

Diaz v Boston Props., Inc.

2026 NY Slip Op 30142(U)

January 14, 2026

Supreme Court, New York County

Docket Number: Index No. 151421/2022

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN PART 58

Justice

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SALVADOR DIAZ,

Plaintiff,

- v -

BOSTON PROPERTIES, INC.,TIMES SQUARE TOWER
ASSOCIATES LLC,ANNTAYLOR RETAIL,
INC.,ANNTAYLOR, INC.,STRUCTURE TONE (UK),
LLC,STRUCTURE TONE, LLC,PETRETTI & ASSOCIATES
LLC,SOVEREIGN MECHANICAL CORP.,

Defendants.

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INDEX NO. 151421/2022

MOTION DATE 02/11/2025

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 154, 155, 156, 157

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff moves, pursuant to CPLR § 3212, for summary judgment on the issue of liability on his Labor Law § 240(1) claim against defendants Boston Properties, Inc. (Boston), Petretti & Associates LLC (Petretti), and Sovereign Mechanical Corp. (Sovereign) (collectively, defendants).

I. BACKGROUND

This action arises out of a construction accident that occurred on July 6, 2021, at a commercial office building located at 7 Times Square, New York, New York (the premises) (NYSCEF 141; NYSCEF 142). Plaintiff was employed as a union welder/sheet metal worker by third-party defendant All City Metal Inc. (All City) (a non-party to this motion) and was assigned to perform work on a renovation project on the 15th floor of the building (NYSCEF 141).

Boston owned the building at the time of the accident (NYSCEF 139), Petretti served as the general contractor for the renovation project (NYSCEF 140), and Sovereign Mechanical was a subcontractor on the project, which in turn subcontracted certain ductwork-related tasks to All City, plaintiff's direct employer (NYSCEF 141, 147).

Plaintiff testified that his assigned task on the night of the accident was to cut and shorten an existing metal exhaust duct elbow and weld a metal cap to the end (NYSCEF 155). The ductwork was located approximately 10 to 12 feet above the floor, and the task required plaintiff to perform overhead welding using a welding torch and other power tools (*id.*). Plaintiff testified that the work was expected to take several hours to complete (*id.*).

The work was performed during overnight hours. Plaintiff testified that he was accompanied only by a fire watch mechanic, a man name Castillo (*id.*). Castillo testified that he had received a certification to be a fire watch mechanic, and that his role included maintaining a perimeter clear of debris or any other hazard of at least six feet around the welding site (NYSCEF 141).

To perform the elevated work, plaintiff used an A-frame ladder that was available at the site (NYSCEF 141; NYSCEF 144). Plaintiff testified that he personally set up the ladder before beginning work and that it was placed on an even surface (NYSCEF 138). When asked whether the surface was uneven, plaintiff answered, "No, the surface wasn't uneven" (*id.*). Plaintiff further testified that there was nothing he could remember being wrong with the ladder prior to the accident (*id.*).

At the time of the accident, plaintiff was standing on the ladder and welding overhead. Plaintiff testified that he "lost [his] balance" first, stating: "Yes. I lost my balance and the ladder shook and I fell" (NYSCEF 138). When asked why the ladder shook, plaintiff responded, "I

don't know. I guess maybe because I lost my balance" (*id.*). Plaintiff did not testify that the ladder slipped, collapsed, or moved on its own prior to his loss of balance. A supervisor accident report prepared after the incident similarly states that plaintiff was "half-way up the ladder welding ductwork," that he "lost balance," and that the ladder moved slightly as he fell back (NYSCEF 143).

Photographs submitted in connection with the motion depict the A-frame ladder positioned beneath the overhead ductwork (NYSCEF 144).

Plaintiff was transported for medical treatment following the incident (NYSCEF 142). No evidence has been presented that plaintiff was given specific safety instructions directing him to use alternative equipment or that he disobeyed any such instructions.

Party Contentions

Plaintiff moves for summary judgment, arguing that defendants, as the owner, general contractor, and subcontractor, are subject to statutory liability for the failure to provide adequate safety devices to protect against elevation-related risks. Plaintiff contends that he fell from an unsecured ladder while performing overhead welding work, and that the ladder failed to afford proper protection for the work being performed. Plaintiff further argues that he was not the sole proximate cause of the accident, as there is no evidence that he disobeyed any immediate safety instructions or that an adequate alternative safety device was provided or available.

Defendants oppose the motion, arguing that plaintiff was the sole proximate cause of his injuries. Defendants contend that material issues of fact exist regarding how the accident occurred, including whether plaintiff was injured due to plaintiff losing his balance while standing on the ladder and welding, or due to slipping while descending the ladder. Defendants also argue that purported inconsistencies in plaintiff's testimony and medical records preclude

summary judgment. In addition, defendants assert that plaintiff's expert affidavit is inadmissible because the expert was not properly disclosed prior to the filing of the motion.

