

2018 WL 5914129
Supreme Court, Appellate Division,
First Department, New York.

Maria CAMINITI, as Administratrix of the Estate
of Pasquale Caminiti, etc., Plaintiff–Respondent,

v.

[EXTELL WEST 57TH STREET
LLC](#), et al., Defendants–Appellants.

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ENTERED: NOVEMBER 13, 2018

Synopsis

Background: Representative of deceased construction worker's estate brought wrongful death action against the defendants, the site owner, developer, and general contractor of a construction project. The Supreme Court, New York County, [Arlene P. Bluth, J.](#), 2018 WL 1225251, granted plaintiff's motion for summary judgment on scaffold law claim and denied defendants' motion for summary judgment dismissing the complaint.

Holdings: The Supreme Court, Appellate Division, held that:

[1] worker's statement to his wife that he should have known better than to use ladder as he did was properly admitted as statement against interest;

[2] representative established prima facie entitlement to judgment as matter of law on motion for summary judgment on wrongful death claim under scaffold law; and

[3] genuine issues of material fact existed as to whether construction worker's injuries were caused by an accident involving a ladder, precluding summary judgment on wrongful death claim under scaffold law.

Affirmed as modified.

West Headnotes (3)

[1] Evidence



In wrongful death action against site owner, developer, and general contractor of a construction project by representative of deceased construction worker's estate, construction worker's statement to his wife that he should have known better than to use ladder as he did was properly admitted as statement against interest, even though statement was uncorroborated, where statement had sufficient indicia of reliability, in that the experienced, 52-year-old electrician described his accident to his wife alone in an emergency room while awaiting surgery, in the absence of any coercion or attempt to shift blame away from himself.

[Cases that cite this headnote](#)

[2] Judgment



Representative of deceased construction worker's estate established prima facie entitlement to judgment as matter of law on motion for summary judgment, on wrongful death claim under scaffold law, by presenting worker's statement against interest that he was working on a ladder when it started to move, and when he tried to stabilize the ladder, it tipped and struck him in the chest, even though he did not present evidence that ladder was defective. [N.Y. Labor Law § 240\(1\)](#).

[Cases that cite this headnote](#)

[3] Judgment



Genuine issues of material fact existed as to whether construction worker's injuries were caused by an accident involving a ladder, precluding summary judgment on wrongful

death claim under scaffold law. [N.Y. Labor Law § 240\(1\)](#).

[Cases that cite this headnote](#)

Attorneys and Law Firms

Marks, O'Neill, O'Brien, Doherty & Kelly, P.C., New York (Joel M. Maxwell of counsel), for appellants.

Fortunato & Fortunato, PLLC, Brooklyn (Louis A. Badolato of counsel), for respondent.

Sweeny, J.P., [Manzanet–Daniels](#), [Gische](#), [Gesmer](#), [Singh](#), JJ.

Opinion

*1 Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered March 6, 2018, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on the [Labor Law § 240\(1\)](#) claim, and denied defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to deny plaintiff's motion for partial summary judgment on the [Labor Law § 240\(1\)](#) claim, and grant defendants' motion for summary judgment dismissing so much of the [Labor Law § 241\(6\)](#) claim as based on alleged violations of Industrial Code §§ 23–1.2, –1.5, –1.16, –1.17, –1.30, –1.31, –2.1, and –2.4, and otherwise affirmed, without costs.

[1] The court properly found that plaintiff's testimony about her now-deceased husband's statement regarding his accident is admissible as a declaration against interest (see generally [Basile v. Huntington Util. Fuel Corp.](#), 60 A.D.2d 616, 617, 400 N.Y.S.2d 150 [2d Dept. 1977]; Guide to N.Y. Evid rule 8.11, Statement Against Penal or Pecuniary Interest, www.nycourts.gov/judges/evidence/8–HEARSAY/8.11). Decedent's statement that he should have known better than to use the ladder as he did, established that he knew his statement was against his interest. Although the statement was uncorroborated, it had sufficient indicia of reliability, in that the experienced, 52-year-old electrician described his accident to his wife alone in an emergency room while awaiting surgery, in the absence of any coercion or attempt to shift blame away from himself (cf. [Nucci v. Proper](#), 95 N.Y.2d 597, 602, 721 N.Y.S.2d 593, 744 N.E.2d 128 [2001]). Accordingly, we

decline to reach plaintiff's alternative arguments as to the statement's admissibility.

[2] [3] Plaintiff made a prima facie showing of entitlement to judgment as a matter of law on the [Labor Law § 240\(1\)](#) claim by presenting decedent's statement that he was working on a ladder when it started to move, and when he tried to stabilize the ladder, it tipped and struck him in the chest (see [Rom v. Eurostruct, Inc.](#), 158 A.D.3d 570, 71 N.Y.S.3d 57 [1st Dept. 2018]). Plaintiff was not “required to present further evidence that the ladder was defective” ([Fanning v. Rockefeller Univ.](#), 106 A.D.3d 484, 485, 964 N.Y.S.2d 525 [1st Dept. 2013]).

However, defendants raised triable issues of fact as to whether decedent's injuries were caused by an accident involving a ladder. Two accident reports set forth his alleged statement that he was working on the ladder when he started feeling chest pains and his legs became “unsteady” or “wobbly.” Moreover, decedent's coworker, who was working in the same apartment unit separated from decedent by a concrete wall but went over to decedent's area, not in response to any commotion but for routine purposes, saw that the ladder was in the upright position about 10 feet away from decedent when he expressed that he was suffering from chest pains (cf. [Lipari v. AT Spring, LLC](#), 92 A.D.3d 502, 938 N.Y.S.2d 303 [1st Dept. 2012]). Although decedent was disoriented and unable to answer basic questions at some points, he eventually became alert while in the hospital, yet his medical records do not refer to any ladder accident.

*2 Contrary to plaintiff's assertion, defendants preserved their arguments about triable issues of fact by asserting them in their memorandum of law in opposition to plaintiff's partial summary judgment motion. However, defendants failed to preserve their argument that even if plaintiff was injured by the ladder, his conduct was the sole proximate cause of his injuries, and we decline to review this fact-sensitive argument in the interest of justice.

The court should have dismissed the [Labor Law § 241\(6\)](#) claim insofar as predicated on Industrial Code §§ 23–1.2, –1.5, –1.16, –1.17, –1.30, –1.31, –2.1, and –2.4, which were abandoned “since plaintiff failed to specify any particular subsection(s) and subdivision(s) of these provisions” ([McLean v. Tishman Constr. Corp.](#), 144 A.D.3d 534, 535, 40 N.Y.S.3d 771 [1st Dept. 2016]).

Defendants' remaining arguments concerning the common-law negligence and Labor Law §§ 200 and 241(6) claims are unpreserved, and we decline to review them, since their resolution involves facts relevant to issues not brought to plaintiff's attention below, and they are not purely legal arguments that are clear from the face of the

record (*see Bonaerge v. Leighton House Condominium*, 134 A.D.3d 648, 648, 22 N.Y.S.3d 52 [1st Dept. 2015]).

All Citations

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