Castro v Civic Ctr. Community Group Broadway LLC.
2025 NY Slip Op 33358(U)
September 4, 2025
Supreme Court, New York County
Docket Number: Index No. 161301/2020
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYNN R. KOTLER** **PART** **08**

Justice

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JORGE YUMBATO CASTRO,

Plaintiff,

- v -

CIVIC CENTER COMMUNITY GROUP BROADWAY LLC., NEW LINE STRUCTURES & DEVELOPMENT LLC.,

Defendants.

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INDEX NO. 161301/2020

MOTION DATE 06/25/2025

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 89, 93, 94, 95, 96, 97, 98, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138

were read on this motion to/for JUDGMENT - SUMMARY.

This labor law action arises from a workplace accident suffered by plaintiff Jorge Yumbato Castro on July 14, 2020, while working at a construction project located at 108 Leonard Street in Manhattan (the "Property"). The Property was owned by defendant Civic Center Community Group Broadway LLC. Defendant New Line Structures & Development LLC was the general contractor for the construction project at the Property. Castro now moves pursuant to CPLR 3212 for partial summary judgment as to liability on his Labor Law § 240(1) claim. Defendants oppose the motion. The motion is granted.

On a motion for summary judgment, the proponent bears the initial burden of making a prima facie showing that it is entitled to summary judgment as a matter of law, providing sufficient evidence that no material issues of triable fact exist (*see Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.*, 36 NY3d 69, 74 [2020]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once met, the burden shifts to the opposing party to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]).

"'Whether a plaintiff is entitled to recovery under Labor Law § 240(1) requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies'" (*Rivas v Seward Park Hous. Corp.*, 219 AD3d 59, 63-64 [1st Dept. 2023], quoting *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011]). "'[T]he single decisive question [in this connection] is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential'" (*id.* at 64, quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). "This single decisive question 'center[s] around a core premise: that a defendant's failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability'" (*id.*, quoting *Wilinski*, 18 NY3d at 7).

In support of his motion, Castro submits, *inter alia*, his deposition transcript and the affirmation of his coworker, Javier Gonzalez, who witnessed the subject accident. These submissions establish the following facts: the subject accident occurred while Castro and Gonzalez were jointly working to install sheetrock wall panels, each of which measured approximately four feet by eight feet and weighed approximately 50 pounds. The height of the wall on which they were installing the panels was approximately 14 feet. At the time of the accident, they had installed two panels horizontally, one on top of the other, and were in the process of installing a third panel higher up the wall using an A-frame ladder provided to them. They were not given any additional fall protection devices, nor were they provided any device, such as a sheetrock lift, to hoist and secure the sheetrock panel as it was being installed at height. Thus, to install the third sheetrock panel high on the wall, Castro climbed the A-frame ladder and stood a few rungs down from its top, approximately eight feet above the ground, while Gonzalez remained on the floor to pass the panel up to him. As Castro attempted to take the panel from Gonzalez and manually lift and hold it in place, Gonzalez let go of and/or lost control of the panel, which, due to its size and weight, caused Castro to fall backwards off the ladder to the floor below.

This testimony suffices to establish Castro's prima facie entitlement to summary judgment on his Labor Law § 240(1) cause of action. The testimony demonstrates that the A-frame ladder given to Castro was not "'[an] adequate safety device[ ] to . . . protect [him] from falling'" (*Rivera v 712 Fifth Ave. Owner LP*, 229 AD3d 401, 401–02 [1st Dept. 2024], quoting

Montalvo v J. Petrocelli Const., Inc., 8 AD3d 173, 175 [1st Dept. 2004]; *see Spaulding v Metro. Life Ins. Co.*, 271 AD2d 316, 316–17 [1st Dept. 2000]). Additionally, the testimony demonstrates that Castro's accident was proximately caused by the force of gravity upon the scaffold panel, over which Castro and Gonzalez were unable to maintain control absent a safety device of the kind enumerated in the statute to hoist and secure the panel during its installation at height (*see Rzymski v Metro. Tower Life Ins. Co.*, 94 AD3d 629, 629 [1st Dept. 2012]; *Kosavick v Tishman Const. Corp. of New York*, 50 AD3d 287, 288 [1st Dept. 2008]; *see generally Fabrizi v 1095 Ave. of Americas, L.L.C.*, 22 NY3d 658, 662-63 [2014]; *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604-05 [2009]).

Defendants fail to raise a triable issue of fact in opposition. Defendants submit an accident report that provides a conflicting account of the subject accident, stating that Castro was on the floor passing the sheetrock panel up to Gonzalez on the ladder and strained his arm when the weight of the panel shifted. However, the accident report, which is unsigned and unauthenticated, is inadmissible hearsay; defendants provide no excuse for their failure to tender the report in admissible form; and, as such, the report is insufficient to raise an issue of fact (*see Ging v F.J. Sciame Constr. Co.*, 193 AD3d 415, 417 [1st Dept. 2021]; *Kristo v Bd. of Educ. of City of New York*, 134 AD3d 550, 551 [1st Dept. 2015]).

