SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** IAS MOTION 58EFM

Justice

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RICHARD MCGILL,

Plaintiff,

- v -

WHITNEY MUSEUM OF AMERICAN ART and TURNER CONSTRUCTION COMPANY,

Defendants.

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INDEX NO. 158766/2015

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126 were read on this motion to/for JUDGMENT – SUMMARY.

In this personal injury action, defendants Whitney Museum of American Art and Turner Construction Company move, pursuant to CPLR 3212, to dismiss plaintiff Richard McGill's claims of violations of Labor Law sections 200 and 240(1). Plaintiff opposes the motion and cross-moves, pursuant to CPLR 3212, for summary judgment as to liability on his claim pursuant to Labor Law section 240(1). After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

In his complaint, filed August 24, 2015, plaintiff alleged that he was injured on August 16, 2013 while working as a glazier for Permasteelisa Installation ("PI") during the construction of the defendant Whitney Museum of American Art ("the Whitney") on Gansevoort Street in Manhattan. Doc. 1 at par 3. Defendant Turner Construction Company ("TCC") was the general contractor or construction manager at the site. Doc. 1 at par. 4. In his bill of particulars,

plaintiff alleged that he was a journeyman glazier and that he slipped or tripped and fell "on a scissor lift/man lift/aerial lift ["the lift"], the wheels of which were positioned on or about the ninth floor of [the Whitney]." Doc. 105. Plaintiff also claimed that his accident occurred because the lift did not have proper steps, and that, when he fell, "his shoulder/body" struck a pile of materials which were improperly stacked in the area. Doc. 105. He further claimed that he fell on a slippery working surface. Doc. 105. Additionally, he alleged that defendants violated Labor Law sections 200, 240(1) and 241(6) as well as numerous Industrial Code and OSHA regulations. Doc. 105.

At his deposition, plaintiff again claimed that he was injured at the Whitney on August 16, 2013. Doc. 108 at 11, 64. He was present at the Whitney in his capacity as a glazier for PI. Doc. 108 at 23, 144-145. PI was at the site to prepare window frames and install glass. Id. at 65. His "super foreman" Scott told him what to do, and neither TCC nor the Whitney ever instructed him in this regard. Id. at 45-48, 67. On the day of the incident, Scott told him to go to the ninth floor of the Whitney, where he had worked two days prior, to check the mullions[1] for any imperfections, to use a lift positioned on the eighth floor to ascend to the area where he was to work, and to correct any problems that existed. Id. at 48-49, 73-74, 89-90, 116-117. The lift itself was positioned on the eighth floor. Id. at 73-74.

Plaintiff checked the mullions on a canopy made of vertical and horizontal beams to see whether there were any imperfections and addressed the conditions he was instructed to. Id. at 65, 90-91, 189. After doing so, he began to enter the basket of the lift so that he could descend to the eighth floor. Id. at 72-73. To enter the basket, it was necessary for him to put his legs over its top rail. Id. at 114. It was while he was climbing into the basket that his accident occurred.

[1] A vertical element that forms a division between units of a window.

Id. at 86-87. Before entering the basket, he was standing on the ninth floor and the floor of the lift basket was approximately six to twelve inches below the ninth floor and approximately four to six inches away from the ninth floor. Id. at 72-77. Thus, when he was entering the basket, he had to step down. Id. at 78. He first stepped into the basket with his left foot, "approximately two feet down to the center rail closer to [him]." Id. at 79. He then attempted to place his right foot on the center rail further away from him, which was "two feet down and about three feet across" the basket. Id. at 79-80. As he extended his right leg to put it into the basket, the tip of his boot (which he also described as the ball of his foot) hit the center rail of the basket, he slipped, or "misstep[ed]", fell forward, his right shoulder hit the angle mullion, and his chest fell onto the top rail of the basket. Id. at 72, 83, 129-130, 191, 207-208. He was not aware of any witnesses to the incident. Id. at 136.

Plaintiff reported the accident to Scott, who told him to report it to Harry, the "safety guy" at the site. Id. at 134-136. Plaintiff did not know who owned the lift, but said it was provided by PI or another contractor. Id. at 120. Although the lift was in working order, there was silicone on the mid-rail on which his right foot slipped. 120-121, 207-208. He did not notice the silicone until he entered the basket. Id. at 121.

At his deposition, plaintiff was shown a signed but unsworn statement which he had given to an investigator in which he said that he had fallen when he misstepped. Id. at 187, 190-191. He identified the signature on the statement as his own. Id. at 187.

