[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ **PART** _____
Justice

Index Number : 107866/2009
EVANS, RICHARD
VS.
YONKERS CONTRACTING COMPANY
SEQUENCE NUMBER : 003
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Is decided in accordance with the annexed decision.

Dated: 6/19/12 _____, **J.S.C.**

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: Part 55

----------x

RICHARD EVANS,

Plaintiff,

Index No. 107866/09

-against-

DECISION/ORDER

YONKERS CONTRACTING COMPANY, INC., GOTHAM CONSTRUCTION COMPANY, LLC, RIVER PLACE II, LLC and SILVERSTEIN PROPERTIES, INC.,

Defendants.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	
Answering Affidavits to Cross-Motion.....	
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced this action to recover for injuries he allegedly sustained in the course of his employment. He now brings this motion for partial summary judgment against defendants on the issue of liability pursuant to Labor Law §240(1). For the reasons set forth below, plaintiff's motion is granted.

The relevant facts are as follows. Plaintiff was employed as a steel king/steel worker by J & E Construction. J & E Construction was contracted by defendant Yonkers Contracting Company, Inc. ("Yonkers") and Gotham Construction Company, LLC ("Gotham") to assist and

perform work for the foundation excavation and foundation at a project located at 600 West 42nd Street, New York, New York (the "worksite"). The project called for the construction of a high-rise building which was owned and maintained by defendants River Place II, LLC ("River Place") and Silverstein Properties, Inc. ("Silverstein").

On or about June 6, 2007, plaintiff was working at the worksite and was given the responsibility of assisting in the direction of a crane, transporting materials around the worksite, carrying steel rebar and preparing areas and material for the crane that was at the worksite. Plaintiff alleges that immediately before his accident, he was assisting his co-worker, Dennis Moore, in transporting a steel rebar piece. Mr. Moore was unable to reach the rebar piece as he was 10-20 feet away. Mr. Moore then asked plaintiff to carry the rebar over to him. Plaintiff lifted the rebar onto his shoulder. He then walked onto a wood plank which was positioned over a large approximately five-foot gap in the ground in order to reach Mr. Moore. The wood plank was acting as a make-shift bridge over said gap at the worksite which many of the workers used. Plaintiff testified that he tested the wood plank with his foot before walking on it and thought it was secure. While walking in the middle of the wood plank, plaintiff alleges that the plank gave way beneath him, causing him to fall approximately five to ten feet to the ground below severely injuring his head, back, elbow, shoulder and neck. Plaintiff alleges that at the time of his accident, he was not wearing a safety harness nor were there safety harnesses available. Plaintiff further alleges that at the time of his accident, there were no safety devices of any nature in place to prevent him from falling such as a railing or barricade on the plank, safety nets below the plank or any sort of scaffolding whatsoever.

Pursuant to Labor Law §240(1),

> All contractors and owners and their agents . . . who contract for but do not control the work, 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 enacted to protect workers from hazards related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of materials or load being hoisted or secured. *See Rocovich v. Consolidated Edison*, 78 N.Y.2d 509, 514 (1991). Liability under this provision is contingent upon the existence of a hazard contemplated in §240(1) and a failure to use, or the inadequacy of, a safety device of the kind enumerated in the statute. *Narducci v. Manhasset Bay Associates*, 96 N.Y.2d 259 (2001). Owners and contractors are subject to absolute liability under Labor Law §240(1), regardless of the injured worker's contributory negligence. *See Bland v Manocherian*, 66 N.Y.2d 452 (1985). Only if the plaintiff was the sole proximate cause of his injuries would liability under this section not attach. *See Robinson v East Medical Center, LP*, 6 N.Y.3d 550 (2006). Additionally, a workplace accident can have more than one proximate cause. *See Pardo v Bialystoker Center & Bikur Cholim, Inc.*, 308 A.D.2d 384, 385 (1st Dept 2003).

