SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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JOSE GONCALVES and CRISTINA GONCALVES,

Plaintiffs,

- v -

NEW 56TH AND PARK (NY) OWNER, LLC N/K/A 56TH AND PARK (NY) OWNER, LLC, LEND LEASE (US) CONSTRUCTION LMB INC.,

Defendants.

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INDEX NO. 150847/2015

MOTION DATE

MOTION SEQ. NO. 004

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 004) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87

were read on this motion to/for partial summary judgment.

Plaintiffs move pursuant to CPLR 3212 for an order granting them partial summary judgment as to liability on their third cause of action alleging a violation of Labor Law § 240(1). Defendant opposes.

I. UNDISPUTED FACTS

Plaintiff Jose Goncalves was a carpenter employed by a nonparty subcontractor hired by defendant Lend Lease, the general contractor for the construction of a building at 432 Park Avenue in Manhattan. On May 9, 2014, he was instructed to go to the 57th floor to inspect a form for a supporting column into which concrete had been poured. To ensure that the column remained plumb, or straight, plaintiff's employer set up a chain hoist, a kind of rigging.

The chain hoist was connected to a wire rope sling, or choker. The choker encircled a steel post that was embedded in the top of the column which was approximately 15 feet high as measured from the elevated platform on which plaintiff stood. The hoist mechanism was some eight feet above the platform. The hoist was attached to the ground by a chain attached to an embedded piece of blue steel. Once pressure was applied to the hoist, it secured the steel post which lifted the column and rendered it straight. A worker would then climb to the top of the column to check that the poured concrete was level.

As a result of the accident, the New York City Department of Buildings (DOB) investigated and issued a violation to Lend Lease for failing to safeguard persons and property affected by the construction and ordered Lend Lease to cease use of the chain hoists. (NYSCEF 81).

At a deposition, Lend Lease's senior environmental health and safety manager testified that the top of the column was approximately 15 feet from the ground level and that plaintiff's employer supplied the chain hoists and inspected them for their safety; Lend Lease did not. What caused the chain to break, he stated, was never determined. (NYSCEF 73).

On March 24, 2017, plaintiff testified at his deposition that upon arriving at his assignment on the 57th floor, he saw that the chain hoist was attached to the top of the concrete form and that the hoist mechanism was eight feet above the floor, which was above where he stood on an elevated platform, and six feet away. Before he could begin his climb up the column, plaintiff heard a loud bang. He turned toward the bang and saw a chain come at him from the left. His face was struck by the chain which had attached the hoist to the column and snapped. He sustained a broken cheekbone, nose, and teeth. When asked if the hoist remained attached, plaintiff answered that he did not know as he had not seen it. (NYSCEF 78).

In an affidavit dated March 20, 2018, plaintiff alleged that he had been stricken in the face by the "entire chain hoisting mechanism" that had fallen from above and collapsed. (NYSCEF 79).

II. CONTENTIONS

A. Plaintiff (NYSCEF 68-84)

As it is undisputed that the chain that struck plaintiff had been some 15 feet above the floor on which he stood, plaintiff maintains that he is entitled to an award of summary judgment as to liability pursuant to Labor Law § 240(1). He argues that the chain hoist is a safety device which failed because it was not properly constructed, maintained, and secured, thereby exposing him to an elevation-related risk and establishing defendants' strict liability. (NYSCEF 69).

B. Defendants (NYSCEF 86)

In opposition, defendants claim that plaintiff fails to demonstrate a violation of Labor Law § 240(1) or that such a violation proximately caused his alleged injuries, observing that plaintiff testified that the chain struck the left side of his face and that there was no evidence that it had fallen from an elevated position. Thus, defendants maintain that there exists a factual issue as to whether the instrument of injury was the chain or the chain hoist. They also rely on plaintiff's testimony that there was nothing which would have prevented his injury, and assert that plaintiff offers no evidence that the chain was inadequate to secure the column or that it was a safety device.

Defendants also contend that even if there was a violation of Labor Law § 240(1), they cannot be held liable as the statute protects against a hazard that is not the hazard that caused plaintiff's injury. In any event, they assert that the hazard did not result from a height differential between the level where plaintiff stood and where the hoist was secured, and that plaintiff and the chain were on the same level. Thus, there is a triable issue as to the location of the chain in relation to plaintiff's position when it broke off. They also observe that as the purpose of the

chain hoist was to keep the column plumb, it did not constitute a safety device. Moreover, they maintain, there is no evidence that it was improperly or unsafely used and take issue with the affidavit in which plaintiff newly claims that the chain hoist fell.

