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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK
J.S.C. Justice

PART 2

Schaefer, Steven

-v-

Goldman Sachs ET AL

INDEX NO. 114721-2009

MOTION DATE _____

MOTION SEQ. NO. 2

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

MAR 27 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 3/23/12

_____, J.S.C.
LOUIS B. YORK

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

x

STEVEN SCHAEFFER,

Plaintiff,

-against-

GOLDMAN SACHS HEADQUARTERS, LLC, and TISHMAN CONSTRUCTION CORP.,

Defendants.

x

Index No. 114721/09

LOUIS B. YORK, J.:

In this action, plaintiff Steven Schaefer ("plaintiff") asserts Labor Law §§ 200, 240, and 241(6) claims as well as common law negligence claims against defendants Goldman Sachs Headquarters, LLC ("Goldman") and Tishman Construction Corporation ("Tishman") (collectively, "defendants"). Currently, defendants move for summary judgment dismissing all claims..[1]

According to the Complaint, Goldman, which owned a building located at 200 Murray Street, contracted with Tishman to perform renovation, repair and construction work at the building. Plaintiff worked at the project during the period in question – for a subcontractor, Component Assembly Systems. On July 16, 2008, he used a ladder which slid to the ground, as a result of which he allegedly sustained a fractured left elbow and injury to one of his right fingers. Allegedly, the ladder slipped almost as soon as he started to use it. He sues defendants

[1] The Court notes that plaintiff cross-moved for affirmative relief, but in an untimely fashion and without the consent of defendants. Therefore, the Court does not consider the cross-motion.

for negligence and for violations of Labor Law §§ 200, 240 and 241(6). Under Labor Law § 241(6), he alleges violations of the Industrial Code, 12 NYCRR §§ 23-1.5, 23-1.7, 23-1.8, 23-1.15, 23-1.15, 23-1.17, 23-1.19, 23-1.21, 23-1.31, 23-1.32, 23-1.34, 23-2.1, and 23-2.4. In their joint Answer, defendants denied the allegations in the Complaint except to the extent that it stated Goldman owned the property and Tishman worked on a project there, pursuant to contract. Moreover, the Answer asserts that plaintiff was the sole proximate cause of his injuries.

Now, defendants jointly move for summary judgment dismissing the Complaint in its entirety. As to the Labor Law § 200 and negligence claims, defendants argue that they did not control the work or create or have notice of the condition. Therefore, they cannot be liable for plaintiff's accident. As for Labor Law § 240(1), defendants cite sections of plaintiff's deposition transcript, which they allege shows that plaintiff leaned the ladder, an extension ladder, against the wall and neither secured the ladder to the wall nor had someone there to hold it in place for him, as required. They also cite Select Safety Consulting Services Inc. ("SSCS"), the consultant they hired to monitor safety practices at the work site, which supposedly concluded that the sole cause of the accident was plaintiff's negligence. Therefore, defendants assert, plaintiff was the sole proximate cause of the accident and cannot recover under this provision as well. As to his Labor Law § 241(6) claim, they state that none of the cited provisions are applicable to the case at hand and that plaintiff has failed to show their applicability or present evidentiary support.

Plaintiff opposes the motion in all respects. As for their first argument, plaintiff counters that defendants controlled the work site, thus satisfying the first prong of the test under Labor Law § 200. As to the second prong, actual or constructive notice, plaintiff states that defendants have not satisfied their burden and shown that they did not have such notice. Next, plaintiff alleges that he was not the sole proximate cause of the accident – and, in fact, as this is the only

basis for avoiding liability under the statute – this Court should exercise its discretion under CPLR § 3212(f) and grant summary judgment to plaintiff on this issue. Finally, plaintiff argues that issues of fact exist regarding certain of the Industrial Code violations. The Court notes that, as to this issue, plaintiff only argues that issues of fact exist under 12 NYCRR §§ 23-1.16(b) and 23-1.21(b)(4)(iv). Thus, he implicitly concedes that his 12 NYCRR §§ §§ §§ 23-1.5, 23-1.7, 23-1.8, 23-1.15, 23-1.17, 23-1.19, 23-1.31, 23-1.32, 23-1.34, 23-2.1, and 23-2.4 claims should be stricken.

