SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42
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BRIAN ISAAC,

Plaintiff, DECISION AND ORDER

Index No. 158529/2014

- v -

135 WEST 52ND STREET OWNER LLC, NEW LINE CONSTRUCTION CORP., NEW LINE STRUCTURES, INC.

MOT SEQ 004

Defendants.
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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action under Labor Law §§ 200, 240(1) and 241(6) the plaintiff Brian Isaac allegedly fell from scaffolding with no witness present. The defendants, 135 West 52nd Street Owner LLC and New Line Construction Corp., move pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's complaint as against them. The plaintiff opposes the motion. The motion is granted to the extent discussed herein.

II. BACKGROUND

On March 20, 2014, Isaac was working as a construction welder at his jobsite at West 52nd Street in Manhattan. Isaac was instructed to drill holes through a concrete wall using a water pressure drill, so that the wall could be reinforced with steel

in anticipation of adding additional floors to the building. Isaac claims that the scaffolding was about five-feet in height, with wheels on the bottom that he locked prior to climbing the scaffolding to begin drilling. Isaac further claims that while he was drilling, the scaffolding 'jerked' and slipped from underneath him, leading to his fall, and that there were no witnesses to his accident. Isaac alleges that he landed on his hands and knees after the fall, and that after laying on the ground for an undisclosed amount of time, he managed to get up and tell his supervisor, Cleison Rocha Costa of non-party GMC Contracting and Estimating (GMC), that he fell. Isaac further alleges that Costa told him that he would fill out an accident report form, which Isaac claims he was never shown.

The defendants dispute Isaac's version of events, claiming that nobody was alerted about Isaac's accident until March 27, 2014, when Misael Silva and John Pascale, the payroll administrator and controller GMC respectively, noticed that Isaac was limping at work. When asked about his limp, the defendants claim that Isaac responded that he hyperextended his knee while stepping off of a two-foot in height scaffolding, and that the pain is his knee was likely exacerbated from diabetes-related inflammation. The defendants further claim that, after they were alerted to Isaac's injury, he took three days off, saw

an orthopedic specialist, and then returned to work for an additional week before the specialist told him to stop working.

III. DISCUSSION

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 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez, supra; Zuckerman, supra. However, 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, supra; 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 480, 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

"Labor Law § 240 (1) imposes a nondelegable duty and absolute liability upon owners or contractors for failing to provide safety devices necessary for protection to workers subject to the risks inherent in elevated work sites who sustain injuries proximately caused by that failure." Jock v Fien, 80 NY2d 965, 967-968 (1992); see also Rocovich v Consolidated Edison Co., 78 NY2d 509 (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." Ross v Curtis-Palmer Hydro Elec. Co., 81 NY2d 494, 501 (1993). To impose liability under Labor Law § 240(1), the plaintiff must prove a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices), and that the statutory violation proximately caused his or her injuries. See Blake v Neighborhood Hous. Sews. of N.Y. City, 1 NY3d 280 (2003).

"[T]he single decisive question is whether the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." Runner v New York Stock Exch., Inc., supra. The purpose of the statute is to "protect[] workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident." Zimmer v Chemung County Performing Arts, 65 NY2d 513, 520 (1985). It is well established that contractors and owners have a statutory duty to provide adequate safety devices for their workers. The failure to provide a safety device is a per se violation of the statute for which an owner/contractor is strictly liable. See Zimmer v Chemung County Performing Arts, supra at 523-524 (1985); Cherry v Time Warner, Inc., 66 AD3d 233 (1st Dept. 2009). The public policy protecting workers requires that the statute be liberally construed. Id. The plaintiff may recover under § 240(1) if he was engaged in an activity covered by the statute and exposed to an elevation-related hazard for which no safety device was provided or the device provided was inadequate. See Jones v 414 Equities LLC, 57 AD3d 65 (1st Dept. 2008).

To establish a claim under Labor Law § 241(6), a plaintiff must show that a specific, applicable Industrial Code regulation was violated and that the violation caused the complained-of injury. See Ross v Curtis-Palmer Hydro-Elec. Co., supra. Here, the plaintiff alleges violations of 22 NYCRR §23-1.7(d) (failure to provide safe flooring, passageway, walkways, scaffolding, platforms or other elevated working surface free from slippery conditions); 22 NYCRR §23-1.7(e) (failure to provide safe passageways free from debris, dirt and other obstructions); 22 NYCRR §23-5.1(b) (improper footing or anchorage of scaffold); 22 NYCRR §23- 5.1(c)(1) (scaffolding not constructed to bear proper weight requirements); 22 NYCRR §23-5.1(c)(2) (scaffolding not provided with adequate horizontal and diagonal bracing to prevent lateral movement); 22 NYCRR §5.1(f) (improper maintenance and repair of scaffolding); and 22 NYCRR §5.1(h) (every scaffold shall be erected and removed under the supervision of a designated person).

The defendants move for summary judgment dismissing the plaintiff's claims under Labor Law §§ 200, 240(1) and 241(6), arguing that the plaintiff's injuries were not caused by the defendants' negligence or an elevation-related hazard, as he was injured stepping off of a two-foot high scaffold, and that the plaintiff's allegations do not support any violation of an applicable Industrial Code regulation. In support of their

motion, the defendants submit, *inter alia*, the affidavit of John Pascale, averring that Isaac did not report his injury to Costa, but rather told him of his injuries a week after they occurred and that the injuries were caused by him stepping off of a two-foot scaffolding, and the deposition transcript of Cleison Costa corroborating the version of events put forth in the Pascale affidavit. The defendants also submit the plaintiff's medical records from Premier Orthopedics Sports Records and Concerta Medical Center, all of which state that the plaintiff was injured stepping off of scaffolding, not from a fall.

The defendants' submissions fail to establish, *prima facie*, the defendants' entitlement to summary judgment under Labor Law § 240(1). The plaintiff's deposition testimony, submitted in support of the motion, contradicts the defendants' version of events with regard to (i) the nature of the plaintiffs' accident, inasmuch as the plaintiff testified that he fell from the scaffolding after it jerked while he was on it, not that he injured himself stepping down from the scaffolding, (ii) the height of the scaffolding, as the plaintiff testified that he fell from a scaffolding five-feet in height, and (iii) the timeline under which the plaintiff reported his injuries, as the plaintiff testified that he told Costa about his fall shortly after it happened. As such, the version of events contained in the plaintiff's deposition testimony raises triable issues of

facts as to whether the plaintiff may have been injured from a fall due to the inadequacy of the provided scaffolding.

Although the defendants contend that their submissions demonstrate that their version of events is correct, any such determination would require an assessment of the credibility of the plaintiff, Pascale, and Costa, which may not be resolved by a court to reach a determination on a motion for summary judgment. See S. J. Capelin Assocs., Inc. v Globe Mfg. Corp., 34 NY2d 338 (1974); Baseball Office of Com'r v Marsh & McLennan, Inc., 295 AD2d 73 (1st Dept. 2002).

However, the defendants do establish their entitlement to summary judgment on the plaintiff's claims under Labor Law § 241(6). The plaintiff's allegations of violations of Industrial Code regulations 22 NYCRR §23-1.7(d) and 22 NYCRR §23-1.7(e) fail as the plaintiff's deposition testimony does not allege any slippery conditions or dirt, debris, or other obstructions that led to his purported fall. Moreover, the defendants correctly argue that the plaintiff's claims for violations of 22 NYCRR §§23-5.1(b), 23- 5.1(c)(1), 23-5.1(c)(2), 5.1(f), and 5.1(h), collectively entitled "General Provisions for All Scaffolds," are insufficiently specific to constitute a proper predicate for liability under Labor Law § 241(6). See Varona v Brooks Shopping

Centers LLC, 151 AD3d 459 (1st Dept. 2017); Kosovrasti v Epic (217) LLC, 96 AD3d 695 (1st Dept. 2012).

The defendants also establish their *prima facie* entitlement to summary judgment on the plaintiff's claims under Labor Law § 200. Claims for personal injury under Labor Law § 200 fall into two categories: those arising from an alleged defect or dangerous condition existing on the premises, and those arising from the manner in which the work was performed. See Cappabianca v Skanska USA Bldg. Inc., 99 AD3d 139 (1st Dept. 2012); Cook v Orchard Park Estates. Inc., 73 AD3d 1263 (1st Dept. 2010). Where an existing defect or dangerous condition caused the injury, liability only attaches if the owner or general contractor created the condition or had actual or constructive notice of it. See Mendoza v Highpoint Assoc., IX LLC, 83 AD3d 1 (1st Dept. 2011). Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor can only be liable if it actually exercised supervisory control over the injury-producing work. See Foley v Consolidated Edison Co. of N.Y., Inc., 84 AD3d 476 (1st Dept. 2010); Dalanna v City of New York, 308 AD2d 400 (1st Dept. 2003).

Here, the defendants' submissions demonstrate that they neither had actual or constructive notice of any dangerous condition relating to the scaffolding, if one existed, nor did

they exercise supervision or control over the plaintiff's injury-producing work, as the plaintiff took all direction from his foreman, Cleison Costa of GMC. The plaintiff does not put forth any argument in response in his reply papers on this cause of action, and thus fails to raise a triable issue of fact.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the defendants' motion for summary judgment dismissing the plaintiff's claims under Labor Law §§ 200, 240(1) and 241(6) is granted to the extent that the plaintiff's claims under Labor Law §§ 200 and 241(6) are dismissed and the remainder of the motion is denied; and it is further,

ORDERED that the parties are to contact chambers on or before June 30, 2020 to schedule a settlement conference.

This constitutes the Decision and Order of the court.

Dated: June 1, 2020 ENTER:

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