

**Miranda v NYC Partnership Hous. Dev. Fund Co.,
Inc.**

2013 NY Slip Op 33775(U)

October 24, 2013

Supreme Court, Bronx County

Docket Number: 306801/2010

Judge: Alison Y. Tuitt

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

PART 05

Case Disposed
 Settle Order
 Schedule Appearance

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX:

DE JESUS MIRANDA, JOSE

Index No. 0306801/2010

-against-

Hon. ALISON Y. TUITT

NYC PARTNERSHIP

Justice.

The following papers numbered 1 to 5 Read on this motion, SUMMARY JUDGMENT/LIABILITY
 Noticed on April 08 2013 and duly submitted as No. _____ on the Motion Calendar of 6/10/13

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2, 3, 4	
Replying Affidavit and Exhibits	5	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion is decided in
 accordance with the annexed
 memorandum decision

Motion is Respectfully Referred to:
 Justice: _____
 Dated: _____

OCT 30 2013

Dated: 10/24/2013

Hon. ALISON Y. TUITT
 ALISON Y. TUITT, J.S.C.

NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

JOSE DE JESUS MIRANDA,

INDEX NUMBER: 306801/2010

Plaintiff,

-against-

Present:

HON. ALISON Y. TUITT

Justice

NYC PARTNERSHIP HOUSING DEVELOPMENT
FUND COMPANY, INC. WEIHER COURT, LLC
AND GREAT AMERICAN CONSTRUCTION
COMPANY CORP.,

Defendants.

GREAT AMERICAN CONSTRUCTION COMPANY
CORP.,

Index Number: 83751/2011

Third-Party Plaintiff,

-against-

JACE CONSTRUCTION CORP.,

Third-Party Defendant.

WEIHER COURT, LLC,

Index Number: 83807/2011

Second Third-Party Plaintiff,

-against-

JACE CONSTRUCTION CORP.,

Second Third-Party Defendant.

The following papers numbered 1 to 5,

Read on this Plaintiff's Motion for Summary Judgment

On Calendar of 6/10/13

Notice of Motion-Exhibits, Affirmation	<u>1</u>
Affirmations in Opposition	<u>2, 3, 4</u>
Reply Affirmation	<u>5</u>

Upon the foregoing papers, plaintiff's motion for summary judgment is for the reasons set forth herein.

The within action involves personal injury claims asserted by plaintiff alleged to have been sustained on November 14, 2008 when he fell from a ladder at a construction site located at 3305 3rd Avenue, Bronx, New York. Plaintiff had been hired by third party defendant Jace Construction, Corp. (hereinafter "Jace") to perform construction work at the aforementioned premises which was owned by defendants Weiher Corp., LLC (hereinafter "Weiher"). Weiher had contracted with Great American Construction Corp. (hereinafter "Great American") as the general contractor to perform construction work at the premises. Jace was contracted by Great American. On the date of the accident, plaintiff claims that he was installing sheetrock on a metal frame for an interior roll-up security gate/door. The frame was attached to the 20 foot high ceiling and hung down from the ceiling approximately three feet. In order to reach the height of 17-20 feet, plaintiff states that he was provided a six foot high scaffold and an A-frame ladder that was placed on top of the scaffold. Plaintiff claims that while he was working securing sheetrock to the frame, he was standing on the top step beneath the top shelf of the ladder, when suddenly and without warning, the ladder fell causing him to fall to the concrete floor below.

Plaintiff claims that at the time of the accident, the bakers scaffold, a moveable scaffold with four wheels, was set at the highest level possible - six feet high; that three of the scaffold wheels were not, and could not, be locked into place, and as such, the scaffold was not secured and it moved when being used; the scaffold platform also had a hole in it making it even less stable; there were no safety railings on the scaffold platform; and the A-frame ladder that was placed on the scaffold platform, with fully opened spreaders locked in place,

was not secured in any manner. Plaintiff further alleges that he was not provided any safety materials; no safety harnesses, no safety rails attached to the scaffold, and no one was assigned to hold the ladder or scaffold.

Plaintiff moves for summary judgment on his Labor Law §240(1) claim arguing that he was not provided with proper protection sufficient to prevent or break his fall from the ladder. Plaintiff also moves for summary judgment on his Labor Law §241(6) claim arguing that defendants failed to maintain the workplace in a safe condition. Defendants oppose the motion arguing that there are questions of fact as to whether plaintiff was the sole cause of his accident and whether the ladder and scaffold were defective. Defendants also argue that the multiple versions concerning how this accident happened raises issues of fact. In addition, defendants argue that plaintiff accident was not caused by the absence of protective devices enumerated in Labor Law §240(1) and §241(6).