In the instant action, plaintiff is entitled to partial summary judgment on the issue of liability against defendants as plaintiff has shown that his injury occurred due to defendants' failure to provide an adequate safety device to prevent plaintiff from falling five to ten feet to the

ground after a wood plank he was walking on gave way from beneath him in violation of Labor Law §240(1). Here, plaintiff's injury clearly occurred due to a gravity-related hazard as the accident flowed directly from the application of the force of gravity onto the plank on which the plaintiff was walking. There is no explanation for the accident other than the fact that the plank and the area around the gap was improperly secured thus causing plaintiff to fall and become severely injured when the plank gave way from under him. It was foreseeable that a worker could fall into the gap and injure himself if the plank was not properly secured. The fact that the plank did give way from beneath the plaintiff and caused plaintiff to fall to the ground below is proof that there was a failure to provide adequate safety devices to protect plaintiff from such a fall pursuant to Labor Law § 240(1).

In response, defendants have failed to raise an issue of fact sufficient to defeat plaintiff's motion for summary judgment. Defendants' assertion that there are issues of fact as to whether plaintiff's accident involved a gravity-related hazard, based on the testimony of Richard Vicars, a former co-worker of plaintiff at the worksite, is without merit. On May 1, 2012, Mr. Vicars testified that immediately before plaintiff's accident, he was working five feet below the plaintiff tying steel. He testified that he did not actually see the accident occur but that by the time he turned around to see what had happened, plaintiff was already on the ground on his back on the same level on which he had been walking before his accident. Defendants allege that this raises an issue of fact as to whether plaintiff ever fell from any height into the gap. However, this testimony does not raise an issue of fact as it is not inconsistent with plaintiff's testimony. As an initial matter, it is undisputed that Mr. Vicars does not know how plaintiff's accident actually occurred as he testified that he did not see the accident happen. Further, plaintiff himself

testified that shortly after falling in the gap, his co-workers "dragged" him out of the hole to the level where had he been working and laid him down to stabilize him and get him medical attention. Further, this is corroborated by the testimony of Gerard Strehle, the supervisor at the worksite, who testified that when he arrived at the scene of the accident approximately two minutes after it occurred, plaintiff had already been "moved out of [the hole]." He also testified that he saw one of the two wood planks which had been laying across the gap down in the hole and that it had previously been laying over the hole. He further stated that "[e]verybody had the same story, they were cutting across this plank, it slipped, Rich took a pretty good fall." Moreover, the Investigation Report filled out after plaintiff's accident states that "Mr. Evans was carrying rebar as he was walking across a plank on rebar and the plank slipped." Finally, in an affidavit dated May 18, 2012, Mr. Vicars affirmed that he "did not witness Richard Evans' accident and when [he] first saw Mr. Evans, he was laying in a hole on top of planking and was well below ground level." The court need not address plaintiff's argument that the deposition transcripts of non-party witnesses Mr. Vicars and Mr. Strehle are a nullity because they were neither signed nor verified by the witnesses, as the transcripts do not affect the outcome of the instant motion as this court is granting plaintiff's motion for summary judgment.

Further, defendants assertion that summary judgment is inappropriate because it was common in the industry for workers to walk over OSHA-approved planks, and therefore, not in violation of Labor Law § 240(1), is also without merit. The fact that the use of such wood planks to walk over gaps in the foundation at the worksite may have been common in the industry is immaterial as that is not the standard for imposing liability under Labor Law § 240(1).

Finally, defendants' assertion that summary judgment should be denied as the sole

proximate cause of the accident was plaintiff's decision to step on an unsecured wood plank, is also without merit. There can be multiple proximate causes for a workplace accident. *See Pardo*, 308 A.D.2d at 384. Although plaintiff's decision to walk on the unsecured wood plank may have played a role in his accident, plaintiff's injury would not have occurred if he had been provided with some sort of safety device such as a harness or if the plank had been secured by scaffolding or had been properly tied down. Therefore, plaintiff's negligence, if any, was not the sole proximate cause of his accident. Even if plaintiff was comparatively negligent in walking over an unsecured wood plank to deliver rebar to a co-worker, plaintiff's comparative negligence is not enough to defeat his motion for summary judgment. As this court has already stated, comparative negligence is not a defense to the imposition of liability under Labor Law § 240(1). *See Bland*, 66 N.Y.2d 452; *see also Haimes v. New York Telephone Company*, 46 N.Y.2d 132 (1978).

Accordingly, plaintiff's motion for partial summary judgment on the issue of liability pursuant to Labor Law §240(1) as against defendants Yonkers, Gotham, River Place and Silverstein is granted. This constitutes the decision and order of the court.

Dated: 6/14/12

Enter: _____
J.S.C.