Defendants' reliance on the affirmation of Castro's jobsite foreman, James O'Neill, is similarly unavailing. O'Neill, too, offers a conflicting account of how the accident occurred, stating that Castro was on the floor passing the sheetrock panel up to Gonzalez on the ladder when the panel slipped and struck Castro. However, O'Neill admitted at his deposition that he did not witness the accident and his account of how the accident occurred is expressly based on hearsay statements purportedly made to him by Gonzalez. The court notes that Gonzalez, in his own affirmation in support of Castro's motion, contradicts O'Neill's account and denies making the statements on which that account is based. Be that as it may, because the portions of O'Neill's testimony relied upon by defendants are inadmissible hearsay and defendants again provide no excuse for their failure to tender this evidence in admissible form, O'Neill's affirmation is also insufficient to raise an issue of fact (*see Zuckerman,* 49 NY2d at 562; *Kristo*, 134 AD3d at 551, citing *Allstate Ins. Co. v Keil*, 268 AD2d 545, 545-46 [2nd Dept. 2000]).

Also unavailing is defendants' reliance on a purportedly inconsistent statement in Castro's hospital record from Long Island Jewish Forest Hills Hospital, which reflects that "Pt stated he tried to lift sheet rock and he heard a crack in right arm . . . ." That description, though, is consistent with Castro's testimony, in which Castro similarly describes hearing "a crack on my right elbow" after Gonzalez lost control of the sheetrock panel and immediately preceding his fall from the ladder. Moreover, "[w]here details of how a particular injury occurred are not useful for purposes of medical diagnosis or treatment, they are not considered to have been recorded in the regular course of the hospital's business," and thus do not come within the ambit of the business records exception to the hearsay rule (*People v Ortega*, 15 NY3d 610, 617 [2010]). The burden is on "[t]he proponent of hearsay evidence [to] establish the applicability of a hearsay-rule exception" (*Tyrrell v Wal-Mart Stores Inc.*, 97 NY2d 650, 652 [2001]). Here, however, defendants make no showing that the purportedly inconsistent statement in the relevant hospital record is germane to Castro's diagnosis and treatment.

The court notes that defense counsel attempts to lay a foundation for consideration of the hospital record by offering her own summary of deposition testimony purportedly given by a hospital witness, including a statement that the history of how Castro's injury occurred was necessary to assess his condition and plan his treatment. However, counsel's summary, standing alone, is without evidentiary value, and defendants fail to submit the actual transcript of the hospital witness's deposition testimony with their timely-filed opposition papers. The court will not consider defendants' unauthorized "Supplemental Affirmation in Opposition" or the additional documentary evidence annexed thereto, which includes the hospital witness's missing deposition transcript. These submissions, which were filed without good cause nearly two weeks after the deadline for filing opposition papers and four days after the filing of Castro's reply, constitute an improper sur-reply not entitled to the court's consideration (*see Traders Co. v AST Sportswear, Inc.*, 31 AD3d 276, 277–78 [1st Dept. 2006]; *Pinkow v Herfield*, 264 AD2d 356, 358 [1st Dept. 1999]; *Carpenter v Steadman*, 149 AD3d 1599, 1600 [4th Dept. 2017]; *HSBC Bank USA, Nat. Ass'n v Roumiantseva*, 130 AD3d 983, 985 [2nd Dept. 2015]; *McMullin v Walker*, 68 AD3d 943, 944 [2nd Dept. 2009]; *Flores v Stankiewicz*, 35 AD3d 804, 805 [2nd Dept. 2006]). Notably, while the underlying hospital record was transmitted to defendants in October 2023, defendants did not seek the deposition of a hospital witness until April 2025.

Defendants offer no explanation for this delay. As such, the fact that the hospital witness was not ultimately deposed until June 11, 2025, the same day defendants' opposition papers were due, does not constitute good cause for defendants' unauthorized sur-reply. This is especially so given defendants' additional failure to seek either an adjournment of the deadline for filing their opposition or leave of court for the filing of a sur-reply.

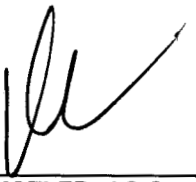
The court has considered defendants' additional contentions in opposition to the motion, even if not specifically addressed herein, and finds them unavailing.

Accordingly, it is

ORDERED that plaintiff's motion pursuant to CPLR 3212 for partial summary judgment as to liability on his third cause of action for violation of Labor Law § 240(1) is granted; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



9/4/2025
DATE

LYNN R. KOTLER, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
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