SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 29

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JUAN CARLOS SALDARRIAGA and JESSICA VERA, Index No.: 158636/2016

Plaintiffs,

-against-

164 ATTORNEY STREET, LLC, 164-166 PARTNERS, LLC, 166 ATTORNEY STREET REALTY LLC and STRUCTURE TECH NEW YORK, INC.,

Defendants.

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Kalish, J.:

This is an action to recover damages for personal injuries allegedly sustained by a worker on July 14, 2016, when, while working on a ladder at a construction site located at 164 Attorney Street, New York, New York (the Premises), the ladder shifted, causing him to fall.

In motion sequence number 002, plaintiffs Juan Carlos Saldarriaga (plaintiff) and Jessica Vera move, pursuant to CPLR 3212, for summary judgment in their favor on the Labor Law §§ 240 (1) and 241 (6) claims against defendants 164 Attorney Street, LLC, 164-166 Partners, LLC and 164 Attorney Street Realty LLC (collectively, defendants).[1][2]

BACKGROUND

On the day of the accident, defendants owned the Premises where the accident occurred.

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[1]This action was discontinued as against defendant Structure Tech New York, Inc. by stipulation on December 5, 2017.

[2]While plaintiffs moved for summary judgment on that part of the Labor Law § 241 (6) claim predicated on an alleged violation of Industrial Code sections 23-1.21 (b) (4) (ii) and (iv), as acknowledged at an oral argument held on November 21, 2018, in their reply, plaintiffs withdrew said claims.

Plaintiff was employed by nonparty DeMar Plumbing (DeMar), a plumbing, fire protection and HVAC contracting company. DeMar served as the general contractor on a project at the Premises, which entailed the new construction of a building (the Project). At the time of the accident, plaintiff was installing a fire damper inside a duct located near a ceiling on the first floor of the Premises.

Plaintiff's Deposition Testimony

Plaintiff testified that, on the day of the accident, he was employed by DeMar, a company specializing in plumbing, fire protection and HVAC systems. On that day, DeMar was serving as the general contractor on the Project underway at the Premises. Plaintiff and four other DeMar employees were assigned to install ducts, fire dampers and access doors, as part of the installation of the building's air conditioning system.

Plaintiff testified that on the morning of the accident, DeMar's assistant foreman, a man named "Nick," asked him to install a fire damper inside a duct located in a room on the first floor of the Premises (plaintiff's tr at 26).[3] The damper, which weighed approximately 10-to-15 pounds, was to be inserted into the duct in order to prevent fire from passing through the duct to other parts of the Premises. Plaintiff described the floor in the subject room as covered with metal pipes and pieces of wood with nails. In order to reach the duct, which was approximately 12-to-14 feet high, it was necessary for plaintiff to utilize a metal 8-foot high A-frame ladder, which was provided by DeMar.

Plaintiff asserted that Nick set up the ladder on top of some round pipes that were lying on the floor and then leaned the ladder against the wall underneath the duct. Plaintiff explained

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[3]Plaintiff's assistant foreman's name is actually Mykola Zemba.

that Nick could not set up the ladder in an open position because the pipes and wood prevented the feet of the ladder to be placed squarely on the floor. Plaintiff specifically testified that the ladder's legs "rested over these pipes" (*id.* at 44).

Plaintiff maintained that when he informed Nick that he was not comfortable with the way the ladder was positioned, Nick climbed up onto the ladder and jumped on it a couple of times, in order to demonstrate that the ladder's placement was safe. Nick also told plaintiff "that he was going to hold it, not to worry" (*id.* at 41).

After plaintiff ascended the ladder to the second highest rung, he placed the damper inside the duct. Thereafter, plaintiff descended the ladder in order to get a drill and some screws to secure the damper in place. When plaintiff reached the bottom of the ladder, Nick was there.

Plaintiff then went back up the ladder, returning to the second highest rung. As he began to place the first screw in the damper, the ladder made a "violent" movement that caused plaintiff to fall to the floor on top of the pipes (*id.* at 43). After falling, plaintiff noticed that Nick was not there. When he yelled for help, Nick returned to the accident area and helped him up to his feet.

Plaintiff's Affidavit

In his affidavit, plaintiff stated that "[t]he pipes and wood made it impossible for the feet of the ladder to rest firmly and squarely on the floor" (plaintiff's aff). In addition, "[t]he upper end of the ladder was not secured by mechanical or other means at the upper end against side slip" at the time of the accident (*id.*). Plaintiff also maintained that he "was neither provided with, nor told of the availability of any safety harness, safety line, or other safety device to prevent or break [his] fall" (*id.*).

Affidavit of Mykola Zemba ("Nick") (DeMar's Assistant Foreman)

In his affidavit, Mykola Zemba ("Nick") stated that was DeMar's assistant foreman on the day of the accident. He asserted that after a DeMar employee asked him to retrieve some materials from the basement of the Premises, he instructed plaintiff to "wait for [him] to return to hold the base of the ladder before he climbed it to continue his installation work" (Zemba aff). While he was retrieving said materials, he was told that plaintiff fell from the ladder. Zemba maintained that he did not "place the ladder on unstable surfaces or on top of pipes covering the floor" (*id.*). In addition, he never instructed plaintiff "to climb an unstable ladder" (*id.*).

Deposition Testimony of Alex DeMarinis (DeMar Owner)

Alex DeMarinis testified that he was DeMar's owner on the day of the accident. He explained that DeMar served as the general contractor on the Project, and that DeMar is in the business of plumbing, fire protection and HVAC installation. He testified that plaintiff was installing duct work on a ladder at the time of the accident. When asked who owned the pipes that the ladder was placed on, he replied, "I believe it was the storage area for the materials" (DeMarinis tr at 41).

DISCUSSION

"'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 eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228

[1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The Labor Law § 240 (1) Claim (motion sequence number 002)

Plaintiffs move for summary judgment in their favor on the Labor Law § 240 (1) claim against defendants. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

> "All contractors and owners and their agents . . . 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 . . . 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'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

> "Not 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 Assoc.*, 96 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

The Court finds that Plaintiffs have met their prima facie burden of establishing that Labor Law § 240 (1) was violated through plaintiff's uncontested testimony that, while he performed his assigned work, the unsecured ladder on which he was working shifted, causing him to fall to the ground and become injured. Importantly, "'[w]here a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well-settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240 (1)'" (*Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004] [where the plaintiff was injured as a result of an unsteady ladder, the plaintiff did not need to show that ladder was defective for the purposes of liability under Labor Law § 240 (1), only that adequate safety devices to prevent the ladder from slipping or to protect the plaintiff from falling were absent], quoting *Kijak v 330 Madison Ave. Corp.*, 251 AD2d 152, 153 [1st Dept 1998]; *Hart v Turner Constr. Co.*, 30 AD3d 213, 214 [1st Dept 2006] [the plaintiff "met his prima facie burden through testimony that while he performed his assigned work, the eight-foot ladder on which he was standing shifted, causing him to fall to the ground"]; *Rodriguez v New York City Hous. Auth.*, 194 AD2d 460, 461 [1st Dept 1993] [Labor Law § 240

(1) violated where the ladder the plaintiff fell from "contained no safety devices, was not secured in any way and was not supported by a co-worker"]).

"[A] presumption in favor of plaintiff arises when a scaffold or ladder collapses or malfunctions 'for no apparent reason'" (*Quattrocchi v F.J. Sciame Constr. Corp.*, 44 AD3d 377, 381 [1st Dept 2007] [citation omitted], *affd* 11 NY3d 757 [2008]). "Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials" (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000]; *Cuentas v Sephora USA, Inc.*, 102 AD3d 504, 504 [1st Dept 2013]; *Melchor v Singh*, 90 AD3d 866, 869 [2d Dept 2011] [where the plaintiff was injured when the top of the ladder that he was working on slid away from the house, Court held that "[t]he defect in the ladder, and the fact that it was not secured, were substantial factors in causing plaintiff to fall"]).

It should be noted that it is not necessary for plaintiffs to show that the ladder was defective in order to recover under Labor Law § 240 (1), as "[i]t is sufficient for purposes of liability under section 240 (1) that adequate safety devices to . . . protect plaintiff from falling were absent" (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]; *Serra v Goldman Sachs Group, Inc.*, 116 AD3d 639, 640 [1st Dept 2014] [Court properly granted partial summary judgment as to liability on the plaintiff's Labor Law § 240 (1) claim "since plaintiffs submitted uncontradicted deposition testimony that the unsecured extended ladder upon which plaintiff was working slipped and fell out from underneath him"]; *McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 333-334 [1st Dept 2008] [where plaintiff sustained injuries "when the unsecured ladder he was standing on to drill holes in a ceiling tipped over," the plaintiff was not required to demonstrate, as part of his prima facie showing, that the ladder he was working on at

the time of the accident was defective]).

