

Short Form Order

**NEW YORK STATE SUPREME COURT - QUEENS COUNTY**

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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JAMES REID and ALISON REID,

Plaintiffs,

-against-

Index No.: 12713/07  
Motion Date: 4/15/09  
Motion Cal. No.: 30  
Motion Seq. No.: 3

TOP 8 CONSTRUCTION CORP., F & T INT’L  
(FLUSHING, NEW YORK) LLC, and F & T GROUP,

Defendants.

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The following papers numbered 1 to 14 read on this motion for an order, pursuant to CPLR 3212, granting summary judgment to defendants and dismissing plaintiffs’ complaint; and on the cross motion by plaintiffs for an order granting plaintiffs partial summary judgment on liability on their cause of action brought under Labor Law §240(1).

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Notice of Cross Motion-Affirmation- Memorandum of Law-Exhibits.....	5 - 9
Defendants’ Reply Affirmation.....	9 - 12
Plaintiff’s Reply Affirmation-Memorandum of Law.....	12 - 14

Upon the foregoing papers, it is hereby ordered that the motion and cross motion are resolved as follows:

This is a Labor Law action to recover damages for injuries allegedly sustained on November 4, 2006, by plaintiff James Reid (“plaintiff”), a journeyman employed by Kone, Inc., a sub-contractor of defendant Top 8 Construction Corp., engaged to install elevators in a newly constructed building owned by defendants F& T Int’l (Flushing, New York) LLC and F & T Group (“F&T”), located at 38-25 Main Street, Flushing, New York, and known as the Queens Crossing project. The project consisted of the demolition of an existing building and parking lot and the construction of a 12 story office retail building. The injury allegedly occurred when plaintiff, while working in the five foot deep pit of one of the elevator shafts, jumped from a “wobbling” A-frame ladder placed in the pit to facilitate his climb out of the shaft, to avoid “buffer steels” in the pit and fractured his leg. Plaintiff commenced this action alleging violations of sections 240(1), 241(6) and 200 of the Labor

Law. Defendant moves for summary dismissing the complaint on the grounds that the accident does not give rise to liability under section 240(1) of the Labor Law because it does not involve “the unique hazards of height and gravity; section 241(6) of the Labor Law because the Industrial Code provisions relied on by plaintiff have no applicability to the facts of the case; or section 200 of the Labor Law because defendants did not supervise plaintiff’s work and had no notice of the alleged”defect” that plaintiff claims caused his accident. Plaintiff cross moves for partial summary judgment in his favor on his section 240(1) cause of action.<sup>1</sup>

Summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1<sup>st</sup> Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2<sup>nd</sup> Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, *supra*.

Labor Law § 240(1) imposes a nondelegable duty upon owners and contractors to provide or cause to be furnished certain safety devices for workers at an elevated work site, including the provision of safety equipment to protect workers against falling from a height, and the absence of appropriate safety devices constitutes a violation of the statute as a matter of law. Narducci v Manhasset Bay Assocs., 96 N.Y.2d 259 (2001); Misseritti v Mark IV Constr. Co., Inc., 86 N.Y.2d 487 (1995); Ross v Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494 (1993); Rocovich v Consolidated Edison Co., 78 N.Y.2d 509 (1991); Riccio v. NHT Owners, LLC, 51 A.D.3d 897 (2<sup>nd</sup> Dept. 2008); Cambry v. Lincoln Gardens, 50 A.D.3d 1081 (2<sup>nd</sup> Dept. 2008); Natale v. City of New York, 33 A.D.3d 772 (2<sup>nd</sup> Dept. 2006). “[T]he purpose of the statute is to protect workers by placing ultimate responsibility for safety practices on owners and contractors instead of on workers themselves (citations omitted).” Panek v. County of Albany, 99 N.Y.2d 452 (2003). A cause of action under section 240(1) of the Labor Law is stated when an injury is the result of one of the elevation-related risks contemplated by that section. See, Rose v. A. Servidone, Inc., 268 A.D.2d 516 (2000). However, “[t]he extraordinary protections of Labor Law § 240(1) extend only to a narrow class of special hazards, and do ‘not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity.” Nieves v Five Boro Air Conditioning & Refrig. Corp., 93 N.Y.2d 914, 915-916 (1999); see, Meng Sing Chang v. Homewell Owner's Corp., 38 A.D.3d 625 (2<sup>nd</sup> Dept. 2007); Natale v. City of New York, 33 A.D.3d 772 (2<sup>nd</sup> Dept. 2006). Thus, “liability cannot be imposed under Labor Law § 240(1) where ‘there is no evidence of violation and the proof

