SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

KEVIN P. POWERS

INDEX NO. 153260/13

MOT. DATE

- v -

MOT. SEQ. NO. 004

RIVER CENTER LLC et al.

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____
Replying Affidavits NYSCEF DOC No(s)._____

In this action, plaintiff seeks to recover for personal injuries he sustained when he was struck by a carpet as it was being unrolled and installed during a renovation project. Plaintiff has asserted claims for violations of Labor Law §§ 240[1], 241[6] and 200 as well as for common law negligence. Defendants Turner Construction Company ("Turner") and Dormitory Authority of the State of New York ("DASNY") move for summary judgment (CPLR § 3212) and/or to dismiss plaintiff's complaint pursuant to CPLR § 3211[a][7]. Plaintiff opposes the motion and cross-moves for summary judgment on liability in his favor. Turner and DASNY oppose the cross-motion.

In a decision/order dated January 31, 2014, the Honorable Joan Kenney granted a default judgment against River Center LLC and Rein L.P. and directed that an inquest be held at the time of trial to assess plaintiff's damages against them. Plaintiff discontinued this action as to defendant The AP & ASBP Holding Company, Inc., so Turner and DASNY are the only remaining defendants that have appeared in this action.

Issue has been joined and note of issue has not yet been filed. Therefore, summary judgment relief is available. The court's decision follows.

Many of the relevant facts are not in dispute. Plaintiff was injured on November 8, 2011 while working for Elite Flooring on a renovation/construction project at John Jay college located at 805 Third Street, New York, New York (the "project'). Specifically, plaintiff was injured while attempting to install 200 feet of carpeting which measured 6'6" in width. The carpet was rolled on a spindle that was eight feet long.

Dated: 10/28/20

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☒**GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐**SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐**FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

In a sworn affidavit, plaintiff explains how his accident occurred. He and approximately nine other workers were told to jerry-rig a support apparatus to unroll a carpet on a spindle which weighed approximately 275 pounds. The workers did so by placing the ends of the carpet spindles on two stacked buckets of carpet adhesive, each standing about 16 to 18 inches in height and then placing two bags of "powdered patch" weighing approximately 10 pounds each on top of the spindle to keep the spindle in place as the carpet was rolled out.

Plaintiff claims that the carpet was not rolling out properly, so his foreman told him "to climb up and stand on top of the buckets, to add weight (I weighted 135 pounds) to help secure the spindle." He claims that he then turned to face the carpet. When other workers began to unroll the carpet, plaintiff states that one of the buckets slipped out from under him, causing the whole assembly to collapse. Plaintiff further states:

> I was thrown backwards to the ground, with my back against the door jam, and the carpet roll fell on top of me. 3 workers had to lift the carpet off of me in order for me to be freed.

In opposition to plaintiff's cross-motion, defense counsel asserts that plaintiff's affidavit advances a "new 'version' of the happening of the accident" and maintains that plaintiff's affidavit "plainly contradicts the deposition testimony [plaintiff] advanced at multiple depositions in this case."

Plaintiff's deposition was held over four days: August 26, 2014, April 22, 2015, August 17, 2016 and October 1, 2019. On the first date, plaintiff testified that he was "[i]n front" of the rolled-up carpet "by the pipe" when the accident occurred. He further testified:

Q How did this incident happen?
A When they were pulling it all of a sudden the whole, the buckets came down, the pipes came down and landed on me pinned me up against the door jamb and three guys had to lift the carpet and another guy had to drag me out from underneath.
Q First of all you said pipes, was there more than one?
A One pipe.
Q So what happened that started this, that triggered this process, did somebody kick a bucket, did somebody drop a pipe, what happened?
A The carpet just, the whole pipe, the carpet just came, just came this way and –
…
Q Do you know if the carpet had been secured to the bucket in any way?
A No.
…
Q What, if anything, is normally done to keep the pipe on the bucket and keep it from slipping off as it did on this day?
A You would have somebody maybe stand or we would put a bag of patch underneath it to keep it and it would just slide on the patch on top of the bucket.
Q Was that done on this day?
A Yes, the patch on top of the bucket with the pipe on top of the patch.
Q But the pipe still came off the patch?
A Yes.
Q Do you know why?
A No.
…
Q At the time you were standing still was the roll of carpet behind you?
A No.
Q Was it next to you?

A In front of me, next to me.
…
Q Was it your intention to walk down the hall –
A No.
Q To pull out the carpet?
A No.
Q What were you intending to do?
A To, I guess to, I don't know, I don't, I guess to see to make sure maybe the carpet roll wasn't going to come off.
Q Come off the patch?
A Off the patch and off the bucket.
Q How were you going to do that?
A Maybe just push on the pipe if it was coming forward.
Q Was that something you had done before?
A On this particular job, yes.
Q You would check the pipe?
A Yes.
Q To make sure that it was secure on top of the patch –
A Yes.
Q On the bucket?
A Yes.
,,,
Q As you were standing there were you facing towards the carpet or away from the carpet?
A Towards the carpet.

