SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD TSAI** **PART** **21**

Justice

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JOHN GOLDRICK,

Plaintiff,

- v -

CITY OF NEW YORK and TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY (POPULARLY KNOWN AS MTA BRIDGES AND TUNNELS),

Defendants.

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INDEX NO. 155876/2019

MOTION DATE 01/25/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 24-45, 48-50 were read on this motion for SUMMARY JUDGMENT.

In this action alleging violations of Labor Law §§ 240 (1), 241(6), 200 and alleging common-law negligence, plaintiff John Goldrick alleges that, on July 14, 2018, a wooden two-by-four fell approximately 20 feet and struck him in the face, while he was engaged in construction work at construction site located near the lower-level toll plaza of the Henry Hudson Parkway Bridge (the Bridge).[1]

Plaintiff now moves for partial summary judgment in his favor as to liability on his Labor Law § 240 (1) claim as against defendant Triborough Bridge and Tunnel Authority (popularly known as MTA Bridges and Tunnels) (TBTA). TBTA opposes the motion, arguing that the two-by-four was not required to be secured and that plaintiff was the sole proximate cause of the accident.

BACKGROUND

On the day of the accident, TBTA owned and operated the Bridge. TBTA hired non-party Restani Construction Corp. (Restani) as the general contractor for a project entailing the renovation of the Bridge and portions of the Henry Hudson Parkway leading thereto (the Project). Plaintiff was a carpenter employed by Restani.

Plaintiff's 50-H Testimony (NYSCEF Doc. No. 28)

Plaintiff testified that, on the day of the accident, he was employed as a carpenter by Restani (plaintiff's 50-h tr at 9). He did not know who hired Restani (*id*.). He was

[1] The action was discontinued as against defendant City of New York (*see* Plaintiff's Exhibit 6 [NYSCEF Doc. No. 32]).

working at the base of a retaining wall on the Henry Hudson Parkway (*id.* at 8). His foreman was a Restani employee named "John" (*id.* at 10).

Plaintiff was part of a five-man crew, consisting of three carpenters, a crane operator and the foreman (*id.* at 12). At the time of the accident, "two guys [were] on the top of the wall" – "Bobby Murray and Chris Brooks" – and John, the foreman, was "on the outside" (*id.* at 10). The group was tasked with removing forms from the retaining wall (*id.*). Forms hold cement in place while it dries (*id.* at 11). Specifically, the crew was in the process of removing the wooden forms with a crane (*id.* at 11-12).

As a part of the removal procedure, plaintiff was "four or five feet below ground level," loosening the clamps at the bottom of the form with a wrench (*id.* at 13). Once he had done that, "[he] [could] do no more" (*id.* at 13. So he moved to a space behind the retaining wall that "was kind of a safe space" (*id.* at 13). He stayed in this area for a few minutes and "[w]hen [he] went to turn back, a two-by-four from the top came flying down" and struck plaintiff "between the eyes" (*id.* at 13), causing injury. Plaintiff did not know why the two-by-four fell.

Plaintiff's Deposition Testimony (NYSCEF Doc. No. 34)

Plaintiff's deposition testimony largely mirrors his 50-h testimony.

Plaintiff further explained that his work area was within an excavated trench, where the base of the retaining wall was embedded. The retaining wall was approximately 100 feet wide, 25 feet tall and four feet thick (plaintiff's tr at 45).

Plaintiff testified that his work included removing planks and scaffolding (*id.* at 40). He performed that work without incident (*id.* at 42). Later in the day, the Restani crew began removing the formwork (*id.* at 43).

The formwork on the retaining wall was made from "Doka panels," which were "extremely tough to remove" (*id.* at 34). To remove the forms, the Doka panels first had to be unclamped. Then, the carpenters would "put a wedge in the crack of the wall and the form" and "open it up" (*id.* at 43-44). The wooden wedges, provided by Restani, were used to open up the forms from the newly set concrete, so that the form could be hooked to the crane and lifted away (*id* at 46, 44, 104).

