At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 9th day of FEBRUARY, 2021

P R E S E N T:
HON. RICHARD VELASQUEZ, Justice.

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WHITNEY TITUS,

Plaintiff,

-against-

CABLEVISION SYSTEMS CORPORATIN, CSC HOLDINGS LLC, CABLE VISION SYSTEMS NEW YORK CITY COPRPORATION and QUEENS HOLDING CORP.,

Defendants,

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QUEENS HOLDING CORP.,

Plaintiff,

-against-

701 GREENE AVE REALTY, LLC and HATTIE PICKET,

Defendants,

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Index No.: 512717/2015
Decision and Order

The following *papers NYSCEF* Doc #'s 80 to 142 read on this motion:

Papers	*NYSCEF DOC NO.'s*
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed	80-90
Opposing Affidavits (Affirmations)	133-141
Opposing Affidavits (Affirmations)	142

After having heard Oral Argument on NOVEMBER 4, 2020 and upon review of the foregoing submissions herein the court finds as follows:

Plaintiff moves pursuant to CPLR 3212 for partial summary judgment on the issue of liability under Labor Law 240(1) against CABLEVISION SYSTEMS CORPORATION, CSC HOLDINGS LLC, CABLE VISION SYSTEMS NEW YORK CITY COPRPORATION and QUEENS HOLDING CORP. (MS#7) Defendant QUEENS HOLDING CORP. opposes the same.

FACTS

This action arises from an alleged incident occurring on August 13, 2013, while conducting work installing cable television at 132 Van Buren Street, Brooklyn (hereinafter "Premises") when he was injured after slipping an falling from a pole while attempting to reconnect cable to a cable box. It is alleged that at the time of the accident the plaintiff did not use the ladders provided by his work and climbed a 6-foot fence to reach the rungs on the pole to get to the cable box and when descending the same he slipped and fell from the pole. Defendant QUEENS HOLDING CORP is the owner of the property.

ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trail of the action. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). However, where the moving party fails to make a

prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.

A motion for summary judgment is a drastic measure and to be used sparingly (*Wanger v. Zeh,* 45 Misc2d 93 [SupCt., Albany County], aff'd 26 AD2d 729 [3rd Dept 1965]). Summary judgment is proper when there are no issues of triable fact (*Alvarez v. Prospect Hospital,* 68 NY2d 320, 324 [1986].) Issue finding rather than issue determination is its function (*Sillman v. Twentieth Century Fox Film Corp.,* 3 NY2d 395 [1957].) The evidence will be construed in the light most favorable to the one moved against (*Weiss v. Garfield,* 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. The moving party must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. (*Zuckerman v. City of New York,* 49 NY2nd 557 [1990].) Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v.Algaze,* 84 NY2d 1019 [1995]).

Labor Law § 240(1)

Labor Law § 240(1) provides:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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."

To prevail on a Labor Law § 240(1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*see Berg v. Albany Ladder Co.,* 10 NY3d 902, 904, 861 NYS2d 607, 891 NE2d 723; *Blake v. Neighborhood Hous. Servs. of N.Y. City,* 1 NY3d 280, 287, 771 NYS2d 484, 803 NE2d 757; *Martinez v. Ashley Apts Co., LLC,* 80 AD3d 734, 735, 915 NYS2d 620). "[W]here a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability" (*Cahill v. Triborough Bridge & Tunnel Auth.,* 4 NY3d 35, 39, 790 NYS2d 74, 823 NE2d 439; *see Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.,* 1 NY3d at 290, 771 NYS2d 484, 803 NE2d 757).

"Liability under Labor Law § 240(1) depends on whether the injured worker's task creates an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against". (*Salazar v. Novalex Contracting Corp.,* 18 NY3d 134, 139 [2011].) " Labor Law § 240(1) was designed to prevent those types of 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,* 13 NY3d 599, 604 [2009] [quoting *Ross v. Curtis–Palmer Hydro–Elec. Co.,* 81 N.Y.2d 494, 501 (1993)].) In determining the applicability of the statute, the "relevant inquiry" is "whether the harm flows directly from the application of the force of gravity to the object." (*See Runner v. New York Stock Exchange,* 13 NY3d at 604.) "The dispositive inquiry ... does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker." (*Runner v. New York Stock Exchange,* 13 NY3d at 603.) **"Rather, the single decisive question**

is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." (*Id.*)

In the present case the record establishes the plaintiff testified in his deposition that on August 13, 2013, he was injured while conducting work at 132 Van Buren Street, Brooklyn (hereinafter "Premises"). Plaintiff testified he was allegedly installing cable services for the alleged occupants of the property. See Plaintiff's Deposition Transcript attached to the opposition papers as Exhibit D, pp. 66-69. Plaintiff went on to testify that during the course of the work, he realized that there was no cable line running from the exterior utility pole to the Premises. Plaintiff, then testified he did not call for assistance from his employer nor did he request additional equipment to safely complete the work, but decided to rectify the alleged situation by himself. Id. at 67-68; 71-74. Plaintiff testified he did not use the ladders that were provided to him by his employer nor did he attempt to use said ladders. Plaintiff alleged that he could not get the ladders he had on his truck to the backyard of the Premises, where the utility pole was located. However, Plaintiff admits he did not try to get the ladder to the backyard. Instead, Plaintiff testified he allegedly climbed a six foot fence in the backyard of the Premises to reach the first rung of the pole in the backyard of the Premises. Id. at pp. 93-115. Plaintiff the testified he allegedly slipped or fell from the pole as he was climbing down the pole trying to reach the fence.

In the present case, plaintiff's own testimony establishes that he chose not to use the equipment that he was provided and he chose to instead climb a 6 foot fence to be able to reach the lowest rung on a telephone pole to then climb up said pole and

attempt to reach the cable box. There is no evidence in this record that establishes plaintiff was not provided with adequate protection against a risk arising from a physically significant elevation differential. Plaintiff's own testimony establishes the defendants did not direct or control the means or manner of his work. Plaintiff's testimony establishes he unilaterally decided not use the equipment that was provided to him. Plaintiff's testimony establishes there is no evidence of a violation of Labor Law 240(1). Defendant's established they were unaware of plaintiff's presence at the property and did not contract for any work done at said premises. As such, plaintiff has failed to establish as a matter of law that plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential.

Accordingly, plaintiff's motion pursuant to CPLR 3212 for partial summary judgment under Labor Law 240(1) is hereby denied, for the reasons stated above. (MS#7)

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
February 9, 2021

ENTER FORTHWITH:

HON. RICHARD VELASQUEZ