SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

CARLOS J. GAMEZ and SILVIA M. NUNEZ-GAMEZ,

Plaintiffs,

- against -

NEW LINE STRUCTURES & DEVELOPMENT LLC, HALLETS BUILDING 1 SPE LLC and HALLETS ASTORIA LLC,

Defendants.

- x

Index No.: 707629/2017

Motion Date: 1/23/20

Motion No.: 20

Motion Seq.: 1

The following electronically filed documents read on this motion by plaintiffs CARLOS J. GAMEZ and SILVIA M. NUNEZ-GAMEZ for an Order pursuant to CPLR § 3212, granting plaintiffs partial summary judgment against defendants on the issue of liability pursuant to Labor Law § 240(1) and 241(6), and setting this matter down for a damages only trial:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits................	EF 19 - 31
Affirmation in Opposition-Exhibits...................	EF 33 - 46
Correspondence-Amended Affirmation in Opposition......	EF 47 - 49
Reply Affirmation-Exhibits...........................	EF 51 - 53

This personal injury action arises out of an incident that occurred on April 24, 2017 at 1-02 26th Avenue, in Queens County, New York. Plaintiff alleges that while performing construction work, he fell one story through a hole in the top floor of a building under construction at the subject premises. Hallets Building 1 SPE LLC and/or Hallets Astoria LLC (Hallets) is the owner of the premises. New Line Structures & Development LLC (New Line) sub-contracted with plaintiff's employer, Casino Development (Casino) for the concrete foundation and superstructure aspects of the building.

Plaintiff commenced this action by filing a summons and complaint on June 5, 2017. Defendants joined issue by service of an answer on August 9, 2017. Plaintiff now moves for summary judgment on his Labor Law § 240(1) and 241(6) claims.

Plaintiff appeared for an examination before trial on January 29, 2019. Prior to the subject incident, he had been working as a carpenter for Casino for approximately four years, and on the subject job site for approximately four months. He had an orientation the first day, but attended no safety meetings after that. New Line Safety Managers walked the site. At the time of the incident, he was working alone on the top 6th Floor sky deck. He was wearing a harness, but there were no anchor points or lifelines to which he could tie off his harness. Prior to the day of the incident, he complained to a New Line Safety Manager about the lack of anchor points. On the day of the incident, he did not make any complaint to anyone on the job site that there was no anchor point on the 6th Floor deck. Approximately ten sheets of unsecured plywood were laying all around the 6th Floor deck. As he was walking, he slipped on a sheet of the unsecured plywood, moving it away, and he fell through a hole the plywood had been covering. His whole body fell through the hole, and he landed on his left side, hitting the 5th Floor deck, which was approximately ten feet below.

The certified copy of the FDNY Prehospital Care Report Summary indicates that plaintiff told the paramedic that he was working and walked over plywood, which slipped from underneath him, and fell about nine feet.

Odes Cobbins submits an affidavit dated March 22, 2019, affirming that he worked for Casino for approximately five years. On the date of the incident, he was working as a Foreman at the job site. Plaintiff was part of his crew and working as a carpenter. Pablo was the top deck Foreman for Casino, and Armando was the owner of Casino. Carmine was the "site safety guy" from Casino. New Line was the General Contractor. New Line had its own Site Safety Manager who would inspect the site to see that the workers all had their proper safety equipment and were performing the work safely. On the day of the incident, they were putting up the safety railing around the perimeter and open holes and shafts on the 6th Floor. They were told it would take too long to install the fillers/forms to reduce their size so instead they just laid down ½ inch plywood sheets over the holes. The plywood was not secured to the deck because they were told it would take too long to secure each piece. The plywood was not painted a bright color and did not have anything such as the word "HOLE" written on top of it. Although the Casino workers all wore harnesses, there were no lifelines in place or designated anchor points above the 6th Floor deck to tie off to. On the day of the incident, they were never told to tie off. The distance between the 6th and 5th deck floors was approximately ten feet. The Assistant Foreman named Johnny told him plaintiff fell. He went to where plaintiff had fallen and saw the hole uncovered. He then went to the 5th floor and saw plaintiff.

Jarrett Churchin appeared for an examination before trial on behalf of New Line on April 8, 2019 and testified that he was the Lead Mechanical Superintended for New Line. New Line was the Construction Manager on site. He was onsite every working day. He walked the whole site at least one to two times per hour. New Line had the authority to inspect and direct Casino's work. New Line had the authority to enforce safety standards upon Casino workers and stop or change any work New Line deemed to be unsafe. New Line walked the site to specifically look for Casino's compliance with proper fall protection. On the day of the incident, Casino was the only sub-contractor working on site, and he was the only New Line representative present. Casino was in the process of building the 6th Floor safety railings. There were empty holes on the 6th Floor that were to be covered with 3/4 inch plywood, which should have been nailed down so it could not slip or be kicked away. From time to time, holes were left uncovered and/or the plywood was not nailed down. The plywood was supposed to have the work "HOLE" painted on it with bright paint, but that was not always done. The holes never had any guard rail system built around them. The written and verbal rule on the site was that if a worker was exposed to a fall hazard of six feet or more, that worker must be tied off. There were parts of the 6th Floor where a worker was exposed to such a fall hazard without anywhere to tie off. At the time of the incident, the tie-ff system Casino chose to use could not yet be built on the 6th Floor, so a worker was forced to walk and work near holes in the deck without having any anchor points or lifelines available to tie off to. If Casino would have used the Cable System instead of the Miller System, plaintiff could have been tied off at the time of the incident. At the time of the incident, plaintiff was working on the 6th Floor deck by himself in a place where there was nowhere for him to tie off. The closest re-bar was approximately twenty feet away. Workers on the 6th Floor are supposed to tie off on the re-bar columns. He was not authorized to go up on the sky deck or working deck. He never heard any complaints from Casino workers that there was no where to tie off to on the working deck. New Line employees were not authorized to go on the working deck until safety railings were installed. When he arrived at the scene, he saw plaintiff laying on the 5th Floor. He determined that plaintiff had fallen through a 2 x 4 foot hole where a piece of the 6th Floor deck was missing. The plywood on the 6th Floor nearest to that hole did not have "HOLE" painted on it, and it was not nailed down or otherwise secured to the deck. He documented that plaintiff was properly using all available fall protection equipment at the time of the incident. After the incident, New York City Department of Buildings shut down the site.

Plaintiffs submit the records from NYC DOB, including a Summons and Commissioner's Order, photographs, an Office of

Administrative Trials and Hearings (OATH) Decision, and an OATH Appeal Decision. The Summons and Commissioner's Order indicates that New Line violated New York City Building Code Section 3301.2 by allowing plaintiff to fall approximately six to ten feet onto the floor below because he was not tied in. The OATH Decision and photographs taken by the NYC DOB's Inspector show plywood and an open area, and plywood covers that were loose and unsecured. The Inspector noted that plaintiff was not tied off. The Hearing Officer determined, inter alia, that there were open holes, insufficient planking, and plaintiff was not tied in. Additionally the Hearing Officer noted that New Line was present regularly on site. New Line was fined $25,000.

In opposition to the motion, defendants submit an affidavit from Chris Juhas, the Site Safety Manager. He affirms that CRSG Safety Company was the site safety company retained by New Line. He was present at the subject premises every day. He received a call from Carmine Graziano reporting that someone had fallen on the 5th Floor. He went to the 5th Floor with the medic and observed plaintiff sitting upright on the floor. He then went to the 6th Floor deck to inspect. He took a photograph, which shows a 2 inch by 2 inch hole covered by a piece of plywood. The hole was in between the 2 re-bar columns and approximately four to five feet from each re-bar column. Each re-bar column contains horizontal re-bar rings around the columns that were tie off points for the Safety Carpenters entering the controlled access zone. The jobsite used the Miller Edge Fall Protection System, which is a portable, anchorage system designed to protect deck workers engaged in lead edge deck construction. Plaintiff and his partner's were the designated Safety Carpenters on site. On the date of the incident, plaintiff was responsible for covering the subject hole, securing the hole, and writing "HOLE" on the plywood. The Safety Carpenter should not have entered the controlled access zone without identifying a tie off point and tying off. Mr. Juhas opines that plaintiff could have used the re-bar columns adjacent to the hole as tie off points or the Miller Edge fall protection system, which is equipped with a fixed cable lifeline system. Mr. Juhas further opines that Mr. Churchin may not know whether the Miller Edge System was in place on the 6th Floor working deck on the date of the incident because Mr. Churchin was not responsible for or familiar with deck work or concrete operations.

Defendants also submit an affidavit from Carmine Graziano, the Concrete Safety Manager of Casino. Mr. Graziano's affidavit confirms Mr. Juhas' affidavit. Mr. Graziano affirms that on the date of the incident at approximately 4:00 p.m., he received a call from the Casino Foreman, requesting his presence on the 5th Floor of the south tower. The job site used the Miller Edge Fall Protection System. Since the system is portable, if plaintiff

needed to use it, he would have notified his Foreman who would have had it moved to where it was needed. There is strict protocol on site that a hole in a working deck must be covered by plywood, nailed down and marked "HOLE". Mr. Graziano affirms that plaintiff could have used the re-bar columns adjacent to the hole as tie off points or the Miller Edge System. Mr. Graziano further opines that Mr. Churchin may not know whether the Miller Edge System was in place on the 6th Floor

The proponent of a summary judgment motion has the initial burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing an entitlement to judgment as a matter of law (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v City of New York, 49 NY2d 557 [1980]). Once the requisite showing has been made, the burden shifts to the opposing party to produce admissible evidence sufficient to establish the existence of a triable issue of fact (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]).

Labor Law § 240(1) requires owners, contractors, and their agents to provide workers with appropriate safety devices to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]). To prevail on a Labor Law § 240(1) cause of action, a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident (see Blake v Neighborhood Hous. Servs. of New York City, Inc., 1 NY3d 280 [2003]). Although any purported contributory or comparative negligence of the plaintiff is not a defense in an action brought under the statute, a claim under Labor Law § 240(1) will not stand where the plaintiff's own conduct was the sole proximate cause of his or her injuries (see Zimmer v Chemung County Performing Arts, 65 NY2d 513 [1985]; Plass v Solotoff, 5 AD3d 365 [2d Dept. 2004]).

Here, plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1). Plaintiff submitted evidence demonstrating that the hole he fell through was improperly guarded and insufficiently covered in violation of OSHA regulations 29 CFR 1926.501(b)(4)(I) and (ii). Additionally, plaintiff demonstrated that he was not provided with a suitable lifeline or anchor point to tie off his harness. Thus, plaintiff established, prima facie, that his fall was the result of an elevation-related hazard within the meaning of Labor Law § 240(1)(see Zhou v 828 Hamilton, Inc., 173 AD3d 943 [2d Dept. 2019]; Munzon v Victor at Fifth, LLC, 161 AD3d 1183 [2d Dept. 2018]; Garzon v Viola, 124 AD3d 715 [2d Dept. 2015]).

In opposition to plaintiff's prima facie showing, defendants raised a triable issue of fact as to whether there was a statutory violation. Contrary to plaintiff's testimony, both Mr. Juhas and Mr. Graziano affirmed that there was a Miller System and re-bar available for plaintiff to tie-off. Thus, there is a question of fact as to whether plaintiff was provided adequate protection.

Regarding that branch of the motion seeking summary judgment on the Labor Law § 241(6) claim, Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners, contractors and their agents, regardless of their control or supervision of the work site, to provide reasonable and adequate protection and safety to all persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed (see Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343 [1998]; Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494 [1993]; Miranda v City of New York, 281 AD2d 403 [2d Dept. 2001]). To support a Labor Law § 241(6) cause of action, a plaintiff must allege a New York Industrial Code violation that is both concrete and applicable given the circumstances surrounding the incident (see Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343 [1998]).

Industrial Code § 23-1.7(b)(I) applies to hazardous openings and requires that such an opening be guarded by a cover, or a barrier or safety railing guarding the opening, while work is in progress. Industrial Code § 23-1.16(b) requires tail lines and lifelines to be provided and requires every employee who is provided with such to be instructed prior to use.

Here, plaintiff failed to eliminate all triable issues of fact as to whether the alleged Industrial Code violations are applicable. While it is undisputed that the opening was not guarded by a barrier or safety railing, there is an issue of fact as to whether the opening in question was an integral part of the work taking place. Specifically, defendants contend that plaintiff was charged with covering and securing the subject hole. Thus, an issue of fact exists as to whether § 23-1.7(b)(1) applies to this situation (see Salazar v Novalex Contr. Corp., 18 NY3d 134 [2011]). Similarly, issues of fact exist as to whether defendants complied with § 23-1.16(b). While plaintiff testified that there was no where to tie-off, Mr. Juhas and Mr. Graziano affirmed that there were two tie-off points within four to five feet of the subject hole.

Thus, and viewing the evidence submitted in the light most favorable to the nonmoving parties, there are issues of credibility which must be determined by the trier of fact rather than on a motion for summary judgment. "A court may not weigh the credibility of witnesses on a motion for summary judgment, unless

it clearly appears that the issues are not genuine, but feigned" (Conciatori v Port Auth. of N. Y. & N. J., 46 AD3d 501 [2d Dept. 2007]).

Lastly, New Line contends that it is not a contractor under the Labor Law, and thus, the motion against New Line must be denied. However, Mr. Churchin testified that New Line had the authority to inspect and direct Casino's work, and had the authority to enforce safety standards upon Casino workers and stop or change any work New Line deemed to be unsafe. Thus, New Line is a contractor under the Labor Law (see Walls v Turner Constr. Co., 4 NY3d 861 [2005]).

Accordingly, for the reasons stated above, it is hereby

ORDERED, that plaintiff's motion for summary judgment is denied.

Dated: Long Island City, NY
January 27, 2020

ROBERT J. McDONALD
J.S.C.