Roque v Vibes of One LLC
2025 NY Slip Op 35076(U)
March 14, 2025
Supreme Court, Bronx County
Docket Number: Index No. 34904/2019E
Judge: Erik L. Gray
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 30

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VICTOR ROQUE,

Index No. 34904/2019E

-against-

Hon. ERIK L. GRAY

VIBES OF ONE LLC and NY DEVELOPERS AND MANAGEMENT.

Justice of the Supreme Court

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The following papers were read on plaintiff's motion for summary judgment on the issue of liability on his Labor Law §§ 240 (1) and 241 (6) claims (mot seq 1) filed on April 5, 2024:

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	NYSCEF Doc No(s). 20-32
Answering Affidavit and Exhibits	NYSCEF Doc No(s). 34-36
Replying Affidavit and Exhibits	NYSCEF Doc No(s). 38

Motion is Respectfully Referred to Justice: _____
Dated: _____

Plaintiff's motion for summary judgment on the issue of liability on his Labor Law § 240 (1) claim is granted and on his Labor Law § 241 (6) claim is denied pursuant to the attached decision and order.

The parties shall appear for a pretrial conference on May 7, 2025, at 9:30 a.m. in Part 30, Room 703.

Dated: March 14, 2025

Hon. _____

ERIK L. GRAY, JSC

1. CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY	☒ CASE STILL ACTIVE			
2. MOTION IS.....	☒ GRANTED	☐ DENIED	☐ GRANTED IN PART	☐ OTHER	
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER	☐ SUBMIT ORDER	☒ SCHEDULE APPEARANCE		
	☐ FIDUCIARY APPOINTMENT	☐ REFEREE APPOINTMENT			

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 30

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VICTOR ROQUE, Index No. 34904/2019E

Plaintiff,

-against- DECISION AND ORDER

VIBES OF ONE LLC and NY DEVELOPERS AND MANAGEMENT,

Defendants.

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ERIK L. GRAY, J.

After due deliberation, plaintiff's motion, pursuant to CPLR 3212, for summary judgment on the issue of liability on his Labor Law § 240 (1) claim is granted and on his Labor Law § 241 (6) claim is denied.

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Bazdaric v Almah Partners, LLC*, 41 NY3d 310, 316 [2024]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 NY2d at 324; *see also Bazdaric*, 41 NY3d at 316). It is settled law that "Labor Law § 240 (1) places a nondelegable duty on owners, contractors, and their agents to furnish safety devices giving construction workers adequate protection from elevation-related risks" (*Hill v City of New York*, 140 AD3d 568, 569 [1st Dept 2016]; *see also* § 240 [1]; *Gordon v E. Ry. Supply, Inc.*, 82 NY2d 555, 559 [1993]). "Section 240 (1) applies where an employee is engaged 'in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure' " (*Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003], quoting § 240 [1]; *see also Dos Santos v Consol. Edison of N.Y., Inc.*, 104 AD3d 606, 607 [1st Dept 2013]). Labor Law § 241 (6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers [performing covered work] and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993], quoting § 241 [6]; *see also Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82, 85 [1st Dept 2018]). "To establish a claim under the statute, a plaintiff must show that a specific, applicable Industrial Code regulation was violated and that the violation caused the complained-of injury" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012]; *see also Ross*, 81 NY2d 494 at 501-502).

Regarding plaintiff's § 240 (1) claim, plaintiff argues that the evidence demonstrates that he was injured when a steel rod approximately 10 inches thick and 5 to 6 feet long, weighing

approximately 15 to 20 pounds, fell on his head and back while he was working at a location on the ground breaking up a rock pursuant to his supervisor's instructions. Plaintiff further argues that a co-worker was working on a wall with steel rods while on a scaffold approximately five to six feet above him, and that at the time of the accident he was wearing a helmet. Plaintiff further argues that there was no overhead netting in place at the time of the accident. " '[T]he decisive question as to whether the statute applies to a particular accident is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against harm directly flowing from the application of the force of gravity to an object or person' " (*Torres-Quito v 1711 LLC*, 227 AD3d 113, 116 [1st Dept 2024], quoting *Arnaud v 140 Edgecomb LLC*, 83 AD3d 507, 508 [1st Dept 2011]; *see also Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603, 604 [2009]). " 'In the context of falling objects, the risk to be guarded against is the unchecked or insufficiently checked descent of the object' " (*Torres-Quito*, 227 AD3d at 116, quoting *Arnaud*, 83 AD3d at 508). Thus, "plaintiff establishe[d] a prima facie entitlement to liability on [his] Labor Law § 240 (1) 'falling object' claim [since] he show[ed] that he was struck by a falling object, that such object required securing for the purposes of the undertaking, and that the lack of adequate overhead protection failed to shield against the falling of such object and therefore proximately caused plaintiff's injuries" (*Torres-Quito*, 227 AD3d at 116; *see also Hill v Acies Group, LLC*, 122 AD3d 428, 429 [1st Dept 2014]).

