**Solano v Gramercy 128 W., LLC**

2023 NY Slip Op 34052(U)

November 3, 2023

Supreme Court, New York County

Docket Number: Index No. 152018/2020

Judge: Shlomo S. Hagler

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

**PRESENT:** **HON. SHLOMO S. HAGLER** **PART** **17**

***Justice***

---------------------------------------------------------------------------X

JOSE ARCELLO SOLANO,

Plaintiff,

- v -

GRAMERCY 128 WEST, LLC,GRAMERCY 128-130 WEST, LLC,PAN BROTHERS CAPITAL MANAGEMENT GROUP LLC,LRC CONSTRUCTION, LLC

Defendant.

---------------------------------------------------------------------------X

**INDEX NO.** 152018/2020

**MOTION DATE** 11/10/2021

**MOTION SEQ. NO.** 001

AMENDED
**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for JUDGMENT - SUMMARY.

This is an action for personal injuries allegedly sustained by plaintiff on July 25, 2019 while working as a laborer/carpenter employed by non-party Trinity Builders of New York, Inc. ("Trinity") for a project to develop and construct a residential building (the "Project") at a construction site located at 128 West 23rd Street, New York, NY (the "Premises").

Plaintiff moves for summary judgment on liability pursuant to Labor Law § 240 (1). Defendants Grammercy 128 West LLC, Pan Brothers Capital Management, LLC i/s/h/a Pan Brothers Capital Management Group LLC and LRC Construction LLC ("LRC") (collectively, "defendants") cross-move for summary judgment dismissing plaintiff's cause of action predicated on Labor Law § 240 (1).

## BACKGROUND

Grammercy is the owner of the Premises which contracted and hired LRC as construction manager on the Project. Grammercy in turn hired LRC, plaintiff's employer, as a subcontractor

at the Project. Plaintiff alleges he was struck by a falling piece of lumber that fell from the floor above, striking plaintiff's back and shoulders.

*Plaintiff's Deposition Testimony*

Plaintiff testified that he had worked at the Project for approximately eight months doing carpentry (Plaintiff Deposition Tr., dated June 22, 2021 [NYSCEF Doc. No. 29] at 35). On the day of the accident, plaintiff testifies he was performing form work on the ninth floor and above him, workers were beginning to assemble the tenth floor (*id.* at 36-37).[1] Plaintiff testified as follows[2]:

Q. Can you describe for me in your own words, right at the time you got hurt, what was above you? If you looked straight up, what would you have seen?
A. Wood and wooden beams.
Q. And who would put those wooden beams there, would that have been Trinity Builders?
A. Yes.
Q. Were there men from Trinity Builders working above you on the tenth floor at the time you got hurt?
A. No.
Q. Okay. Tell me in your own words, how did you get hurt? Tell me about the accident.
A. A piece of wood hit me from the other floor.
Q. Okay. When you say a piece of wood, can you describe what kind of piece of wood? First of all, how long was it?
A. Approximately eight feet.
Q. And what was this wood intended to be used for?
A. To build the platform of the following floor.
Q. Now can you describe for me the piece of wood more than you already done, for example, was it plywood?
A. Three-by-four-by-eight.
Q. The next question is was this wood going to be a permanent part of the building or was it part of a frame to pour concrete?
A. Normally they are by 16 feet, but the company usually works three-by-fours.

---

[1] There is some inconsistency in the record as to whether plaintiff was working on the ninth floor and the wood fell from the tenth floor (as plaintiff testifies) or plaintiff was working on the eighth floor and the wood feel from the ninth floor (as defendants' witness testifies). In either scenario, however, it is uncontroverted that the wood fell from a floor above where plaintiff was working.
[2] There was an interpreter at the deposition, which resulted in some colloquy between the attorneys and the interpreter as to plaintiff's understanding of the questions.

Q. That's not the answer to my question. My question is at the end of the day was this piece of work going to stay part of the building or would it have been taken down because it was only being used as a form to pour concrete, or something else?

I want to know if this piece of wood is part of a concrete form that ultimately would have been removed after the concrete had been poured or was it going to be a permanent part of the building, or something else?

A. Yes.

(*id.* at 37-40).

******

Just so we are clear, Mr. Solano, the piece of wood that struck you was a piece of wood that was being used in order to create a form to pour concrete, which at the end of the day after the concrete had been poured and had formed, the piece of wood would have been removed from the building; is that correct?

A. Yes.

Q. Do you know how to came to be that that wood fell on you?

A. I was working in that area and when I bent down to pick up – and I bent down to pick up a two-by-sixteen that I needed to cut, at that time that's when the piece of wood hit me.

Q. Do you know why that piece of wood fell on you.

A. I don't know.

Q. Do you know if someone had been holding that piece of wood and dropped it accidentally?

A. No.

(*id.* at 41-42).

******

Q. In the hour that you were there after before you left, did you ever ask anybody where the wood that hit you came from?

