Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY PART 35
Justice

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MABROUK SAYARI, **Index No.: 715546/18**

Plaintiff, **Mot. Date: 8/24/21**

-against- **Mot. Seq. 1**

48 WALL, LLC and INSIDE SQUAD, INC.,

Defendant.

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INSIDE SQUAD, INC.,

Third-Party Plaintiff,

-against-

DATO A/C INC.,

Third-Party Defendant.

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The following papers read on this motion by plaintiff Mabrouck Sayari for an order granting him summary judgment, pursuant to pursuant to CPLR 3212, on his Labor Law 240(1) claim against defendants.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	EF 21-30
Answering Affidavits-Exhibits.....	EF 34
Answering Affidavits-Exhibits.....	EF 35; 37-38
Memorandum of Law in Opposition.....	EF 36; 49
Amended Answering Affidavits-Exhibits.....	EF 48; 50-52
Replying Affidavits.....	EF 53-56

Upon the foregoing papers, it is ordered that the motion by plaintiff Mabrouck Sayari for an order granting him summary judgment, pursuant to CPLR 3212, only on his Labor Law 240(1) cause of action against defendants 48 Wall, LLC and Insidesquad Inc., (Insidesquad) is granted.

Plaintiff Mabrouck Sayari maintains, that on September 15, 2017, he was lawfully working on a renovation project at the premises, located on the 24th Floor of 48 Wall

Street, New York, New York when he was struck by an overhead hanging ceiling panel that was being hoisted and installed by another worker working nearby. Plaintiff further maintains that he was caused to sustain serious personal injuries. It is undisputed that defendant 48 Wall, LLC is the owner of the subject premises and defendant Insidesquad is the general contractor of the subject premises.

Plaintiff commenced this action alleging liability against the defendants, pursuant to Labor Law §§ 200, 240(1) and 241(6) and common-law negligence. It is undisputed that non-party Star Heating and Cooling Corp. was the plaintiff's employer at the time of the accident, whereby the plaintiff was responsible for performing HVAC work and for supervising other workers.

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v Twentieth Century-Fox Film Corp*., 3 NY2d 395 [1957]; *Pizzi by Pizzi v Bradlee' s Div. of Stop & Shop, Inc*., 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v DiNapoli*, 134 AD2d 235 [2d Dept 1987]).

Plaintiff established a *prima facie* case that his claim under Labor Law 240(1) must be granted as there are no triable issues of fact regarding this section. 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]; *see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Gasques v State of New York*, 59 AD3d 666 [2009]; *Rau v Bagels N Brunch, Inc.*, 57 AD3d 866 [2008]). The duty to provide scaffolding, ladders, and similar safety devices is non-delegable, as the purpose of the section is to protect workers by placing the ultimate responsibility on the owners and contractors (*see Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 559

[1993]; *Ortega v Puccia*, 57 AD3d 54 [2008]; *Riccio v NHT Owners, LLC*, 51 AD3d 897 [2008]). In order to prevail on a cause of action pursuant to Labor Law § 240 (1), the plaintiff must establish that the statute was violated and that said violation was the proximate cause of his or her injuries (*see Chlebowski v Esber*, 58 AD3d 662 [2009]; *Rakowicz v Fashion Inst. of Tech.*, 56 AD3d 747 [2008]; *Rudnik v Brogor Realty Corp.*, 45 AD3d 828 [2007]).

"Labor Law 240(1) evinces a clear legislative intent to provide exceptional protection for workers against the special hazards that arise when the work site is either itself elevated or is positioned below the level where materials or loads are hoisted or secured." (*Orner v Port Authority*, 293 AD2d 517 [2d Dept 2002]). The statute will be applicable wherever there is a significant risk posed by the elevation at which material or loads must be positioned or secured (*Salinas v Barney Skansa Construction Co.*, 2 AD3d 619 [2d Dept 2003]).

The Appellate Division, Second Department has granted summary judgment to workers struck by falling objects. In *Salinas, supra*, ductwork fell several feet onto a worker's head and the court held that the plaintiff met its burden of establishing that the duct fell due to the absence or inadequacy of a safety device enumerated in the statute for securing or lowering the load. In *Orner, supra,* the worker was injured while hit upon the head by unsecured roofing material that had fallen from the roof. The Court granted summary judgment to the plaintiff, holding that a plaintiff may recover under Labor Law § 240(1) where an object falls from a height, when it was not properly secured (*see also Outar v City of New York*, 286 AD2d 671 [2d Dept 2001] [holding that where worker was injured when an unsecured dolly fell from the top of a bench wall 5 ½ feet high, plaintiff was entitled to summary judgment on the issue of liability under § 240[1]).

The Court finds that the plaintiff has established a *prima facie* entitlement to judgment as a matter of law as to his cause of action, pursuant to Labor Law § 240(1). By virtue of, *inter alia*, plaintiff's own examination before trial transcript testimony and the examination before trial transcript of eye witness, Sofien Garnaoui, the plaintiff has demonstrated a *prima facie* case that: he was engaged in an enumerated activity of installing HVAC ductwork during a renovation project at a job site when the accident occurred; and, that a device (a large ceiling-panel) that was in the midst of being lifted

was unsecured, broke, and struck the plaintiff from above. The Courts have granted plaintiff summary judgment to plaintiff where a device needed to be secured, and it was not properly secured (*See Salinas, supra*; *See also Landgraff 1579 Bronx River Avenue, LLC* 18 AD3d 385 [1st Dept 2005]).

Defendants have failed to raise a triable issue of fact in opposition. This Court finds unavailing the defendants' arguments that the plaintiff was the "sole proximate cause" of the accident (*see Allan v DHL Express* [*USA*], *Inc.,* 99 AD3d 828, 833; *Robinson v Goldman Sachs Headquarters, LLC, Robinson v. Goldman Sachs Headquarters, LLC,* 95 AD 3d 1096, 1097). The "sole proximate cause" exception precludes claims under § 240(1) (*see Weininger v Hagedorn & Co.*, 91 NY2d 958, 960 [1998]) where the injured party is solely responsible for the accident (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]; *Weininger v Hagedorn & Co.*, 91 NY2d 958, 960 [1998]; *see also Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35 [2004]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 [2003]). The sole proximate cause defense is applicable only where the plaintiff's actions are the sole cause of his alleged injuries and there has been no statutory violation by a defendant (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]).

Defendants contend that the plaintiff should not have been standing in the area where the ceiling fell. To support this defense, the defendants submit merely an affidavit of an employee of Insidesquad, Yuriy Maystrenko, wherein he avers that he is employed as a carpenter for Insidesquad, and that another employee of Insidesquad, Bogdan Deledyvka "had told the other companies on the jobsite not to be in the area because [Insidesquad] was testing the area." Such fails to raise a triable issue of fact.

Additionally, the Court finds there is no merit to all the remaining arguments, including the argument that there is an issue of fact as to whether any accident ever occurred at all.

As, the Court finds that as there are no triable issues of fact as to whether defendants are liable under Labor Law § 240(1), summary judgment is granted to plaintiff on said cause of action.

Accordingly, it is

ORDERED that the motion by plaintiff seeking summary judgment as against defendants on his Labor Law 240(1) claim is granted.

The foregoing constitutes the decision and order of the Court.

Dated: December 1, 2021

TIMOTHY J. DUFFICY, J.S.C.