In opposition to plaintiff's motion on his § 240 (1) claim, defendants first argue that plaintiff failed to establish prima facie entitlement to summary judgment because he did not provide any evidence as to why the rod fell on him or how far it fell. "Contrary to defendants' argument, '[a] plaintiff's prima facie case in a Labor Law § 240 (1) action involving falling objects is not dependent on whether the plaintiff observed the object that hit him' " (*Torres-Quito*, 227 AD3d at 117, quoting *Harsanyi v Extell 4110 LLC*, 220 AD3d 528, 529 [1st Dept 2023]). Moreover, the fact that plaintiff did not or could not specifically identify the origin of the rod does not preclude summary judgment in his favor (*see Fromel v W2005/Hines W. Fifty-Third Realty, LLC*, 232 AD3d 513, 514 [1st Dept 2024]; *Harsanyi*, 220 AD3d at 529). "A plaintiff is not required to show the exact circumstances under which the object fell, where a lack of a protective device proximately caused the injuries" (*Torres-Quito*, 227 AD3d at 117; *see also Arnaud*, 83 AD3d at 508). Furthermore, as plaintiff established that the scaffold was approximately 5 to 6 feet above him and the rod weighed approximately 15 to 20 pounds, "no issue of fact exists as to whether the distance the [rod] fell was de minimis, [since] the harm to plaintiff was the direct consequence of the application of the force of gravity upon the [rod], whose weight, and force generated by its fall, were sufficient to cause such injuries" (*Torres-Quito*, 227 AD3d at 118; *see also Rutkowski v New York Convention Ctr. Dev. Corp.*, 146 AD3d 686, 686 [1st Dept 2017]). Defendants further argue that there are triable issues of fact regarding how the accident occurred because the accident/incident report, which they submitted as evidence, states that the accident occurred when plaintiff's co-worker was carrying a rod and swung it, striking plaintiff in the head. The accident report, however, is inadmissible because it is unsworn and unauthenticated (*see Li Xian v Tat Lee Supplies Co., Inc.*, 170 AD3d 538, 539 [1st Dept 2019]; *Rue v Stokes*, 191 AD2d 245, 246-247 [1st Dept 1993]). While "inadmissible hearsay statements may be considered in opposition to a motion for summary judgment where offered in conjunction with admissible evidence in support of the same argument" (*Garcia v 122-130 E. 23rd St. LLC*, 220 AD3d 463, 464 [1st Dept 2023]; *see also Zimbler v Resnick 72nd St Assoc.*, 79 AD3d 620, 621 [1st Dept 2010]), the unauthenticated accident report was the only evidence defendants submitted in support of this argument. Thus,

defendants failed to raise a triable issue of fact requiring denial of plaintiff's motion for summary judgment on his § 240 (1) claim.

Regarding plaintiff's § 241 (6) claim, plaintiff argues that defendants violated Industrial Code (12 NYCRR) 23-1.7 (a) (1), which entitles him to judgment as a matter of law on this claim. Industrial Code 23-1.7 (a) (1), requires that "[e]very place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection." As defendants correctly argue in opposition, however, plaintiff failed to submit any "evidence that the area where [he] was working was normally exposed to falling objects" (*Torres-Quito*, 227 AD3d at 118; *see also Quinlan v City of New York*, 293 AD2d 262, 263 [1st Dept 2002]). Consequently, plaintiff failed to establish entitlement to judgment as a matter of law on this claim.

Accordingly, plaintiff's motion, pursuant to CPLR 3212, for summary judgment on the issue of liability on his Labor Law § 240 (1) claim is GRANTED and on his Labor Law § 241 (6) claim is DENIED.

This constitutes the decision and order of the court.

Dated: March 14, 2025
Bronx, New York

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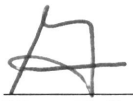

Hon. Erik L. Gray
Justice of the Supreme Court