

Smith v New York City Hous. Auth.

2025 NY Slip Op 33636(U)

September 15, 2025

Supreme Court, Kings County

Docket Number: Index No. 507000/2022

Judge: Devin P. Cohen

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Supreme Court of the State of New York
County of Kings

Index Number 507000/2022
Seqs. 003, 004

Part LL1M

DECISION/ORDER

DARRYL SMITH,

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Plaintiff,

Papers Numbered

against

Notice of Motion and Affidavits Annexed	<u>1-2</u>
Order to Show Cause and Affidavits Annexed	<u>3-4</u>
Answering Affidavits	<u>5-6</u>
Replying Affidavits	<u>Var.</u>
Exhibits	<u>Var.</u>
Other	<u>Var.</u>

THE NEW YORK CITY HOUSING AUTHORITY,

Defendant.

Upon the foregoing papers, plaintiff’s motion for summary judgment (Seq. 003) and defendant’s cross-motion for summary judgment (Seq. 004) are decided as follows:

Introduction and Factual Background

Plaintiff commenced this action to recover for damages he claims he sustained on July 13, 2021, when the Lull forklift he was driving fell into an unsecured trench at a construction site located at 2410 Surf Avenue, Brooklyn, NY 11224. The premises was owned by the New York City Housing Authority (NYCHA).

The essential facts of the incident are undisputed. Plaintiff was driving a Lull forklift in order to move concrete cylinders. The route to the cylinders involved driving along a recently backfilled trench. Within the trench there was a sewer line, which was covered with plywood before the trench was backfilled (Smith EBT at 81–82). While driving the forklift to the cylinders along the edge of a trench, the ground underneath the right two wheels collapsed (Smith 50h at 31). Plaintiff extended the outrigger to stabilize and level the machine (Smith EBT at 126, 130). Plaintiff then drove the machine out of the trench (*id.* at 130).

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Labor Law § 240 (1)

Liability under Labor Law § 240 (1) attaches where “a failure to provide adequate protection against a risk arising from a physically significant elevation differential” is a proximate cause of the plaintiff's harm (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). That question can be answered affirmatively even in cases where a plaintiff neither falls nor is struck by a falling object (*see Johnsen v State of New York*, 207 AD3d 530, 531 [2d Dept 2022] [plaintiff's harm was caused by violent shaking of manlift]; *see also Wilson v Bergon Constr. Corp.*, 219 AD3d 1380, 1381–82 [2d Dept 2023] [plaintiff's harm caused by bracing himself to prevent a fall from a scaffold]; *Vislocky v City of New York*, 62 AD3d 785 [2d Dept 2009] [plaintiff's harm caused by bracing himself on an elevated platform while bending rebar]). Furthermore, “the 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” (*Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958–959 [1988]).

The plaintiff has demonstrated his prima facie entitlement to summary judgment on his Labor Law § 240 (1) claims. Plaintiff testified that he was operating a Lull near an excavated trench and that the trench was not properly shored, causing the trench to collapse and plaintiff to

fall (within his vehicle) partially into the trench. These facts are analogous to a plaintiff who was required to work on an elevated platform that collapses, causing the plaintiff to fall or sustain harm due to almost falling (*see Wilson*, 219 AD3d at 1381–82).

Defendant contends that it is entitled to summary judgment, or that plaintiff's motion should minimally be denied, because trench collapses are not covered by Labor Law § 240 (1) in the Second Department. However, this argument is unavailing because the line of cases cited by defendant, ending with *Ferreira v Village of Kings Point*, 68 AD3d 1048, 1050 (2d Dept 2009), were all decided before the Court of Appeals decided *Runner*, and therefore were not analyzed under contemporary Labor Law § 240 (1) jurisprudence. The Second Department has not issued a decision on trench collapses since *Runner*; the First Department has affirmatively held that trench collapses fall within the purview of Labor Law § 240 (1) (*Rivas v Stewart Park Housing Corp.*, 219 AD3d 59, [1st Dept 2023]). Pursuant to *Runner*, and under the Second Department holdings in *Wilson*, *Johnsen*, and *Vislocky*, a worker need not fall in order to be afforded the protection of Labor Law § 240 (1). Here, the plaintiff was exposed to an elevation-related risk and was furnished with inadequate safety devices, placing his claims within the purview of Labor Law § 240 (1).

Therefore, plaintiff's motion is granted with respect to his Labor Law § 240 (1) claim; defendant's motion is denied.

Labor Law § 241 (6)

To prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show that he was (1) on a job site, (2) engaged in qualifying work, and (3) suffered harm (4) the proximate cause of which was a violation of an Industrial Code provision (*Moscato v Consolidated Edison*

Co. of N.Y., Inc., 168 AD3d 717, 718 [2d Dept 2019]). Plaintiff's claim is predicated on two alleged Industrial Code violations: Rule 1.7 (b) (1) (i) and Rule 4.2 (i).

Rule 1.7 (b) (1) requires that "[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule)." The court is not aware of, and neither side cites, caselaw from an Appellate Division involving the application of Rule 1.7 (b) (1) in cases where a vehicle falls into an allegedly hazardous opening, and not a person. In any event, plaintiff testified that the ground gave way beneath the wheels of the Lull, not that the Lull fell into an open trench. The plaintiff does not advance substantive argument that the absence of a cover or safety railing was a proximate cause of his accident, nor that such devices would not have been contrary to the work being performed. Therefore, this Industrial Code provision is not applicable to the instant facts (*see Salazar v Novalex Contracting Corp.*, 18 NY3d 134 [2011]; *see also Barillaro v Beechwood RB Shorehaven, LLC*, 69 AD3d 543 [2d Dept 2010]).

Plaintiff's pleadings allege a violation of Rule 4.2 (i), which requires that open excavations that are at least three feet deep must be guarded when they are unattended. Plaintiff only advances arguments in his own motion that the trench should have been shored, and does not address how the lack of fencing or barricading was a proximate cause of plaintiff's accident. In his opposition to defendant's motion, plaintiff only makes argument concerning Rule 4.2 (k), but does not request to amend his pleadings to assert this unpleaded violation (*Gonzalez v City of New York*, 227 AD3d 958, 961 [2d Dept 2024]). Therefore, in the absence of substantive argument, defendant's motion is granted with respect to this alleged rule violation.

Conclusion

Plaintiff's motion for summary judgment (Seq. 003) is granted with respect to this Labor Law § 240 (1) claim; the motion is otherwise denied.

Defendant's cross-motion for summary judgment (Seq. 004) is granted with respect to plaintiff's Labor Law § 241 (6) claim; the motion is otherwise denied. To the extent discovery is outstanding, denial is without prejudice to a new motion as to discovery enforcement only made in the appropriate part.

This constitutes the decision and order of the court.

September 15, 2025

DATE



DEVIN P. COHEN

Justice of the Supreme Court