On April 22, 2015, plaintiff testified that the two buckets were stacked, a bag of patch was on top of the buckets and then the pipe was on top of the bag of patch. About where plaintiff was when the accident occurred, plaintiff stated:

> Well, my co-workers were pulling the carpet. I was over by the roll, and the pipe, and the buckets. I was in that section to make sure that the pipe wouldn't hit the door or hit anything. And that is when it came down and pinned me up.

At that second deposition, plaintiff consistently testified that he was by the ends of the pipe and buckets, not on them:

Q. During the time that they are pulling the carpet, you were over by one of the ends of the pipe, correct?
A. Yes.
…
Q. As they are pulling the carpet down the hallway, are you looking down at those co-workers that are pulling the carpet, or are you looking somewhere else?
A. I probably was looking at them. I don't remember.
Q. You were standing next to the roll near one of the end of the pipe; is that correct?
A. Yes.
Q. That means you are also standing next to two buckets; is that correct?
A. Yes.

Plaintiff's affidavit also contradicts his testimony at the second deposition as to what happened with the buckets:

Q. Now, at some point did something happen to the buckets?

A. Before they came down?
Q. Yes.
A. No.
…
Q. When the two top buckets fell towards the people pulling the carpet, what happened to the pipe that was on top of the buckets?
A. It came towards the guys pulling the carpet. Everything went forward.

Plaintiff has further provided an incident report generated in connection with his accident. That report provides in relevant part as follows:

> Worker was installing carpet on 12th floor south hall. As they attempted to pull out a 150' sheet of 6' wide carpet (roll was propped up on four gallon buckers (sic) with 8' black pipe through middle of roll) the carpet roll fell off the support and pinned injured worker's left knee against a door jamb. Worker complained of pain and foreman took precautionary measure to call the ambulance. Worker transported to New York Presbyterian Hospital for possible knee sprain.

DASNY produced Ammar Abdul-Hussein for a deposition. Abdul-Hussein, who prepared the incident report. In addition to testifying about creating the report, he testified that DASNY hired Turner as the construction manager for the project. DASNY also hired Total Safety, a non-party, as safety monitor. He admitted that both Turner and himself or someone on behalf of DASNY had the authority to stop work if they saw an unsafe condition.

Turner produced Francis Pascual, its project superintendent, who worked at the project. Pascual explained that “Turner’s work scope was to oversee the project for DASNY.” Non-party Total Safety was the safety monitor for the project. Pascual was at the project when plaintiff’s accident occurred. He arrived at the scene of the accident in response to a radio call by a safety person. Although he didn’t recall speaking to plaintiff specifically, he did observe the carpet with a pole through it and buckets in the area. Pascual stated:

Q Do you recall a roll of carpeting being present in the area when you spoke to the gentleman that was hurt and his coworker?
A Yes, there was carpet.
Q Was there, in addition to the carpeting, some type of buckets and a pole that ran through the roll of carpeting?
A Yes.
Q Did you make any comments to them about the method of using that hoist to have the carpet utilized for their work?
A I believe we put a stop to it immediately.
Q Why was a stop put to it immediately?
A It's not the norm to do that.
…
Q Were there any devices that were available to elevate the carpet that was used in the industry? …
A I don't know.
Q Did you understand that the roll of carpet was suspended by this pole that was positioned by those two buckets and a bag of cement was overlaid at the ends?
A I did see that when I arrived.
Q That's what you felt was unsafe?
A Yes.
…
Q After this, did you ever have any conversations with anyone from Elite Flooring about the method of how they were supposed to do the work?

A Yes, we did.
Q When was that?
A Immediately.
Q Who did you speak to?
A The foreman.
Q Who was that?
A I don't recall.
Q What was the nature of the conversation?
A That they can't use a pipe and elevate the carpet the way they had.
Q That would be an unsafe practice and you wanted to do something different?
A Correct.

Discussion

In support of their motion for summary judgment, defendants Turner and DASNY argue that plaintiff's accident did not occur due to the failure or absence of a safety device as required by Labor Law §240[1] and that "any alleged height differential between the plaintiff's legs and the carpet roll was minor, *de minimis*, and insufficient to support a claim pursuant to Labor Law §240[1]." Defendants assert that plaintiff has failed to allege any specific violations of the Industrial Code as required to support the Labor Law §241[6] claim and that the remaining causes of action must be dismissed because defendants did not create or fail to remedy the condition/equipment that allegedly caused plaintiff's accident nor were they supervising plaintiff's injury-producing work.

On the cross-motion, plaintiff seeks "summary judgment [] on the issue of liability" without specifying as to which claims in his notice of cross-motion. In the affirmation in support of the cross-motion, plaintiff only advances arguments as to Section 240[1] and maintains that "[a]s set forth by Plaintiff's expert, Defendants failed to provide the necessary safety devices to protect Plaintiff from the elevation-related risk."

Meanwhile, in opposition to the motion-in-chief, plaintiff's counsel asserts "Defendants fundamentally misread how the subject accident happened - critically, Plaintiff was not on ground level when the subject hoist collapsed" (emphasis removed). Plaintiff's counsel only asserts arguments in opposition to defendants' motion as to the Section 240[1] claim and seemingly abandons his other causes of action.

Defendants have also submitted transcripts of recorded statements made by other Elite Flooring employees about the accident, which plaintiff's counsel argues on reply is inadmissible and should not be considered by the court.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Plaintiff's failure to oppose defendants' motion as to the Labor Law § 241[6], § 200 and common law negligence claims mandates a grant of summary judgment in favor of the defendants as to those

causes of action which are hereby severed and dismissed. The court now considers the parties' arguments as to Section 240[1].

Labor Law § 240[1], which is known as the Scaffold Law, imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury (*Gordon v. Eastern Railway Supply, Inc.*, 82 NY2d 555 [1993]). The statute provides in pertinent part as follows:

> All contractors and owners and their agents, … in the erection, demolition, repairing, altering, painting, cleaning or pointing of a premises 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 protects workers from "extraordinary elevation risks" and not "the usual and ordinary dangers of a construction site" (*Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.*, 84 NY2d 841 [1994]). "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)" (*Narducci v. Manhasset Bay Associates*, 96 NY2d 259 [2001]).

Section 240[1] was designed to prevent 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 Exchange, Inc.*, 13 NY3d 5999 [2009] quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]). The protective devices enumerated in Labor Law § 240 [1] must be used to prevent injuries from either "a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1991]).

At the outset, the court rejects plaintiff's feeble attempt to create a feigned issue of fact at this stage of the litigation by offering contradictory testimony as to how his accident occurred and where he was when it did. "A party's affidavit that contradicts his prior sworn testimony creates only a feigned issue of fact and is insufficient to defeat a properly supported motion for summary judgment" (*Vila v. Foxglove Taxi Corp.*, 159 AD3d 431 [1st Dept 2018]; *cf. Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). Indeed, plaintiff clearly and repeatedly testified on two different deposition dates that he was next to the carpet/spindle apparatus, not on top of it. He further testified that it wasn't the buckets that collapsed, but rather, that the carpet moved forward and off of the buckets and onto the floor.

While Section 240[1] liability may be imposed in cases where objects fall onto a worker, the "relevant inquiry" is "whether the harm flows directly from the application of the force of gravity to an object" (*Runner v. New York Stock Exch., Inc.*, 13 NY3d 604 [2009]). Here, the carpet/spindle apparatus was pulled forward and off of the two stacked buckets and onto plaintiff. On this record, plaintiff's accident does not fall within the ambit of Section 240[1] because gravity only played a part in the accident rather than being the root cause thereby warranting the type of safety devices required under Section 240[1] (*Narducci*, *supra* citing *Rodriguez*, *supra* for the proposition that "[t]he fact that gravity worked upon this object which caused [the] plaintiff's injury is insufficient to support a [S]ection 240[1] claim"]; *see also Oakes v. Wal-Mart Real Estate Business Trust*, 99 AD3d 31 [3d Dept 2016]).

Further, the court agrees with defendants that the carpet/spindle on top of the jerry-rigged apparatus plaintiff testified to does not give rise to the type of extraordinary elevation-related risks Section 240[1] was designed to address (see i.e. *Eddy v. John Hummel Custom Bldrs, Inc.*, 147 AD3d 16 [2d Dept 2016]). Rather, the carpet/spindle moving forward and falling onto the floor is squarely within the usual and ordinary dangers of a construction site. Moreover, the task that plaintiff was engaged in at time of his accident, simply standing next to the buckets and carpet/spindle, did not present an eleva-

tion-related risk (*Id. citing Broggy v. Rockefeller Group, Inc.*, 8 NY3d 675, which explains that Section 240[1] "liability turns on whether a particular [] task creates an elevation-related risk of the kind that the safety devices listed in [S]ection 240[1] protect against.")

For all these reasons, defendants Turner and DASNY's motion for summary judgment dismissing plaintiff's Labor Law § 240[1] claim is also granted and plaintiff's cross-motion on this claim is denied.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that defendants Turner and DASNY's motion for summary judgment dismissing plaintiff's complaint is granted in its entirety; and it is further

ORDERED that plaintiff's cross-motion for summary judgment on liability is denied; and it is further

ORDERED that plaintiff's claims against Turner and DASNY are severed and dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff is directed to file note of issue on or before December 18, 2020 so that an inquest may be calendared as to the defaulting defendants, River Center LLC and Rein L.P., as per decision/order dated 1/31/14.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 10/28/20
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.