C. Plaintiff's reply (NYSCEF 87)

Plaintiff references his testimony that the hoist was eight feet over the concrete floor, and that as he is five feet, five inches, it was above him. He also relies on the testimony of Lend Lease's senior environmental health and safety manager who states that the chain was attached to a piece of steel 15 feet high, and observes that hoists are specifically enumerated safety devices in Labor Law § 240(1).

III. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Labor Law § 240(1) provides, in pertinent part, that:

> [a]ll contractors and owners and their agents, . . . in the erection, . . . of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, . . . hoists, stays, ladders, slings, hangars, 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.

The statute imposes absolute liability on building owners and their agents for workplace injuries (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]; *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513 [1985]), and a "'flat and unvarying' duty upon the owner and contractor despite any contributing culpability on the part of the worker" (*Bland v Manocherian,* 66 NY2d 452, 461 [1985]; *Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 49 [1st Dept 2005]), even if they exercise no supervision or control over the work performed (*Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280, 287 [2003]). It is liberally construed. (*Koenig v Patrick Constr. Corp.*, 298 NY 313, 319 [1948]; *Quigley v Thatcher*, 207 NY 66, 68 [1912]).

Labor Law § 240(1) is "designed to prevent those types of accidents in which the . . . hoist . . . 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 [2009], *quoting Ross*, 81 NY2d at 501; *Naughton v City of New York*, 94 AD3d 1, 8 [1st Dept 2012]). There is no minimum height differential for a violation to be found. (*Wilinski v 334 E. 92 Hous.*, 18 NY3d 1 [2011]; *Auriemma v Biltmore*

Theatre, LLC, 82 AD3d 1, 9 [1st Dept 2011]; *affd as modified* 18 NY3d 1; *Thompson v St. Charles Condominium,* 303 AD2d 152, 154 [1st Dept 2003]).

To establish liability, the plaintiff must prove that his injuries proximately resulted from a violation of the statute. (*Blake*, 1 NY3d at 287; *Rocovich v Consol. Edison Co.*, 78 NY2d 509 [1991]). A violation may be found not only when a safety device malfunctions, but when the safety device provided does not operate so as to give "proper protection." (*Harris v City of New York*, 83 AD3d 104, 111 [1st Dept 2011]).

As a hoist constitutes a safety device under the statute, so too does its component, the chain. (*See e.g., Wade v Bovis Lend Lease LMB, Inc.*, 102 AD3d 476 [1st Dept 2013] [hoist, as safety device, failed when piece of guide rail that was part of hoisting mechanism, broke off and fell, striking plaintiff]; *Jiron v China Buddhist Assn.*, 266 AD2d 347 [2d Dept 1999] [statute protects workers from hazards of defective hoists or portions thereof from falling]).

Plaintiff's affidavit in support of the motion, in which he states for the first time that the entire chain hoisting mechanism had collapsed and fallen on him from above, constitutes an impermissible attempt to create a feigned issue of fact following his deposition, during which he stated that the chain struck him. (*See Tuzzolino v Consol. Edison Co. of New York*, 160 AD3d 568 [1st Dept 2018] [affidavit which conflicted with deposition testimony created feigned issue of fact]; *Chong v 457 W. 22nd St. Tenants Corp.,* 144 AD3d 591 [1st Dept 2016] [owner's affidavit wherein he stated that safety equipment had been provided to workers contradicted deposition testimony that he did not know if equipment had been provided, and presented feigned factual issue]).

As plaintiff's affidavit is thus disregarded, it is undisputed that the chain was the part that had struck him and that it had struck him from the left. Thus, there is no evidence that the chain fell on him from an elevation. (*See e.g., Brownell v Blue Seal Feeds, Inc.,* 89 AD3d 1425 [4th Dept 2011] [plaintiff did not show that he was struck by falling object, rather, piece of rebar swung outward in horizontal direction before hitting him]; *Mosher v County of Rensselaer*, 232 AD2d 952, fn 2 [3d Dept 1996] ["(t)here is . . . no liability under Labor Law § 240(1) when a plaintiff is injured as the result of the horizontal or lateral movement of materials or equipment"]).

Plaintiff thus fails to meet his *prima facie* burden of establishing that defendants violated Labor Law § 240(1). (*See Podobedov v E. Coast Constr. Group, Inc.*, 133 AD3d 733 [2d Dept 2015] [as plaintiff did not see falling object, how it fell, or where it fell from, his belief that object fell from sixth floor did not establish, *prima facie*, that injuries were caused by violation of statute]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for partial summary judgment on his Labor Law 240(1) claim is denied.

12/21/2018
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE