| **Munro v City of New York** |
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| 2018 NY Slip Op 30092(U) |
| January 16, 2018 |
| Supreme Court, New York County |
| Docket Number: 158041/2012 |
| Judge: Kelly A. O'Neill Levy |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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GARRY MUNRO and STEPHANIE MUNRO,

Plaintiffs,

- against -

CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY and LONG ISLAND RAIL ROAD,

Defendants.

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DECISION AND ORDER

Index No. 158041/2012
Mot. Seq. 002

**KELLY O'NEILL LEVY, J.:**

This is an action to recover for damages for personal injuries sustained by a union sandhog when he fell from a straight, metal ladder while working at a construction site.

Plaintiff Garry Munro moves, pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law §§ 240(1) and 241(6) claims against defendants City of New York, New York City Transit Authority, Metropolitan Transportation Authority and Long Island Railroad (together, Defendants). Defendants oppose.

**BACKGROUND**

On the day of the incident, August 15, 2012, plaintiff was employed by Dragados to work on a construction project known as the East Side Access Project in Grand Central Terminal in Manhattan. Defendant, the Metropolitan Transportation Authority, was the owner of the premises and hired Dragados to work on the project. Plaintiff was instructed to help co-workers spray "shotcrete," a type of concrete. In order to access the work area he was required to climb a straight, 8-foot metal ladder. As plaintiff climbed the ladder, it shifted causing him to jump off and sustain injuries to his foot. Defendants contend that there are issues of fact requiring a trial as to whether the ladder constitutes an inadequate safety device within the meaning of Labor Law § 240(1), whether plaintiff deliberately jumped off

the ladder, whether the ladder was used as a regular means of access between levels at the worksite, and whether the ladder's footing was firm.

Plaintiff testified at his 59-h hearing and examination before trial that on the date of the accident, he was a Union Local 147 sandhog employed by Dragados working on the East Side Access Project in Grand Central Terminal (50-h hearing tr. at 15-17). Plaintiff was assigned to spray shotcrete onto surfaces of the East Side access tunnel (*id.* at 17-19; Plaintiff's tr. at 27-28). That day, plaintiff took an elevator down to the tunnel which at that point was made of dirt, and then walked down a dirt slope to a ladder, which plaintiff needed to climb to reach his co-workers on an upper level (50-h hearing tr. at 41-42; Plaintiff's tr. at 54-55). The ladder was a straight, metal, 12-foot ladder (50-h hearing tr. at 52) which went up about eight feet to the next level (Plaintiff's tr. at 58). The ladder was leaning on an angle against a wall (50-h hearing tr. at 52; Plaintiff's tr. at 58-59, 62). It had rubber feet but was not tied off or secured to anything at the top or bottom (50-h hearing tr. at 56; Plaintiff's tr. at 60-61). Plaintiff contends that the entire area, including the floor where the ladder stood, was made of dirt and rocks, and the area around the ladder was uneven (Plaintiff's tr. at 56, 62-63). Plaintiff testified that he started climbing the ladder and when he got about halfway up, the base of the ladder suddenly slipped on the ground away from the wall, at which point he jumped off to the right, fell on loose rock debris, and injured his left foot (50-h hearing tr. at 58-62; Plaintiff's tr. at 63-66). Plaintiff fell approximately 6 feet to the ground below and the ladder came to rest flat on the ground (50-h hearing tr. at 58-59; Plaintiff's tr. at 68-69).

Defendants contend that at plaintiff's 50-h hearing, plaintiff testified that he did not inspect the ladder before stepping on its first rung, or observe whether the ladder was secured and did not know whether the ladder was tied (50-h Hearing tr. at 53-56). Defendants also argue that, in contrast, plaintiff testified at his deposition that he inspected the ladder immediately before climbing it, and that when he placed his feet and hands on the ladder it

"felt sturdy" to climb (Plaintiff's tr. at 43, 63). Defendants also contend that plaintiff clarified at his deposition that the area on the ground where the ladder that positioned was level, but the area around the ladder was uneven (*Id.* at 62-63).

**DISCUSSION**

On a summary judgment motion, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that material factual issues exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or factual findings. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012).

***Plaintiff's Labor Law § 240(1) Claim Against Defendants***

Plaintiff moves for summary judgment in his favor as to liability on the Labor Law § 240(1) claim against defendants. Labor Law § 240(1) provides, in relevant part:

> "All 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, 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 designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person.'"

*John v. Baharestani*, 281 A.D.2d 114, 118 (1st Dep't 2001) (quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501 [1993]).

> "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein."

*Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259, 267 (2001); *See Hill v. Stahl*, 49 A.D.3d 438, 442 (1st Dep't 2008); *See Buckley v. Columbia Grammar & Preparatory*, 44 A.D.3d 263, 267 (1st Dep't 2007).

To prevail on a § 240(1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries. *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 287 (2003); *Felker v. Corning Inc.*, 90 N.Y.2d 219, 224 (1997); *Torres v. Monroe Coll.*, 12 A.D.3d 261, 262 (1st Dep't 2004).

"'Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240(1).'" *Montalvo v. J. Petrocelli Constr., Inc.*, 8 A.D.3d 173, 174 (1st Dep't 2004) (where plaintiff was injured as a result of unsteady ladder, plaintiff did not need to show that ladder was defective for the purposes of liability under Labor Law § 240(1), only that adequate safety devices to prevent the ladder from slipping or to protect the plaintiff from falling were absent) (quoting *Kijak v. 330 Madison Ave. Corp.*, 251 A.D.2d 152, 153 [1st Dep't 1998]); *Klein v. City of New York*, 89 N.Y.2d 833, 835 (1996); *Hart v. Turner Constr. Co.*, 30 A.D.3d 213, 214 (1st Dep't 2006) (plaintiff met his prima facie burden through testimony that while he performed his assigned work, the eight-foot ladder on which he was standing shifted, causing him to fall to the ground).

"Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials." *Nelson v. Ciba-Geigy*, 268 A.D.2d 570, 572 (2d Dep't 2000); *Cuentas v. Sephora USA, Inc.*, 102 A.D.3d 504, 504 (1st Dep't 2013); *Kwang Ho Kim v. D & W Shin Realty Corp.*, 47 A.D.3d 616, 618 (defendant not entitled to dismissal of Labor Law § 240(1) claim where it failed to establish that the ladder, which had slipped out from underneath the plaintiff, provided proper protection); *Peralta v. American Tel. and Tel. Co.*, 29 A.D.3d 493, 494 (1st Dep't 2006) (unrefuted evidence that the unsecured ladder moved, combined with evidence that no other safety devices were provided, warranted a finding that the owners were liable under Labor Law § 240(1)); *Chlap v. 43rd St.-Second Ave. Corp.*, 18 A.D.3d 598, 598 (2d Dep't 2005); *Sinzieri v. Expositions, Inc.*, 270 A.D.2d 332, 333 (2d Dep't 2000) (Labor Law § 240(1) liability where the plaintiff "presented undisputed evidence that, while dismantling the . . . exhibit, he fell when an unsecured ladder upon which he was standing and which had no protective rubber skids, slipped from underneath him").

Here, plaintiff climbed a straight ladder to access a higher level to perform work with co-workers when the unsecured ladder on which he was standing slipped from underneath him causing him to fall to the ground. There were no adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling. Labor Law § 240(1) was violated and this violation was the proximate cause of plaintiff's injury.

There is no conflict between plaintiff's 50-h hearing testimony and his deposition testimony. At the 50-h hearing, plaintiff was asked if he inspected the ladder, to which he replied in the negative (50-h hearing tr. at 53-54). At the 50-h hearing, plaintiff was not asked how the ladder felt when he attempted to climb it. Plaintiff testified at his deposition that the ladder felt sturdy once he placed his foot on it (Plaintiff's tr. at 63). The testimony is not contradictory and thus raises no issue of fact.

Defendants assert that plaintiff decided to jump off the ladder (Plaintiff's tr. at 64) and that there is conflicting evidence as to whether plaintiff was injured because the ladder slid out from underneath him or because he deliberately and voluntarily jumped from it, thus potentially breaking the chain of causation for the injuries. Plaintiff's testimony is clear that the ladder first slipped and then, in an attempt to avoid injury and getting entangled with the ladder, he jumped off as the ladder slipped from under him (*Id.* at 64-65). He jumped to avoid the potential injury of falling to the ground with the ladder, such as getting his foot or hands caught in between the ladder and the ground (*Id.*). Thus there is no conflicting evidence precluding a determination as a matter of law that the ladder constituted an inadequate safety device or that the Labor Law violation was the proximate cause of plaintiff's injuries. *See Messina v. City of New York*, 148 A.D.3d 493, 494 (1st Dep't 2017) (plaintiff not required to show that ladder on which he was standing that moved underneath him was defective or that he actually fell off it to satisfy his prima facie burden).

In any event, to the extent plaintiff's alleged conduct goes to the issue of comparative fault or negligence, this theory is not a defense to a Labor Law § 240(1) claim because the statute imposes absolute liability once a violation is shown. *Bland v. Manocherian*, 66 N.Y.2d 452, 460 (1985); *Dwyer v. Central Park Studios, Inc.*, 98 A.D.3d 882, 884 (1st Dep't 2012); *Orphanoudakis v. Dormitory Auth. of State of N.Y.*, 40 A.D.3d 502, 502 (where there was no question that the ladder was defective due to its missing rubber feet, plaintiff was not the sole proximate cause of the accident); *Velasco v. Green-Wood Cemetery*, 8 A.D.3d 88, 89 (1st Dep't 2004) ("Given an unsecured ladder and no other safety devices, plaintiff cannot be held solely to blame for his injuries"); *Klein v. City of New York*, 222 A.D.2d 351, 352). "[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it.'" *Hernandez v. Bethel United*

*Methodist Church of N.Y.*, 49 A.D.3d 251, 253 (1st Dep't 2008) (quoting *Blake v. Neighborhood Hous. Servs. of N.Y.*, 1 N.Y.3d 280, 290). Even if plaintiff's failure to inspect the ladder is evidence of negligence, it is not a defense to a Labor Law § 240(1) claim.

Therefore, plaintiff is entitled to summary judgment on the Labor Law § 240(1) claim against defendants.

***Plaintiff's Labor Law § 241(6) Claim Against Defendants***

Plaintiff also moves for summary judgment in his favor on the Labor Law § 241(6) claim against defendants. Labor Law § 241(6) provides, in pertinent part, as follows:

> "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, [and] equipped ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. . . ."

Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers. *See Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501-502. However, Labor Law § 241(6) is not self-executing, and to show a violation of this statute it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety. *Id.*

Plaintiff claims that defendants violated Industrial Code §§ 23-1.21(b)(4)(i) and (ii), which provide:

**§ 23-1.21 Ladders and ladderways.**

(b) General requirements for ladders.

(4) Installation and use.

(i) Any portable ladder used as a regular means of access between floors or other levels in any building or other structure

> shall be nailed or otherwise securely fastened in place. Such a ladder shall extend at least 36 inches above the upper floor, level or landing or handholds shall be provided at such upper levels to afford safe means of access to or egress from the ladder. Such a ladder shall be inclined a maximum of three inches for each foot or rise.
>
> (ii) All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings.

Industrial Code §§ 23-1.21(b)(4)(i) and (ii) are sufficiently specific to maintain a Labor Law § 241(6) cause of action. *See Stankey v. Tishman Const. Corp. of New York*, 131 A.D.3d 430 at 431 (1st Dep't 2015).

Here, the ladder was being used as a means of access between levels of the project and it was not securely fastened in any manner at the top or bottom (50-h Hearing tr. at 51-52; Plaintiff's tr. at 60-61). This violation of the Industrial Code was a proximate cause of plaintiff's accident. Defendants contend that plaintiff has not established that the ladder was used as a regular means of access between levels at the work site, citing plaintiff's deposition testimony that he had neither observed the ladder in the worksite where the accident occurred before nor worked in that area (Plaintiff's tr. at 59). This testimony does not address the question of whether the ladder was being used as regular means of access between levels at the work site. This ladder was the means available to plaintiff to reach the upper level of the work site, the ladder's purpose was to access an upper level of the work site, and there is no evidence that workers were performing work from this ladder (50-h Hearing tr. at 46-47, 50-52; Plaintiff's tr. at 58). Accordingly, Industrial Code § 23-1.21(B)(4)(i) applies and a clear violation has been established.

Industrial Code § 23-1.21(b)(4)(ii) requires that ladder footings be firm. Plaintiff testified that the area on the ground around the ladder was composed of dirt, and was wet and uneven (Plaintiff's tr. at 62-63). Furthermore, plaintiff testified that as he climbed the ladder,

it shook and slid on the dirt ground it was resting upon (*See* Plaintiff's tr. at 64). While defendants contend that plaintiff has not tendered sufficient evidence that the ladder's footings were not firm or that the ladder was placed on a slippery surface, they have not proffered any alternative evidence.

Therefore, plaintiff is entitled to summary judgment on the Labor Law § 241(6) claim against defendants based on violations of Industrial Code §§ 23-1.21(b)(4)(i) and (ii).

**CONCLUSION AND ORDER**

For the foregoing reasons, it is hereby

**ORDERED** that plaintiff Garry Munro's motion, pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law §§ 240(1) and 241(6) claims against defendants City of New York, New York City Transit Authority, Metropolitan Transportation Authority and Long Island Railroad is granted; and it is further

**ORDERED** that the remainder of the action shall continue.

This constitutes the decision and order of the court.

January 16, 2018
**DATE**

Kelly O'Neill Levy
**KELLY O'NEILL LEVY, J.S.C.**

HON. KELLY O'NEILL LEVY
J.S.C.

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