ORIGINAL

STATE OF NEW YORK

SUPREME COURT COUNTY OF SARATOGA

SCOTT CHRISTIANSEN,

Plaintiff,

-against-

DECISION AND ORDER
RJI No. 45-1-2011-0670
Index No. 20103690

BONACIO CONSTRUCTION, INC. and
262 BROADWAY, LLC,

Defendants.

PRESENT: **HON. THOMAS D. NOLAN, JR.**
Supreme Court Justice

APPEARANCES: LAW OFFICE OF EDWARD P. RYAN
Attorney for Plaintiffs
38 Eagle Street
Albany, New York 12207

GOLDBERG SEGALLA LLP
Attorneys for Defendants
8 Southwoods Boulevard, Suite 300
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On March 18, 2009, during construction of a multi-story residential condominium building in Saratoga Springs, New York, plaintiff sustained injuries for which he seeks money damages. Defendant 262 Broadway, LLC owned the construction site, and defendant Bonacio Construction, Inc. (Bonacio) was the general contractor. Bonacio hired, as masonry a contractor, plaintiff's employer, AJS Masonry, Inc. (AJS). Plaintiff, a mason's helper, was tasked with delivering bricks and mortar to masons working that day on an exterior wall of the building's third floor. The masons were located on scaffolding owned and erected by AJS. Plaintiff carried

bricks and mortar, earlier delivered to the third floor, through an exterior framed doorway and over an exterior balcony to the scaffold. According to plaintiff, after making a second delivery to the masons and as he was walking back into the building with two buckets of debris, a section of unassembled scaffolding, apparently being stored on the third floor balcony, "fell over and hit [him] in the back of the neck". At this deposition, plaintiff testified that the scaffold section was six feet high by five feet wide and was "attached to some other frames so I thought". Plaintiff also testified that there were "a total of three or four frames out there [on the balcony]" and that the frame "fell" as he walked under it, and struck his neck and right shoulder and ended up on top of him. According to plaintiff, another laborer helped lift the frame from him. Plaintiff then reported the incident and that he was "sore" to his foreman, Dave Traver, and was told to go home. The next day, plaintiff sought medical attention and subsequently had three surgeries to repair/treat cervical disc herniations.

In his complaint, plaintiff alleges causes of action against the owner and general contractor sounding in common law negligence and Labor Law §§ 200, 240 (1), and 241 (6). Discovery has been completed.

Plaintiff moves for summary judgment on the issue of defendants' liability under Labor Law §§ 240 (1) and 241 (6). Plaintiff's motion is supported by the pleadings, his affidavit and deposition, the depositions of Bonacio's project manager, Anthony Bonacio, and nonparty, Stanley Kwatkowski, Sr., a co-worker of plaintiff, and the affidavit of a co-worker, Nathan Affinito. Briefly, plaintiff contends that the scaffold section was left on the balcony unsecured and its collapse onto plaintiff falls within the protections afforded under § 240 (1). Plaintiff further contends that the method and manner with which the scaffold sections were stored

violated certain regulations contained in three sections of the State Industrial Code, namely 12 NYCRR § § 23-5.1, 23-5.3, and 23-5.5 and defendants' liability under Labor Law § 241 (6) is thus demonstrated.

Defendants oppose plaintiff's motion and cross-move to dismiss the complaint in its entirety on the assertions that neither Labor Law § 240 (1) nor Labor Law § 241 (6) applies here since the section of scaffolding was not being used as a scaffold when it fell and struck plaintiff and that the incident was simply the type of normal hazard or danger construction workers are exposed to on construction sites. Defendants further assert that plaintiff's Labor Law § 200 and common law negligence causes of action lack merit as a matter of law since neither defendant owned the scaffold sections or placed them on the third floor balcony and additionally, neither defendant controlled or directed the work of AJS, plaintiff's employer. Defendants assert that AJS owned the scaffold sections and presumably its employees placed them on the balcony. Defendant's cross motion is supported by plaintiff's deposition and affidavits from Anthony Bonacio, defendant Bonacio's construction manager for the project, and John Tomich, an occupational safety and health consultant.

Now the general principles governing summary judgment. As on all summary judgment motions, the court's initial role is issue identification, not issue resolution, Speller v Sears, Roebuck & Co., 100 NY2d 38, 44 (2003) or stated differently, the court's role is not to try issues of fact but to determine whether there are such issues to be tried. Sommer v Federal Signal Corp., 79 NY2d 540, 554 (1992). Provided the movant establishes by competent and admissible evidence a prima facie entitlement to judgment, Connor v Tee Bar Corp., 302 AD2d 729 (3rd Dept 2002), the nonmovant, to defeat the motion, must demonstrate the existence of material

triable issues of fact by "affirmative proof to demonstrate that the matters are real and capable of being established upon a trial". Nelson v Lundy, 298 AD2d 689, 690 (3rd Dept 2002). The facts must be viewed in the light most favorable to the party opposing summary judgment, here the defendants on plaintiff's motion and the plaintiff on defendants' cross motion. Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35, 37 (2004); Czarnecki v Welch, 13 AD3d 952 (3rd Dept 2004). And, in doing so, the court must "accord [the opposing party] the benefit of every reasonable inference from the record proof, without making any credibility determinations". Winne v Town of Duanesburg, 86 AD3d 779, 781 (3rd Dept 2011).

Considered first is that portion of defendants' cross motion seeking dismissal of plaintiff's Labor Law § 200 and common law negligence claims. To prevail, defendants must show they did not own, place, or store on the third floor balcony, the section of scaffold that struck plaintiff, or otherwise direct AJS to place the scaffold section in an allegedly unsafe manner. Defendant Bonacio's project manager, Anthony Bonacio, testified at his deposition and as well, stated in his affidavit that AJS, plaintiff's employer and defendant Bonacio's subcontractor, supplied all scaffolding used on the job and that neither defendant placed or stored or directed AJS to place or store the scaffold sections on the third floor balcony. In opposition, plaintiff offers no evidence to refute defendants' representations. Stated differently, there is no evidence either defendant was negligent. Plaintiff's claims based upon Labor Law § 200 and common law negligence lack merit and must be dismissed.

Defendants' cross motion is granted to such extent, without costs.

Next, the plaintiff's Labor Law § 240 (1) claim. As an initial matter, defendants offer no evidence to dispute plaintiff's version of how he was injured. The issue then is whether § 240

(1) affords plaintiff its protections on the facts offered by the plaintiff.

Labor Law § 240 (1) provides in relevant part:

> All contractors and owners...in the erection...of a building...shall furnish or erect or cause to be furnished or erected for the performance of such labor...hoists, stays...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.

The Court of Appeals has applied § 240 (1) in three recent cases: Runner v New York Stock Exchange, Inc., 13 NY3d 599 (2009); Wilinski v 334 East 92nd Housing Dev. Fund Corp., 18 NY3d 1 (2011), and Salazar v Novalex Contr. Corp., 18 NY3d 134 (2011), and a thread in these opinions is that Labor Law § 240 (1) should be interpreted and applied "to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction work site elevation differentials", Runner, supra at 603, and **(but?)** that Labor Law § 240 (1) applies "where a worker sustains an injury caused by a falling object whose base stands at the same level as the worker" provided that the injury "resulted from the lack of a statutorily prescribed protective device". Wilinski, supra at 5.

More recent cases have considered application of Labor Law § 240 (1) to factual situations similar to those in this case. In Rodriguez v DRLD Dev. Corp., 109 AD3d 409 (1st Dept 2013), plaintiff, a construction worker, tripped on a metal cable and dislodged a pile of sheetrock boards, eight feet high, which had been leaning against a wall and the sheetrock boards fell onto the plaintiff. The court held that Labor Law § 240 (1) applied even though the sheetrock was located on the same level that plaintiff was working on and was not then being hoisted or secured, yet denied summary judgment to either plaintiff or defendant as it found a

triable issue over "whether plaintiff's injuries were proximately caused by the lack of a safety device of the kind required by Labor Law § 240 (1)". In Flossos v Waterside Redevelopment Co., 108 AD3d 647 (2nd Dept 2013), plaintiff, a painter, was standing on an unopened A-frame ladder leaning against a closet door when a piece of ceiling struck him and knocked him and the ladder to the floor. There, the court dismissed plaintiff's Labor Law § 240 (1) cause of action on its finding that plaintiff did not show that the ceiling fell "because of the absence or inadequacy of a safety device of the kind enumerated in [§ 240 (1)]", citing Narducci v Manhasset Bay Assoc., 96 NY2d 259, 268 (2001).

Again, unsecured materials and equipment which fall and strike a construction worker, even though not then being lifted, may come under the ambit of § 240 (1) if the material or equipment was insufficiently or inadequately secured. Outar v City of New York, 5 NY3d 731 (2005), affg 11 AD3d 593 (2nd Dept 2004) [unsecured dolly fell and struck plaintiff].

The record is silent whether the unassembled sections of scaffolding stored here on the balcony could have or should have been secured by a device enumerated by § 240 (1). Mr. Tomich's conclusory statement that "none of the devices enumerated [in § 240 (1)] were not [*sic*] appropriate, necessary nor expected to be used" is insufficient to support dismissal since he does not explain how or why he reached that opinion. Again, the facts are very close to those of Rodriguez v DRLD Dev. Corp., supra. There is a triable issue here whether plaintiff's injuries were proximately caused by the lack of use a safety device required by Labor Law § 240 (1). Plaintiff's motion and defendants' cross motion directed to plaintiff's Labor Law § 240 (1) cause of action are both denied, without costs.

Finally, the plaintiff's claim based upon Labor Law § 241 (6). The three cited regulations

apply only in cases involving the "use" of a scaffold. It is clear plaintiff was not injured by the collapse of a scaffold; rather, he was injured when a component section of a scaffold, not then in use, fell on him.

Defendants' cross motion is granted to the extent that plaintiff's claim based upon Labor Law § 241 (6) is dismissed, without costs. Plaintiff's motion seeking summary judgment on his Labor Law § 241 (6) causes of action is denied, without costs.

This constitutes the decision and order of the court. The original decision and order is forwarded to counsel for plaintiff. All original motion papers are delivered to the Supreme Court Clerk/County Clerk for filing. Counsel for plaintiff is not relieved from the applicable provisions of CPLR 2220 relating to filing, entry and notice of entry of the decision and order.

So Ordered.

DATED: September 30, 2013
Saratoga Springs, New York

HON. THOMAS D. NOLAN, JR.
Supreme Court Justice

ENTERED
Peter R. Martin
Saratoga County Clerk

SARATOGA COUNTY
CLERK'S OFFICE
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