

Zackiewicz v M&H Realty LLC

2025 NY Slip Op 35207(U)

December 22, 2025

Supreme Court, Kings County

Docket Number: Index No. 516135/2023

Judge: Devin P. Cohen

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

Index Number 516135/2023
Seqs. 003

Part LL1M

JAROSLAW ZACKIEWICZ,

Plaintiff,

DECISION/ORDER

against

M&H REALTY LLC AND NINTH AVE
CONSTRUCTION GROUP LLC,

Defendants.

As required by CPLR 2219 (a), the following e-filed documents, listed by NYSCEF document numbers, were considered on this motion: 84-104.

Upon the foregoing papers, defendants’ motion for summary judgment (Seq. 003) is decided as follows:

Introduction and Factual Background

Plaintiff commenced this action to recover for damages he claims to have sustained on May 23, 2023 while working as a bricklayer at a construction site located at 11 West Street, Brooklyn, NY a/k/a 65 Private Drive, Brooklyn, NY (the premises). The following is undisputed: The premises was owned by M&H Realty LLC (M&H) and Ninth Ave Construction Group LLC (Ninth Ave) was the general contractor hired to construct a new building at the premises. Ninth Ave sub-contracted ATS 360 Corp d/b/a AMG Builders Inc. (AMG) to perform masonry work for the construction project. Plaintiff was employed by AMG.

Plaintiff testified as follows: On the date of his accident, plaintiff was installing stones on the exterior of the building (Zackiewicz EBT at 23). The stones were being hoisted to the plaintiff and his co-workers on an elevated platform using a lull (*id.* at 15, 23–24). The stones

weighed between 180 and 200 pounds (*id.* at 33). The stones were cut by another AMG employee and then brought to the lull. They were then hoisted to the plaintiff and then guided into a metal bracket by AMG employees, including plaintiff (*id.* at 29–31). The brackets were installed by AMG employees before the stones were installed (*id.* at 31). At least one of the stones was improperly measured and cut, causing it not to fit into the brackets (*id.*)¹ While attempting to maneuver one stone into a bracket, the lift operator “wanted to lift it, and the stone was torn out of the brackets, and the stone went up to its maximum, up two feet, and [plaintiff] got struck in [his] chin from the bottom” (*id.* at 35). Plaintiff later testified that the stone “hit [him] in [his] chin, head and partially, it went down [his] hand” (*id.* at 51).

Now, defendants move for summary judgment on plaintiff’s complaint; plaintiff did not move.

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) is “absolute” where the failure of a safety device enumerated by the statute is a proximate cause of the plaintiff’s accident (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 N.Y.3d 280, 287 [2003] [citing *Haimes v. New York Tel.*

¹ Plaintiff’s testimony is not clear as to whether every stone, some stones, or only this stone was improperly cut; however, his testimony is unequivocal that at least the stone that allegedly struck him was improperly cut (*id.* at 38).

Co., 46 N.Y.2d 132, 136 (1978) and *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 500 (1993)]).

Defendants contend that the stone did not fall but was rather being lifted at the time of the accident, barring the application of Labor Law § 240 (1) to this case. However, the plaintiff's testimony here is ambiguous as to both the mechanism that caused the stone to move and whether the stone "fell down" after it came out of the metal bracket. Even if plaintiff testified unambiguously that the object struck him while it was being hoisted up, there would be an issue as to whether this case qualified under Labor Law § 240 (1) pursuant to *Runner v New York Stock Exchange, Inc.*, 13 NY3d 599 (2009). Here, however, the evidence is ambiguous and must be viewed in a light most favorable to plaintiff as the non-moving party (*Bazdaric v Almah Partners LLC*, 41 NY3d 310, 314 [2024]). Plaintiff's testimony leaves open questions of fact about, among other things, whether the stone coming out of the bracket constituted the failure of a safety device, whether the stone subsequently fell onto the plaintiff (*Zackiewicz EBT* at 51), and whether the plaintiff's "harm flow[ed] directly from the application of gravity to the object" (*Runner*, 13 NY3d at 605). These issues preclude summary judgment and require a trial for resolution; defendants' motion is therefore denied as to this claim.

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) a proximate cause of which was a violation of an Industrial Code provision (*Moscatti v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]). Plaintiff waives all alleged violations except Rules 23-6.1 and 6.2, and does not advance any substantive arguments as to Rule 6.2.

Therefore, defendants' motion is granted with respect to all of the unopposed Industrial Code provisions.

With respect to Rule 23-6.1, the parties dispute whether a lull is included in the exemption provision of Rule 6.1 (a) and whether this code provision was violated. Here, as previously noted, there are material issues of fact concerning how plaintiff's accident occurred. Furthermore, defendants have failed provide any expert testimony to demonstrate that a lull should be considered part and parcel with the excluded equipment ("cranes, derricks, aerial baskets, excavating machines used for material hoisting and fork lift trucks"). Therefore, defendants have failed to eliminate all issues of material fact concerning the alleged violation of Rule 23-6.1, and their motion is denied with respect to this alleged Industrial Code violation.

Labor Law § 200

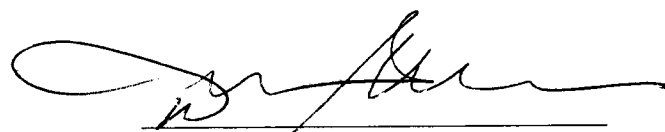
Plaintiff waives this claim in his affirmation in opposition; therefore, defendants' motion is granted as to this claim.

Conclusion

Defendants' motion for summary judgment (Seq. 003) is granted to the extent that plaintiff's Labor Law § 241 (6) claim as predicated on all Industrial Code violations except Rule 6.1 and plaintiff's Labor Law § 200 claim are dismissed; the motion is otherwise denied.

This constitutes the decision and order of the court.

December 22, 2025
DATE



DEVIN P. COHEN
Justice of the Supreme Court