SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ **PART** 13
Justice

MICHAEL MAZZOLA,
Plaintiff,

- against -

SILVERSTEIN PROPERTIES, INC., TISHMAN CONSTRUCTION CORPORATION, and 3 WORLD TRADE CENTER, LLC,
Defendants.

INDEX NO. 163159/2015
MOTION DATE 02/07/2018
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4 - 6
Replying Affidavits	7 - 8

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiff's motion for summary judgment on liability on his Labor Law §240[1] claim pursuant to CPLR §3212, is granted. Defendants' motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiff's Labor Law §241[6], §200 and common-law negligence claims, is granted.

On October 21, 2015 Plaintiff sustained injuries when he fell off a ladder. Plaintiff was standing on an A-frame ladder approximately three feet above the floor while pulling on electrical wire that was being fed through conduit in the wall by another co-worker. As he was pulling, the wire snapped causing the ladder to move and the Plaintiff to lose his balance and fall.

Plaintiff was employed by non-party Zwicker Electric Co., Inc. ("Zwicker") as a journeyman electrician for a construction project located at Defendant 3 World Trade Center's ("WTC") premises at 3 World Trade Center, New York, New York ("Construction Project"). Defendant Tishman Construction Corporation ("Tishman") was the general contractor for the Construction Project who employed Zwicker as a sub-contractor responsible for electrical work. Defendant Silverstein Properties, Inc. ("Silverstein") was the managing agent/lessor of the Property. On December 31, 2015 Plaintiff commenced this action to recover damages for the personal injuries sustained in the accident.

Plaintiff now moves for summary judgment on liability on his Labor Law §240[1] claim pursuant to CPLR §3212 (Mot. Seq. 001). The Defendants oppose the motion. The Defendants also move for summary judgment pursuant to CPLR §3212 to dismiss Plaintiff's Labor Law §241[6], §200 and common-law negligence claims (Mot. Seq. 002). Plaintiff does not oppose Defendants' motion.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v City of New York, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of

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

material factual issues (Amatulli v Delhi Constr. Corp., 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (Kornfeld v NRX Tech., Inc., 93 AD2d 772, 461 NYS2d 342 [1983], aff'd 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]). The drastic remedy of summary judgment should not be granted when there is any doubt as to the existence of a triable issue of fact or where such an issue is even arguable (Holender v Fred Cammann Productions, 78 AD2d 233, 434 NYS2d 226 [1st Dept. 1980]).

The "public policy [of] protection of workers requires that the [Labor Law] statutes in question be construed liberally to afford the appropriate protections to the worker" (Kosavick v Tishman Constr. Corp. of New York, 50 AD3d 287, 855 NYS2d 433 [1st Dept. 2008]). A plaintiff may not recover under common-law negligence or New York Labor Law §200, §240[1] or §241[6] when the plaintiff was the sole proximate cause of the injuries (Blake v Neighborhood Hous. Servs. of N.Y.C., Inc., 1 NY3d 280, 771 NYS2d 484, 803 NE2d 757 [2003]).

The court is unpersuaded by Defendants' assertion that Plaintiff was the sole proximate cause of his injuries. "To raise a triable issue of fact as to whether a plaintiff was the sole proximate cause of an accident, the defendant must produce evidence that adequate safety devices were available, that the plaintiff knew that they were available and was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injury sustained" (Nacewicz v Roman Catholic Church of the Holy Cross, 105 AD3d 402, 963 NYS2d 14 [1st Dept. 2013]). While Plaintiff's expert conceded a baker scaffold would have been a safer device rather than the ladder for pulling wires (Mot. Seq. 001 Moving Papers Ex. H), there is no evidence Plaintiff knew where to find the baker scaffold that Defendants have claimed were available to him (Gallagher v N.Y. Post, 14 NY3d 83, 896 NYS2d 732, 923 NE2d 1120 [2010]). The record before this Court leads it to conclude that the Plaintiff was not expected to use anything other than the ladder for his task, and therefore, holds that the Plaintiff was not the sole proximate cause of his injuries.

