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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SHLOMO S. HAGLER, J. PART 17
Justice

Index Number : 114452/2010
POUSO, JUAN
vs.
COLUMBIA UNIVERSITY
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for Summary Judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1
Answering Affidavits — Exhibits _____ No(s). 2
Replying Affidavits _____ No(s). 3

Upon the foregoing papers, it is ordered that this motion is

THIS MOTION/ORDER TO SHOW CAUSE IS DECIDED IN ACCORDANCE WITH THE ATTACHED ORDER.

FILED
JAN 03 2013
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/21/12

_____, J.S.C.
SHLOMO S. HAGLER, J.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 17

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JUAN POUSO,

Plaintiff,

Index No.: 114452/10

-against-

COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,

DECISION/ORDER

Defendant.

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SHLOMO S. HAGLER, J.:

Plaintiff Juan Pouso ("Pouso" or "plaintiff") moves, pursuant to CPLR § 3212, for summary judgment on the issue of liability on his causes of action based on violations of Labor Law §§ 240 (1) and 241 (6). Defendant Columbia University in the City of New York ("Columbia University" or "defendant") opposes the motion.

BACKGROUND

Plaintiff is a construction worker who was injured on July 20, 2010, while working on a job that consisted of expanding defendant Columbia University's facilities. At the time of the occurrence, plaintiff was employed by Felix Associates LLC ("Felix"), a utilities contractor, performing excavation work for the installation of utilities for the expansion project ("Project"). The accident occurred at the corner of West 125th Street and 12th Avenue, New York, New York.

Plaintiff provided a portion of the agreement entered into between Columbia University and Stantec (the engineers therein), which indicates that Columbia University is the owner of the Project, and that Bovis Lend Lease LMB, Inc. ("Bovis") is the project manager. (See, Exhibit "G" to the motion). Plaintiff also attached the trade contract entered into between Bovis, as construction manager, and Felix, plaintiff's employer, which also identifies Columbia University as the owner of the Project. (See, Exhibit "H" to the motion).

According to the report filed by Felix on the day of the accident,

> "[a]t approximately 4:00 am this morning, [plaintiff] fell approximately 4.5 feet into a trench, located at the intersection of 12th Avenue and 125th Street, from a cross brace which is attached to one set of legs of the slide rail system. The crew was in the process of installing the slide rail system in order to sheet the trench for further excavation for installation of the sewer line. [Plaintiff] was unhooking the chain sling that was used to lower the leg into the trench. There was a slight downward movement of the cross brace which caused [plaintiff] to lose his balance resulting in the ensuing fall.
> A 911 call was immediately placed and an ambulance was dispatched to the job site. [Plaintiff] was brought to St. Luke's Hospital for treatment and underwent a series of tests. As of this afternoon, it appears that he has a deep bruise to his ribs and could be released from the hospital later today."

(See, Exhibit "I" to the motion).

At his examination before trial ("EBT"), plaintiff averred that the accident occurred while he was working in or next to a trench. (See, Exhibit "D" to the motion, Plaintiff's EBT, at

39). According to plaintiff, as the trench was being excavated, metal panels were being put into place to support the side of the trench, the metal panels being lowered into place by a large excavator machine. *Id.* at 43-45. Plaintiff testified that, after the metal panels are in place, a metal brace is installed across the trench to prevent any sort of cave-in, said brace extending from one side of the trench to the other. *Id.* at 50-51.

At the time of his accident, plaintiff said that he was approximately four to five feet from the trench, which he described at being between four to eight feet deep, that he was watching the brace being lifted into place by the machine, and that he was told by his foreman to unhook the brace. *Id.* at 65. At this time, the cross brace was at street level, and was being held in place by chains placed across the trench. *Id.* at 65-66. In order to unhook the cross brace, plaintiff stated that he had to walk over the trench, putting one foot on the cross brace to reach the area where the chain was connected. *Id.* at 66. When plaintiff put his foot on the cross brace, over the open trench, the cross brace moved out of position, which, he said, caused him to fall to the bottom of the trench, striking the chains as he fell. *Id.* at 67-69. At the time of the occurrence, plaintiff was not wearing a harness, and he said that

he did not ask for a harness, nor had he used a harness in the past when he performed the same task. *Id.* at 68, 70.

Plaintiff contends that he was not provided with any safety devices which could have prevented his fall.

The complaint alleges two causes of action: (1) negligence; and (2) violation of the Labor Laws.[1] (See Exhibit "A" to the motion). In his supplemental bill of particulars, plaintiff states that defendants violated sections 240 and 241 (6) of the Labor Law. At the hearing on this motion, it was indicated to the court that plaintiff is asserting a violation of section 23-1.7 of the Industrial Code to support his Labor Law § 241 (6) cause of action.

Keith D. Pettey ("Pettey"), a senior project manager for Columbia University, was also deposed in this matter and stated that, during the course of the Project, Columbia University employee Lawrence Price ("Price") was overseeing the day-to-day progress of the project, but Price did not supervise any of the activities that took place at the site, nor did he maintain any records or reports. (See Exhibit "E" to the motion, Pettey EBT, at 14-16). In addition to Price, Columbia University had Amr Mohamed ("Mohamed"), an assistant project manager, who may also have been involved with the Project. *Id.* at 18.

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[1]The complaint does not specify which sections of the Labor Law plaintiff alleges were violated.

According to Pettey, Felix was responsible for supervising and directing the utility work at the job site. *Id.* at 22. Safety at the Project was the responsibility of Total Safety, but Total Safety did not have people at the Project both day and night. *Id.* at 32. Pettey admitted that work was being performed at night at the time in question. *Id.* Pettey said that he first became aware of the accident when he received his usual overnight report. *Id.* at 38. Pettey stated that, in addition to Total Safety, Bovis also had an on-site safety person. *Id.* at 40. Pettey also said that was unaware of the details of any discussions regarding the protection of workers in connection with bracing of the sheathing in the trench. *Id.* at 49.

Plaintiff argues that there is no evidence that Columbia University provided any safety equipment that was available to him at the time of his accident that could have prevented his fall.

In opposition to the instant motion, Columbia University maintains that Labor Law § 240 (1) is inapplicable to the instant matter because plaintiff's accident did not involve an elevation-related risk, since he was on street level when he fell. Columbia University also argues that Labor Law § 241 (6) is inapplicable because Columbia University was not the owner of the location where the occurrence took place, i.e., the street between 125th Street and 12th Avenue. Additionally, Columbia

University states that the provisions of the Industrial Code asserted by plaintiff to have been violated do not apply to the facts of the case, since none of the risks enumerated therein were responsible for plaintiff's injuries.[2] Lastly, although not part of plaintiff's motion, Columbia University argues that plaintiff's common-law negligence and Labor Law § 200 causes of action should be dismissed because Columbia University neither directed or supervised plaintiff's work, nor did it have any notice of a dangerous condition.

In support of its opposition, Columbia University has provided the affidavit of Gaetano Iavarone ("Iavarone"), who was the superintendent for Felix at the time of the incident, who avers that:

> "site specific training was provided to laborers regarding tasks such as unhooking the chain from braces being installed in the trench. Laborers involved in trench excavation were advised that the proper procedure to unhook a chain from the brace was to: use a ladder to climb down into the trench, once the laborer reached the bottom of the trench the laborer was to use another ladder to climb up to the brace and unhook the chain from the brace while the laborer was still standing on the ladder. All Felix employees were given site-specific training before they began working at this job site. The training was provided by the Risk Manager Tom Miller.
> Felix also provided written instructions for this procedure within 'Pre-Task Plans' that were given

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[2]The bill of particulars identifies Industrial Code sections 23-1.7, 23-2.2 and 23-5.1 as having been violated, but plaintiff has only argued the applicability of 23-1.7, and so the other sections are deemed abandoned.

> to the workers before the excavation began. Felix Associates also provided a number of ladders to the laborers at the work site. Ladders were used for exactly the purpose of climbing into the trench and climbing up to safely remove the chain from the brace. The ladders ranged from twelve to thirty feet in height. These ladders remained on site and were available to be used by laborers during their work on July 20, 2010.
>
> . . .
>
> I was advised that [plaintiff] was not using the ladder provided to him at the time of the accident."

(See, Exhibit "A" to the opposition papers).

