SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART IV

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ANTHONY ROUGGERIS,

Plaintiff,

-against-

TIMER WARNER CABLE NEW YORK CITY, LLC,

Defendant.

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DECISION AND ORDER

Index Number

159629/2017

FRANK P. NERVO, J.S.C.

Plaintiff and defendant have both moved for summary judgment in their favor, motion sequences 002 and 003, respectively. As the issues presented therein are indistinguishable, the Court issues the following joint decision and order disposing of both motions.

Plaintiff moves for partial summary judgment on his Labor Law § 240(1) claim, finding defendant Time Warner Cable New York City (hereinafter "Time Warner") liable (mot. seq. 002). Time Warner opposes contending that plaintiff has failed to establish he was engaged in an activity contemplated by the Labor Law, plaintiff's expert's opinion is speculative, and plaintiff had control of the activity causing his injury. Defendant contends that it is entitled to summary judgment for these reasons, and plaintiff opposes (mot. seq. 003).

Plaintiff's employer contracted with defendant to perform work related to the installation of infrastructure fiber cables. Plaintiff was the lead technician or foreman for the project at defendant's facility; his duties included supervising three other

technicians, as well as performing installation work himself. Defendant provided plaintiff and his technicians a manual crank-type extension lift to perform the work along the ceilings of defendant's facility. While plaintiff was standing on the platform of the lift, raised approximately 20 to 25 feet above the ground, the platform collapsed or was otherwise caused to contract to the ground. Plaintiff alleges he was injured as a result of the lift's collapse.

As an initial matter, defendant contends that the affidavit of Kathleen Hopkins is not properly considered on this summary judgment motion because it is speculative, draws conclusions of law reserved for the Court, and made by a person unqualified in the field. A movant seeking summary judgment must establish its claim or defense through proof tendered in admissible form (*JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]). Such proof may include deposition transcripts, or other proof annexed to an attorney's affirmation; however conclusory affidavits or those made by an individual without personal knowledge of the facts will not establish a movant's prima facie burden (*id.*, *see also Vermette v. Kneworth Truck Co.*, 68 NY2d 714 [1986]). An expert's affirmation is properly considered where it is non-conclusory and supported by an evidentiary foundation (*Bender v. Gross*, 33 AD3d 417 [1st Dept 2006]; *Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). The Court finds the affidavit of Kathleen Hopkins conclusory and without probative value; consequently, it declines to consider the affidavit on these motions (*id.*). Alternatively, were the Court to consider the affidavit of Kathleen Hopkins, it would not reach a conclusion contrary to its decision herein.

Summary Judgment

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). "When a plaintiff moves for summary judgment, it is proper for the court to ... deny summary judgment if facts are alleged in opposition to the motion which, if true, constitute a meritorious defense" (*Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 NY2d 175 [1982]). "Where a defendant moves for summary judgment and establishes a prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact" (*Kesselman v. Lever House Rest.*, 29 AD3d 302 [1st Dept 2006]). However, a "feigned issue of fact" will not defeat summary judgment (*Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alverez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

Labor Law § 240(1)

Labor Law § 240(1) provides, in pertinent part:

> all contractors and owners ... 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.

The duty imposed by Labor Law § 240(1) is nondelegable; an owner or contractor may be held liable regardless of whether such party actually exercised supervision or control over the work (*Haimes v. New York Tel. Co.*, 46 NY2d 132 [1978]; *compare Russin v. Picciano & Son*, 54 NY2d 311 [1981], Labor Law § 200). Labor Law § 240(1) "is to be construed as liberally as may be for the accomplishment of the purpose for which it was ... framed" (*Koenig v. Patrick Constr. Corp.*, 298 NY 313 [1948] quoting *Quigley v. Thatcher*, 207 NY 66 [1912]). However, the injury claimed under § 240(1) must result from elevation-related hazards, "injuries resulting from other types of hazards are not compensable under that statute even if proximately caused by the absence of an adequate scaffold or other required safety device" *(Ross v. Curtis-Palmer Hydro-Electric Co.*, 21 NY2d 494 [1993] Back strain alleged because platform was placed in manner requiring worker to contort not within class of hazards contemplated by Labor Law § 240[1]; *Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1991]).

Plaintiff was employed to perform cable installation type work on defendant's building which involved alterations to the building. Plaintiff testified, at his deposition, that this work required, inter alia, cutting through walls, installing sleeves in these cuts between rooms, placing splicing equipment/boxes, and installing various cables in defendant's building. Construing Labor Law § 240(1) liberally, as this Court must, plaintiff's work, as performed on the lift, is an activity contemplated by Labor law § 240(1), and the injuries plaintiff alleges are the result of the elevation related hazard (see *Joblon v. Solow*, 91 NY2d 457 [1998]). Consequently, plaintiff's testimony that the

lift suddenly collapsed is sufficient to establish his prima facie burden of violation of § 240(1) (*see Noah v. 270 Lafayette Associates, L.P.*, 233 AD2d 108 [1st Dept 1996]).

