**Aguirre v 161 Ct. St. LLC**

2025 NY Slip Op 30538(U)

January 31, 2025

Supreme Court, Kings County

Docket Number: Index No. 520821/2017

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 31st day of January, 2025.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----------------------------------------------------------------------X
MIGUEL ANGEL RODRIGUEZ AGUIRRE,

Plaintiff,

-against-

161 COURT STREET LLC and BUSA BUILDERS LLC,

Defendants.
-----------------------------------------------------------------------X
161 COURT STREET LLC and BUSA BUILDERS LLC,

Third-Party Plaintiffs,

-against-

STRUCTURE USA, CORP.,

Third-Party Defendant.
-----------------------------------------------------------------------X
BUSA BUILDERS LLC,

Second Third-Party Plaintiff,

-against-

HERSHEY GRUNBLATT,

Second Third-Party Defendant.
-----------------------------------------------------------------------X

Index No.: 520821/2017

**DECISION AND ORDER**

(Motion Seq. Nos. 7-8)

| The following e-filed papers read herein: | NYSCEF Doc Nos. |
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| **Mot. Seq. No. 7** | |
| Notice of Motion/Affirmation in Support/Exhibits/Memorandum of Law...... | 159 – 173 |
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| Affirmation in Opposition to Cross-Motion and in Reply.......................... | 190 |

**Mot. Seq. No. 8**

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| Notice of Cross-Motion/Affirmation in Opposition and in Support of Cross-Motion/Memorandum of Law/Exhibits… | 180 – 184 |
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Upon the foregoing papers, Plaintiff Miguel Angel Rodriguez Aguirre ("Plaintiff") moves for an order, pursuant to CPLR 3212, granting him summary judgment on his Labor Law § 240 (1) cause of action (Mot. Seq. No. 7). Defendant/Third-Party Plaintiff 161 Court Street LLC ("161 Court") cross-moves for an order: (1) pursuant to CPLR 3212, granting it summary judgment and dismissing Plaintiff's Labor Law §§ 200, 240 (1) and 241 (6) claims; and (2) denying Plaintiff's motion for summary judgment (Mot. Seq. No. 8). Defendant/Third-Party Plaintiff/Second Third-Party Plaintiff Busa Builders, LLC ("Busa") opposes Plaintiff's motion and argues that 161 Court's motion should be granted in its entirety.

This matter involves an accident that occurred on October 11, 2017, at a construction site at a building located at 161 Court Street in Brooklyn, New York (the "Premises"). The premises was owned by 161 Court and Busa was the general contractor on the project. Plaintiff was employed by Third-Party Defendant Structure USA, Corp. ("Structure").[1]

In his motion, Plaintiff avers that he is entitled to summary judgment on his Labor Law § 240 (1) cause of action because he was, while engaged in construction work, caused to fall from a height due to the absence of any safety equipment to prevent or break his fall. On the date of the accident, Plaintiff asserts that he and his coworkers were attempting to install temporary metal decking on what would become the third floor. Plaintiff avers that while he was wearing a harness at the time, there was no secure anchorage or tie-off spot where the accident occurred.[2] Plaintiff contends that when he was passed a piece of wood by his coworker, he lost his balance and fell backwards to the second-floor deck. According to Plaintiff, he was caused to fall due to the absence of any connection point for the harness, as well as the absence of any guardrail along the edge of the metal decking.

[1] Structure and Second Third-Party Defendant Hershey Grunblatt, the owner of Structure, are in default (*see* NYSCEF Doc Nos. 166-167).

[2] Plaintiff testified that the harness cable was six feet in length (Plaintiff tr at 90, lines 18-19) but no extension were provided (*id.* at 90; lines 23-25; at 91, lines 1-5).

In its cross-motion, 161 Court contends that Plaintiff successfully tied off to nearby joists and beams while working on the first and second floors. According to 161 Court, Plaintiff unilaterally untied his harness in order to move freely. Thus, 161 Court argues that Plaintiff's "improper" decision to untie the harness was the proximate cause of the accident. 161 Court submitted an expert report from Michael Cronin, P.E., who opined that Plaintiff was provided with appropriate safety devices at the time of the accident, the harness was sufficient, and no additional safety devices were required. Further, Mr. Cronin opined that 161 Court did not violate any applicable codes or industry standards, including Labor Law §§ 200, 240 and 241. With respect to Labor Law § 200, 161 Court asserts that it did not supervise Plaintiff's work nor create, or have prior knowledge of, any dangerous condition at the Premises. 161 Court asserts that Plaintiff failed to follow directions regarding his safety and was the sole proximate cause of the accident, thus Plaintiff's Labor Law § 240 (1) claim is barred. 161 Court further argues that Plaintiff's Labor Law § 241 (6) claim must be dismissed because he was the sole proximate cause of his accident and there is no evidence of violations of any relevant and applicable Industrial Code provisions. In addition, 161 Court notes that there is no sworn testimony from an eyewitness and no accident report, photograph or statement verifying Plaintiff's accident. Thus, if Plaintiff's claims are not dismissed, 161 Court alternatively request that Plaintiff's summary judgment be denied since there are issues of fact warranting a trial. Moreover, 161 Court argues that the motion is premature because Plaintiff did not disclose the identity or contact information for two alleged witnesses until February 2024.

Busa similarly argues that Plaintiff's motion for summary judgment should be denied because he was provided with a harness, which he admittedly unhooked and failed to hook on to nearby joists. Busa maintains that since Plaintiff is the sole proximate cause of the accident, Plaintiff's Labor Law § 240 (1) claim should be dismissed. Moreover, Busa contends that Plaintiff's Labor Law § 241 (6) claim fails because he cannot establish a violation of any Industrial Code. Finally, Busa maintains that it did not exercise control, supervision or direction over the work performed by Plaintiff or Structure. Therefore, Busa argues that Plaintiff's Labor Law § 200 and common law negligence claims against Busa should be dismissed. Busa argues that even if Plaintiff established entitlement to summary judgment, the motion is premature because defendants have not been able to depose the two alleged witnesses, whose testimony may impact the issue of liability.

In opposition to the cross-motion and in further support of his motion, Plaintiff maintains that he is entitled to summary judgment on his Labor Law § 240 (1) claim since 161 Court ignores Plaintiff's testimony that there was no anchorage point to which his safety harness could be attached and thus, Plaintiff cannot be the sole proximate cause of the accident. Plaintiff further argues that 161 Court and its expert Mr. Cronin ignored his testimony that there was no center beam available to tie off to since it was covered by the metal decking. With respect to the alleged lack of corroborating evidence, Plaintiff asserts that this does not warrant denial of summary judgment because there is no bona fide challenge to his credibility as to a material fact. Turning to his Labor Law § 241 (6) cause of action, Plaintiff maintains that it should not be dismissed because 161 Court did not demonstrate the absence of triable issues of fact regarding Industrial Code § 23-1.16(b), which requires safety harnesses and anchorage points.[3]

In reply to Plaintiff's opposition to its cross-motion, 161 Court maintains that Plaintiff is the sole proximate cause of his accident. 161 Court argues that photographs of the accident site demonstrate that safety guide wires were installed and there was multiple tie-off and tie line areas present.[4] Thus, 161 Court asserts that Industrial Code § 23-1.16(b) does not apply since Plaintiff *chose* not to use the equipment provided.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact'" (*Kolivas v Kirchoff*, 14 AD3d 493, 493 [2d Dept 2005], citing *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *see Sucre v Consolidated Edison Co. of N.Y., Inc.*, 184 AD3d 712, 714 [2d Dept 2020]). "The proponent for the summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact" (*Sanchez v Ageless Chimney Inc.*, 219 AD3d 767, 768 [2d Dept 2023], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

[3] Plaintiff takes no position on 161 Court's request for dismissal of his Labor Law § 200 cause of action or the Labor Law § 241 (6) cause of action to the extent it is not predicated upon Industrial Code § 23-1.16.

[4] The Court notes that only one photograph was submitted in relation to this motion, which was introduced as Exhibit B at Plaintiff's deposition. When asked about this specific photograph, Plaintiff testified that he did not know when the photograph was taken but he identified himself in the picture as working on the second floor (Pl tr at 83, lines 3-8). It is undisputed that at the time of the accident, Plaintiff was on the third floor and thus, the photograph is not a fair and accurate depiction of the scene of the accident. Moreover, 161 Court argues that there are no pictures verifying the accident.

Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce admissible evidence to establish the existence of material issues of fact which require a trial for resolution (*see Gesuale v Campanelli & Assocs.*, 126 AD3d 936, 937 [2d Dept 2015]; *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 494 [2d Dept 1989]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad*, 64 NY2d at 853; *Skrok v Grand Loft Corp.*, 218 AD3d 702 [2d Dept 2023]; *Menzel v Plotnick*, 202 AD2d 558, 558-559 [2d Dept 1994]).

The Court will first turn to the parties' claims concerning Labor Law § 240 (1), which states, in relevant part, that:

> 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 purpose of Labor Law § 240 (1) is to protect workers "from the pronounced risks arising from construction work site elevation differentials" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see also Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Consequently, Labor Law § 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a protected task (*see Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2d Dept 2009], *lv dismissed* 13 NY3d 857 [2009]). The statute is designed to protect against "'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 DD 11th Ave., LLC*, 109 AD3d 604, 604-605 [2d Dept 2013], quoting *Ross*, 81 NY2d at 501).

