Wasilewski v 533 Leo, LLC
2017 NY Slip Op 31451(U)
July 7, 2017
Supreme Court, Kings County
Docket Number: 502878/15
Judge: Debra Silber
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 7th day of July 2017.

P R E S E N T:

HON. DEBRA SILBER

Justice.

----------X

ROBERT WASILEWSKI,

Plaintiff,

- against -

533 LEO, LLC AND SUNRISE CONSTRUCTION, LLC,

Defendants.

----------X

533 LEO, LLC AND SUNRISE CONSTRUCTION, LLC

Third-Party Plaintiffs,

- against -

JANBAR, INC.,

Third-Party Defendant.

----------X

DECISION / ORDER

Index No. 502878/15

Mot. Seq. #1

The following papers numbered 1 to 23 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1- 15
Opposing Affidavits (Affirmations)	16-18, 19-21
Reply Affidavits (Affirmations)	22, 23
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiff Robert Wasilewski moves for an order, pursuant to CPLR 3212, granting him partial summary judgment as to liability against defendants/ third-party plaintiffs 533 Leo, LLC and Sunrise Construction, LLC on his Labor Law §§ 240(1) and 241(6) causes of action.

Factual Background

This is an action to recover monetary damages for personal injuries allegedly sustained by the plaintiff Robert Wasilewski (plaintiff) on February 6, 2015, while working at a jobsite located at 533 Leonard Street, Brooklyn, New York (the premises). Defendant/third-party plaintiff 533 Leo, LLC (Leo) owned the subject premises, which was undergoing a construction/renovation project involving demolition and construction to expand an existing building and create new condominiums in the space. Defendant/third-party plaintiff Sunrise Construction, LLC (Sunrise) was the general contractor in charge of the construction/renovation project. Third-party defendant Janbar, Inc. (Janbar) was a subcontractor hired by Sunrise to perform certain concrete, steel, masonry and other work on the project. At the time of the accident, the plaintiff was employed by Janbar.

During his deposition, the plaintiff testified that the project which he was working on involved the renovation of an old building, which had a cellar/basement and two stories located above it. During the project, the plaintiff received all of his instructions from his Janbar foreman, Grzegorz Kowalski (Kowalski). On the morning of the accident, Kowalski instructed the plaintiff to cut off two pieces of metal that were sticking out of a beam located in and/or near an opening in the floor. Plaintiff explained that the opening was in the first floor, at an elevation of about ten to twelve feet above the basement level beneath it. The

metal beam that the plaintiff was instructed to cut was located in or at the edge of the opening. The opening was intended for the installation of a staircase later during the project. Kowalski instructed the plaintiff to place planks over the uncovered opening to support him while he performed the cutting work.

Just before the accident occurred, plaintiff was arranging the planks in order to access the area where he had to cut the steel pieces. He placed the planks over the opening in the floor. According to the plaintiff, the planks were not long enough. He first placed two planks over the opening and cut off the first of the two pieces of the steel beam he was instructed to cut. Plaintiff then picked up a third plank and placed it on over the opening. When he went to get the fourth plank, he stepped on to one of the previously placed planks, which moved, causing him to fall through the opening to the basement, approximately ten to twelve feet below. The plank that the plaintiff stepped on was not tied down or secured in any way. Plaintiff further testified that he was never instructed to secure the planks, and there was no safety fence (railing) around the floor opening. At the time of the accident, the plaintiff was wearing a safety harness, but he claimed there was no place for him to tie-off or attach it in the area where he was working. According to plaintiff, he was not hooked onto any safety line because one had not been erected in the area he was working. Plaintiff claimed that when he asked Kowalski for a safety line, Kowalski told him it would take too long to install. Plaintiff further testified that on the morning of the accident, he did not see any scaffold located directly underneath the opening which he fell through, nor was he told to use a scaffold. Although the plaintiff had seen safety netting around the opening previously, he did not remember if the netting was in place at the time of the accident.

On or about March 13, 2015, the plaintiff commenced this action against defendants Sunrise and Leo seeking to recover damages for his injuries. Plaintiff alleges violations of Labor Law §§ 240(1), 241(6), 200 and common-law negligence. Issue was joined by defendants with the service of their Verified Answer dated April 9, 2015. Leo and Sunrise thereafter commenced a third-party action against Janbar. The parties engaged in discovery and, on August 15, 2016, the plaintiff filed a note of issue and certificate of readiness. Plaintiff now moves for partial summary judgment as to liability on his Labor Law §§ 240(1) and 241(6) causes of action.

