

<b>Boccia v First Republic Bank</b>
2020 NY Slip Op 34128(U)
December 9, 2020
Supreme Court, New York County
Docket Number: 160640/15
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

MICHAEL BOCCIA

INDEX NO. 160640/15

- v -

MOT. DATE

MOT. SEQ. NO. 001

FIRST REPUBLIC BANK et al.

The following papers were read on this motion to/for partial summary judgment
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits

This is an action for personal injuries at a construction site. Plaintiff Michael Boccia moves for partial summary judgment on the issue of liability. Defendants First Republic Bank (FRB) and Coyle Contracting Corp. (Coyle) oppose the motion. Issue has been joined but note of issue has not yet been filed. Therefore, summary judgment relief is available. The court's decision follows.

On August 18, 2014, the date of the accident, plaintiff, a union electrician, was employed by non-party Atlas Acon Electric Service Corp, and working at a construction site at the FRB branch located at East 79th Street, New York, New York. Plaintiff was assigned to run electricity from the basement's mechanical room for a lobby waterfall fountain located on the first floor of the building.

At plaintiff's deposition in November 2019, he testified that to run power to the waterfall, he had to run conduit, pull wire, install a junction box, strap pipe and drill a hole. Plaintiff further testified that to perform the work, he needed a ladder because the concrete slab was roughly 8 feet high. Plaintiff used a 6-foot fiberglass A-frame ladder that he found in the room where he worked, which was in the open position upon his arrival. He inspected the ladder before he used it and found nothing wrong with it. Plaintiff testified that the room he worked in was being used for storage and that in front of the door there were boxes on the floor containing paint cans, cinder block, plumber's pipe, janitor's mop and bucket and existing electrical panels and that he did not have to move any of the debris out of the way before using the ladder because "it wasn't in my way". Immediately prior to his accident, Boccia was working on the second rung from the bottom of the ladder, and specifically was installing a conduit strap in the concrete slab ceiling. As he was coming down the ladder to finish the job, his left hand was on the ladder and his right hand was holding the drill, Boccia testified that his accident occurred as he stepped from the second rung of the ladder to the first rung. Boccia testified that "the ladder shifted, causing me to lose my balance and the ladder started to tilt, and as I was falling, I tripped over an existing three-quarter copper drainpipe for the HVAC unit".

Dated: 12/9/20

[Signature]
HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [ ] GRANTED [X] DENIED [ ] GRANTED IN PART [ ] OTHER
3. Check if appropriate: [ ] SETTLE ORDER [ ] SUBMIT ORDER [ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

Boccia further testified that after the accident, the ladder shifted because of “debris” but “I couldn’t tell you which particular item it exactly was”, because “I seen it on the floor after I hit the floor” and “after the accident, I saw the ladder was caused to shift by debris on the floor under the footing of the ladder, which I had not seen prior to the accident”. Boccia was unable to identify the debris that allegedly caused the ladder to shift. When asked about tripping over the  $\frac{3}{4}$  inch copper pipe, Boccia testified that “my foot got caught under it and I went over”. Plaintiff alleges that the ladder fell not only because of the debris on the floor but also “because I had no co-worker assigned to work with me, so no one was holding the ladder, I was not provided with any meanings of securing the ladder...”.

Regarding what transpired after the accident, plaintiff testified as follows:

- A. I stood up, I observed. Kind of shook it off. You know, obviously I felt some pain, and reset myself up. After I got myself back together, went to lunch.
- Q. Did you return to work in that room after lunch?
- A. Sure, yes.
- Q. Did you use that ladder?
- A. Yes.
- Q. Did you inspect the ladder after the incident occurred?
- A. Absolutely.
- Q. Did you see any damage to the ladder?
- A. No.

Meanwhile, after the incident, plaintiff reported his accident to his foreman and then completed an Incident Report referred to as “Accident Report ADR C-2”. The Accident Report, marked as Exhibit A at plaintiff’s deposition, provides the following: **What was employee doing when injured?** “Was installing conduit and junction box, plus drilling for anchor supports; **How did injury occur?** “Climbing down ladder and tripped over copper drain line on ground causing lose of balance and falling onto leftside of body onto debris and ground”; and **Describe in detail how the accident occurred. Relate the events which led up to this injury or illness. Tell what the injured was doing at the time of the accident.** Running conduit on ceiling and installed junction box. Proceed to drill holes for anchor supports for box and conduit. Then climbed (descended down) ladder with drill in hand. Stepped off bottom step of ladder and tripped over drainpipe on ground.

Plaintiff has also submitted an affidavit in support of the motion where he clarifies how his accident occurred:

As I testified (pages 101, 111, 112), the ladder shifted, causing me to lose my balance, the ladder started to tilt to the left, the ladder and I fell to the left, and as I was falling I tripped over an existing  $\frac{3}{4}$  copper drainpipe for the HVAC unit. As I testified (page 110), after the accident, I saw the ladder was caused to shift by debris on the floor under the footing of the ladder, which I had not seen prior to the accident. As I had testified (pages 93-94, 95-96), while I did not see anything within one foot of the base of the ladder, within five feet of where the ladder was set up, there were boxes on the floor, containing paint cans, cinder block, plumbers pipe, as well as pieces of plumbers pipe on the floor, and some boxes, paint cans and loose plumbing pipe were laying on the floor within 2-feet of the ladder. I either failed to see the debris which was already in the area of the footing of the ladder, or a piece of the loose plumbing pipe I had seen within two feet of the ladder rolled into the footing as I was working.

