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

----------x

PABLO HUILCA,

Plaintiff,

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendant.

----------x

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Third-Party Plaintiff,

-against-

DELTA ENVIRONMENTAL, INC.,

Third-Party Defendant.

----------x

Index No.: 155023/2013

Motion Seq. No.: 001

DECISION/ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

Plaintiff Pablo Huilca ("plaintiff" or "Huilca") moves pursuant to CPLR 3212 for an order granting partial summary judgment in his favor as to liability on his claim of a violation of Labor Law § 240 (1) against defendant/third-party plaintiff Consolidated Edison Company of New York, Inc. ("Con Edison").[1] Defendant opposes the motion.

[1]Although plaintiff seeks summary judgment as to Con Edison, counsel for third-party defendant Delta Environmental, Inc. ("Delta") submits opposition. In its Affirmation in Opposition, Con Edison adopts and incorporates the legal and factual arguments made by counsel for Delta. Arguments made in opposition to this motion submitted by Con Edison and Delta, will be referred to as defendant's opposition.

FACTUAL ALLEGATIONS

Plaintiff alleges that he suffered personal injuries on May 28, 2013, after falling from a scaffold while performing demolition work on the 13th Floor of 4 Irving Place, New York, New York, owned by Con Edison (the "Premises"),

Plaintiff's Deposition Testimony

Plaintiff testified that he had been employed by Delta doing work at the Premises for four to five weeks before his accident, and that he had been a member of a union, known as "Local 12A" for approximately two years (Notice of Motion, Exhibit "3" [Plaintiff's February 24, 2015 Deposition] at 22-25, 37-38). Prior to working for Delta, plaintiff had received training regarding scaffold use from Local 12A at which time he learned that "no scaffold can be moved while a person is on the scaffold" (*Id.* at 34-35; *see also Id.* at 105).[2] Plaintiff maintains that he was never given any safety talks by Delta or at the subject location and that he did not attend any meetings conducted by Con Edison, Delta, or the union during the four or five weeks prior to his accident (*Id.* at 36-37, 43). Before commencing work at the subject location, plaintiff was not provided with any manuals or other written materials regarding site safety (*Id.* at 38).

Plaintiff testified that when he started working at the subject site, he was introduced to the supervisor but that he did not remember his name. He maintains that "Mary," the wife of the supervisor, was his forewoman and would give him orders (*Id.* at 41, 91). Plaintiff testified that he never met with a project foreman named "Mr. Chacon," a Delta environmental supervisor named "Bodzioch," or a project manager named "Garbacz" (*Id.* at 39-40).

---

[2]According to plaintiff, he received both OSHA and asbestos training (*Id.* at 38).

On the date of his accident, plaintiff was demolishing the ceiling. Specifically, plaintiff's job consisted of "bringing down all the aluminum of the ceiling tiles" (*Id.* at 42). Plaintiff was utilizing a scaffold provided by Delta which was approximately five or six feet tall, two or three feet wide, and six feet long (*Id.* at 39-40, 49, 106).[3] As there were no steps to reach the top of the scaffold, plaintiff had to climb on the scaffold's horizontal bars (*Id.* at 49-50, 107-108). The scaffold's platform had a metal protective fence, which had one side that reached plaintiff's knee, and the other side which reached his shoulder (*Id.* at 52-53). The fence was located on all four sides of the scaffold (*Id.* at 53, 98).[4] Immediately prior to the subject accident, plaintiff was standing in the corner of the top of the scaffold (*Id.* at 107). Plaintiff wore his own goggles, mask, hard hat, gloves, and lifting belt (*Id.* at 54-55).

Plaintiff testified that shortly before the subject accident, he had finished chipping an area and that Mary called Tio, a co-worker, to move the scaffold on which he was standing (*Id.* at 60-61, 114). Plaintiff states that Tio came over and that he [plaintiff] told Tio to move the scaffolding to the next section (*Id.* at 60-61, 115). Plaintiff also maintains that both he and Mary told Tio to move the scaffold at the same time (*Id.* at 114-115).[5] At his deposition, plaintiff answered "yes" when asked whether he told Tio to move the scaffold while he [plaintiff] was "still on it" (*Id.* at 63, 107). Plaintiff also testified that he knew that a scaffold should not be

---

[3] He was provided all materials by Delta (*Id.* at 46, 48).

[4]Plaintiff testified that the day of the subject accident was the first time he had used the particular scaffold (*Id.* at 98).

[5]Plaintiff also testified that he actually signaled Tio to move the scaffold rather than verbally tell him because "we all" wore ear protection, goggles and masks so could not hear well (*Id.* at 115-116).

moved while someone is standing on it, but he asked Tio to move the subject scaffold anyway (*Id.* at 105).

Tio held onto the horizontal part of the bars and began to move the scaffold toward himself, while plaintiff held onto a protection fence with one hand and a "chipping gun" in his other hand (*Id.* at 63-66). Plaintiff maintains that before the scaffold was moved, he tried to get off by opening the fence and starting to climb down (*Id.* at 111-112). However, Mary told him not to descend the scaffold while it was being moved. (*Id.* at 113-114).[6]

When the scaffold started to move, plaintiff felt the protection fence pull him (*Id.* at 66). Plaintiff alleges that the scaffold fell sideways away from the wall and that Tio tried but could not hold onto the scaffold's weight (*Id.* at 67-68). Plaintiff proceeded to fall down in a forward direction five or six feet to the ground with the scaffold (*Id.* at 70, 112). Plaintiff landed on the floor, hitting his nose, lower back, right knee, left arm, and left foot. He also felt pain in his neck (*Id.* at 69). At the time of his accident, plaintiff was not using a safety harness and nobody at the job site told him that he would need to wear a harness while working on the scaffold (*Id.* at 75). Plaintiff testified that he was wearing boots required by Delta which had steel tips and ridges on the soles (*Id.* at 77-78).

Plaintiff claims that before he started working on the subject scaffold, he noticed that its wheels and protection fence did not have pins (*Id.* at 81). Plaintiff maintains that the pins hold together the wheels so that they do not fall off of the scaffold (*Id.* at 99). The pins are also inserted on each corner of the fence to keep all four sides secure (*Id.* at 100). Plaintiff testified

---

[6]Plaintiff also testified that it was after Mary told him not to climb down the scaffold that he told Tio to move the scaffold (*Id.* at 113-114).

that he had told Mary about this issue, who responded that the same scaffold had been utilized for three years without problems (*Id.* at 81-82).. Mary told him to use the scaffold without the pins (*Id.* at 82). Plaintiff concluded that the lack of pins on the wheels caused his accident because at the moment the scaffold was moved, "the wheel" fell off (*Id.* at 100). Plaintiff did not see the wheel fall or detach from the scaffold. However, two co-workers told him they saw "the wheel" detach from the scaffold before the accident (*Id.* at 100-101). Plaintiff stated that "the scaffold lost stability and I felt it falling sideway[s]" (*Id.* at 101). Plaintiff alleges "at the moment that they moved the scaffold, the wheel of the scaffold fell because it didn't have the pin, and that was when the scaffold collapsed" (*Id.* at 100).

Deposition of Mike Musantry

Mike Musantry ("Musantry") works for Con Edison as an inspector (Notice of Motion, Exhibit "4" [Musantry's July 9, 2015 Deposition] at 8-9). Musantry testified that he was serving as the inspector for the subject project along with Jim Neilis ("Neilis"),[7] and that the main general contractor for the project was Delta (*Id.* at 11, 14). Musantry was first notified of plaintiff's accident moments after plaintiff fell via phone by "Kris," Delta's site superintendent (*Id.* at 17, 27). When Musantry arrived at the scene, he saw plaintiff, who was injured, and a scaffold which had tipped over (*Id.* at 18). He noticed that the scaffold was owned by Delta and took photos of the scene with his cell phone (*Id.*).

Musantry inspected the scaffold and determined that it was not broken (*Id.* at 26). He maintains that when the scaffold fell over, the platform came off, but that it had four wheels

[7]Musantry testified that he and Neilis worked on different days but that Musantry was the inspector for the shift at the time the subject accident occurred (*Id.* at 12).

which were fastened by pins (*Id.* at 26-27). Musantry asked Kris what had happened, and Kris's understanding was that the accident occurred when a worker pushed the scaffold while plaintiff was located on top of the scaffold platform (*Id.* at 28-29). Musantry also spoke to the worker who pushed the scaffold before it fell (*Id.* at 29). Musantry did not see any defects, cracks, oil or grease on the flooring where the accident occurred, and the floor was relatively smooth and flat (*Id.* at 30-31). He did not have any conversation with plaintiff other than asking him about his condition. Musantry concluded that the scaffold fell over because it was pushed (*Id.* at 34). Musantry testified that the name "Mary" "doesn't ring a bell" (*Id.* at 38-45).

Musantry maintains that he had safety meetings every day before shifts would commence and that Kris would also run safety meetings. Musantry had noticed that plaintiff and the worker who pushed the scaffold on the date of plaintiff's accident were present at a safety meeting in which workers were told not to push occupied scaffolds (*Id.* at 38-39). Following the accident, Musantry filed an accident report with the "Central Information Group" of Con Edison (*Id.* at 50).

Deposition of Flor Chacon

On the date of plaintiff's accident, Flor Chacon ("Chacon") was working for Delta at the Premises, performing demolition and remodeling work, and repairing the contamination that was in the area (Affirmation in Opposition, Exhibit "A" [Chacon's Deposition of July 9, 2015] at 9). The supervisor was Krysztof Bodzioch who was known as 'Kris' ("Kris") (*Id.* at 9). Chacon maintains that at the beginning of the shift on the day of the accident, she gave a safety talk at the entrance of the work site (*Id.* at 10-11). Chacon required that all workers attend the meeting prior to their shift (*Id.* at 11). At safety meetings, Chacon spoke about scaffold safety and told

the workers that they would have to descend before a scaffold was moved (*Id.* at 15-17). Chacon testified that OSHA "requires that in order for any scaffold to be moved even an inch from one place to the other, everybody has to come off of it, move the scaffold and then get back on" (*Id.* at 18). Chacon claims that she reminded employees of these OSHA requirements every day (*Id.*). Chacon stated that the type of scaffold being used on the day of the subject accident is known as a 'Baker's Scaffold' (*Id.* at 22). Chacon explained that in order to move a scaffold, the brakes on each of the four wheels must be released (*Id.* at 24-25).[8]

Chacon stated she was in a different area on the 13th floor when she was notified by a "young man" that an accident had occurred whereupon she went to the location of the accident and found plaintiff had fallen on the floor (*Id.* at 25-27). She testified that Delta provided all of the equipment for the workers on the subject job including scaffolds, shovels, and that Con Edison did not provide Delta with any safety equipment (*Id.* at 14, 46).

Chacon Affidavit

Defendant submits an affidavit of Chacon, sworn to on January 5, 2016, wherein she states that she was the only forewoman at the Con Edison site and that there was no one named "Mary" present. Chacon states further that she "did not instruct [plaintiff] not to step down from the scaffold [and] did not tell Tio to move the scaffold that [plaintiff] was on" (Affirmation in Opposition, Exhibit "D").

---

[8]Chacon also testified that the pins on each wheel lock the wheels in place but that the pins have nothing to do with the brakes (*Id.* at 23-24).

DISCUSSION

Summary Judgment

"'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]; *see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *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]).

Labor Law § 240 (1) Claim

Plaintiff moves for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim. Labor Law § 240 (1), also known as the Scaffold Law, 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]; *see Makarius v Port Auth. of N.Y. & N.J.*, 76 AD3d 805, 807 [1st Dept 2010] ["a distinction must be made between those accidents caused by the failure to provide a safety device required by Labor Law § 240 (1) and those caused by general hazards specific to a workplace"]; *see Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a Labor Law § 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, as plaintiff argues, Labor Law § 240 (1) was violated, because, while plaintiff was subjected to an elevation-related risk, the scaffold, which was in use as a safety device to protect plaintiff from falling as he performed his work on the ceiling, fell sideways away from the wall. Important to the facts of this case, "a presumption in favor of plaintiff arises when a scaffold or ladder collapses or malfunctions 'for no apparent reason'" (*Quattrocchi v F.J. Sciame Constr.*

Corp., 44 AD3d 377, 381 [1st Dept 2007], *affd* 11 NY3d 757 [2008], quoting *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d at 289). "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]; *see Cuentas v Sephora USA, Inc.*, 102 AD3d 504, 505 [1st Dept 2013]; *Agresti v Silverstein Props., Inc.*, 104 AD3d 409, 409 [1st Dept 2013] [Labor Law § 240 (1) liability where the makeshift scaffold failed to protect the plaintiff from falling]; *Saldivar v Lawrence Dev. Realty, LLC*, 95 AD3d 1101, 1102 [2d Dept 2012] [Labor Law § 240 (1) liability where "(t)he collapse of the makeshift scaffold . . . failed to afford the injured plaintiff proper protection for the work being performed, and . . . this failure was a proximate cause of his injuries"]; *Tapia v Mario Genovesi & Sons, Inc.*, 72 AD3d 800, 801 [2d Dept 2010] ["Since the scaffold collapsed, the plaintiff established, prima facie, that he was not provided with an adequate safety device to do his work, as required by Labor Law § 240 (1)"]).

While defendant argues that plaintiff is not entitled to judgment in his favor, because he has not established that the scaffold was defective in any way,[9] plaintiff is not required to demonstrate that the scaffold was defective, as "[i]t is sufficient for purposes of liability under section 240 (1) that adequate safety devices to . . . protect plaintiff from falling were absent" (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]; *see Carchipulla v 6661 Broadway Partners, LLC*, 95 AD3d 573, 573 [1st Dept 2012]; *McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 333 [1st Dept 2008] [where plaintiff sustained injuries "when the unsecured

[9]Defendant argues that the scaffold had protective side rails, an adequate platform, and proper wheels and pins.

ladder he was standing on to drill holes in a ceiling tipped over," the plaintiff was not required to demonstrate, as part of his prima facie showing, that the ladder he was working on at the time of the accident was defective]).

In opposition to plaintiff's motion, defendant argues that plaintiff is not entitled to summary judgment in his favor on the Labor Law § 240 (1) claim, because at least a question of fact exists as to whether plaintiff was the sole proximate cause of his accident due to his direction to a co-worker to push the scaffold while he stood on its platform in contradiction to safety instructions he had received.

However, under these circumstances, whether or not plaintiff contributed to the accident by taking it upon himself to direct a co-worker to move the scaffold while he continued to stand on its platform, 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 Manocherian*, 66 NY2d 452, 460 [1985]; *Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 884 [1st Dept 2012]). "[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). "The mere allegation that plaintiff had disobeyed his supervisor's instructions when he climbed the broken ladder does not provide a basis for a defense against plaintiff's Labor Law § 240(1) cause of action" (*Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993]; *see Dedndreaj v ABC Carpet & Home*, 93 AD3d 487 [1st Dept 2012]).

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]; *see Ranieri v Holt Constr. Corp.*, 33 AD3d 425, 425 [1st Dept 2006] [Court found that the failure to supply plaintiff with a properly secured ladder or any safety devices was a proximate cause of his fall, and there was "no reasonable view of the evidence to support defendants' contention that plaintiff was the sole proximate cause of his injury"]).

In addition, defendant has not demonstrated that this is a case of a recalcitrant worker as it failed to demonstrate that plaintiff was specifically instructed to use any safety device and refused to do so (*see Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [1st Dept 2008]; *Olszewski v Park Terrace Gardens*, 306 AD2d 128, 128-129 [1st Dept 2003]; *Morrison v City of New York*, 306 AD2d 86, 86-87 [1st Dept 2003]; *Crespo v Triad, Inc.*, 294 AD2d 145, 147 [1st Dept 2002]). "An instruction by an employer or owner to avoid using unsafe equipment or engaging in unsafe practices is not a 'safety device' in the sense that plaintiff's failure to comply with the instruction is equivalent to refusing to use available, safe and appropriate equipment" (*Hill v Acies Group, LLC*, 122 AD3d 428, 429 [1st Dept 2014]).

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 citations 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).

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED, that the motion by plaintiff Pablo Huilca pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendant Consolidated Edison Company of New York, Inc. is granted; and it is further

ORDERED, that this matter shall proceed to a trial on damages.

Dated: July 18, 2017

ENTER:

J.S.C.

SHLOMO HAGLER
J.S.C.