

Xiufeng Xu v City of New York

2025 NY Slip Op 33980(U)

October 6, 2025

Supreme Court, Kings County

Docket Number: Index No. 503979/2023

Judge: Devin P. Cohen

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**Supreme Court of the State of New York
County of Kings**

Index Number 503979/2023
Seqs. 001, 003-005

Part LL1

DECISION/ORDER

XIUFENG XU,

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>1-5</u>
Order to Show Cause and Affidavits Annexed.	_____
Answering Affidavits	<u>6-10</u>
Replying Affidavits	<u>11-15</u>
Exhibits	_____
Other	_____

THE CITY OF NEW YORK, BROOKLYN NAVY YARD
DEVELOPMENT CORPORATION,

Defendants.

THE CITY OF NEW YORK AND BROOKLYN NAVY YARD
DEVELOPMENT CORPORATION,

Third-Party Plaintiffs,

against

GMD SHIPYARD CORPORATION,

Third-Party Defendants.

GMD SHIPYARD CORPORATION,

Second Third-Party Plaintiff,

against

BLASTMASTER HOLDINGS USA, LLC AND AXXIOM
MANUFACTURING, INC.,

Second Third-Party Defendants.

Upon the foregoing papers, plaintiff's motion to sever the second third-party action against Blastmaster Holdings USA (Blastmaster) and Axxiom Manufacturing, Inc. (Axxiom) (Seq. 001), second third-party defendant Blastmaster's cross-motion to sever (Seq. 003), second

third-party defendant Axxiom's cross-motion to sever (Seq. 004), and plaintiff's motion for summary judgment (Seq. 005) are decided as follows:

Procedural Posture and Factual Background

Plaintiff commenced this action to recover for damages he claims he sustained on February 12, 2022 while sandblasting ships at the Brooklyn Navy Yards. Plaintiff filed suit on February 7, 2023. Plaintiff's employer, GMD Shipyard Corporation (GMD), was impleaded on April 24, 2024. On January 9, 2025, GMD impleaded Blastmaster and Axxiom in a third-party complaint containing allegations sounding in products liability, indemnification, and contribution. A compliance conference order dated March 7, 2024 did not establish a deadline by which impleader needed to be completed, and the note of issue was not filed until March 4, 2025.

It is undisputed that defendant Brooklyn Naval Yard Development Corporation (BNYDC) was the tenant at the premises owned by defendant City of New York (NYC). The plaintiff testified as follows: On the date of the accident, plaintiff was asked to check the blast pot to see if it needed more sand (Xu EBT at 81). No one at GMD ever told him to wear a harness while working at an elevation (*id.* at 60–61). The date of the accident was the first time that plaintiff had ever climbed the pot to fill it with sand because typically “a dedicated person [named Mr. Kim] would do that” (*id.* at 63). On the date of his accident, plaintiff was instructed to open the pot and see if sand needed to be added (*id.* at 75–76, 81). Plaintiff climbed the ladder on the outside of the pot and then climbed on top of the pot to open it (*id.* at 82). While plaintiff was attempting to open the pot, the lid sprang open and struck plaintiff in the hand, knocking him off of the pot (*id.* at 81–82). Plaintiff contends that this occurrence was caused by the lack of “[something] on top of the pot that [he could] hold” on to (*id.* at 92).

Tingnan Cui, an employee of GMD and plaintiff's foreman, testified as follows: Mr. Cui showed plaintiff how to fill the pot (Cui EBT at 29–30). Mr. Cui testified that workers could open the pot from the ladder, but also answered affirmatively when he was asked if workers could “climb on top of the pot” after it was depressurized in order to fill it (*id.* at 36–37). Once a worker was on top of the pot, there was “nothing [to] prevent” them from falling off (*id.* at 36). Workers were not provided with tethering devices since they were “too cumbersome” with their other equipment, although there were harnesses in a box beside the blast pot (*id.* at 37). On the date of the accident, Mr. Cui instructed plaintiff to sandblast the bottom of the ship (*id.* at 42–43). Mr. Cui observed Mr. Xu immediately prior to, during, and after his accident (*id.* at 54–55). Because the work was being performed at night, Mr. Cui would use a laser pointer to communicate with workers (*id.* at 58). Mr. Cui claims that when he observed plaintiff climbing the blast pot he attempted to signal, both with the laser pointer and by yelling, that the pressure was not released, and that plaintiff should not open the pot (*id.* at 58). Mr. Cui contends that plaintiff responded, “I know, I know,” before opening the pot and falling off (*id.* at 59–60). Mr. Cui had previously testified that it could be difficult for workers to hear him because he was on the deck and the workers had helmets with ear protection, although Mr. Cui testified that plaintiff was not wearing his helmet at the time of the accident (*id.* at 53, 60).

Analysis

As an initial matter, Blastmaster's and Axxiom's cross-motions are procedurally defective, as they are not motions filed against the initially moving party (*see* CPLR 2215). Therefore, these motions are denied.

Severance

“The grant or denial of a request for severance is a matter of judicial discretion” (*Chiarello v Rio*, 101 AD3d 793, 797 [2d Dept 2012]). However, that “discretion should be exercised sparingly” because “where complex issues are intertwined . . . it would be better . . . to facilitate one complete and comprehensive hearing and determine all the issues involved between the parties at the same time” (*Shanley v Callahan Industries, Inc.*, 54 NY2d 52 [1981]).

