

**Llamatumbi v 805 Third New York, LLC**

2012 NY Slip Op 32921(U)

December 4, 2012

Sup Ct, New York County

Docket Number: 117199/09

Judge: Cynthia S. Kern

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: \_\_\_\_\_  
*Justice*

PART \_\_\_\_\_

Index Number : 117199/2009  
LLAMATUMBI, EDGAR  
vs.  
805 THIRD NEW YORK  
SEQUENCE NUMBER : 003  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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



**FILED**  
DEC 07 2012  
NEW YORK  
COUNTY CLERK'S OFFICE

**RECEIVED**

DEC - 6 2012

MOTION SUPPORT OFFICE  
NYS SUPREME COURT - CIVIL

Dated: 12/4/12

pgk, J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
EDGAR LLAMATUMBI,

Plaintiff,

Index No. 117199/09

-against-

**DECISION/ORDER**

805 THIRD NEW YORK, LLC and CCBS  
CONSULTING,

Defendants.

-----X  
805 THIRD NEW YORK, LLC,

Third-Party Plaintiff,

-against-

**FILED**

ON SITE DEMOLITION AND TRUCKING CORP.,

DEC 07 2012

Third-Party Defendant,

**NEW YORK  
COUNTY CLERK'S OFFICE**

-----X  
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Cross-Motion and Affidavits Annexed .....	<u>2</u>
Reply Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff Edgar Llamatumbi commenced the instant action against defendants 805 Third New York, LLC ("805") and CCBS Consulting ("CCBS") to recover for injuries he allegedly sustained when he was working on a demolition project on the 27<sup>th</sup> floor of a building located at 805 Third Avenue, New York, New York (hereinafter the "premises" or the "building") on October 6, 2009. Defendant 805 now moves for an Order pursuant to CPLR § 3212 for summary

judgment dismissing plaintiff's Labor Law §§ 200, 240(1) and 241(6) claims and plaintiff's common-law negligence claims. Plaintiff cross-moves for an Order (a) pursuant to CPLR § 3212 for partial summary judgment on his Labor Law § 240(1) claim against 805 and (b) setting this matter down for a jury trial on the issue of damages only. Plaintiff has also agreed to withdraw his claims for common-law negligence and his Labor Law § 200 claim against defendants. For the reasons set forth below, both 805's motion and plaintiff's cross-motion are denied.

The relevant facts are as follows. 805 is the owner of the building. 805 contracted Cohen Brothers Realty Corp. ("Cohen Brothers") to act as the managing agent of the premises. In or around October 2009, Cohen Brothers, on behalf of 805, contracted Third-Party Defendant On Site Demolition and Trucking Corp. ("On Site") to perform demolition work on Floors 26 through 29 of the premises (the "demolition project"). The demolition project involved taking down the ceilings, carpets, light fixtures and telephone, BX and internet cables on each floor.

On Site employed Arif Rexhaj as the foreman for the demolition project. 805 alleges that Mr. Rexhaj was on site at the demolition project everyday that work was performed. Mr. Rexhaj was plaintiff's supervisor during the evening shift on the demolition project. 805 alleges that on the date of plaintiff's accident Mr. Rexhaj instructed plaintiff and a co-worker, Jose, to clean up the garbage on the 27<sup>th</sup> floor of the building, including the wires on the floor, and put it all into large dumpsters/containers. 805 further alleges that plaintiff and Jose were instructed to push the dumpsters/containers into the freight elevator on that floor. Prior to plaintiff's accident, Mr. Rexhaj had shown plaintiff how to fill up the dumpsters/containers.

On October 6, 2009, at approximately 6:00 p.m., plaintiff was standing in one of the dumpsters/containers attempting to push down the cables that were already inside. Plaintiff

entered the dumpster/container by holding onto the edge and pushing himself up and inside. Plaintiff testified that his co-worker, Jose, was holding onto the dumpster/container when plaintiff climbed inside. When plaintiff was inside the dumpster/container, the cables were filled to the top, about four and a half feet off the floor. Plaintiff pushed down the cables and his plan was to grab onto an edge of the dumpster/container and jump down. As plaintiff was trying to get out of the dumpster/container, it tipped over, causing him to become injured.

805 alleges that plaintiff decided, on his own, to stand inside the dumpster/container to push down the cables that were inside the container and that no one from 805 or On Site instructed or directed plaintiff to climb inside the container. Further, 805 alleges that at the time of plaintiff's accident, there were at least two empty dumpsters/containers available in which to put the remaining cables that were on the floor and that there were also A-frame ladders available on the 27<sup>th</sup> floor for plaintiff to use to enter and exit the container. Plaintiff, however, alleges that he had previously been directed to stand on the debris in the dumpster/container in order to push down the wires and cables to make room for other debris and that "[t]his was the custom and practice of On Site..." Plaintiff further alleges that the purpose of doing so "was to utilize as much space available in these containers." Specifically, plaintiff testified at his deposition that Mr. Rexhaj had told him on prior occasions to stand on top of the cables inside the containers and push them down. Additionally, plaintiff testified and affirmed in his affidavit that no safety equipment was provided to him, such as any type of rope, tail line or harness to secure him while he was standing on top of the dumpster/container and it is undisputed that the wheels on the container had not been locked. Further, plaintiff alleges that with regard to the A-frame ladders, he was directed to use those ladders only when he would need to do demolition work on top of

the ceiling.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Wayburn v Madison Land Ltd. Partnership*, 282 A.D.2d 301 (1<sup>st</sup> Dept 2001). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Id.*

Both 805 and plaintiff are not entitled to summary judgment on plaintiff’s Labor Law § 240(1) claim. Pursuant to Labor Law §240(1),

All contractors and owners and their agents . . . who contract for but do not 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.

