SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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CARLOS LOPEZ-GONZALEZ,

Plaintiff,

-against-

1807-1811 PARK AVENUE DEVELOPMENT CORP., ESF PROPERTY INC. and EASTSIDE FLOOR SERVICES LTD.,

Defendants.

Index No.: 151085/13

DECISION/ORDER
MOT. SEQ. 008

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1807-1811 PARK AVENUE DEVELOPMENT CORP., ESF PROPERTY INC. and EASTSIDE FLOOR SERVICES LTD.,

Third-Party Plaintiffs,

-against-

NAVAC CONSTRUCTION CORP.,

Third-Party Defendant.

Third-Party Index No.: 595189/14

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NAVAC CONSTRUCTION CORP.,

Second Third-Party Plaintiff,

-against-

LURIG CONSTRUCTION INC. and CALIM FERRIS,

Second Third-Party Defendants.

Second Third-Party Index No.: 595013/15

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KELLY O'NEILL LEVY, J.:

This is an action to recover damages for personal injuries sustained by a construction worker when he fell from a scaffold while working at a construction site located at 101 East 123rd

Street, New York, New York (the Premises) on September 18, 2012.

Plaintiff Carlos Lopez-Gonzalez moves, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants 1807-1811 Park Avenue Development Corp. (Park), ESF Property Inc. (ESF) and Eastside Floor Services Ltd. (Eastside) (collectively, defendants).

BACKGROUND

On the day of the accident, defendant Park owned the Premises where the accident occurred. Defendant ESF served as the general contractor on a project underway at the Premises, which entailed the construction of a two-story commercial building (the Project). ESF hired plaintiff's employer, Navac Construction Corp. (Navac), to perform masonry work for the Project. However, while Navac was responsible for providing materials and scaffolding for the Project, Navac hired second third-party defendants Lurig Construction Inc. (Lurig) and Calim Ferris (Ferris) to perform the actual masonry work at the Premises. Defendant Eastside provided flooring for the Project.

Plaintiff's Affidavit

In his affidavit, plaintiff stated that on the day of the accident, he was working for Navac as a mason's apprentice. He described the weather that day as "drizzling and windy" (plaintiff's aff at 2). Upon arriving at the Premises, he was instructed by his foreman, Ferris, to work on the roof of the Premises. Specifically, plaintiff was instructed to "work on top of [a] 40 foot high scaffold to receive materials from a worker on the roof and hand those materials to the bricklayer working on the facade and parapets" (*id.*).

Plaintiff described the subject scaffold as "a tubular metal scaffold which was erected to

the roof and alongside the facade of the building, about 40 feet above the ground" (*id.* at 3). As it was raining, the scaffold "was wet with rainwater and in a slippery condition" (*id.*). Therefore, Ferris "gave [him] a tarp and told [him] and a co-worker to erect it over the top of the scaffold as a protective cover so that the bricklayers and workers could continue working despite the winds and rain" (*id.*).

Plaintiff explained that, in order to install the tarp over the workers, he and his coworker "were required to connect an extra piece of metal frame to the top of the scaffold" (*id.*). In order to accomplish this task, the men "were required to first remove the [scaffold's] railing, which [they] did" (*id.*). At the time that the two men were attempting to attach said metal piece to the scaffold, "[plaintiff's] co-worker was holding it on one end and [plaintiff] was holding the other end while facing the building, with [his] back toward the open end of the scaffold" (*id.*). Plaintiff was injured when he "was pushed off the platform with great force and [he] fell from the scaffold approximately 40 feet onto metal, brick, glass, and other construction debris that was on the ground" (*id.*).

Plaintiff maintained that he "was never given any fall protection or other safety equipment while working at that job site, including on the day of the accident" (*id.* at 2). Plaintiff further asserted that he "had no safety belt or harness. Even if [he] had a harness, there was no anchorage point, tail line and/or lifeline to hook up to" (*id.* at 3).

Plaintiff's Deposition Testimony

At his deposition, plaintiff testified that he could not recall whether Ferris directed him to go up onto the scaffold and perform his work, or whether it was some other person, whose name he did not remember. Plaintiff explained that, in order to attach the tarp to the scaffold, he and

his coworker "had to remove [the railing] to add [a piece of metal scaffold]" (plaintiff's tr at 73). As he and his coworker were attempting to fit the piece of metal into the scaffold, the piece of metal "pushed [him]," causing him to fall off the building (*id.* at 83).

The Workers' Compensation Board's C-2 Report

In the Workers' Compensation Board's C-2 report (the Report), it is stated that the accident occurred when "[d]uring the dismantling process of the scaffolding, [plaintiff] took a step back. However there wasn't a wood plank in place to support him. He had removed it during the dismantling process. [Plaintiff] fell approximately 20 feet to the ground" (plaintiff's notice of motion, exhibit L, the Report).

Deposition Testimony of Gerard Flynn (President of Eastside and Owner of ESF)

Gerard Flynn testified that he was president of Eastside, as well as an owner and shareholder of ESF, on the day of the accident. He explained that ESF was a general contractor, and that Eastside was a flooring subcontractor. When asked what safety equipment his "company or companies provide[d] for the workers" at the Premises, Flynn replied, "None" (Flynn tr at 39).

Deposition Testimony of Thomas Briody (Navac's Owner)

Thomas Briody testified he was Navac's owner on the day of the accident. Navac, the subcontractor in charge of brickwork on the Project, subcontracted said work to Lurig and Ferris. Navac only provided the masonry materials and scaffolding for the Project. Prior to the day of the accident, plaintiff was employed by Lurig. When plaintiff was about to be let go because the work was nearing its end, Briody hired plaintiff to help clean debris at the Premises. In addition, plaintiff also assisted Ferris and the bricklayers if needed. Briody testified that there was no

reason for plaintiff to remove the guardrail, because the tarp "had holes in it and you could attach it with cable ties or string" (defendants' opposition, exhibit I, Briody's tr at 113). In addition, Briody testified that the only harness available at the site was the one that he kept for his own personal protection. He also conceded that, on the day of the accident, there were no lifelines or anchorage points for a worker to hook up to even if they had a harness.

Deposition Testimony of Calim Ferris (Masonry Subcontractor)

Calim Ferris testified that he has never met plaintiff, and that plaintiff never worked for him. In addition, plaintiff's accident occurred on the east side of the Premises, and he and his men were working on the west side of the building at the time of the accident.

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], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also 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

Plaintiff moves for partial summary judgment in his favor as to liability 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]).

Initially, it should be noted that plaintiff has not sufficiently established that Eastside, the flooring contractor on the Project, had anything to do with the accident. Therefore, plaintiff is not entitled to summary judgment in his favor as to liability on the Labor Law § 240 (1) claim

against Eastside. Therefore, the remainder of this decision will be addressed in regard to defendants Park and ESF only.

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]).

Here, plaintiff is entitled to partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim because he has sufficiently established that the accident was caused when the subject scaffold that he was working on at the time of the accident failed to protect him from falling. "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, 505 [1st Dept 2013]).

In addition, in light of the fact that the work required the removal of the railing, plaintiff should have been provided with additional fall protection (*id.*; *see 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"]). "'[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 v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006], quoting *Conway v*

New York State Teachers' Retirement Sys., 141 AD2d 957, 958-959 [3d Dept 1988]).

In opposition to plaintiff's motion, defendants argue that plaintiff is not entitled to summary judgment in his favor on the Labor Law § 240 (1) claim because genuine issues of fact exist with respect to how the accident occurred and plaintiff's credibility. Defendants argue that, while plaintiff states in his affidavit that the installation of the tarp required him to remove the scaffold's railing, other testimony establishes that, not only was plaintiff never instructed to remove said rail, its removal was not necessary to the performance of the work. "Where the injured worker's version of the accident is inconsistent with either his own previous account or that of another witness, a triable question of fact may be presented" (*Rodriguez v New York City Hous. Auth.*, 194 AD2d 460, 462 [1st Dept 1993]).

Defendants further argue that plaintiff's negligent dismantling of the scaffold's railing, an appropriate safety device in place to prevent plaintiff from falling, raises triable issues of fact as to whether plaintiff was the sole proximate cause of his accident. "When the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1)]).

Initially, a review of plaintiff's affidavit, as well as his deposition testimony, reveals that there is no inconsistency in his statements regarding how the accident occurred. Plaintiff's "unrebutted contention" is that he was required to remove the scaffold's railing in order to install

the tarp, and that he fell because he was not provided with additional fall protection necessary to keep him safe once the railing was removed.

In opposition, defendants have "not offer[ed] any evidence, other than mere speculation, to refute . . . plaintiff's showing or to raise a bona fide issue as to how the accident occurred" (*Pineda v Kechek Realty Corp.*, 285 AD2d 496, 497 [2d Dept 2001]; *Hauff v CLXXXII Via Magna Corp.*, 118 AD2d 485, 486 [1st Dept 1986]).[1] To that effect, defendants have failed to refute plaintiff's testimony that, while working at a height, he was not provided with a harness, a safety line and an anchorage point to tie off to, so as to protect him from falling once the scaffold's railing was necessarily removed.

Moreover, defendants have not demonstrated that plaintiff was recalcitrant in that he was specifically instructed to use a safety device and refused to do so (*see Durmiaki v International Bus. Machs. Corp.*, 85 AD3d 960, 961 [2d Dept 2011]; *Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [1st Dept 2008]; *see also Hoffman v SJP TS, LLC*, 111 AD3d 467, 467 [1st Dept 2013] [the plaintiff was not at fault for not tying off his safety harness, where "there was no appropriate anchorage point to which the lanyard could have been tied-off"])).

In any event, any alleged misuse of the scaffold on plaintiff's part 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*

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[1]It should be noted that, although defendants put forth that plaintiff's credibility is at issue, because, in his affidavit, plaintiff maintains that Ferris instructed him to perform the subject work, and Ferris testified that he never met plaintiff, plaintiff did testify in his deposition that either Ferris or some other person did so. In any event, defendants' credibility arguments have nothing to do with whether or not defendants violated their nondelegable duties under the Labor Law.

Manocherian, 66 NY2d 452, 460 [1985]; *Melito v ABS Partners Real Estate, LLC*, 129 AD3d 424, 425 [1st Dept 2015]; *Velasco v Green-Wood Cemetery*, 8 AD3d 88, 89 [1st Dept 2004] ["Given an unsecured ladder and no other safety devices, plaintiff cannot be held solely to blame for his injuries"]; *Klein v City of New York*, 222 AD2d 351, 352 [1st Dept 1995], *affd* 89 NY2d 833 [1996]). "[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 v Neighborhood Hous. Servs. of N.Y.*, 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 [internal quotation marks and citations omitted]" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002]).

Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed [internal citation omitted]" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006]). "As has been often stated, the purpose of Labor Law § 240 (1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, 'those best suited to bear that responsibility' instead of on the workers, who are not in a position to protect themselves" (*John v Baharestani*, 281 AD2d at 117, quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 500).

Thus, plaintiff is entitled to partial summary judgment in his favor on the issue of liability

under Labor Law § 240 (1) against defendants 1807-1811 Park Avenue Development Corp. and ESF Property Inc.

The court has considered defendants' remaining arguments in opposition and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion of plaintiff Carlos Lopez-Gonzalez, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendants 1807-1811 Park Avenue Development Corp. (Park), ESF Property Inc. (ESF) and Eastside Floor Services, Ltd. is granted as to Park and ESF only, and the motion is otherwise denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action shall continue.

This constitutes the decision and order of the court.

DATED: August 24, 2016

ENTER:

Kelly O'Neill Levy

J.S.C.

HON. KELLY O'NEILL LEVY