Plaintiff testified that he was stationed at the bottom of the wall, and Murray and Brooks were at the top, approximately 19 feet above him (*id.* at 46). Plaintiff further testified that the area where he was standing at the time of the accident was behind the retaining wall. He described it as "dead space" created when Restani dug the excavation and "made the hole too big" (*id.* at 48). He testified that he believed that the area was protected from falling objects (*id.* at 48 ["It was a space that I found it safe to be if anything come [sic] down when they were working up top"]). Plaintiff testified that he was never told that he was supposed to stay out of the area (*id.* at 52).

Plaintiff also testified that the two-by-four that struck him was approximately 12-to-14 feet long (*id.* at 55). He did not know its weight (*id.*).

At his deposition, plaintiff was shown a handwritten statement regarding the accident. He acknowledged that he wrote and signed it (*id.* at 97). He confirmed that the statement stated that he "was inside the wall" and that "when [he] was turning to go behind, [he] was struck with a dropped object" (*id.*).

Deposition Testimony of Patrick Keenan (TBTA's Assistant Facility Engineer) (NYSCEF Doc. No. 36)

Patrick Keenan testified that, on the day of the accident, he was an assistant facility engineer for TBTA, assigned to the Bridge (Keenan tr at 10, 15). TBTA maintains and operates several bridges and tunnels in New York City, including the Bridge (*id.* at 17). Keenan's duties included overseeing Bridge maintenance and managing construction projects for the Bridge, including the Project (*id.* at 15). TBTA was the entity that initiated and bid out the Project (*id.* at 19-20). TBTA hired Restani to provide general contracting services for the Project (*id.* at 24). Restani was responsible for hiring subcontractors and providing materials and equipment (*id.* at 33).

Keenan was not present at the Bridge on the day of the accident, but he learned about it via email shortly after it happened (*id.* at 61). He understood that it involved a worker being struck in the head by a piece of wood (*id.*).

Keenan's knowledge of the accident came solely from the accident report and discussions with a safety inspector (*id.* at 66). He testified that he understood that the accident was caused when "in the course of removing the forms for the concrete abutment wall . . . a wedge of wood that was used to kind of help free the form from the concrete wall . . . fell down," striking plaintiff (*id.* at 66).

When Keenan inspected the accident location a few days later, he saw the area where the accident occurred was cordoned off with caution tape, so that "while the forms were being removed, [workers] wouldn't be in that location directly below" (*id.* at 69). He noted that the space where the accident occurred was "a narrow area" and "a place where normally you wouldn't stand" (*id.* at 70).

At the deposition, he reviewed several photographs and confirmed that they depicted the accident location (*id.* at 72, 74). One photograph depicted a piece of wood that was "about six to eight inches long, and maybe an inch or two wide" (*id.* at 74). Other than seeing a picture, Keenan did not ever see the piece of wood that hit plaintiff (*id.* at 66, 74) .

The Accident Reports

The MTA Field Inspection Report (NYSCEF Doc. No. 38)

Plaintiff submits a series of MTA documents for the day of the accident, including a "Resident Engineer's Daily Project Diary", a "Daily Inspection Report" and a "Field Inspection Checklist Form" (plaintiff's exhibit 12 [NYSCEF Doc. No. 38]). The project diary indicates that "[a] carpenter was injured while performing removal of the abutment 1 wall formwork." The daily inspection notes that "[t]here was an accident on site today around 0915. A carpenter was struck in the face by a piece of wood while the contractor was stripping form work from abutment wall." In the section of the Daily Report for "Safety Deficiencies," a box was checked off next to "None Observed" (*id.*).

Restani's Safety Incident Report (NYSCEF Doc. No. 39)

Restani prepared a "Safety Incident Report" on July 15, 2018, the day after the accident (the Report). It states, in pertinent part:

> "Four carpenters were assigned to remove Doka forms at the abutment wall section #1. Two were on top placing wedges and pieces of 2 x 4 woods [sic] to release the Doka form from the form liner . . . As the one carpenter pushed the wedge down, one piece of wedge slide [sic] to the side and hit the worker standing by the bulkhead . . . as he was coming out from the back of the wall"

(plaintiff's exhibit 13, at 1). The Report further classified the injury as "Struck or Injured by . . . Falling or flying object" (*id.* at 2).