Labor Law §240[1] imposes absolute liability on owners, contractors and their agents for their failure to provide workers with safety devices that properly protect against elevation-related hazards while they are engaged in certain enumerated activities (Runner v New York Stock Exch., 13 NY3d 599, 895 NYS2d 279, 922 NE2d 865 [2009]). A plaintiff is entitled to protection from the gravity-related risk under §240 when he demonstrates: (i) the injury was caused by the inadequacy or absence of a protective device of the kind enumerated in Labor Law §240[1] (*Id*); and (ii) the nature of the task being performed by the plaintiff at the time of his accident presented a foreseeable risk of a gravity-related injury (Narducci v Manhasset Bay Assoc., 96 NY2d 259, 727 NYS2d 37, 750 NE2d 1085 [2001]).

"The special hazards covered by Labor Law §240[1] are limited to such specific gravity-related accidents as falling from a height [including falls from ladders] ... (Runner v N.Y. Stock Exch., Inc., 13 NY3d 599, 895 NYS2d 279, 922 NE2d 865 [2009] *citing* Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 [1993]). The protection extends to "all workman on the job" engaged in work limited to: erection, demolition, repairing, or alterations of buildings and

structures (Haimes v N.Y. Tel. Co., 46 NY2d 132, 412 NYS2d 863, 385 NE2d 601 [1978]).

Upon a showing that a protected worker was injured as a result of a violation of the statute, absolute liability against the owner, contractor or agent is established as it is not relevant whether Defendant's conduct conformed with the customs or practices, or whether it actually exercised control or supervision over the work that led to the injuries (Zimmer v Chemung Cty. Performing Arts, Inc., 65 NY2d 513, 493 NYS2d 102, 482 NE2d 898 [1985]). In accidents involving ladders, prima facie evidence is established for a Labor Law §240[1] claim when it is established that the ladder was defective or that it slipped, tipped, was placed improperly or otherwise failed to support the worker (Felker v Corning Inc., 90 NY2d 219, 660 NYS2d 349, 682 NE2d 950 [1997]). "Where the furnished protective devices fail to prevent a foreseeable external force from causing a worker to fall from an elevation, that worker is entitled to judgment as a matter of law" (Cruz v Turner Constr. Co., 279 AD2d 322, 720 NYS2d 10 [1st Dept. 2001]). "Therefore, even though the ladder itself [is] not structurally defective, as a matter of law it [becomes] defective inasmuch as it [is] clearly inadequate to protect plaintiff from the foreseeable risk of being caused to fall from it while he was performing his job" (*Id*).

Plaintiff makes a prima facie showing of entitlement to judgment as a matter of law on his §240[1] claim. Plaintiff was a protected worker who was injured while employed to perform work expressly protected by Labor Law §240[1] when he fell from the ladder. Plaintiff's prima facie burden is met as he fell due to the ladder shifting after the electrical wires he was working on broke.

This Court finds Defendants' contention that the sole-witness, John Margaritis, a co-worker of Plaintiff, offered contradicting statements, and therefore creates an issue of fact as to the accident, as unavailing. In Mr. Margaritis' signed October 28, 2015 post-accident statement, he did not mention that the ladder moved when he described Plaintiff's fall (Mot. Seq. 001 Opposition Papers Ex. 1). He stated: "I assume the drag line just snapped... [causing the Plaintiff to lose] his balance" and fall backwards (*Id*). Mr. Margaritis' June 21, 2017 sworn affidavit stated once again that he assumed the drag line snapped, but this time added that it "caused the ladder to move and [the Plaintiff] to lose his balance, and fall" (Mot. Seq. 001 Moving Papers Ex. F). This Court does not find these statements contradictory as Mr. Margaritis' failure to include the movement of the ladder is not a contradiction since he did not offer any different reason for Plaintiff's fall (Hill v City of N.Y., 140 AD3d 568, 35 NYS3d 307 [1st Dept. 2016]) and merely added to his original statement. In any event, it is "clear that the ladder did not prevent plaintiff from falling and there is no dispute that no safety devices, other than the ladder, were provided," (Deng v A.J. Contracting Co., 255 AD2d 202, 680 NYS2d 223 [1st Dept. 1998]) subjecting Defendants to absolute liability on Plaintiff's Labor Law §240[1] claim.