A. My coworkers, they warned me to be careful of the piece of wood, but I didn't have enough time to avoid it.

Q. Ok. That was right at the time you got hit; correct?

A. Yes

Q. After you got hit, did anybody tell you how the wood fell on you?

A. Yes.

Q. What did they tell you?

A. That the piece of wood came from the top floor, the one we are next going to work on.

Q. Other than that it came from the top floor, did they tell you how it came to fall on you? For example, did they tell you that someone dropped it by accident?

A. No.

Q. As far as you know, did anybody go to the tenth floor and ask around as to how that wood dropped from that floor on to the floor below?

A. No.

(*id.* at 42-43).

> Q. Did Mr. Riera [plaintiff's friend] tell you that he saw the accident?
> A. Some people told me there how the wood fell.
> Q. Who told you how the wood fell?
> A. Miguel, Danny, and other people that were around?
> Q. What did they tell you?
> A. That the wood fell from above.
> Q. Did they tell you any more details than that?
> A. That's it.

(*id* at 50-51).

*Defendants' Deposition Testimony*

William Lozito ("Lozito") testified on behalf of Trinity as the Vice President and Superintendent of Field Operations on the Project (Lozito Deposition Tr., dated July 20, 2021 [NYSCEF Doc. No. 30] at 13). The Project entailed the construction of a new sixteen story mixed use building (*id.* at 17). Lozito was at the Project on a daily basis (*id.*) and was onsite at the Project full-time when construction was proceeding (*id.* at 81). Lozito was standing on the street in front of the Project site when plaintiff informed him of the subject accident (*id.* at 73). During this conversation, plaintiff stated that "a piece of lumbar fell and hit him in the back" (*id.* at 105). Lozito asked several of the other workers about the accident and "they said basically the same thing that [plaintiff] did, that a piece of three-by-four, six feet or so, was a cut end and fell" (*id.* at 110). Lozito testified as follows regarding what he knew about the accident:

> "My understanding is that Solano was working on the eighth floor and we were building the deck from the ninth floor. The deck is the temporary form work that holds the concrete and one of the workers, Trinity workers, was cutting a three-by-four to complete the deck work on nine and the cut end slipped and fell down to where Solano was working and hit him in the back"

(*id.* at 119-120). Lozito testified that plaintiff was working on the eighth floor and that the material that fell came from the ninth floor which was approximately nine feet from the eighth floor (*id.* at 120). With respect to the size of the object, Lozito testified:

> It's a three-by-four, three inches – well, it's rough cut lumber, so it's called a three-by-four, but it measures two and a half inches by three and a half inches. The piece that I understand fell was somewhere between six and eight feet and the three-by-four weighs two and half pounds a foot"

(*id.*).

Lozito stated that he was not aware that any photos were taken of the subject wood or accident scene (*id.*). Lozito's deposition testimony includes further explanation of the accident as follows:

> Q. Where in general on the project was he [plaintiff] working when he got hurt?
> A. My understanding is that he was in the elevator shaft portion of the eighth floor.
> Q. So the elevator shaft means there had to be some sort of temporary platform he was standing on?
> A. Correct. He was standing on a temporary platform. The ninth floor was being erected above him, so that wasn't built yet. They were building that up to the elevator part.
> Q. The worker – first of all, the worker who was cutting the lumber that created the piece, do we know who that is?
> A. I am not sure.
> Q. Where was that worker working at the time he cut the lumbar that then fell and hit Solano?
> A. He was on the ninth floor deck, correct. The way the deck has to be built is we use a support system of jacks with a heavy wooden beam, yellow wooden beam. Then the little – when I say, "little," three-by-fours on top of the wooden beam and plywood on top of that, so you have to erect the posts, the yellow beams and then put the three-by-fours down.
> My understanding was as we were putting the three-by-fours down, we were approaching the elevator area where you would cut – have a cut piece and the length that we typically use are sixteen feet long and we were cutting a piece of the sixteen-foot to fit. My understanding was the cut piece fell into the area of the elevator shaft where Solano was removing forms for the walls. That is my understanding.
>
> ******
>
> Q. How high above where Solano was working did the concrete walls extend above him?
> A. If he was standing on eight, the floor to floor height is nine feet so let's say – I don't know how tall he is. Let's say he is five feet tall. It would only be another four feet above him.
> Q. The wood fell roughly four to five feet before it struck him in the shoulder; is that your understanding?
> A. That's my understanding.
> Q. Was that elevator shaft topped out at the ninth floor at that time and it would have been building higher up later on?
> A. Generally, the elevator shaft is used as an access point to the next floor. Since there is an opening in the elevator shaft, you put a temporary platform to work on, you form the walls and then the ninth floor, right of the floor above, would be open. That would remain open until we finished pouring the ninth from eight to nine, then you would build a new platform on the

ninth floor when you were going to do the tenth floor. Every floor, the elevator shaft becomes the temporary work platform.

Q. For each floor, the elevator shaft was created floor by floor?

A. Correct.

Q. So the elevator shaft wouldn't have extended above the ninth floor at that time, correct?

A. No.

Q. At the time of this accident, correct?

A. Correct.

(*id.* at 126-130).