DISCUSSION

"[T]he proponent of a summary judgment motion 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. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). "'[I]t is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods*., 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

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

> "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 a nondelegable duty on owners and contractors to provide devices which shall be so constructed, placed and operated as to give proper protection to those individuals performing the work" (*Quiroz v Memorial Hosp. for Cancer & Allied Diseases*, 202 AD3d 601, 604 [1st Dept 2022] [internal quotation marks and citations omitted]). It "'was designed to prevent those types of accidents in which the scaffold . . . 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'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co*., 81 NY2d 494, 501 [1993]).

The absolute liability found within section 240 "is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*O'Brien v Port Auth. of N.Y. & N.J.,* 29 NY3d 27, 33 [2017] [internal quotation marks and citation omitted]). Liability under section 240 (1) "is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). Therefore, section 240 (1) "does not cover the type of ordinary and usual peril to which a worker is commonly exposed at a construction site" (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]). Accordingly, to prevail on a Labor Law § 240 (1) claim, a plaintiff must establish that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]).

As an initial matter, TBTA does not dispute that it is an owner for the purposes of the Labor Law and, therefore, that it is a proper Labor Law defendant.

Plaintiff's accident occurred when a piece of wood fell from the top of a retaining wall, approximately 20 feet above plaintiff and struck plaintiff in the face, causing injuries. It is undisputed that the piece of wood fell from a significant height.

> "In the context of falling objects, the risk to be guarded against is the unchecked or insufficiently checked descent of the object. It is settled law that a plaintiff establishes a prima facie entitlement to liability on a Labor Law § 240(1) 'falling object' claim where he shows that he was struck by a falling object, that such object required securing for the purposes of the undertaking, and that the lack of adequate overhead protection failed to shield against the falling of such object and therefore proximately caused plaintiff's injuries"

(*Torres-Quito v 1711 LLC,* —AD3d —, 2024 NY Slip Op 01279, *2 [1st Dept 2024] [internal quotation marks and citation omitted]).

Here, plaintiff has established that he was assigned to work at the base of the retaining wall (plaintiff's 50-h tr at 10; plaintiff's tr at 46). TBTA does not contest this point. Plaintiff also established that, while in that area, workers at the top of the wall, 20 feet above him, were using wooden wedges to loosen the formwork, and that one of those wooden wedges fell approximately 20 feet before it struck him (*see* plaintiff's 50-h tr at 13-14; Report, at 1-2). TBTA does not contest this point.

TBTA argues that plaintiff has failed to establish that the wooden wedge that fell needed to be secured for the purposes of the undertaking – namely loosening wooden formwork 20 feet above plaintiff's work area. More specifically, TBTA appears to assert that section 240 (1) does not apply to objects that fall while actively in use by workers (affirmation in opposition ¶ 30 [NYSCEF Doc. No. 48]).

Some courts have held that Labor Law § 240 (1) is inapplicable when the falling object is *deliberately* dropped or thrown, apparently as part of the method of the work. (*see Roberts v General Elec. Co*., 97 NY2d 737, 738 [2002] [no Labor Law § 240(1) protection where the plaintiff, an employee of an asbestos removal company, was injured when a piece of asbestos, which had been cut and deliberately dropped from above him, fell on him]; *Fried v Always Green, LLC*, 77 AD3d 788, 789 [2d Dept 2010] [no Labor Law § 240(1) liability where the plaintiff was injured when a laborer tossed a bag of construction debris from the roof of the building onto the plaintiff's head]; *Harinarain v Walker*, 73 AD3d 701, 702 [2d Dept 2010] [no Labor Law § 240(1) liability where the plaintiff was struck with a piece of plywood which was either thrown, or fell from, the hole in the roof]; *Isabel v U.W. Marx, Inc*., 299 AD2d 701, 702 [3d Dept 2002] [no Labor Law § 240(1) liability where the beam that struck the plaintiff was "deliberately dropped to accomplish the task of flipping it"]; *Belcastro v Hewlett–Woodmere Union Free School Dist. No. 14*, 286 AD2d 744, 745–746 [2d Dept 2001] [piece of wood that allegedly struck the plaintiff in the head was not a material in need of securing where it was allegedly thrown from the roof]).