In reply, plaintiff contends that, based on the documentary evidence and Pettey's deposition, Columbia University is identified as the owner of the construction project and, therefore, Labor Law §§ 240 (1) and 241 (6) are applicable to it. Further, based on the facts of the case, plaintiff maintains that section 23-1.7 of the Industrial Code is applicable to his accident. Lastly, plaintiff has provided his affidavit that contradicts Iavarone, stating:

> "Contrary to that claimed by Mr. Iavarone, we were not given any specific instructions regarding the use of a ladder placed in the trench to unhook the cross beam which was at the top of the trench and extending from side to side. In fact, there were no ladders readily available for this task and the only ladders that were utilized were the ones that would allow us to access into the trench to perform work in the trench itself. However, the custom and practice both that evening and on many prior occasions was to actually step onto the cross beam and manually unhook the chain. I was instructed to do specifically this by my foreman and at no time that evening was I or any other worker instructed to use a ladder or any other device to gain access to the beam other than stepping onto it. ... No safety devices of any kind were provided to me nor was I instructed to utilize

> any safety device prior to stepping out onto the beam. There were supervisory personnel at the jobsite who were in a position to observe the task we were performing and at no time on this or any other occasion when the chains were unhooked did any supervisory personnel complain about the manner in which the work was performed."

(See, Exhibit "B" to the reply papers).

In addition, plaintiff says that Iavarone's affidavit should be disregarded because, until the opposition papers were filed, he was unaware of any witness to the occurrence, and Columbia University, at the preliminary conference, averred that it was unaware of any witness to the occurrence. Also, plaintiff says that Iavarone's affidavit is only based on hearsay. However, the court notes that Iavarone states, in his affidavit, that he was not present at the time of the occurrence and is only affirming Felix's practice and procedures and that ladders were present and available at the job site.

It is plaintiff's position that there is no evidence that there were any safety devices at the job site, mandating the grant of his motion.

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 [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186

(1st Dept 2006). 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); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

At the outset, the court finds unpersuasive Columbia University's argument that Labor Law §§ 240 (1) and 241 (6) are inapplicable because it was not the owner of the place where the accident occurred. While this argument might have some validity to a claim of negligence, for the purposes of the Labor Laws, Columbia University is clearly the owner of the Project, as evidenced by the terms of its contract with Felix and Pettey's deposition testimony.

> "The term 'owner', for purposes of the applicable sections of the Labor Law, 'has not been limited to the titleholder ... [but] has been held to encompass a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit' [internal citation omitted]."

Bach v Emery Air Frgt. Corp., 128 AD2d 490, 491 (2nd Dept 1987).

Consequently, the court finds that Columbia University is the owner of the Project for the purposes of Labor Law §§ 240 (1)

and 241 (6), and must now address the actual merits of plaintiff's claims.

That branch of plaintiff's motion seeking summary judgment on the issue of liability for his Labor Law § 240 (1) claim is granted.

Section 240 (1) of the New York Labor Law states, in pertinent part:

> "All contractors and owners and their agents, except owners of one and two-family dwellings 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."

As stated by the Court of Appeals in *Rocovich v Consolidated Edison Co.* (78 NY2d 509, 513 [1991]),

> "It is settled that section 240 (1) is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed. Thus, we have interpreted the section as *imposing absolute liability* for a breach which has proximately caused an injury. ... In furtherance of this same legislative purpose of protecting workers against the known hazards of the occupation, we have determined that the duty under section 240 (1) *is nondelegable* and that an owner is liable for a violation of the section even though the job was performed by an independent contractor over which it exercised no supervision or control [internal quotation marks and citations omitted]."

Labor Law § 240 (1) was designed to protect workers against elevation-related risks, including instances wherein a worker

falls from a height or is struck by a falling object (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259 [2001]). "In order to prevail upon a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated, and that this violation was a proximate cause of his injuries" (*Zgoba v Easy Shopping Corp.*, 246 AD2d 539, 541 [2nd Dept 1998]). A worker's contributory negligence is irrelevant to the absolute liability of the owner and contractor (*Cosban v New York City Tr. Auth.*, 227 AD2d 160 [1st Dept 1996]). However, not all gravity-related injuries are encompassed by this section of the Labor Law, and the "single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 (2009).

The court finds Columbia University's argument that plaintiff's accident did not involve an elevation-related risk to be contrary to judicial precedent. Numerous cases hold that an elevation-related risk, as defined in Labor Law § 240 (1), is present when a worker falls from street level into a trench or a pit. *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1 (1st Dept 2011)(worker fell into a four-foot-deep pit from ground level); *Wild v Marrano/Marc Equity Corp.*, 75 AD3d 1099 (4th Dept 2010)(worker fell into an excavation when the plank on which he

was standing gave way); *Bell v Bengomo Realty, Inc.*, 36 AD3d 479 (1st Dept 2007)(worker injured when the ground under his feet gave way, causing him to fall into an open trench); *Jiminez v Nidus Corp.*, 288 AD2d 123 (1st Dept 2001)(worker slipped on ice and fell into a foundation excavation); *Trillo v City of New York*, 262 AD2d 121 (1st Dept 1999)(worker injured when he stepped onto a beam running alongside a trench and the beam collapsed, causing the worker to fall into the trench).

