

Jimenez v Vornado Eleven Penn Plaza Owner LLC
2022 NY Slip Op 34052(U)
November 30, 2022
Supreme Court, New York County
Docket Number: Index No. 154198/2019
Judge: Sabrina Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

-----X

ISRAEL JIMENEZ,

Plaintiff,

- v -

VORNADO ELEVEN PENN PLAZA OWNER LLC, AMC
NETWORKS INC., J.T. MAGEN & COMPANY INC.,
RAINBOW MEDIA HOLDINGS LLC.

Defendants.

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INDEX NO. 154198/2019

MOTION DATE 11/09/2022

MOTION SEQ. NO. 002 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 71, 73, 75, 81, 82, 83, 85

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 74, 76, 77, 78, 79, 80, 86, 87, 88

were read on this motion to/for SUMMARY JUDGMENT.

BACKGROUND

Plaintiff commenced this action seeking damages for personal injury allegedly incurred on April 20, 2017, while he was working as an electrician on the 18th Floor of 11 Penn Plaza New York, New York. Vornado Eleven Penn Plaza Owner LLC (Vornado) was the owner of the property at 11 Penn Plaza. Rainbow Media (Rainbow) was the tenant for the 18th Floor. Rainbow entered into a contract with J.T. Magen & Company Inc. (JT) for renovations of the 18th and 19th floors at 11 Penn Plaza. JT was the general contractor for this jobsite.

PENDING MOTIONS

On August 22, 2022, plaintiff moved for partial summary judgment on liability as against Vornado and JT on his Labor Law §240(1) cause of action.

On September 9, 2022, defendants moved for summary judgment in favor of all defendants dismissing plaintiff's causes of action sounding in negligence and violations of Labor Law §§ 200, 241(6) and 240(1).

On November 9, 2022, the motions were fully briefed, marked submitted and the court reserved decision. The motions are consolidated herein for disposition. For the reasons set forth below, plaintiff's motion is denied, and defendants' motion is granted in part.

ALLEGED FACTS

Plaintiff's accident occurred on April 20, 2017, in the course of his employment as a journeyman electrician for Campbell & Dawes Electric, while roughing cable on the 18th floor of premises known as 11 Penn Plaza, New York, New York. Eight floors in the commercial building were being renovated, including the 18th floor.

At the time of the accident, plaintiff was working alone and in the process of roughing out an area, which included locating the junction box, deciding how to proceed, and beginning to install the cable. The hangers necessary for the installation of the cable had already been installed.

Plaintiff was pulling five (5) separate cables. He used a drag line, a quarter inch nylon rope, which is attached to a point called the nose of the cable to pull the cable in the ceiling. Plaintiff grabbed a Campbell & Dawes 6-foot fiberglass A-frame ladder which happened to be in the area when he started to encounter the tension while pulling the wire. Plaintiff testified that needed the ladder for leverage, to effectively pull the wire. He inspected the ladder prior to using it, made sure the rungs were not broken, that the legs were not broken, checked the footing, made sure it opened all the way, visually inspected that the ladder was properly locked open, found no problems. At the time of his accident, he was standing on the ladder. As he was

pulling wire, the ladder. wobbled and moved forward a few inches, he held onto the wire with both hands and felt a pop in his shoulder.

Vornado, AMC, JT Magen and Rainbow Media did not instruct plaintiff on how to perform its work or provide plaintiff with any tools or equipment needed to perform his work. Plaintiff was given his daily assignment from the General Foreman, Eugene Smith, for Campbell & Dawes. JT Magen had general supervisory duties on site.