At the time of the incident, plaintiff was wearing a harness but it was not connected to anything because there was nothing to which it could have been attached. Id. at 100-104. Although plaintiff claimed that he told Scott prior to the incident that there should be a "three point system" which he could have used to connect his harness, Scott merely told him to be

careful climbing in and out of the basket. Id. at 104-105, 109-110. He conceded, however, that he had successfully climbed in and out of the basket about twenty to thirty times before without the harness connected. Id. at 105. He also admitted that, had he been tied off, it would not have prevented him from slipping on the silicone. Id. at 210. Plaintiff admitted that he was able to tie off on the ninth floor by wrapping his lanyard around the mullions, but could not recall whether his lanyard was wrapped around the mullions at the time of the incident. Id. at 108. He intended to connect his harness to the basket once he entered it. Id. at 103-104.

Plaintiff maintained that, had a platform been built at the site, he could have accessed the canopy without the need to use the lift. Id. at 209-210. However, prior to the occurrence, he neither requested such a platform nor told anyone he did not want to work on the lift. Doc. 108 at 210-211.

Harry Harriendorf, TCC's Site Safety Manager at the Whitney, also appeared for a deposition. Doc. 111. Harriendorf walked the site daily "[p]retty much all day" and would identify any safety concerns he encountered. Id. at 77-79. He testified that employees of subcontractors at the site reported to their own respective foremen and that, although TCC had responsibility for overall site safety, including the ability to stop a contractor's work if it was unsafe, it did not have control over the means and methods of plaintiff's work. Id. at 39, 95, 97-98.

Andrew Thomann, TCC's project manager at the site, testified that the Whitney hired his company to be the construction manager on the project. Doc. 112 at 17-19, 31. TCC in turn hired PI to build a "roof monitor system" composed of vertical steel, steel at an angle, and glass. Id. at 19-21. He further stated that TCC coordinated the work of the contractors at the site, was "responsible for initiating, maintaining, and supervising all safety precautions and programs in

connection with the performance of the Whitney contract", and had "overall site safety responsibility." Id. at 27-28, 115-118. Thomann authenticated the contracts between the Whitney and Turner and between Turner and PI, as well as TCC's Corporate Safety, Health & Environmental Policy. Id. at 84-88.

Plaintiff filed a note of issue on February 28, 2020. Doc. 99.

Defendants now move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's claims pursuant to Labor Law sections 200 and 240(1). Docs. 101-113. Initially, they assert that the section 200 claim must be dismissed since they did not direct, supervise or control plaintiff's work and had no notice of the allegedly dangerous condition (the silicone). They further assert that the section 240(1) claim must be dismissed since plaintiff's accident did not occur as the result of a failure to provide him with adequate protection against a risk arising from a significant elevation differential.

Plaintiff opposes that branch of the motion seeking dismissal of the section 200 claim on the ground that TCC was obligated, pursuant to its contract with the Whitney, to be "solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures and for coordinating all portions of the work." Doc. 119 at par. 3.3.1. Plaintiff further asserts that the branch of defendants' motion seeking dismissal of the section 240(1) claim must be denied on the ground that his accident was gravity-related and arose from the failure of defendants to provide plaintiff with a proper device to perform his work, and that this also entitles him to summary judgment on his cross motion pursuant to that statute.[2]

In reply, defendants argue, inter alia, that plaintiff's claim pursuant to section 200 must be dismissed because, if the alleged injury was caused by the means and methods of plaintiff's

[2] Although plaintiff also alleges a violation of Labor Law section 241(6), that statute in not at issue in either of the motions herein.

work, they did not supervise or direct the same. Doc. 126. They further assert that the "alleged incident was not caused by a dangerous condition on the premises." Id. at 9. Additionally, they maintain that the section 240(1) claim must be dismissed because "[t]here is no [safety] device that would [have] protect[ed] [p]laintiff from misstepping [on] the alleged silicone he encountered in the scissor lift" and, thus, this was not the type of gravity-related hazard that section 240(1) was designed to prevent. Id. at 11.

LEGAL CONCLUSIONS

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). Once met, the burden shifts to the opposing party, who must establish the existence of a triable issue of fact to defeat the summary judgment motion (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). It is well-established that "[t]his burden is a heavy one," requiring that the "facts . . . be viewed in the light most favorable to the non-moving party" (*Jacobsen v NY City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014] [internal quotation marks and citation omitted]). "Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Defendants' Motion for Summary Judgment

Labor Law Section 240(1)

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

> "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]). The statute "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC,* 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]). Liability under the statute "is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). Therefore, to prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]).

Defendants have established their prima facie entitled to summary judgment by submitting plaintiff's deposition testimony demonstrating that the lift he was provided was in working order, that he fell due to a misstep, and that, even if plaintiff had been able to attach his harness to the basket of the lift, the accident could not have been avoided.

In opposition, plaintiff raises an issue of fact by submitting plaintiff's testimony that he fell because he slipped on silicone which was on the mid-rail of the basket. Since "[t]here may be more than one proximate cause of a workplace accident" (*Wiscovitch v Lend Lease [U.S.] Constr. LMB Inc.*, 157 AD3d 576, 578 [1st Dept 2018], quoting *Pardo v Bialystoker Ctr. & Bikur Cholim*, 308 AD2d 384, 385 [1st Dept 2003]), this Court finds that issues of fact exist regarding how the accident occurred as well as whether the allegedly slippery lift was a safety

device which provided plaintiff proper protection against gravity-related risks. The inherent contradictions in plaintiff's testimony regarding the cause of the incident alone warrant the denial of the branch of the motion seeking dismissal of the section 240(1) claim (*DiCembrino v Verizon NY Inc.*, 149 AD3d 541, 542 [1st Dept 2017] [citations omitted]).

Despite defendants' contention, a jury may find that plaintiff was injured due to a gravity related risk given his testimony that he had to step down two feet into the basket and that, when he fell, the force of his body caused his chest to collide with the top rail of the basket. Since plaintiff testified that a platform should have been built for him to perform his work safely, another factual issue exists regarding whether the use of a lift under the circumstances was proper.

Although plaintiff did not fall to the ground or from a great height, this does not preclude application of the statute "where some risk-enhancing circumstance implicates the protections of the statute" (*Intelisano v Sam Greco Constr., Inc.*, 68 AD3d 1321, 1323 [3d Dept 2009]). Plaintiff testified that the basket was located approximately six inches below the level of the ninth floor and that he had to step down approximately two feet to enter it and that, when he did so, he slipped on the silicone on the mid-rail.[3] Thus, a jury may find that the silicone enhanced the risk of plaintiff's use of the lift.

Labor Law Section 200

Labor Law section 200 "codifie[s] the common-law duty imposed upon an owner or general contractor to provide construction site work[ers] with a safe place to work." (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981] [citation omitted]). An owner may be liable under the common law or under Labor Law section 200 for a dangerous condition arising

[3] Defendants incorrectly represent that the plaintiff described the elevation differential herein as "merely six inches to a foot." Doc. 113 at 15.

from either the condition of the premises or the means and methods of the work (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). An owner or contractor's liability only attaches for an injury arising from the means and methods of the work if the owner exercised supervisory control over the work (*Id.* at 144). Where a dangerous condition in the premises caused the accident, liability only arises if the owner created the condition or had actual or constructive notice of it (*Id.*).

Since plaintiff concedes that his work was directed and supervised exclusively by PI personnel, his section 200 claim cannot be premised on liability arising from the means and/or methods of his work. However, since Harriendorf admitted that he was at the site daily, walked the site all day for the purpose of, inter alia, identifying any safety concerns, and that TCC had the ability to stop the work in the event of a safety problem, defendants are not entitled to summary judgment on their section 200 claim since they have failed to establish as a matter of law that they did not create or have actual and/or constructive notice of the allegedly dangerous condition (*See Mott v Tromel Constr. Corp.*, 79 AD3d 829 [2d Dept 2010] [summary judgment on section 200 claim denied to general contractor where its site superintendent was at the site daily, walked around the building several times a day, conducted safety inspections, and had the ability to stop any work if necessary]).

Although defendants' attorney argues that "[t]here has been no evidence presented in this lawsuit that [TCC] caused or created the silicone to be present on the scissor lift or had notice of this condition" (Doc. 113 at 13), counsel either disregards or misapprehends the summary judgment standard, which, as noted above, requires that the movants affirmatively establish their entitlement to judgment as a matter of law. Since defendants have failed to submit evidence that they did not create, or have notice of, the dangerous condition, i.e., the silicone, this Court is

constrained to deny their motion seeking dismissal of the section 200 claim. Finally, defendants' conclusory assertion that the "alleged incident was not caused by a dangerous condition on the premises" (Doc. 126 at 9) is clearly belied by plaintiff's testimony that he slipped on silicone.

Plaintiff's Cross Motion For Summary Judgment

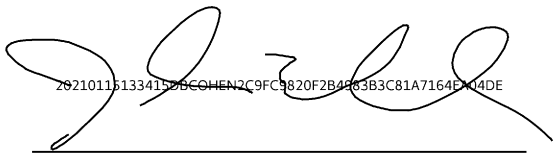
Given the factual issues identified in the analysis of the branch of defendants' motion seeking dismissal of the section 240(1) claim, *supra*, plaintiff's motion for summary judgment based on that statute is denied.

The parties' remaining contentions are either without merit or need not be addressed in light of the conclusions reached above.

Therefore, it is hereby:

ORDERED that the motion by defendants Whitney Museum of American Art and Turner construction Company seeking dismissal of plaintiff's claims pursuant to Labor Law sections 200 and 240(1) is denied; and it is further

ORDERED that the cross motion by plaintiff Richard McGill seeking summary judgment pursuant to Labor Law section 240(1) is denied.



1/14/2021
DATE

DAVID BENJAMIN COHEN, J.S.C.

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