| **Passanisi v City of New York** |
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| 2018 NY Slip Op 31774(U) |
| July 24, 2018 |
| Supreme Court, New York County |
| Docket Number: 155914/2014 |
| Judge: Robert D. Kalish |
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**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK: PART 29**

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TIMOTHY PASSANISI, Index No.: 155914/2014

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

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**Kalish, J.:**

This is an action to recover damages for personal injuries allegedly sustained by a journeyman ironworker on March 11, 2014, when, while working on a platform located underneath the Brooklyn Bridge (the Bridge), he was struck in the knee by a falling C-channel, which had been leaned up against a cable on the platform.

Plaintiff Timothy Passanisi moves, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendant The City of New York. For the reasons stated herein, the motion is granted.

**BACKGROUND**

On the day of the accident, defendant owned the Bridge where the accident took place. Pursuant to a contract with defendant, nonparty Skanska Koch served as the general contractor on a project at the Bridge, which entailed its rehabilitation (the Project). At the time of the accident, plaintiff, who was employed as a journeyman ironworker by nonparty Northeast Structural Steel (Northeast), was replacing steel parts on the Bridge, including C-channels, angles and bolts.

***Plaintiff's Deposition Testimony***

Plaintiff testified that on the day of the accident, he was working for Northeast as a journeyman ironworker on the Project. His duties that day included repairing and replacing damaged steel on the Bridge. Specifically, plaintiff was taking down rotted steel C-channels, angles and bolts and replacing them with new steel. Plaintiff described the C-channels as weighing approximately 100 pounds and measuring four or five feet long and eight-to-ten inches wide.

In order to perform his work, it was necessary for plaintiff to stand on a safe span. He explained that a safe span is a work platform that hung by cables from the underside of the Bridge. As such, the safe span moved when it was walked on.

Plaintiff explained that the accident occurred as he was trying to grab a tool out of a toolbox. As he was reaching for the tool, an old and rusty C-channel fell over and hit his right knee, knocking him to the ground. Plaintiff was about three-to-four feet from the C-channel when it fell on him. While plaintiff did not know for sure what caused the C-channel to tip over, it was his opinion that someone walking on the safe span caused it to move and the C-channel to become unstable.

Plaintiff testified that the men who removed the C-channel were responsible for improperly leaning it up against the cable, rather than placing it "flat on the ground off to the side of the skids," which was the usual method for temporarily storing C-channels once they were removed from the Bridge (plaintiff's tr at 48). Plaintiff maintained that he had never seen a C-channel leaning up against a cable before. However, if he had, he "would have laid it down flat on the ground" (*id.* at 54). Plaintiff noted that, while he was not aware of any particular rule

regarding "how to handle the steel that's removed," laying it flat on the ground was "common sense" (*id.* at 51, 54).

***Deposition Testimony of Ohene Duodu (Engineer for the New York City Department of Transportation)***

Ohene Duodu testified that he was employed by the New York City Department of Transportation (the DOT) as the engineer in charge of the Project on the day of the accident. Duodu testified that the City owned the Bridge where the accident took place, and that Skanska served as the general contractor on the Project.

Duodu described the safe span as a platform, which Skanska workers installed under the Bridge using cables. Duodu testified that he occasionally walked on the safe span, and that it was "[s]atisfactory to walk on" (Duodu tr at 20). When asked if he could "feel any kind of give in the [safe span] when [he] would walk steps across it," Duodu responded, "No" (*id.*).

***The Employers Report of Work-Related Injury/Illness C-2 Report***

In the employers report of work-related injury/illness C-2 report (the C-2 Report), it is indicated that the accident occurred when the C-channel fell on plaintiff's knee as he was reaching into his tool bag. The C-2 report also indicated that "Ironworker Al Sinner was working with Tim Passanisi; He said he [Sinner] never saw the accident, but the C-channel was standing vertically against the painter cable (C-channel weight 72 pounds)" (*id.* at 3).

***Oral Argument***

On May 21, 2018, the parties appeared before the court for oral argument on the motion and reiterated the arguments made in their papers submitted on the motion.

**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 on the Labor Law § 240 (1) claim against defendant. 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]).

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]).

Initially, plaintiff may recover damages for a violation of Labor Law § 240 (1) under a falling objects theory, because the object that fell on him, i.e., the C-channel, "was 'a load that required securing for the purposes of the undertaking at the time it fell [citation omitted]'" (*Cammon v City of New York*, 21 AD3d 196, 200 [1st Dept 2005], citing *Outar v City of New York*, 5 NY3d 731 [2005]; *Gabrus v New York City Hous. Auth.*, 105 AD3d 699, 699 [2d Dept 2013] [the plaintiff was entitled to summary judgment in his favor on his Labor Law § 240 (1) claim where he demonstrated that the load of material that fell on him while being hoisted to the top of the building was inadequately secured]; *Dedndreaj v ABC Carpet & Home*, 93 AD3d 487,

488 [1st Dept 2012] ["[p]laintiff established his prima facie entitlement to summary judgment by showing that defendants' failure to provide an adequate safety device proximately caused a pipe that was in the process of being hoisted to fall and strike him"]).