Discussion

Labor Law § 240(1)

Plaintiff seeks partial summary judgment as to liability on his Labor Law § 240(1) cause of action against defendants Leo and Sunrise. It is well settled that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], *citing Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*Alvarez v Prospect Hospital*, 68 NY2d at 324; *see also, Smalls v AJI Industries. Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

In support of his motion, plaintiff contends that he is entitled to summary judgment on his section 240(1) claim as a matter of law based on his own deposition testimony that he fell approximately ten to twelve feet from unsecured planking, that he was not provided with appropriate safety devices that could have prevented his fall, and that the lack of such devices was the proximate cause of the accident. Specifically, in order to perform his assigned task of cutting portions of a metal beam, the plaintiff was instructed by his Janbar foreman, Kowalski, to place wooden planks over an opening in the floor in order to make a platform on which he could work. It is undisputed that the planks were not secured in any way, and that the plaintiff, while stepping on an unsecured plank, fell through the opening into the basement. The plaintiff further testified that there was no barrier around the opening, and although he wore a safety harness, no safety lines were erected or available in the subject area to which he could have attached his harness. Based upon the foregoing, plaintiff argues that he is entitled to summary judgment on his Labor Law § 240(1) cause of action against Leo and Sunrise (*see Vetrano v J. Kokolakis Contracting, Inc.*, 100 AD3d 984, 986 [2012]; *Moran v 200 Varick St. Assoc.*, LLC, 80 AD3d 581, 582 [2011]; *Chlebowski v Esber*, 58 AD3d 662, 663 [2009]; *Madalinski v Structure-Tone, Inc.*, 47 AD3d 687, 687-688 [2008]).

In opposition, Leo and Sunrise (collectively, defendants) argue that the evidence in the record demonstrates that the plaintiff was in fact provided with the proper safety devices. In this regard, defendants refer to the deposition testimony of Jansusz Bartnicki, the owner of Janbar. Bartnicki testified that Kowalski, the foreman on the job, held safety tool box meetings once a week on Mondays during the renovation period. He further

testified that the workers were told to use a safety harness if the job was dangerous, and that Janbar provided safety lines to its workers. Bartnicki claimed that everyone on the job, including the plaintiff, had his own harness. Bartnicki further stated that when he heard about the accident, he was told that the plaintiff was not using a safety line at the time of the accident because he was "lazy." Although Bartnicki admitted that he did not know if the plaintiff had hooked up his harness to a safety line at the time of the accident, he claimed that Janbar provided harnesses and safety lines to its workers, and that there were lots of things to which the workers could have connected a safety line, such as beams and/or poles which were supporting the next floor. When shown a photograph of the accident location, Bartnicki pointed to a black pole depicted therein and testified that the plaintiff could have connected a safety line onto that pole. Bartnicki additionally testified that, at the time of the accident, there were scaffolds located on the floor below where the plaintiff was working. Defendants additionally refer to the deposition testimony of Jeffrey Amengual, the Director of Construction for Sunrise, who testified that, at the time of the accident, Janbar had a scaffold located directly below the opening involved in the accident. Based upon the forgoing, defendants argue that the plaintiff had access to safety lines, as well as a scaffold, at the time of the accident and, thus, there were available safety devices at the site that he could have used to prevent the accident.

Defendants further argue that there are conflicting versions of how the accident occurred, thereby precluding summary judgment in plaintiff's favor. In this regard, defendants contend that there is evidence in the record suggesting that the plaintiff was caught by his safety harness when he initially fell through the opening, and that his

injuries occurred when he fell a second time as a result of being removed from that harness. Defendants have submitted a certified copy of the New York City Fire Department (FDNY) pre-hospital care report (ambulance call report) which states the following: "PT [patient] STS [states] HE FELL OFF A CONSTRUCTION BEAM AND WAS SAFELY CAUGHT BY HARNESS 5 FEET FROM GROUND. WHEN PT WAS REMOVED FROM HARNESS HE FELL AGAIN ONTO LEFT ARM AND SHOULDER CAUSING INJURY" (Baxter Affirmation in Opposition, Exhibit B). The report indicates that it was authored by Shmuel Rosenfeld, an Emergency Medical Technician (EMT).

Defendants have submitted the non-party deposition transcript of EMT Shmuel Rosenfeld (Baxter Affirmation in Opposition, Exhibit C). During his deposition, Rosenfeld testified that he was a paramedic employed by the FDNY, and that on the date of the plaintiff's accident, he responded to the scene. Rosenfeld further testified that the statement that the plaintiff fell a subsequent time onto his left arm upon being removed from the harness could have come from the plaintiff or from someone else who was on the scene, such as a coworker. Based upon the foregoing, defendants argue that there is an issue of fact as to whether the plaintiff's injuries were a result of the initial fall, which was arrested by the harness and safety line, or his subsequent fall when the harness was removed, causing him to fall an additional five feet. Defendants contend that plaintiff's subsequent fall due to his removal from the harness was an intervening act establishing a superseding cause for plaintiff's injuries thereby precluding liability under section 240(1).

Janbar additionally opposes the plaintiff's motion arguing that issues of fact remain as to whether the plaintiff's own conduct in failing to properly place the planks over the opening, and failing to hook his harness to a safety line or tie-off was the sole proximate cause of the accident. Janbar has submitted the affidavit of Grzegorz Kowalski, Janbar's foreman at the site, wherein he avers that the subject opening in the floor had orange safety netting around it, which had been installed by Sunrise's employees (Zamurs Affirmation, Exhibit E). He further states that, on the day of the accident, he instructed the plaintiff to slide planks over the opening in a manner in which they would overlap to prevent them from flipping up. Kowalski avers that he never told the plaintiff not to secure the planks. He further avers that the plaintiff had a safety harness, and that Janbar had safety lines available at the site, and that the area where the plaintiff was working had a number of areas a worker could tie-off in order to prevent a fall. He further states that he never told the plaintiff not to use or install a safety line before the accident.

Janbar also refers to the deposition testimony of Jeffrey Amengual, Sunrise's Director of Construction, wherein he testified that he found out about the accident through a telephone call from a man named Zachary Goodman, the site superintendent for Sunrise. Amengual went to the accident site approximately five minutes after the call and noticed that the safety netting around the opening had been disturbed. Amengual further testified that Goodman told him that he (Goodman) had told all Janbar employees, including the plaintiff, that they were not supposed to be working on planks. According to Amengual, Goodman told him that he specifically told the plaintiff not to put planks in the opening and that the plaintiff disregarded his instructions. Based upon the foregoing, Janbar argues that the evidence

demonstrates that the plaintiff failed to follow the instructions from a Sunrise representative, and that he also failed to properly place the planks over the opening as instructed by his Janbar foreman. Janbar therefore argues that the plaintiff's actions were the sole proximate cause of the accident.

Labor Law § 240(1) is designed to protect employees on construction sites from elevation-related risks. This section provides that:

> "All contractors and owners and their agents ... who contract for but do not direct or 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."

Elevation risks covered by the statute 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 (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). In order to prevail on a cause of action pursuant to Labor Law § 240 (1), a plaintiff must establish that an owner or contractor failed to provide appropriate safety devices at an elevated work site and that such violation of the statute was the proximate cause of his or her injuries (*see Ramsey v Leon D. DeMatteis Constr. Corp.*, 79 AD3d 720, 722 [2010]; *see also Vetrano v J. Kokolakis Contracting, Inc.*, 100 AD3d 984, 985 [2012]).

Here, the court finds that the plaintiff has demonstrated a prima facie entitlement to judgment as a matter of law on his Labor Law § 240 (1) cause of action. Plaintiff's deposition testimony established prima facie that, while subjected to an elevation-related risk (working over a floor opening approximately ten to twelve feet above the basement floor below), he was injured due to defendants' failure to provide him with appropriate safety devices that could have prevented his fall, and that the lack of such devices was the proximate cause of the accident (*see Anderson v MSG Holdings, L.P.*, 146 AD3d 401, 402 [2017]; *Hoffman v SJP TS, LLC*, 111 AD3d 467 [2013]; *Vetrano,* 100 AD3d at 985).

In opposition to the plaintiff's prima facie showing, the defendants Leo and Sunrise have failed to raise a triable issue of fact (*see Vetrano,* 100 AD3d at 986; *see also Gallagher v New York Post*, 14 NY3d 83, 88-89 [2010]; *Andresky v Wenger Constr. Co., Inc.*, 95 AD3d 1247, 1249 [2012]). The court rejects defendants' contention that the ambulance call report, which contains statements suggesting that the plaintiff initially fell and was caught by his harness before a subsequent fall upon the removal of his harness, raises an issue of fact as to how the accident occurred. It is well settled that a translated statement contained within an ambulance call report may be potentially admissible in evidence as a business record or as an admission against interest, but only upon a showing that the plaintiff was the source of the statement, and that its translation was accurate (*see Martinez v New York City Tr. Auth.*, 41 AD3d 174, 175 [2007]; *Quispe v Lemle & Wolff Inc.*, 266 AD2d 95, 96 [1999]). The defendants have failed to make either showing here. It is undisputed that the plaintiff only spoke the Polish language and did not speak any English. Thus, the defendants were required to establish that the plaintiff was the source of the information and that the translation from