DISCUSSION

*Summary Judgment*

A party moving for summary judgment under CPLR 3212 "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the moving party has met this prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324). The moving party's "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*).

*Plaintiff's claim under Labor Law § 240 (1)*

Labor Law § 240 (1), also known as the Scaffold Law, provides, as relevant:

> "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 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC,* 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

Not every worker who falls or is struck by a falling object at a construction site is afforded the protections of Labor Law § 240 (1), and "a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace" (*Makarius v Port Auth. of N.Y. & N.J.*, 76 AD3d 805, 807 [1st Dept 2010]). Instead, 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 NY2d 259, 267 [2001]).

Therefore, to prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]).

In support of his motion and in opposition to defendants' cross-motion, plaintiff argues that the subject object fell on plaintiff because it was not secured for the purpose of the undertaking and should have been secured. In support of their cross-motion and in opposition to plaintiff's motion, defendants argue that plaintiff failed to establish defendants' liability under Labor Law § 240 (1) as there was no failure to provide plaintiff proper protection. The subject

object was not being hoisted or secured and the object did not fall because of the absence or inadequacy of a safety device of the kind enumerated in the statute.

Although plaintiff could not identify exactly how the wood fell on him, defendant's own witness Lozito testified that the workers on the ninth floor were cutting lumbar to construct that floor while plaintiff was working on the eighth floor. Lozito testified as follows:

> Q. Where was that worker working at the time he cut the lumbar that then fell and hit Solano? Was he on the ninth floor deck? A. He was on the ninth floor deck, correct.

[NYSCEF Doc. No. 30 at 127]).

It is uncontroverted that plaintiff was hit by a piece of wood which fell on him from the floor above where workers were cutting pieces of lumbar for the building of a platform on a floor above plaintiff.

In the instant matter, plaintiff has sufficiently established prima facie entitlement to summary judgment on his Labor Law § 240 (1) claim based on defendants' failure to "provide an adequate safety device to protect him from falling objects that were required to be secured" (*Rincon v New York City Hous. Auth.*, 202 AD3d 421, 422 [1st Dept 2022]). In *Rincon*, "plaintiff's coworker was working on the roof near the parapet wall when a wrench accidentally slipped out of his hand and fell 10 to 15 feet, striking plaintiff, who was working below on a hanging scaffold" (*see Pados v City of New York*, 192 AD3d 596, 596 [1st Dept 2021] ["testimony, that a coworker was working with rebar 30 feet above [plaintiff] on the same column immediately before the accident, was sufficient evidence that the rebar, whether it was dropped or fell in some other manner, was material requiring securing"]; *Diaz v Raveh Realty, LLC* 183 AD3d 515, 515 [1st Dept 2020] [the plaintiff "was hit by a heavy 4' x 8' plywood form that fell or was dropped by co-workers who were stripping plywood forms from the cured concrete-poured ceiling"]; *Passos v Noble Constr. Group, LLC*, 169 AD3d 706, 707 [2d Dept

2019] ["plaintiff was hit by an unsecured four-by-eight foot plywood sheet that fell from the first floor ceiling onto the plaintiff as he was walking underneath"]; *Humphrey v Park View Fifth Ave. Assoc. LLC*, 113 AD3d 558, 559 [1st Dept 2014] [plaintiff was "injured when an aluminum beam fell from above him, struck the 18-foot long wooden stringer that he was carrying on his shoulder, and knocked him to the ground"]; *cf Henriquez v Clarence P. Grant Hous. Dev. Fund Co., Inc.*, 186 AD3d 577 [2d Dept 2020]).

The fact that plaintiff did not see the piece of wood that hit him or know exactly where the wood came from "does not preclude partial summary judgment in his favor, as the testimony demonstrates that the [wood] came from somewhere above plaintiff and was a proximate cause of his injuries" (*Humphrey*, 113 AD3d at 559; *see Pados*, 192 AD3d at 596 ["plaintiff was not required to show the exact circumstances of how the rebar came to strike him"]). Moreover, the fact that there is no evidence in the record of a witness to the accident, does not preclude summary judgment in plaintiff's favor (*see Humphrey*, 113 AD3d at 559).

In view of the foregoing determination granting plaintiff partial summary judgment on liability under Labor Law § 240 (1), defendants' cross-motion for summary judgment dismissing plaintiff's claims under Labor Law § 240 (1) is denied as moot.

On the basis of the foregoing, it is

ORDERED that the motion by plaintiff Jose Arcelio Solano for summary judgment on liability on plaintiff's cause of action under Labor Law § 240 (1) is granted; and it is further

ORDERED that the cross-motion by defendants Gramercy 128 West LLC, Pan Brothers Capital Management, LLC i/s/h/a Pan Brothers Capital Management Group LLC and LRC

Construction LLC to dismiss plaintiff's cause of action premised on violation of Labor Law § 240 (1) is denied.

11/3/2023
DATE

SHLOMO S. HAGLER, 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 |