FRB witness, David Brady, Director of Facilities, testified at his deposition that First Republic entered into a contract with Coyle as the general contractor for the renovation project at the bank’s branch

located at 148 East 79<sup>th</sup> Street. He further testified that Coyle oversaw the various trades involved in the construction at the site and was responsible for hiring laborers who cleaned up after the trades at the site. Brady stated that he would perform periodic walkthroughs at the site, but that FRB did not hire a project manager or safety manager for the site, nor did FRB provide any equipment for the project, including the ladder that plaintiff claims fell. Brady had no firsthand knowledge of plaintiff's accident.

Colum Morrissey, Coyle's owner, testified that he entered into a proposal for the 79<sup>th</sup> Street job with FRB but was uncertain if it was even reduced to a formal contract. He stated that Coyle entered into a contract with Atlas for electrical work at the site. Morrissey further testified that Coyle was hired as the general contact for the project, that it employed a site superintendent whose general duties were to oversee the various trades and ensure that the work was progressing, and that Coyle did not tell Atlas workers how to perform their jobs, nor provide Atlas workers with equipment nor was it specifically responsible for overseeing site safety for the various trades.

Plaintiff argues that he is entitled to partial summary judgment on the issue of liability on his Labor Law §§ 240[1] and 241[6] claims against FRB and Coyle. Defendants argue that triable issues of fact preclude summary judgment. Specifically, defendants argue that plaintiff's five different scenarios depicted by him about how his unwitnessed accident took place while working for Atlas do not dovetail with one another, therefore plaintiff's lack of credibility creates a question of fact as to how the accident happened. Further, defendants contend that plaintiff's attempts to clarify the confusion created by the initial versions of the accident by attaching an affidavit in support of his motion.

## DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

### Labor Law § 240[1]

Labor Law § 240(1), which is known as the Scaffold Law, imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury (*Gordon v. Eastern Railway Supply, Inc.*, 82 NY2d 555 [1993]). The statute provides in pertinent part as follows:

All contractors and owners and their agents, ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a premises 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 protects workers from "extraordinary elevation risks" and not "the usual and ordinary dangers of a construction site" (*Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d 841 [1994]). "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)" (*Narducci v. Manhasset Bay Associates*, 96 NY2d 259 [2001]).

Section 240(1) was designed to prevent accidents in which the scaffold, hoist, stay, ladder 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 (*Runner v. New York Stock Exchange, Inc.*, 13 NY3d 5999 [2009] quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). The protective devices enumerated in Labor Law § 240 [1] must be used to prevent injuries from either “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 the materials or load being hoisted or secured” (*Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1991]).

Plaintiff argues that he “made a *prima facie* showing that defendants, the owner of the premises in which Plaintiff was working and the contractor by whom Plaintiff was employed, violated Labor Law Sec. 240(1), and that the violation was a proximate cause of the accident” as defendants’ “failure to properly secure a ladder, to ensure that it remain steady and erect which being used, constitutes as violation of Labor Law Sec. 240(1) and defendants cannot controvert Mr. Boccia’s showing that “no one was holding the 6 foot A-frame ladder from which plaintiff fell, that the ladder was not secured to something stable and was not chocked or wedged in place and that no other safety devices such as safety belts were provided”.

Defendants argue that plaintiff’s version of how a ladder in good working order somehow “shifted” during his descent from the second rung of the ladder with tripping over  $\frac{3}{4}$  inch copper drainpipe is “nothing more than a transparent attempt to factually conflate two disparate actions in order to satisfy the strict liability requirements of Labor Law 240(1)”, which is “misleading and legally insufficient to establish plaintiff’s claim and ...should be rejected by the Court”.

On reply, plaintiff’s counsel contends that the “considering the wording of very brief accounts in accident report or the bill of particulars as “separate accounts,” under each of the “accounts,” defendants’ violation of Labor Law §§ 240(1) and 241(6) is established.” He maintains that no matter which version of how the accident occurred is true, he is still entitled to summary judgment. Otherwise, he argues that the accident report, his pleadings, deposition testimony and affidavit are harmonious and consistent.

The court agrees with defendants. Assuming *arguendo* that plaintiff has established a violation of Labor Law § 240(1) and that this violation was the proximate cause of his injuries, triable issues of fact preclude summary judgment. At his deposition, plaintiff testified that the ladder was in good working order and that there was no debris within a foot of the ladder. The accident report handwritten by plaintiff states: “[s]tepped off bottom step of ladder and tripped over drainpipe on ground.” Plaintiff’s inconsistent statements and/or versions as to how the accident happened, the “shifting” of the ladder or the tripping over the drainpipe, raise questions of fact regarding how the accident happened. If plaintiff only tripped over a pipe after he descended the ladder, he does not have a viable Section 240[1] claim. Moreover, plaintiff failed to establish as a matter of law that the lack of safety devices, i.e. lack of chocks or wedges, violated Labor Law § 240(1) or that these violations proximately caused his accident.

Further, summary judgment should not be granted “where conflicting inferences may be drawn from the evidence, or where there are issues of credibility”. *Scott v Long Is. Power Auth.*, 294 A.D.2d 348, 741 N.Y.S.2d 708 [2002]). The different versions of how the accident happened relied on by plaintiff are not only contradictory, but also raise questions as to Boccia’s credibility. According to plaintiff’s deposition testimony, the accident was caused by the “shifting” of the ladder as he descended it. However, the Accident Report, prepared in his own handwriting, contradicts that claim. This is not a situation, as plaintiff’s counsel seems to suggest, where plaintiff’s deposition testimony amplified the accident report.

Based on the foregoing, plaintiff’s motion for summary judgement under Labor Law § 240(1) is denied.

Labor Law § 241[6]

Labor Law § 241[6] imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure that:

[a]ll 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 scope of the duty imposed by Labor Law § 241[6] is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57<sup>th</sup> Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). Plaintiff must allege violations of specific, rather than general, provisions of the Industrial Code (*Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998]). Plaintiff asserts that the defendants violated 12 NYCRR § 23-1.7(e)(1) and (2) and 23-2.1(a).

Section 23-1.7(e)(1) and (2) provides as follows:

(e) Tripping and other hazards.

(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

(2) Working areas. The parts of floors, platforms and similar areas where persons work, or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Section 23-2.1 Maintenance and housekeeping provides in relevant part:

(a) Storage of material or equipment.

(1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.

(2) Material and equipment shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge.

Plaintiff argues that he has *prima facie* demonstrated violations of Industrial Code Sections 23-2.1 and 23-1.7(e) based on his deposition testimony.

Defendants argue that plaintiff provides no evidence to support his claims for violations under Labor Law 241(6) and that based on plaintiff's own testimony that the area around the ladder was clear from debris and building materials and that he did not need to move anything before he started working. Defendants further contend that under plaintiff's various iterations of how his purported accident took place, he never claims to have slipped or tripped on materials or debris and that if plaintiff fell because of a shaking ladder then the sections of the industrial code cited by plaintiff do not apply. Defendants contend that plaintiff's version of how the accident happened because he stepped on or his foot hooked under the drainpipe, then the industrial code sections do not apply here. Defendants argue that plaintiff's papers are devoid of any proof or argument that plaintiff was in a passageway when his accident happened and therefore, that portion of plaintiff's papers should not be considered by the court. Finally,

defendants claim that Section 23-1.7e(2) working areas is inapplicable as plaintiff does not claim that he tripped on dirt, debris, scattered tools or material, but on a drainpipe or because of a shaky ladder

The court rejects plaintiff's argument that Sections 23-1.7(e)(1) and 23-2.1(a)(2) apply. While the term "passageway" is not defined in the Industrial Code, "courts have interpreted the term to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area". *Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 1250, 961 NYS2d 634 [4th Dept 2013]. Based on plaintiff's own testimony, he was working in a room when the alleged accident occurred. There can be no dispute on this record before the court that the accident did not occur in "any passageway, walkway, stairway or other thoroughfare" (see *i.e. Gualpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416 [1st Dept 2014]).

Similarly, plaintiff's accident was not caused by material or equipment which exceeded a weight capacity for the floor thereon and/or was on an edge. Therefore, the court searches the record and grants defendants summary judgment dismissing plaintiff's claim premised upon Industrial Code §§ 23-1.7(e)(1) and 23-2.1(a)(2) (see *Dunham v. Hilco Const. Co., Inc.*, 89 NY2d 425 [1996]).

Plaintiff is not entitled to summary judgment as to Section 23-1.7(e)(2), "Working Areas". Issues of fact requiring credibility determinations by a fact finder remain as to whether plaintiff's accident was caused by "accumulations of dirt and debris and from scattered tools and materials ... consistent with the work being performed". Therefore, plaintiff's motion as to this provision is denied.

Finally, plaintiff's motion as to Industrial Code § 23-2.1(a)(1), which requires building materials to be stored in a safe and orderly manner, must also be denied (see *i.e. Armental v 401 Park Ave. S. Assoc., LLC*, 182 AD3d 405 [1st Dept April 2, 2020]). It remains for a factfinder to determine if there was any debris in the area where plaintiff worked and whether such debris caused his accident.

## CONCLUSION

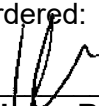
In accordance herewith, it is hereby:

**ORDERED** that plaintiff's motion is denied in its entirety and upon a search of the record, the court grants summary judgment to the defendants dismissing plaintiff's Labor Law § 241[6] claim predicated upon Industrial Code §§ 23-1.7(e)(1) and 23-2.1(a)(2), which is hereby severed and dismissed; and it is further

**ORDERED** that plaintiff's time to file note of issue is extended to March 15, 2021.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 12/9/20  
New York, New York

So Ordered:  
  
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Hon. Lynn R. Kotler, J.S.C.