Some courts have similarly held that Labor Law § 240 (1) was not applicable where the falling object was *inadvertently* dropped (*see Moncayo v Curtis Partition Corp*., 106 AD3d 963, 964 [2d Dept 2013] [Labor Law § 240 (1) not applicable where a small piece of sheetrock slipped from a worker's hand, bounced off a window sill, and fell through an empty window frame, striking plaintiff below]).

However, the Appellate Division, First Department rejected the "deliberately dropped" line of cases in *Albuquerque v City of New York* (188 AD3d 515 [1st Dept 2020]; *but see Torres v Love Lane Mews, LLC*, 156 AD3d 410, 411 [1st Dept 2017 [if bricks were deliberately dropped by demolition workers, they would not constitute falling objects pursuant to Labor Law § 240 (1)]). In *Albuquerque*, the Appellate Division reasoned that "a section of pipe, was 'a load that required securing,' regardless of the fact that it was deliberately lowered down" (188 AD3d at 515). Meanwhile, as plaintiff

correctly points out, in *Hill v Acies Group, LLC* (122 AD3d 428, 429 [1st Dept 2014]), the Appellate Division, First Department held that Labor Law § 240 (1) was violated when a brick that had fallen out of the hands of a masonry worker several stories above then struck the plaintiff below, given the lack of overhead protection.

Thus, in *Diaz v Raveh Realty, LLC* (182 AD3d 515, 515-16 [1st Dept 2020]), the Appellate Division, First Department reasoned,

> "it is unclear whether [the plaintiff] was hit by a dislodged plywood form that a co-worker dropped or tossed, or was hit by a loosened plywood form that simply fell from the ceiling. We find that, *in either instance*, plaintiff was entitled to partial summary judgment on his Labor Law § 240 (1) claim"

(*id.* at 515-516 [emphasis supplied]).

This case is on all fours with *Torres-Quito v 1711 LLC* (2024 NY Slip Op 01279, *supra*), which cited, among other cases, *Hill v Acies Group, LLC*. In *Torres-Quito*, window installation and the appurtenant masonry work were being performed directly above the plaintiff on an exterior scaffold located on the twenty-second floor (*Torres-Quito*, 2024 NY Slip Op 01279, at *2). The work being performed could have resulted in brick debris falling from the building, and a falling brick struck the plaintiff in the head, cracking his hard hat and causing heading injuries (*id.*). It was uncontested that there was no horizontal netting under the exterior scaffold, and no overhead netting and/or other protection where the plaintiff was standing, to protect against any debris falling from the exterior scaffold.

Like the plaintiff in *Torres-Quito*, the work of releasing the Doka formwork using wooden two-by-four wedges could result in such wedges falling or being inadvertently dropped from above. Thus, following *Torres-Quito*, the wooden wedges in use at the top of the wall were required to be "secured for the purposes of the undertaking" (*see also Matthews v 400 Fifth Realty LLC*, 111 AD3d 405, 406 [1st Dept 2013] [partial summary judgment on Labor Law § 240 (1) should have been granted, where an iron grate that was in process of being installed which fell onto the plaintiff was required to be secured]; *see also Sarata v Metropolitan Transp. Auth.,* 134 AD3d 1089, 1091 [2d Dept 2015] [given the nature and purpose of the work, the falling debris presented a significant risk of injury]).

