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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER PART 15

Justice

Index Number : 101981/2009
GOVE, ROBERT
vs.
PAVARINI MCGOVERN
SEQUENCE NUMBER : 005
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). 1, 2

Answering Affidavits — Exhibits _____ | No(s). 3

Replying Affidavits _____ | No(s). 4

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

JUL 20 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 7/18/12

J.S.C.
HON. EILEEN A. RAKOWER

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 15

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ROBERT GOVE,

Plaintiff,

Index No.
101981-2009

Seq No.: 001

- against -

Decision and Order

PAVARINI MCGOVERN, LLC; VVA, LLC AND NEW YORK LAW SCHOOL,

Defendants.

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HON. EILEEN A. RAKOWER

The instant action is brought by Robert Gove ("Plaintiff") pursuant to Labor Law §240(1) to recover for personal injuries allegedly sustained in a construction accident involving an elevation-related risk. The incident allegedly occurred on May 13, 2008 while Plaintiff was working as an employee of Interstate Industrial Corp., at a new building being constructed at New York Law School, in the County and State of New York. Plaintiff moves for partial summary judgment on the issue of liability under Labor Law §240(1) as against defendants Pavarini McGovern, LLC, VVA, LLC and New York Law School. Defendants oppose.

The premises where the accident occurred were owned by New York Law School. VVA, LLC was the developer of the construction project. New York Law School hired Pavarini McGovern LLC as the construction manager. Interstate Industrial Corp. was hired by Pavarini to excavate and provide a concrete foundation for the building. Plaintiff worked laying steel, specifically, rebar, reinforcing steel rods used in poured concrete structures.

Labor Law §240(1) imposes a duty of protection of employees upon owners, contractors and their agents "in the erection, demolition, repairing, altering, painting, cleaning and pointing of a building or structure." This duty consists of providing "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices." (*See, Labor Law* 240[1]). Labor Law

240(1) was designed to place the responsibility for a worker's safety squarely on the owner and contractor rather than on the worker. (*See, Felkner v. Corning Inc.*, 90 NY2d 219, 660 NYS2d 349 [1997]). Where an owner or contractor fails to provide any safety devices, liability is mandated by Labor Law §240(1), without regard to external considerations. (*See, Zimmer v. Chemung,* 65 NY2d 522 [1985]).

The protections of the statute are limited to specific gravity-related accidents such as falling from height or being struck by a falling object. (*See, Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 [1993]). "Absolute liability for falling objects under Labor Law 240(1) arises only when there is a failure to use necessary and adequate hoisting or securing devices" and "the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute," (See, *Narducci v. Manhasset Bay Associates*, 96 NY2d 259, 727 NYS2d 37, 750 NE2d 1085 [2001]).

Plaintiff was working on a mid-landing between the second and third underground floors receiving a bundle of rebar, when the person lowering the bundle lost control of the bundle and it fell, hitting plaintiff. The accident was witnessed by Bobby Shannon. Plaintiff contends that the falling bundle was improperly secured, and should have been lowered by use of a winch and chains or a crane, rather than by the use of manned ropes.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

In support of his motion, Plaintiff provides his own deposition testimony, the sworn affidavit of Bobby Shannon, a witness who was working on site and observed the accident from the ground level, and the sworn expert affidavit of Kathleen Hopkins, a Certified Site Safety Manager.

Plaintiff indicates that on the date of the accident, his site foreman was Timmy Murtha. Plaintiff indicated he could not find the "safety guy" to ask him how to lower the rebar. Previously, rebar had been lowered by crane, but plaintiff and his co workers were unable to get the cooperation of the crane or find the super of the job or the "safety guy." Instead, plaintiff and his co workers were handed a rope and proceeded "the old fashioned way" to lower the bundle. There were no pulleys set up, no wenches [sic], and no chains to aid in lowering the bundle into the pit. Plaintiff was standing one level below his co worker, Chi, and Chi was lowering a 250 pound bundle of steel to him with the rope. Chi began to lose control of the bundle and the rebar

> it hit me – it hit with my left hand and the right hand I missed it. It hit my shoulder, my head, my neck. I then was off balance and going towards the edge and I thought I was going fall over the edge. And in the meantime I had gotten it off my shoulder and started to get control of it but it was still bouncing, the ends from the fall. And that is what made me unstable and kind of bouncing with it, and it wanted to take me off the edge and it wanted to go off the edge and I fought it with everything I had. And it didn't go over and I managed to gain control. I was scared, you know, that I was going to fall too. (Plaintiff's deposition, page 91, lines 6-17).

In opposition, Defendants provide the expert report of Dr. William Marletta, a certified safety professional, the sworn affidavit of Dr. Marletta, Plaintiff's handwritten notes to his treating physician soon after the accident, and an affidavit from Peter Redmond, a Pavarini project superintendent who worked on this project on the date of Plaintiff's accident and prior thereto.

Mr. Redmond, a Pavarini mechanical electrical superintendent, testified that a well wheel, "a pulley, 14-inch diameter, round , and it is supported from above with a rope through it, so that materials can be raised or lowered manually, from one floor to the other" exists and could be used to lower rebar. However, no other

witness identified where such wheel was kept. Additionally, Pavarini testified that an electric winch was on site, but not until later in the project.

Dr. Marletta suggests that safety devices like those provided in Labor Law § 240 (1) would not have prevented the accident. However, clearly, proper hoists or a crane would have provided protections that manned ropes did not. Simply, there is no evidence the well wheel or crane were provided for the task plaintiff and his co workers were told to complete. Comparative fault principles have no application in an action governed by Labor Law §240 *(See, Blake v. Neighborhood House Services of NYC, Inc.*, 1 NY3d 280, 771 NYS2d 484, 803 NE2d 757 [2003]. Where lack of a safety device is the proximate cause of an injury, comparative negligence is no defense. (*See, Samuel v. Simone Dev. Co.*, 13 AD3d 112, 786 NYS2d 163 [1st Dept 2004]). To eliminate Defendant's liability under Labor Law §240(1), the worker's own action must be the sole proximate cause of the injury. (*See, Robinson v. East Medical Center, LP, 6 NY2d 550, 815 NYS2d 589*). Here, Defendants fail to demonstrate how Plaintiff could be solely to blame for his injury, where other workers were lowering the rebar to him when it went awry, and where there was no safety equipment was provided by Defendants.

Wherefore, it is hereby,

ORDERED that the motion for partial summary judgment on the issue of liability pursuant to Labor Law §240(1) is granted as to New York Law School and Pavarini McGovern, LLC.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: July 18, 2012

EILEEN A. RAKOWER, J.S.C.