SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **47**

Justice

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KEITH KIRK,

Plaintiff,

- v -

STRUCTURE TONE LLC,200 PARK L.P., TISMAN SPEYER PROPERTIES, INC.,

Defendants.

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INDEX NO. 151733/2020

MOTION DATE 06/30/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

STRUCTURE TONE LLC

Plaintiff,

-against-

ADMORE AIRCONDITIONING CORP., ALFA PIPING CORP

Defendants.

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Third-Party
Index No. 595773/2020

The following e-filed documents, listed by NYSCEF document number (Motion 003) 72, 73, 74, 75, 76, 77, 78, 79, 80, 82, 83, 84, 85

were read on this motion to/for RENEWAL.

In this personal injury Labor Law action plaintiff Keith Kirk moves pursuant to CPLR § 2221 (d) to renew or in the alternative, pursuant to CPLR § 2221 (e) to reargue the Labor Law § 240 (1) portion of plaintiff's previous motion for summary judgment (mot seq no 002) that was denied due to plaintiff's failure to attach plaintiff's deposition transcript to his moving papers (motion seq no 003). Plaintiff seeks to renew or reargue the motion only against defendants Structure Tone LLC (Structure Tone) and 200 Park, L.P. (200 Park) since plaintiff's claims against defendant Tishman Speyer Properties, L.P. i/s/h/a Tishman Speyer Properties, Inc. (Tishman) were dismissed by decision and order dated May 2, 2023 (NYSCEF Doc No 67).

Plaintiff argues that leave to renew should be granted due to the reasonable excuse of law office failure for the inadvertent omission and defendants cannot establish prejudice since they attached plaintiff's deposition transcript to their cross-motion.

Defendants Structure Tone, 200 Park, and Tishman oppose the motion. Defendants respond that plaintiff already had a chance to argue his point in response to defendant's cross-motion and chose not to, there are no facts that the court looked overlooked or misapprehended, and plaintiff's excuse is not reasonable. Both parties repeat the same arguments proffered in motion sequence 002 regarding plaintiff's Labor Law § 240 (1) claim should the motion to renew or reargue be granted.

DISCUSSION

Renew / Reargue

Pursuant to CPLR § 2221 (e) (2) a motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination." In addition, the motion to renew must "contain reasonable justification for the failure to present such facts on the prior motion" (*id.* § 2221 [e] [3]). "Renewal is granted sparingly" and 'is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation'" (*Acevedo v Nurmamatov*, 206 AD3d 488, 488 [1st Dept 2022], quoting *Gibbs v Kings Harbor Health Servs., LLC*, 190 AD3d 586, 587 [1st Dept 2021]). However, "law office failure for [an] inadvertent omission" of exhibits has been held to be a reasonable excuse such that, absence prejudice to defendant, plaintiff's motion to renew should be granted (*Cruz v Castanos*, 10 AD3d 277, 278 [1st Dept 2004]). Additionally, "even if the vigorous requirements

for renewal are not met, such relief may still be granted so as not to defeat substantive fairness" (*Garner v Latimer*, 306 AD2d 209, 210 [1st Dept 2003] [internal quotations omitted]).

Here, though plaintiff failed to exercise due diligence in making his first factual presentation, defendants were not prejudiced because they too relied on plaintiff's deposition transcript in support of their cross-motion (*Cruz*, 10 AD3d at 278).

Accordingly, plaintiff's motion to renew his motion for partial summary judgment on his Labor Law § 240 (1) claim will be granted.

Labor Law 240 (1)

Upon renewal, plaintiff moves for partial summary judgment as to liability on his Labor Law § 240 (1) claim against defendants Structure Tone and 200 Park. Plaintiff contends that these entities were owners or agents of owners and that he is entitled to judgment as a matter of law given the evidence that the ladder suddenly collapsed causing him to fall. Defendants cross-move to preclude summary judgment, arguing that there are genuine issues of material fact regarding whether plaintiff simply slipped or fell off the ladder not due to a defect with the ladder itself. Plaintiff replies that the First Department has rejected similar arguments even where there is a question of whether a claimant merely slipped off a ladder where it is evident that it was the movement of the ladder that caused plaintiff to fall.

Labor Law § 240 (1), also known as the Scaffold Law, provides, in relevant part:

> All contractors and owners and their agents . . . 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.

Labor Law § 240 (1) "imposes absolute liability on building 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 quotation marks and citation omitted]). To prevail on a Labor Law § 240 (1) cause of action, the plaintiff must establish that the statute was violated, and that the violation was a proximate cause of his or her injuries (*Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280, 287-89 [2003]). "[T]he 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" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

The legislative intent behind the statute is to place "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident" (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 520 [1985], *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citations omitted]). Therefore, the statute should be liberally construed to achieve the purpose for which it was framed (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]).

Labor Law § 240 (1) requires that ladders and other safety devices be "so constructed, placed and operated as to give proper protection" to a worker (*see also Klein v City of New York*, 89 NY2d 833, 833-34 [1996]; *Lipari v AT Spring, LLC*, 92 AD3d 502, 503-04 [1st Dept 2012]). It is well established that the "failure to properly secure a ladder to insure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240 (1)" (*Plywacz v 85 Broad St. LLC*, 159 AD3d 543, 544 [1st Dept 2018] [internal quotation marks and citation omitted]). "It

is sufficient for purposes of liability under section 240 (1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent" (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]). The plaintiff is not required to show that the ladder was defective (*Perez v NYC Partnership Hous. Dev. Fund Co., Inc.*, 55 AD3d 419, 420 [1st Dept 2008]).

Here, plaintiff testified that the ladder "crumbl[ed] from under [him]" due to the metal brace on the right side bending inwards causing him to fall and injure himself (Plaintiff's EBT, pp 64-65, 72-74, NYSCEF Doc No 63). In view of this testimony, plaintiff has made a *prima facie* showing of entitlement to summary judgment under Labor Law §240 (1) (*see Lizama v 1801 Univ. Assoc., LLC*, 100 AD3d 497 [1st Dept 2012]).

Defendants have failed to raise an issue of fact as to whether plaintiff himself was the proximate cause of his accident by slipping or falling off the ladder. Defendants have not disputed that the ladder collapsed. Thus, a statutory violation occurred as a matter of law, which served as a proximate cause of the accident. "[I]f a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it" (*Blake*, 1 NY3d at 290; *see Mussara v Mega Funworks, Inc.*, 100 AD3d 185, 194 [2d Dept 2012]).

To the extent that defendants rely on plaintiff's medical records (NYSCEF Doc Nos 53-55) following the accident that state plaintiff fell off the ladder, such statements do not contradict plaintiff's testimony that the fall was caused by the ladder itself (*see Rom v Eurostruct, Inc.*, 158 AD3d 570 [1st Dept 2018] [accident report stating plaintiff lost his balance and fell did not contradict the fact that the ladder caused him to slip and fall]). "The ladder did not prevent plaintiff from falling; thus the 'core' objective of section 240(1) was not met" (*Gordon v E. Ry. Supply, Inc.*, 82 NY2d 555, 561 [1993]).

Accordingly, plaintiff is entitled to partial summary judgment as to liability under Labor Law § 240 (1) as against 200 Park and Structure Tone.

CONCLUSION

Based on the foregoing, it is

ORDERED that plaintiff's motion to renew his motion for summary judgment on his Labor Law § 240 (1) claim is granted; and it is further

ORDERED that plaintiff's motion for partial summary judgment as to defendants 200 Park and Structure Tone's liability under Labor Law § 240 (1) is granted.

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8/25/2023
DATE

PAUL A. GOETZ, 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