Miranda v A.A.T.Z. Contr. Inc.
2025 NY Slip Op 35327(U)
January 17, 2025
Supreme Court, Queens County
Docket Number: Index No. 722698/2020
Judge: Nicole McGregor Mundy
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HON. NICOLE McGREGOR MUNDY** IA PART 7
Acting Justice

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JULIO MIRANDA,

Plaintiff(s),

-against-

A.A.T.Z. CONTRACTING INC., KYROUS REALTY GROUP INC, and 139 E. 66 ST. CORPORATION,

Defendant(s).

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Index No.:722698/2020

Motion Date: February 6, 2024

Motion Seq. No.: 003

The following papers numbered EF38 to EF52, EF54 to EF65 and EF67 to EF72, read on this motion by plaintiff for an Order, pursuant to CPLR §3212 and Labor Law §240(1), granting partial summary judgment to plaintiff on the issue of liability and setting this matter for trial on the sole issue of plaintiff's damages.

	PAPERS NUMBERED
Notice of Motion - Affid.-Exhibits.....	EF38-EF52
Answering Aff. - Exhibits	EF54-EF65, EF67-EF69
Reply Aff. - Exhibits	EF70-EF72

Upon the foregoing papers it is Ordered that the motion by plaintiff is determined as follows:

On November 24, 2020, plaintiff commenced this action against defendants Kyrous Reality Group Inc and 139 E. 66 St Corporation to recover damages for personal injuries sustained on August 7, 2020. On March 11, 2011, plaintiff filed a Supplemental Summons and Amended Complaint which added defendant A.A.T.Z.Contracting Inc. The Amended Complaint alleges that plaintiff, an employee of A.A.T.Z. Contracting Inc., was injured while working on a construction project at the premises owned by 139 E. 66 St Corporation for which Kyrous Realty Group Inc was the contracting agent that hired A.A.T.Z. Contracting Inc. The Complaint asserts common law negligence and Labor Law §200, §240(1), and

§241(6) claims. Plaintiff now moves for summary judgment on the issue of liability pursuant to Labor Law §240(1).

Plaintiff claims defendants failed to provide necessary safety devices or proper equipment, such as a ladder or scaffold. In support of the instant motion, plaintiff annexed: (1) the deposition transcript of Andy Tase, the owner of A.A.T.Z. Contracting Inc., (2) the deposition transcript of Juan Pena, a contractor hired by A.A.T.Z. Contracting Inc. on the construction project, and (3) the deposition transcript of Jose Bonilla, the doorman at 139 East 66th Street, the accident location.

Defendants Kyrous Realty Group Inc. and 136 E. 66 St. Corporation oppose the motion claiming there is an issue of fact as to whether plaintiff was the sole proximate cause of the accident and that plaintiff failed to use readily available equipment such as a scaffold, ladder, and painting spackling poles. Defendants further contend that plaintiff possibly "staged" the alleged accident.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence sufficient to demonstrate the absence of any material issues of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Oxford Health Plans (NY), Inc. v Biomed Pharmaceuticals, Inc.*, 181 AD3d 808 [2d Dept. 2020]; *St. Claire v Empire General Contracting & Painting Corp.*, 33 AD3d 611 [2d Dept. 2006]; *Toure v. Avis Rent A Car System*, 98 NY2d 345 [2002]). Once the movant makes a prima facie showing that it is entitled to judgment as a matter of law, the burden shifts to the non-movant to demonstrate the existence of afactual issues requiring a trial (*Oxford Health Plans (NY), Inc. v Biomed Pharmaceuticals, Inc.*, 181 AD3d 808 [2d Dept. 2020]; *see, Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]; *Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]; *Leto v. Feld*, 131 AD3d 590 [2d Dept. 2015]).

Labor Law §240(1) requires "[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed." The statute was intended to protect workers from gravity related incidents stemming from the inadequacy or absence of safety devices (*Castano v. Algonquin Gas Transmission, LLC*, 213A.D.3d 905 [2d Dept. 2023]). The duties articulated in Labor Law §240(1) are nondelegable and a general contractor or owner is found liable when a breach of the statute is the proximate cause of the injuries (*Ortega v. Puccia*, 57 A.D.3d 54 [2d Dept. 2008]). Although comparative fault is not a defense to the strict liability of Labor Law §240(1), if plaintiff is found to be the sole proximate cause of their injuries, then there can be no liability under Labor Law §240 (*Lojano v. Soiefer Bros. Realty Corp.*, 187 A.D.3d 1160 [2d Dept.

2020]). Plaintiff bears the initial burden of establishing prima face entitlement to judgment as a matter of law.

Here, plaintiff met his initial burden of establishing entitlement to judgment as a matter of law on plaintiff's Labor Law §240(1) cause of action. Plaintiff's Affidavit demonstrated that defendants failed to provide plaintiff with the necessary and/or proper safety devices to protect plaintiff during the performance of his work (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Oxford Health Plans (NY), Inc. v Biomed Pharmaceuticals, Inc.*, 181 AD3d 808 [2d Dept. 2020]; *St. Claire v Empire General Contracting & Painting Corp.*, 33 AD3d 611 [2d Dept. 2006]; *Toure v. Avis Rent A Car System*, 98 NY2d 345 [2002]).

The burden thus shifted to defendants, who met their burden of raising triable issues of fact as to whether Labor Law §240(1) was violated by defendants, and if so, whether such violation was a proximate cause of plaintiff's alleged injuries. In opposition to the motion, defendants annexed, among other documents, the continued deposition transcript of Juan Pena, affidavits from Jose Bonilla and Andrew J. Rentschler, PH.D, defendants' biomechanical expert, and the ambulance/EMS report. Andy Tase testified that at the time of plaintiff's accident, a scaffolding unit, ladder, and extension pole, that could be used to access a physically unreachable area, were all available for use by plaintiff (NYSCEF Doc. No. 44). Mr. Tase further testified that he previously saw plaintiff use the extension pole on this specific job site and he was surprised that plaintiff fell because plaintiff did not need to be on the railing to "accomplish the job." Plaintiff "could have had easier scaffolding" where he allegedly fell and plaintiff would have been on the same elevation level "where the steps are and not sitting crooked or standing crooked" to do the job. Juan Pena testified that he and plaintiff worked in the lobby area of the building owned by defendant 139 E. 66 St Corporation and that defendant A.A.T.Z. Contracting Inc provided ladders, materials, and tools at the job site (NYSCEF Doc. No. 49). Lastly, Jose Bonilla testified that on the day of the accident he saw plaintiff using a ladder (NYSCEF Doc. No. 50). Mr. Pena further testified that the ladder contained a piece of wood that could be welded to the wall "so the ladder can stay stuck at a certain position." Mr. Pena additionally testified that he observed plaintiff using the ladder however the ladder was closed and flat against the wall at the time of the accident.

"A plaintiff may be the sole proximate cause of his or her own injuries when, acting as a recalcitrant worker, he or she (1) had adequate safety devices available, (2) knew both that the safety devices were available and that [he or she was] expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had [he or she] not made that choice" (*Amaro v. New York City School Authority*, 229 A.D.3d 746 [2d Dept. 2024]). Opposing defendants contend that the documents submitted in opposition to the motion demonstrate that plaintiff was the sole and proximate cause of the alleged accident.

Conflicting testimonies and affidavits are sufficient to raise a trialbe issue of fact (*Ricciuti v. Village of Tuckahoe*, 202 A.D.2d 488 [1994]; *Castronovo v. John Doe*, 274 AD2d 442 [2000]; *Alexandre v. Dweck*, 44 AD3d 597 [2007]; *Surdo v. Albany Collision Supply Inc.*, 8 AD3d 655 [2004])). It is well settled that questions of credibility on a motion for summary judgment should not be determined by the Court (*Combs v. Incorporated Village of Freeport*, 139 AD2d 688 [1988]).

In light of the conflicting testimonies and affidavits submitted in support and opposition to the motion, plaintiff's motion for summary judgment on the issue of liability pursuant to Labor Law §240(1) is denied.

Dated: January 17, 2025

NICOLE McGREGOR MUNDY
A.J.S.C.

FILED
1/23/2025
COUNTY CLERK
QUEENS COUNTY