In addition, due to the nature of the task at hand, which required the ladder to be placed unopened on an uneven surface, an additional and/or different safety device, such as a rope to tie it off or other securing method was required to prevent plaintiff from falling (*see Ortega v City of New York*, 95 AD3d 125, 131 [1st Dept 2012] [where the plaintiff was working on an elevated work platform that "was taller than it was wide and rested upon wooden planks atop an uneven, gravel surface," the Court considered that "[i]t was foreseeable both that the plaintiff could fall off the elevated work platform and that the . . . rack could topple over"]; *Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006] [as it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake, additional safety devices were required to satisfy Labor Law § 240 (1)]).

"'[T]he availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures'" (*Nimirovski*, 29 AD3d at 762, quoting *Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]).

In opposition, defendants argue that plaintiffs are not entitled to judgment in their favor on the Labor Law § 240 (1) claim because plaintiff's foreman, Zemba ("Nick"), was available at the site to secure the ladder, so as to prevent plaintiff from falling. They further argue that plaintiff's recalcitrance in not following Zemba's instruction to wait for him to return, so that he could hold said ladder, made plaintiff the sole proximate cause of the accident. Where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1) (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]).

Here, defendants have not established that plaintiff was recalcitrant by showing 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 [1st Dept 2012], citing *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 10 [1st Dept 2011]; *see also Durmiaki v International Bus. Machs. Corp.*, 85 AD3d 960, 961 [2d Dept 2011]).

To explain, defendants argue that plaintiff was, in fact, supplied with a safety device to keep the ladder secure against movement, i.e., plaintiff's assistant foreman, Zemba. However, a coworker "is not a safety device contemplated by the statute" (*McCarthy v Turner Constr., Inc.*, 52 AD3d at 334 [Court found that "[t]he apprentice electrician working with plaintiff is not a safety device contemplated by the statute"]; *Noor v City of New York*, 130 AD3d 536, 541 [1st Dept 2015]). Moreover, "[n]or, even if plaintiff had disobeyed an instruction to have [him] hold the ladder steady for him, would [defendants'] liability for failing to provide adequate safety devices be reduced" (*McCarthy*, 5 AD3d at 334). "An instruction to avoid an unsafe practice is not a sufficient substitute for providing a worker with a safety device to allow him to complete his work safely" (*Vasquez v Cohen Bros. Realty Corp.*, 105 AD3d 595, 598 [1st Dept 2013]; *see Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993] [noting that "an instruction by the employer or owner to avoid using unsafe equipment or engaging in unsafe practices is not itself a 'safety device;'"Court found that recalcitrant worker defense did not apply where the plaintiff disobeyed his supervisor's instructions not to use a broken ladder unless someone was available to secure it for him]).

In any event, any alleged negligence on plaintiff's part in disregarding Zemba's

instruction to wait for him goes to the issue of comparative fault, and comparative fault is not a defense to a Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Guaman v 1963 Ryer Realty Corp.*, 127 AD3d 454, 455 [1st Dept 2015] [Court noted that "[e]ven if there were admissible evidence [that the 'plaintiff failed to attach his safety harness to the lifeline in the proper manner'], the scaffold fell as a result of the ropes supporting it being loosened, rendering plaintiff's alleged conduct contributory negligence which is not a defense to a Labor Law § 240 (1) claim"]; *Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014]; *Berrios v 735 Ave. of the Ams., LLC*, 82 AD3d 552, 553 [1st Dept 2011] [Court held that "even if plaintiff could be found recalcitrant for failing to use a harness, defendants' 'failure to provide proper safety [equipment] was a more proximate cause of the accident'"]; *Milewski v Caiola*, 236 AD2d 320, 320 [1st Dept 1997] [Court held that "even if plaintiff could be deemed recalcitrant for not having used the harness, no issue exists that the failure to provide proper safety planking was a more proximate cause of the accident"]).

"[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake*, 1 NY3d at 290). Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002] [internal quotation marks and citations omitted]).

Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed"§ (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

Thus, plaintiffs are entitled to summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that plaintiffs Juan Carlos Saldarriaga and Jessica Vera's motion (motion sequence number 002), pursuant to CPLR 3212, for summary judgment in their favor on the Labor Law § 240 (1) claim against defendants 164 Attorney Street, LLC, 164-166 Partners, LLC and 164 Attorney Street Realty LLC is granted; and it is further

ORDERED that the branch of the motion for summary judgment on the Labor Law.§ 241 (6) claim is withdrawn.

Dated: Dec 14, 2018

ENTER:

HON. ROBERT D. KALISH
J.S.C.