Polish to English in the ambulance call report was accurate, which they failed to do (*see Quispe*, 266 AD2d at 96). In fact, the author of the subject report, Samuel Rosenfeld, admitted during his deposition that he had no recollection of attending to the plaintiff or if someone else had attended to him before he arrived at the scene, or how the plaintiff was removed from the harness he was wearing. According to Rosenfeld, another ambulance unit responded to this call in addition to him. He also did not recall if he personally spoke with the plaintiff, or if anyone translated the plaintiff's statements so that he could understand them. Rosenfeld further testified that he was not sure of the source of the information in the report which indicated that the plaintiff fell a second time when he was removed from the harness. He admitted that he had no independent recollection of the circumstances surrounding his response to the plaintiff's accident and injuries. Thus, contrary to the defendants' contention, the statements set forth in the ambulance call report fail to raise an issue of fact precluding summary judgment in plaintiff's favor on his Labor Law § 240(1) cause of action.

Additionally, although it is undisputed that the plaintiff was wearing a safety harness, there is no evidence that he was provided with a safety line to which he could have tied-off or attached his harness at the time of the accident. Plaintiff specifically testified that at the time he started moving the planks, his harness was not hooked up to a safety line because one was not in place near the opening where he was working (Mark Affirmation, Exhibit 6, at 130). Plaintiff claimed that when he asked Kowalski for a safety line, Kowalski told him it would take too long (*id.*). While there is deposition testimony that some safety lines existed at the site, there is no evidence that there were any safety lines actually in place and available

for plaintiff's use in the area in which he was working at the time of the accident. Thus, defendants have not sufficiently refuted plaintiff's testimony that there was no place for him to tie-off his harness (*see Myiow v City of New York*, 143 AD3d 433, 435 [2016]; *Hoffman,* 111 AD3d at 467 [2013] [although plaintiff was wearing his safety harness, there was no appropriate anchorage point to which the lanyard could have been tied-off]; *Phillip v 525 E. 80th St. Condominium,* 93 AD3d 578, 579 [2012] ["although plaintiff was provided with a safety harness, there was no location on the truck where the harness could be secured"]; *Cordeiro v TS Midtown Holdings, LLC*, 87 AD3d 904, 905 [2011]).

Furthermore, any attempt to argue that the plaintiff was a recalcitrant worker, predicated on his failure to secure his harness to a safety line or install a safety line, is unavailing. It is well settled that to establish the recalcitrant worker defense, the owner/contractor must demonstrate that a worker deliberately refused to employ safety devices available, visible and in place at the worksite (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39–40 [2004]; *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562–563 [1993]). While there is deposition testimony (by Janbar's owner, Bartnicki) suggesting that the plaintiff could have tied-off and attached to a nearby pole, there is no evidence in the record that the plaintiff was aware of this pole as being a suitable place to install a safety line, or that he was instructed to erect or install a safety line himself in the vicinity of his accident, and refused to do so. In fact, during his deposition, the plaintiff testified that in the three to four years that he had worked for Janbar prior to the accident, he had never erected a safety line himself (Mark Affirmation, Exhibit 6, at 63-64). According to the plaintiff, a Janbar foreman, named Mateuz Nawrocki, usually erected the safety lines

at the site, by securing them with a "special knot," one that apparently only Nawrocki had mastered in making (*id.* at 64-66).

Additionally, Janbar has failed to raise an issue of fact as to whether the plaintiff disobeyed instructions from Sunrise's site superintendent to not work on the planks. Janbar's reliance upon the deposition statements made by Jeffrey Amengual, Sunrise's director of construction, constitutes inadmissible hearsay (*see Mallen v Farmingdale Lanes, LLC*, 89 AD3d 996, 997 [2011]).

Even if the plaintiff were deemed a recalcitrant worker, which the record herein does not support, defendants have failed to raise an issue of fact to rebut plaintiff's prima facie showing that the collapse of the unsecured planking (makeshift platform) was also a proximate cause of the accident (*see Olszewski v Park Terrace Gardens,* Inc., 306 AD2d 128, 128 [2003]). It is undisputed that the planks were unsecured and subject to movement during the plaintiff's work. Since the planking was insufficient to protect plaintiff from the elevation-related hazard that caused his harm, plaintiff was not, under any view of the evidence, the sole proximate cause of his injuries (*see Osario v BRF*, 23 AD3d 202 [2005]; *Lajqi v New York City Tr. Auth.*, 23 AD3d 159 [2005]). Thus, on this record, it is clear that any negligence in plaintiff's failure to tie-off his harness, or properly position the planking, if in fact there is a safe way to position unsecured planks, was not the sole proximate cause of the accident (*Allen v N.Y. City Transit Auth.*, 35 AD3d 231, 232 [2006]).

Furthermore, defendants' assertion that the plaintiff should have used a scaffold in the basement and that his failure to do so was a proximate cause of the accident is unavailing (*see Orellana v Am. Airlines*, 300 AD2d 638, 639 [2002]["The mere presence of ladders

somewhere at the work site does not establish that such devices were so placed as to give the proper protection required by the statute"]). There is no evidence in the record that the plaintiff was ever directed or expected to use a scaffold in order to perform his job at the time of the accident. Rather, it is undisputed that the plaintiff was following the specific directions of Kowalski to use the planking (unsecured) as a platform from which to work. Given the set of facts presented herein, defendants' argument that the plaintiff's injuries were entirely his fault, when he was following the directions of his Janbar foreman, is unavailing as well (*see Tapia v Mario Genovesi & Sons, Inc.*, 72 AD3d 800, 802 [2010]; *see also Fernandez v BBD Developers, LLC*, 103 AD3d 554, 555-556 [2013] ["[A] plaintiff cannot be the sole proximate cause of his or her injuries where uncontroverted evidence shows that the plaintiff followed his or her supervisor's instructions"]). Additionally, even assuming that the plaintiff was in some way negligent in the manner he positioned the planks over the opening, it is well settled that comparative negligence is not a bar to recovery under Labor Law § 240 (1) (*see e.g. Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 49 [2005]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [2002]). The defendants have failed to establish that the plaintiff was the sole proximate cause of the accident. Accordingly, that branch of the plaintiff's motion seeking partial summary judgment as to liability on his Labor Law § 240(1) cause of action is granted as against defendants Leo and Sunrise.

Labor Law § 241(6)

Plaintiff also seeks summary judgment on his Labor Law § 241(6) cause of action against Leo and Sunrise. Labor Law § 241(6) imposes on owners and contractors a nondelegable duty "to provide reasonable and adequate protection and safety to persons

employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Perez v 286 Scholes St. Corp.*, 134 AD3d 1085, 1086 [2015]; *Lopez v New York City Dept. of Envtl. Protection,* 123 AD3d 982, 983 [2014]). To establish liability under Labor Law § 241(6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision mandating compliance with concrete specifications (*see Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]; *La Veglia v St. Francis Hosp.*, 78 AD3d 1123 [2010]; *Pereira v Quogue Field Club of Quogue, Long Is.*, 71 AD3d 1104 [2010]). Furthermore, it is well settled that provisions of the Industrial Code that reiterate general common-law standards and that do not mandate compliance with concrete specifications are not a basis for liability under section 241(6) (*see Ross v Curtis-Palmer Hydro Elec. Co.*, 81 NY2d at 505).

In support of his section 241(6) claim, plaintiff alleges that the opening into which he fell was in violation of 12 NYCRR 23-1.7(b)(1)(i), which requires that "[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule)." This regulation has been found sufficiently concrete in its specification to support a cause of action under Labor Law § 241(6) (*see Scarso v M.G. Gen. Constr. Corp.*, 16 AD3d 660, 661 [2005]; *Olsen v James Miller Marine Serv., Inc.*, 16 AD3d 169, 171 [2005]). The court finds that the plaintiff has submitted sufficient evidence to prima facie establish a violation of Labor Law § 241(6) predicated upon section 23-1.7(b)(1)(i), in that the undisputed evidence establishes that the opening in the floor was large enough for the plaintiff to fall

through to the lower basement level, and no fence, barricade or safety railings were installed around it. Moreover, the court notes that none of the parties oppose this branch of the plaintiff's motion. Thus, plaintiff's motion for partial summary judgment as to liability pursuant to Labor Law § 241(6) is hereby granted.

Conclusion

Accordingly, plaintiff's motion for an order pursuant to CPLR 3212 for partial summary judgment on the issue of liability pursuant to Labor Law §§ 240(1) and 241(6), with the latter predicated upon a violation of Industrial Code section 23-1.7(b)(1)(i), is granted against defendants Leo and Sunrise.

The foregoing constitutes the decision and order of the court.

ENTER:

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court