It should be noted that, in opposition, defendant argues that plaintiff is not entitled to summary judgment, because, in order for Labor Law § 240 (1) to apply, the hazard must have arisen out of an appreciable differential in height between the object that fell and the work (*see Melo v Consolidated Edison Co. of N.Y.*, 92 NY2d 909, 911 [1998]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Here, plaintiff testified that the C-channel was on the same level as plaintiff when it fell on him.

However, in *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* (18 NY3d 1, 9 [2011]), a case with similar facts, the Court of Appeals "decline[d] to adopt the 'same level' rule, which ignores the nuances of an appropriate section 240 (1) analysis." In *Wilinski*, the plaintiff was struck by metal pipes, which stood 10-feet tall and measured four inches in diameter. As in the instant case, the pipes that toppled over onto the plaintiff were located at the same level as the plaintiff. Quoting *Runner v New York Stock Exch., Inc.* (13 NY3d 599 [2009]), the Court in *Wilinski* determined that the "'the elevation differential . . . [could not] be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent" (*id.* at 10, quoting *Runner* at 605); *see also Marrero v 2075 Holding Co., LLC*, 106 AD3d 408, 409 [1st Dept 2013]).

Applying *Wilinski* to the instant case, not only is plaintiff not precluded from recovery simply because the C-channel and he were on the same level, but, given the amount of force that it was capable of generating during its fall, his accident "'ar[ose] from a physically significant

elevation differential'" (*id.* at 10, quoting *Runner* at 603). In addition, as the vertically placed C-channel was precariously placed on an unstable surface, and no protective devices, such as slings or ropes, were provided to secure it from falling over, Labor Law § 240 (1) is applicable, because plaintiff's injuries were "'the direct consequence of [defendants'] failure to provide adequate protection against [that] risk'" (*id.*).

To that effect, plaintiff testified that the safe span moved when anyone walked on it. In addition, it is undisputed that the safe span hung from the Bridge from cables. As such, it was foreseeable that, due to the unstable nature of the safe span, the C-clamp might easily fall over if no safety device was utilized in order to secure it against movement (*see Ortega v City of New York*, 95 AD3d 125, 131 [1st Dept 2012] [where the plaintiff was working on an elevated work platform that "was taller than it was wide and rested upon wooden planks atop an uneven, gravel surface," the Court considered that "[i]t was foreseeable both that the plaintiff could fall off the elevated work platform and that the . . . rack could topple over"]; *Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006] [as it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake, additional safety devices were required to satisfy Labor Law § 240 (1)]).

In addition, contrary to defendant's argument, it would be improper to deny plaintiff summary judgment merely because plaintiff has not provided the testimony of other witnesses who observed the accident (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d at 290 [the court granted plaintiff, who was alone at time of accident and fell from an A-frame ladder which had no protective devices while installing a light fixture, summary judgment on his section 240 (1) claim "[r]egardless of the precise reason for his fall"]; *Campbell v 111 Chelsea Commerce, L.P.*,

80 AD3d 721, 722 [2nd Dept 2011] ["The fact that the plaintiff may have been the sole witness to the accident does not preclude the award of summary judgment in her favor"]).

Also contrary to defendant's argument, the minor inconsistencies in plaintiff's testimony "[do] not relate to a material issue," and, thus, they do not preclude an award of partial summary judgment as to liability in plaintiff's favor (*Laconte v 80 East End Owners Corp.*, 80 AD3d 669, 671 [2d Dept 2011]; *Anderson v International House*, 222 AD2d 237, 237 [1st Dept 1995]).

Finally, while defendant asserts that plaintiff's motion should have been supported by expert testimony establishing that a safety device was needed to keep plaintiff safe, expert testimony is required only when the subject matter is "beyond the ken of the typical juror," or when the issues involved are of "such scientific or technical complexity as to require the explanation of an expert in order for the jury to comprehend them" (*Hendricks v Baksh*, 46 AD3d 259, 260 [1st Dept 2007]). Here, defendant has not sufficiently established that the subject matter and issues involved herein are of the kind that would make such expert testimony necessary.

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 as to liability on the

Labor Law § 240 (1) claim against defendant.

The court has considered defendant's remaining contentions and finds them to be unavailing.

**CONCLUSION**

For the foregoing reasons, it is hereby

**ORDERED** that plaintiff Timothy Passanisi's motion, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendant The City of New York is granted.

Dated: July 24, 2018

ENTER:

HON. ROBERT D. KALISH
J.S.C.