Columbia University asserts that plaintiff was given instructions regarding the use of a ladder to unhook the braces and that plaintiff failed to follow those instructions, thereby causing his injuries. In order for Columbia University to escape liability under this theory, it must evidence that specific instructions regarding use of safety devices were given and that the safety devices were readily available at the work site, and that plaintiff, for no good reason, decided not to use them. *Cahill v Triborough Bridge & Tunnel Authority*, 4 NY3d 35 (2004)(this defense can apply even if there is a lapse of weeks between the instruction and the accident). In such instances, plaintiff's own negligence would be the sole proximate cause of his injury. *Gallagher v New York Post*, 14 NY3d 83, 88 (2010).

Iavarone testified that the laborers were instructed to use the ladders to unhook the braces and that ladders were present at the job site. However, he does not testify as to who gave the

instructions and does not aver any personal knowledge that plaintiff actually received those instructions. Furthermore, he was not at the job site at the time of the accident and therefore could not have had personal knowledge regarding the availability of safety devices at the workplace at the time of the accident. As a consequence, Iavarone's affidavit contains only hearsay assertions, which, although admissible to oppose a motion for summary judgment, "is insufficient to warrant denial of summary judgment where it is the only evidence submitted in opposition [internal citation omitted]." Candela v City of New York, 8 AD3d 45, 47 (1st Dept 2004). In the case at bar, Iavarone's affidavit is the only evidence that Columbia proffers on these issues, which is contradicted by plaintiff.

In addition, plaintiff was sent by the foreman to unhook the brace. He was not instructed to use a ladder for safety. (See, Exhibit "D" to the motion, Plaintiff's EBT, at 64-66).

Therefore, based on the foregoing, that portion of plaintiff's motion seeking summary judgment on the issue of liability for his cause of action based on a violation of Labor Law § 240 (1) is granted.

That branch of plaintiff's motion seeking summary judgment on the issue of liability on his Labor Law § 241 (6) claim is also granted.

Labor Law § 241 states:

"Construction, excavation and demolition work. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

***

6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

To prevail on a cause of action based on Labor Law § 241 (6), a plaintiff must establish a violation of an applicable Industrial Code provision which sets forth a specific standard of conduct (*Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343 [1998]). However, while proof of a violation of a specific Industrial Code regulation is required to sustain an action under Labor Law § 241 (6), such proof does not establish liability, and is merely evidence of negligence (*id.*). In addition, an owner or general contractor may raise any valid defense to the imposition of the vicarious liability imposed under section 241 (6) of the Labor Law, including contributory and comparative negligence. *Id* at 350.

Industrial Code 23-1.7 has been held sufficient to support a cause of action based on a violation of Labor Law § 241 (6).

Olsen v James Miller Mar. Serv., Inc., 16 AD3d 169 (1st Dept 2005).

Section 23-1.7 (b) (iii) of the Industrial Code states:

> "Where employees are required to work close to the edge of ... an opening, such employee shall be protected as follows: ... (c) An approved safety belt with an attached lifeline which is properly secured to a substantial fixed anchorage."

There is no evidence that any safety belt was made available for plaintiff's use or that he failed to use one so provided. Hence, Columbia University is liable to plaintiff, pursuant to Labor Law § 241 (6).

Lastly, the court need not address Columbia University's arguments regarding plaintiff's causes of action for common-law negligence and violation of Labor Law § 200, because such claims were not part of plaintiff's motion and Columbia University did not cross-move to dismiss these causes of action. Therefore, these arguments are procedurally defective.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED, that plaintiff's motion is granted with respect to liability on his Labor Law §§ 240 (1) and 241 (6) causes of action and the issue of the amount of judgment to be entered thereon shall be determined at the trial herein; and it is further

ORDERED, that the action shall continue on the remaining causes of action.

Dated: December 21, 2012

ENTER:

Shlomo S. Hagler, J.S.C.