

**Podskarbi v New York City Indus. Dev. Corp.**

2013 NY Slip Op 33258(U)

December 18, 2013

Supreme Court, New York County

Docket Number: 100634/10

Judge: Anil C. Singh

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

PRESENT: HON. ANIL C. SINGH  
SUPREME COURT JUSTICE  
Justice

PART 61

Index Number : 100634/2010  
PODSKARBI, EUGENIUSZ  
vs.  
NEW YORK CITY INDUSTRIAL  
SEQUENCE NUMBER : 006  
REARGUMENT/RECONSIDERATION

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 3, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). 1

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 2

Replying Affidavits \_\_\_\_\_ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the annexed memorandum opinion.*

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

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

Dated: 12/18/2013

acc, J.S.C.  
HON. ANIL C. SINGH  
SUPREME COURT JUSTICE

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 61

-----X

EUGENIUSZ PODSKARBI,

Plaintiff,

-against-

NEW YORK CITY INDUSTRIAL DEVELOPMENT  
CORPORATION, et al.,

Defendants.

-----X

DECISION AND  
ORDER

Index No.  
100634/10

HON. ANIL C. SINGH, J.:

Plaintiff moves pursuant to CPLR 2221 for leave to reargue the prior motion pursuant to CPLR 3212 and Labor Law sections 240(1) and 241(6), for summary judgment on the issue of liability, as well as that portion of the prior cross-motion for summary judgment of defendant New York City Industrial Development Corporation, dismissing plaintiff's Labor Law sections 200, 240(1) and 241(6) claims. Defendants oppose the motion.

Plaintiff Eugeniusz Podskarbi is a plumber. On October 22, 2009, he was working at a construction site at 257 Beach 17<sup>th</sup> Street in Queens. Plaintiff's main task at the job site was installing cast iron sewer pipes (or "lines") into the ceilings of the new floors of the building.

To perform this work, non-party ADD Plumbing provided plaintiff and other

plumbers with rolling, mobile “baker’s” scaffolds. The scaffolds were approximately two-and-a-half feet wide and five feet long. The height of the scaffolds could be adjusted, and the maximum height was approximately five feet from the bottom of the platform. None of the scaffolds provided by ADD Plumbing to its employees, including plaintiff, had any side rails or guard rails.

Plaintiff commenced the instant action by filing a summons and verified complaint on January 15, 2010, alleging violations of sections 200, 240(1) and 241(6) of the Labor Law.

Plaintiff filed a motion for summary judgment pursuant to sections 240(1) and 241(6) on the issue of the liability against all named defendants. In addition, defendant New York City Industrial Development Corporation cross-moved to dismiss plaintiff’s complaint in its entirety, and all of the other defendants moved to dismiss plaintiff’s Labor Law section 241(6) claims.

Plaintiff testified that as he was attempting to place a ten-foot section of pipe into a hanger, the pipe slipped out of his hands, came out of the hanger, and struck him on the back of his neck and head. The blow caused plaintiff to be knocked off the scaffold and onto the floor below.

Plaintiff’s employer ADD Plumbing gave a different version of the accident. The employer contends that plaintiff had been using an electric handheld saw known

as a “Sawzall” to adjust the length of the pipe and that “gyrations” from the tool caused a nut on the hanger to loosen on the side that plaintiff was working on. The pipe then fell out of the hanger on the opposite end of the pipe, and plaintiff lost his balance and fell off the scaffold.

The Court heard oral argument on March 27, 2013. At the conclusion of oral argument, the Court denied plaintiff’s motion for partial summary judgment on the issue of liability for the reasons stated on the record, and granted the cross-motion only to the extent of dismissing the complaint against the New York Industrial Development Corporation (Hearing Transcript, March 27, 2013, pp. 27-30).

As the record reflects, we denied summary judgment on the Labor Law 240(1) claim based on the conflicting versions of the accident offered by plaintiff and his employer. In doing so, we relied on the First Department’s opinion in Ellerbe v. Port Auth. of N.Y. & N.J., 91 A.D.3d 441 [1<sup>st</sup> Dept., 2012]).

In Ellerbe, plaintiff was allegedly injured when he fell off an extension ladder that he had climbed to perform steel work at a construction site. Ellerbe had stated in a deposition that the ladder had reared back when he attempted to dismount, which caused his fall. However, the site safety manager testified that immediately after the fall, plaintiff, while still on the ground, told him that he fell because he lost his footing. The Appellate Division affirmed the Supreme Court’s denial of plaintiff’s

motion for partial summary judgment, finding that there was a triable issue of fact as to the plaintiff's version of the accident. Further, the Court noted that defendants would not be subject to statutory liability if plaintiff simply lost his footing while climbing a properly secured, non-defective extension ladder that did not malfunction.

Based on Ellerbe, we found that there was an issue of fact similarly raised in the instant matter whether Labor Law 240(1) was violated.

Plaintiff's motion to reargue is now pending before the Court.

#### Discussion

“A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided. Nor does reargument serve to provide a party an opportunity to advance arguments different from those tendered on the original application. It may not be employed as a device for the unsuccessful party to assume a different position inconsistent with that taken on the original motion.”

(Foley v. Roche, 68 A.D.2d 558, 567-568 [1<sup>st</sup> Dept., 1979]).

The Court finds that reargument is necessary only regarding the claim under Labor Law section 240(1).

Irrespective of how the accident occurred, it is undisputed that plaintiff was struck by a falling object and that he fell from a scaffold that had no handrails or other safety devices to prevent his fall.

“In evaluating a claim under Labor Law section 240(1), the single decisive question is whether plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential” (Cuentas v. Sephora USA, Inc., 102 A.D.3d 504 [1<sup>st</sup> Dept., 2013] (internal quotation marks and citation omitted)). Here, plaintiff established his entitlement to judgment as a matter of law by demonstrating that his claim encompasses both a falling object and a fall from an elevation due to inadequate safety devices (Rzymski v. Metropolitan Tower Life Insur. Co., 94 A.D.3d 629, 629 [1<sup>st</sup> Dept., 2012]). Where, as here, a worker falls off a baker’s scaffold that lacked handrails, such evidence establishes that plaintiff’s injuries were proximately caused by defendants’ failure to provide proper protection against the elevation-related risk (Vail v. 1333 Broadway Associates, LLC, 105 A.D.3d 636 [1<sup>st</sup> Dept., 2013]).

The Court finds that plaintiff’s account regarding how he fell from the scaffold was sufficient to establish his prima facie entitlement to partial summary judgment on his section 240(1) claim.

To rebut plaintiff’s prima facie case, defendants assert that plaintiff was

negligent because he allegedly lost his balance while using the “Sawzall.” “However, because plaintiff has established that no adequate safety device was provided, his own negligence, if any, ... is of no consequence” (Cuentas, supra. (internal quotation marks and citation omitted)).

“[A] worker’s comparative negligence is irrelevant to a Labor Law 240(1) cause of action” (Goreczny v. 16 Court Street Owner LLC, 110 A.D.3d 465 [1<sup>st</sup> Dpt., 2013]). “[A] worker’s contributory negligence does not bar recovery under section 240(1)” (Mata v. Park Here Garage Copr., 71 A.D.3d 423, 424 [1<sup>st</sup> Dept., 2010]).

To summarize, the Court finds that the lack of a safety device was a violation of Labor Law 240(1), and was the proximate cause of plaintiff’s injuries (Reavely v. Yonkers Raceway Programs, Inc., 88 A.D.3d 561 [1<sup>st</sup> Dept., 2011]).

Accordingly, it is

ORDERED that the motion for leave to reargue is granted only regarding the claim under Labor Law 240(1); and it is further

ORDERED that, upon reargument, plaintiff’s motion for partial summary judgment on the issue of liability under Labor Law 240(1) is granted.

The foregoing constitutes the decision and order of the court.

Date: 12/18/13  
New York, New York

  
\_\_\_\_\_  
Anil C. Singh

**HON. ANIL C. SINGH**  
**SUPREME COURT JUSTICE**