

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 12

EDWIN GIOVANNY LOJANO x

INDEX NO. 15969/06

MOTION SEQ. NO. 2

-against-

BY: BUTLER, J.

LAKE GROVE HOME & LAND CO. LLC

DATED: JANUARY 15, 2010

LAKE GROVE HOME & LAND COMPANY,
LLC x

-against-

ALL COUNTY SERVICES, INC.

x

Plaintiff Edwin Giovanni Lojano has moved for his summary judgment on the issue of liability arising under his cause of action based on Labor Law § 240(1).

Defendant Lake Grove Home & Land Co. LLC, the owner of property located at the intersection of Burr Lane and New Moriches Road, Lake Grove, New York., entered into a contract with All County Services, Inc, whereby the latter undertook construction work on the property. All County employed plaintiff Lojano as a framer on the project which involved the erection of multiple condominiums.

According to the plaintiff, on January 5, 2006, “Wayne,” the All County supervisor on the project site, directed him to climb to the top of an elevator shaft, which was about the height of the roof, and to nail the last piece of wood needed to complete the shaft. The plaintiff, an immigrant from Ecuador, speaks little English, and coworkers usually translated Wayne’s orders into Spanish for him. However, Wayne spoke directly to the plaintiff about nailing the last piece of wood, and the plaintiff understood the instructions “a little.” (Lojano EBT Tr, p 13.) A 2 x 4 roof truss ran across the top of the shaft, and, according to the plaintiff, Wayne directed him to lie down on the 2 x 4 face up and to nail the last piece of wood in place. The plaintiff climbed to the top of the shaft by using its interior framing rather than a ladder. At his deposition, the plaintiff alleged at first that although there were ladders on the project site, “it [sic] didn’t reach to the level that I needed to get to.” (Lojano EBT Tr, p 17.) The plaintiff subsequently testified that he had previously used a ladder to “get up to” the roof, but at the time he worked on the last piece of wood for the elevator shaft, the ladder had been taken to the “following” building at the project site by an All County employee. (Lojano EBT Tr, pp 17-18.) When asked if that was the only ladder big enough to reach the roof area, the plaintiff answered, “Yes, one.” (Lojano EBT Tr, p 18.) Richard Ward, who investigated the accident for the developer, testified at this deposition that he had seen ladders at the project site that “would have gone from the ground floor up that 20-25 foot height.” (Ward EBT Tr, p 53.) As the plaintiff lay upon the 2 x 4,

without safety equipment of any kind, the 2 x 4 detached from the structure, and the plaintiff fell 25 to 30 feet to the ground. This action for personal injury ensued.

Labor Law § 240(1) provides: “All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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.” (*See, Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d 280.) The duty imposed upon contractors and owners pursuant to Labor Law § 240(1) is nondelegable (*see, Rocovich v Consolidated Edison Co.*, 78 NY2d 509), and a violation of the duty results in absolute liability. (*Bland v Manocherian*, 66 NY2d 452.) “Negligence, if any, of the injured worker is of no consequence ***.” (*Rocovich v Consolidated Edison Co.*, *supra.*)

“[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 ***.” (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324.) Plaintiff Lojano successfully carried this burden. In order to prove a cause of action arising under Labor Law § 240(1), a plaintiff must show that a violation of the statute occurred and that the violation was a proximate cause of his injury. (*See, Singh*

v City of New York, ___ AD3d ___, ___ NYS2d ___, 2009 WL 4981797; *Kindlon v Schoharie Cent. School Dist.*, 66 AD3d 1200; *Nelson v Ciba-Geigy*, 268 AD2d 570; *Walsh v Baker*, 172 AD2d 1038; *Heath v Soloff Construction, Inc.*, 107 AD2d 507.) The plaintiff’s proof of the collapse of the roof truss that supported his weight and lack of safety devices established a prima facie violation of Labor Law § 240(1). (See, *Kindlon v Schoharie Cent. School Dist.*, *supra* [collapse of roof].) The plaintiff established a prima facie case by submitting evidence that the owner and his employer failed to provide him with proper protection as he worked at an elevated site and that this failure was the proximate cause of his injuries. (See, *Singh v City of New York*, *supra*; *Riffo-Veloza v Village of Scarsdale*, ___ AD3d ___, ___ NYS2d ___, 2009 WL 4674062.) The plaintiff produced evidence that his employer directed him to perform work while laying upon a roof truss which collapsed, causing him to fall 25 to 30 feet to the ground. “The collapse of the work site itself, even if it is part of a permanent structure, will constitute a prima facie violation of the statute, especially if the structure being worked upon is acting as the functional equivalent of a scaffold ***.” (*Kindlon v Schoharie Cent. School Dist.*, *supra*, 1202 [internal quotations omitted]; see, *Beard v State of New York*, 25 AD3d 989.) The plaintiff also submitted evidence that the owner and his employer failed to provide him with any of the safety devices listed in Labor Law § 240(1). The production of evidence showing that an owner or contractor did not provide a laborer working at an elevated height with any safety devices and that the failure to do so was a proximate cause of injury establishes prima facie his

entitlement to judgment as a matter of law on a Labor Law § 240(1) claim. (*See, Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513; *Cummings v Vargo*, 63 AD3d 1718; *Triola v City of New York*, 62 AD3d 984; *Mihelis v i.park Lake Success, LLC*, 56 AD3d 355, 356 [collapse of roof panel].) The court can conclude as a matter of law in this case that the failure to supply safety devices was a proximate cause of the plaintiff's injuries. (*See, Zimmer v Chemung County Performing Arts, Inc., supra.*)

The burden on this motion shifted to defendant Lake Grove to produce evidence showing that there is a triable issue of fact. (*See, Alvarez v Prospect Hospital, supra.*) The defendant failed to carry this burden. It is true that an owner or a contractor cannot be held liable under Labor Law § 240(1) if the worker's own actions were the sole proximate cause of his injuries. (*See, Marin v Levin Properties, LP*, 28 AD3d 525.) In the case at bar, while there may have been suitable ladders present somewhere on the job site that the plaintiff did not use (*see, Marin v Levin Properties, LP, supra*), nevertheless, the plaintiff testified at this deposition that his supervisor instructed him to lay upon the roof truss to nail the last piece of wood in place. Since he did the job as ordered by his supervisor, the plaintiff's non-use of a ladder was not the sole proximate cause of the accident. Although the defendant attempted to raise an issue of fact by casting doubt on the ability of the plaintiff to understand his supervisor's instructions, the defendant failed to submit an affidavit or deposition testimony from the supervisor denying that he instructed the plaintiff to lay upon the roof truss. Under these circumstances, defendant Lake Grove failed to raise a genuine

issue of fact concerning whether the plaintiff's own actions were the sole proximate cause of the accident.

Accordingly, the plaintiff's motion for summary judgment on the issue of liability arising under his cause of action based on Labor Law § 240(1) is granted.

Short form order signed herewith.

J.S.C.