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<sup>1</sup>In his memorandum of law in support of the cross motion, plaintiffs set forth that they “take no position with respect to that part of the motion for summary judgment directed at their causes of action under Labor Law §§ 200 and 241(6).” Accordingly, this Court deems those causes of action abandoned and grants defendants’ motion to dismiss those causes of action.

reveals that the plaintiff's own negligence was the sole proximate cause of the accident' (citations omitted)" Destefano v. City of New York, 39 A.D.3d 581, 582-583 (2<sup>nd</sup> Dept. 2007); Blake v. Neighborhood Housing Services. of N.Y. City, 1 N.Y.3d 280 (2003). A defendant moving for summary judgment dismissal of a section 240(1) claim thus bears "the prima facie burden of demonstrating by proof in admissible form that the plaintiff's accident was not proximately caused by a violation of Labor Law § 240(1) (citation omitted), or that the plaintiff's own negligent conduct in failing to use an available and adequate safety device was the sole proximate cause of the accident (citations omitted)." Santo v. Scro, 43 A.D.3d 897 (2<sup>nd</sup> Dept. 2007); see, Gittleson v. Cool Wind Ventilation Corp., 46 A.D.3d 855 (2<sup>nd</sup> Dept. 2007); Leniar v. Metropolitan Transit Authority, 37 A.D.3d 425 (2<sup>nd</sup> Dept. 2007). Defendants failed to meet their burden.

In support of their motion, defendants submit, inter alia, the deposition of Tom Barone, the President of defendant Top 8 Construction Corp.'s construction division, and plaintiff's deposition testimony. After referencing various portions of plaintiff's testimony in which he testified that the A-frame ladder which had been furnished by the builder was not defective, that he experienced no difficulty with the ladder, and that he was provided with all of the equipment necessary to enter and exit the elevator pit on the day of his accident, defendants conclude that they are entitled to summary judgment because the "ladder was not defective or improperly secured at the time of the accident," and "provided adequate and proper protection to the plaintiff." Defendants' conclusory statement begs the question, to wit: whether or not the ladder provided proper protection under Labor Law § 240(1). Moreover, where, as here, plaintiff alleges that the subject ladder was "wobbly" and that he jumped to avoid falling onto the danger posed by the dangerous "buffer steels," plaintiff does not have the burden of setting forth evidence that the ladder was defective. See, Mingo v. Lebedowicz, 57 A.D.3d 491 (2<sup>nd</sup> Dept. 2008).

By contrast, plaintiff, on his cross motion, established his entitlement to summary judgment in his favor. Plaintiff testified at his deposition that on November 4, 2006, the date of his accident, he was the sole journeyman elevator mechanic and installer performing tests on an elevator in the office building under construction, and was working in the pit of the #4 elevator shaft. He further testified that to gain entry to the pit, he opened the door to the pit, lowered a eight foot, wooden A-frame ladder in its closed position through an opening and down into the pit, wedged it against a steel beam, and climbed down, facing the ladder. Because the top of the ladder protruded through the opening to the pit, plaintiff described putting the ladder on the floor, and closing the door to the opening, which was required to conduct the necessary testing. He testified that when he completed the test, he set up the ladder in its open position so he could climb out of the pit through the then closed door. The accident occurred when the ladder began wobbling and started to fall over while plaintiff was reaching from the third step of the ladder to open the door. Plaintiff testified that: "I began to fall off it, and I knew there were buffer steels, buffers in the pit, and I tried to, I don't know, maybe instinct, I don't know, I tried to Jump – I tried to get myself clear of that, and I went between the buffer steel and the rail and I landed there." He further testified that he could not use the ladder in its folded position to exit the pit and could not have used an extension ladder because it was too tall. This testimony as to the happening of the accident was sufficient to establish plaintiff's prima facie entitlement to summary judgment on his cause of action based on Labor Law § 240(1).