DISCUSSION

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

However, “[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez*, 68 NY2d at 324). “[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion” (*People v Grasso*, 50 AD3d 535,544 [1st Dept 2008]). “On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact” (*Martin v Citibank, N.A.*, 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong*, 2 AD3d 166,168 [1st Dept 2003] [“The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not

to determine the merits of any such issues”], *citing Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

The Claims Asserted Under Labor Law §200 And §241(6) Are Dismissed

Plaintiff submitted no opposition addressing that portion of defendant’s motion that seeks dismissal of the claims asserted under Labor Law §200 or §241(6). As plaintiff fails to oppose these portions of this motion, he has abandoned all other predicates not raised in his legal arguments. *Burgos v. Premier Props. Inc.* 145 A.D.3d 506 (1st Dept. 2016). Defendants’ motion as to Labor Law §200 or §241(6) is granted and these claims are dismissed.

Plaintiff’s Claims against AMC and Rainbow under Labor Law §240(1) Are Dismissed

A threshold determination for liability under Labor Law §240(1) is whether the defendant is an owner, general contractor, or their agent. *Russin v. Louis N. Picciano & Son*, 445 N.Y.S.2d 127, 129. Here, there is no evidence or testimony that AMC nor Rainbow were an owner of the Premises or general contractor and the contracts at issue do not identify either entity as an owner or general contractor.

Plaintiff fails to address its claim as to AMC in anyway in the motion papers. As to Rainbow, plaintiff provides a long string of cites which indicate there are times when a tenant in charge of the construction could be liable under the Labor Law. but makes no factual allegations supporting application of those cases to Rainbow in this action.

The Balance of The Motions Seeking Summary Judgment as To the Claims Under Labor Law 240(1) Are Denied As There Are Material Questions Of Fact To Be Determined At Trial

Plaintiff cannot prevail on a motion for summary judgment on the issue of liability under Labor Law Section 240(1) if there is any view of the evidence which would permit a finding that the defendants’ violation of that provision might not have been a proximate cause of the

plaintiff's accident (*see, Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524; *Duda v Rouse Constr. Corp.*, 32 NY2d 405, 410; *Zeitner v Herbmax Sharon Assocs.*, 194 AD2d 414; *Golaszewski v Cadman Plaza N.*, 136 AD2d 596).

Plaintiff's own testimony was that he could have alleviated the tension of the wire, the alleged proximate cause of his accident, by pre-rolling it, which would require him to walk back and forth to the reel. Plaintiff did not intend to use a ladder for his task that day and had worked for over an hour without a ladder prior to the accident occurring. Plaintiff had one foot on the second rung and the other on the first rung when he went to pull the wire, but due to the tension, the wire recoiled.

The protections of Labor Law § 240(1) do not encompass any and all perils that may be connected in some tangential way with the effects of gravity" (*Nicometi v. Vineyards of Fredonia*, 25 N.Y. 3d 90 (2015)) and "[n]ot every worker who falls at a construction site . . . gives rise to the extraordinary protections of Labor Law § 240(1). "The single decisive question in determining whether Labor Law § 240(1) is applicable is whether the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Escobar v Safi*, 150 AD3d 1081, 1083, 55 NYS3d 350 [2017]). In this case the answer to that question is not legal but factual and must be determined by the jury at trial. The jury must determine based on assessment of all the evidence including the credibility of plaintiff whether his injuries resulted from the sort of "elevation-related risk" that is essential to a cause of action under this section. *Toefer v Long Is. R.R.*, 4 NY3d 399 (2005), and whether the proximate cause of plaintiff's injury was the ladder, the failure to preroll the wires or the gravity related issues, if any caused by the weight of the cables.

Neither party made a *prima facie* case of entitlement as a matter of law on this point.

CONCLUSION

WHEREFORE it is hereby:

ORDERED that the action is dismissed in its entirety against AMC NETWORKS INC. and RAINBOW MEDIA HOLDINGS LLC; and it is further

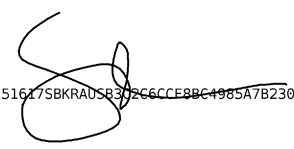
ORDERED that the claims asserted under labor law §200 and §241(6) are dismissed as against all Defendants; and it is further

ORDERED that the balance of the relief sought in the consolidated motions is denied; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that this constitutes the decision and order of this court.



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11/30/2022

DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE