Fraser v City of New York
2016 NY Slip Op 32406(U)
December 8, 2016
Supreme Court, New York County
Docket Number: 153101/2012
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 29
---X
Andrew Fraser,

Plaintiff,

Index Number:

153101/2012

-against-

City of New York, New York City School Construction Authority and Hunter Roberts Construction Group, LLC

Defendants.
---X

Robert D. Kalish, J.:

Upon the foregoing papers, the Plaintiff's motion for summary judgment (motion seq. 001) on his Labor Law §240(1) and 241(6) claims against the Defendants is hereby granted as to his Labor Law §240(1) claim, and the Defendants' motion for summary judgment (motion seq. 002)[1] dismissing all of the Plaintiff's causes of action is granted solely to the extent that the Plaintiff has conceded to the dismissal of the Plaintiff's claim pursuant to Labor Law §200.

Underlying Allegations

Without reiterating the entirety of the pleadings, the Plaintiff alleges in sum and substance that on or about January 9, 2012 he was employed as a structural iron worker by North American Iron Works ("North American"), a company subcontracted to perform construction work at P.S. 281. P.S. 281 is located at First Avenue and 36th Street in New York County (the "Premises"). The Plaintiff alleges that the Defendant New York City School Construction Authority (the "SCA") was the owner and/or lease holder of the Premises and that the Defendant Hunter Roberts Construction Group, LLC ("Hunter Roberts") acted as the general contractor for said construction project (the "Project").

[1] For the remainder of the instant decision, the Court will refer to the Defendants' motion for summary judgment under motion sequence 002 as a cross-motion.

The Plaintiff alleges that on or about January 9, 2012, he sustained injuries due to an accident that was caused solely by the Defendants' negligence, carelessness and recklessness. Specifically, the Plaintiff alleges that while he was performing work on an elevated steel beam, he was struck by another steel beam that was being hoisted above him. Plaintiff alleges that said accident caused him to fall from the elevated beam to the ground below. The Plaintiff alleges that his accident was caused by the Defendants' failure to provide adequate safety devices including safety belts and safety harnesses. The Plaintiff further alleges that his accident was also caused when he was struck by an elevated load which fell due to an ineffective hoist. The Plaintiff further alleges that the Defendants' violations of Labor Law §§ 200, 240 and 241(6) were the sole and proximate cause of the Plaintiff's accident and injuries sustained therein..

Parties' Contentions

The Plaintiff argues in support of his motion for summary judgment on his Labor Law §240(1) claim that there is no dispute that he was struck by a steel beam that was being suspended from a height (the "Steel Beam"). He further argues there is no dispute that he was standing on an elevated beam when he was stuck by the Steel Beam, which caused him to fall to the ground below. In addition, the Plaintiff argues that there is no dispute that the Steel Beam was improperly secured in a hoisting device at the time of the accident. As such, the Plaintiff argues that his accident is squarely within the scope of Labor Law §240(1) and that Labor Law §240(1) is an absolute liability statute.

The Plaintiff further argues that his accident was also caused by the Defendants' failure to provide him with an adequate safety device to secure himself while working on an elevated beam. The Plaintiff argues in sum and substance that his work required him to transverse an elevated steel beam and that the Defendants did not provide him with the means to transverse the beam while staying secured. Specifically, the Plaintiff argues he had no choice but to unhook himself from a safety device (the "yo-

yo") in order to transverse the elevated beam past the two workers who were hoisting the Steel Beam (using a chain fall).

The Plaintiff further argues that he is entitled to summary judgment on his Labor Law §241(6) claim based upon the Defendants' violation of Industrial Code §23-1.16(b). The Plaintiff argues that based upon the deposition testimony, it is clear that the Defendants violated Industrial Code §23-1.16(b), and as such the Plaintiff is entitled to summary judgment on his Labor Law §241(6) claim as well as his Labor Law §240(1) claim.

In opposition to the Plaintiff's motion, the Defendants argue in sum and substance that if the Plaintiff had asked the other workers to unhook the Steel Beam (from the hoist), the Plaintiff could have walked past the workers while remaining anchored by the yo-yo. The Defendants further attach with their opposition papers an affidavit by their expert Eugenia Kennedy, who concludes that the Plaintiff had all of the appropriate safety equipment he needed and that there was no violation of Labor Law §240(1). Ms. Kennedy further concludes that even if there was a Labor Law §240(1) violation, the accident was the direct result of the Plaintiff's failure to follow the explicit tie-off rules and use the safety equipment he had been provided with. Ms. Kennedy further concludes that the Defendants did not violate any of the claimed Industrial Code regulations. As such, the Defendants argue that there are issues of fact as to whether or not the Plaintiff was a "recalcitrant worker", sufficient to deny the Plaintiff's motion for partial summary judgment.

In reply to the Defendants' opposition and in opposition to the Defendants' cross-motion for summary judgment, the Plaintiff argues that the Defendants' arguments are built entirely upon hypotheticals that are not supported by the evidence and/or deposition testimonies. The Plaintiff reiterates his argument that it is unrefuted that he was standing on an elevated steel beam when the suspended/hoisted Steel Beam struck him and caused him to fall to the ground.

The Plaintiff further argues that he could not be a "recalcitrant worker" because it is unrefuted that there were no retractable securing devices at the entrance to the elevated steel beam. The Plaintiff also argues that the Defendants' argument that the Plaintiff could have asked the other workers to put down their load in order to pass (while still tethered to the beam) is based entirely upon baseless hypotheticals. The Plaintiff further argues that the Defendants' expert's conclusions are based upon patently false conclusory statements.

In deciding the Plaintiff and Defendants' motions for summary judgement, the Court reviewed all of the papers submitted by the Parties on both motions, including the Defendants' cross-motion for summary judgment (motion seq. 002). The primary issues argued by the Defendants in support of their argument for summary judgment (motion seq. 002) dismissing the Plaintiff's Labor Law §§ 240 and 241(6) claims are that the Plaintiff was a recalcitrant worker and that the Defendants did not violate any provisions of the Industrial Code. The Court need not address the Defendants' arguments for the dismissal of Plaintiff's Labor Law §200 claim since the Plaintiff consented to the dismissal of said claim at oral argument.

Oral argument

The Parties appeared before the Court for oral argument on their motions on October 6, 2016. Plaintiff's counsel argued before the Court that there is no dispute as to how the Plaintiff's accident occurred. Specifically, there is no dispute that two workers were hoisting the Steel Beam with a chain fall, which failed, causing the Steel Beam to strike the Plaintiff. Further, there is no dispute that the Plaintiff was standing upon an elevated steel beam at the time of the accident and that he fell to the ground below. Plaintiff's counsel further argued that there was no way for the Plaintiff to get past the workers and the hoisted Steel Beam without first detaching from the yo-yo. Specifically, Plaintiff's counsel argued that if the Plaintiff had not detached from the yo-yo prior to passing the workers, he

would have become entangled in the Steel Beam and the chain fall. As such, Plaintiff's counsel argued that the Plaintiff's accident was proximately caused by two specific violations of Labor Law §240(1):

- the malfunctioning hoist holding the Steel Beam, which knocked the Plaintiff off of the elevated beam and
- the lack of adequate securing devices for the Plaintiff to attach himself to the elevated beam he was working upon, which caused him to fall from the elevated beam when he was struck by the Steel Beam.

The Plaintiff's counsel further argued that the Defendants' arguments in opposition to the Plaintiff's motion for summary judgment (and in support of their own cross-motion for summary judgment) are based entirely upon hypothetical questions posed to the Plaintiff as to what he could have done prior to the accident (i.e. that the Plaintiff could have asked the workers to put down the hoist and Steel Beam so that he could pass them while tethered).

As to the Labor Law §241(6) claim, Plaintiff's counsel argued that it is unrefuted that there was no place for the Plaintiff to attach his harness at the entry point of the elevated beam from the deck. The Plaintiff argues that said lack of a securing mechanism at the entry point of the elevated beam was in direct violation of Industrial Code 23-1.16 since there was no place for the Plaintiff to tie off to when he stepped out onto the elevated steel beam from the deck.

Plaintiff's counsel acknowledged that the Plaintiff detached himself from the yo-yo prior to the accident. However, Plaintiff's counsel argued the Plaintiff could not be a recalcitrant worker for detaching himself, because he had a "good reason" for doing so. Specifically, Plaintiff's counsel argued that the Plaintiff needed to detach himself in order to safely pass the two workers, the chain fall and the Steel Beam. Plaintiff's counsel further argued that the accident was not caused at the point where the Plaintiff detached himself from the yo-yo, but later when the Steel Beam struck the Plaintiff as he was returning to his work area, after he passed the Steel Beam.

In opposition, the Defendants' counsel argued in sum and substance that the underlaying accident was caused solely by the Plaintiff's "choice" to detach himself, which was both unnecessary and a violation of Hunter Roberts' safety rules. Specifically, Defendants' counsel argued that the Plaintiff was a "recalcitrant worker" the minute he detached himself from the yo-yo in order to pass the workers, the hoist and the Steel Beam. Defense counsel further argued that the Plaintiff's "choice" to detach himself in order to pass the workers and the Steel Beam (when he first went from his work area back to the deck to get more bolts) was a violation of Hunter Roberts' safety rules and that said "choice" was the proximate cause of the accident.

Defendants' counsel did not dispute Plaintiff's counsel's description of the accident. However, Defendants' counsel argued that the Plaintiff was provided with adequate safety equipment in the form of a tethering point and yo-yo. Defense counsel further argued that the Plaintiff signed a document indicating that he read and understood Hunter Roberts' safety rules for the job site, and that Hunter Roberts' safety rules required that the Plaintiff be tethered ("tied off") any time he was at an elevation over six feet.

There is no dispute that the Plaintiff was able to tether himself to the yo-yo when he first got to the part of the elevated beam that he was working on. Defense counsel argued that if the Plaintiff had either asked the workers to lower the hoist or waited for them to finish hoisting the Steel Beam, the Plaintiff would have been able to transverse the elevated beam back and forth from his work area to the deck without ever detaching from the yo-yo. Defense counsel argued that had the Plaintiff done so, the Plaintiff would have been in full compliance with Hunter Roberts' rules and the accident would not have occurred. In addition, Defense counsel argued that if the workers had put down the chain fall and Steel Beam, the chain fall would not have malfunctioned and the Steel Beam would not have struck the Plaintiff.

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Defense counsel also referred to the Plaintiff's EBT testimony that he did not wait until the workers had finished hoisting the Steel Beam before attempting to pass because his boss would have yelled at him for "standing there". Defense counsel argued that this was not a good reason for the Plaintiff not to wait to pass the workers.

Defense counsel conceded at oral argument that had the accident occurred when the Plaintiff first went out from the deck onto the elevated beam, then the action would have been within the scope of Labor Law §240(1) since there is no dispute that the Plaintiff could not have attached himself upon first entering the elevated beam. However, Defense counsel argued that this was not the situation in the underlying action, since the Plaintiff could have remained tethered to the yo-yo while he was walking back to the deck from his work area, getting bolts, and returning to his work area with the bolts.

Defense counsel further argued that the Plaintiff's choice not to wait for the workers to finish hoisting the Steel Beam before passing them also creates a basis for contributory negligence as to the Plaintiff's Labor Law §241(6) claim.

Defense counsel further argued that the Defendants were moving to dismiss the Plaintiff's Labor Law §200 claim. The Plaintiff conceded to the dismissal of said claim.

The Court indicated at oral argument that if it determined that the Plaintiff was entitled to summary judgment on his Labor Law §240(1) claim, Plaintiff's Labor Law §241(6) claim would be largely academic as the only remaining issue in the underlying action would be the damages that the Plaintiff allegedly sustained as a result of the accident, regardless of whether the Defendants were liable under Labor Law §§ 240.0 and/or §241(6).

Deposition Testimonies

Plaintiff Andrew Fraser

In the underlying action, The Plaintiff Andrew Fraser appeared for deposition over a two day period. He testified that his most resent employment was as a structural iron worker with North American, and that his duties included welding, stuffing bolts, bolting up, connecting steel, taking pieces from the crane and building and creating a building (Plaintiff's deposition p.14-15).

Plaintiff testified that he was working for North American at the time of the incident, and that he has not worked since the incident (Plaintiff's deposition p. 47). He further testified that he had been working for North American Iron Works for approximately 5 - 6 months at the time of the incident, and that he was working on the Project for approximately two weeks to a month before the incident (Plaintiff's deposition pp. 48, 52). Plaintiff testified that on his first day at the Project site he received brush-up training in the form of a video (Plaintiff's deposition p.52). He further testified that his job title at the Project site was "Iron Worker" and that his responsibilities included setting steel, welding, laying deck, stuffing bolts, specific duties differing from day to day (Plaintiff's deposition p. 55).

Plaintiff testified that there would be "toolbox talks", meetings where they discussed safety at the Project site (Plaintiff's deposition p. 55). He further testified that these meetings occurred approximately once or twice a month, or after anyone got hurt at the site (Plaintiff's deposition p. 56). Plaintiff testified that he wore a work-belt and tie-off apparatus as part of his daily gear, which included his harness and lanyard (Plaintiff's "tie off gear") (Plaintiff's deposition p. 59-60).

Plaintiff testified that he brought his own harness and lanyard to the Project site, that he had obtained from a different job. He further testified that his tie off gear was new and that if a worker did not have their own lanyard and harness, the job-site would provide them with one. Plaintiff testified that he would leave his gear in a box at the Project site every night (Plaintiff's deposition p. 60).

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Plaintiff testified that on the date of the accident, he had on his harness and lanyard (Plaintiff's deposition p. 61). He further testified that the work site had "beam buddies" and "yo-yos", which are safety devices that workers would clip to their harnesses when working on elevated beams (Plaintiff's deposition 64-65). Plaintiff testified that yo-yos were retractable "leashes" that a worker would attach to his harness (Plaintiff's deposition p. 65).

The Plaintiff testified that the accident occurred on January 9, 2012 (Plaintiff's deposition p. 67). He further testified that his job that day was "bolting up", replacing the temporary bolts that the connectors use and stuffing the right bolts to sustain the weight (Plaintiff's deposition pp. 70-71). He testified that he climbed up a ladder to a "deck", filled up a bucket of bolts, and headed out to the area that he was to work (Plaintiff's deposition pp.71-73). Plaintiff testified that he was "bolting up" right before the accident, which happened at around 8:00-8:30 am (Plaintiff's deposition pp. 76). He further testified that at the time of the accident, he was standing on a eight to twelve inch beam, ten to fifteen feet off of the ground (Plaintiff's deposition p.77).

Plaintiff testified that he was not tethered when he walked out from the "deck" onto the elevated beam. He testified that this was because there was no safety device (to tie off to) for the first ten feet of the elevated beam from the deck to the first yo-yo (Plaintiff's deposition pp.77-78). He further testified that he was not tied off at the time of the accident (Plaintiff's deposition pp 77-78). Plaintiff testified that he could have tied off to the beam using a "beam buddy" clamp, but those types of clamps were not available on the date of accident (Plaintiff's deposition p. 79). Plaintiff testified that he complained to Diego Dumas about the lack of safety clamps for the first ten feet of the elevated beam and was told to get to work (Plaintiff's deposition p. 79).

