SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

----------X

SALVATORE CAFISI,

Plaintiff,

- v -

L&L HOLDING COMPANY, LLC, COMREF 380, LLC,J.T. MAGEN & COMPANY INC.,SHISEIDO AMERICA INC.,MANHATTAN MECHANICAL CONTRACTORS, INC.,D & G SHEETMETAL, INC.,PAR FIRE PROTECTION, LLC,

Defendant.

----------X

INDEX NO. 157075/2018

MOTION DATE 09/01/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

J.T. MAGEN & COMPANY INC.

Plaintiff,

-against-

NATIONAL ACOUSTICS, LLC

Defendant.

----------X

Third-Party
Index No. 595221/2019

MANHATTAN MECHANICAL CONTRACTORS, INC.

Plaintiff,

-against-

PAR FIRE PROTECTION, LLC, D & G SHEETMETAL, INC.

Defendant.

----------X

Second Third-Party
Index No. 595436/2021

The following e-filed documents, listed by NYSCEF document number (Motion 003) 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 252, 254, 255, 256, 257, 258, 259, 260, 261, 262

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

The motion by plaintiff for summary judgment on his Labor Law § 240(1) cause of action against only defendants L&L Holding Company LLC, COMREF 380, LLC, J.T. Magen & Company Inc., Shiseido America Inc., (collectively, "Opposing Defendants") is granted in part.

Background

Plaintiff contends that while working at a job site, he fell from a baker scaffold that shook and tipped while he was on the 17th floor. He alleges that defendant Comref 380 LLC owned the property, defendant L&L Holding Company, LLC was the managing agent, defendant Shiseido America, Inc. was the lessee and contracted for work to be done with the general contractor (defendant J.T. Magen & Company, Inc.).

Plaintiff testified that he "was framing the soffit and as I was – I finished framing. And as I was finished framing my last piece I was putting on, I was descending down from the scaffold. As I was descending from the scaffold, it started shaking and tipping. Next thing you know, I was holding on with my right hand. I remember there were these metal straps on the floor, like inch and a half. And it got—I am getting a little emotional. It was like a sheet of ice underneath my feet. And I wound up tumbling backwards. I fell backwards, you know" (NYSCEF Doc. No. 223 at 53-54). He added that the top of the ladder he used to go down the scaffold was about seven and a half feet off the ground (*id*. at 56).

Plaintiff contends that his accident falls directly under the purview of Labor Law § 240(1). He was working at an elevation and suffered injuries as a result of a gravity-related incident. Plaintiff insists he was not provided with any safety devices, such as a harness, to prevent a fall.

In opposition, the Opposing Defendants point out that plaintiff recently added two parties as direct defendants (who are not parties to this motion) and that this motion is premature. They

insist that plaintiff's credibility is at issue because there are various versions of the accident reported to different sources. The Opposing Defendants insist that these conflicting versions compel the denial of plaintiff's motion. They claim that plaintiff initially said he fell after slipping on metal straps and only later asserted he fell off a scaffold.

The Opposing Defendants also claim that the scaffold in question had nothing wrong with it and therefore plaintiff was provided with adequate working conditions. They also argue that the managing agent and the lessee cannot be held liable as they are not proper Labor Law defendants (they were not the owner or general contractor).

Also offering opposition is third-party defendant National Acoustics, LLC which asserts that the motion is premature as discovery has not been completed. Defendant Manhattan Mechanical Contractors, Inc. submits an affirmation in which it offers no position as the motion does not seek relief against this party.

In reply, plaintiff emphasizes that there is no witness testimony that contradicts his version of events and the accident report was compiled by individuals based on hearsay.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"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 Court grants the motion with respect to all defendants except for defendant L&L Holding Company LLC. The fact is that plaintiff established that he had a gravity-related

accident and that the tipping scaffold he fell off of was a proximate cause of his injuries. The Opposing Defendants' attempts to characterize his versions as conflicting are without merit. Unfortunately for the Opposing Defendants, plaintiff is the only eyewitness to his accident and other accounts (such as those included in the accident report) do not compel denial of the instant motion. Written reports by "witnesses" who only acquired knowledge of the accident from other sources, including plaintiff himself, cannot raise a material issue of fact.

Moreover, this accident report, if it were admissible, does not raise a material issue of fact. It states that plaintiff fell while coming down a "40" Baker" scaffold (NYSCEF Doc. No. 260). That is not inconsistent with plaintiff's deposition testimony of how the accident occurred. The Court recognizes that the Opposing Defendants focus on the fact that plaintiff testified that the metal straps he slipped on were on the ground (*see e.g.,* NYSCEF Doc. No. 223 at 59). But that does not render Labor Law § 240(1) inapplicable. Plaintiff clearly and directly claimed that the scaffold tipped, he grabbed the scaffold with his right hand, landed on the straps and fell backwards (*id*. at 58). That means the scaffold was a proximate cause of his fall; the tipping scaffold started the chain of events that led to plaintiff falling.

The Court also observes that the instant motion is not premature as defendants argue. Plaintiff testified as to how the accident happened and defendants did not offer any contradictory first-hand witnesses to raise a material issue of fact. Plaintiff need not arbitrarily wait until discovery is completed to move for summary judgment.

The Court grants the motion as against the lessee Shiseido America, Inc. "The term 'owner' within the meaning of article 10 of the Labor Law encompasses a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit. The statute may also apply to a lessee, where the lessee has the right or

authority to control the work site, even if the lessee did not hire the general contractor" (*Zaher v Shopwell, Inc.*, 18 AD3d 339, 339-40, 795 NYS2d 223 [1st Dept 2005] [internal quotations and citations omitted]). Plaintiff contends that Shiseido contracted for the work done and, in opposition, the Opposing Defendants do not contest this assertion. Instead, they argue that a lessee cannot be held liable under the Labor Law.

However, the Court denies the claim against the managing agent, L&L Holding Company, LLC. By not addressing this defendant's arguments in reply, plaintiff abandoned his request for summary judgment against this defendant.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment on liability on his Labor Law § 240(1) claim is granted only with respect to defendants COMREF 380, LLC, J.T. Magen & Company Inc., and Shiseido America Inc.

The Court declines to set this matter down for an assessment (as requested by plaintiff). There are other causes of action asserted by plaintiff in this matter as well as two newly-added defendants, plus numerous third-party claims. The Court prefers that all of these issues be decided together.

Conference: October 27, 2022 per NYSCEF Doc. No. 253 [directing the parties to upload a discovery update by October 20, 2022]).

9/8/2022
DATE

ARLENE P. BLUTH, J.S.C.

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