SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ **PART** IAS MOTION 47EFM

Justice

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CHRISTOPHER FALDETTA,

Plaintiff,

- v -

SMITELL, LLC, EXTELL DEVELOPMENT COMPANY, LENDLEASE (US) CONSTRUCTION INC.

Defendants.

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INDEX NO. 161404/2018

MOTION DATE 09/23/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47 were read on this motion to/for JUDGMENT - SUMMARY.

In this Labor Law action Christopher Faldetta was injured after he fell into a hole in the concrete floor at the construction site where he was working. At the time of the accident, plaintiff and his co-worker were removing debris, garbage and wood from a staircase. When plaintiff's co-worker handed plaintiff a wooden plank, plaintiff stepped back with his left foot into what he believed was solid ground and heard a crack and his left foot fell into a hole up to his groin. The hole had a diameter of approximately 12" and appeared to be a pipe sleeve, used to put piping through the concrete. When plaintiff looked through the hole, he saw a plastic disk approximately 13" in diameter which was cracked on one side and which plaintiff assumed was used to cover the hole. There were no warning signs around the hole and there was debris all around so that plaintiff was unable to see the hole on his prior trips to and from the staircase.

Plaintiff now move pursuant to CPLR 3212 for summary judgment on his Labor Law § 240 claim. 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]). As such, the statute applies to incidents involving a "falling worker" or a "falling object" (*Harris v. City of New York*, 83 A.D.3d 104, 108 [1st Dep't 2011] [internal quotation marks omitted]).

The statute "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citation omitted]). However, "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 Assoc.*, 96 NY2d 259, 267 [2001]). "[T]he single decisive question is whether [a] 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 NY Stock Exchange*, 13 NY3d 599, 603 [2009]). Therefore, in order 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]). Once a plaintiff establishes that a violation of the statute

proximately caused his or her injury, then an owner or contractor is subject to "absolute liability" (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011], citing *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995], *rearg denied* 87 NY2d 969 [1996]).

Plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability on his Labor Law § 240(1) claim. The evidence shows that the plastic disk which covered the hole was inadequate as it gave way when plaintiff stepped on it. Further, defendants' argument that plaintiff was not exposed to an elevation-related risk that required the protections under Labor Law 240(1) is meritless as the First Department has repeatedly held that "section 240(1) is violated when workers fall through unprotected floor openings." *Alonzo v. Safe Harbors of the Hudson House Dev. Fund.*, 104 A.D.3d 446, 449-50 (1st Dep't 2013) (citing cases and holding that plaintiff established a prima facie violation of the statute by showing that the plywood board covering the hole was an inadequate safety device because it was not secured); *Carpio v. Tishman Constr. Corp.*, 240 A.D.2d 234 (1st Dep't 1997).

In opposition, defendants have failed to raise an issue of fact. Although defendants contend that plaintiff's testimony is self-serving and uncorroborated, they have failed to raise any issues of fact with respect to plaintiff's credibility or the manner in which the accident occurred. *Strojek v. 33 East 70th Street Corp.*, 128 A.D.3d 490, 491 (1st Dep't 2015) (fact that plaintiff was only witness does not raise an issue of fact where plaintiff's proof was not inconsistent or contradictory to the evidence). The defendants' argument that the accident could not have occurred in the manner in which plaintiff claims is based on mischaracterizations of the plaintiff's testimony and the relevant evidence. Further, the defendants' expert Dr. Levitan's report is based on speculation as she never visited the site where plaintiff's accident occurred to observe the layout and positioning of the staircase. Affirmation in Opposition, Exh. H. To the

extent that Dr. Levitan opines on the issue of plaintiff's injuries, her conclusions are entirely unsupported by any medical research or data and cannot be considered.

Finally, plaintiff is not entitled to summary judgment against defendant Extell Development Company as plaintiff has failed to show that this defendant was an owner or general contractor of the construction site, as required under Labor Law 240. The deed lists Extell's address simply as "c/o" or "care of" for the undisputed owner, defendant Smitell, and does not state that Extell is a co-owner of the property. Further, there is no evidence that the two entities are one and the same. Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on his Labor Law 240 claim is granted with respect to defendants Smitell LLC d/b/a Smitell Sponsor LLC and Lendlease (US) Construction Inc., and denied with respect to defendant Extell Development Co.

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10/30/2020
DATE

PAUL A. GOETZ, J.S.C.

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