Bautista v Aroof, Inc.
2026 NY Slip Op 30602(U)
January 13, 2026
Supreme Court, Kings County
Docket Number: Index No. 530520/2022
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings

Index Number 530520/2022
Seqs. 009–016

Part LL1M

RAUL BAUTISTA,

Plaintiff,

against

AROOF, INC., ARON PADWA, TEEM INTERIORS, INC., AND ALLIANCE MAINTENANCE, INC.,

Defendants.

TEEM INTERIORS, INC.,

Third-Party Plaintiff,

against

JG INTERIORS CORP.,

Third-Party Defendant.

DECISION/ORDER

As required by CPLR 2219 (a), the following e-filed documents, listed by NYSCEF document numbers, were considered on this motion: 218–272, 274–283, 325–363, 367–375, 377–383.

Upon the foregoing papers, Teem Interiors (Teem) and Alliance Maintenance (Alliance)'s motion for summary judgment (Seq. 009), Aron Padwa (owner)'s motion for summary judgment (Seq. 010), plaintiff's motion for summary judgment against Alliance and Teem (Seq. 011), Aroof, Inc. (Aroof)'s motion for summary judgment (Seq. 012), Teem's cross-motion for spoliation and sanctions against plaintiff (Seq. 013), Padwa's cross-motion for sanctions and spoliation against plaintiff (Seq. 014), plaintiff's cross-motion to strike Teem's pleadings for spoliation (Seq. 015), and Teems and Alliance's untimely cross-motion to amend (Seq. 016) are decided as follows:

Procedural Posture

Plaintiff commenced this action to recover for damages he claims he sustained on August 3, 2022, while working at the premises located at 517 Dahill Road, Brooklyn, NY (the premises). It is undisputed that the premises was owned by defendant Aron Padwa. Mr. Padwa hired Alliance as the general contractor, and Teem was retained by Alliance to perform work at the premises. Teem sub-sub-contracted with third-party defendant JG Interiors Corp. (JG Interiors), and JG Interiors employed the plaintiff.

The action was discontinued without prejudice against ARoof, Inc. via stipulation (NYSCEF Dkt. 282); therefore, motion sequence 012 is denied as moot. Additionally, third-party defendant JG Interiors has never appeared, and a default judgment was issued against it on August 14, 2024. Plaintiff filed the note of issue on March 21, 2025. On July 2, 2025, Justice Ruchelsman denied both defendants' motions to vacate the note of issue and directed all further arguments on spoliation be dealt with in this part.

With respect to the instant motions, motion sequence 016 was filed untimely, pursuant to the court's briefing order, without citation to any explanation or extenuating circumstances. Padwa's cross-motion for spoliation and sanctions is improperly made as a cross-motion because the plaintiff did not move against Padwa (CPLR 2215).

Factual Background

Mr. Padwa testified that he was the joint owner of the premises (Padwa EBT at 18). Mr. Padwa claimed that his family occupied two floors and that he only had one tenant, who occupied the first floor (*id.* at 22). The premises also had a basement which Mr. Padwa testified was sometimes occupied by family and friends (*id.* at 23–24), but that he never accepted money for anyone staying in the basement (*id.* at 74). The work at the premises constituted a

renovation, for which Mr. Padwa hired Alliance (*id.* at 22). When asked whether he would "tell [the workers] to do anything differently," Mr. Padwa answered, "Sometimes yes," and subsequently confirmed that "the things [he] would tell them to do differently . . . [were] in relation to the construction work being performed" (*id.* at 31).

Plaintiff testified as follows: On the date of the accident, Π was installing soffit ceiling framing on the second floor of the three-story house (Bautista EBT). This work required the plaintiff to use an eight-foot A-frame ladder (*id.*). The floor where plaintiff had to set the ladder was metal decking (*id.* at 79). Plaintiff responded "No" when asked whether "it [is] usual to work on a floor . . . when it's just metal decking" (*id.*). While performing the work, the ladder started to "tilt over" causing the plaintiff to fall (*id.* at 42).

During the work at the premises, Teem employee Zelig Berkowitz supervised the plaintiff. The record contains screenshots of WhatsApp messages between Zelig Berkowitz and plaintiff. In one text message, contained in the midst of audio messages and photographs, Mr. Berkowitz writes, "U can use the cement board." In a post-deposition affidavit, Mr. Berkowitz claims that he instructed plaintiff to "put down a cement board before using the ladder" because of the metal decking (Berkowitz aff. at para. 10). There is no indication about the load-bearing capacity of the referenced cement board, nor any indication about whether such a board was available. However, at his deposition, Mr. Berkowitz testified that he did not think there would "be anything on the floor to secure the ladders to" (Berkowitz EBT at 43).

In plaintiff's post-deposition affidavit, he contends that he was not provided with any safety devices or equipment to secure the ladder in place (plaintiff aff. at ¶¶ 12–13).