Labor Law § 200 imposes liability on owners, contractors and subcontractors in situations where these parties fail to provide the employee with a safe workplace, resulting in injury. Jock v. Fien, 80 N.Y.2d 965, 967, 590 N.Y.S.2d 878, 880 (1992). It is a codification of common law negligence and generally these two causes of action are asserted together. Mendoza v. Highpoint Assoc., IX, LLC, 81 A.D.3d 1, 9, 919 N.Y.S.2d 129, 135 (1st Dept. 2011). When the allegation is that the subcontractor is guilty of negligence in this respect, the owner and general contractor are only liable if they exercised some supervisory control over the work site or work. Hughes v. Tischman Constr. Corp., 40 A.D.3d 305, 306, 836 N.Y.S.2d 86, 88 (1st Dept. 2007).

To satisfy their burden of showing that Tischman did not control the work site, defendants cite plaintiff's deposition testimony that he personally was not supervised by someone from Tischman. Other than that, they assert in conclusory fashion that there is an "absence of evidence" that they had control over the work site. Mem. of Law, at I.[2] They present the deposition transcript of Roger Cettina, one of defendant Tischman's superintendents, who was a general supervisor at the site in question on the date of the accident, which allegedly

[2] As defendants did not number the pages, the Court must cite to their overall outline instead.

supports their position that Tischman had no control over the project. Defendants submit a huge contract and other documents which relate to the work done at the site, but they do not provide any explanation as to how it furthers their argument. Therefore, the documents have no evidentiary or substantive value in the context of this motion.

Defendants seem to think this is sufficient because, they argue, plaintiff rather than defendants as movants bears the burden of proof in their summary judgment motion. They are incorrect. Instead, where, as here, the owner and general contractor move for summary judgment dismissing the plaintiff's claims under Labor Law § 200 and common law negligence, they bear the burden of submitting evidence sufficient to comprise a prima facie case. See Pitts v. Bell Constructors Inc., 81 A.D.3d 1475, 1476, 916 N.Y.S.2d 731, 733 (4th Dept. 2011); Slikas v. Cyclone Realty Co., LLC, 78 A.D.3d 144, 148-49, 908 N.Y.S.2d 117, 121 (2nd Dept. 2010). The cases to which defendants cite for the contrary proposition are all general negligence actions and thus are not persuasive in this Labor Law action. Moreover, some also are distinguishable on other grounds, which this Court need not discuss.

In addition, the Cettina deposition, which defendants submit in support of their contentions, raise issues of fact as to whether Tischman exercised any control of the project. In particular, the Court notes that, when asked about his duties and responsibilities on the Goldman project, he stated that he handled "[s]cheduling, coordination of all the subcontractors, quality control of the subcontractors' work, overall safety." Cettina Dep. p. 10, ll. 12-14. Shortly thereafter, when asked what his involvement was with Component Assembly's work, he stated, "I was involved with all the work they did." Id. p. 15, ll.8-9. When asked to elaborate, he did so, explaining, "I would basically monitor heir progress, and if there were areas where they weren't working that they should be working, I would instruct them to." Id. p. 15, ll. 11-14. He

also indicated that he attended at least some of the worker safety meetings along with plaintiff and other workers at the site. As stated, if anything, these comments raise issues of fact as to Tischman's degree of knowledge of and control over the project.