Labor Law §200 codifies the common law duty imposed upon an owner or general contractor to maintain a safe construction site (Rizzuto v L.A. Wenger Contracting Co., 91 NY2d 343, 670 NYS2d 816, 693 NE2d 1068 [1998]). In a §200 claim, liability is found if defendant exercised control or supervision over the work (Zak v UPS, 262 AD2d 252, 692 NYS2d 374 [1st Dept. 1999]). "Even in the absence of supervision or control by the contractor, the statute applies, *inter alia*, to owners and contractors who either create or have actual or constructive notice of a dangerous condition" (Bradley v Morgan Stanley & Co., Inc., 21 AD3d 866, 800 NYS2d 620 [2nd Dept. 2005]). Constructive notice requires that a

defect be visible and apparent and exist for a sufficient length of time prior to the incident to permit the defendant to discover and remedy it (Gordon v Am. Museum of Natural History, 67 NY2d 836, 501 NYS2d 646, 492 NE2d 774 [1986]).

"Labor Law §241[6] imposes a nondelegable duty of reasonable care upon workers and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (Rizzuto, *supra*). "The statute is meant to protect workers engaged in duties connected to the inherently hazardous work of construction, excavation or demolition" (Nagel v D & R Realty Corp., 99 NY2d 98, 752 NYS2d 581, 782 NE2d 558 [2002]).

The Defendants make a prima facie showing that Plaintiff's §241[6], §200 and common-law negligence claims must be dismissed. The Plaintiff was solely supervised by Zwicker and only used Zwicker's equipment in the Construction Project (Mot. Seq. 002 Moving Papers Ex. D). Plaintiff inspected the ladder and conceded it was not defective (*Id*). None of the Industrial Code regulations Plaintiff relies on for his §241[6] claim have provided a basis for the imposition of liability. They are either too broad or inapplicable to the facts at hand (*see e.g.* McLean v Tishman Constr. Corp., 144 AD3d 534, 40 NYS3d 771 [1st Dept. 2016]; *see e.g.* Egan v Monadnock Constr., Inc.,43 AD3d 692, 841 NYS2d 547 [1st Dept. 2007]). As to Plaintiffs Labor Law §200 and common-law negligence claims, it is undisputed that his work was supervised solely by his employer, Zwicker. Furthermore, since Plaintiff did not raise any defense to dismissal of his §241[6], §200 and common-law negligence claims in his opposition papers, he has abandoned them (Perez v Folio House, Inc., 123 AD3d 519, 999 NYS2d 29 [1st Dept. 2014] *citing* Gary v Flair Beverage Corp., 60 AD3d 413, 875 NYS2d 4 [1st Dept. 2009]).

Accordingly, it is ORDERED, that Plaintiff's motion for summary judgment on liability on his Labor Law §240[1] claim against Defendants pursuant to CPLR §3212, is granted, and it is further,

ORDERED, that Plaintiff is granted judgment on liability on his Labor Law §240[1] claim, and it is further,

ORDERED, that the Defendants' motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiff's Labor Law §241[6], §200 and common-law negligence claims is granted, and it is further,

ORDERED, that Plaintiff's Labor Law §241[6], §200 and common-law negligence causes of action are hereby severed and dismissed against the Defendants, and it is further,

ORDERED, that the Clerk enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: February 15, 2018

Manuel J. Mendez
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE