SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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JOHN GILPIN

Plaintiff,

- v -

MUTUAL REDEVELOPMENT HOUSES, INC.,

Defendant.

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INDEX NO. 156193/2015

MOTION DATE 10/10/2018

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 59, 61, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

In this personal injury action arising from a fall from a ladder at construction site, the plaintiff moves for partial summary judgment on the cause of action of the complaint alleging a violation of New York State Labor Law § 240(1). The defendant, owner of the subject property at 305 West 28th Street in Manhattan, opposes the motion. The motion is denied.

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824, 833 (2014); Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980). If the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra; O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "'summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. v Mount

Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

Labor Law § 240(1) provides that "[a]ll contractors and owners and their agents . . . shall furnish or erect, or cause to be furnished or erected . . . 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 [construction workers employed on the premises]." The duty created by Labor Law § 240(1) is nondelegable, and an owner or contractor who breaches that duty may be held liable for damages "regardless of whether it has actually exercised supervision or control over the work." Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494, 500 (1993); see Cahill v Triborough Bridge and Tunnel Authority, 4 NY3d 35 (2004). Moreover, "where an accident is caused by violation of the statute, the plaintiff's own negligence does not furnish a defense." Cahill v Triborough Bridge and Tunnel Authority, supra at 39.

However, not every worker who falls at a construction site is afforded the 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). To prevail on a Labor Law section § 240(1) claim, a plaintiff must thus show that the statute was violated, and that this violation was a proximate cause of his or her injuries. See Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35 (2004). Thus, "[a] mere fall from a ladder or other similar safety device that did not slip, collapse or otherwise fail is insufficient to establish that the ladder did not provide appropriate protection to the worker.'" McGill v Qudsi, 91 AD3d 1241, 1243 (3rd Dept. 2012), quoting Briggs v Halterman, 267 AD2d 753, 755 (3rd Dept. 1999). Where there is no evidence or testimony as to how an accident occurred, "it is just as likely that the accident could have been caused by some other factor, such as a misstep or loss of balance," and "any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation." Teplitskaya v 3096 Owners Corp., 289 AD2d 477, 478 (2nd Dept. 2001).

Furthermore, it is undisputed that material inconsistencies and contradictions about the circumstances of an accident and whether a plaintiff's injuries were proximately caused by a statutory violation of Labor Law § 240(1) provide a basis for denying summary judgment. Smigielski v. Teachers Ins. and Annuity Ass'n of America, 137 AD3d 676, 676 (1st Dept. 2016).

An inconsistency or contradiction is material when one version of events would preclude recovery. See Buckley v. Jones/GMO, 38 A.D.3d 461, 462 (1st Dept. 2007); Potter v. NYC Partnership Hous. Dev. Fund Co., Inc., 13 A.D.3d 83, 85 (1st Dept. 2004).

The plaintiff, a journeyman level steamfitter with more than 20 years experience, testified at his deposition and maintains that, on May 26, 2015, while installing an HVAC system in the lobby of the defendant's property, and while he was holding equipment in both hands, he fell from a rung of an A-frame ladder when it suddenly "twisted." He does not explain how the ladder "twisted" but stated that he and the ladder fell to the floor. The plaintiff testified that, as per his usual practice, he had taken the 6 or 8-foot ladder from a closet and set it up himself and that his co-worker/apprentice Jeremiah Stewart had been "footing" the ladder but had left the lobby at some point and was absent when he fell to the ground. The plaintiff testified that the ladder, which was owned and provided by his employer, F.W. Sims, was made of aluminum and fiberglass, that he did not notice any broken rungs or any pieces missing from the ladder, that he made sure the ladder "locked in" and that "both feet are on the ground, not twisted", and there was no debris on the floor of the work area. He experienced "no issues" with the ladder or a second ladder they used that morning, and this accident occurred approximately 15 minutes after he repositioned the ladder following the lunch break. He testified that the only witness to the accident was a resident of the building, whose name he did not know. When the plaintiff reported the fall to his foreman, Chris Perks, he did not mention that Stewart had left the lobby. The plaintiff was taken to the hospital by ambulance, where doctors took x-rays and prescribed pain medication.

In opposition to the motion, the defendant argues that the plaintiff fails to meet his initial burden on the motion in that he failed to present any evidence as to whether any statute was violated and as to whether adequate alternative safety devices were available to him to perform his work. The defendant further argues that, in any event, its proof, including the affidavit of Jeremiah Stewart raises triable issues as to the circumstances of the accident. See Trolone v Lac D'Amiante Du Quebec, Ltee, 297 AD2d 528 (1st Dept. 2002). In his affidavit Stewart alleges that, although it was his custom and practice to stand near the ladder of the worker he was assisting, just before the subject accident, the plaintiff had directed Stewart to leave the lobby and retrieve material from the shanty on 26th Street. When he left to get the material, the plaintiff was not on the ladder. Upon returning, Stewart found the plaintiff laying on the floor. He did not

recall seeing any tools on the floor near the plaintiff. Contrary to the plaintiff's testimony, Stewart alleged that the plaintiff never requested or directed him to hold the ladder.

In reply, the plaintiff merely argues that the court should not consider Stewart's affidavit as he was not previously revealed as a witness. However, as noted above, Stewart was the plaintiff's co-worker at the time of the accident and found him lying on the floor. As such, the plaintiff can not reasonably argue that Stewart was a "surprise" witness.

The defendant correctly argues that the plaintiff failed to meet his burden in the first instance, thus obviating the need to look to the opposing papers. In any event, the defendant's proof presents material inconsistencies and contradictions about the circumstances of the accident and raises triable issues as to the plaintiff's credibility and whether a plaintiff's injuries were proximately caused by a statutory violation of Labor Law § 240(1) The accident reports relied upon by the plaintiff in reply do not warrant a different result.

Accordingly, it is

ORDERED that the plaintiff's motion for partial summary judgment is denied, and it is further

ORDERED that the parties shall appear for a status/settlement conference on February 27, 2020, at 11:00 a.m.

This constitutes the Decision and Order of the court.

12/13/2019
DATE

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

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