Defendant's reliance on *Kretzchmar v. NY State Urban Dev. Corp.*, for the proposition that significant or permanent physical change to the subject building is required to obtain Labor Law § 240(1) protection is misplaced (13 AD3d 270 [1st Dept 2004]). The Appellate Division has expressly found "a change in the structural integrity is not necessarily required to obtain Labor Law § 240(1) coverage" (*Mananghaya v. Bronx-Lebanon Hosp. Ctr.*, 165 AD3d 117, 124 [1st Dept 2018] [Gesmer, J.]). As the Appellate Division reasoned, "the small hole chiseled into the wall to run wires between rooms to install an electric wall clock in *Joblon* is unlikely to have affected the building's 'structural integrity.' Nevertheless, it was 'significant enough' to constitute an alteration" (*id.*; *see generally Joblon v. Solow*, 91 NY2d 457). Here, plaintiff testified that he was installing fire-proofing putty at the time of the alleged accident, as part of his running cables between rooms, when the lift failed and he was caused to fall. This type of work is similar to that in *Joblon*, and is therefore sufficient to support plaintiff's Labor Law § 240(1) claim.

The distinction urged by defendants between a scissor-lift and manual crank-type lift is without consequence and defeated by a plain reading of the statute referencing "other devices." Likewise without merit, defendants contend that this Court should limit its analysis of whether plaintiff's activity is contemplated by the Labor Law to the moment of injury. The Court of Appeals has rejected this argument (*Saint v. Syracuse supply Co.*, 25 NY3d 117, 125 [2015] "We therefore reject an interpretation unsupported

by the case law and which does no more than undermine the statutory purpose of protecting workers from dangers inherent to tasks involving elevation differentials.") Thus, as in *Joblon* and *Saint*, viewing the totality of the work plaintiff was performing, the Court finds his work within the type contemplated by Labor Law § 240(1).

Defendant also contends that plaintiff's claims must be dismissed because he is the sole-proximate cause of his injuries, in that he used the lift without permission and supervised the work performed. To the extent defendant contends plaintiff used the lift without permission, such argument is, at best, disingenuous. Plaintiff testified that defendant provided the lift on his first day at the job site, and he told defendant's employees that he was leaving the lift in its position to be used the following day. Defendant's witness likewise testified that the lift used by plaintiff was provided by defendant. Defendant has not offered any evidence that the lift was used without permission. To the extent that defendant contends plaintiff is the sole cause of his injury, and thus dismissal is warranted, its reliance on case law for that proposition is misplaced, as defendants in those matters did not provide the equipment used resulting in injury or did not otherwise violate Labor Law § 240(1) (*see e.g. Robinson v. East Med. Ctr., LP*, 6 NY35 550 [2006] No valid Labor Law claim where plaintiff placed bucket on top of ladder which he knew was too short to perform duties).

Plaintiff's activity at the time of his accident, installing fireproofing putty into holes which had been drilled through the wall, is clearly within the protections of Labor Law § 240(1) (*see generally Joblon v. Solow*, 91 NY2d 457; *Mananghaya v. Bronx-Lebanon Hosp. Ctr.*, 165 AD3d 117). Notwithstanding, even if plaintiff's activity at the

moment of injury was not contemplated by Labor Law § 240(1), the Court of Appeals has rejected restricting § 240(1)'s protections on such a basis, instead requiring consideration of the totality of a plaintiff's activities. Thus, the limitation urged by defendant is thus contrary to Court of Appeals authority (*see Saint v. Syracuse supply Co.*, 25 NY3d 117).

Having determined that plaintiff's work is within the type intended to be covered by Labor Law §240(1) and that plaintiff has met his prima facie burden establishing defendant violated Labor Law § 240(1), the burden shifts to defendant to demonstrate an issue of material fact precluding summary judgment (*Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 NY2d 175, *supra*). Defendant has failed to point to any such evidence. Thus, plaintiff's application is granted.

Labor Law § 200

Defendant seeks summary judgment dismissing plaintiff's Labor Law § 200 claim, contending it did not exercise control over plaintiff's work or notice of the alleged defect.

Labor Law § 200 is a "codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v. New York State Electric and Gas Corp.*, 82 NY2d 876, 877 [1993]; *Allen v. Cloutier Constr. Corp.*, 44 NY2d 290 [1978]). It provides, in pertinent part:

> All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or

> lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded and lighted as to provide reasonable and adequate protection to all such persons

(Labor Law § 200).

The party responsible under Labor Law § 200 must, therefore, have the control over the activity bringing about the injury (*Russin v. Picciano & Son*, 54 NY2d 311 [1981]). Accordingly, a breach of Labor Law § 200 is, effectively, a breach of the common law duty to maintain a safe work site (*Allen v. Cloutier Constr. Corp.*, 44 NY2d at 299). If the dangerous condition or defect arises from the contractor's methods, the owner will not be liable under § 200 or the common law, absent a showing the owner exercised some control or supervision over the operation (*Comes v. New York State Electric and Gas Corp.*, 82 NY2d at 877; *see also Lombardi v. Stout*, 80 NY2d 290, 295 [1992]). However, where the plaintiff's injuries arise from a dangerous condition on the premises not caused by the contractor's methods, liability will attach if the property owner had control over the work site and notice of the dangerous condition (*Bradley v. HWA 1290 III LLC*, 157 AD3d 627 [1st Dept 2018]; *Mendoza v. Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]).

Here, defendant provided plaintiff with the manual-type lift for the performance of his duties.[1] Defendant's witness testified that the lift was not subject to routine inspections or maintenance, other than inspecting the lift before he used it, and that records related to the lift were not kept. Therefore, there is a question of fact as to

[1] Although defendant contends that plaintiff utilized the lift without defendant's permission, it has provided no evidence to support this claim (*see* Decision and Order p. 6; *see also* EBT of Michael Reis p.43-44).

whether defendant was negligent, under Labor Law § 200, in providing allegedly defective machinery/equipment. Likewise, there is a question of fact as to whether defendant exercised the requisite control over plaintiff's work under Labor Law § 200 by providing the lift. Summary judgment is inappropriate under these circumstances.

Labor Law § 241(6) & Industrial Code

Defendant also moves for dismissal of plaintiff's Labor Law § 241(6) claims of violations of the Industrial Code. Plaintiff does not oppose dismissal as to 23 NYCRR §§ 1.16, 1.17, and 1.21.[2] Consequently, those claims are dismissed.

Labor Law § 241(6) requires contractors, owners, and their agents to "'provide reasonable and adequate protection and safety' for workers" as well as comply with the rules and regulations as promulgated by the Department of Labor (*Ross v. Curtis-Palmer Hydro-Electric Co.*, 21 NY2d at 501-02; *see* Labor Law § 241). As with Labor Law § 240(1), the duty imposed by Labor Law § 241(6) is nondelegable as it relates to compliance with the Industrial Code. However, to the extent Labor Law § 241(6) relates to general safety standards, it does not give rise to the same non-delegable duty (*id.*). Thus, § 241(6) is best described as a "hybrid" between the common law duty of Labor Law § 200 and the specific duties imposed by § 240(1) (*id.*).

Here, defendant contends the manual-type lift used by plaintiff is not a scaffold within the meaning of the Industrial Code, and thus his § 241(6) claim of violations of

[2] The parties cite the Industrial Code at 23 NYCRR §§ 5.1, 5.2 & 5.3. The Industrial Code is located at 12 NYCRR §§ 23-5.1, 23-5.2, and 23-5.3

that code must fail. The Appellate Division has held scissor type lifts to be functionally similar to scaffolding and thus within the protection of the Labor Law related to scaffolding (*Drew v. Correct Mfg. Corp., Hughes-Keenan Div.*, 149 AD2d 893 [3d Dept 1989]). The manual-type lift used by plaintiff is functionally similar to an electric or motorized scissor lift, in that it provides a temporary elevated working platform. As they are functionally similar, the Court finds no reason to draw the distinction urged by defendants and find the instant lift outside the scope of the industrial code. This finding is supported by the definition of "scaffold" in the Industrial Code, "[a] temporary elevated working platform and its support structure including all components" (12 NYCRR § 23-1.4).

For the same reasons the Court finds plaintiff was engaged in alteration of the building structure under Labor Law § 240(1), it finds he was engaged in the type of work contemplated under Labor Law § 241(6) (*see* Decision and Order p. 5; *see also Mananghaya v. Bronx-Lebanon Hosp. Ctr.*, 165 AD3d 117). The Court further finds the alleged violations of the Industrial Code sufficiently detailed and pled. Defendants have failed to establish, as a matter of law, a defense to these claims and therefore have failed to meet their prima facie burden. Consequently, that branch of the motion is denied (*Alverez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Accordingly, it is

ORDERED that defendant's motion seeking summary judgment and dismissal of the Labor Law § 240(1) claim as against it is denied; and it is further

ORDERED that defendant's motion seeking summary judgment and dismissal of the Labor Law § 200 claim as against it is denied as issues of fact preclude summary judgment; and it is further

ORDERED that defendant's motion seeking summary judgment and dismissal of the industrial code is granted as to 23 NYCRR §§ 1.16, 1.17, 1.21, without opposition, and otherwise denied; and it is further

ORDERED it appearing to the court that plaintiff is entitled to judgment on liability on his Labor Law § 240(1) claim only, and that the only triable issues of fact arising on plaintiff's motion for summary judgment relate to the amount of damages to which plaintiff is entitled, and it is

ORDERED that plaintiff's motion is granted with regard to liability on the Labor Law § 240(1) claim only; and it is further

ORDERED that a trial of the issues regarding damages shall be had before the court together with a trial on liability and damages on plaintiff's remaining claims; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and shall serve and file with said

Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial before the undersigned; and it is further

ORDERED that such service upon the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: December 15, 2020

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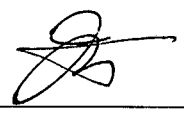

Hon. Frank P. Nervo, J.S.C.