

Kocher v Cydonia W48, LLC
2026 NY Slip Op 30173(U)
January 6, 2026
Supreme Court, New York County
Docket Number: Index No. 153174/2019
Judge: Verna L. Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36

Justice

JUAN CARLOS KOCHER, Plaintiff, INDEX NO. 153174/2019 MOTION SEQ. NO. 001; 002

- v -

DECISION + ORDER ON MOTION

CYDONIA W48, LLC and CCNY CONSTRUCTION INC, Defendants.

CYDONIA W48, LLC and CCNY CONSTRUCTION INC Third-Party Plaintiffs,

Third-Party Index No. 595934/2019

-against-

PROPENSITY PARTNERS, LLC, Third-Party Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 63, 64, 65, 66

were read on this motion to/for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 67, 68

were read on this motion to/for SUMMARY JUDGMENT

This action concerns a personal injury that plaintiff allegedly sustained on February 5, 2019, at the premises located at 12 West 48th Street, New York County ("building"), where he was working as a bricklayer for Propensity Partners LLC (hereinafter, "Propensity"), an entity hired to perform brickwork to the building's façade. Defendant CYDONIA W48, LLC (hereinafter, "Cydonia") owned the subject property and defendant CCNY CONSTRUCTION, INC. (hereinafter, "CCNY") was the general contractor for the subject project. Plaintiff testified at his deposition that his accident occurred when he and his coworker were working from a scaffold erected around the exterior of the building façade. He claims his injury was not witnessed by the coworker and that he did not report the injury sustained to his foreman on the date of the injury. Plaintiff asserts that his foreman/supervisor and other co-workers had instructed him to move bricks from the interior third floor to the premise's exterior by stacking them on the scaffold. He further averred that on the date of the accident, a sudden gust of wind blew, causing some of the bricks he was stacking to fall on his right hand and knee as the boards on which the bricks were stacked moved. Plaintiff asserts causes of action based on common law negligence, New York State Labor Law §§ 200 and 241(6) violations (NYSCEF Doc. No. 1, summons and complaint).

In Mot. Seq. 001, defendants move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's common-law negligence and Labor Law §§ 200 and 241(6) claims (NYSCEF Doc. No. 33, *notice of motion*). In Mot. Seq. 002, plaintiff moves, pursuant to CPLR 3212, for an order granting his Labor Law § 240(1) cause of action (NYSCEF Doc. No. 46, *notice of motion*).

Mot. Seq. 001 and 002 are hereby consolidated for disposition.

In Mot. Seq. 001, defendants move for an order, pursuant to CPLR 3212, granting summary judgment in their favor and dismissing plaintiff's common-law negligence and Labor Law §§ 200 and 241(6) claims. According to defendants, plaintiff's common-law negligence and Labor Law § 200 claims must be dismissed because defendants neither supervised nor controlled his work. They assert that plaintiff's accident resulted from the means and methods of plaintiff's work because there were no inherent defects with the scaffold when the bricks fell on plaintiff. Defendants append the deposition transcript of Peter Joseph Barack, Cydonia's president (NYSCEF Doc. No. 40), and that of William McIndoo, CCNY's senior project manager (NYSCEF Doc. No. 41), to contend that they did not supervise or control plaintiff's work. They also aver that Cydonia neither monitored the construction project nor provided any equipment or participated in any meetings concerning the day-to-day happenings at the construction site where plaintiff was injured. Defendants insist that insofar as plaintiff testified that he received all of his job instructions from Propensity employees and that he did not know the general contractor for construction project, the common-law negligence and Labor Law § 200 claims must be dismissed.

As to plaintiff's Labor Law § 241(6) claims, defendants contend that same must be dismissed because plaintiff failed to cite to any applicable Industrial Code provision. While plaintiff's pleadings alleged violations of Industrial Code sections: 23-1.5; 23-1.6; 23-1.7; 23-1.8; 23-1.15; 23-1.16; 23-1.17; 23-1.19; 23-1.21; 23-1.22; 23-1.31; 23-1.32; 23-1.33; 23-2.4; 23-2.6; 23-2.7; 23-5.1; 23-5.2; 23- 5.3; 23-5.4; 23-5.5; 23-5.6; 23-5.7; 23-5.8; 23-5.9; 23-5.10; 23-5.11; 23-5.12; 23-5.13; 23-5.14; 23-5.15; 23-5.16; 23-5.17; 23-5.18; 23-5.22; 23-6.1; 23-6.2; 23-6.3; 23-7.1; 23-7.2; and 23-7.3, they assert that plaintiff has not alleged sufficient facts to support the Industrial Code sections asserted (NYSCEF Doc. No. 42, *defs memo of law*).

In opposition, plaintiff does not advance any arguments in support of the Labor Law § 200 and negligence causes of action. With respect to the Labor Law § 241(6), plaintiff argues that he has alleged sufficient facts to support Industrial Codes sections 23-1.5(c)(3), 5.1(c), (d), (e), (f), (g), and 5.3 through 5.18, and 5.22. Specifically, plaintiff contends that insofar as the planks on which the bricks were being stacked shifted when the scaffold moved, this fact alone supports a cause of action under Labor Law § 241(6) because these sections concern scaffold safety and its ability to hold weight (NYSCEF Doc. No. 63, *opposition*).

Defendants, in reply, note that plaintiff has abandoned his Labor Law § 200 and common-law negligence claims. They also contend that plaintiff has abandoned Industrial Code sections 23-1.6; 23-1.7; 23-1.8; 23-1.15; 23-1.16; 23-1.17; 23-1.19; 23-1.21; 23-1.22; 23-1.31; 23-1.32; 23-1.33; 23-2.4; 23-2.6; 23-2.7; 23-5.2; 23-6.1; 23- 6.2; 23-6.3; 23-7.1; 23-7.2; and 23-7.3. According to them, while plaintiff references sections 23-5.3; 23-5.4; 23-5.5; 23-5.7; 23-

5.8; 23-5.9; 23-5.10; 23-5.11; 23-5.12; 23-5.13; 23-5.14; 23-5.15; 23-5.16; 23-5.17; 23-5.18; 23-5.22, he fails to proffer any argument in support of these sections and as such, these provisions are also abandoned. Concerning codes 23-1.5(c)(3); 23-5.1(c)(d)(e)(f)(g); and 23-5.6(e), defendants posit that the facts alleged are insufficient to impose liability. Specifically, section 1.5(c)(3) requires notice of a defective condition, claims defendants, and to the extent there was no notice of any defect, this provision is inapplicable. Insofar as there are no allegations that the planks became dislodged but only that the entire scaffold moved because an unusually strong gust of wind blew and caused the entire scaffold to move thereby causing the bricks to fall, sections 5.1(d)(e)(f)(g) and 5.6(e) are inapplicable and must be dismissed, posit defendants (NYSCEF Doc. No. 65, *reply*).

In Mot. Seq. 002, plaintiff moves for an order, pursuant to CPLR 3212, granting summary judgment in his favor and against defendants for their violation of Labor Law § 240(1). According to plaintiff, the masonry activity he was engaging in at the time of his injury is a covered activity. Insofar as the boards upon which he was stacking the bricks suddenly moved, causing the brick to fall and strike him, plaintiff asserts that the scaffold failed to adequately protect him from the elevation-related hazard of his work, and the bricks were a load that were inadequately secured for the purposes of the undertaking (NYSCEF Doc. No. 58, *plaintiff's memo of law*).

In opposition, defendants urge the court to deny the relief sought insofar as there are conflicting accounts of how and when plaintiff's injuries occurred. Defendants submit a copy of the daily log to contend that on the date of plaintiff's alleged injuries, plaintiff's employer was performing interior work and was not, as plaintiff asserts, performing exterior work (NYSCEF Doc. No. 61). They also rely on the daily log to argue that the weather condition, specifically the speed of the wind, on the date of plaintiff's injuries was not strong enough to blow the bricks off the scaffold or move the boards on which the bricks were stacked. As to the cause of plaintiff's injury, defendants proffer plaintiff's medical record which was generated when plaintiff sought medical treatment for the alleged injury, wherein it states that plaintiff did not know how his hand was injured to contradict plaintiff's testimony as to the cause of his accident. According to them, this statement conflicts with plaintiff's deposition testimony that the falling bricks injured the hand (NYSCEF Doc. No. 60, *plaintiff's medical records*). To the extent that plaintiff has failed to establish that the scaffold was inadequate for the subject task or that the bricks required securing with an alternative safety device enumerated within the statute, defendants assert that the instant summary judgment motion must be denied (NYSCEF Doc. No. 68, *opposition memo*).

It is well-settled that the proponent of a motion for summary judgment 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 (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action or show that "facts essential to justify opposition may exist but cannot [now] be stated." (CPLR 3212[f]; see *Zuckerman*, 49 NY2d at 562).

“Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers 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, 502 [1993]). Liability under section 241(6) by requires that the rule or regulation alleged to have been breached be a “specific, positive command” (see *Toussaint v Port Auth. of N.Y.*, 38 NY3d 89, 93 [2022]).

Labor Law § 240(1) protects persons engaged “in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.” The task that a plaintiff is performing at the exact moment of their accident is not dispositive of whether they were engaged in a protected activity for purposes of liability under this statute (see generally *Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 881-882 [2003]). Rather, the inquiry includes whether the plaintiff’s employer was contracted to perform the kind of work enumerated in the statutes (see *Gibson v Worthington Division-of-McGraw-Edison Co.*, 78 NY2d 1108, 1109 [1991]) and whether the plaintiff was performing work “necessary and incidental to” a protected activity (see *Rodriguez v Riverside Ctr. Site 5 Owner LLC*, 240 AD3d 452, 453 [1st Dept 2025]).

Turning now to Mot. Seq. 001, that branch of the motion seeking dismissal of claims based on a violation of Industrial Code sections § 23-1.5(c)(3), 5.1(e) and 5.8(h) is denied. Industrial Code § 23-1.5(c)(3) provides that: “(c) Condition of equipment and safeguards. (3) All safety devices, safeguards and equipment in use shall be kept sound and operable and shall be immediately repaired or restored or immediately removed from the job site if damaged.” Sections 23-5.1(e)(1) specifies that scaffolding planks must be “laid tight” (see *Susko v 337 Greenwich LLC*, 103 AD3d 434, 436 [1st Dept 2013]) and 23-5.8(h) directs that scaffold “planking shall be either nailed in place or otherwise secured against displacement”. It is undisputed that scaffolds are safety devices, and plaintiff testified that that he was injured because the planks upon which the bricks were stacked were not secured. There are no arguments that the planks on which the bricks rested were either nailed in place or otherwise secured against displacement so as to prevent the accident. As such, sufficient facts have been alleged in support of the above listed industrial code sections to withstand dismissal.

However, the court dismisses the claims premised on violation of Industrial Code § 23-5.1(c), which concerns the scaffold structure; 5.1(d) which addresses scaffold loading; 5.1(f) which regards scaffold maintenance and good repair; and 5.1(g) which pertains to scaffold lumber insofar as plaintiff does not allege that the scaffold could not sustain the weight of the bricks he was stacking or that the scaffold needed repairs. Plaintiff testified that a strong gust of wind blew, causing the scaffold to move and the planks on which the bricks rested to shift and the bricks to fall on him, but not that the scaffold could not sustain the weight of the bricks. Industrial Code 12 NYCRR 23-5.6(e) governs planking on pole scaffolds, not the pipe scaffold at issue here and hence, this section is not applicable to the facts alleged. Also, the allegations premised on violation of Industrial Code § 23-5.3 through 5.18(b), except 5.8(h), are inapplicable to plaintiff’s accident.

The court also notes that plaintiff does not advance arguments in opposition to defendants’ motion which seek dismissal of plaintiff’s Labor Law § 200 and common negligence; thus, those claims are deemed abandoned (see *Linares v Massachusetts Mut. Life Ins.*

Co., 225 AD3d 520, 521 [1st Dept 2024] [affirming dismissal of a plaintiff's common-law negligence and Labor Law § 200 claim because the plaintiff did not oppose its dismissal on summary judgment]).

Now addressing Mot. Seq. 002, the motion is denied as there are issues of fact that preclude summary judgment in plaintiff's favor. The proof presents conflicting narratives as to the cause of plaintiff's injury. Although plaintiff asserted at his deposition that his accident was caused by defendants' failure to provide a safety device that could adequately prevent a stack of bricks from falling on him, there is also proof that he told his medical provider that he did not remember how his hand was injured (see *Chiatto v Four State Commercial Devs., LLC*, 236 AD3d 510, 511 [1st Dept 2025]; *Pina v Arthur Clinton Hous. Dev. Fund Corp.*, 188 AD3d 614, 614 [1st Dept 2020]). Moreover, a review of the daily log evinces that petitioner's employer, Propensity, was performing interior work and was not, as plaintiff asserts, performing exterior work. Thus, at the very least, there is an issue of fact concerning whether plaintiff's accident occurred as alleged (see *Marquez v 171 Tenants Corp.*, 106 AD3d 422, 423 [1st Dept 2013]). Accordingly, it is hereby

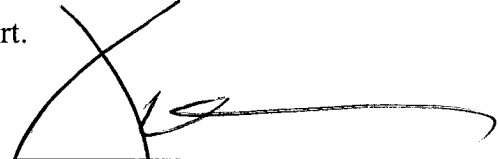
ORDERED that Mot. Seq. 001 is granted, except as to claims premised on violations of Industrial Code sections § 23-1.5(c)(3), 5.1(e) and 5.8(h); and it is further

ORDERED that Mot. Seq. 002 is denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendants shall serve a copy of this decision and order, with notice of entry, upon plaintiff.

This constitutes the decision and order of the court.

January 6, 2026


HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

- CASE DISPOSED
- GRANTED
- DENIED
- NON-FINAL DISPOSITION
- GRANTED IN PART
- OTHER