SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE BLUTH** **PART** **14**

Justice

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WILLIAM RIVERA,

Plaintiff,

- v -

SUYDAM 379 LLC,BLUEBERRY BUILDERS LLC,ATLANTIC STEEL SOLUTIONS,

Defendant.

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INDEX NO. 154555/2018

MOTION DATE 12/20/2021

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

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BLUEBERRY BUILDERS LLC

Plaintiff,

-against-

MODENESE CO., DEDER CONSTRUCTION

Defendant.

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Third-Party
Index No. 595525/2019

The following e-filed documents, listed by NYSCEF document number (Motion 006) 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151

were read on this motion to/for JUDGMENT - SUMMARY.

The motion by plaintiff for partial summary judgment on his Labor Law §§ 240(1) and 241(6) claims is denied. The cross-motion by defendants Blueberry Builders LLC ("Blueberry") is also denied and the cross-motion by Suydam 379 ("Suydam"), LLC for summary judgment dismissing plaintiff's claims is granted in part and denied in part.

Background

In this Labor Law case, plaintiff contends that he worked for nonparty Marine Construction. He claims that he was tasked with replacing and changing beams at a job site

owned by Suydam and where Blueberry was the general contractor when he fell from the top of a ladder. He claims that he was carrying beams up a ladder to place on a scaffold but that because the ladder was unsecured, the ladder wobbled when he got to the top rung causing him to fall. Plaintiff claims he was not provided with any adequate safety devices to protect him from the fall such as a harness.

Blueberry cross-moves for summary judgment on the ground that plaintiff was the sole proximate cause of his accident. It claims that its on-site superintendent told plaintiff to use the scaffold and fall protection rather than a ladder to access the adjustable scaffold platforms. Blueberry argues that plaintiff deliberately ignored these directions and used a ladder because it was more convenient. Blueberry points out that the scaffold had tie off points affixed to the side of it so that workers, such as plaintiff, could safely work at an elevation.

Suydam makes a similar cross-motion on the ground that plaintiff was the sole proximate cause of his accident. It also argues that plaintiff's Labor Law § 200 claim should be dismissed as against Suydam because it neither supervised nor controlled plaintiff's work at the job site.

In opposition to the cross-motions, plaintiff claims that defendants are trying to "fix" a bad deposition from Blueberry through an affidavit submitted in opposition. He claims that Blueberry's witness admitted that there was no way to climb up and down from the roof while being tied off. Plaintiff emphasizes that the issue here is that there was no adequate protection provided and so he is entitled to partial summary judgment.

Discussion

"Labor Law § 240(1), often called the 'scaffold law,' provides that all contractors and owners . . . shall furnish or erect, or cause to be furnished or erected . . . 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 construction workers employed on the premises" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500, 601 NYS2d 49 [1993] [internal citations omitted]). "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" (*id.* at 501).

"[L]iability [under Labor Law § 240(1)] is contingent on a statutory violation and proximate cause . . . violation of the statute alone is not enough" (*Blake v Neighborhood Hous. Servs. of NY City*, 1 NY3d 280, 287, 771 NYS2d 484 [2003]).

The central question on this motion and cross-motions is whether defendants raised an issue of fact regarding their arguments that plaintiff was the sole proximate cause of his accident. As an initial matter, the Court will focus only on the deposition testimony of Mr. Burgos (Blueberry's witness). His affidavit cannot raise an issue of fact by itself.

Mr. Burgos testified that he showed plaintiff "where he was going to be working and where he needed to tie the ladder off at" (NYSCEF Doc. No. 120 at 28). He added that the roof, where plaintiff was going, was 20 feet high while the ladder plaintiff was using was 12 feet (*id.* at 33). Mr. Burgos claimed plaintiff should not have used the ladder and instead should have climbed up the scaffold to get to the roof (*id.*). He later testified that the told plaintiff he had to tie off the ladder around 9:15 a.m. on the day of the accident, right after plaintiff and his co-

workers got to the site (*id*. at 74). Plaintiff testified that the accident happened while he was on the second to last rung on the ladder and he was carrying up some beams to the scaffold (NYSCEF Doc. No. 119 at 204-06).

Under these circumstances, the Court finds that there is an issue of fact regarding whether plaintiff was the sole proximate cause of his accident and denies plaintiff's motion as well as the branches of the cross-motions based on Labor Law § 240(1) and 241(6). This situation raises an issue about whether that plaintiff knew he was supposed to tie off the ladder and chose not to do so (*c.f. Maltese v Port of Auth. of New York and New Jersey*, 199 AD3d 612 [1st Dept 2021]).

Mr. Burgos claims he told plaintiff to tie off the ladder and it is undisputed that the ladder was not tied off. And plaintiff insists he fell from the ladder. A jury could conclude that plaintiff deliberately ignored Mr. Burgos' instructions and that he is entirely responsible for the accident. If a worker ignores a safety instruction to tie off a ladder and then falls off that ladder because it wobbled and moved, then there is an issue of fact regarding whether that worker was a sole proximate cause for that accident. "Liability under section 240(1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident" (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]). For similar reasons, there is an issue of fact with respect to plaintiff's claims under the Industrial Code (his Labor Law § 241[6] claim). The Court denies the cross-motions that seek dismissal of these claims because a jury could also find that there was no adequate protection provided or not credit Mr. Burgos' story. As the jury must make credibility findings on this point, summary judgment is inappropriate.

However, the Court grants the branch of Suydam's cross-motion that seeks dismissal of the Labor Law § 200 claim as plaintiff did not oppose that branch of the motion.

Accordingly, it is hereby

ORDERED that the motion by plaintiff and the cross-motion by defendant Blueberry Builders LLC are denied in their entirety; and it is further

ORDERED that the cross-motion by defendant Suydam 379 LLC for summary judgment is granted only to the extent that plaintiff's Labor Law § 200 claim is severed and dismissed against it.

12/22/2021
DATE

ARLENE BLUTH, J.S.C.

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