\_\_\_\_\_ In cases such as this, the courts consistently have found in favor of the plaintiff on motions for summary judgment. See, Barr v. 157 5 Ave., LLC 60 A.D.3d 796 (2<sup>nd</sup> Dept.2009)[plaintiff made a prima facie showing of entitlement to judgment as a matter of law on the issue of liability on so much of the complaint as alleged a violation of Labor Law § 240(1) through the submission of his deposition testimony, which demonstrated that the subject ladder failed to afford him proper protection for the work being performed, and that this failure was a proximate cause of the accident]; Denis v. City of New York, 54 A.D.3d 803, 803-804 (2<sup>nd</sup> Dept. 2008)[plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability on the cause of action pursuant to Labor Law § 240(1) by showing that he was injured when he fell from the second step from the top of an unsecured ladder while removing guard frames from windows]; Ricciardi v. Bernard Janowitz Const. Corp., 49 A.D.3d 624 (2<sup>nd</sup> Dept. 2008)[plaintiff established his prima facie entitlement to judgment as a matter of law on the cause of action alleging a violation of Labor Law § 240(1) by submitting evidence that he was injured when he fell from the seventh rung of an unsecured A-frame ladder while installing a sprinkler system at a construction site]; Argueta v. Pomona Panorama Estates, Ltd., 39 A.D.3d 785, 786 (2<sup>nd</sup> Dept. 2007)[plaintiff met his burden of demonstrating his entitlement to judgment as a matter of law on the issue of liability on his Labor Law § 240(1) cause of action by submitting evidence establishing that he fell while climbing an unsecured ladder that had been placed on uneven dirt, which suddenly slid to the right ]; Boe v. Gammarati, 26 A.D.3d 351 (2<sup>nd</sup> Dept. 2006)[plaintiff established his prima facie entitlement to judgment as a matter of law on the cause of action alleging a violation of Labor Law § 240(1) by submitting evidence that he fell while descending an unsecured ladder which twisted, lost contact with the wall, and slipped out from underneath him]; Chlap v. 43rd Street-Second Ave. Corp., 18 A.D.3d 598 ( 2<sup>nd</sup> Dept. 2005)[plaintiff injured when he fell after the unsecured ladder on which he was standing slipped out from underneath him as he attempted to step onto a ledge]. Defendants’ reliance upon the unreported trial court’s decision in Riccio v. NHT Owners, LLC, 13 Misc.3d 1209(A) (N.Y.Sup.,Kings County 2006) militates against, rather than in favor of, a grant of summary judgment in its favor. There, the Court found:

Hence, “[a] fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240(1)” ( Olberding v. Dixie Contr., 302 A.D.2d 574, 574 [2003] [internal citations omitted] ). Partial summary judgment on liability only results when a plaintiff presents proof showing use of a defective or unsecured ladder (see Williams v. Dover Home Improvements, 276 A.D.2d 626, 627 [2000]; Avendano v. Sazerac, 248 A.D.2d 340, 341 [1998] ). Here, plaintiff has made no such showing. Instead, he acknowledged that the ladder’s side braces were locked in position to secure the legs, that his helper used the ladder without any problems and made no complaint about the ladder and that he, himself found that the ladder was not wobbly in any way.

Unlike in Riccio v. NHT Owners, plaintiff established that the ladder was unsecured. Like in Reaber v. Connequot Cent. School Dist. No. 7, 57 A.D.3d 640 (2<sup>nd</sup> Dept 2008), plaintiff established his

prima facie entitlement to judgment as a matter of law as by submitting proof that defendants failed to provide him with adequate safety devices for the elevation-related risks of his work, and that their failure was the proximate cause of his injuries. As defendants, in opposition, failed to show that the failure to secure the ladder was not a substantial factor leading to plaintiff's injuries [see, Barr v. 157 5 Ave., LLC, *supra*; Mingo v. Lebedowicz, 57 A.D.3d 491 (2<sup>nd</sup> Dept. 2008); Guzman v. Gumley-Haft, Inc., 274 A.D.2d 555 (2<sup>nd</sup> Dept. 2000)], or to raise a triable issue of fact as to whether plaintiff's conduct was the sole proximate cause of the accident [(see, Ricciardi v. Bernard Janowitz Const. Corp., *supra*; Gilhooly v. Dormitory Authority of State of N.Y., 51 A.D.3d 719 (2<sup>nd</sup> Dept. 2008). Argueta v. Pomona Panorama Estates, Ltd., *supra*], plaintiffs' cross motion for summary judgment in their favor is granted.

Accordingly, based upon the foregoing, defendants' motion for summary dismissing the complaint on the grounds that this action does not allege violations of sections 240(1), 241(6) and 200 of the Labor Law, is granted to the extent that the claims asserted under Labor law sections 200 and 241(6), hereby are dismissed, as conceded by plaintiffs by their abandonment of those claims. That branch of the motion for dismissal of section 240(1) of the Labor Law on the ground that it has no applicability to the facts of the case is denied, and plaintiffs' cross motion for summary judgment on their section 240(1) of the Labor Law claim is granted.

Dated: June 11, 2009

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J.S.C.