In reply, plaintiff argues that it is undisputed that he fell from an elevated height while using the only safety device made available to him to perform overhead work, and that the unsecured ladder was inadequate to safely perform that work as a matter of law.

II. DISCUSSION

“On a motion for summary judgment, facts must be viewed ‘in the light most favorable to the non-moving party’ ” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). The “movant bears the heavy burden of establishing ‘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’ ” (*Deleon v New York City Sanitation Dept.*, 25 NY3d 1102, 1106 [2015], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The moving party's “[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez*, 68 NY2d, at 324). Only if movant's burden is met does the burden then shift to the opposing party to demonstrate the existence of a triable issue of fact (*Alvarez* 68 NY2d, at 320, 324; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Labor Law § 240(1) imposes a nondelegable duty on owners and contractors to provide safety devices that give proper protection to workers exposed to elevation-related risks, and it imposes absolute liability where a violation proximately causes injury (*Saint v Syracuse Supply Co.*, 25 NY3d 117, 124 [2015]; *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 501 [1993]). The “single decisive question” is whether the plaintiff's injuries were “the direct

consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential” (*Hill v City of New York*, 140 AD3d 568, 569 [1st Dept 2016] [internal quotation marks omitted]).

Here, the record establishes that plaintiff’s fall resulted from losing his balance while working from the ladder, rather than from any defect, instability, or malfunction of the ladder itself. As set forth above, plaintiff testified that the ladder was properly positioned on an even surface, that nothing was wrong with it prior to the accident, and that the ladder moved only after he lost his balance. There is no evidence that the ladder slipped, collapsed, shifted on its own, or otherwise failed to provide proper protection.

A fall from a ladder, without more, does not establish a violation of Labor Law § 240(1). Rather, statutory liability attaches only where the injury is proximately caused by the failure of a safety device to afford proper protection against an elevation-related risk (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 288–289 [2003]). Where, as here, the record supports a finding that the worker merely lost his balance while using a properly positioned, non-defective ladder that did not malfunction, Labor Law § 240(1) is not implicated (*Pelonero v Sturm Roofing, LLC*, 175 AD3d 1062, 1064 [4th Dept 2019] [“defendant would not be liable under § 240(1) if plaintiff merely lost balance and fell off ladder”]; *see also Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442 [1st Dept 2012] [defendants would not be subject to statutory liability if plaintiff simply lost his footing while climbing a properly secured, non-defective ladder that did not malfunction]; *Buckley v J.A. Jones/GMO*, 38 AD3d 461, 462 [1st Dept 2007] [same]; *Mitchell v City of New York*, 169 AD3d 505 [1st Dept 2019] [no viable 240(1) claim where plaintiff lost footing while descending properly-secured, non-defective extension ladder that did not malfunction]).

This case is therefore distinguishable from those in which summary judgment was granted because the ladder itself moved, slipped, or collapsed, or was otherwise shown to be unsecured or defective (*cf. Hill v City of New York*, 140 AD3d 568, 569–570 [1st Dept 2016] [summary judgment granted where plaintiff testified that ladder wobbled before he lost his balance, causing him to fall]; *Kuras v Cornell Univ.*, 118 AD3d 488, 489 [1st Dept 2014] [unsecured ladder with worn legs and no rubber tips slipped and collapsed]; *Goreczny v 16 Ct. St. Owner LLC*, 110 AD3d 465, 466 [1st Dept 2013] [unsecured ladder moved, causing fall]).

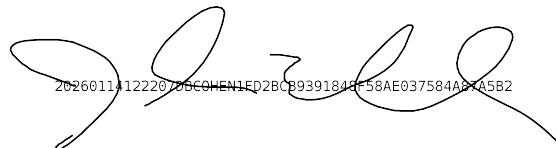
Plaintiff also pleads claims under Labor Law §§ 241(6) and 200, as well as common-law negligence. However, those claims were not substantively addressed or pursued in connection with this motion. In any event, in light of the determination that plaintiff's accident resulted from a loss of balance while using a properly positioned, non-defective ladder that did not malfunction, there is no basis for liability under Labor Law § 241(6), which requires a violation of a specific Industrial Code provision, nor under Labor Law § 200 or common-law negligence, absent evidence of a dangerous premises condition or supervisory control over the means and methods of the work.

Lastly, although defendants did not cross-move for summary judgment, a court may search the record and grant summary judgment to a non-moving party where appropriate (CPLR 3212[b]). Here, the fully developed record establishes as a matter of law that plaintiff's injuries were not proximately caused by the failure of a safety device within the meaning of Labor Law § 240(1). Accordingly, upon searching the record, summary judgment dismissing the complaint is warranted.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment on the issue of liability under Labor Law § 240(1) is denied; and it is further

ORDERED that, upon searching the record pursuant to CPLR 3212(b), summary judgment is granted in favor of defendants and the complaint is dismissed.



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1/14/2026

DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE