

**Hamilton v Barr & Barr, Inc.**

2012 NY Slip Op 32180(U)

August 17, 2012

Supreme Court, New York County

Docket Number: 111606/10

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE  
*Justice*

PART 10

*Stephen Hamletan*

Plaintiff (s),

INDEX NO.

111606/10

MOTION DATE

- v -

*Barr & Barr, Inc +  
Phelps Memorial*

Defendant (s).

MOTION SEQ. NO.

001

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, the court's decision on this (these) motion (s) is as follows:

Motion (s) decided in accordance with  
the accompanying memorandum decision

*CC 10/25/12  
NOI 10/26/12*

**FILED**

**AUG 20 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: Aug 17, 2012

*[Signature]*  
Hon. Judith J. Gische, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE  SETTLE/SUBMIT ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

-----X  
Stephen Hamilton,

Plaintiff (s),

**-against-**

Barr & Barr, Inc. and Phelps Memorial  
Hospital Association,

Defendant (s).  
-----X

**DECISION/ORDER**  
Index No.: 111606-10  
Seq. No.: 001

**PRESENT:**  
Hon. Judith J. Gische  
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of  
this (these) motion(s):

**FILED**

<b>Papers</b>	<b>Numbered</b>
Hamilton n/m (3212) w/NMB affirm, SH affid, exhs .....	1
Barr & Barr opp w/AMB affirm, exh .....	<b>AUG 20 2012</b> 2
Phelps Memorial opp w/HH affirm .....	3
Hamilton reply and second reply w/NMB affirms .....	NEW YORK 4, 5

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COUNTY CLERK'S OFFICE

*Upon the foregoing papers, the decision and order of the court is as follows:*

**GISCHE J.:**

This is a negligence action in which Stephen Hamilton alleges defendants violated Labor Law § 240, thereby proximately causing his injuries. Issue was joined by each of the defendants and plaintiff now moves, pre-note of issue, for partial summary judgment in his favor solely on the issue of liability. Each defendant has separately opposed the motion. Plaintiff objects to the court's consideration of Barr & Barr's opposition papers on the basis that they were untimely served. Hamilton has, however, interposed a second reply affirmation in which he addresses the arguments Barr & Barr raised in its late opposition. Since plaintiff has shown no prejudice, Barr & Barr's

opposition papers will be considered. Having met the requirements of CPLR § 3212, summary judgment relief is available and this motion will be decided on its merits (CPLR § 3212 [a]; Brill v. City of New York, 2 N.Y.3d 648 [2004]). The court's decision is as follows:

**Arguments Presented:**

Hamilton claims that while working at a construction project on September 20, 2007, at a hospital owned by defendant Memorial Hospital Association ("Phelps Memorial"), he was injured when the Baker's scaffold he was working on collapsed, throwing him against the side railings of the scaffold. Phelps Memorial hired Barr & Barr, Inc. (sometimes "GC") as its general contractor for the construction work and Hamilton was employed by non-party Wing, Inc., a subcontractor of the GC.

Hamilton provides a sworn affidavit setting forth the details of his accident and describing the scaffold. He describes the scaffold as being comprised of two side frames with planks laid across the frames in a horizontal manner. The Baker's scaffold had no railings, nor was he provided with any lines, harnesses, or other safety devices to stop him from falling.

According to Hamilton, he was standing at the top of the scaffold demolishing a wall when he descended the scaffold to take his morning break. His descent was without incident. After his break, Hamilton climbed back up to the top level. Hamilton avers that he was careful when climbing back up the scaffold and that he was not instructed to do his job or access the top level in any other manner. When he reached the top platform and stood up, the scaffold collapsed, causing his body and right shoulder to strike into the bars of the side of the scaffold.

Although the defendants allege that Hamilton may have passed out, then fallen, Hamilton denies being mentally or physically impaired in any way when the accident occurred. Hamilton denies there were any stepladders, scaffolds or other safety devices available to him that would have allowed him to perform his job at the required height safely. He states he had to start demolition of the wall up near the ceiling and the Baker's scaffold was the only thing available to him to do the work.

In addition to his sworn affidavit, Hamilton relies on the deposition testimony of Barr & Barr's foreman, John Bassani who testified that the scaffold Hamilton was using is accessed by rungs up the side. He described the scaffold as consisting of two braces that lock together with a wood platform. Although Bassani did not witness the accident, he recounts that someone told him Hamilton had fallen through the scaffold.

In opposition to the motion, the GC and the owner present similar arguments. Neither defendant provides sworn affidavit, but rely solely on their attorney's respective affirmations. The defendants contend that Hamilton's accident did not occur as he claims, and even if it did, the accident does not come within the provisions of Labor Law § 240 because Hamilton neither fell from a height, nor did he fall to the ground. Defendants point out that there are no witness to Hamilton's accident.

Defendants contend that assuming Hamilton "fell," he suffered a lateral, not downward fall because the plank shifted and he hit the side of the scaffold. Thus, the defendants contend that the wooden planking may have been defective, causing it to shift, but that condition and type of fall – described by the defendants as "an incidental contact" – is not a elevation related accident, but simply a routine hazard of working at a construction site. Without elaborating, defendants deny any safety devices were

necessary for Hamilton to safely do his job. Barr & Barr also provides Hamilton's hospital record, seeking to raise a triable issue of fact about how Hamilton's accident occurred. In particular, defendant highlights a statement in the a hospital record that Hamilton "fell approximately 10 ft off a scaffold yesterday after passing out..."

#### Law Applicable to Motions for Summary Judgment

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its prima facie case that would entitle it to judgment in its favor, without the need for a trial (Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980]). The party opposing the motion must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her/its failure so to do (Alvarez v. Prospect Hosp., 68 N.Y.2d 320 [1986]).

#### **Discussion**

Labor Law § 240 [1], commonly known as the "scaffold law," was enacted to protect workers in construction projects against injury from the expected risks of inherently hazardous work posed by elevation differentials at the work site (Buckley v. Columbia Grammar and Preparatory, 44 A.D.3d 263, 267 [1<sup>st</sup> Dept 2007] *citing* Misseritti v. Mark IV Constr. Co., 86 N.Y.2d 487 [1995]). The scaffold law imposes a non-delegable duty upon owners, contractors and their agents to supply necessary security devices for workers at an elevation, to protect them from falling (Bland v. Manocherian, 66 N.Y.2d 452, 458-459 [1985]).

An owner, contractor or agent who breaches that duty may be held liable in damages, regardless of whether it has actually exercised supervision or control over the work (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500 [1993]). Therefore, a

violation of this duty results in absolute liability where the violation was a proximate cause of the accident (Meade v. Rock-McGraw, Inc., 307 A.D.2d 156 [1<sup>st</sup> Dept. 2003]). To establish a prima facie case, the plaintiff must show that there is a Labor Law § 240 [1] violation and that such violation proximately caused the injuries sustained (Quattrocchi v. F.J. Sciamè Const. Corp., 44 A.D.3d 377 [1<sup>st</sup> Dept. 2007]). However, a plaintiff is not entitled to the protections of this section unless his or her injuries "were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (Runner v New York Stock Exch., Inc., 13 NY3d 599, 603 [2009]; Makarius v. Port Authority of New York and New Jersey, 76 A.D.3d 805 [1<sup>st</sup> Dept. 2010]).

Hamilton has made out his prima facie case for Labor Law § 240 liability. He has established that the scaffold he was standing on collapsed, dislodging the wooden plank he was standing on, causing him to tumble/fall sideways, slamming into the side of the scaffold with his body and his right shoulder. Fortunately, he did not fall to the ground, some 6 feet below. His further fall, however, was not stopped by a harness, lifeline or other safety device, but only because his body impacted and became twisted in the side of the scaffold. The fact that his fall may have been a short distance does not render Labor Law § 240 inapplicable and is irrelevant (Megna v. Tishman Const. Corp. of Manhattan, 306 A.D.2d 163 [1<sup>st</sup> Dept. 2003]). There is no rule regarding a definitive height differential at which the scaffold law begins to apply (Thompson v. St. Charles Condominiums, 303 A.D.2d 152 [1<sup>st</sup> Dept. 2003]). Where, as here, the Baker's scaffold was being used to elevate Hamilton so he could perform his assigned tasks, and the scaffold collapses, causing some shift in either the materials or the worker,

Labor Law § 240 applies (Thompson v. St. Charles Condominiums, supra). Thus, plaintiff has established that the harm (his accident) flowed directly from the application of the force of gravity, even though he did not actually fall to the ground below (Reavely v. Yonkers Raceway Programs, Inc., 88 A.D.3d 561 [1<sup>st</sup> Dept. 2011] citing Runner v. New York Stock Exch., Inc., 13 NY3d at 604).

The defendants' description of how Hamilton's accident may have happened is nothing more than sheer speculation. It is unclear whether the accident was witnessed, because there may have been one or more workers nearby, but defendants either could not locate those workers or did not depose them. Regardless, an unwitnessed accident presents no bar to summary judgment in favor of plaintiff where, as here, there is no substantiated challenge to credibility (Franco v. Jema, 280 A.D.2d 409 [1<sup>st</sup> Dept 2001]). Defendants provide no affidavits or other evidence in admissible form materially conflicting with Hamilton's statements about how his accident occurred (Vogel v. Blade Contracting, Inc., 293 AD2d 376 [1<sup>st</sup> Dept 2002]).

Defendants seize on a statement in the hospital record about Hamilton passing out before he fell. An entry in a hospital record comes within the statutory business records rule, only if it is relevant to the diagnosis or treatment of the patient's ailment (Del Toro v. Carroll, 33 A.D.2d 160, 165 [1969]). Any statement made by the patient "detailing the circumstances of an accident, where it is immaterial to and was never intended to be relied upon in the treatment of the patient, and which serves no medical purpose, may not be regarded as having been made in the regular course of the hospital's business" (Williams v. Alexander, 309 N.Y. 283, 288 [1955]; see also Del Toro, 33 A.D.2d at 165) (*internal quotation marks and citations omitted*).



Leaving aside the fact that the court is simply directed to look at the "history" section of his hospital record, without any indication what page they are referring to, the court has undertaken a review of this 100 page long record to locate the reference. On the "triage" page of the hospital record there is a statement that the patient "fell 5 ft from scaffold onto R chest (illegible)..." This is the most relevant section of the hospital record because it was made soon after Hamilton arrived at the hospital and ostensibly made by Hamilton to receive medical treatment. Another section of the hospital record indicates that the patient "FELL 5FT ON RT LAT ADB AREA. PT PALE DIAPHORETIC CLUTING SIDE, SENT TO TX AREA IMMEDIATELY." The discharge summary contains similar notations. It is only in a document identified as "Consultation" with Dr. Halko that the following statement appears: "History: this is a 41 year old gentlemen who fell approximately 10 ft of a scaffold yesterday after passing out..."

Assuming this statement about Hamilton having passed out before he fell is admissible because it was provided to ascertain medical treatment, it fails to raise a factual dispute about the happening of his accident. Although defendants learned of this statement in discovery, they failed to pursue it any further or make any effort to substantiate it. The statement is so vague and disconnected from anything else documented as a medical condition that, standing alone, it is insufficient to defeat plaintiff's motion. A motion for summary judgment cannot be defeated by the shadowy semblance of an issue, rather the parties must lay bare their proof (SJ Capelin v. Globe, 34 NY2d 338 [1974]).

Hamilton has established that he was provided with the Baker's scaffold to do his job and that a scaffold is a safety device under Labor Law § 240. He did not set the

scaffold up himself and there were no other safety devices available to him, such as a harness or lifeline. The scaffold collapse while he was on it, sending Hamilton slamming into, and becoming twisted in, the side of the scaffold. Though his fall was not from a significant height, the purpose of the scaffold was to hold him aloft, near the ceiling, where he could do his job safely. The scaffold failed and there was no other safety device to prevent his fall. Defendants' statement, that no other safety device was necessary for Hamilton to do his job, fails to raise a triable issue of fact to defeat Hamilton's motion. Therefore, plaintiff is entitled to summary

Hamilton has met his burden of proving he is entitled to partial summary judgment in his favor on the issue of liability on his Labor Law § 240 claim. Defendants have failed to raise issues of fact. Therefore, Hamilton's motion is granted in all respects.

**Conclusion**

Plaintiff's motion for partial summary judgment is granted in all respects. Since the note of issue has not yet been filed, the discovery deadlines are extended. The court sets October 25, 2012 as a compliance conference date and the time to file the note of issue to October 26, 2012.

Any relief requested but not specifically addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
August 17, 2012

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**FILED**

**AUG 20 2012**

NEW YORK  
COUNTY CLERK'S OFFICE