Plaintiff testified at his deposition that he had been working on the subject scaffold for more than a week prior to the accident. There were two scaffolds at the site. The one he had been working on all week was a yellow, eight foot rectangular scaffold made of metal and wood with wheels. The scaffold had wheel locks which he checked prior to use. Plaintiff testified that he put the wheel locks on "but then, once I moved [the scaffold] the whole thing just moved." He further testified that "[t]he locks worked, but I don't know why the wheels did not respond accordingly." Plaintiff further stated that only one of the four wheels was working and that "if one applied pressure to the scaffold, or, if one grabbed the scaffold with force, it moved." While working on the scaffold, they would work in a team of two. Plaintiff and his co-worker would move the scaffold and they would put it in a way that was secure and then they would both go up on it to perform their work. Plaintiff stated that they sometimes, or the majority of the time, put pieces of wood blocks to prevent the scaffold from moving. Other times they "would place the wheels [of the scaffold] at an angle, not straight, in front of each other, at an angle, so they wouldn't move."

Plaintiff had also been using the same ladder all week prior to his accident. Plaintiff testified that the ladder had been provided to them to do their work and had already been set up when he arrived at the job site, as was the scaffold. He described the ladder as being able to lock when it was completely opened. Prior to the accident, he did not have any issues with the ladder. In order to perform his work, plaintiff would place the ladder on top of the scaffold platform and this is how he performed the framing work the entire time he was at the job site. Plaintiff testified that no one told him not to use the ladder and scaffold in that manner. Plaintiff further testified that he did not believe they had the proper equipment to reach "high altitudes" to perform their work. Plaintiff never asked if there was any other safety equipment other than what they were working with at the job site.

With respect to the date of the accident, plaintiff testified that he had relocated the scaffold and ladder at least one time. Immediately before the accident, the ladder was on the scaffold in an open A-frame position. Two of the scaffold wheels on the right were braced with wood. Plaintiff had been installing a piece of sheetrock with his co-worker and both were on the scaffold. From the scaffold, they lifted up the sheetrock. Plaintiff was on the ladder on the scaffold putting screws into the sheetrock when "suddenly I was already on the floor, everything happened too quick." Plaintiff later testified that he fell with the ladder and that the scaffold was unstable.

In an affidavit dated February 1, 2013, in support of his motion, plaintiff states that at the time he was working on the ladder, he was wearing his own hard hat that he brought from home and that he was not provided offered any protective gear on this job, including a safety harness. He also states that he did not set up the ladder and scaffold at any time and that it was used the same way by others on the job site as well as throughout the project.

Plaintiff annexed a letter from Great American containing notarized statements from Giovanni Valdez, foreman for Jace at the construction site, and Crescencio Escobar, owner of Jace. The statement provides, in relevant part, as follows:

On November 14, 2008 Giovanni heard a bang and turned to see a scaffold and Jesus Miranda on the floor. Giovanni was working approximately 25' away from the accident... Crescencio Escobar... received a call from Giovanni saying one of the workers fell off the scaffold. Crescencio ran to find the scaffold and Jesus Miranda on the floor... Giovanni rode with Jesus in the ambulance to the hospital. In the ambulance, Jesus told the paramedic that he fell from the scaffold... Giovanni has repeatedly told Jesus to wear a hard hat and not to place the ladder on scaffold. Israel Sanchez & Jose Rene Escobar are witnesses to that. Israel is in the picture with Jesus. The photograph was taken on November 14, 2008, 30 minutes prior to the fall. Crescencio believes Jesus was trying to move the scaffold while standing on it instead of getting down off the scaffold to move it.

The statement has a photograph attached that depicts two people standing on a scaffold next to an opened A-frame ladder. Plaintiff provides an affidavit wherein he states that the photograph depicts the blue scaffold and he was on the yellow scaffold when the fall occurred. The photograph depicts a similar set up of an A-frame ladder atop a Baker scaffold that he fell from. Plaintiff states that he did not set up the ladder or the scaffold at any time. It was used this way by others on the job site as well as throughout the ongoing project. He further states that no one warned him about using the ladder atop this scaffold. Plaintiff claims that the photograph demonstrates that the other workers also used the ladder on the scaffold in the same manner he did on the date of the accident. Plaintiff states that the photograph does not depict him on the scaffold. He never used the blue scaffold and only used the yellow one. Plaintiff further states that the photograph shows that it

was not taken 30 minutes before his accident because it shows a column without sheetrock attached. Approximately one week prior to his fall, plaintiff had secured sheetrock to the column shown in the photograph. Plaintiff claims that the photograph does not show him or the particular location where he was working on the date of the accident. The location where he was working when he fell would be off to the left side of the photograph. Moreover, plaintiff states that the photograph depicts a tall A-frame ladder on the left side. That ladder belonged to the plumbers working on the site and they were explicitly told that they were not allowed to use it.

Giovanni Valdez submits an affidavit wherein he states that various safety devices were provided at the job site, including ladders, as well as two to three scaffolds and hard hats for use by all the workers. Mr. Valdez states that the subject scaffolds were six feet in height, however, there were planks and piping located at the job site to extend the scaffolding up to 12 feet in height. Mr. Valdez claims that the Jace employees, including plaintiff, were specifically instructed to wear hard hats at all times and that all of the ladders and scaffolds at the job site were readily available for the use of Jace employees. Mr. Valdez disputes that plaintiff was told that he could not use any of the ladders and/or scaffolds and he states that plaintiff was never instructed not to extend the height of the scaffold and the piping and planks to extend the height of the scaffold were readily available to all employees. Mr. Valdez further states that plaintiff was aware of the existence of the piping and planks to extend the height of the scaffold; he knew how to set up scaffolds for his use and was responsible for setting up the scaffold he was using on the date of the accident; he had set up the scaffold on numerous occasions prior to his accident; and plaintiff had extended the height of the scaffold on occasions prior to the accident. Mr. Valdez claims that he had specifically instructed plaintiff not to place ladders on top of the scaffold, within half an hour of his accident and that if the ladder was not sufficient, the scaffolds were to be used and extended. Neither plaintiff nor any other person made any complaints regarding the scaffolds or ladders. Mr. Valdez further states that the wheels of the scaffold upon which plaintiff was working at the time of the accident were fully operation and lockable.

In response to Mr. Valdez's statements, plaintiff submits a second affidavit date June 1, 2013 wherein he again states that he never set up the ladder or the scaffold at any time. He also states that neither he nor his co-workers were provided with any safety devices and that there was no piping or planks or anything else provided to raise the height of the scaffold. He further states that he was never told at any time that he should raise the height of the scaffold and that there were no such materials, piping or planks, near where he was working or anywhere on the site.

The court's function on this motion for summary judgment is issue finding rather than issue

determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

Labor Law §240(1) provides in pertinent part as follows: "[a]ll contractors and owners and their agents... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect... 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." Strict liability under §240(1) is limited only to risks associated with elevation differentials. Daley v. City of New York, 716 N.Y.S.2d 50 (1st Dept 2000). Not every gravity-related hazard falls within the statute. Misseritti v. Mark IV Constr. Co., 86 N.Y.2d 487, 490-491. Moreover, once it is determined that the owner or contractor failed to provide the necessary safety devices required to give the worker proper protection, absolute liability is unavoidable under §240(1). See, Bland v. Mamocherian, 66 N.Y.2d 452 (1985).

An owner of a premises has a non-delegable duty under the Labor Law to provide a safe work environment. However, an implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition. Russin v. Louis N. Picciano & Son, 54 N.Y.2d 311 (1981) citing Reynolds v Brady & Co., 329 N.Y.S.2d 624 (2d Dept. 1972). Moreover, the work giving rise to these duties may be delegated to a third person or party. Russin 54 N.Y.2d at 317. When the work giving rise to these duties has

been delegated to a third-party, that third-party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor. Id.

It is a fact that there are inconsistencies in plaintiff's testimony and affidavits, specifically pertaining to the ladder and scaffold. In his affidavits, plaintiff states that he "never set up the ladder or the scaffold at any time". However, at his deposition, he testified that "[w]e would move [the scaffold], we would put it in a way that it would be secure, and then we would both go up it." When asked "[s]o you would move the scaffold together?", plaintiff responded "[y]es". Then plaintiff testified about how they would secure it with wood blocks. When asked if he himself ever picked up the ladder off the ground and put it on top of the scaffold, plaintiff responded "[t]o move it, yes." "So, after completing a section of the upper framing, you would close the ladder, take it off the scaffold, move the scaffold, put the ladder back up, and open it back up?" Plaintiff again responded "[y]es".

Notwithstanding the inconsistencies, plaintiff's motion for summary judgment on his Labor Law §240(1) claim must be granted. See, Orellano v. 29 East 37th Street Realty Corp., 740 N.Y.S.2d 16 (1st Dept. 2002)(Possible discrepancies in plaintiff's description of how or why he fell off the ladder are irrelevant since there is no dispute that his injuries were caused by his fall). Here, the photograph provided by defendant Great American clearly and without question depicts the construction site as plaintiff has claimed existed on the date of the accident. There is a scaffold and clearly visible is an A-frame ladder in its open position on top of the scaffold. There are two workers depicted in the photograph standing on top of the scaffold, next to the ladder. A careful view of this photograph, which defendant's claim was taken 30 minutes before plaintiff's accident, shows that there were no barricades to prevent a worker from falling. The photograph which was provided by defendant, clearly shows that defendant was aware that there were ladders being used on scaffolds at the job site. Whether plaintiff set up the ladder or it was already there, the fact is that plaintiff fell from the scaffold. Mr. Escobar, the owner of Jace, himself states that he "ran to find the scaffold and Jesus Miranda on the floor".

Plaintiff has adduced evidence that he was performing work covered by §240(1) of the Labor Law and that he is a member of the protected class contemplated by the statute. Plaintiff has further submitted evidence that he fell from an elevated level while performing his work. Moreover, he has submitted evidence in admissible form that the platform he was working on was unstable and that he was not provided with the necessary safety equipment or safeguards. Additionally, he has submitted evidence that the faulty platform and the failure to provide adequate safety measures were the proximate cause of his injury. Defendant failed to offer any proof to the contrary.

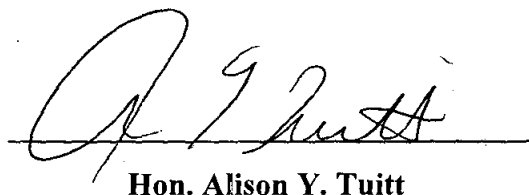
Any recalcitrant worker argument is without merit. The recalcitrant worker defense would allow

defendant to escape liability imposed by Labor Law §240(1). In order to establish a recalcitrant worker defense, a defendant must show that a plaintiff deliberately refused to use available safety devices provided by the owner or contractor. Hagins v. State of New York, 81 N.Y.2d 921, 922-923 (1993); Stolt v. General Foods Corp., 81 N.Y.2d 918 (1993). The defense is not established by merely showing that the worker failed to comply with an employer's instruction to avoid using unsafe equipment or engaging in unsafe practices or to use a particular safety device, or by the mere presence of safety devices on the work site. Hagins v. State of New York, *supra*; Gordon v. Eastern Railway, 82 N.Y.2d 555 (1993). On these facts, the recalcitrant worker defense is inapplicable. In the instant matter, due to the nature of the work that plaintiff was performing, it was foreseeable to defendants that workers were using A-frame ladders on the scaffold, as is depicted by their very own photograph. Given the fact that defendants did not provide adequate safety devices to protect him from falling off the scaffold, plaintiff cannot be held solely to blame for his injuries. Velasco v. Green-Wood Cemetery, 779 N.Y.S.2d 459 (1st Dept. 2004)(Defendants argument that the only cause of the accident was plaintiff's own negligence in helping to set up the ladder in soil and then using it even though he knew that his co-worker was not holding it held inadequate. The argument overlooks plaintiff's evidence that no safety devices were provided to protect him in the event the ladder slipped. Given an unsecured ladder and no other safety devices, plaintiff cannot be held solely to blame for his injuries. Plaintiff's use of the ladder without his co-worker present amounted, at most, to comparative negligence, which is not a defense to a section 240(1) claim); Bonanno v. Port Authority, 750 N.Y.S.2d 7(1st Dept. 2002); Mirraglia v. H&L Holding Corp., 828 N.Y.S.2d 329 (1st Dept. 2007); Hernandez v. 151 Sullivan Tenant Corp., 762 N.Y.S.2d 603 (1st Dept. 2003).

In light of the grant of plaintiff's motion for partial summary judgment on liability, defendants' arguments regarding plaintiff's claims for Labor Law §241(6) are academic. See, Carchipulla v. 6661 Broadway Partners, LLC, 945 N.Y.S.2d 4 (1st Dept. 2012); Fanning v. Rockefeller University, 964 N.Y.S.2d 525 (1st Dept. 2013).

This constitutes the decision and order of this Court.

Dated: 10/24/2013


 Hon. Alison Y. Tuitt