SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET CHAN** **PART** **49M**

Justice

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EDWIN JARAMILLO,

Plaintiff,

- v -

PORT AUTHORITY OF NEW YORK AND NEW JERSEY, TISHMAN CONSTRUCTION CORPORATION

Defendants.

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INDEX NO. 160297/2020

MOTION DATE 01/27/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 46, 47, 48, 49, 50, 51

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

In this action arising out of a construction site work-related accident, plaintiff the moves for summary judgment as to liability on his Labor Law 240(1) claim. Defendants oppose the motion.

Background

Plaintiff was injured on July 15, 2020, while working as a reinforcing ironworker/lather on a construction project at the World Trade Center (Project) for non-party Peter, John, Sarah Construction (PJS). Defendant Port Authority of New York and New Jersey owns the Project site and defendant Tishman Construction Corporation (Tishman) was the Project's construction manager.

According to plaintiff's deposition testimony, on the date of the accident, PJS's foreman instructed plaintiff to prepare a beam to install a rebar and "to cut off sections of the brace that were supporting it and holding it in place" (NYCSEF # 40-Plaintiff's Dep. Tr. at 48). The top of the beam was "about five feet" off the ground, about twenty feet long, and was connected to temporary braces approximately five feet apart (*id.* at 50). Two of the three temporary support braces needed "to be trimmed [to]. . . lay the rebar and to be covered from the concrete" (*id.* at 49). While plaintiff's coworker, Jake Clapp, was finishing trimming one of the temporary braces, Clapp asked plaintiff to "start marking up . . . the one [temporary brace] that was going to be cut next" (*id.* at 53). To accomplish this, plaintiff stated that he would have to climb up on the beam, walk across and then get off the beam so to mark the brace (*id.*). Plaintiff climbed up the beam, without using a ladder, by lifting himself up and walked across the beam (*id.* at 54-56).

To mark the brace that needed to be cut get down, plaintiff had to climb down the beam. He did so by using a ladder on the other side that was leaning against the concrete wall (*id.*, at 55, 62). Plaintiff described those details as follow:

> when I was going to step off the beam onto the ladder, I kind of braced myself on one of the temporary beams they had lowered. What I didn't know is that [the temporary beam] was on a chain fall and it was hanging[;] it wasn't actually on the ground or laying on the beam. So I kind of swayed out of the way while I was in the motion of stepping onto the ladder. When I'm in that whole motion, I got my right foot off to the ladder and the ladder started to go off towards the right. So I'm like, trying to hold onto the beam that wasn't stable, I'm trying to hold onto the ladder. I'm just trying to hold onto everything so I wouldn't go down.

(*id.* at 56). Plaintiff fell from the ladder headfirst onto the concrete floor after he failed to steady himself by grabbing onto some plywood (*id.* at 60-61).

According to plaintiff, the ladder had been placed before the accident. He did not know if it was defective or the way it was placed, and he had never used it before (*id.* at 56, 58). Plaintiff was not wearing a safety harness as he was five feet above ground; harnesses must be worn at heights of six feet or more (*id.* at 61). Plaintiff did not think there was any other equipment available to him that would have prevented him from falling (*id.* at 60-62).

When asked why, if he was able to climb up on the beam, he chose to use the ladder to get down, plaintiff responded that there was nothing that impeded his climb up on the beam, but on the side where he was getting down the beam, there was "stuff" or more steel in the way (*id.* at 58). As to why he chose to mark the brace from the ground as opposed to from the beam he was sitting on, plaintiff testified that "[b]eing a big guy, it makes it awkward and difficult" (*id* at 62).

Tishman's Incident Report states that plaintiff was injured "while climbing down a ladder from a metal deck elevation ... [and] leaned his hand on a beam which was being removed by the steel contractor. The beam was hanging from a central point attached to a chain fall. As [plaintiff] leaned on the beam, it began to teeter, causing [him] to lose balance an[d] fall from the ladder" (NYSCEF # 42 at 1).

Plaintiff asserts claims against defendants for violating Labor Law §§ 200, 241(6), and 240(1) (NYSCEF # 1). After the issue was joined and discovery was completed, plaintiff made this motion for summary judgment as to liability under Labor Law § 240(1).

Plaintiff argues that he is entitled to summary judgment as to liability because the record demonstrates that he was injured when the ladder failed to

perform its function to support and protect him from injury (citing *e.g. Ortega v City of New York*, 95 AD3d 125, 128 [1st Dept 2012]). Plaintiff asserts that he was neither a recalcitrant worker nor were his actions the sole proximate cause of the accident.

