

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

----------X **Index No. 310531/09**

Raul Marquez and Carmen Suarez-Marquez,

Plaintiffs,

-against- **DECISION and ORDER**

New York Stone Company, Inc., The City of New York, The Board of Education of The City of New York and New York City School Construction Authority,

Present:

Defendants. Hon. Julia I. Rodriguez

----------X Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered in review of Plaintiff's motion for summary judgment with regard to liability pursuant to Labor Law § 240(1):

Papers Submitted	Numbered
Notice of Motion, Affirmation & Exhibits	**1**
Defs. Affirmation in Opposition	**2**
Plaintiff's Reply Affirmation	**3**

Plaintiff commenced this action alleging injuries sustained after an accident at his work site on August 1, 2009, when he fell from a ladder. Defendants The City of New York and Board of Education ("the City") owned the property where the accident occurred. On the City's behalf, Defendant New York City School Construction Authority ("SCA") hired Defendant New York Stone Company, Inc. ("N.Y. Stone") as the general contractor for a construction/excavation project at the subject site. N.Y. Stone hired Plaintiff's employer, Better Designs, Inc. ("Better Designs") as the window subcontractor.

Plaintiff moves for summary judgment, as to liability, pursuant to Labor Law § 240(1), on the ground that he was not provided with adequate safety equipment to prevent his fall.

In opposition, Defendants contend that they are not liable to Plaintiff because his failure to properly secure the ladder was the sole proximate cause of his injuries.

In support of summary judgment Plaintiff submitted, *inter alia,* his affidavit, 50-h transcript and deposition testimony, and the deposition testimony of Constantine Brown and Joseph Durante.

Labor Law §240(1) requires, *in pertinent part,* that: "all contractors and owners and their agents . . . shall furnish . . . ladders . . . which shall be so constructed, placed and operated as to give proper protection to a person so employed." Section 240(1) provides for extra safety protection to the laborer engaged in certain contemplated occupational hazards that involve elevation risk and are related to the effects of gravity. *Ross v. Curtis-Palmer Hydro-Electric Co.,* 81 N.Y.2d 494 (1993). The occupational hazards entail a significant risk because of the relative elevation at which the task must be performed or at which materials or loads must be hoisted or secured. *Toeffer v. Long Island Rail Road,* 4 N.Y.3d 399 (2005). Specifically, the statute imposes liability in situations in which a worker is exposed to the risk of falling from an elevated worksite or being hit by an object fall from an elevated work site. *Rocovich v. Consolidated Edison Co.,* 78 N.Y.2d 509 (1991). "The extraordinary protections of the statute 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 & Refrigeration Corp.,* 93 N.Y.2d 914 (1999). Where a Plaintiff's actions are the sole proximate cause of his injuries, liability will not attach. *Weininger v. Hagedorn & Co.,* 91 N.Y.2d 958 (1998). Finally, "not every worker who falls at a construction site . . . gives rise to the hazard contemplated in 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." *Narducci v. Manhasset Bay Associates, et al.,* 96 N.Y. 259, 267, 727 N.Y.S.2d 37, 41 (2001).

In his affidavit[1], Plaintiff states as follows: The day prior to the accident, Greg Murillo, Plaintiff's "boss," directed that he "report to P.S. 18 to perform window construction work: replacing old windows and installing new windows." On the date of the accident, his "co-worker and supervisor," Matias Matute, "directed that [he] perform this window construction work in the first floor cafeteria of this school." In order to perform the work, "[Matute] told [Plaintiff] to use an extension/leaning ladder that was brought by Mr. Matute. The ladder that he was standing on at the time of the accident was leaning against the wall near the window that he was going to replace. At the time of the accident, he had already removed the window and was in the process of performing the preparatory work before he was going to erect the new window. As he was performing this work, the ladder "suddenly moved, slipped and fell down" which caused him to "fall off the ladder and fall at a height of several feet and strike the floor below." No one was holding the ladder at the time of the accident and no lifelines or scaffolding were provided. There was no "tail line or similar device" attached to either the bottom or the top of the ladder to secure the ladder and prevent the ladder from moving and falling. Although he had a harness at the site, he was unable to use it because "there was nothing at the location where [his] accident occurred to secure/hook [his] harness to." Also, no one "directed or warned [him] not to stand on the ladder without having [his] harness safely secured to something."

At his 50-h hearing, when asked whether anyone was working with him or near him at the time of the accident, Plaintiff responded that Manuel Marquez was the only other person working near him at that time. Plaintiff testified that, at the time of the accident, Marquez was doing the same job that he was doing but on a different window. The ladder Plaintiff was working on was not being held by anyone and was not secured by anything. No one went over

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[1]The Court finds no merit in Defendants' assertion that Plaintiff's affidavit should not be considered because it contradicts his prior, sworn testimony. In this regard, Defendants contend that Plaintiff's statement in his affidavit that Matute was his supervisor and prior, sworn testimony that Brown was his supervisor are inconsistent. However, Plaintiff's 50-h and deposition testimony reflect that Brown was "the man in charge" of the entire construction job at the site and "brought" the workers to the cafeteria, Matute provided specific instructions to Plaintiff with respect to how to perform the work. Notably, at his deposition, Brown testified that Matute was "in charge" of Plaintiff.

safety issues with him at the job site and he was not provided with any safety equipment. He had his own harness, glasses and helmet with him at the site but he did not use his harness because "there was no place to connect it to." On the day of the accident, Brown was "in charge of the school construction that was going on." Matute and Marquez were his only co-workers at the job site. It was Plaintiff's first day at the job site, however, Matute and Marquez had already been working at the school prior to that day. There was a television in the area near the window that Plaintiff was working on that could not be moved. He had to place the ladder "behind the television" to do the work.

At his deposition, Plaintiff testified that Matute told him which windows he was to work on. Matute brought the ladder to the job site and drove Plaintiff to the job site. Plaintiff could not place the ladder directly in front of the window that he was working on at the time of the accident because there was a television in the way. He asked Matute "what was it we were going to do in regards to the television" and Matute told him that Brown "had told him not to try to move the television because they had already moved it previously and the screws had not been quite safe." The ladder was "very close" to the window but he had to bend himself "a little towards the right" to do the work he was doing at the time of the accident.

At his deposition, Constantine Brown, a Site Superintendent for N.Y. Stone, testified that, prior to the accident, he never spoke with Plaintiff about the work to be performed but "spoke to his partner, because he was in charge." Brown told Plaintiff's partner that "anybody on the ground working, somebody make sure to stand, stay on the ground and hold the ladder . . . if you got to get tools, make sure the guy on [the ladder] is on the ground." Then Brown "walked away." After someone knocked on his door and told him there had been an accident, Brown came to the scene of the accident and observed both Plaintiff and the ladder on the floor. Based upon the scratch on the floor and the ripped "decorations" on the wall, Brown concluded that the ladder slipped from the wall "because it was not being held."

At his deposition, Joseph Durante, SCA's Safety Inspector, testified that he inspected the site of the accident several days after the accident and prepared a report based upon information provided to him by Constantine Brown. Durante confirmed that his report indicates that, at the

time of the accident, Plaintiff was on an unsecured ladder when the ladder slipped out from under him.

Under these facts, Plaintiff contends that Defendants are liable for his injuries pursuant to §240(1) because he was not provided with proper fall protection or safety equipment and Defendants' failure to provide proper protection to Plaintiff was a proximate cause of his accident.

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The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center,* 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court; the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn form the evidence submitted, and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Aasaf v. Ropog Cab Corp.,*153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dept. 1989). Summary judgment will be granted only if there are no material, triable issues of fact. *Sillman v. Twentieth Century-Fox Film Corp.,* 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957).

After consideration of Plaintiff's submissions, the Court finds that Plaintiff has established his *prima facie* entitlement to judgment as a matter of law with respect to his claim pursuant to Labor Law §240(1).

In opposition to summary judgment, Defendants contend that Plaintiff is the sole proximate cause of the accident because he refused to comply with "explicit instructions" not to use the ladder without someone to steady it. However, while Defendants cite to Brown's deposition testimony in support of this assertion, at his deposition, Brown testified that he never spoke with Plaintiff about how to perform the work prior to the accident but spoke only to his co-worker because he had worked with his co-worker previously and his co-worker was "in charge."

To raise a triable issue of fact as to whether the Plaintiff was the sole proximate cause of the accident, the defendant must produce evidence that adequate safety devices were available, that the Plaintiff knew that they were available and was expected to use them, and that the Plaintiff unreasonably chose not to do so, causing the injury sustained. *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 790 N.Y.S.2d 74 (2004); *Gallagher v. New York Post,* 14 N.Y.3d 83, 896 N.Y.S.2d 732 (2010); *Nacewicz v. Roman Catholic Church of the Holy Cross,* 105 A.D.3d 402, 963 N.Y.S.2d 14 (1st Dept. 2013). Here, defendants do not contend that Plaintiff was provided with anything other than an extension ladder to perform his work. And, Plaintiff's uncontroverted testimony establishes that the subject ladder was the only ladder offered to him, that he set up the ladder properly with the lock in place, and that no one was holding the ladder because each worker in the cafeteria was working on a separate window at the time of the accident.

Based on the foregoing, Plaintiff's motion seeking summary judgment in his favor pursuant to Labor Law § 240(1) is **granted.**

Dated: Bronx, New York
April 12, 2016

Hon. Julia I. Rodriguez, J.S.C.