Labor Law §240(1) was enacted to protect workers from hazards related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of materials or load being hoisted or secured. *See Rocovich v. Consolidated Edison*, 78 N.Y.2d 509, 514 (1991). Liability under this provision is contingent upon the existence of a hazard contemplated in §240(1) and a failure to use, or the inadequacy of, a safety device of the kind enumerated in the statute. *Narducci v. Manhasset Bay*

*Associates*, 96 N.Y.2d 259 (2001). Owners and contractors are subject to absolute liability under Labor Law §240(1), regardless of the injured worker's contributory negligence. See *Bland v Manocherian*, 66 N.Y.2d 452 (1985). Only if the plaintiff was the sole proximate cause of his injuries would liability under this section not attach. See *Robinson v East Medical Center, LP*, 6 N.Y.3d 550 (2006).

In the instant action, 805 is not entitled to summary judgment dismissing plaintiff's Labor Law § 240(1) claim and plaintiff is not entitled to summary judgment on his Labor Law § 240(1) claim as there exists an issue of fact as to whether plaintiff's accident was caused by 805's failure to provide an adequate safety device to prevent plaintiff from falling when the dumpster/container he was standing on tipped over in violation of Labor Law § 240(1). As an initial matter, plaintiff's injury clearly occurred due to a gravity-related hazard as the accident flowed directly from the application of the force of gravity onto the tipping container on which the plaintiff was standing. Further, an employee working on top of a dumpster/container is considered the kind of foreseeable risk within the contemplation of Labor Law § 240(1). See *Bush v. Goodyear Tire & Rubber Co.*, 9 A.D.3d 252 (1<sup>st</sup> Dept 2004). However, there exists an issue of fact as to whether plaintiff's accident was caused by 805's failure to provide an adequate safety device to prevent plaintiff from falling when the dumpster/container he was standing on tipped over in violation of Labor Law § 240(1). 805 has presented evidence that plaintiff was the sole proximate cause of his accident, including testimony that he was not directed to stand on the dumpster/container as part of his job, that there were other empty dumpsters/containers available for plaintiff to use and that plaintiff could have used an A-frame ladder to exit the dumpster/container. However, plaintiff has presented conflicting evidence, including his

testimony that he was directed to stand on the dumpster/container to push the cables down in order to make room for more debris and that he was directed not to use the A-frame ladder unless he was doing demolition work on top of the ceiling. Thus, as there exists an issue of fact as to whether plaintiff's accident was caused by 805's failure to provide an adequate safety device, 805's motion for an Order pursuant to CPLR § 3212 for summary judgment dismissing plaintiff's Labor Law § 240(1) claim is denied and plaintiff's cross-motion for an Order pursuant to CPLR § 3212 for summary judgment on his Labor Law § 240(1) claim is also denied.

Additionally, 805 is not entitled to summary judgment dismissing plaintiff's Labor Law § 241(6) claim. Pursuant to Labor Law § 241(6),

All contractors and owners and their agents...when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

(6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

In order to support a cause of action under Labor Law § 241(6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of a New York Industrial Code provision that is applicable under the circumstances of the accident and that sets forth a concrete standard of conduct rather than a mere reiteration of common law principles. *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494 (1993).

In the instant action, 805 is not entitled to summary judgment dismissing plaintiff's Labor



Law § 241(6) claim as there exists an issue of fact as to whether plaintiff's injuries were proximately caused by a violation of the New York Industrial Code. To support his Labor Law § 241(6) claim, plaintiff alleges that 805 violated both 12 NYCRR 23-1.7(f) and 12 NYCRR 23-3.3(1). 12 NYCRR 23-1.7(f) states: "Vertical passage. Stairways, ramps or runways shall be provided as the means of access to working levels above and below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided." See 12 NYCRR 23-1.7(f). 12 NYCRR 12-3.3(1) states:

Safe footing required. Any person working above the first floor or ground level in the demolition of any building or other structure shall not be suffered or permitted to use accumulated debris or piled materials as a footing in the performance of his work. Every person shall be provided with safe footing consisting of sound flooring, planking not less than two inches thick full size, adequately supported exterior grade plywood at least three-quarters inch thick or other material of equivalent strength.

See 12 NYCRR 23-3.3(1).

Although 805 alleges that it did not violate either 12 NYCRR 23-1.7(f) or 12 NYCRR 23-3.3(1) as a matter of law because plaintiff was not directed to stand on the dumpster/container, this argument is without merit. Plaintiff has presented conflicting testimony that he was, in fact, directed, as part of his employment with On Site, to stand on the dumpster/container in order to push down the cables and wires to make room for more debris. As there exists an issue of fact as to whether plaintiff was directed to perform the work on top of the dumpster/container, and thus, it is entirely possible that 805 has violated the above provisions of the Industrial Code, 805's motion for an Order pursuant to CPLR § 3212 for summary judgment dismissing plaintiff's Labor Law § 241(6) claim is denied.