In opposition, defendants counter that the record is devoid of evidence that the ladder was defective, and that plaintiff's testimony shows that plaintiff could have safely performed the work without the ladder since he could have climbed down from the beam without a ladder. Defendants note that plaintiff acknowledged that no other equipment available to him would have prevented his fall. Defendants also argue that even if plaintiff was not recalcitrant, the record raises issues of fact as to whether his actions were the sole proximate cause of his injuries, including because he chose to descend the beam to make his work easier and to use a ladder placed by an unknown contractor (citing e.g. *Mercado v New York University* 29 AD3d 493 [1st Dept 2006]).

In reply, plaintiff argues that defendants submit no evidence to rebut plaintiff's showing that the ladder provided was not secured and failed to perform its function of supporting plaintiff and preventing him from falling. As for defendants' assertion that issues of fact exist as to whether plaintiff was the sole proximate cause of the accident, plaintiff points out that this argument ignores plaintiff's testimony that he needed to mark the brace from the ground because it was awkward and difficult to do so from the beam, that he could not climb down because he was blocked by materials, and that the ladder was the only available safety device.

Discussion

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once a showing has been made, the burden shifts to the party or parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*, 18 NY3d 499, 503 [2012] [internal citations and quotation omitted]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Grossman v Amalgamated Hous. Corp*, 298 AD2d 224, 226 [1st Dept 2002]).

Labor Law § 240(1) provides that: "[a]ll contractors and owners and their agents... in the... altering of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding ... ladders, slings ... ropes, and other devices which shall be so constructed, placed and

operated as to give proper protection to a person so employed." The provision imposes absolute liability on owners and contractors whose failure to provide "proper protection to workers employed on a construction site, proximately causes injury to a worker" *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011] [internal citation and quotations omitted]). Whether a plaintiff is entitled to recover under Labor Law § 240(1) also "requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies" (*id*, [internal citation omitted]). In ascertaining whether there is liability under the statute, the issue to be determined is whether plaintiff's injuries were a direct consequence of a failure to provide adequate protection against injury resulting from a fall from a significant height differential (*Runner v New York Exchange, Inc.*, 13 NY3d 599, 603 [2009]). Thus, it is well settled that where an elevated work surface fails to remain stable or erect and results in injury of a worker, there is prima facie liability under § 240(1) (*Aburto v City of New York*, 94 AD3d 640 [1st Dept 2012]).

Here, plaintiff has made prima facie showing that he is entitled to summary judgment on his § 240(1) based on his testimony that he fell from a ladder which did not provide adequate protection and was a proximate cause of his injuries (*see Ocana v Quasar Realty Partners, L.P.*, 137 AD3d 566, 567 [1st Dept] *lv dismissed* 27 NY3d 1078 [2016][plaintiff met his burden on summary judgment based on plaintiff's testimony that "the ladder on which he stood to perform work wobbled, and that both he and the ladder fell to the ground"]; *see also Runner*, 13 NY3d at 603 [noting that the decisive question regarding liability under § 240(1) is whether plaintiff's injuries were a direct consequence of a failure to provide adequate protection against a risk arising from a physically significant height differential]).

In opposition, defendants have failed to raise a triable issue of fact warranting the denial of summary judgment. In this regard, contrary to defendants' argument, when, as here, there is no dispute that a safety device failed "it is not relevant that the scaffold or ladder were free from defects" (*Martinez v St-Dil LLC*, 192 AD3d 511, 513 [1st Dept 2021]). Defendants' argument concluding that plaintiff's actions in using the ladder when he could have climbed down from the beam as the sole proximate cause of the accident is unavailing. Notably, this argument does not account for plaintiff's uncontroverted testimony that he could not climb down on his own since he was blocked by materials, like steel, below. Moreover, it cannot be said that plaintiff's actions were the sole proximate cause of his injuries since he was not provided with an adequate safety device to prevent his fall (*id.* at 512 [rejecting defendant's contention that plaintiff's actions were the sole proximate cause of the accident "since he was not provided a proper safety device to prevent his fall, and that failure is a cause of his injuries"][internal citations omitted]; *see also Mata v Park Here Garage Corp.*, 71 AD3d 423, 427 [1st Dept 2010][where no adequate safety devices were provided, "that plaintiff's improvised use of his own extension ladder might be viewed as inappropriate is not material

since a worker's contributory negligence does not bar recovery under § 240(1)"]; *cf Mercado v New York University*, 29 AD3d 496, 496-497 [1st Dept 2006] [issue of fact raised as to whether plaintiff was the sole proximate cause of the accident when plaintiff used a ladder that fell over as a shortcut out of the building rather than obtaining a ladder that was intended and designated for the purpose of accessing different floors]).

Accordingly, plaintiff is entitled to summary judgment as to liability on his Labor Law § 240(1) claim.

Conclusion

In view of the above, it is

ORDERED that plaintiff's motion for summary judgment as to liability on his Labor Law § 240(1) claim is granted.

This constitutes the Decision and Order of the court.

8/15/2022
DATE

MARGARET CHAN, J.S.C.

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