Thus, in this context, "secured for the purposes of the undertaking" does not mean that the falling object should have been held/fixed in place to prevent the object from falling at all. Rather, under the appellate precedent in this judicial department, which has split from the Appellate Division, Second and Third Departments, "secured for the purposes of the undertaking" has been construed to mean that the falling object must secured in such a way so as to not fall onto construction workers below (*see McVicker v. Port Auth. of N.Y. & N.J.*, 195 AD3d 554, 555 [1st Dept 2021] ["no

appropriate safeguard, such as a hoisting device, barrier, or exclusion zone, was utilized]).

As there is no evidence that safety devices were in place at the top of the retaining wall to prevent a falling object from striking the workers below, plaintiff met his prima facie burden of establishing a violation of Labor Law § 240 (1) (see *Mercado v Caithness Long Is. LLC*, 104 AD3d 576, 577 [1st Dept 2013] [granting plaintiff's motion for summary judgment on the section 240 (1) claim where it was "undisputed that there was no netting to prevent objects from falling on workers" and the defendants did not "show that adequate protective devices . . . were employed at the site"]; *see also Greenwood v Whitney Museum of Am. Art*, 161 AD3d 425, 425-26 [1st Dept 2018] [affirming partial summary judgment on the plaintiff's section 240 (1) claim "inasmuch as the record establishes that plaintiff's injury was the proximate result of the failure to take adequate steps to secure the piece of scrap metal from falling from the height at which it was being used"]).

In opposition, TBTA argues that plaintiff was the sole proximate cause of his accident, such that the Labor Law cannot apply here (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003] ["[T]here can be no liability under section 240 (1) when there is no violation and the worker's actions . . . are the 'sole proximate cause' of the accident"]). Specifically, TBTA argues that plaintiff's own conduct of "coming out from behind the retaining wall" was the only reason for the accident (affirmation in opposition ¶ 36). This argument is unpersuasive.

Importantly, "the Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake,* 1 NY3d at 290; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002] [internal quotation marks and citation omitted] [where an "owner or contractor has failed to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, [the] negligence, if any, of the injured worker is of no consequence"]). In addition, even if "plaintiff was in an area of the worksite where he was not supposed to be at the time of his accident, this would at most constitute comparative negligence, which is not a defense to a Labor Law § 240 (1) claim" (*Hewitt v NY 70th St. LLC*, 187 AD3d 574, 575 [1st Dept 2020]). TBTA submitted no evidence that plaintiff was standing in an area specifically marked off as an exclusion or drop zone (*Albuquerque*, 188 AD3d at 515; *McVicker*, 195 AD3d at 555).

Next, TBTA argues that plaintiff is not entitled to summary judgment because the accident was unwitnessed. This argument is unavailing. "[T]he fact that plaintiff was the sole witness to the accident does not preclude summary judgment on his behalf" (*Wise v McDonald Ave., LLC*, 297 AD2d 515, 517 [1st Dept 2002]).

Finally, plaintiff's failure to identify the reason why the wooden wedge fell is immaterial where, as here, the falling object was not properly secured (*Torres-Quito*, 2024 NY Slip Op 01279 at *3 ["A plaintiff is not required to show the exact circumstances under which the object fell, where a lack of a protective device proximately caused the injuries"]; *Mercado*, 104 AD3d at 577).

Accordingly, TBTA has failed to raise any triable issue of material fact warranting denial of plaintiff's motion. Thus, plaintiff is entitled to summary judgment in his favor as to liability his Labor Law § 240 (1) claim as against TBTA.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion for partial summary judgment against defendant Triborough Bridge and Tunnel Authority (popularly known as MTA Bridges and Tunnels) (Seq. No. 001) is **GRANTED**, and plaintiff is granted summary judgment as to liability in his favor on the third cause of action of the complaint, for violation of Labor Law § 240 (1), against defendant Triborough Bridge and Tunnel Authority (p/k/a MTA Bridges and Tunnels); and it is further

ORDERED that an early settlement conference is scheduled for July 26, 2024 at 10:00 a.m.

This constitutes the decision and order of the court.

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5/28/2024
DATE

RICHARD TSAI, 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**