Here, plaintiff contends that second third-party action was commenced late and will therefore impose undue delay on the trial of plaintiff’s personal injury action. The plaintiff also argues that the products liability claims in the second third-party complaint will likely result in jury confusion if tried contemporaneously with the Labor Law personal injury action. Contrary to plaintiff’s contentions, the second third-party action “involve[s] common factual and legal issues,” such that the “interests of judicial economy and consistency of verdicts” militate against severance (*Nieto v 1054 Bushwick Ave, LLC*, 219 AD3d 754 [2d Dept 2023]). To the extent that plaintiff’s arguments are predicated on discovery in the second third-party action, the parties’ first appearance in the Jury Coordinating Part is September 23, 2025, and standards and goals is June 5, 2026. Plaintiff’s concerns about delay are not yet ripe. Therefore, severance is denied without prejudice to a new motion, if appropriate, when the issue is ripe.

Summary Judgment

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) is “absolute” 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]; *see also Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 287 [2003] [citing *Haimes v. New York Tel. Co.*, 46 NY2d 132, 136 (1978) and *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 500 (1993)]). In order to bar a plaintiff from recovery on the basis that he was a “recalcitrant,” defendants must demonstrate that plaintiff “(1) had adequate safety devices available, (2) knew both that the safety devices were available and that they were expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had they not made that choice”; mere comparative fault is not a defense to Labor Law § 240 (1) (*Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167–1168 [2020]).

Plaintiff testified that he was cleaning the exterior of the ship and, after climbing the blast pot to see if it was filled with sand, was knocked to the ground. Plaintiff further testified that the blast pot was not equipped with guardrails and that he was not instructed to wear a harness while performing the work. Mr. Cui explicitly denied that workers were provided with tethers, saying they were “too bulky.” The absence of safety devices sufficient to protect plaintiff from the elevation-related risk were, at a minimum, a proximate cause of plaintiff’s accident; therefore, plaintiff has demonstrated his prima facie entitlement to summary judgment on his Labor Law § 240 (1) claim.

In opposition, defendants fail to raise a triable issue of material fact. Mr. Cui’s testimony that Mr. Kim typically refilled the pots does not rebut plaintiff’s testimony that plaintiff was trained how to inspect the pots and was instructed by his supervisor to inspect the pots on that

day. Furthermore, “an instruction not to be in a particular area is not a safety device in the sense that plaintiff’s failure to comply with the instruction [would be] equivalent to refusing to use available, safe and appropriate equipment” (*Rivera v 26 W. 56, LLC*, 241 AD3d 844 [2 Dept 2025]). Mr. Cui’s testimony that he yelled out to plaintiff in the instant before he fell not to open the pot yet is insufficient to rebut plaintiff’s prima facie showing. As an initial matter, Mr. Cui testified that it was difficult for workers to hear him when he was on the deck, undermining his contention that plaintiff heard his instruction. Even if the court accepted for arguments’ sake that plaintiff was able to hear Mr. Cui, the purported instruction not to open the pot came after plaintiff was already exposed to an elevation-related risk without adequate safety devices. Mr. Cui does not allege that he instructed plaintiff to use any safety devices. Therefore, this testimony does not raise a material issue of fact as to plaintiff’s recalcitrance; there is no evidence that plaintiff refused to use an adequate, available safety device for no good reason (*Biacca-Neto*, 34 NY3d 166 [2020]).

Defendants’ remaining arguments about the applicability of Labor Law § 240 (1) are equally unavailing. Plaintiff cannot have been the sole proximate cause of his accident. It is undisputed that plaintiff was not provided with adequate safety devices, including a tether or safety rails, and the presence of a statutory violation precludes a determination that the plaintiff was the sole proximate cause (*see Blake*, 1 NY3d 280 [2003]). Furthermore, Mr. Cui admitted that he had shown plaintiff how to fill the blast pot with sand, undermining any contention that plaintiff was acting entirely on his own volition to perform work that was outside of the scope of his employment. With respect to defendants’ arguments about the applicability of Labor Law § 240 (1), GMD does not contend that plaintiff was sandblasting something other than a ship which was large and permanent enough to require sandblasting. The court can reasonably infer

that the ship plaintiff was working on was larger, more complicated, and more permanent than the chuppah that qualified as a structure in *McCoy v Abigail Kirsch at Tappan Hill, Inc.*, 99 AD3d 13 (2d Dept 2012). Furthermore, sandblasting has long been held to be covered work under the statute and not merely routine maintenance (*see Gordon v Eastern Ry. Supply*, 82 NY2d 555 [1993]). Ensuring that the blast pot contained sand is certainly ancillary to the work of sandblasting (*see Prats v Port Authority of NY & NJ*, 100 NY2d 878, 882 [2003]).

Therefore, plaintiff’s motion for summary judgment on his Labor Law § 240 (1) claim is granted.

Labor Law § 241 (6)

In his affirmation in reply, plaintiff withdrew that portion of his motion seeking summary judgment on his Labor Law § 241 (6) claim.


Conclusion

Plaintiff’s motion for severance (Seq. 001), Blastmaster’s cross-motion to sever the second third-party action (Seq. 003), and Axxiom’s cross-motion to sever the second third-party action (Seq. 004) are denied.

Plaintiff’s motion for summary judgment (Seq. 005) is granted with respect to his Labor Law § 240 (1) claim.

This constitutes the decision and order of the court.

October 6, 2025
DATE


DEVIN P. COHEN
Justice of the Supreme Court