The duty to provide the required "proper protection" against elevation-related risks is nondelegable; therefore, owners, contractors and their agents are liable for the violations even if they have not exercised supervision and control over either the subject work or the injured worker (*see Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [owner or

contractor is liable for Labor Law § 240 (1) violation "without regard to . . . care or lack of it"]; *see Roblero v Bais Ruchel High Sch., Inc.*, 175 AD3d 1446, 1447 [2d Dept 2019]). "A worker's comparative negligence is not a defense to a claim under Labor Law § 240 (1) and does not effect a reduction in liability" (*Roblero*, 175 AD3d at 1447, citing *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003]; *see also Garzon v Viola*, 124 AD3d 715, 716-717 [2d Dept 2015]). "[W]here . . . a violation of Labor Law § 240 (1) is a proximate cause of an accident, the worker's conduct cannot be deemed solely to blame for it" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 696 [2d Dept 2006], citing *Blake*, 1 NY3d at 290). "In determining whether the plaintiff is entitled to the extraordinary protection of that strict liability statute, 'the single decisive question is whether [the] plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential'" (*Christie v Live Nation Concerts*, 192 AD3d 971, 972 [2d Dept 2021], quoting *Runner v New York Stock Exch.*, Inc., 13 NY3d 599, 603 [2009]; *see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1 [2011]). Nonetheless, "[t]he availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures" (*Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006], quoting *Conway v NY State Teachers' Retirement Sys.*, 141 AD2d 957, 958 [3d Dept 1988]).

Upon review of the documents submitted, the Court finds that Plaintiff established entitlement to summary judgment on his Labor Law § 240 (1) claim. It is uncontested that Plaintiff's assignment posed an elevation-related risk. Plaintiff has demonstrated that he was injured due to the Defendants' failure to provide him an appropriate place to attach his harness. In opposition, Defendants have failed to refute Plaintiff's testimony that the harness cable was only approximately six feet long and they have submitted no evidence that there were appropriate anchorage points to which Plaintiff could have tied off his cable (*see Martinez v Kingston 541, LLC*, 210 AD3d 556, 556-557 [1st Dept 2022]; *Gomez v Trinity Ctr. LLC*, 195 AD3d 502, 503 [1st Dept 2021]; *Anderson v MSG Holdings, L.P.*, 146 AD3d 401, 404 [1st Dept 2017]; *Garzon v Viola*, 124 AD3d 715, 716-717 [2d Dept 2015]). 161 Court's expert Mr. Cronin did not address Plaintiff's testimony that the center beam was covered such that it could not be used to tie-off or that an extension was not provided. Accordingly, the Court finds that Plaintiff is entitled to summary judgment on his Labor Law § 240 (1) cause of action.

With respect to Plaintiff's Labor Law § 241 (6) cause of action, under that section, an owner, general contractor or their agent may be held vicariously liable for injuries to a plaintiff where the plaintiff establishes that the accident was proximately caused by a violation of an Industrial Code section stating a specific positive command that is applicable to the facts of the case (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349-350 [1998]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821 [2d Dept 2017]). The only Industrial Code at issue here is Section 23-1.16.

Section 23-1.16 (b) requires that a worker using a harness have an appropriate secure location to tie off his or her tail line and that such "attachments shall be so arranged that if the user should fall such fall shall not exceed five feet." At his deposition, Plaintiff testified that he was working on the third floor when he fell through to the second floor, approximately 12 feet below (Pl tr at 58, lines 2-4; at 96, line 25; at 97, line 1). He further testified that the crane put the package of metal sheets down in the middle "where there was no way to connect to or hold onto anything" (Pl tr at 65, lines 24-25; at 66, lines 1-3; at 67, lines 1-2). The Court finds that 161 Court failed to meet its prima facie burden demonstrating that there was a place for Plaintiff to tie off when he was performing the work at the time of the accident. Therefore, 161 Court's cross-motion for summary judgment on Labor Law § 241 (6) predicated on Industrial Code § 23-1.16 (b) is denied.

To the extent not specifically addressed herein, the parties' remaining contentions and arguments were considered and found to be without merit and/or moot.

Accordingly, it is hereby

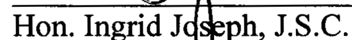
ORDERED, that Plaintiff's motion (Mot. Seq. No. 7) for an order granting summary judgment as to his Labor Law § 240 claim as asserted against 161 Court Street LLC and Busa Builders LLC is granted; and it is further

ORDERED, that the portion of 161 Court Street, LLC's cross-motion (Mot. Seq. No. 8) for summary judgment dismissing Plaintiff's Labor Law § 200 claim is granted; and it is further

ORDERED, that the portion of 161 Court Street, LLC's cross-motion seeking dismissal of Plaintiff's Labor Law § 241 (6) is denied to the extent it is predicated upon Industrial Code § 23-1.16 only.

This constitutes the decision and order of the court.

Hon. Ingrid Joseph, J.S.C.



Supreme Court Justice