As for Goldman, as plaintiff points out, defendants present no evidence at all other than their conclusory statement that plaintiff has failed to prove Goldman's control over the project. Although it is possible that defendants could have shown lack of control, their current motion is insufficient to prove Goldman's right to summary judgment. Moreover, as this Court already stated, defendants fail to explain the significance of the contracts and other documents it has annexed and therefore the documents have no value in the context of this motion. As defendants fail to satisfy their burden at this juncture as to either defendant, they also cannot prevail on this aspect of their motion as it relates to Goldman. Therefore, the Court does not address the sufficiency of plaintiff's arguments in opposition. See Janiak v. Ewall, 88 A.D.3d 849, 851, 931 N.Y.S.2d 344, 346 (2nd Dept. 2011). Moreover, as it denies summary judgment on this ground, the Court need not reach the issue of actual or constructive notice.

Next, defendants seek dismissal of plaintiff's Labor Law § 240(1) claims against them. Under Labor Law § 240(1), owners, contractors and the agents of either are strictly liable if a breach of duty leads to the plaintiff's injury. Sanatass v. Consolidated Investing Co., Inc., 10 N.Y.3d 333, 338-39, 858 N.Y.S.2d 67, 70 (2008). The statute "protect[s] workers in construction projects against injury from the risks of inherently hazardous work posed by elevation differentials at the work site." Lipari v. At Spring, LLC, 92 A.D.3d 502, –, 938 N.Y.S.2d 303, 305 (1st Dept. 2012). Although the owners are not insurers, the duty to provide a safe workplace is nondelegable and thus exists even in the absence of control over the work site, as long as some causal connection exists between the breach and the accident. See id.

There is a limited exception in those situations in which a plaintiff's actions are the sole proximate cause of the accident. This rule is triggered only where the injured worker chose not to use the available safety devices or misused them. Cherry v. Time Warner, Inc., 66 A.D.3d 233, 236, 885 N.Y.S.2d 28, 31 (1st Dept. 2009). It is not intended to be interpreted with "laxity" and therefore courts should not place a burden on the worker to make normal, logical choices which is equal to the burden of the contractor's or owner's burden to provide a safe workplace and adequate safety devices. Id. Courts require a strong showing of misuse or failure to use the available safety devices. For example, sole proximate cause existed where the worker descended from a twelve foot bridge by climbing down a tree instead of using a ladder, Torres v. Our Townhouse, LLC, 91 A.D.3d 549, 937 N.Y.S.2d 53 (1st Dept. 2012), and where the worker stood on top of an inverted bucket rather than go and get a ladder. Montgomery v. Federal Express Corp., 4 N.Y.3d 805, 795 N.Y.S.2d 490 (2005).

In an action such as the one at hand, involving a fall from a ladder, a plaintiff makes out a prima facie case under Labor Law § 240(1) by showing that he or she was injured because of a collapsing ladder. See Demaj v. Pelham Realty, LLC, 82 A.D.3d 531, 531, 918 N.Y.S.2d 459, 460 (1st Dept. 2011). "The evidence that the ladder collapsed . . . for no apparent reason raises the presumption that the ladder was not good enough to afford proper protection under the statute." Soodin v. Fragakis, 91 A.D.3d 535, 937 N.Y.S.2d 187 (1st Dept. 2012). Once plaintiff makes sucha showing, the burden shifts to the defendants to present evidence which raises an issue of fact as to sole proximate cause. Id. The absence of corroborating testimony does not by itself raise an issue of fact or abnegate defendants' evidentiary burden. See Rodriquez v. 3251 Third Avenue, LLC, 80 A.D.3d 434, 914 N.Y.S.2d 142, 143 (1st Dept. 2011); Perrone v. Tischman Speyer Prop., L.P., 13 A.D.3d 146, 147, 787 N.Y.S.2d 230, 231 (1st Dept. 2004).