Plaintiff testified that he crossed over the ten feet of beam (where there was no tie off) and made it over to the part of the beam where he could tie off (Plaintiff's deposition p. 81). He further testified that he was working on "open steel" and that there was a line of yo-yos that he was working off of (Plaintiff's deposition p. 81). Plaintiff testified that immediately prior to the accident, he had ran out of bolts and that there were two workers installing a horizontal cross beam manually with a "chain fall". Plaintiff testified that he told the workers that he was coming through. Plaintiff testified that he was unhooked when he walked past the workers with his empty bucket. He further testified that he filled up his bucket and then went back to the elevated area where there was nothing to tie off to. Plaintiff testified that he told the workers that he was coming back and that they told him to "go". Plaintiff testified that he got around the workers and was on the elevated beam. Plaintiff testified that he was only five steps from the spot where he had been bolting and that his back was to the workers, when he heard screaming and a loud noise. Plaintiff testified that the workers had lost control of the Steel Beam they were hoisting and that the Steel Beam struck him. Plaintiff testified that he lost his footing when the Steel Beam hit him, he fell off of the elevated beam and hit the ground face first (Plaintiff's deposition pp. 81-82).

The Plaintiff testified that the Steel Beam was not in the air the first time he passed the workers (to refill his bucket of bolts). However, when he walked back (after filling his bucket), the Steel Beam was suspended in the air by the chain fall (Plaintiff's deposition p. 84). Plaintiff testified that the Steel Beam came in contact with his shoulder and the top of his back (Plaintiff's deposition pp. 85-86). He further testified that immediately prior to the accident, the Steel Beam was being suspended up and over him (Plaintiff's deposition pp 86-87).

Plaintiff testified that he had to detach himself from the yo-yo in order to pass the workers, the chain fall and the Steel Beam (on his way back to get more bolts) so as not to get tangled up (Plaintiff's deposition p. 88). He further testified that if the workers had not been working with the Steel Beam and chain fall, he could have crossed that area of the beam while still being attached to the yo-yo (Plaintiff's deposition pp 90-92). The Plaintiff testified that if he had stayed tied off and waited for the workers to complete the task they were performing, he would have been criticized for standing around and not working (Plaintiff's deposition p 93). He further testified that the beam he was working on was the only one with yo-yos on the line, and that if he had taken any of the other beams he would have been untied even further from the deck (Plaintiff's deposition pp. 93-94). He further testified that the deck was the only place where the bolts were kept. Plaintiff testified that there were no apprentices on site that day, that he was the only person blotting up, and that he had to get his own bolts (Plaintiff's deposition p. 94). Plaintiff testified that there was no way to get from the beam to the deck while remaining tied off (Plaintiff's deposition p. 94).

Plaintiff testified that there was no way of getting past the other workers, the Steel Beam and the chain fall without detaching himself (Plaintiff's deposition p. 96). He further testified that he would have had to unhook in order to get past the obstacles even if the workers had left (Plaintiff's deposition pp. 95-97). Plaintiff testified that he did not specifically inform the two workers that he was detached, but just told them that he was coming through (Plaintiff's deposition pp. 100-101).

Plaintiff testified that if the workers had unhooked the Steel Beam and pulled the chain fall out of the way, then he could have walked through without detaching (Plaintiff's Deposition p. 105). He further testified that he did not ask the workers to unhook the Steel Beam and pull down the chain for him to pass (Plaintiff's Deposition p. 106).

Plaintiff testified that the Steel Beam was suspended eight to ten feet above him, that the Steel Beam was ten to twelve feet long, eight inches wide, and weighed more than 200 pounds (Plaintiff's Deposition pp 106-107). He further testified that he was still under the Steel Beam when the workers lost control of it (Plaintiff's Deposition p. 107). The Steel Beam did not actually fall on the ground, but swung while it was suspended and hit him (Plaintiff's Deposition p. 108). Plaintiff testified that the workers were behind him and that he heard yelling before the Steel Beam hit him (Plaintiff's Deposition p. 109).

Plaintiff testified that he did not recall if there were any specific directions as to what to do when you had to pass someone on a beam, except for courtesy in allowing the other person to pass first (Plaintiff's Deposition p. 110). He did not recall ever being told that he should always be tied off when not on the ground, but Plaintiff testified that it was understood that workers working at elevations had to be tied off (Plaintiff's Deposition p. 111). Plaintiff testified that he fell ten to fifteen feet from the beam (Plaintiff's Deposition p. 114).

Plaintiff testified that some times a worker would have to detach themself from a beam. He further testified that sometimes, in a tight area, it is more dangerous to be tethered than untethered (Plaintiff's Deposition p. 116)

The Plaintiff was shown a sign-in sheet from a site safety training and acknowledged that bore his initials and his "print signature" (Plaintiff's Deposition p. 233).

Defendant New York City School Construction Authority by Eric Tiedemann

Eric Tiedemann testified at his deposition that in 2012 he was a "contingent employee" of the SCA. This meant that he was employed by a firm, AG Consulting, who paid him to work for the SCA as a project officer for the Project (Tiedemann Deposition pp. 8-9).

Tiedemann was shown a document entitled the "Safety Open Observations Project" "Incident Report" that was prepared by SCA. He described the Incident Report as a report that states what happened in an accident, but stated that the Incident Report is not a comprehensive accident investigation form (Tiedemann Deposition pp. 40-41). Tiedemann testified that the Incident Report was prepared by a safety officer employed by SCA. He further testified that he did not assist in the preparation of the document and did not assist in any aspect of the accident investigation (Tiedemann Deposition pp. 42-44). Tiedemann was unable to testify as to where the information on the Safety Open Observations Project" came from nor provide any information as to its accuracy (Tiedemann Deposition p. 50).

Tiedemann testified that he did not know anything about the Plaintiff's accident other than that the Plaintiff fell (Tiedemann Deposition p. 46). Tiedemann further testified that on the date of the accident, he was told by one of the laborers that there had been an accident. He testified that he went to the site of the accident and saw the Plaintiff lying on the ground, but did not speak to the Plaintiff (Tiedemann Deposition p. 49).

Tiedemann testified that at some point after the Plaintiff's accident, an OSHA inspector came to the Project site (Tiedemann Deposition p. 51). He further testified that Darren Mullahy, a project manager for Hunter Roberts, prepared an incident report. Tiedemann described said incident report as a simple report, not an investigation (Tiedemann Deposition p. 53). Tiedemann testified that he did not compare the SCA report against the Hunter Roberts Report (Tiedemann Deposition p. 59). Tiedemann testified that the SCA report says that the Plaintiff was not in compliance with Hunter Roberts' one-hundred percent tie-off rule, and that the Hunter Roberts Report says that the Plaintiff was not tied off at the time of the accident (Tiedemann Deposition p. 62).

Tiedemann testified that after the accident, he discussed fall protection with Hunter Roberts but not with North American (Tiedemann Deposition pp. 64-65). He further testified that Hunter Roberts was the general contractor for the Project and had a responsibility to insure that any of the subcontractors performing on the job site complied with the SCA site safety manual (Tiedemann Deposition p. 139). Tiedemann testified that Hunter Roberts also had its own site safety manual and corporate manual (Tiedemann Deposition pp. 139-140).

Tiedemann testified that SCA relied on Hunter Roberts to enforce all three of these manuals, and that it was Hunter Roberts' job to ensure that the subcontractors were providing their workers with the proper fall protection in order to maintain one-hundred percent fall protection (Tiedemann Deposition p. 140). He further testified that if a subcontractor was unable to provide one-hundred percent fall protection, it was Hunter Robert's responsibility to provide it (Tiedemann Deposition p. 141). Tiedemann testified that Hunter Roberts had individuals on the job site on a daily basis (Tiedemann Deposition pp. 141-143).

<u>Hunter Roberts by William Rose</u>

William Rose testified at his deposition that he has been employed as safety director for Hunter Roberts for 11 years, and that his responsibilities include looking at policies, procedures and keeping up to date with OSHA compliance (Rose's Deposition pp. 7-8). He further testified that he is responsible for the New Jersey, Pennsylvania and New York areas (Rose's Deposition p. 8). Rose testified that he does not have specific knowledge of the New York Industrial Code (Rose's Deposition p. 10).

Rose testified that Hunter Roberts acts as a general contractor for the Project (Rose's Deposition pp. 10-11). He further testified that the Hunter Roberts Corporate Safety and Health Program is the safety manual applicable to any project where Hunter Roberts is acting as a general contractor (Rose's Deposition p. 12). Rose testified that subcontractors have to put their own site specific safety program

together that complies with Hunter Roberts' safety manual (Rose's Deposition p. 14). He further testified that Hunter Roberts' safety manual requires job hazard analysis. That is, a daily morning meeting to discuss the tasks of the day, the scope of the work to be performed, and what will be provided to laborers in terms of resources, tools and looking for and addressing potential hazards (Rose's Deposition p.15). Rose testified that Hunter Roberts requires that their superintendents and different individuals on the job sites will attend job hazard analysis (Rose's Deposition p. 16).

Rose testified that according to Hunter Roberts' procedure and policy, North American would have been required to submit a site safety plan to Hunter Roberts (Rose's Deposition p. 18). He further testified that any worker who comes to a construction project has to go through a Hunter Roberts safety orientation (Rose's Deposition p. 19).

Rose testified that Hunter Roberts requires one-hundred percent fall protection for elevations over 6 feet, and that Hunter Robert's one-hundred percent fall protection requirement is more stringent then the OSHA fall protection rules (Rose's Deposition pp. 20-22). He further testified that Hunter Roberts has had conflicts with contractors who do now wish to follow the one-hundred percent fall protection rule, who instead insist on only following the OSHA rules (Rose's Deposition pp. 21-23). Rose testified that employers chose whether to follow Hunter Roberts' one-hundred percent rule or to follow OSHA's rules as to their employees (Rose's Deposition pp. 25-27).

Rose testified that subcontractors were required to submit to Hunter Roberts a corporate safety program and a site specific plan for approval (Rose's Deposition p. 78). Rose further testified that North American was required to submit to Hunter Roberts a site-specific safety plan relating to the project for review and approval by Hunter Roberts. He further testified that the site-specific plan could have been reviewed by Rose, the project manager on the job, the superintendent on the job or the site safety manager on the job (Rose's Deposition pp. 31-32).

Rose testified that Hunter Roberts' site safety manager walked the Project daily (Rose's Deposition p. 33). Rose further testified that part of his responsibilities include going to job sites to do inspections (Rose's Deposition p. 34). Rose testified that Shawn McBride was Hunter Roberts' full time site safety manager for the Project (Rose's Deposition p. 35). He further testified that the project manager for the Project was Darren Mullahy. Rose testified that the project manager had the responsibility of implementing Hunter Roberts' safety plan as a well as the site-specific plan for the Project (Rose's Deposition p. 43). Rose testified that it was the project manager's responsibility to enforce the applicable rules and regulations in Hunter Roberts' Manual (Rose's Deposition p. 44).

Rose testified that Barry Eakin was Hunter Roberts' superintendent for the project and that it was his responsibility to ensure that subcontractors were complying with the site safety manual (Rose's Deposition p. 47). Rose further testified that the job-site superintendent is responsible for making sure the appropriate safety measures are provided for Hunter Roberts Construction Group and subcontractor employees (Rose's Deposition pp. 77 - 78

Rose was shown a "Hunter Roberts Incident Report" (Rose's Deposition p. 86). Upon examining the incident report, Rose testified that it did not indicate the source of the information included therein (Rose's Deposition p. 91). He further testified that the incident report does not include any description of the Plaintiff's perception of the accident (Rose's Deposition p. 98). Rose testified that he does not have any information or knowledge as to whether or not the Plaintiff was provided with a safety device that would have allow him to stay tied off the entire time he was on the elevated beam (Rose's Deposition p. 96).

Analysis

Summary Judgment Standard

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc., 96 AD3d 551, 553 (MY App Div 1st Dept 2012) [internal quotation marks and citation omitted]). "Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment" (id.). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (Giuffrida v Citibank Corp., 100 NY2d 72, 81 [2003]). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted)). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 (1978); Grossman v Amalgamated Hous. Corp., 298 AD2d 224, 226 (MY App Div 1st Dept 2002)). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (Sommer v Federal Signal Corp., 79 N.Y.2d 540, 555 (NY 1992)).

Plaintiff is entitled to summary judgment on his Labor Law §240(1) claims

Labor Law § 240(1), also known as the Scaffold Law (Ryan v Morse Diesel, 98 AD2d 615, 615 (NY App Div 1st Dept 1983), provides, in relevant part:

> "All contractors and owners ... 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 designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person"" (Runner v New York Stock Exch., Inc., 13 NY3d 599, 604 (NY 2009) quoting Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 (NY 1993)). "The contemplated hazards are those 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 the materials or load being hoisted or secured." (Rocovich v Consolidated Edison Co., 78 NY2d 509, 514 (NY 1991)). Further, the Scaffold Law is to be liberally construed to accomplish its purpose, which is to protect workers against the special hazards and risks involved in elevation differentials, by placing responsibility for safety practices at building construction sites on owners and contractors (See Rocovich v Consolidated Edison Co., 78 NY2d 509, 512-513 (NY 1991)).

The Court of Appeals has held that this duty to provide safety devices is nondelegable (Gordon v Eastern Ry. Supply, 82 NY2d 555, 559 (NY 1993)), and that absolute liability is imposed where a breach has proximately caused a plaintiffs injury (Bland v Manocherian, 66 NY2d 452, 459 (1985)). "The extraordinary protections of Labor Law § 240 (1) 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 NY2d 914, 915-916 (NY 1999) quoting Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 (NY 1993)).

To prevail on a Labor Law §240(1) claim, the Plaintiff must show (1) a violation of the statute (i.e., that defendants breached their nondelegable duty to furnish or erect, or cause to be furnished or erected, safety devices in a manner that gave him proper protection from gravity related risks); and (2) that the statutory violation was a contributing or proximate cause of the injuries sustained (See Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35, 39 (NY 2004); Blake v Neighborhood Hous. Servs. of NY City, Inc., 1 NY3d 280, 287-289 (NY 2003)). Upon making such a showing, "[t]he burden then shifts to defendant[s] to establish that 'there was no statutory violation and that plaintiff's own acts and omissions were the sole cause of the accident'" (Kosavick v Tishman Constr. Corp. of N.Y., 50 AD3d 287, 288 (NY App Div 1st Dept 2008) quoting Blake, 1 NY3d at 289 n. 8). "If defendant[s'] assertions in response fail to raise a fact question as to these issues, the plaintiff must be accorded summary judgment" (Blake, 1 NY3d at 289 n. 8). Contributory or comparative negligence is not a defense to absolute liability under the statute (Jamison v GSL Enters., 274 AD2d 356 (NY App Div 1st Dept 2000); Johnson v Riggio Realty Corp., 153 AD2d 485 (NY App Div 1st Dept 1989)).

Labor Law §240(1) applies to both "falling worker" and "falling object" accidents (See Wilinski v 334 E. 92nd Hous. Dev. Fund Corp., 18 NY3d 1, 7 (N.Y. 2011). That is "specific gravity-related accidents [such] as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (Fegundes v N.Y. Tel. Co., 285 AD2d 526, 527 (NY App Div 2d Dept 2001) quoting Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 (NY 1993)). However, "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein. (Narducci v Manhasset Bay Assocs., 96 NY2d 259, 267 (NY 2001); see also Sarata v Metropolitan Transp. Auth., 134 AD3d 1089 (NY App Div 2d Dept 2015).

Further, Labor Law §240 does not automatically apply simply because an object fell and injured a worker. "In order to prevail on summary judgment in a section 240 (1) 'falling object' case, the injured worker must demonstrate the existence of a hazard contemplated under that statute 'and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein'. Essentially, the plaintiff must demonstrate that at the time the object fell, it either was being 'hoisted or secured', or 'required securing for the purposes of the undertaking'" (Fabrizi v 1095 Ave. of the Ams., L.L.C., 22 NY3d 658, 662-663 (NY 2014) [internal citations omitted]).

Undisputed facts and chronology of the accident

In the underlying action, the Plaintiff alleges in sum and substance that the accident involved two violations of Labor Law §240(1). Specifically, the Plaintiff alleges that he fell from an elevated height due to the lack of sufficient safety provisions, and that he was struck by the Steel Beam that was being improperly hoisted. Further, the following facts and chronology of the underlying action are undisputed by the Parties:

1. Plaintiff was assigned to work on an elevated beam approximately ten to fifteen feet above the ground;
2. there was no yo-yo attachment for the Plaintiff to tether himself to when he first got on the beam from the deck;
3. there was a yo-yo attachment for the Plaintiff to tether himself to in the area of the elevated beam where the Plaintiff was supposed to work;
4. Plaintiff was untethered when he first took the bucket of bolts and went from the deck to his work area;
5. Plaintiff tethered himself to the yo-yo when he got to his work area;
6. at some point prior to the accident, the Plaintiff ran out of bolts and had to go back to the deck to refill his bucket;
7. Plaintiff went back along the elevated beam to the deck in order to refill his bucket;
8. Plaintiff detached himself from the yo-yo in order to get past two workers that were attempting to raise the Steel Beam attached to a chain fall;
9. when Plaintiff first came upon the workers, the Steel Beam and the chain fall (on his way back to the deck), the Steel Beam was not yet being hoisted;
10. the Plaintiff got back to the deck untethered and refilled his bucket without incident;
11. the Plaintiff then walked from the deck back onto the elevated beam untethered;
12. Plaintiff was still untethered when he came to the area where the workers were now hoisting the Steel Beam with the chain fall;
13. Plaintiff indicated to the workers that he wished to pass and they indicated to him that he could pass;
14. Plaintiff began to pass the workers and the Steel Beam, which was now being hoisted above him by the chain fall;
15. the Plaintiff had passed the workers when the workers lost control of the chain fall;
16. The Steel Beam swung and struck the Plaintiff in the back, causing him to fall to the ground.

Upon review of the submitted papers and having heard oral argument, the Court finds that the Plaintiff has established prima facie entitlement to summary judgment on his Labor Law §240(1) claim. Specifically, there is no dispute that the Plaintiff was struck by a hoisted/elevated object, which caused him to fall from a height. As such, the Plaintiff has established prima facie that the underlying action is squarely within the scope of Labor Law §240(1) as both a "falling worker" accident and a "falling object" accident.

Further the Court finds that the Defendants have failed to raise an issue of fact based upon their "recalcitrant worker" argument. As argued by the Defendants, "[l]iability under section 240 (1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident. In such cases, plaintiff's own negligence is the sole proximate cause of his injury." (Gallagher v. New York Post, 14 NY3d 83, 88 (NY 2010) citing Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35 (NY 2004). However, in order to raise an issue of fact regarding plaintiff's recalcitrance, the Defendants were required to show that: "(a) plaintiff had adequate safety devices at his disposal; (b) he both knew about them and that he was expected to use them; (c) for "no good reason" he chose not to use them; and (d) had he used them, he would not have been injured" (Tzic v Kasampas, 93 AD3d 438, 439 (NY App. Div. 1st Dept 2012).

The Defendants argue in sum and substance three points in opposition to the Plaintiff's motion for summary judgment:

- that the accident would not have occurred had the Plaintiff kept his harness attached to the yo-yo on his way back from his work area to the deck;
- that the Plaintiff could have kept his harness attached to the yo-yo on his way back to the deck if he had either asked the workers to lower the hoist or waited until the workers had finished hoisting the Steel Beam; and
- that the Plaintiff' had no "good reason" to detach himself from the yo-yo given that he could have either asked the workers to lower the hoist or waited until the workers had finished hoisting the Steel Beam

However, the Defendants have submitted no admissible evidence in support of said arguments. Although the Defendants argue that the underlying accident would not have occurred but for the Plaintiff's "choice" not to ask for the workers to lower the hoist, the Defendants' sole basis for said "argument" comes from the affirmation of Defendants' counsel. The Defendants have offered no proof to show that the Plaintiff would not have been struck by the Steel Beam had he waited for the workers to fully lower the beam before passing by them, or even that the workers would have fully lowered the beam had the Plaintiff asked them to do so.

In addition, it is undisputed that the workers lost control of the hoist and that the Steel Beam struck the Plaintiff. The Defendants have failed to offer any proof to show that the workers would have somehow not lost control of the hoist and/or that the hoisted Steel Beam would not have struck the Plaintiff had the Plaintiff waited until the workers had finished hoisting the beam. Further, although the Defendant's expert addresses the fact that the Plaintiff had detached his harness at the time of the accident, said expert does not in anyway suggest that, had the Plaintiff been wearing his harness, the workers would not have lost control of the hoist and/or that the Plaintiff would not have been struck by the Steel Beam.

Further, there is nothing in the Defendants' expert's affidavit nor any of the Defendants' admissible evidence to "question" the Plaintiff's choice to detach his harness prior to passing the workers and/or the Plaintiff's choice to pass the workers (after notifying them that he was going to pass them) as opposed to staying tethered and waiting for them to either lower the Steel Beam or finish hoisting it. The Plaintiff testified that he had to unharness himself in order to safely pass the workers and get more supplies for the work he was doing. He further testified in sum and substance that he could not wait for the workers to finish hoisting the Steel Beam before passing them, as he would have been criticized for it. Although the Defendants argue that the Plaintiff violated the rules of the Project site by detaching his harness while working in an elevated area, they have offered no proof to question the Plaintiff's choice to detach himself in order to pass the workers. Specifically, the Defendants offer no admissible proof to show that the Plaintiff could have safely passed the workers, the hoist and the Steel Beam, without first detaching his harness.

Further, the Plaintiff did not fall at the time he detached himself from the yo-yo. After the Plaintiff detached himself from the yo-yo, he was able pass the workers (for the first time) and get to the deck without incident. It was not until the second time he passed the workers, as he was returning to his work area from the deck, that the accident occurred. The Defendants do not dispute the fact that the Plaintiff could not tether himself upon entering the beam from the deck. As such, the Defendant has failed to show that that the Plaintiff's "choice" to detach himself was the proximate cause of the accident. There were multiple intervening "steps" that occurred between the time the Plaintiff detached himself and the accident. Specifically, in between the time the Plaintiff detached himself and the moment he was struck by the Steel Beam, the Plaintiff traversed the elevated beam back to the deck without incident and re-entered the beam from the deck, where there was no yo-yo for him to attach himself to.

In addition, the fact that the Plaintiff could not tether himself upon entering the beam from the deck cuts against the Defendants' "recalcitrant worker" argument. The Defendants' entire "recalcitrant worker" argument hinges on the idea that Hunter Rose required all laborers working at an elevation to use the appropriate safety equipment. The Defendants do not argue that there were any other safety devices functionally equivalent to the yo-yo/harness system available to the Plaintiff. As such, the fact that the Plaintiff could not tether himself upon entering the beam from the deck meant that the Plaintiff had to transverse a significant span of the elevated beam without safety attachments in order to even get to his work area. The Defendants cannot argue that the Plaintiff was a "recalcitrant worker" for violating a rule requiring him to use appropriate safety equipment when working at an elevation, while at the same time allowing a situation to exist where the Plaintiff could not even get to his work area without first violating said rule.

The Court further finds that the Defendants' expert affidavit was conclusory and insufficient to raise an issue as to whether or not the Plaintiff's detached harness was the sole proximate cause of the underlying action. The Defendant's expert in no way indicates that the workers would not have lost control of the hoist and/or that the Plaintiff would not have been struck by the Steel Beam, had the Plaintiff's harness been attached. Similarly, the expert gives not basis for her conclusion that the Plaintiff's accident would not have occurred but for the fact that the Plaintiff's harness was detached.

"[O]nce a Labor Law § 240 (1) violation and proximate cause are established, a defendant cannot raise an injured employee's contributory negligence as a defense" (Barreto v Metropolitan Transp. Auth., 25 NY3d 426, 436 (NY 2015) [internal citations omitted]). The Defendants' argument that the Plaintiff was a "recalcitrant worker" would only have been sufficient to warrant denying Plaintiff's motion for summary judgment if the Defendants had submitted proof sufficient to create an issue of fact as to whether the Plaintiff's choice to detach his harness and/or the Plaintiff's choice not to wait until the

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workers had hoisting the steel was the sole proximate cause of the alleged accident (See Gallagher v. New York Post, 14 NY3d 83, 88 (NY 2010))). However, the Defendants' argument on this point are built entirely upon unsupported hypotheticals as to how the accident might have been prevented. Said hypotheticals were based primarily upon Defendants counsel's assertions as to "safer" choices the Plaintiff might have made.

As such, the Defendants' argument that the Plaintiff was a "recalcitrant worker" is insufficient to create an issue of fact in opposition to the Plaintiff's motion for summary judgment on his Labor Law 240.0(1) claim. For these same reasons, the Defendants have also failed to establish that they are entitled to summary judgment dismissing the Plaintiff's Labor Law §240.0(1) claim.

Further, as the Court is granting the Plaintiff summary judgment on his Labor Law §240.0(1) claim (i.e. that the Defendants violated Labor Law §240.0(1) and are therefore liable to the Plaintiff) the Court need not reach the Plaintiff's remaining claims in negligence and/or pursuant to Labor Law §§ 200 and 241(6).[2] The only issue remaining issue remaining in the underlying action is the determination of damages the Plaintiff incurred as a result of the accident.

[2] Though the Court does recognize that the Plaintiff conceded to the dismissal of his Labor Law §200 claim at oral argument.

Conclusion

Accordingly, it is hereby

ORDERED that the Plaintiff motion for summary judgment on his Labor Law § 240(1) claim against the Defendants is hereby granted. It is further

ORDERED that the Defendants' motion for summary judgment is denied. It is further

ORDERED that Plaintiff is directed to serve a copy of this Order with Notice of Entry upon the Defendants and upon the Clerk of the Court who is directed to enter judgment accordingly.

The foregoing constitutes the ORDER and DECISION of the Court.

Dated: December 8, 2016