SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. George J. Silver PART 10
Justice

OSTROWSKI, ZDZISLAW

- v -

SUTTON HILL CAPITAL, LLC, C&D RESTORATION, INC. and CITADEL CINEMAS, INC.

INDEX NO. 107412-2010
MOTION DATE
MOTION SEQ. NO. 001

The following papers, numbered 1 to 6, were read on this motion for

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits	No(s). 1, 2
Notice of Cross-Motion — Affirmation — Affidavit(s) — Exhibits	No(s). 3, 4
Plaintiff's Affirmation in Opposition/Reply —Exhibits	No(s). 5
Defendants' Reply Affirmation — Exhibits	No(s). 6

Upon the foregoing papers, it is hereby:

In this personal injury action plaintiff Zdzislaw Ostrowski ("plaintiff") moves pursuant to CPLR § 3212 for an order granting him partial summary judgment on the issue of liability under Labor Law § 240 [1] against defendants Sutton Hill Capital, LLC, C & D Restoration, Inc. ("C & D") and Citadel Cinemas, Inc. (collectively "defendants"). Defendants cross-move for summary judgment dismissing plaintiff's complaint.

Plaintiff testified at his examination before trial that on February 19, 2010 he was working as an employee of Amerpol at a construction project at a building located at 12th Street and Second Avenue in New York County. Amerpol been retained to reconstruct the roof at the above location. According to plaintiff, the roof was composed of several roofs, including three lower roofs, one middle roof and one high roof. All the roofs were flat. Plaintiff would access the roof using a fire escape stairway located on the outside of the building or via an internal stairway. Once on the roof, plaintiff used ladders to access the different roof levels. On February 19, 2010 plaintiff was working on one of sixteen posts that had previously been installed on the lowest level roof. Plaintiff was cleaning the posts so that a material called Parapro could be applied to posts. According to plaintiff, Parapro is a material that is applied with a roller in order to seal off a roof. The post plaintiff was working on had not been properly cleaned so plaintiff needed to retrieve a grinder in order to clean the metal. The grinder was located near a skylight that was approximately six or seen feet away from the post plaintiff was working on. Plaintiff walked to the grinder and picked it up. According to plaintiff, the grinder's cable was connected to another machine so plaintiff pulled the cable, presumably to disconnect it. When plaintiff pulled the cable he lost balance and tumbled backwards. As he tumbled backwards approximately two steps one of plaintiff's heels came into with a 2 by 4 that was laying on the roof. The 2 by 4 was not attached to roof. Plaintiff testified that he then tripped and fell into the uncovered skylight hole, which plaintiff testified was being

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

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check as appropriate: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

worked on by workers from C & D. Plaintiff testified that he was not wearing a safety belt or harness at the time of the accident and had never worn a safety belt or harness while working on this particular job site.

Eugeniusz Szpynda (Szpynda") testified that he was the foreman for C & D at the job site where plaintiff was injured. C & D was the general contractor and Amerpol was hired as a subcontractor to remove the old roof and install a new roof. C & D did all other work at the job site. As foreman, Szpynda testified that he was responsible for safety at the job site and that he had the authority to stop the work of a subcontractor if the work was being done in an unsafe manner. Sypynda further testified that plaintiff removed the subject skylight, with Sypynda's permission, so that plaintiff and co-workers could apply Parapro around the skylight opening so as to water proof it. Szpynda testified that he instructed plaintiff that the skylight opening had to be protected while plaintiff was working. According to Szpynda, plaintiff's co-worker who was applying the Parapro was kneeling on a wooden plank that had been placed across the opening for the skylight. Plaintiff was directing his co-workers. Szpynda did not know who the wooden plank belonged to. The worker who was applying the Parapro was not wearing a harness. Szpynda testified that he came to plaintiff's work area at the skylight at least twenty times on te day of plaintiff's accident and at all times the Parapro was being applied by a worker kneeling on the wooden plank. Szpynda did not say or do anything regarding the workers' use of the wooden plank. Once the work of applying the Parapro had been completed, Szpynda told plaintiff that a new skylight had to be put on top of the opening. According to Szpynda, plaintiff told him to wait to before placing the new skylight so that the Parapro could dry completely. Szpynda agreed to wait until the Parapro had dried before putting the skylight back on. Less than two minutes later, while Szpynda was approximately ten-to-fifteen feet away from the skylight opening speaking with a co-worker, plaintiff's accident occurred. Szpynda was facing the other way and did not actually witness plaintiff fall. There was no wooden plank across the skylight opening when plaintiff's accident occurred.

Szpynda further testified that there were no safety devices in place at the time of plaintiff's accident to prevent a worker from falling because the work around the skylight had been completed and there was no reason for plaintiff to have been in the area when his accident took place. According Szpynda, there were no life lines in place nor was there anything underneath the skylight opening to catch a worker should one fall. Szpynda also testified that it would have been impractical, and more dangerous, for a worker to use a safety harness while applying Parapro around the skylight opening because the lanyard from the safety harness would get in the liquid Parapro material which would cause the workers to grab and jerk the lanyard and thus increase their chances of falling. Szpynda also testified that plaintiff had his own safety harness because workers were required to wear safety harnesses when working near a wheel well in another area of the job site. Szpynda testified that the safety harnesses were owned by Amerpol and that it was plaintiff's responsibility to ensure that his own safety. Szpynda testified that he did not tell plaintiff to hang and hook life line or wear a safety harness when working near the skylight but only told plaintiff to make sure the skylight opening was covered when work was being done in the area.

Szpynda also submits an affidavit in which he claims that during a meeting with plaintiff on the morning of the accident he told plaintiff that he could remove the skylight but instructed plaintiff that the opening had to be covered and protected while plaintiff was working. Szpynda also claims that he told plaintiff that OSHA planking, screws and nails were available, where they were stored, and that the materials should be used to cover the skylight opening.

Szpynda further avers that after plaintiff instructed him not to put the skylight cap on so that the membrane could dry properly, Szpynda told plaintiff that the area around the skylight had to be closed off. Plaintiff then told Szpynda that no one would enter the area and plaintiff would inform Szpynda when the area was dry. Szpynda claims plaintiff knew the skylight was open and, as Amerpol's foreman, was responsible for keeping the area clear of any workers until the membrane was dry. Szpynda claims that plaintiff did not obey his instructions to cover the skylight opening or to close off

the area around the skylight and if plaintiff had done so, the accident would not have occurred.

Finally, Szpynda claims that he did not control or supervise the methods and means by which plaintiff and his workers performed their work. Szpynda would check on the progress of plaintiff's work but never told plaintiff or any of plaintiff's co-workers how to do their jobs. Szpynda also denies providing plaintiff with any of the tools or equipment needed to perform plaintiff's work.

Plaintiff argues that summary judgment pursuant to Labor Law § 204 [1] is appropriate because his submission establishes that the height at which he worked created an elevation-related hazard and his fall was the result of defendants' failure to provide him with an adequate safety device. Plaintiff further argues that the different versions of his accident do not negate his entitlement to partial summary judgment because his fall was at least partially caused by defendants' failure to provide a statutorily required safety device.

In opposition to the motion and in support of the cross-motion defendants argue that plaintiff's Labor Law § 240 [1] claim should be dismissed because plaintiff was a recalcitrant worker in that he failed to follow specific directives by C&D to cover the skylight opening and close off the area while the Pararpro was drying and, therefore, his action were the sole proximate cause of the accident. Defendant also contend that if plaintiff's Section 240 [1] claim is not dismissed, plaintiff's motion should be denied because there are triable issues of fact as to whether plaintiff was the sole proximate cause of his accident. Defendants also contend that plaintiff's Labor Law § 200 and common law negligence claims should be dismissed by none of the defendants supervised, directed or controlled the manner and means by which plaintiff performed his work and did not provide him with any tools or equipment for his work.

Analysis

It is well-settled that on a motion for summary judgment, the moving party has the initial burden of demonstrating, by admissible evidence, its right to judgment (*Bendik v Dybowski*, 227 AD2d 228 [1st Dept 1996]). The burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists warranting a trial (*id.*). "On a motion for summary judgment, the court should accept as true the evidence submitted by the opposing party" (*Pellegrini v Brock*, 2009 NY Slip Op 6721 [1st Dept]). Summary judgment is a drastic remedy that should only be employed where no doubt exists as to the absence of triable issues (*Leighton v Leighton*, 46 AD3d 264 [1st Dept 2007]). The key to such procedure is issue-finding, rather than issue-determination (*id.*).

Labor Law § 240 (1) states that: "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." Labor Law § 240 (1) imposes a nondelegable duty upon the owner and contractor to provide proper and adequate safety devices to protect workers at an elevation from falling (*Lajqi v New York City Tr. Auth.*, 23 AD3d 159 [1st Dept 2005]). To establish a cause of action under section 240 [1], a plaintiff must prove both that the statute was violated and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287, 803 NE2d 757, 771 NYS2d 484 [2003]). The statute is violated when the plaintiff is exposed to an elevation-related risk while engaged in an activity covered by the statute and the defendant fails to provide a safety device adequate to protect the plaintiff against the elevation-related risk entailed in the activity or provides an inadequate one (*Jones v 414 Equities LLC*, 57 AD3d 65 [1st Dept 2008]).

Plaintiff established his prima facie entitlement to summary judgment by producing evidence in admissible form that he was injured after a fall through a skylight opening and had not been provided with any safety device or equipment to afford him proper protection from such an elevation-related hazard (*Angamarca v New York City P'ship Hous. Dev. Co., Inc.*, 56 AD3d 264 [1st Dept 2008]; *see also Babiack v Ontario Exteriors, Inc.*, 106 AD3d 1148 [4th Dept 2013] [plaintiff's fall through a skylight

opening is the very type of elevation-related accident encompassed by the statute]; *Figuerido v New Palace Painters Supply Co., Inc.*, 39 AD3d 363 [1st Dept 2007]).

In opposition, defendants fail to raise a triable issue of fact whether plaintiff was a recalcitrant worker or the sole proximate cause of his accident. The recalcitrant worker defense requires a showing that the injured worker refused to use safety devices that were provided by the owner or the employer (*Stolt v General Foods Corp.*, 81 NY2d 919, 613 NE2d 556, 597 NYS2d 650 [1993]). Even accepting as true the averments in Szpynda's affidavit that plaintiff was told on the morning of his accident to use OSHA planking, nails an screws to cover the skylight opening, which Szpynda did not testify to in his deposition, and that the opening had to be covered while plaintiff was working, Szpynda also testified that the skylight opening could not be covered while the Parapro was being applied. Therefore, it cannot be said that plaintiff acted unreasonably by opting not to cover the skylight opening while the Parapro was being applied.

Defendants' claim that plaintiff was recalcitrant after the Parapro had been applied by failing to comply with Szpynda's instructions and by entering the wet area where the skylight was still uncovered also fails to raise a triable issue of fact. Szpynda's instruction to plaintiff to close off the area around the skylight opening is nothing more than a general instruction to avoid engaging in an unsafe practice and is not a safety device (*Garcia v 1122 East 180th St. Corp.*, 250 AD2d 550 [1st Dept 1998]; *Andino v BFC Partners, L.P.*, 303 AD2d 338 [2d Dept 2003]). Evidence of such an instruction does not, by itself, create an issue of fact sufficient to support a recalcitrant worker defense (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 563, 626 NE2d 912, 606 NYS2d 127 [1993]). To the extent that plaintiff can be deemed to have made himself a safety monitor by assuming responsibility for keeping both himself and other workers out of the area around the skylight opening after the Parapro was applied, a person acting as a safety monitor is not of the same general kind or class as the physical objects enumerated in Labor Law § 240 [1] and the word "device" as used in the statute does not include a system in which a person acts a safety monitor, spotter or lookout (*Miranda v Norstar Bldg. Corp.*, 79 AD3d 42, 47 [3rd Dept 2010]). Moreover, workers like plaintiff, who ply their livelihoods working on roofs, "are scarcely in a position to protect themselves from accident" (*Koenig v Patrick Constr. Co.*, 289 NY 313, 318, 83 NE2d 133 [1948]). Since defendants' failure to provide adequate safety devices was a proximate cause of plaintiff's accident, the arguments that plaintiff was the sole proximate cause of the accident and that he was a recalcitrant worker are without merit (*McCarthy v Turner Constr., Inc.*, 52 AD3d 333 [1st Dept 2008]; *Orellanio*, 292 AD2d at 291). Even if plaintiff could be deemed recalcitrant for disobeying Szpynda's instruction, no issue exists that defendants' failure to provide proper safety equipment was a more proximate cause of the accident (*Berrios v 735 Ave. of the Ams.* 82 AD3d 552 [1st Dept 2011]; *Milewski v Caiola*, 236 AD2d 320 [1st Dept 1997]).

The fact that plaintiff's accident was unwitnessed is not a bar to summary judgment in plaintiff's favor. The various versions of how plaintiff's accident occurred are consistent in that in each version it is undisputed that plaintiff fell into the skylight opening and had not been provided with any safety device or equipment to afford him proper protection. The differing accounts of what occurred prior to plaintiff's accident do not raise bona fide issues as to plaintiff's credibility (*see Franco v Jemal*, 280 AD2d 409 [1st Dept 2001]; *Casabianca v Port Auth.*, 237 AD2d 112 [1st Dept 1997]; *Orellano v 29 E. 37th St. Reatlty Corp.*, 292 AD2d 289 [1st Dept 2002]). Accordingly, defendants have failed to raise a triable issue of fact in response to plaintiff's prima facie showing. Nor have defednants established their entitlement to summary dismissal of plaintiff's Section 240 [1] claim.

Section 200 [1] of the Labor Law codifies an owner's or general contractor's common-law duty of care to provide construction site workers with a safe place to work (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]; *Perrino v Entergy Nuclear Indian Point 3, LLC*, 48 AD3d 229, 230 [1st Dept 2008]). Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed (*see Cook v Orchard Park Estates, Inc.*, 73 AD3d 1263, 1264 [3rd Dept 2010]). Where an existing defect or dangerous condition caused the

injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]). The notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken (*Mitchell v N.Y. Univ.*, 12 AD3d 200 [1st Dept 2004]; *Canning v Barneys N.Y.*, 289 AD2d 32 [1st Dept 2001]). Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work (*Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]; *Dalanna v City of New York*, 308 AD2d 400 [1st Dept 2003]).

Summary dismissal of plaintiff's Labor Law § 200 and common-law negligence claims is inappropriate in light of Szpynda's averment that he instructed plaintiff to cover the skylight opening and protect the opening while he was working as said averments raise issues of fact as to the level of supervisory control exercised by C&D over plaintiff's work. In accordance with the foregoing, it is hereby

ORDERED that plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240 [1] is granted; and it is further

ORDERED that defendants' cross-motion for summary judgment is denied; and it is further

ORDERED that plaintiff movant is to serve a copy of this order, with notice of entry, upon defendants within 20 days of entry.

FILED

OCT 22 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: OCT 17 2013

New York County

George J. Silver, J.S.C.

GEORGE J. SILVER