Defendants state that plaintiff's failure to tie off the ladder to secure it, or else to have a co-worker hold it in place, was a violation of OSHA – in particular, 29 CFR § 1910.26(iii), which states that a ladder's "base section must be placed with a secure footing" – and this violation was the sole proximate cause of the accident. Defendants rely on the affidavits of Cettina and also of Frank Susimo, co-founder of Select Safety Consulting Services, and on Cettina's deposition transcript. In his affidavit Cettina states that plaintiff violated the OSHA regulation described above. This constituted a misuse of the ladder, he stated. Susimo's affidavit introduces the accident report of the site safety supervisor at the site, his former employee Fred Wiesner, who is now deceased. According to defendants the report, which they annex, proves that it was plaintiff's carelessness alone caused the accident. Defendants suggest that together this evidence proves sole proximate cause, adequate to justify dismissal of the claims. Plaintiff counters that defendants have failed to show he was the sole proximate cause of the incident. Instead, he claims, it is clear that he was not the sole cause of the accident. Therefore, he asks the Court to exercise its discretion under CPLR § 3212 and grant summary judgment on plaintiff's behalf on his Labor Law § 240(1) claims.

After careful consideration, the Court denies this portion of defendants' motion and instead grants summary judgment to plaintiff on the issue of liability. For one thing, the OSHA rule on which defendants rely does not expressly state that the ladder had to be tied or held in place, only that the footing be secure. As defendants note, plaintiff stated at deposition that this type of ladder was stable enough that he did not need to secure it further. Moreover, as explained below, this is consistent with Cettina's deposition testimony as well.

Even if, as defendants argue, plaintiff violated the OSHA regulation, this is not sufficient to show that the violation was the only cause of the accident. See Gallagher v. New York Post,

14 N.Y.3d 83, 89, 896 N.Y.S.2d 732, 735 (2010). Instead, plaintiff's conduct must not be *a* cause but *the* cause – the sole proximate cause – in order to excuse defendants from liability. See Cevallos v. Morning Dun Realty Corp., 78 A.D.3d 547, 548, 911 N.Y.S.2d 329, 331 (1st Dept. 2010). Here, where the ladder fell without explanation and defendants have not presented evidence sufficient to counter plaintiff's prima facie showing, defendants have failed to show sole proximate cause.

Also, though defendants argue that plaintiff knowingly misused the ladder by failing to secure it and they challenge the credibility of plaintiff's deposition testimony to the contrary, it is not clear that plaintiff was aware of the OSHA rule. See Gallagher, 14 N.Y.3d at 88-89, 896 N.Y.S.2d at 1123 (evidence did not clearly indicate whether worker was aware of alleged "standing order"). Defendants state that plaintiff had to know the rule because he attended the safety meetings. However, although in his affidavit Cettina refers to the OSHA rule, in his deposition, his response at the deposition – based in part upon his experience and at least in part on the knowledge he acquired at those same meetings – was somewhat different:

> Q: Do you know what [SSCS instructed the workers] about the use of ladders at the [safety meetings]?
>
> A: I don't recall exactly.
>
> Q: Was there anything about tying ladders into walls discussed?
>
> A: Could have been, yes.
>
> Q: But you don't know for sure?
>
> A: I can't say for sure.
>
> Q: Do you know whether or not there was anything about workers using harnesses and tying themselves into walls or if extension ladders were discussed?

A: It's really not – if you're on the extension ladder, it all depends, if you're on a ladder you don't have to be tied off. It all depends on what height you're at.

Q: What about if you're seven feet high on an extension ladder?

A: I don't believe you have to be tied off.

Q: Say extension ladder usage is from seven to 10 feet, what safety precautions are supposed to be in place, if any?

A: An extension ladder is meant to be leaned up against a wall . . . . Basically, the biggest safety issue is to make sure – it comes with rubber feet on the bottom of it that keep the ladder from sliding to the ground. So really when it's set up if the rubber feet are clean and the floor is clean, and it's set down onto the bottoms of the ladder, it can't slide.

Cettina Dep. p. 29, l. 18 - p. 31, l. 2. This testimony is more consistent with plaintiff's explanation of the rule at his deposition.

Moreover, the accident report on which defendants rely does not unequivocally blame plaintiff as the sole cause of the incident. Instead, Wiesner stated, "No one saw what happened but it *appears* that it *could have been* carelessness" (SSCS Accident Report, annexed at Exh. B)(emphasis supplied). As defendants acknowledge, there were no witnesses to the accident and the report contains no information as to whether there was a defect or problem with the extension ladder in question. Apparently there was no contemporaneous examination of the ladder and therefore no examination to determine whether it was defective. The two photographs that defendants annex to the Weisner report from 2008 also do not indicate whether the ladder was defective. Instead, at photograph 1, Weisner stated, "It appears that the top portion of the extension ladder may have slid down." Next to photograph 2, he said, "Ladder appears to have come down perpendicular to wall." All of this simply shows that the ladder slipped or slid, but does not conclude anything with respect to the cause. Moreover, defendants

have provided no other evidence as to the condition of the ladder. As defendants have not shown that plaintiff acted unreasonably when he used the ladder in question, the existence of other ladders or of safety harnesses on other floors is insufficient to raise an issue as to sole proximate cause. Therefore, as this is a narrow exception to a longstanding rule, partial summary judgment for plaintiff as to liability is appropriate.

Finally, the Court addresses plaintiff's Labor Law § 241 claims. As stated earlier, plaintiff implicitly concedes that the 12 NYCRR §§ 23-1.5, 23-1.7, 23-1.8, 23-1.15, 23-1.17, 23-1.19, 23-1.31, 23-1.32, 23-1.34, 23-2.1, and 23-2.4 claims should be stricken. This leaves only 12 NYCRR §§ 23-1.16(b) and 23-1.21(b)(4)(iv). Under 12 NYCRR § 23-1.16(b), employees must use the safety belts and harnesses that are provided to them when either the rules or the employers require it. In addition, they must attach the belts or harnesses properly. However, where, as here, plaintiff was not using a safety belt or harness, the rule is inapplicable. See D'Acunti v. New York City School Constr. Auth., 300 A.D.2d 107, 107-08, 751 N.Y.S.2d 459, 460 (1st Dept. 2002). Moreover, the Court notes, plaintiff does not allege in his bill of particulars that he was given a defective belt or harness. See Cordeiro v. TS Midtown Holdings, LLC, 87 A.D.3d 904, 906, 931 N.Y.S.2d 41, 44 (1st Dept. 2011). As for 12 NYCRR § 23-1.21(b)(4)(iv), this requires a leaning ladder to be held in place at the lower end by a person and at the top end by mechanical means when an individual performs work from ladder rungs between six and ten feet above the ladder footing. Evidence suggesting that the ladder slid for no apparent reason is a sufficient basis for a claim under this provision. Soodin v. Fragakis, 91 A.D.3d 535, 937 N.Y.S.2d 187 (1st Dept. 2012).

Thus, for the reasons above, it is

ORDERED that the motion is denied to the extent that it seeks to dismiss the Labor Law § 200 and common law negligence claims; and it is further

ORDERED that the motion is granted to the extent that it seeks to dismiss plaintiff's Labor Law § 241(6) claims under 12 NYCRR §§ 23-1.5, 23-1.7, 23-1.8, 23-1.15, 23-1.15, 23-1.16(b), 23-1.17, 23-1.19, 23-1.31, 23-1.32, 23-1.34, 23-2.1, and 23-2.4 and denied to the extent that it seeks to dismiss plaintiff's Labor Law claims under 12 NYCRR § 23-1.21(b)(iv); and it is further

ORDERED that the motion is denied to the extent that it seeks to dismiss the Labor Law § 240(1) claims; and it is further

ORDERED that, after a search of the record, the Court grants partial summary judgment to plaintiff on the issue of Labor Law § 240(1) liability.

Dated: March 23, 2012

Enter:

FILED

MAR 27 2012

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LOUIS B. YORK, J.S.C.

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J.S.C.