’s workstation or in an adjacent area that she was required to pass through as she returned to her workstation following her break. Whereas 12 NYCRR §23-1.7(e)(2) is inapplicable in as much as the plaintiff’s accident was not caused by scattered tools or the accumulation of debris but rather from the momentum of DOKA beams that had fallen/spilled onto the area after an SBF foreman released the metal bands binding them together.

Plaintiff does not oppose defendants branch of motion to dismiss plaintiff’s other Industrial Code claims as alleged in her Bill of Particulars.

Accordingly, it is hereby

**ORDERED**, that defendant’s motion pursuant to CPLR §3212 dismissing plaintiff’s Labor Law §240(1) and plaintiff’s cross motion under this Section are both denied, it is further

**ORDERED**, that defendants branch of motion pursuant to CPLR §3212 dismissing plaintiff’s Labor Law §241(6) is granted, it is further

**ORDERED**, that defendants branch of motion and plaintiff’s branch of cross-motion pursuant to CPLR §3212 dismissing plaintiff’s common law negligence and Labor Law §200 claims as against Gilbane Residential Construction, LLC are both denied, it is further

**ORDERED**, that defendants shall serve a copy of this order, with notice of entry, upon plaintiff within thirty days from the date of entry.

This constitutes the decision and order of the Court.

Dated: October 29, 2024

  
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HON. KARINA E. ALOMAR, J.S.C.

