SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT DAVID KALISH** **PART** **IAS MOTION 29EFM**

Justice

----------X

ALBERTO SANCHEZ,

Plaintiff,

- v -

THE BET ELI COMPANY DELAWARE LLC et al.,

Defendants.

----------X

INDEX NO. 155420/2014

MOTION DATE 01/17/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

NYSCEF Doc Nos. 37–57 and 59–68 were read on this motion for summary judgment.

Motion by Plaintiff Alberto Sanchez pursuant to CPLR 3212 for partial summary judgment in favor of Plaintiff and against Defendants The Bet Eli Company Delaware LLC, Artisan Construction Partners, LLC, and Newmark & Company Real Estate Inc. as to liability on his Labor Law § 240 (1) cause of action is granted.

Plaintiff laborer Alberto Sanchez commenced the instant action on June 2, 2014, alleging personal injuries resulting from a fall from a scaffold at a worksite located at 80 Eighth Avenue, New York, New York (the "Premises"), on or about May 15, 2014, due to the negligence of Defendants The Bet Eli Company Delaware LLC ("Bet Eli"), as owner of the Premises, Newmark & Company Real Estate Inc., as Bet Eli's managing agent, and Artisan Construction Partners, LLC ("Artisan"), as the general contractor. Plaintiff alleges that Defendants violated Labor Law §§ 200, 240, and 241 (6).

As is relevant here, Plaintiff has moved pursuant to CPLR 3212 for partial summary judgment on his Labor Law § 240 (1) cause of action against Defendants. Plaintiff alleges, in sum and substance, that he was performing painting and patchwork at the Premises for his employer, LJM Painting LLC ("LJM"), on the date of the accident. Plaintiff further alleges that that Artisan retained LJM to perform the work and that Plaintiff was working under the direction of Artisan superintendent Richard Brown ("Brown") on the date of the accident. Plaintiff alleges that Brown directed Plaintiff to patch and paint the ceiling in the lobby of the Premises and that the only scaffold available on the Premises was an eight-foot Baker scaffold provided by LJM and erected by Plaintiff.

As to how the accident occurred, Plaintiff argues in his moving papers that "[a]s I was painting going forward and back the scaffold started to tremble." Plaintiff was allegedly thrown forward and/or threw himself forward, causing him to fall eight feet and hit the floor. Plaintiff further argues that the scaffold did not have safety rails and that he was not provided with any safety harness, lanyard and anchor point, hoist, or other safety device. Plaintiff's accident was unwitnessed. Plaintiff himself reported that he had properly secured the scaffold's wheels prior to ascending and that it seemed safe and secured. Brown testified that the scaffold appeared to be

in "great" condition and was sturdy and secured when he came upon the scene after the alleged accident occurred.

Plaintiff argues, in sum and substance, that the Baker scaffold was inadequate as a safety device because it lacked rails. Plaintiff further argues that other height-protective safety devices or additional measures were not present or taken to make him safe in his place of work eight feet above the floor. Plaintiff, in sum and substance, argues that his fall from an eight-foot height from a scaffold shows prima facie his entitlement to judgment as a matter of law on his Labor Law § 240 (1) cause of action.

Defendants argue in their opposition papers, in sum and substance, that there are at least five versions of the accident with some support in the record, and so there exist genuine issues of material fact as to how the accident occurred and whether Plaintiff was the sole proximate cause of it. Those versions of the accident are, based upon deposition testimony and documents submitted with the motion: (1) the ground trembled; (2) Plaintiff threw himself forward off the scaffold; (3) Plaintiff missed a step and fell off the edge; (4) Plaintiff lost his balance while on top of the scaffold; (5) Plaintiff lost his footing while climbing down the scaffold.

DISCUSSION

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form." (*Zuckerman v City of New York*, 49 N.Y.2d 557, 562 [1980] [internal quotation marks and citation omitted].) "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." (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Id.*) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 N.Y.2d 72, 81 [2003].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012] [internal quotation marks and citation omitted].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*See Rotuba Extruders v Ceppos*, 46 N.Y.2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 A.D.2d 224, 226 [1st Dept 2002].)

Labor Law § 240 (1) provides, in pertinent 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) imposes absolute liability on owners, contractors and their agents for any breach of the duty imposed by this statute which proximately causes an injury. (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513, [1991].) "'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder 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.'" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604, [2009], quoting *Ross*, 81 NY2d at 501.) "The dispositive inquiry [regarding liability under this section] does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker. Rather, the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide protection against a risk arising from a physically significant elevation differential." (*Runner*, 13 NY3d at 603.) To establish liability under Labor Law section 240 (1), a plaintiff must prove that the statute was violated and that the violation proximately caused his or her injuries. (*Blake v Neighborhood Hous. Servs. of NY. City*, 1 NY3d 280, 290, 803 N.E.2d 757, 771 N.Y.S.2d 484 [2003].)

"Proximate cause is demonstrated where the plaintiff generally shows that the defendant's negligence was a substantial cause of the events that produced the injury, and the plaintiff need not demonstrate that the precise manner in which the accident happened, or the extent of the injuries, was foreseeable." (*Rodriguez v. Forest City Jay Street Associates*, 234 AD2d 68, 650 N.Y.S.2d 229 [1st Dept 1996], quoting *Public Adm'r of Bronx County v Trump Vil. Constr. Corp.*, 177 AD2d 258, 259 [1st Dept 1991].) Labor Law § 240 (1) is to be liberally construed so as to accomplish the purpose for which it was enacted. (*Rocovich.*)

On January 16, 2019, the Court heard oral argument on Plaintiff's motion for partial summary judgment on his Labor Law § 240 (1) claim. The Court found at the oral argument, the transcript from which is incorporated herein by reference (as it will appear on NYSCEF), that Plaintiff has shown prima facie entitlement to judgment as a matter of law on that claim.

Specifically, "[p]laintiff made a prima facie showing of entitlement to judgment as a matter of law on the Labor Law § 240 (1) claim by presenting undisputed evidence that he fell off a scaffold without guardrails that would have prevented his fall." (*Celaj v Cornell*, 144 AD3d 590, 590 [1st Dept 2016].) In *Celaj*, Plaintiff's failure to lock the wheels was found to be, at most, comparative negligence, which was not a bar to granting the motion. Further, inconsistencies in Plaintiff's account did not raise issues of fact because he was not afforded proper protection. Further, as also found in *Celaj*, the height of the scaffold is irrelevant on a Labor Law § 240 (1) claim; the scaffold must have guardrails, at any height, to be an adequate safety device. (*See Klapa v O & Y Liberty Plaza Co.*, 218 AD2d 635, 636 [1st Dept 1995], quoting *Bland v Manocherian*, 66 NY2d 452, 461 [1985] ["the general standard of section 240 (1), as correctly applied by the Appellate Division, requires that scaffolding be so constructed and erected as 'to give proper protection' to the worker, *without regard to height*."]; *see also Veseli v West Investors LLC, 420 W*, 2014 NY Slip Op. 30188[U], at 7 [Sup Ct, NY County, Madden, J.].) In such a case, a plaintiff's injuries are at least partially attributable to the defendant's failure to provide guardrails, safety netting, or other proper protection, and summary judgment as to liability must be granted in favor of the plaintiff, absent some finding he was a

recalcitrant worker. (*See Vail v 1333 Broadway Assoc., LLC*, 105 AD3d 636 [1st Dept 2013]; *Laquidara v HRH Const. Corp.*, 283 AD2d 169, 169 [1st Dept 2001].)

The Court reserved decision at the oral argument on the limited question of whether Artisan has raised a genuine issue of material fact in response as to an allegedly inconsistent version of the accident.

The document at issue submitted in support of Artisan's contention is a two-page printout of what is alleged to be a Bellevue Hospital Center record dated May 15, 2014, the date of Plaintiff's alleged accident. The header of the document indicates that it consists of pages two and three out of 63, only. The pages contain no certification or authentication of any kind. The document contains a "Provider Note," allegedly written by the attending physician Dr. Demian Szyld, stating, in relevant part, that "[patient] was trying to get down from scaffolding elevated approx. 4 feet above the ground when he lost his footing and fell on outstretched left hand."

Although it appears to the Court that "[t]he statement is clearly relevant to the diagnosis and treatment of plaintiff's injuries and therefore admissible as part of a hospital record" (*Eitner v 119 West 71st St. Owners Corp.*, 253 AD2d 641, 642 [1st Dept 1998]), the hospital record itself is not admissible as submitted because it is unsworn, and thus it may not be considered in opposition to the motion. (*See Vickers v Francis*, 63 AD3d 1150, 1150–1151 [2d Dept 2009].) Further, the unsworn record fits into no exception known to this Court for admissibility of an unsworn hospital record on a motion. (*See, e.g., Clemmer v Drah Cab Corp.*, 74 AD3d 660 [1st Dept 2010]; *cf. Joseph v Bd. of Educ. Of City of New York*, 91 AD3d 528 [1st Dept 2010].)

The Court finds that the remaining statements, attributed to Plaintiff from his deposition, and argued by Artisan as raising a genuine issue of material fact, exhibit what are, when compared with each other, mere inconsistencies of the type found permissible in *Celaj*. As the Court indicated at the oral argument, every such version of how the fall occurred placed Plaintiff at the top of the scaffold, which lacked guardrails, and the questions remaining has to how the accident occurred relate now to Plaintiff's comparative negligence and damages only.

The Court notes that the instant notice of motion and accompanying documents were timely filed with the exception of Plaintiff's expert's affidavit. Plaintiff's reply papers were also untimely filed. The Court has declined to consider both the expert's affidavit and the reply papers in reaching its decision. However, Plaintiff was not precluded from replying on the record at the oral argument to Artisan's opposition arguments or from citing additional case law to the Court at that time.

(THIS SPACE IS INTENTIONALLY LEFT BLANK.)

CONCLUSION

Accordingly, it is

ORDERED that the motion by Plaintiff Alberto Sanchez pursuant to CPLR 3212 for partial summary judgment in favor of Plaintiff and against Defendants The Bet Eli Company Delaware LLC, Artisan Construction Partners, LLC, and Newmark & Company Real Estate Inc. as to liability on his Labor Law § 240 (1) cause of action is granted; and it is further

ORDERED that, within 10 days of the date of the decision and order on this motion, Plaintiff shall serve a copy of this order with notice of entry on Defendants and on the clerk, who is directed to enter judgment accordingly; and it is further

ORDERED that, within 30 days of the date of the decision and order on this motion, Plaintiff shall obtain a copy of the January 16, 2019 oral argument transcript and upload it to NYSCEF.

The foregoing constitutes the decision and order of the Court.

1/17/2019
DATE

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

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

155420/2014 SANCHEZ, ALBERTO vs. BET ELI COMPANY DELAWARE
Motion No. 001