Douglas Miller, plaintiff's expert who reviewed the voice notes, provided an affidavit that Mr. Berkowitz told plaintiff to use a cement board to close off the opening above the door,

not to stabilize the ladder. Mr. Miller transcribes the messages as follows and no party, all of whom now have access to these messages, contests the transcription:

- 10:14 am - Berkowitz responds with 2 audio texts. 1st Audio text states the following "Umm, on top of that door I need to cover the opening, the gap. Maybe by cutting a piece of DensGlass on the outside and extending it, or a piece of framing, just I need it for to be able to finish up the waterproofing on the outside"
- 10:14 am - Berkowitz 2nd text states the following: "I don't know where your off to on the ceilings, but maybe you can do the DensGlass and your father can continue with the ceiling in the meantime, but the waterproofing is waiting for that."
- 10:26 am - Bautista responds with an audio text which states: "Uh there's no DensGlass, I just looked around – there's no DensGlass"
- 10:26 am - Berkowitz responds with a written text that states "U can use cement board"
- 10:27 am - Bautista responds with a written text: "No cement board either, Where is it, I see nvm, take out the blue skin?"
- 10:27 am - Zelig responds with an audio text stating: "Uhh Yesterday I still saw a piece of that cement board. I don't remember where I saw that, uhh check the other floors, upstairs, downstairs."
- 10:27 am - Berkowitz responds with a written text that states "No" in reference to taking out the blue skin
- 10:28 am - Bautista in a written text states "So I can't put it up unless I do framing bottom and top"
- 10:28 Berkowitz responds in an audio text stating the following: "okay, do the minimum needed, I don't want to waste the time on it so whatever you have to do but you don't have to put a special effort to make it with studs also, just a track top and bottom is fine. (Miller aff. at 3–4).

Mr. Berkowitz also testified that someone working on an 8-foot ladder would "need to be tied off" (Berkowitz EBT at 44). It is undisputed that neither Teem nor plaintiff's employer provided a personal fall arrest system, and there is no evidence that plaintiff was otherwise provided with a harness, lanyard, lifeline, and/or tail line.

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]).

Homeowner Exemption

Labor Law §§ 240 (1) and 241 (6) exempt owners from liability where (1) the dwelling is a residence for only one or two families, and (2) the defendant did not direct or control the work or have actual or constructive notice of a defective condition (*Nai Ren Jiang v Shane Yeh*, 95 AD3d 970, 971 [2d Dept 2012]). Mr. Padwa seeks summary judgment against plaintiff based on these exemptions. However, his own testimony that he would sometimes instruct workers about how to perform work on the project raises material issues of fact about direction and control which preclude Mr. Padwa's entitlement to summary judgment. Therefore, Mr. Padwa's motion is denied as to these claims.

Labor Law § 240 (1)

Liability under Labor Law § 240 (1) is "absolute" where the failure of a safety device enumerated by the statute (*e.g.* a ladder) 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. Co.*, 46 N.Y.2d 132, 136 (1978) and *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 500 (1993)]). In order to bar a plaintiff from recovery on the basis that he was a "recalcitrant," defendants must demonstrate that plaintiff "(1) had adequate safety devices available, (2) knew both that the safety devices were available and that they were expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had they not made that choice"; mere comparative fault is not a defense to Labor Law § 240 (1) (*Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167–1168 [2020]).

Plaintiff's testimony is sufficient to meet his burden under Labor Law § 240 (1) that he was required to use an A-frame ladder on uneven flooring, the ladder moved, and the plaintiff fell. It is further undisputed that plaintiff was not provided with any way of securing the ladder, and that plaintiff was not provided with any kind of personal fall arrest system, which constitutes a further violation of the statute.

In opposition, defendants have failed to raise a triable issue material fact. All defendants contend that plaintiff was instructed via WhatsApp to put down a "cement board" and place the ladder on the floor, and that plaintiff's failure to do so made him a recalcitrant worker. However, unchallenged transcript of the voice and text messages offered between Mr. Berkowitz and plaintiff indicate that plaintiff was never told to use the cement board for that purpose. Neither do defendants demonstrate that the cement board would have constituted a safe working platform, even if used. Finally, defendants do not contest that they failed to provide a personal fall arrest system and that one should have been provided. Therefore, plaintiff's motion against Alliance and Teem is granted as to this claim.

Labor Law § 241 (6)

Neither plaintiff nor defendant substantively addresses the Industrial Code violations alleged by plaintiff. Although Teem and Alliance's counsel contends that the Industrial Code violations are "addressed in a supplemental addendum" (memo of law at 9), the court finds no such document in the record and, in any event, no court authorization was given to submit an "addendum to a memorandum of law," rendering it procedurally improper. Therefore, Teem and Alliance's motion is denied with respect to this claim. Plaintiff did not move on this claim.

Labor Law § 200

Defendants alone move for summary judgment on plaintiff's Labor Law § 200 claim. Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Pacheco v Smith*, 128 AD3d 926, 926 [2d Dept 2015]). Claims under this statute are evaluated under a dangerous premises condition analysis (*Chowdhury v Rodriguez*, 57 AD3d 121, 131 [2d Dept 2008]), a dangerous means and methods analysis (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 51 [2d Dept 2011]), or a combination of the two (*id.*)

Here, it is undisputed that Mr. Berkowitz instructed plaintiff how to perform his work on behalf of Teem. Plaintiff has made out his prima facie entitlement to summary judgment on his claim against Teem on the basis that he was instructed to use the ladder in an unsafe manner and subsequently suffered harm. Although plaintiff summarily states that Alliance is also subject to Labor Law § 200 liability, he does not actually advance any evidentiary or specific legal argumentation that this is true besides generally alleging that Alliance had notice of the dangerous condition. Absent substantive argument, plaintiff's motion is denied with respect to Alliance. However, Alliance's motion is also denied due to questions of fact about Alliance's notice of the condition of the decking during the ongoing work, and by extension, whether it created or permitted a dangerous condition to persist on premises while work was ongoing (*see McLean v 405 Webster Ave. Associates*, 98 AD3d 1090 [2d Dept 2012).

Mr. Padwa's motion is also denied as to this claim based on his testimony that he would instruct workers at the site and, under those circumstances, due to questions regarding his notice of the dangerous condition in the area where work was being performed.

Spoliation and Sanctions

Both parties seek spoliation sanctions against the other. "Under the common-law doctrine of spoliation, a party may be sanctioned where it negligently loses or intentionally destroys key evidence. . . . A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" (*McDonnel v Sandaro Realty, Inc.*, 165 AD3d 1090 [2d Dept 2018]).

Mr. Padwa's purported cross-motion is procedurally defective in that it was made against the plaintiff who did not move against Mr. Padwa (CPLR 2215). Furthermore, none of the movants have demonstrated their entitlement to sanctions on the merits. Plaintiff's response to defendant's combined demands in early 2024 stated that he was not in possession of any photographs, video recordings, text messages or other statements relevant to this action. The defendants ultimately obtained the WhatsApp messages because they were attached to plaintiff's Workers' Compensation file, which was timely exchanged. After Teem, Alliance, and Padwa moved to vacate the note of issue on April 10, 2025, plaintiff subsequently provided WhatsApp authorizations on June 3, 2025. Perhaps most importantly, Mr. Berkowitz testified that he reviewed all the text messages at issue on the day of his deposition and further affirmed on April 28, 2025 that he was still in possession of same. Teem provided a supplemental discovery response, dated February 24, 2025, demonstrating that Mr. Berkowitz was still in possession of the relevant text messages.

The defendants have not demonstrated that plaintiff acted "willfully," and have further failed to demonstrate that plaintiff "fatally compromised" their ability to defend this action by failing to preserve the messages. This is especially true because Mr. Berkowitz himself retained possession of the messages. Plaintiff has similarly failed to demonstrate that Teem's answer should be stricken in light of its response to discovery demands that it was not in possession of text messages which it ultimately had. Both parties appear to have given incomplete discovery responses; however, now, the record has been clarified and each party possesses (and may have always possessed) the available evidence in this action. In the absence of prejudice, all parties' motions for sanctions are denied.

Amendment

Finally, Teem and Alliance filed an untimely cross-motion to amend their pleadings to assert a counterclaim for fraud on September 12, 2025. A briefing order, dated July 1, 2025, directed that all cross-motions be made on or before September 8, 2025. In the absence of any demonstration of extenuating circumstances or any argument for good cause, the motion is fatally late and must denied. Furthermore, on the merits, the defendants failed to attach a copy of proposed amended pleadings to their moving papers and did not properly allege the elements of fraud. Therefore, the motion is denied as both procedurally defective and on the merits (CPLR 3025 [b]; *Mendoza v Enchante Accessories, Inc.*, 185 AD3d 675, 679 [2d Dept 2020]; *Matter of Clarke v Wallace Oil Co., Inc.*, 284 AD2d 492, 492–493 [2d Dept 2001]).

Conclusion

Teem and Alliance's motion for summary judgment (Seq. 009) is denied.

Mr. Padwa's motion for summary judgment (Seq. 010) is denied.

Plaintiff's motion for summary judgment against Alliance and Teem (Seq. 011) is granted.

ARoof's motion for summary judgment (Seq. 012)has been withdrawn; the action has been discontinued against ARoof.

Teem's cross-motion for spoliation and sanctions against plaintiff (Seq. 013) is denied.

Padwa's cross-motion for sanctions and spoliation (Seq. 014) is denied.

Plaintiff's cross-motion to strike Teem's pleadings for spoliation (Seq. 015) is denied.

Teems and Alliance's untimely cross-motion to amend (Seq. 016) is denied.

This constitutes the decision and order of the court.

January 13, 2026
DATE

DEVIN P. COHEN
Justice of the Supreme Court